TESIS DE LA UNIVERSIDAD DE ZARAGOZA

2021 217

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http://zaguan.unizar.es/collection/Tesis

ISSN 2254-7606

Prensas de la Universidad
Universidad Zaragoza

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Servicio de Publicaciones

ISSN 2254-7606

Universidad Zaragoza
1542

Tesis Doctoral

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Escuela de Doctorado

2021

Repositorio de la Universidad de Zaragoza – Zaguan http://zaguan.unizar.es

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Doctoral Thesis

Organ Trafficking in the Sinai: Viewed Through the Keyhole of Forced Migration

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Acknowledgments

This thesis would not have been possible without the inputs of several people. I would like to extend my gratitude to my supervisor Prof. YOLANDA GAMARRA CHOPO for her support and guidance. Prof. Gamarra's effort to build up verbal writing and correction is one of the best helpful supports I receive in the past four years. My special thanks go to the staffs of the law department for their extra ordinary advice on many occasions when I need help. In addition, the department and the university of Zaragoza accorded me with this wonderful opportunity to expand my knowledge in an ample environment. Above all, this thesis would not have been possible without data from several documents and reports. Last but not the least, I would like to thank my wife SOSINA GIRMA for her unwavering blessings for all undertakings I have taken so far. Her patience, resilience and encouragement made me who I am today.

It is my strong conviction and deep believes that this Doctoral thesis will fill some knowledge gaps existing in the field of International Law and human rights protection.

Abstract

The dissertation in **DOCTORAL HUMAN RIGHTS & FUNADAMENTAL FREEDOMS** addresses organ trafficking in the Sinai, as viewed through the keyhole of forced migration. It considers a wide spectrum of human organ trafficking cases throughout the world and how they add to the knowledge base of information related to the process of illegal organ trafficking and organ smuggling and the ways to combat them. The research is based on academic, public, and private sources throughout the world. The problem of organ trafficking is first introduced, including the reality that a very fluid definition of the term 'organ trafficking' complicates the issues. Human trafficking of one type or another has been in existence as long as mankind, but organ trafficking did not become possible until the advent of modern medicine. The historical background of human trafficking is traced, providing the reader with an understanding of the numerous forms that human trafficking has taken over the generations. This background is intended to help the reader understand that the idea of taking other people, or taking control of other people's bodily autonomy, is a very human action. Still, when we consider how refugees in the Sinai are being treated, it is not surprising that the United Nations have a responsibility to the refugees in the Sinai, not only to protect the refugees from foreign and local forces but also to prevent the theft of their organs. The actions of traffickers in the Sinai region (as well as other areas of the globe) rise to the category of crimes against humanity. The link between organ trafficking in Egypt and the Sinai is discussed, and the possibility of increasing the availability of the legal organ supply is considered. In the final chapter, the status quo is synthesized, along with recommendations for future research.

Keywords:

Eritrea, Ethiopia, Sinai, Israel, Sahara, human trafficking, organ trafficking

Resumen

Esta tesis doctoral en DERECHOS HUMANOS aborda el tráfico de órganos en el Sinaí, desde la aproximación de la migración forzada. La tesis trata un amplio espectro de casos de tráfico de órganos humanos en todo el mundo y cómo se suman al conjunto de conocimientos sobre información relacionada con el proceso de tráfico ilegal de órganos y contrabando de órganos y las formas de combatirlos. La investigación se apoya en fuentes académicas, públicas y privadas de todo el mundo. Primero se introduce el problema del tráfico de órganos, incluida la realidad de que una definición muy fluida del término "tráfico de órganos" genera ciertos problemas. La trata de seres humanos de un tipo u otro ha existido desde el comienzo de la humanidad, pero el tráfico de órganos no fue posible hasta el desarrollo de la medicina moderna. Se rastrea el trasfondo histórico de la trata de seres humanos, proporcionando al lector una comprensión de las numerosas formas que la trata de personas ha asumido a lo largo de las generaciones. Este trasfondo está destinado a ayudar al lector a comprender que la idea de tomar a otras personas, o tomar el control de la autonomía corporal de otras personas, es una acción muy humana. Sin embargo, cuando consideramos cómo se trata a los refugiados en el Sinaí, no es sorprendente que las Naciones Unidas tengan una responsabilidad con los refugiados en el Sinaí, no sólo para proteger a los refugiados de las fuerzas extranjeras y locales, sino también para prevenir el contrabando de sus órganos. Las acciones de los traficantes en la región del Sinaí, así como en otras áreas del mundo, se elevan a la categoría de crímenes contra la humanidad. Se discute el vínculo entre el tráfico de órganos en Egipto y el Sinaí, y se considera la posibilidad de aumentar la disponibilidad del suministro legal de órganos. En el capítulo final, se sintetiza el status quo, junto con una serie de recomendaciones para el futuro y para disminuir el peligro para las personas del Sinaí, así como para otras víctimas globales de este horrendo crimen.

Palabras clave

Eritrea, Etiopía, Sinaí, Israel, Sáhara, Trata de seres, Tráfico de órganos

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ABBREVIATIONS

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CERD – Convention on the Elimination of All Forms of Racial Discrimination

CRC – Convention on Rights of the Child

EEBC - Ethiopian-Eritrean Boundary Commission

EPLF - People's Front for Democracy and Justice

EPRP - Ethiopian People's Revolutionary Party

FATW - Foundation against Trafficking in Women

GAATW - Global Alliance against the Trafficking in Women

HOTA- Human Organ Transplantation Act

IASFM - International Association for the Study of Forced Migration

ICC- International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross

IHL – International Humanitarian Law

IHRLG - International Human Rights Law Group

ILO - International Labour Organisation

MEISON - All-Ethiopia Socialist Movement

NGFHR - New Generation Foundation of Human Rights

NGO – Non-governmental organisation(s)

OPT – Occupied Palestinian Territory

Palermo Protocol - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime

PLO – Palestine Liberation Organization

PMAC - Provisional Military Administrative Committee

SAARC- South Asian Association for Regional Cooperation

SPO – Special Prosecutor's Office

THBOR - Trafficking in human beings for organ removal

TPLF -	Tigray People's Liberation Front
TVPA -	Trafficking Victims Protection Act
UN –	United Nations
UNCTOC -	United Nations Conventions against Transnational Organized Crime
UNDP –	United Nations Development Plan
UNHCR –	United Nations High Commissioner for Refugees. Also, the United Nations Refugee Agency
UNMEE –	United Nations Mission in Ethiopia and Eritrea
UNODC -	United Nations Office on Drugs and Crime
UNRWA -	United Nations Relief and Works Agency for Palestine refugees in the Near East
VSA -	viable system approach
VSM -	viable system model
ICCPR -	International Covenant on Civil and Political Rights
ICESCR -	International Covenant on Economic, Social and Cultural Rights
CEDAW -	Convention on the Elimination of All Forms of Discrimination Against Women
CERD -	International Convention on the Elimination of All Forms of Racial Discrimination
CRC -	Convention on the Rights of the Child

DEFINITIONS

Abuse of a position of vulnerability, also referred to as the **abuse of a vulnerable person** - Discussed in both the Palermo Protocol and the UN Model Law Against Trafficking, abuse of a position of vulnerability means to take advantage of a person who has been asked to give up an organ, and who feels like they have no alternative but to do so. It is only considered trafficking if the position of vulnerability exists in the individual whose organ is being sought (Ambagtsheer et al., 2013).

Abuse of power – Using one's position of power to convince someone to give up an organ, again in such a manger that they feel they have no choice. It is only considered trafficking if the position of vulnerability exists in the individual whose organ is being sought (Ambagtsheer et al., 2013).

Black market – the illegal market for organs; it is similar to the regular market for organs, but it is illegal (Ambagtsheer et al., 2013)

Coercion – Threats, violence, the use of force, or non-violent manipulation in the context of organ removal (Ambagtsheer et al., 2013).

Deception – misrepresentation of conduct or information (Ambagtsheer et al., 2013).

Exploitation – the unlawful gaining of financial benefit from the misuse of another person, including prostitution or organ removal.[1] (Ambagtsheer et al., 2013)

Organ – a part of the human body that can be surgically removed and transplanted into another human body, where it will continue performing its original function after being connected vascularly and through the nervous system (Ambagtsheer et al., 2013)

Organ advertising – the advertising of the need for an organ, the availability for an organ, or the need for an organ or an organ seller (Ambagtsheer et al., 2013)

Organ donor – the person who donates an organ, or multiple organs, from their own body[2] (Ambagtsheer et al., 2013)

Organ recipient – someone who receives an organ and has it transplanted into them (Ambagtsheer et al., 2013)

[1] The UN Model law lacks an exact definition of exploitation in the context of organ removal and harvesting (Pascalev et al., 2013). It does, however, define prostitution and the process of prostituting another person. The definition has been adapted for use in this paper in the context of organ removal and/or harvesting.

[2] The donor can be alive, or they can be deceased

Organ seller – a person who receives a financial or material benefit from allowing an organ to be removed from their body and moved into someone else's (Ambagtsheer et al., 2013).

Organ supplier – someone who supplies organs (Ambagtsheer et al., 2013)

Organ transplantation – the process of moving an organ from the donor or seller to the recipient of the transplant (Ambagtsheer et al., 2013)

Trafficked person – or, person trafficked. A victim of trafficking for any purpose (Ambagtsheer et al., 2013).

Transplant commercialism – organs and transplants that are treated as money making enterprises (Ambagtsheer et al., 2013)

Travel for transplantation – the travel or movement of donors, recipients, organs, and//or donors across national or international borders for the purpose of transplantation of organs (Ambagtsheer et al., 2013).

CHAPTER ONE

INTRODUCTION TO THE PROBLEM

1.1 Introduction to the Study's Structure

While this study was intended to address most strongly organ trafficking in the Sinai and its basis in forced migration, it soon became evident that the problem of organ trafficking far exceeded that of the implications of forced migration in the Sinai area. As the project continued and the research evolved, the background materials on human trafficking and organ trafficking began to overshadow the other materials. The original plan was to address only organ trafficking in the Sinai, where the victims of the Eritrea/Ethiopia conflict typically migrated. The research led, however, to details on how Israel was involved. From Israel, the trail led to South Africa. From South Africa, the trail of victims led to Brazil, to India, and virtually to every poor nation in the modern world. A study on forced migration and organ trafficking in the Sinai region eventually led to a study of organised crime, terror groups, the development of UN protocols relating to trafficking, and to a variety of crimes against humanity. What became increasingly clear to this researcher was that the very act of trafficking organs was a denial of humanity itself. Whether the reader comes to believe that individuals who sell their organs to traffickers are victims, or whether they bear full responsibility for their actions, understanding how these individuals go to this point is only accomplished through a systemic view of humanity as a whole, an understanding of economic impacts, of rich and poor, of the powerful and the oppressed. The story of organ trafficking by the Bedouin tribes in the Sinai is so much bigger than this researcher *ever envisioned* and is immensely important to the future of mankind and our understanding of what comprises humanity and how addressing the problem of organ trafficking can solve a number of issues for disadvantaged peoples of the world.

1.1.1 Chapter One – Introduction to the Problem

Chapter One illustrates an overview of what is investigated in the study. It begins with an orientation of the reader to the issues, so that the reader has a solid background of information relating to human trafficking and organ trafficking. It will

be shown that there is a link between the trafficking of humans, and the trafficking of organs. The chapter continues by describing the motivation for the research, as well as defining the aims of the research and the research questions. The misrepresentation or misunderstanding of human trafficking is an international problem; it is described in the context of the development of the organ trade. The criminalisation of the organ trade flows into an overview of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons as well as the UN Convention Against Transnational Organized Crime. The linkage between organ trafficking and forced migration is firmly established as well. The chapter contains a great deal of information and is thus summarised for the reader's ease in understanding.

1.1.2 Chapter Two-Conceptual issues

The chapter introduces the key conceptual issues that are of paramount importance in this study. Efforts here are made in conceptualizing organ trafficking, human trafficking among other concepts which are essential in this thesis.

Issues relating to concept in the discipline of international law have been the object of examination and reflection for decades and decades, not always treated with the same force. From the 19th century and the first decades of the 20th century, the foundation (and concept) of international law was expunged by international legal jurists, becoming a central element of discussion in the discipline. Later, these issues lost force and the problem became invisible. At present, however, the concept in international law continues to be the center of attention of authors with the purpose of generating debate and confronting ideas. Perhaps this leads us to think that we are in a moment of change for the discipline dragged by the dynamics of globalization and new technologies.

1.1.3 Chapter Three – Humanitarian Intervention

In Chapter 3, the historical background of human trafficking is considered. The history of human trafficking is traced, providing the reader with an understanding of the numerous forms that human trafficking has taken over the generations. By understanding these different forms of trafficking and how trafficking evolved, the reader will be educated as to possible development of future forms of trafficking. Once

the history of slave trafficking has been traced, and human trafficking as a whole is reviewed, organ trafficking becomes the focus of the many facets of human trafficking. In a variety of nations, the emergencies that can develop from forced migration and from natural disasters can result in a wide range of emergencies, including genocide. The case of Eritrea and Ethiopia is explored and a series of cases relating to organ trafficking, and humanitarian interventions of the international community in these cases, is presented.

1.1.4 Chapter Four – Treatment of Refugees in the Sinai

Chapter 4 begins with an investigation of the way that refugees in the Sinai are being treated. It is revealed that the United Nations have a responsibility to the refugees in the Sinai, not only to protect the refugees from foreign and local forces but also to prevent the theft of their organs. The extent of organ harvesting from forced migrants in the Sinai is examined, and the relation of harvesting in the community of refugees from Eritrea and Ethiopia is considered in terms of the responsibility of the international community assistance programs. At some point, to allow organ harvesting to continue would be to fail in the international responsibility to protect (R2P), and this consideration is carefully reviewed.

1.1.5 Chapter Five – Analysis of Crimes Against Humanity

Chapter 5 leads into the legal definition of crimes against humanity. The question is considered as to whether or not a failure to protect could possibility be a subset of the crimes against humanity. The basic elements of crimes against humanities and what crimes are considered to be against humanity is discussed so that future consideration of these crimes, and how to prevent them, can be addressed. The possibility that organ trafficking must be considered a crime against humanity is evaluated.

1.1.6 Chapter Six – The Right of the UN to Intervene

The chapters previous placed the context of organ harvesting as part of the responsibility to protect and considered whether or not organ trafficking needs to be considered to be a crime against humanity. There is no way to avoid the reality that there is a clash between the rights of nations, in terms of sovereignty and humanitarian

crimes, and the rights of individuals to their own bodily autonomy. The case chosen to illustrate this clash is the right to sovereignty of the Bedouin Tribes. The rights of nations versus individuals are carefully measured.

1.1.7 Chapter Seven – Organ Trafficking Egypt and a Link to the Sinai

Organ trafficking in Egypt is an increasing problem, and factors that contribute to this developing problem are examined in depth. Egypt is a politically sensitive nation, and the global and political ramifications of attempting to address organ trafficking in Egypt and the Sinai are deliberated. A plan for taking preventive measures to prevent organ trafficking in this sensitive area is presented, and sanctions are considered in relation to what may work in preventing organ trafficking in the area without overt interference with national autonomy.

1.1.8 Chapter Eight – Increasing the Availability of Legal Organs

Chapter Eight investigates the possibility of increasing the availability of organs, including addressing the realities of organ donations today and possibility solutions for organ donations.

1.1.9 Chapter Nine- Discussion and Conclusions

In the final chapter, the findings and conclusions of the research are delineated, and the findings are used to develop suggestions for future research and policy. The entire study is summarised in order to provide a section that can serve as a standalone, portable research document.

1.2. Methodology

This study was underpinned by the integrative review method of data collection. As an approach to research, an integrative review makes it possible for the researcher to make an evaluation of the strength of evidence on a given topic. An integrative review helps the researcher to identify gaps in a given research area and thereby create a platform for the researcher to identify areas which may need further research. It (an

integrative review) also makes it possible for the researcher to identify key issues in a given research area among other issues (Russel, 2005).

This study utilized what is known as the integrative review process. The integrative review process included what is known as problem formulation as the first process of reviewing literature. The second stage includes the data collection process or the literature search. The third stage is the data evaluation process which is followed by the data analysis process. An integrative review of literature involves a detailed and a well thought work which is very helpful in contributing to a given body of knowledge and also to practice and research (Russel, 2005). The integrative review of the literature is defined as a process whereby past studies of researches are summarised through drawing a general or overall conclusion from a number of studies (Broome, 2000).

1.2.1 Problem Formulation

In line with what was suggested by Cooper (1998), the problem identification in this study included the development of operational and conceptual definitions on human trafficking, which were to be examined. The conceptual definition stipulates the way in which the reviewer conceives the issue under study abstractly (Russel, 2005). The researcher made efforts to delineate the nexus between the variables under study.

1.2.2 Data Collection or Literature Search

After having identified the problem, the integrative review process then followed. During this stage, studies and reports which were done on organ trafficking in the past were then reviewed. For Russel (2005), identifying the target studies and accessible studies are the key two steps during this stage. The target studies in this study included the issue of organ trafficking in which the researcher aimed to discuss and analyse in the integrative review. Russel (2005) stated that when carrying out an integrative review, there are two important components of the target population. The first component are all reports which would have been published on a given topic. The other important component which is important is the population of people within these reports that the researcher would be targeting. All reports which are published on a given topic constitute what is known as the accessible population in an integrative

review (Russel, 2005). Additionally, what is known as accessible population also includes groups or individuals which are involved during the primary search that the researcher is in a position to get information on. In this case, databases, subject headings and years of publication are all examples of the inclusion criteria of accessible population.

The process of data collection in this study involved a number of stages as delineated by Copper (1998). There are informal, primary and secondary channels to the process of data collection. The informal channels through which data was collected in this study included reviewing personal research findings on the topic. It included asking for information on the topic from other researchers who were doing research on the same issue. It also included the attendance of conferences and professional meetings by the researcher. It also included the researcher sharing information on the topic with other students. The primary channels in this study included the review of journals and finding articles on the issue under study through examining the lists of references of other articles. The secondary channels to this study involved a review of research bibliographies as well as documents from the United Nations and other related organisations. All this information was used to build information for the integrative review in this study.

1.2.3 Data Evaluation

Data evaluation also forms an integral part of an integrative review of literature. At this stage, the researcher will be making efforts in critically judging whether certain amounts of data are worth keeping in the study or not (Russel, 2005). This process can be done before even collecting the data or after the actual data collection process. In cases where the process of evaluation decisions will be made to include all articles though less weight is given to articles that will be of poor quality (Russel, 2005). In the case of this study, the data evaluation was done after the actual data collection process. The researcher evaluated the data that was collected for unreliable values. Studies whose findings were too different from what was seen as of paramount importance to this study were not included in this study.

1.2.4 Data Analysis

The analysis of data is another important stage in an integrative review. Since this was a qualitative study, no statistical analysis of the data was done. The main aim of data analysis in this study was coming up with a critical interpretation of primary sources of data in an unbiased way. According to Cooper (1998), the data analysis process in an integrative review involves ordering, coding, categorising and summarising primary data sources which would have been used. All this was done in this study with the aim of getting a unified an integrated and unified conclusion on the issue of organ trafficking. This went together with carrying out an innovative synthesis of what was gathered from primary sources.

The data analysis process in this study involved a continuous comparison of what was gathered with the aim of differentiating the patterns, relationships and themes that were inherent in the studies reviewed. The data that was collected was then compared item by item to make the differentiation and make sure that the data that was similar would be grouped and categorised together. In the end, the categorised and grouped data was then compared. The data analysis process in this study followed Whittemore and Knafl's (2005) stages. These included data reductions, data display, data comparison, conclusion drawing and verification.

1.2.5 Ensuring the validity and reliability of the study

The data gathered in an integrative review should be valid. There are various threats to the validity of data in an integrative review and maintaining the integrity of the data is very important. In order to deal with the threats to the validity of the data collected in this study, the researcher ensured that an exhaustive data collection strategy was done. In light with what Cooper (1998) suggested, the researcher avoided defining the operational definitions of human trafficking too narrowly since defining them too narrowly would have impaired the quality of the findings. Since defining the operational dimensions of the issues under study can also be a threat to the validity because it can lead the researcher to overlook details which are very important to a study thereby making the researcher interpret the results incorrectly, the researcher took heed of Cooper (1998)'s suggestion and used the broadest conceptual definition of human trafficking possible.

During the evaluation stage, efforts were made in evaluating the reliability of the findings of each study in comparison with other studies, which were included in this thesis. In order to ensure the validity of the data collected, the researcher made efforts in not positively evaluating researches that is congruent with the researcher's own beliefs and contrarily evaluating those studies that are not congruent with the researcher's belief negatively. Efforts were also made in in evaluating the methodology of each study reviewed in order to establish whether the findings that were arrive at were valid or not. A systematic analytic method was clearly identified before carrying out the review of literature in order to improve the validity of the integrative review.

CHAPTER TWO

CONCEPTUAL ISSUES

2.1 Introduction

The chapter is a conceptual one whose aim is to discuss and unpack the key issues to this study. The key aim of this chapter is to uncover the key issues that inform organ trafficking through fully discussing some conceptual issues which are involved in that process. Is organ trafficking really a subset of human trafficking or a standalone process that is simply misconstrued and seen as a subset of human trafficking? Or fundamentally, how is organ trafficking different from human trafficking? The chapter will give a fuller discussion of human trafficking as it is understood in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000). The chapter also unpacks and discusses organ trafficking as a key process in which organ trafficking is nested as a subset (at least according to how it is understood and discussed in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children). In other words, the chapter will examine how organ trafficking is understood as both a process and concept in both international laws, the academe, policy circles and even the media. The major aim of this examination is to fully understand all the dimensions the issue has been conceptualised and continue to be conceptuallised in different circles.

2.3 Understanding organ trafficking

There is no point to attempting to clarify the principles that should inform international protocols on organ trafficking if the meaning of human trafficking in general is not understood by the reader. In order to understand organ trafficking, the trafficking of humans must be understood, and a conceptual foundation established for further inquiry. The term organ trafficking is used in a way that can be both confusing and titillating. Emotions attached to the term can range from the theatrical horror of waking up in a tub of ice with stitches in one's torso, to the very real reality of being waylaid in the Sinai and facing unwanted, unneeded surgery and the theft of one's vital organs. If lucky, the victim lives. Those who are unlucky join vast numbers of others who fell prey to this illegal economic activity. Yet, as Yea (2010:91) pointed out, "trafficking is generally assumed, rather than rigorously established."

The very concept of organ trafficking has been pregnant with an array of abstract meanings, periphrastic usages, and indecisive undertones. In some cases, the concept has been used in a sloppy fashion. The concept has also been seen as an empty vessel which has been carrying different personal, procedural and institutional descriptions used by journalists, humanitarian workers, academics, and even the average person.

The trustworthiness of the concept is to some extent threatened by its popularity. One is prompted to make efforts in trying to avoid the free ride on the evocative powers of this unclear concept. In the context of surging incidences of illegal migration (mostly into North Africa, Central and South-Eastern Europe, and Eastern Europe) (United Nations Office on Drugs and Crime [UNODC], 2018) there have been calls to deal with the 'scourge' of human trafficking (Gould, 2007: 8). These demands were triggered by the perceived intricate nexus between illegal migration, forced migration, forced labour, human smuggling, and human trafficking.

It is in the midst of this widespread institutional transformation and accretion on an array of issues related to the issue of migration that international laws on human trafficking might be reconsidered. Public officials should be called upon to rethink their justificatory foundation especially when confronted with the issue of organ trafficking. In this reflective exercise, a reconfiguration (or at least a broadening) of the existing concepts in a way that will embolden the issue of human trafficking emerges as a critical exercise. The practical reality is that patients who are likely to die from organ failure will pay someone for an organ. Poor or severely disadvantaged individuals who need money may be likely to accept money for one (or more) of their organs (Jingwei et al., 2010). The problem is that all over the world, *the number of transplants needed far exceeds the number of legal transplant sources under the current state of law, regardless of the nation in which the transplant needs to take place*.

The surging ubiquity of organ trafficking, especially in the Sinai Region, has introduced the topic to the general public in many areas around the world. The recent newsworthiness of the issue and the seeming shift of the issue to the transnational sphere has transcended the traditional domicile of the issue, which was once rooted in science fiction novels and movie fictions. Indeed, new pressures are being put on lawmakers to deal with the issue through the passage of laws meant to decisively deal

with the rapidly developing issue. Jingwei et al. (2010) pointed out that while cadaver donors are the most common, the number of living kidney transplants is steadily increasing. As of 2009, 40% of the kidney donors worldwide were from living donors (Horvat et al., 2009, in Jingwei et al., 2010). According to the World Health Organization (Who.init, 2020) that figure has risen to 46% worldwide. With the increase in live donations, it is more important than ever to provide a record of where the organs came from, how they were acquired, and if the donor survived.

Accounts of victims of tormented and abused victims are mostly found in news media and captured in documentary films. These reports and videos are also featured on non-governmental organisation (NGO) websites and are published in global government reports. Grim images of tortured, sexually assaulted and enslaved individuals are characteristically contrasted with dry statistical reports of the numbers of people who are trafficked for organ purposes yearly. The UNODC reported that over 25,000 persons were reported as being trafficked in 2016, the last year with complete statistics (UNODC, 2018).

Cases of organ trafficking have shown that, the motif of such a practice "is much more than a gothic subtext to film and fiction; it is part of a complex and multifaceted phenomenon presenting a unique challenge to law, policy, ethics and medicine" (Columb, 2015: 22). Today, approximately one percent of the men who are trafficked have their organs stolen. Roughly two thirds of the organ trafficking victims are male. The UNODC (2018) reported that only 100 victims of organ trafficking were detected between 2014 and 2017, and all the victims were adults. Anecdotal evidence from the press and humanitarian groups will be presented, however, which suggests that the actual numbers of organ trafficking victims is much higher. In particular, adult males with fully developed organs are the prime targets of organ traffickers.

Lest this figure seem to be too low to be considered a problem, consider that the numbers of people being trafficked for organs is growing. Over the last 15 years, the UNODC (2018) has tracked 700 bona fide victims of trafficking in persons for removal of organs, across 25 countries. As they point out, the levels of trafficking for organ removal will vary based on the shortage of organs across the globe. The term 'organ trafficking' becomes somewhat confusing at this point, however; UNODC asserts that five to ten percent of all kidney or liver transplants, globally, are accomplished with

organs that have been procured illegally. If the donor has illegally sold an organ, or an inappropriate donor has provided an organ, then the organ is not considered to be trafficked, but rather illegally procured. It is a fine point, and one that is at the heart of the issues discussed in this dissertation. It is this point, related to semantics that makes the prosecution of organ traffickers so difficult even if victims and perpetrators are identified.

The UNODC uses the criteria of 'lack of consent' in its definition of organ trafficking. Thus, if the organ donor did not consent to the harvesting of his or her organ(s), then the organ is considered to have been trafficked. The formal term used by the UNODC is 'trafficking in persons for organ removal' (2018: 30). Lundin (2012:1) argues that the best definition of organ trafficking is "an illegal means of meeting the shortage of transplants." There was a great deal of discussion as to who the victim in terms of trafficking in organs really is (Gunnarson and Lundin, 2015). One of the biggest discussions is whether or not the person was a victim if, in fact, they had accepted money in return for having the organ removed from their body. Similarly, if the donor consented to having the organ removed, but the consent is flawed because the person was deceived, coerced, or vulnerable for some reason, the organ is still considered to have been trafficked (UNODC 2018: 30). In section 1.2.2, the implications of increased trafficking relating to criminal enterprises are discussed.

Lundin (2012) argues that medical needs, poverty, and criminality are interacting reasons for organ trafficking (illegally). She suggests that people have a dream that their bodies can somehow be regenerated if an organ dies, and that the human body is both utilitarian and valuable. The problem is, according to Lundin, that shadow economies exist, and these economies govern the factions of the world that rotate around goods, people, weapons, and bodies. In essence, illegal sales and trafficking has become a huge part of the global economic market (Lundin, 2012).

A core set of international institutional changes has been made to accept victims of human trafficking as refugees, and to offer citizenship to them in some cases. The other indicates that some non-governmental international organisations have been advocating for the remodelling of the institutional *status quo* by way of funding efforts aimed at following up those who would have been trafficked for organ harvesting purposes. The alleged legal loopholes of the existing anti-trafficking laws and

initiatives (domestically, regionally and internationally) have been added to the global agenda since 2010. For instance, journalists who serve as humanitarian workers, such as Meron Estefanos, have been working hard to expose the nature and extent of human trafficking in the Sinai Region. Their work has been raising the global awareness of organ trafficking. There are reasons behind the widespread concern this has generated. Two main reasons can be cited in this study.

The first reason is that there seems to be a tendency by countries to withhold help to those who are falling victim to human trafficking, mainly because the perception is that most victims seem to be illegal migrants. Almost all victims of organ trafficking are illegal migrants who use the services of smugglers to facilitate their journeys to destination countries. These smugglers usually demand exorbitant smuggling fares. This situation puts migrants at a precarious position since they will end up being forced to pay the fees with their body parts. The second reason is the seemingly limited scope of the existing anti-trafficking and anti-smuggling laws. The Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime) and the relevant anti-smuggling instruments seem to be too general and arguably do not award the issue of organ trafficking the seriousness it deserves. These instruments are binding to some countries and non-binding to some. Given the transnational nature of human trafficking in general, the criminalisation and the apprehension of those responsible for the crimes call for global efforts. The lack of global coordination suggests that trafficking in organs has been happening without much being done to abate it. The first critical issue identified, then, is that instruments relating to anti-trafficking and anti-smuggling are not binding to all countries (Bassiouni et al., 2010).

Non-state actors have been taking measures to increase the awareness of the global community of organ trafficking. Non-governmental organisations such as the International Commission on Eritrean Refugees, as well as Radio *Erena* have been developed to raise awareness of organ trafficking in the Sinai by humanitarian workers. Meron Estefanos is a human rights activist, journalist and radio presenter for Radio Erena who is based in Stockholm, Sweden. Meron Estefanos is one of the co-founders

of a non-governmental organisation called the International Commission on Eritrean Refugees.

Such efforts, among others which are beyond the scope of this study, have been helpful in pushing responsible governments to make efforts to help those in serious need of help and also to ensure that organ trafficking is dealt with through the passage of laws intended to be specific to its eradication. For instance, through the efforts of Radio *Erena* and the reporting of the Cable Network News (CNN), trafficking in the Sinai has been reported on a global level. As a result, there has been cooperation from some of the Bedouin tribes in the Sinai. The Bedouin tribes have been offering help by agreeing to provide shelter, food, and burial services to those who have become victims of trafficking, whether victims of human trafficking or organ trafficking. As the reader will see later in this document, the Bedouin tribes have also been major organ traffickers, leading to the possibility that they are offering to help through a desire to self-preservation.

Note, however, that Gunnarson and Lundin (2015) argue that in their research relating to trade in organs, they have dealt with this attitude, asserting that perpetrators are victims more than once. In particular, they say, "The view of organ buyers as non-accountable victims of a life-threatening disease is especially common," (Gunnarson and Lundin, 2015: 18). In particular the argument is frequently made that buyers of organs are not complicit in a crime, because they want to save their own lives. Gunnarson and Lundin point out that in a world where disease is considered an anomaly and people are considered to be complicit with their own disease (such as alcoholism or drug abuse), then people who are sick can be held responsible for their own recovery.

If this philosophical position is taken, then people who are 'forced' to buy organs to survive (because there is a global shortage) should not be held responsible for committing a crime. Taking this a step further, then doctors and medical staff who participate in transferring illegally of organs (or actively harvesting them) would also not be complicity, because they are taking the only possible steps to save the lives of these individuals. Placed in this perspective, stealing an organ from people who have duplicates (lung, kidney) is actually an altruist act and it protects the donor from being exploited by family members or medical staff who may pressure the family to have

them donate. Gunnarson and Lundin (2015:19) refer to this as "the moral charge of reductive views of victimhood." While they consider that placing organ thieves, illegal transplant doctors, or groups such as the Bedouins who harvest for money to be 'one-dimensional', both of these researchers point out that victimhood can never be completely devoid of agency. Regardless of the need for money or food, on some level the individual who buys – or sells – organs need victim status to some degree, but they can never be completely absolved of wrongdoing. At some point, the only way that a person can be fully a victim is if they have had absolutely no agency (Dahl 2009:402, in Gunnarson and Lundin 2015: 20). It should be clear, however, that this status only is applied to individuals who were kidnapped and knocked out, awakening to find an organ gone. Otherwise, individuals do have some level of agency. As Gunnarson and Lundin (2015:20) pointed out, it is possible:

> …to isolate certain points (e.g. the moment of consent or the moment of remuneration) in the chain of events, or to point out certain individuals, seeing them as vulnerable and passive individuals rather than persons whose actions are oriented by a complex and perilous situation.

These efforts, and similar efforts from other organisations, are giving the victims of trafficking a voice needed for global action. Radio *Erena* has been broadcasting talk shows held with trafficking victims. The rationale behind these talk shows is entirely geared towards making the stories of those trafficked for their organs to be heard globally. Interestingly, the talk shows have created a platform for policy debates with important stakeholders such as the United Nations and the European Union. The broadcasts have helped expose the critical gaps which need attention in the existing laws and initiatives relating to human trafficking and organ trafficking.

Apart from being seen by some as the source of intrusion on domestic arrangements by international law, the Palermo Protocol has also given rise to an array of different, but related, concerns about capabilities. In particular, concerns relate to the unequal abilities that developing countries have in comparison to developed ones in terms of offering needed help to victims of human trafficking. For instance, a country like Libya or Nicaragua might not be able to offer all the help needed by victims of human trafficking in the same way a country such as Sweden would be able to. The

Palermo Protocol does not seem to recognise these differences, nor is it able to accommodate difference.

The protocol seems to be influenced by a 'one-size-fits-all' mentality which requires all signatory states to implement it without paying any attention to differences in capabilities of the various states. Criminalising the sale of organs does not effectually limit demand, nor does it deal with the politico-social, economic, legal, and cultural issues which have a critical bearing on organ trade.

Laws are frequently introduced and enacted without taking into account the practical considerations of how to identify, substantiate and implement measures which are against organ trade. Various instruments were crafted to prohibit organ sales, including Resolution WHA40.13 which first banned organ trade in 1987. The Declaration of Istanbul and other regional instruments, such as the Council of Europe Convention on Biomedicine and Human Rights soon followed. However, the Trafficking Protocol (the Palermo Protocol) became the standard bearer for the banishment of organ trafficking. Also known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime, the protocol was established by the United Nations in 2000. It is regarded as the current and all-inclusive protocol which deals with the human trafficking issue. The Protocol is discussed at more length in 1.4.1.

2.4 Conceptualising Human Trafficking

In earliest Conventions, the definition of trafficking in persons was confined to the abduction of females who were then forced into prostitution. Different countries had different needs, and due to these novel manifestations of human trafficking, various governmental and non-governmental organisations adopted individual definitions formulated specifically for their purposes. For instance, the Cambodian Women's Development Agency defined trafficking as the practice of taking people outside their support structure and rendering them powerless (Mollema, 2013).

The International Organisation for Migration defined trafficking in terms of international migratory movements, without specific reference to types of exploitation. To the International Organisation for Migration, trafficking occurs with the exchange of

currency (or another form of payment); the involvement of a facilitator (or trafficker), and the illegal, but voluntary crossing of international borders (Gunatilleke, 1994: 593). To be clear, the original definition meant that an act was *not* trafficking if there was no individual to facilitate crossing an international border after the exchange of currency or other payment. After having considered this weakness, the International Organisation for Migration changed its definition. As a result, trafficking is now defined by the Organisation as a situation in which a migrant is illegally engaged, abducted, sold, and moved, within a country or across its borders by traffickers. The aim of such actions will be for economic gain through force, trickery or other forms of manipulation under circumstances which are in violation of a persons' fundamental rights (Mollema, 2013).

The most widely used definition of trafficking in 1999 was jointly arrived at by feminist organisations such as the Global Alliance against the Trafficking in Women (GAATW), the Foundation against Trafficking in Women (FATW), and the International Human Rights Law Group (IHRLG). What is critical and significant in this definition is that to be considered trafficked, a person would have to be exploited, abused, and deceived in a community alien to his or her original habitat. After noting the serious nature of human trafficking, the global community of nations in 2000 came up with two key international sources of hard law to assist nations in dealing with this type of crime. These two key instruments are The United Nations Conventions against Transnational Organized Crime (UNCTOC) and the Protocol (which has been known as the Palermo Protocol) to suppress and punish trafficking in human beings. The Palermo Protocol arrived at a newer definition of human trafficking. The protocol defines human trafficking as consisting of the recruitment, transportation, transfer, harbouring, or receipt of persons through force or other means. Abduction, fraud, deception, or the abuse of power through receiving payments or benefits to achieve the consent of a person for the purpose of exploitation is regarded as human trafficking under the Palermo Protocol.

One of the thorny issues which was seen during the crafting of the generally accepted definition of human trafficking was the controversy over *consent to trafficking* and the inclusion or exclusion of voluntary prostitution (and whether or not prostitution was ever truly voluntary). Some groups sharply opposed the views on the notions of

consent and prostitution. A point of dispute was whether the means used to secure the consent of the victim for transportation and harbouring should be regarded as a determining factor in the definition of trafficking in persons. Some groups and national bodies did not consider all forms of prostitution as wrong and suggested a definition of trafficking in women in which force should be regarded as the fundamental parameter to decide the act of trafficking. Those who did not consider all forms of trafficking as wrong defined trafficking in persons as being all acts involved in the recruitment and/or transportation of a person within and across national borders for work or services by means of violence or by threatening violence. Abusing authority or having a dominant position over the person, having debt bondage, or using deception or other forms of coercion would all be included acts (Bruckert & Parent, 2002).

Such a definition unfortunately leaves the door open for consensual trafficking for prostitution or any other forms of coercive labour. Those who supported the view of prostitution as employment were of the argument that force, or deception should be a necessary element of the definition of trafficking in order to differentiate trafficking from voluntary prostitution. Those who view prostitution as employment also maintained that human trafficking should encapsulate trafficking of women, men, and children for different types of labour, including sweatshop labour, agricultural labour, and the sex trade. Others strongly rejected a definition of human trafficking which took into consideration the issue of consent. This school of thought proposed fervent action against any form of trafficking in women and of prostitution whether consensual or non-consensual. The basis of this position was that prostitution could never be considered to be voluntary. It was further contended that trafficking ought to include all forms of recruitment and transportation for prostitution, regardless of whether force or deception took place.

The aim here was therefore to abolish prostitution since it could be regarded as organised gang rape and a violation of women's human rights. In this worldview, the idea of voluntary prostitution in fact portrays a prostitute as a subhuman, helpless, and a choiceless victim of male domination. Clearly, a single workable definition of trafficking can be complicated since “[t]he shared international agenda that is designed to combat forced labour and slavery may really include several agendas including

countering organised crime and abolishing prostitution" (Mollema, 2013, citing Gould and Fick 2008:93; Doezema, 2000; Pearson, 2002).

2.5 A Historical Perspective

Human trafficking is not a novel phenomenon. Slavery, a form of human trafficking, is as old as mankind itself (Mollema, 2013; Bvirindi & Landa, 2016). Proof of slavery preludes written records but the occurrence of slavery, in one form or another, can be traced to the remotest of times. History of all ancient civilisations depict captives being taken in war and becoming slaves of their captors. Those captured during wars were employed as slaves in public works, or sold to individuals, or even appropriated by the captors for their own private use as war booty. The Christian Bible, for example, recounts many stories of captured slaves who bore children for their captors.

Slavery could at times come as a result of debt, as a punishment for crime, a punishment for child abandonment, and as punishment for the birth of slave children to slaves. In ancient Egypt, the Egyptian pharaohs were known to employ the labour of captives when erecting stately temples. Slavery among the ancient Greeks in the seventh century BC was both extensive and rigorous[3]. Slaves were gained by invasion of war and as payment of debts. Slaves might be abducted from those who traded in slaves, and then returned for a bounty. In the ancient Greek city of Sparta, the Helots from Laconia were the most cruelly degraded and oppressed of all slaves; they were often murdered capriciously and without any justice.

Slavery continued in all its forms in the second century BC amongst the Romans. With the expansion of the Roman Empire, entire populations were enslaved. Obtained by the triumphs of war, the *servi*, a label denoting their destiny in servitude for the benefit of others, and *mancipia* (which means 'bringing under subjection') were treated more harshly than slaves acquired by sale or as a punishment for a crime. It was lawful for free-born Roman fathers to sell their children to slavery, and insolvent

[3] The issue of slavery in medieval Europe was fully explained by Grewe (2000). Servitude was a system which was practiced in Europe through the feudal system. Under feudalism, Grewe (2000) talks of fiefdoms in which the fiefs controlled the serfs through extracting their labour in a fashion reminiscent of present day slavery. Though it might not have been understood in the same way it is understood today, Grewe (2000) discusses at length how Europe was modelled during the middle ages when the Papacy had a foothold in how Europe was governed during that era.

debtors were sometimes given up to their creditors. In this case, the state of the debtors was not one of absolute slavery. These slave-debtors could be freed, and re-instated to their former privileges. Among the Romans, masters had a complete control and power over their slaves. Masters could scourge or put their slaves to death as they wished. Prisoners of war were sometimes saved so that their blood could be shed in the amphitheatre as gladiators.

During this time period, slaves could obtain their freedom by the voluntary act of the owner, or be emancipated from slavery by the benevolence of another person. Nevertheless, the patron still retained various rights over the slave. If the freed man died intestate, the patron acquired his effects. The citizens of Rome were also enslaved on some occasions. At one point, more than twenty thousand Romans were carried away as captives into Germany only to be rescued by the Emperor Julian. When Rome was destroyed by the Goths, scores of citizens were reduced to slaves. History also show that in medieval times and later (6th to 15th century AD), the slave trade was sustained through constant warfare in mainly South and East Europe. Land and other property was divided amongst the Germanic barbarians according to rank; the few remaining inhabitants of each land were placed in a state of vassalage under their conquerors. This new division of property introduced the feudal system which continued until the end of the twelfth century.

From the eleventh to the nineteenth century, North African Barbary Pirates captured Christians from European coastal villages to sell at slave markets in places such as Algeria and Morocco. This trafficking of Christian slaves to non-Christian lands was repeatedly prohibited by the Roman Catholic Church at the Council of Koblenz (922), the Council of London (1102), and the Council of Armagh (1171) (King, 2007; Mollema, 2013).

Human trafficking throughout the world surged a few hundred years ago in the form of trans-Atlantic slave trade (Southern Africa Development Community, 2009). The original form of human exploitation known as slavery has been seen as an age-old tradition in Asia and Europe and later between Europe and Africa (Martens, Pieczkowski & Van Vuuren-Smyth, 2003). Slavery can factually be traced back to the first written code of laws in human history known as The Code of Hammurabi of 1760

BC (King, 2007). After having practised without any efforts to criminalise and stamp it out, slavery was officially ended by William Wilberforce of Britain in 1833.

In England, canonical law declared slavery within its borders an illegal practice as early as 1102. In Western Europe slavery largely disappeared by the later middle ages but continued for a long time in Eastern Europe. The influence of Christianity in Europe and the emphasis on the rights of man led to slavery becoming almost non-existent in most states. Slavery was nonetheless revived in the fifteenth century, in an aggravated form, in the colonies of the New World. Around the 1440s the Portuguese seized Moors on the African West Coast. At the close of the same century, after the Spaniards took possession of the West Indian islands in 1503, African slaves were captured by the Portuguese to be used for labour.

In 1511, Ferdinand II of Aragon allowed a large importation of slaves. His successor, Charles V, granted a patent for the exclusive supply of thousands of Africans annually to Hispaniola, Cuba, Jamaica and Puerto Rico in 1517. Nevertheless, in 1542, Charles V ordered that all slaves in his West Indian possessions should be freed. The edict was carried out. However, after the abdication of King Charles V in 1555, a return to the former slave trade practice followed. England, which seems to have been the only country which was against slave trade, entered into the African slave trade in 1562 when Captain John Hawkins took 300 slaves' captive. This practice was repeated several times more in the trans-Atlantic slave trade. From 1700 to 1786, the number of slaves imported by the British into the island of Jamaica alone was 610 000; the total import into all the British colonies, from 1680 to 1786, was about 2 130 000. However, due to the pressure from moral entrepreneurs, the British Parliament outlawed slavery with the Slave Trade Act in 1807. The Act came into effect on 1 January 1808 (Black, 2015).

Enforcement of the Act led to the freeing of millions of slaves from servitude in plantations which were scattered across the Americas and the Caribbean Islands. In United States of America, the slave trade officially ended in 1807; in Britain, it ended in 1833 (Dumas, 2013). Despite the abolition of slave trade in the West under the aegis of Britain, illegal slave trade continued in the Americas, Asia and the Middle East, into the second half of the nineteenth century. Pragmatically, slavery in the United States of America came to an end in 1865 following the ratification of the Thirteenth

Amendment after the Civil War. More people began to view slavery as morally wrong, slaveholders lost politico-economic influence and the legal institution of slavery eventually disappeared (Mollema, 2013).

2.6 A Modern Perspective of Slavery

Today, slavery has taken new forms. It is widely recognised as being more pervasive than at any other time in world history and that almost no country is unaffected by it (Skinner, 2008). Popularly known today as human trafficking, the recruitment of persons for the purposes of exploitation has become more conspicuous during the turn of the 21st century in both developed and developing countries (Horwood, 2009).

Human trafficking is not a static phenomenon. Though similarities can be seen between slavery of the 18th and 19th Century, a certain level of consent is seen in human trafficking (Mtimkulu, 2010). It is an issue with various interconnected threads that include life-threatening forms of coercion and persecution on one hand and voluntary aspects on the other (Archavanitkul, 2000). As a momentous aspect of international organised criminal activity, human trafficking can be ranked as one of the most profitable and largely practised criminal activities (Keefer, 2006; Gould & Fick, 2008). Human trafficking is the fastest-growing source of revenue for organised criminal operations internationally (Hughes, 2000; Miko & Park, 2002; Malarek, 2003; Belser, 2005; Siobhan, 2006; Olateru-Olagbegi, 2008; Shelley 2010; United Nations Global Initiative to Fight Human Trafficking, 2010).

Trafficking in children has been among the most profitable ventures since 2000 (Mollema, 2013). Trafficking in children includes an intricate linkage to illegal adoption. Illegal adoption has also become another form of trafficking. Though in some cases it is babies that are kidnapped, there are instances in which poor, pregnant and single women are targeted by baby-selling syndicates or individuals. These women are forcibly held captive until birth, whereupon the child is taken away and sold. This situation amounts to trafficking. Illicit adoptions are detrimental to small children because they are removed and placed outside the protection afforded to them by legal adoption systems; they are usually placed on the black market and are consequently always in danger. This violates many of their human rights, such as the right to non-

separation from the family (Seymore, 2019). The surging internationalisation of the sale of children, child prostitution and child pornography are perturbing (Mollema, 2013). Children are not only sold for prostitution and pornography within state borders but are sold and trafficked across borders and seas (Mollema, 2013). Human trafficking has no bounds and can transcend both national frontiers and local jurisdictions.

Despite the similarities, slavery and human trafficking differ in terms of legality. Slavery, from its original genesis up until the trans-Atlantic slavery trade was abolished, was seen as lawful (Obokata, 2005: 18). In contrast, human trafficking has never been recognised as being legal. Unlike the traditional form of slavery in which a person could be owned legally, human trafficking involves the unlawful control of persons for purposes of exploiting them (Esquibel, 2005: 6). Modern human exploitation encompasses slaveholding, rather than slave-owning (Esquibel, 2005: 6). Slavery during the trans-Atlantic trade was typically based on race. Human trafficking is usually temporary and not based on racial identity (Obokata, 2005: 18).

2.7 The Modern Perspective of smuggling

Human smuggling is another phenomenon related to human trafficking. Before the drafting of the United Nation definition, trafficking in persons was often viewed as human smuggling and a type of illegal migration (Laczko, 2002: 2). When one compares the phenomena of human trafficking and the smuggling of people, four distinctive elements illuminate their disparity. These elements include consent; exploitation, profit generation, and destination (Gallagher, 2001: 1000; Obokata, 2005: 20). Both human trafficking and human smuggling are processes where an individual or an organised criminal group may transport a person to another country or territory. It is a mammoth task to differentiate between people smuggling and trafficking. It is difficult since an agreement that at first appears voluntary may instead be a result of deception. It may also include an individual or family entering into debt to pay for the travel, which usually puts them in a situation where they are at the mercy of the smuggler. Nevertheless, during the process of human smuggling the person is a client, willing to enter a certain foreign territory illegally in exchange for payment. It is critical to note that smuggling is often voluntary since there is no coercion or deception.

Thus, when the people being smuggled consent to their smuggling, trafficked persons do not consent. (Earlier, the argument was presented that analysts are split as to whether a woman entering prostitution can truly consent, or whether trafficking for purposes of the sex trade can be voluntary.) Smuggling essentially involves the crossing of transnational borders, which may not be the case with trafficking (Obokata, 2005: 21). Human trafficking does not require the crossing of a border as long as transfer from one place to another exists. Differences between human trafficking and human smuggling become less clear when the hired smuggler is also a trafficker intending to deceive them into forced labour conditions (Piper, 2005). However, this point emphasises the need for revised language and legal applications.

Trafficking for purposes of forced labour is the second most common form of human trafficking. Debt bondage has been one of the ways used by traffickers. Debt bondage may also be incurred by a victim during trafficking and, in some cases, also at the destination. The debt usually comprises of a high sum of money, which is in no way related to the actual expenditure for the travel costs or costs the smuggler may incur. These debts usually accumulate to such large amounts that the victims are not able to pay them off. As a result, the debt binds the trafficker or employer to the smuggled individual for an uncertain period of time. This can be very difficult when the forced labour is female, because they are usually but not exclusively engaged as household domestic workers, who are typically paid very low wages after being trafficked.

Forced labour trafficking is generally found in such less privatised sectors of economies such as agriculture, construction and manufacturing. Forced labour can include sexual exploitation, crossing the line of the purpose of the trafficking. In addition, females may be trafficked within their countries for the purpose of domestic labour where they are often forced to provide sexual services to their employers or others, with or without the knowledge of their employers. Males are trafficked for the purpose of forced labour and to similar sectors as that of women, although construction and agriculture are the most common types of work which affect males (Tiefenbrun 2001; Bermudez, 2008).

Human smuggling is the illegal facilitation of border crossing. Smuggling always involves illegal entry while trafficking may entail the legal or illegal entry of individuals (Obokata, 2005). The illegal entry of smuggled persons indicates that

human trafficking is involved as well. Human trafficking victims usually have legal entry documents which are consequently taken away from them by the traffickers. The relationship between the smuggler and the smuggled usually ends once a fee for smuggling is paid and when the smuggled has successfully entered the country of destination (Hosken, 2006). Human trafficking only ends with either the escape or death of the victim (Mollema, 2013). Unlike in the case of human trafficking, no relationship continues in smuggling after crossing the border. Human smugglers are usually only held responsible by the smuggled individuals for safe passage, and not for what happens in the destination country.

Nevertheless, in the case of trafficking, the relationship between the trafficked person and the trafficker continues. During human trafficking, the victim of human trafficking may be passed from one trafficker to another, but the exploitative relationship does not change. When it comes to human trafficking, traffickers usually have total control over their movement. Victims of human trafficking may be physically confined in the destination state. Victims are nearly always compliant, because travel documents will have been confiscated, or by threats of disclosure to the authorities (International Labour Organisation, 2003: 36).

To traffickers, human beings are a commodity that can be exchanged for profit. During the process of human smuggling, smugglers make a profit from the fees generated by the illegal entry of migrants. In a similar vein, traffickers financially gain from the exploitation of their victims. This implies that human trafficking is a violation of the individual's human rights while the product in human smuggling is an illegal service, which is a crime against the destination state's immigration laws. In this sense, then, the individuals who are smuggled may be more objectified than individuals who are trafficked for the purpose of labor or sex. The distinction between trafficking and smuggling can be clear to those who attach political meanings to issues of border control and national sovereignty. The distinction is however, far from obvious to those who are mainly concerned with the promotion and protection of the rights of migrant workers (Gould & Fick, 2008), and to those who are being or have been smuggled or trafficked.

2.8 Migration and Trafficking

Human trafficking cannot be viewed outside the context of migration. Migration entails the movement of large numbers of people, from one place to another, or from one geographical unit to another across an administrative or political border, with the intention of settling indefinitely or temporarily in a place other than the place of origin (Laczko & Thompson, 2000). In this framework, migration can be legal or illegal; it can take place within a country's borders or be can be transnational. If it is unlawful, migration can either take the form of illegal migration or trafficking in persons. Migration and human trafficking are often distinguished from one another on the basis that migration is characterised by choice and trafficking by coercion or, deception for purposes of exploitation (Joshi, 2002).

Human trafficking is a particularly abusive form of migration. From a practical standpoint, the line between human trafficking and migration is often blurred. The nexus between migration and trafficking is often sophisticated, contentious and fluid. The relationship often shifts easily between what might be seen as voluntary migration for legitimate work and what can clearly be recognised as exploitation. People caught in this whirlwind usually migrate in expectation of well-paid employment, only to find themselves forced to work under exploitative conditions (Mollema, 2013). Migration in itself does not make a person susceptible to trafficking. Nevertheless, the process of migration encapsulates particular risks for women and children, who may end up being trafficked in an exploitative situation (Preece, 2005:13). Regardless of its cause, uninformed, ill-informed and unconsidered willingness to migrate through unregulated channels has the potential of putting the migrant at risk of human trafficking.

The dynamics and intricacies of human trafficking have been evolving over the years. As a result, the constitutive elements of the crime were not well-defined and have not been responsive to the prevailing veracities of the phenomenon in previous international instruments (Pearson, 2000:21). When these issues are considered, it is implicit that a novel and an all-encompassing operational definition of human trafficking is needed.

2.9 Background Issues Relating to Human Trafficking

In recent years, the issue of human trafficking has taken a spot onstage in law debates and the broad academic spectrum. Talks on human rights, rule of law, constitutionalism and even democracy have all (to some extent) debated the issue of human trafficking, sometimes in a very vocal tone. The current discourse on human trafficking is anchored in numerous assumptions advanced by non-governmental organisations, government authorities and human rights advocates. Generally, human trafficking is seen as a crime which is global in nature and which leads to serious abuse of the rights of humans. Human trafficking sometimes occurs on a massive scale. One major argument is that human trafficking is chiefly a problem of crime control that continues to happen as a result of weak regulations in 'other' States. As a result, it has been suggested that national anti-trafficking stratagems must build expertise in enforcing laws and strengthening the legislations on protecting the victims of the practice. Victims are typically portrayed as un-educated, poor and vulnerable populations (UNODC, 2008; UNODC, 2012a). As of the time of this research, the issue of organ trafficking has not seemed to be taken as a priority issue within the context of human trafficking, although it has gained notoriety as a novel horror factor.

If one is to understand the human and organ trafficking processes, it is critical to determine how clandestine systems and processes such as human trafficking are developed and maintained. However, efforts to do this have been very difficult to establish since the systems and methods used constantly change. Human trafficking includes the recruitment, transportation and exploitation (Mollema, 2013) of individuals. The recruitment of the victims of trafficking usually include some kind of deception. Victims of human trafficking are usually recruited through false promises of marriage or well-paying jobs, but others may simply be abducted (Preece, 2005). As part of the recruitment exercise, some victims respond to false employment advertisements in the media for overseas studies, domestic work, waitressing or any other low-skilled work that they believe may pay them more than they are currently receiving. In some instances, victims of human trafficking are recruited by partial deception. The recruiter may inform the victim that she or he would be doing a particular kind of work without fully disclosing the fully exploitative nature of the work that person will be subjected to (Pearson, 2000). This kind of recruitment is usually

common in the case of women, who believe they are receiving an honest offer of work but who are really being recruited to work as sex workers in areas far away from their homes. Promises of lucrative wages are usually made, but many people end up working under threat of violence and dreadful conditions, while their earnings taken by the traffickers.

The trafficking recruitment system anchors on intricate networks between people. Numerous people are involved in the recruitment or procurement process (Laczko & Thompson, 2000). The first trafficker is generally the one who will be in direct contact with employers. The second stage of human trafficking is transportation, where the victim is smuggled illegally or legally taken away from his or her known surroundings. Transporting a victim from a familiar environment to a new, strange setting renders the victim defenceless and easy to exploit. When people are moved to a new environment, there is no support system for them, and the language may be incomprehensible for the victims. In the third phase of the trafficking process, the ultimate exploitation of the victims occurs. The victims' documentation (identification and passports) is generally confiscated by the traffickers in order to keep the victims from leaving. At transition houses, the victims may be raped or drugged. The trafficker may also exploit the victim for financial gain, sexual gratification, and/or organ harvesting. In most cases, traffickers sell victims to anyone who needs them. The individuals who purchase the victims may resell them. In this manner, victims are continually relocated both internally and internationally. Keeping the victim off-balance or disoriented is part of the methodology of trafficking.

Various types of trafficking can be differentiated according to its movement, types of victims and forms of exploitation. Human trafficking may involve international trafficking or transfers across national borders. Internal trafficking can occur with transfers within national borders. Internal trafficking usually mirrors and shapes international trafficking, whereas a surge in international trafficking has the propensity to lead to more internal trafficking. Internal and international trafficking should not be regarded as completely discrete and separate phenomena (Landesman, 2004). The commodities in human trafficking are people. Like any product for sale, particular persons are more desirable for particular purposes (Mollema, 2013). Human

trafficking can involve both adults and children, and a particular demographic will be sought for particular needs, jobs, or locations.

Since the turn of the millennium trafficking has become a billion-dollar industry which has seen increasing numbers of people being trafficked for sexual exploitation, labour exploitation and for organ harvesting (Shelley, 2010). Sexual exploitation has been seen as the most common form of human trafficking across the globe. Human trafficking for the purposes of sexual exploitation is also described as seen as the most lucrative criminal business. Sexual exploitation has not been well defined in either the Palermo Protocol or in international law. Researchers in the field apply various definitions, and indeed, even law enforcement in various areas will ascribe different meanings to the terms. Sexual exploitation commonly involves the coercion of a trafficked person, in one way or another, to provide sexual services for the benefit of the exploiter. Trafficking in persons for the purpose of sexual exploitation has also been defined as a crime that encompasses the recruitment, transport and exploitation of an individual which can take the form of forced prostitution, production of pornography or any other forced sexual practices.

The sex industry has been as the major driver of sexual exploitation though the nexus between trafficking, globalisation and the sex industry has been largely neglected. The result has grown into a multi-billion-dollar business in virtually all portions of the globe. Henderson (2019) reported that there is no real estimate of how much money is at stake, but he gives a number of facts that interrelate and suggest that the total financial benefit to the traffickers is astronomically high. Consider that:

- More than 4 million people, 99% of them female, are being sex trafficked globally every year
- The US does not attempt to estimate how many people are sex trafficked within its borders, but 1 out of every 7 runaways is sex trafficked
- Girls from foster care are particularly vulnerable
- Seven out of every ten victims are exploited in Asia and the Pacific rim
- Forced sexual labour may bring in $99 billion a year, worldwide
- Victims in developed nations may bring their traffickers $80,000 per year, while victims in undeveloped nations may bring their traffickers $55,000 per year

- In the United States alone, 9,000 illegal massage parlours may bring in $2.8 billion a year (Henderson, 2019; Bouche & Crotty, 2018).
- Major sports events bring a huge influx of trafficking
- While prosecution of sex trafficking has been down in the United States, the victims in many areas, including the U.S., are still arrested for crimes they are compelled to commit (Henderson, 2019).

The global sex industry makes billions of dollars, at a minimum. To keep the global sex industry in business, women are trafficked to, from and through every region in the world. The value of the global trade in women as commodities for sex industries produces a situation in which the sex industry targets and consumes young women, especially underage girls. The trafficking of women and girls into prostitution embodies a severe form of contemporary slavery. As a result of exploitable vulnerabilities arising from poverty, gender inequality, racism, and violence, women and girls are susceptible to being forced into the sex industry (D'Cunha, 2002).

Females can be abducted, lured, deceived, and sold into prostitution. Their price may be fixed on the basis of their colour, beauty, age, and virginity. Different qualities will bring difference prices in different locations. Women who are trafficked seldom escape or negotiate their working or living conditions because of their vulnerability and their completely subordinate position. In a bid to maximise their profits, traffickers working on behalf of brothels owners penetrate ever more remote areas of the developing world in search of the unsuspecting recruits. In forced prostitution, women are subjected to rape, violence or threats of violence against themselves or their families. Their documents are confiscated or destroyed, and they are forced to pay off huge debts. The children of these sex workers, notably girls, are often either pushed into the trade or are taken as substitutes for their mothers. Sexual exploitation is also linked to forced marriages.

Forced marriages are forcible relationships which are done without lawful consent of one or both of the parties notably the female party to the relationship. Forced marriages have been seen as a form of human rights abuse because the practice violates the principle of the liberty and autonomy of people. Also known as 'bride trafficking', forced marriages include constituent acts that are collated crimes in international customary and human rights law. These crimes comprise of rape, sexual slavery,

enforced pregnancy, forced labour, enslavement and torture. Under forced marriages, females are forced to marry for cultural, religious, socio-economic and monetary motives. Numerous countries have a system of forced marriage in which something valuable is exchanged for the woman as either dowry or bride price (Hughes, 1999; 2000); Tiefenbrun (2001); Lehti and Aroma (2006). The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and The Rome Statute on the International Criminal Court (1998), arts 7(1)(c)-(g) have all addressed the subject of forced marriage, which has become a concern to the general public in recent years.

Human trafficking has emerged as an issue of considerable concern for the international community (Pharoah, 2006). Human trafficking is regarded as a serious multifaceted criminal occurrence which is global (Altink, 1995; Kempadoo & Doezema, 1998; Hughes, 2000; Laczko & Thompson, 2000; International Organisation on Migration, 2001; Kyle & Koslowski, 2001; Raymond & Hughes, 2001). Although the correct figures and the exact extent of trafficking in persons cannot be established and verified due to its clandestine nature, it has been estimated that close to twenty-seven million people are working under slavery across that globe (Pharoah, 2006). In June, 2019, the United States Department of State reported that the new estimate of trafficking was nearly 25 million people annually (United States Department of State, 2019). An untold number of people throughout the years have been trafficked across borders and within state borders (Gallagher, 2010).

Human trafficking involves a relationship between two persons or a group of persons, divided into the categories of victim(s) and the trafficker(s) (Mollema, 2013). Traffickers are mostly defined by their trade, position or relationship with the victim. Thus, traffickers are the recruiters and transporters who exercise control over trafficked persons. They transfer or maintain trafficked persons in exploitative situation and make profit either directly or indirectly (Dave-Odigie, 2008: 43). These traffickers may be a single person trafficker (male or female); a second wave trafficker (former victims turned traffickers); syndicates or gangs (Dave-Odigie, 2008). Traffickers can be family members, parents, partners, friends, acquaintances, pimps or business contacts. They can also be strangers or any other person who lure any person through enticement, force, threats, the use of narcotic drugs, or by other means (Preece, 2005).

Traffickers can come from the villages, communities and district of their victims and depend on connections and relationships they have in these areas to operate (Mollema, 2013). They can also come from areas far away from the targeted victims. Some traffickers have loose informal networks from source to border and to the destination point. In some instances, police and immigration officials can also become part of the trafficking process through the help they might offer to those who are involved in internal and cross-border trafficking (Hughes & Denisova, 2001). There are also entrepreneurial networks of traffickers or opportunistic individuals who deceive or force their victim into a scenario of exploitation for profit.

As it has previously been mentioned, a clear definition of the human trafficking victim is not well articulated in the existing instruments on human trafficking. The United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines a victim as any person who:

> …suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power (United Nations, 1985; Amiel, 2006).

That being the case, victims of trafficking are those who have suffered harm as the direct result of their traffickers' exploitation. Victims may be categorised as persons at risk of being trafficked; current victims of trafficking, and former victims of trafficking or 'survivors' (Tyldum & Brunovskis, 2005; Goździak, 2008). It is usually difficult to distinguish externally observable traits of those at risk of trafficking. The typical explanations of trafficking point to young, unsuspecting women being cuckolded and sold to pimps for the purposes of prostitution (Bruinsma & Meershoek, 1999; Caldwell, Galster & Steinzor, 1997). Under the foregoing explanation, the victims of trafficking are described as young, naive, usually uneducated. They are also described as those people who are willing to move abroad and who are attracted by better standards of living. While some victims of trafficking really do fit this description, this nature of description of the victims greatly oversimplifies the problem. The victims of trafficking are difficult to identify due to the secrecy of the trade. Human trafficking victims are usually under the perpetual surveillance of their

employer or other employees, and it is rare that they meet the stereotypical descriptions discussed above.

Developing countries have been the source of most of the victims of human trafficking while developed countries have been the destination of most of those trafficked (Mtimkulu, 2010). To those who regard sexual exploitation as trafficking, the origins of current trafficking dates back to the end of the nineteenth century (Derks, 2000; Doezema, 2000). Thus, despite the arguments that human trafficking is a modern-day phenomenon, stories of the trafficking of white women for sexual exploitation during the 17th Century diamond rush in South Africa and the Muslim Harems in the Middle East depict that human trafficking has a very long history (Doezema, 2000).

During the second half of the nineteenth century, what became known as 'white slavery' or the 'white slave trade' caused considerable concern in Europe and the United States of America. White slavery entailed the abduction and transport of white women for prostitution mainly to Muslim harems. The movement against 'white slavery' grew out of the so-called abolitionist movement which started in England and other western European countries as well as in the United States against the regulation of prostitution. The issue received wide media coverage, a number of organisations were set up to fight against prostitution, national and international legislation were adopted to eliminate the trade.

In a bid to make sure that there was international consensus in the fight against 'white slavery', the League of Nations in 1902 came up with the first international anti-slavery agreement in Paris. The agreement was signed two years later by sixteen states and later ratified by some hundred governments. The International Agreement for the Suppression of the White Slave Trade 1904 (White Slave Traffic Agreement) addressed the fraudulent and abusive recruitment of white women for prostitution. This agreement conceptualised trafficking for prostitution as a moral problem which was linked to slavery and was intended to address the export of European women into brothels in various parts of colonial empires. The White Slave Traffic Agreement provided for the states to refer victims to public or private charitable institutions, or to private individuals offering the necessary security prior to their repatriation. Though the aim of the White Slave Traffic Agreement was to subdue 'white slavery', this agreement

merely required states party to it to collect information on the procurement of women across international borders.

After the 1904 Act proved fundamentally ineffective, its scope was broadened in 1910 (1910 International Convention for the Suppression of the White Slave Traffic) to encapsulate the trafficking of women and girls within national borders. In 1921, the trafficking of boys was also merged into the agreement with the International Convention for the Suppression of Traffic in Women and Children of 1921 (1921 Convention). The 1921 Convention (European Commission, 2019). addressed trafficking, but considered its end purposes, such as prostitution, as a matter of domestic prerogative hence limiting the scope of the convention to recruitment and transportation. Nevertheless, it broadened the scope of protective measures provided by previous instruments such as the White Slave Traffic Agreement to include non-white women and children of either sex. It is however critical to note that no definition of 'traffic' or 'trafficking' was given. It is also critical to note that another international instrument adopted to address slavery but also covering trafficking was the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention 1926, referred to as the 1926 Slavery Convention (Office of the United Nations High Commissioner for Human Rights, 1926).

The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 defined slavery and slave trade as:

> ... the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Under Article 1 of the 1926 of the Slavery Convention, slave trade encompassed all acts involved in the capture, acquisition or disposal of a person with intent to reduce him/her into a slave; all acts involved in the acquisition of a slave with a view to selling or exchanging him/her; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves (Office of the United Nations High Commissioner for Human Rights, 1926).

It is of vital importance to note that this definition already focuses on elements of trafficking such as coercion and loss of liberty, similar to that of the Palermo

Protocol. A succeeding convention, the 1933 International Convention for the Suppression of the Traffic in Women criminalised all recruitment for the purpose of prostitution across international borders. The 1933 Convention also provided that consent by a trafficked woman did not constitute a defence to the crime of international trafficking.

The foregoing four international instruments were merged by the League of Nations to produce the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950 Convention) (Office of the United Nations High Commissioner for Human Rights, 1951). This convention was as a result regarded as the first consolidated anti-trafficking convention of the world though only for the purpose of prostitution. The abolitionist standards of the 1933 Convention stated that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are not compatible with the dignity and worth of a human person and endanger the welfare of the individual, the family, and the community of a person. It is critical to note that the 1933 Convention limited its concern to cross-border trafficking into forced prostitution which it criminalised. The purpose of the 1933 Convention was to punish any person who engaged in the trafficking and procurement of or any other activities related to prostitution, regardless of the victim's age or consent. Albeit trafficking into prostitution was considered a global issue for the first time, its prevention and punishment was left to the nations. The convention further lacked enforcement mechanisms due to the non-binding nature of its provisions. The 1993 Convention lacked a compulsory reporting requirement but merely had self-reporting systems. It also lacked a mandate for an international authority to monitor its implementation and was not widely ratified (Chuang, 1998); Doezema (2000); Derks (2000); Pearson (2000); Amiel (2006).

International trafficking in women for commercial sexual exploitation expanded during the early 19th century. While slavery had thus far mainly focused on labour exploitation, young women were trafficked into South Africa from Europe to serve as prostitutes or wives for mine workers. Concurrently, many African girls were trafficked to Europe where a number of them were used as sex slaves in French ports. In the late nineteenth century, Jewish women were transported to Buenos Aires for prostitution. In

the 1920s Russian women were trafficked into China in order to escape poverty and famine in post-revolutionary Russia (Chuang, 1998; Mollema, 2013).

Due to the fear of being deported and arrested, human trafficking victims usually fail to come forward and report their situation to law enforcement authorities. Despite being subjected to severe physical and mental abuse, only a few ask for assistance and many avoid contact with the police (Brunovskis & Tyldum, 2004). Former victims of trafficking are those rescued by authorities; those who would have escaped enslavement; those whose freedom is bought by customers and those who were left to die but did not (Landesman, 2004).

2.10 Background Issues Relating to Organ Trafficking

The obtaining of human body parts has a long history. This practice traces its roots in the medieval practice of recollecting the remnants of saints in relics used in religious rituals in the 16th century. This can also be corroborated by ancient body-stealing narratives, which include tales of liver eating Pishtaco monsters in the Andes, and accusations of Jews drinking blood from Christian babies (Clark and Poucki, 2018; Scheper-Hughes, 2004). The first study of anatomy was reliant on surging numbers of post-mortems. It also relied on the gathering and exhibition of carcasses and bones as well as with innovative new body-preservation techniques in the 17th century. During the mid-18th century, when academic anatomists made efforts in establishing their own gatherings for teaching and research purposes, human body material became increasingly valuable. With the rise of scientific medicine at the beginning of the 19th century, anatomical collections started developing in medical schools. The main purpose of the anatomical collections quickly became the cataloguing of ailments and exhibits showing how medical diagnoses were reached (Lawrence, 1998). In the 1970s, however, a totally new era was introduced. This era became characterised by practices comprising the procurement of human body parts for the purposes of re-utilisation. Re-utilisation can take the form of transplanting body material for the healing benefit of a recipient; it can also be useful in the development of diagnostic and therapeutic tools and disease-preventing strategies.

Regardless of the employment of a number of strategies aimed at improving the donor pool, the scarcity of organs is rising. Desperate patients may feel tempted to

resort to illegal means with the sole aim of obtaining an organ. Thus, donors may feel forced to contribute organs and feel undue pressure to contribute organs of deceased loved ones. Principles of autonomy, non-maleficence and justice may be sacrificed under organ-shortage conditions (Van Assche, 2014: 438). In most cases, in the forceful pursuit of organs the principle of non-commercialisation is also ignored. This principle is embedded in the notion of human dignity as a constraint (Van Assche, 2014: 438). The idea of non-commercialisation is also crucial to the integrity of the transplant system. The ban on commercialisation of organs is essential in order to avoid exploitation, as well as to avert and stop trafficking in human beings for organ harvesting.

Today, the trade in human organs may be for medical reasons, but a smaller portion of the organ trade is for religious reasons. There is a shortage of transplantable organs all over the world and as a result, there has been a surge of illegal methods of procuring organs in attempts to fulfil organ donation requests. Often these illegal methods entail human-rights abuses, including the sale of organs harvested from trafficking victims (Statz, 2006). In Africa, witchcraft has been one of the reasons behind trafficking for the purpose of organ trafficking. In Africa, body parts such as skulls, hearts, eyes and genitals are sold and used by religious practitioners to increase wealth, influence, health or fertility (Mollema, 2013).

Organ trafficking has been represented as being indicative of the 'global crisis in organs' in which the demand for organs outstretches the supply. The result is that transnational criminal networks have become involved in the organisation and commission of organ trafficking (Delmonico, 2011; Danovitch, *et al.*, 2013). Numerous studies and publications of the phenomena of organ theft, which has established importance on the global stage, ended up constructing a common discourse in which impoverished donors are tricked into selling their organs for transplantation purposes (Scheper-Hughes, 2000; WHO, 2004; Council of Europe and United Nations, 2009; Martin, 2012).

Traders regularly make use their positions of authority in manipulating, deceiving and forcing vulnerable victims into selling their organs (Gentleman, 2008). These victims are then typically transferred to underground medical facilities where they are detained and operated to remove the organ(s) they have sold (Scheper-Hughes,

2000). Regardless of the various manifestations of organ trade (as seen through organ sales, organ harvesting and transplant tourism) the emergent discourse which characterises these occurrences is concentrated on the trafficking of persons for their organ(s). This action is thus located within the meta- narrative of human trafficking (Snajdr, 2013). There is clear differentiation between the legal institution of transplant medicine and the illicit underworld of organised crime and human trafficking (Columb, 2015).

Organ trafficking is conceptualised as the 'the dark side of transplantation' (Panjabi, 2010: 3); it is the counter-narrative to the 'gift of life' rhetoric which extols the virtues of philanthropic organ donation (Calandrillo, 2004; National Health Service, 2013). Organ trafficking is expressed as a criminal exercise which operates outside the legitimate institutes which support the organ transplant industry. Fundamentally, a dyadic split is created between the 'great medical and scientific phenomenon of transplantation' (Panjabi, 2010: 4) and the organised crime of organ trafficking. It is critical to note that this arrangement ricochets critical attention away from the transplant industry and the part it has in generating demand for illegally sourced organs. The paucity of organs is seen as a type of moral crisis which can possibly undermine the decency and legacy of global organ transplantation exercises (Cohen, 2002; International Summit on Transplant Tourism and Organ Trafficking, 2008).

Determinations to regulate the trade in organs have been making efforts in finding ways to increase the availability of organs needed for transplants. For instance, the Declaration of Istanbul on Organ Trafficking and Transplant Tourism proposed an array of measures which were aimed at increasing the donor pool, 'to prevent organ trafficking, transplant commercialism, and transplant tourism' as well as 'to encourage legitimate, lifesaving transplantation programs' (Columb, 2015: 26). Donation of deceased organs was encouraged as a way of preventing organ trafficking. The Declaration of Istanbul on Organ Trafficking and Transplant Tourism suggested that in countries without established deceased organ donation or transplantation, national legislation must enact laws which would initiate deceased organ donation and create transplantation infrastructure in order to satisfy each country's deceased donor potential (International Summit on Transplant Tourism and Organ Trafficking, 2008: 1229).

A joint study done by the Council of Europe and the United Nations recommended the 'need to promote organ donation and establish organisational measures to increase organ availability' in order to curtail organ trafficking. It is also stated that preference must be given to deceased organ donation, which must be developed to its maximum therapeutic potential. It also stated that there is a need to globally extend the administrative and procedural capacity for the transplantation of organs (Council of Europe and United Nations, 2009: 7-8).

The World Health Organisation (WHO) Guiding Principles on Human Cell, Tissue and Organ Transplantation are in line with the Council of Europe's recommendations (Council of Europe and United Nations, 2009: 7-8). They support this strategic methodology; reproducing and reinforcing the oratorical drive towards an international policy aimed at developing the technical capacity of transplantation through increasing philanthropic and deceased organ donation to its 'maximum therapeutic potential' (WHO, 2010). Regardless of the fact that the demand of organs is increasingly outweighing the supply of transplantable organs in nations with established organ procurement regimes, this intervention got support in light of the perceived threats of organ trafficking. The possibility that a narrow emphasis on broadening the donor pool is predisposed to inspire more extreme and illegal ways to satisfy the demand is either casually accepted or totally overlooked by policymakers.

The illegal trade in organs co-exists with state approved organ procurement and transplantation networks, to meet demand that philanthropic systems are unable to satisfy (Ambagtsheer, et al., 2013). Further, though there is a seeming scarcity of obtainable organs in developed countries, this does not denote a worldwide concern simply because this issue this does not mirror world-wide ethics or values in healthcare. The benefits of technology on organ transplant and biomedicine generally apply to countries with progressive healthcare infrastructures and in instances where the prerequisite insurance policies are accessible to cover the expenditures that multiply rapidly both in treatment and aftercare. As a result, the consequences of this apparent 'crisis' are fundamentally different depending on one's locality (Columb, 2015: 27). Certainly, transplantation has remarkable therapeutic worth, but the merits of the worth are relative, and are largely dependent on economic affluence. Taking into consideration of the economic situations of developing countries, and given the reports

that incidences of organ trafficking are active there, it seems important to give priority in investing in primary health care rather than making investments in very expensive biotechnologies which most of the citizens cannot afford.

Depicting the trade in organs as a human trafficking issue related to a global scarcity in organs leads to a specific rationality or kind of thinking that supports certain forms of intervention. The notion that trafficking in organs is as a result of the global crisis in organ availability dampens a consideration of the bio-medical process that has rendered human bodies subject to novel methods of exploitation. The virtues of transplantation are eulogised as an indicator of social development and reputation, generating demand amongst a wave of consumer-patients in surging economies in the global South (Rose, 2001). Countries are therefore encouraged to develop their healthcare infrastructure in order to support the transfer of biotechnologies, such as transplantation (World Health Organisation, 2010), rather than devoting all of their resources to organ procurement. One of the problems that can be addressed in the context of transplant tourism is that individuals who acquire an organ can be a drain on medical systems in their home nations. Transplant patients require a great deal of follow-up, medicine, and care. Those individuals who accept a non-certified organ require care many times that of a recipient for whom the transplant has been carefully vetted (Gill et al., 2008; Inston et al., 2005; Krishnan et al., 2010; Polcari et al., 2011).

Failure to develop healthcare infrastructure and improve the nation's health overall is seen as spurring organ trafficking. The shortage of organs ought to be urgently overcome otherwise unwarranted trade and crime may will thrive (Kishore, 2004: 365). That being the case, making investments in advanced health technologies represents a genuine domain of intervention the benefit of society. From another standpoint, including organ trade into the discourse on human trafficking resists a broader critique of the occurrence joining the rise of a global market in organs to neoliberal globalisation and its unwanted consequences. Rather, the trade in organs as a whole is characterised by organ trafficking and is seen as an object of crime control.

Categorising organ trafficking as organised crime has been as difficult as it has been to categorise other forms of trafficking (in drugs, arms and women) as organised crime. Despite several attempts in defining organised crime, no universal definition of the concept has been reached as yet. Though organised crime was once defined through

a monopolistic structure, today organised crime is characterised by a competitive and less visible low-profile structure (Arlacchi, 2001). Organ trafficking can be categorised as organised crime since one of the criteria for operation is being underground or hidden (Bovenkerk, 2001). Organ trafficking is usually done in private hospitals; it is typically accomplished medical personnel whose records are not verified by authentic medical authorities or who have had their licenses revoked. Usually, the transplantation of the organs is done not only in an illicit manner, but in an unlicensed or illicit facility (Vermot-Mangold, 2004). Given the surging demand for organs and the short supply of those willing to donate the organs, there is a surging underground economy related to buying and selling organs. This trading is done in a milieu in which those who sell and those who buy the organs do this by circumventing national laws while trying to remain undetected (Foster, 1997; Sung, 2004).

Given the sophisticated nature of the business, 'paid' organ trafficking can only take place under the umbrella of a well-organised network. The business is done by highly qualified medical personnel who are well aware of how transplantation is done. It can also be done in the presence of intermediaries or dealers who take part in the recruitment of the willing donors who come from poor communities and get well-paying recipients mostly through the internet. Additionally, the 'exchange' of the organs is done in well-equipped medical theatres where all essential medical instruments are available (Foster, 1997; Vermot-Mangold, 2004). In most cases, crimes are categorised by their nature and the negative effects they have on other people. Whether or not crimes are perceived as organised crime can depend on the perception of the government and of the public. The two major types of activity typically provided by organised crime are the provision of illegal goods (including trafficking in human beings, drugs and sex workers), and services (including gambling and prostitution). The abuse or permeation of legitimate businesses such as labour racketeering or extortion can also be categorised as organised crime. Though organised crime can involve consent between those who supply the services and those who need the services, it can also include force, threats and violence (Fijnaut, 2001). Organ trafficking fits in both categories since it can involve force, threats, violence, but it can also involve consent.

Organ trafficking fits within the organised crime category but can also be categorised under white-collar crime. Thus, though organ trafficking is mostly seen as

an organised crime, a lesser, though critically important aspect of the crime falls under the white-collar crime category (Meyer, 2012). There is an overlap between organised crime and white-collar crime when the violations of national laws occur and there is monetary interest (Meyer, 2012). However, there is a clear line to be drawn between these two forms of crimes if one looks into the methods used and the nature of criminals involved. Foster (1997:139) argues that the transplanting procedure done during human trafficking can be categorised under white collar crime since medical and nursing staff are involved in the transplantation of unregistered organs. However, Foster's work presupposes that transplantation occurs with permission and in a sanitary and relatively safe medical facility.

Gathering official data on organ trafficking has been a mammoth task given the scarcity of official and reliable data (WHO, 2004). Numerous reports on organ trafficking can rather be taken as crime legends than as empirically proven and systematically recognised publications (Donovan, 2002). Dismaying stories published in newspapers and other media platforms have reached a large pool of people; the number of individuals who have been impressed by anecdotal stories rather than facts documented scientifically on organ trafficking can be both daunting and misleading. However, there is a pragmatic reason this occurs: scientific studies and reliable data are scarce in the field of organised crime, and in organ trafficking in particular. If researchers choose to pursue the topic of organised crime and organ trafficking, satisfactory evidence of the crimes committed can be either given by the victims (and their scars) or by criminals themselves. Criminals who are involved in organ trafficking are seldom caught and the victims of such crimes seldom testify. Media representatives and humanitarian workers have had greater success in getting victims to talk about their experiences. The other reason for the low numbers of those who are arrested, as well as those who are convicted of the crime, is likely to be that some officials are fear that their own violations of the laws regulating organ donations could be established (Meyer, 2012).

The conundrum of collecting reliable information on organ trafficking results from the complex nature of business itself. Though organ trafficking is omnipresent in most countries, proving the crime exists and the level of its operation has been a mammoth task (Council of Europe, 2004). Both the donors and those who receive the

organs are not interested in making the transplantation to be known publicly. In some cases, those who will be donating the organs are not even aware that they will be in breach of legislations on organ transplantation. Given the fact that the business of organ trafficking is not as expanded as other businesses of trafficking, it not very visible. In most cases, those carrying out the organ transplantation operate in private medical facilities or in countries where there are few laws prohibiting the buying and selling or organs (Vermot-Mangold, 2004). Because of this, it is less obvious that these precise transplantations are illegal, and those doing the transplantations privately are seldom caught. Mostly medical staff are captured, and they have little information on the important details on the crime. Organised crime tends to operate in cells, and one group does not know what the next group is doing. If one group is caught, critical information on organ trafficking is not obtained (Council of Europe, 2004).

Organ trafficking as a business is very different from what has been termed organ snatching. Organ snatching is done by criminals who are willing to kill people with the sole aim of stealing organs for sell on the black market (Meyer, 2006). Organ snatching is a phenomenon which has established a pedigree since the 1980s. During the 1980s, what was termed transplant tourism or organ tourism, characterised by the traveling of wealthy Asians to Southeast Asia in order to procure organs from poor donors, became known (Council of Europe, 2004). Since the late 1990s, the profitable chance of trafficking in organs in some European countries, or to European customers, has been on the rise. Organ trafficking is about ‘donations’ from people living in very low socio-economic standards. People who donate organs are willing to sell their organs with the aim of improving their standards of living (Foster, 1997; Council of Europe, 2004; Eurotransplant International Foundation, 2005). Organ trafficking is mostly demand driven (Council of Europe, 2004). However, as chronic kidney disease, heart disease, and lung disease rises, so does the demand for illicit organs.

Some of the earliest reports on trafficking in organs were not seen as true by various state authorities. During the early 1990s for instance, the United States Information Agency defined reported instances of organ trafficking as narratives that “encapsulate widespread anxieties about modern life” ; the agency only accomplished trustworthiness due to the fact that they give “voice, form and substance to unarticulated anxieties or suspicions” (Leventhal, 1994: 4). In 1997, the Bellagio Task

Force conducted an investigation on the alleged kidnapping and murder for human organs which was mainly promulgated by 'the baby parts rumour'(Columb, 2015: 21-22). Despite the availability of facts which amounted to substantial evidence of sales in organs, the Bellagio Task Force did not find reliable evidence to validate the claims of theft in organs and murder (Rothman, *et al.*, 1997). Nevertheless, there have been documented instances of organ trafficking, including the Medicus Clinic case (Ambagtsheer et al., 2012; Ambagtsheer et al., 2013).

Pascalev et al. (2016) conducted research to determine the average payment to organ providers (donors or sellers) and the average amount an organ buyer provides. The difference, of course, is the profit per organ. It is very difficult to use existing research materials to make a direct comparison, since different studies have concentrated on different facets of the organ trafficking process. Still, by considering the various facts and inputs, it is possible to gather a basic idea of the finances relating to organ trafficking.

Table 1. Payments to Supplier Compared to Payment by Patient

Payment to supplier	Average $	Payment by patient		Average $
		Country of Origin of organ	Country of operation	
Iran – Kidney	1,219	Turkey – Kidney	Iraq/India	28,500
India –Kidney	1,070	Turkey – Kidney	Egypt	37,500
Pakistan - Kidney	1,488	Pakistan - Kidney	Pakistan	7,271
Philippines- Kidney	3,388	Egypt – Liver	China	57,500
Bangladesh	1,400	Korea – Kidney	China	42,000
Colombia	1,881	Korea – Liver	China	63,000

Source: Pascalev et al. (2016:57, 59)[4]

[4] The individual studies used by Pascalev et al. (2016) are not shown in the current research. They are, however, listed individually in the original work by Pascalev et al.

In the table above, there is no direct country to country comparison, except for Pakistan. However, it is clear from the average payment to the supplier/donor of the organ and the average payment by the patient receiving the organ that there is a huge difference profit for the individuals brokering the sale and actually inserting the organ in the patient. The only direct comparison, in Pakistan, shows that the payment to the individual 'donating' the organ was only 20.4% of the payment made by the recipient of the organ. Pascalev et al. (2016) also reported that in a number of the cases, the amount paid to the donors of the organ was only a portion of the payment that the donors had been promised. Pascalev et al. (2016) also collected data relating to the household income of the individuals that 'donated' the organs. Each of the donors was described as coming from ranges from 'poor' to 'abject poverty'. Pakistan's monthly income was listed as being $15USD, ranging up to Iran's '62% below poverty line' (Pascalev et al. 206:57). There is little doubt based on these numbers that the goal by the brokers and medical workers is to make a profit, rather than to simply provide organs to those in need or to provide a boost in the standard of living in the living donors. Rather, the organ business is strictly a money-making criminal scheme.

In this current research, the position is taken that the idea of victimhood must be sensitive to context and is somewhat situational but can rarely be applied to an individual or group that actively participates in the organ trade (Gunnarson and Lundin, 2015), whether as a buyer, a seller, or a go-between between the two.

2.11 Linkage of Human and Organ Trafficking

Regardless of continued academic attention and media devotion, cases of organ trafficking are particularly uncommon and are not illustrative of the occurrence of human trafficking as a whole. This situation has been compounded by the underground and illicit nature of the organ trade. Gathering reliable information to confirm these trends and confirm them in global patterns is therefore a mammoth task (Ambagtsheer, *et al.*, 2013). As a result of this, in a bid to influence state policy, writers and advocates have a tendency to both produce and accept anecdotal stories and statistics without making any efforts to challenge and critique them (Andreas & Greenhill, 2010). Reports and studies making numerous claims about the nature and extent of organ trade

have multiplied over the past decade (Council of Europe and United Nations, 2009; WHO, 2004; Jafar, 2009; Lundin, 2012; Efrat, 2013).

There have been comparatively few cases of organ trafficking seen at the judicial level (Columb, 2015: 28). Regardless of the surging interest in what has been described as 'a fatal form of exploitation' in a 'fast and expanding black market,' evidence-based research in this area remains deficient (The Human Trafficking Project, 2008; Hummel, 2012). Thus, due to the lack of availability of substantial academic qualitative and quantitative data, journalistic accounts based on anecdotal evidence may hold sway, hence impelling public opinion and stimulating political interest (Columb, 2015: 28).

Data from WHO has been seen as the only 'reliable' data available to date. The WHO reported that an estimate of 5–10 % of the 65,000 transplants in organs which are performed annually are done using organs which are sourced illegally. Loosely translated, this means that one in ten organ transplants are illegal (Columb, 2015: 29). It is unclear how this data has been recorded or corroborated; the WHO process has not been transparent. Despite this, these statistics have been without question blindly accepted and relied upon (Council of Europe and United Nations, 2009: 58). Though these statistics make reference to the illegal sale of organs, reports usually arrive at these figures in line with the accounts of the victims of organ trade. Thus, the reports are mainly used to highlight the pervasiveness and solemnity of the situation (Budiani-Saberi & Delmonico, 2008; Campbell & Davison, 2012).

In most cases, the ghoulish accounts of the experiences of the lonely 'victims' have usually been taken as evidence that organ trafficking is an omnipresent criminal activity. As a result, emphasis on suffering victims has been attracting the attention of the media and evolves into political support for government resources. Nevertheless, this also builds and buttresses the conception of the organ trade as a human trafficking issue that calls for a development and expansion of the law enforcement apparatus (Columb, 2015: 29). For instance, the New Generation Foundation of Human Rights (NGFHR), an NGO in the North Sinai, Egypt, reported on 'hundreds' of West African refugees being kidnapped and killed for their organs. Though there is available evidence to support these reports, accusations of widespread organ theft are completely unfounded (Pleitgen & Fahmy, 2011).

In 2011 CNN released a two-part report/story on organ theft in the Sinai as part of its 'Freedom Project' (Pleitgen & Fahmy, 2011). In this project, the founder and director of NGFHR is regarded as the authoritative source. The director alleges that ethnic (Bedouin) trafficking groups are involved in systematically drugging and killing refugees for their organs. CNN reported that Bedouin smugglers 'may' be snatching organs from African refugees in the Sinai desert (Pleitgen & Fahmy, 2011). In the absence of research and evidence to the contrary, it remains to be seen whether organ trafficking is happening to the degree presented by CNN.

The apprehension is that singular instances of organ trafficking may become the epicentre for political action to such an extent that more common forms of exploitation are disregarded. This might be evident in an organ seller's lack of bargaining power mostly due to sharp income differences and information asymmetry regarding transplantation. Information which is credible on organ trade does exist. Studies which are based on evidence depict the severe financial problems that prompt individuals to sell their organs and the adverse concerns that result (Zargooshi, 2001; Goyal, Mehta, Schneiderman, & Sehgal, 2002; Naqvi, 2007; Yea, 2010; Mendoza, 2011; Budiani-Saberi & Mostafa, 2011; Moniruzzaman, 2012).

Little information is available which suggests that these cases involve organ trafficking (Canales, Kasiske & Rosenberg, 2006; Yea, 2010). Further, since studies that have been done were done on very small sample populations in different countries and regions, the findings are not necessarily representative of the world-wide perspectives of the trade in organs. Various reports continue to connect the trade in organs with complicated international organ trafficking cartels which mostly operating between Israel and Eastern Europe (Hetq Investigative Journalists, 2012). Most of these reports produce and make reference to a handful of documented cases of organ trafficking such as the Netcare Case in South Africa (Gunnarson and Lundin, 2015; Smith, 2010) and the Medicus Clinic case in Kosovo (Columb, 2016; Gunnarson and Lundin, 2015; Lewis, 2010) when it comes to describing what mostly amounts to the sales of organs and/or transplant tourism.

The organ trade includes various practices. It includes what is called organ trafficking, which essentially entails trafficking in persons for the removal of organs. It includes organ sales which require the commercial exchange of organs. It includes

organ harvesting which entails the forcible removal of organs. Ultimately, it includes transplant tourism which entails travelling across state borders to purchase organs. However, the organ trade is mostly defined in terms of organ 'trafficking'. There can be some overlap between the various aspects of organ trading when travel for transplantation includes an organ harvested from a trafficked person; this concept was introduced earlier in the paper. Trafficking in human beings for the purpose of organ removal, or THBOR, is an increasing problem worldwide. The academic, governmental, and media information provided in this current body of research will show that even though there is very little solid data regarding THBOR in the Sinai, there is an increasing body of evidence from other parts of the world, including Israel, which shows that organ removal through coercion of one type or another is an increasing social, medical, and moral issue (OSCE, 2013).

The evolving discourse on the organ trade applies the term organ trafficking interchangeably without giving a distinction as to the variable features involved. That being the case, the organ trade as a whole is represented as an issue of organised crime and human trafficking (UNODC, 2000a, see Article 3; Declaration of Istanbul (2008: 1228; Rohter, (2004). Regardless of the surging concerns over organ trafficking, most writings on the organ trade have been incorporated in the bioethical debates on the merits and demerits of regulating the trading in organs (Caplan & Coelho, 1998; Erin & Harris, 2003; Delmonico, *et al.*, 2012; Radcliffe-Richards, *et al.*, 2012).

Organ trafficking has remained stayed at the backdoor of politico-legal lexis and is just treated as a mere sub-set of human trafficking (Columb 2015). The issue of organ trafficking has not been provocative enough to spur an international resolve to deal with it as a standalone issue. Recent stories of organ trafficking in the Sinai Region have incited reformist initiatives. Media reports and NGO reports of Eritrean, Somalian and other African migrants being trafficked for the purpose of organ harvesting have been incendiary. The reports have been spurred the need to pay attention on the issue of organ trafficking in order to pursue a general reform agenda within the international laws on human trafficking and to bring these discussions to the forefront of criminal investigations.

In the Sinai region, where the menace of organ trafficking has been pervasive, apathy and neglect on the subject have been exhibited. The result has been that cases of

organ trafficking are on the upsurge. Human trafficking in the Sinai region of Africa, notably the trafficking of refugees from the Horn of Africa, became highly publicised in 2009. Trafficked refugees include children, women and men fleeing from conflicts and other problems in their home countries; most of them aim to reach Europe. Human trafficking in the Sinai region has been taking place through diverse but systematic and well organised events. Most people who are trafficked in the Sinai region are kidnapped from refugee camps and smuggled across borders by middlemen. Those kidnapped are usually taken to the Sinai and sold once, or more than once, to Bedouin groups living in the Sinai. Those individuals kidnapped and smuggled are obliged to pay back the smugglers as well as those who would have bought them through ransom from their relatives or friends. Those kidnapped for trafficking purposes in the Sinai region are kept in houses and camps close to the Israeli border in degrading and inhumane conditions where they are subjected to daily torture while their kidnappers negotiate ransoms for their release. The number of people trafficked in the Sinai has been increasing and most of those trafficked are from Eritrea (Van Reisen, Estefanos & Rijken, 2012).

Apart from serving a comprehensive legal reform agenda, organ trafficking seems to have been supplying a political platform with a number of versions. Just like what was the case in human trafficking (with a special emphasis on prostitution), a similar ‘moral panic’ triggered the crusade to make the organ trade, which is not done within the confines of stipulated laws, an international issue. From this standpoint, the discourse of human trafficking has been instrumentalised in order to advance the interests of the organ transplant industry, which is concerned that the illegal organ trade might undermine the reputation of transplantation as well as its economic stability. Although it is vital that organ trafficking is recognised as a trafficking offence, evidence-based research indicates that the majority of organ sellers do not conform to the typical victim profile which has been popularised by the discourse of human trafficking (Zargooshi, 2001; Goyal, Mehta, Schneiderman & Sehgal, 2002; Naqvi 2007; Yea 2010; Mendoza, 2011; Budiani-Saberi, & Mostafa, 2011; Moniruzzaman, 2012.

The controversies and difficulties associated with defining human trafficking and human smuggling makes defining organ trafficking a mammoth task. Given the

modicum of consent involved in human smuggling (which has become an integral part of illegal migration in the 21st Century), understanding the criminality of organ trafficking within such a context has been difficult.

On a general note, holding people who facilitate human trafficking (smugglers) and those who carry out the trafficking (traffickers) accountable for facilitating is generally presumed to be a good thing, and so is curtailing illegal migration. Fighting trafficking has been pronounced as a creditable exercise which should be criminalised regardless of where it takes place (be it locally or regionally, nationally, or internationally). It has been seen as being beneficiary to the victims in numerous ways but perhaps counter-intuitively, it may benefit the traffickers as well. Thus, it can rise above (or sit below) the public domain and infiltrate other categories of power relations which cut across numerous domains of social life.

2.12 Evolving Reality from Fiction and Anthropology from Literature

Today, most people are familiar with the concept of what is referred to as the 'urban legend'. An urban legend is essentially a narrative that "spread as rumors and legends" (Campion-Vincent. 2002: 33). When Campion-Vincent began her original analysis of the topic of organ trafficking back in 1997, the topic was essentially one of science fiction or scary stories. However, as she points out, reviewing narratives or urban legends about organ trafficking is not enough; these stories are grounded somewhere in real life, or these stories would not be popular around the world (Campion-Vincent, 2002). One of the interesting facets of the world of organ trafficking is that the idea of organ transplants actually predated the possibility of doing the transplants. For many generations, people have believed that if an animal organ is accidentally inserted into a human, then the animal's organ will give the human the characteristics of the donating animal. The idea appears in myth, in religious legends, and even popular novels. It was not until the 1950s that the idea of transplanting organs was applied to reality and organ transplantation became an experimental practice. As Campion-Vincent (2002) pointed out, it was only once anti-rejection drugs had been developed that transplants actually became widespread.

Campion-Vincent (2002), who is an anthropologist, suggested that even the idea of organ transplantation took a great deal of thought, long before it was a real

possibility. A number of questions would have to be worked out, whether in fiction or reality. Who would be able to donate organs, and what would the circumstances be? If the organ was considered a gift (the "gift of life"), then how would the gift be acknowledged? From the perspective of popular discussion, one who saves someone's life is then responsible for that life. Yet, in the case of organ transplants, the individual who saves the life is *already dead*. This presents quite a conundrum for the individual who received the gift (Campion-Vincent, 2002).

It was Campion-Vincent's (2002) position that there were two discussions relating to organ transplants that it was critical to consider. The first is the relation of modern medicine to transplants; the second, relating to the symbolism of the body, was to become extremely important in discussions of organ trafficking today. In the first discussion, the life-giving physician could become a criminal who would steal life from one individual and give it to someone else. Campion-Vincent refers to this as being 'medical critique'. The second discussion relates to the economy, and in particular to developing global economic disparities in which the commercial organ trade could help equalise the income of the poor by paying them for their organs. Campion-Vincent considers this as being 'social critique'. A second version of the social critique would have healthy body parts being stolen from the poor and sold to the rich, thus reinforcing the concept of exploitation of the poor by the rich (Campion-Vincent, 2002:34).

2.12.1 Medical Critique

At the time that Campion-Vincent (2002) was conducting her research, urban legends suggested that kidneys and children were being stolen in France, particularly at Disneyland, and under the Eiffel Tower, and in New York and Las Vegas in the United States. Despite there being no evidence of organ trafficking at the time of Campion-Vincent's original work, the stories were told and repeated over and over. With each telling, the story evolved. Campion-Vincent (2002) argued that telling these stories allowed people to express concerns about the medical establishment that they would otherwise be unable to express in the society of the time. In the 1800s, thrillers such as *Dr. Frankenstein* (Shelley, 1817), *Dr. Jeckyll and Mr. Hyde* (Stevenson, 2013, 1885), *The Island of Dr. Moreau* (Wells, 1896) and *Dracula* (Stoker, 1897) came into being. These books emphasised the idea of the mad scientist that could change lives. Humans

became material for experimentation, and for perhaps the first time, doctors began to be portrayed as villains who tried to take over the powers normally reserved for God (Campion-Vincent, 2002).

In the Medical Critique, sociologists consider that a doctor who is reputed in fiction to be a surgeon who steals body parts (such as Dr. Frankenstein) is really a combination of priest (who commits sacrifices) and a butcher (who cuts meat) juxtaposed with the medical profession that saves lives. The idea caught the fantasy of many, many people. Anne-Marie Moulin, a medical sociologist, suggested that the rapid take-off of organ trafficking fantasies was a reflection of this prototype. Ironically, it was the combination of corruption cases, rumors of thefts of organs, and the suggestion of an organ market in Third World nations that cemented Moulin's theories (in Campion-Vincent, 2002). Psychiatrists at the time determined that their transplant patients were looking at doctors in a similar way: they were gods, but they were also butchers; they worked with rationality, but it resembled magic (Campion-Vincent, 2002).

Regamey (2012) observed that in the early 2000s, in the Chechen Republic, rumors began to spread that healthy adult males were being kidnapped by the Russian army and that their organs were being stole and sold. In March of 2001, Emercon, the Russian Emergency Ministry asked residents near Grozny, the capital, to bury the bodies of four males that had not yet been identified. The young men were naked and had the same marks that they would have if they had been through an autopsy. They had been cut open at the throat; the cut extended to the lower portions of the abdomen, and the bodies had been stitched up using rough stitches (Regamey, 2012). The four men were identified as being men who had been arrested by the Russian forces in 2001. No information had been given to these men's families despite repeated requests. When local residents took photographs and video of the bodies before burial, they sent the materials to NGOs and to journalists. The residents who filmed the bodies stated that the young men had not been autopsied; rather, they insisted, they had received surgery to steal their organs.

One of the questions that arises is whether or not it is right to take organs from people who are 'nearly dead'. In the criminal justice field, the idea of the 'slippery slope' is a prominent concern (Welsh et al., 2015). In the slippery slope, small

transgressions, typically of an ethical nature, pave the way for an increase of transgressions over time.[5] Welsh suggests a minor indiscretion might be considered excusable, while a larger indiscretion might be identified as such and deemed impermissible. Just as workers may not feel that taking a pen home from work is a problem, they would be likely to feel that taking the cash from a cash drawer would be stealing. At the same time, few people would think twice about picking up a dime that is laying on the counter. The continuum, then, is a very small act, a larger act, and a clearly identifiable negative act (Welsh et al, 2015: 2). The corollary in the case of organ transplantation might be using organs from deceased individuals (a very small act), using organs from individuals who are in the process of dying and will not live (a larger act), or stealing organs from a healthy individual (a clearly identifiable negative act). The concern is that once the process begins, each subsequent step down the slope becomes easier.

Blair describes the process thusly:

> It's kind of the slippery slope that starts to happen. I think once you realise that you can get away with something, once you cross over that line, you somehow have to rationalise how "I am a good person, and I did this, so somehow this has to be ok, I've got to make this ok." So then it becomes a lot easier to do it. (Blair, in Beaujon, 2012, para. 7).

Thus far, organs as commodities have not been discussed. The reality is that in some parts of the world, organ-selling is legal. Egypt, India, and Iraq have active organ commodities. Organs taking from living donors are primarily livers and kidneys. The idea of organs for sale offends the morality of Western nations. In China, however, organs are harvested from criminals that are being executed. This adds an additional level of moral question and emphasises the validity of the 'slippery slope' arguments. With more than 4,000 executions a year in China, harvesting organs has the potential to alleviate the demand for organs, even though human rights organisations argue that this practice is untenable (Campion-Vincent, 2002: 40).

[5] Conversely, focusing on prevention can reduce the likelihood of sliding down the slope (Welsh et al., 2015).

2.12.2 Social Critique

Organ transplants, whether legal or illegal, highlight issues of social injustice and the differences between higher and lower socioeconomic levels of society. This issue is particularly poignant when one considers that there is a legal or voluntary sale of organs, particularly kidneys, by poor people in Asia and the Middle East (Campion-Vincent, 2002: 41). To the individual who needs a kidney, the kidney is a thing of life; to the poor person with two kidneys, it is an economic resource. The question seems rather moot as to whether or not these sales are actually 'voluntary'; they are, however, legal.

Still, this difference in socioeconomic levels raises some troubling questions. Are the organs prioritised according to need, or according to ability to pay? How can anyone be sure that if a poor, young, otherwise healthy relative or friend is in an accident, that every effort will be made to save them, as opposed to the possibility of economic profit from organs being a driving factor in the hospital's treatment decisions? Will the decisions be made without regard to race, caste, religion, or socioeconomic status? As Campion-Vincent (2002: 43) pointed out, "Today, the dark legend of organ theft expresses the Third World's economic dilemma and points to elite responsibility for it."

Regamey (2012) has also observed that there have been numerous locations across the globe where rumors have occurred relating to organ trafficking. At various points, there was a rumor that Israel was killing Palestinians and selling their organs. This rumor nearly led to military action between Israel and Sweden (Regamey, 2012). Rumors are defined as unverified accounts, which spread rapidly. Rumors have attracted the attention not only of sociologists and anthropologists, but of historians. While Regamey asserts that most rumors refer to organ trafficking in Latin America, the rumors and tales of Latin American organ thefts are remarkably similar to those of organ thefts at other locations around the world, including Chechnya. Ironically, the stories of organ thefts in Latin America led to both the European Parliament taking and actions and making official declarations relating to organ trafficking. No one took action, however, in the Chechen case, or in rumors from Kosovo.

Rumors of organ theft tend to occur in areas where the violence has been extreme. In particularly, when there has been "violent political repression, disappearances, and murder," (Regamey, 2012: 52) rumors related to body parts are likely to arise. Part of the problem is that in extremely violent areas, people tend to disappear, and it can be very difficult to determine where they went. In particularly, Regamey believes that contradictions in what most people would consider 'normal' can increase the rumors of human organ theft. As an example, in the Chechen case, the Russians treated Chechnyans miserably; they did not always bury them and when they did, they used mass graves. Even when Chechnyans were victims of serious crimes, they were rarely investigated. Thus, it makes no logical sense whatsoever that some of the Chechen males would be carefully autopsied. As Regamey (2012) asserts, it makes more sense that the men's organs were stolen than that anyone cared about them.

Minister Khanbiev, the Chechen Minister of Health and General Representative of Chechen Republic of Ichkeria, spoke to the UN Commission for Human Rights in 2004, under the auspices of the Unrepresented Nations & Peoples Organization (UNPO). Rather than concentrating on the potential theft of organs, Khanbiev stated that lack of action by the UN has been:

> …the price of your lack of action. Concentration camps, torture (including torture aimed at destroying fertility), non-judicial executions, kidnappings, trading in hostages and corpses, death squadrons, experiments with poisons on detainees, hidden mass graves…(Khanbiev, in UNPO, 2004, para. 4 of speech).

Khanbiev's analysis, then, reflects Campion-Vincent's (2002) views that genocide is more likely to happen to people in the lower socioeconomic tiers, making it more likely that the poor will be killed.

2.13 Misrepresentation or Misunderstanding of Organ Trafficking

Though organ sales are illicit in most countries across the globe, to sell an organ does not constitute trafficking (Columb, 2015: 30). In order to establish a trafficking offence, there should be vestige of an illegal act (recruitment) followed by an illegal means (coercion) for the purpose of exploitation (organ harvesting) (UNODC, 2000a; UNODC, 2000b). Transplant tourism denotes the practice of travelling to another country in order to procure an organ. Again, this does not essentially involve organ

trafficking. However, reports from the media and related intergovernmental organisations mostly use these terms interchangeably and, in the end, giving the impression that organ trafficking is a widespread crime carried out by transnational criminal organisations (Council of Europe and United Nations, 2009).

As a result, a sort of indistinguishable complacency triumphs, reframing and connecting particular victim accounts of organ sales and transplant tourism to the discourse of human trafficking. Regardless of the scarcity of empirical evidence regarding the issue of organ trade, reports continuously state that organ trafficking is the fastest growing business of organised crime and is worth several billion dollars (Jafar, 2009; Epoch Times, 2013; Latinamerica-Press, 2013). It has been stated that the "organ trade is the second most profitable trade behind only weapons trade. It brings in more money than drug dealing and prostitution" (Pleitgen & Fahmy, 2011).

Global Financial Integrity, a Washington based research and advocacy organisation working to curtail illicit financial flows, estimated that the organ trade had profits of between 600 million and 1.2 billion per year in 2011 (Haken, 2011). These estimates are only estimations without clear empirical support (Steinfatt, 2011; Weitzer, 2011). Organ trafficking is today seen as a surging and prevalent criminal activity, in much the same way that sex-trafficking was presented in the late 1990s. In light of this, Columb (2015: 30) states:

In effect organ trafficking, as opposed to the organ trade as a whole, has become the focal point of investigation where emotive accounts of victim suffering come to define how this phenomenon is conceptualised. By co-opting the organ trade into the meta-narrative of human trafficking, the complexity of this issue is eschewed in favour of a reductionist response that constructs a definite set of actors with fixed roles and expectations, fitting neatly into a universal model of crime control.

Within the milieu of the epistemological tradition of 'the white slave movement' which categorised all the victims of prostitution as victims who needed emancipation and rescuing, the victims of this novel form of human trafficking are those who sell their organs and fall victim to the global crime networks made up of unscrupulous traders and reprobate physicians who operate outside the legal field of transplant medicine (Donovan, 2005). As a result, global attention has been responding

to this phenomenon by focusing on victim protection and law enforcement. This tactical reaction is clear in the UNODC toolkit, which states that four steps are critical in the prevention of organ trafficking through building expertise in law enforcement to "identify potential and actual victims, and perpetrators of organ trafficking and trafficking for the purpose of organ removal" (UNODC, 2008).

As reassuring as this may sound, (from an advocacy perspective at least), this conceptualisation of organ trafficking provides legitimacy and moral determination to wider structural and political milieus (McEvoy, & McConnachie, 2012; Ellison & Pino, 2012). Susceptibility and abuse are issues which are dependent on a wide constellation of relational issues, dynamics of power and individual experiences.

Being a victim is not static. For instance, there are cases where those who sell their organs are considered as 'victims' but consequently become brokers after selling their own organs (Meyer, 2006). In the Philippines, recruiters are mostly neighbours, kinsmen or associates of organ sellers. Additionally, most organ sellers enthusiastically seek out intermediaries when arranging the sale of an organ (Yea, 2010; Mendoza, 2011). A very convoluted set of social relations cannot be reduced to straightforward classes of good and bad. In one way or the other, there is always a corresponding story where the ethical axioms that describe a certain standpoint of discourse are questioned (Columb, 2015: 31). This flux is shown again and again throughout the course of this research. Because the state of victimhood is not static, it can be difficult in any one context to determine who is a true victim, and who is not, or under what conditions. In every case, individuals who sell their organs on the market or through a broker are well aware that what they are doing is illegal. The question is whether or not they believe that their reason for selling the organs is more pressing and more moral than their reason for not selling the organ.

This however does not mean that those who sell their organs are not forced and trafficked for their organs. What is real is that organ trade is not static. Rather it is dynamic, contextual and connected to wider socio-cultural and politico-economic issues. As a result, a serious emphasis on the victim's suffering is usually politically or morally loaded. In most cases, the image of an innocent victim who is tricked into selling an organ is epitomised as the contradiction to the criminal offender or a broker who preys on susceptible persons. As a result, the normative power of these distinctive

victim and offender classifications devotes political capital into actions which usually waive a broader analysis of the politico-social arrangements that lead to circumstances where trading in organs has become an economic activity. The existing international instruments which regulate organ sales and/or organ trafficking mirrors this conceptualisation of the organ trade, hence advancing a formulaic criminal response.

The Trafficking Protocol is the first multidimensional treaty which clearly recognises human trafficking for organ removal as a practice that should be criminalised and punished (UNODC, 2000a. 2000b). The Trafficking Protocol was established as a response to the dangers posed by 'transnational' organised criminal networks who are involved in human trafficking. The protocol was not established to account for local actors who are involved in illegal activities such as organ trading.

2.14 Criminalising the Organ Trade

Human trafficking for the purposes of removing organs presents very unique ethical challenges which called for international global efforts in dealing with it. It is of critical importance to note that the novelty and the sophistication the technological and scientific procedures of the process of organ transplantation confuse the ethical legitimacy of legislative action. Though laws aimed at prohibiting the sale of organs are available, medical committees have continued to tolerate the exchange of organs on a commercial level for the purposes of transplanting. It is however unfortunate that these organs would have been sourced from trafficked persons (Cohen, 1999; Ram, 2011). This legal ambiguity continues to manifest in various states despite laws having been passed against the trading of these organs. Thus, although the World Health Organisation (WHO) Guiding Principles on Human Cell, Tissue and Organ Transplantation and the Declaration of Istanbul have criminalised organ transplantations on a commercial level, transplanting of organs from trafficked persons still continue. The practice is still to be recognised as transnational criminal offences.

2.14.1 The World Health Organisation and organ trafficking

The trafficking of human being with the aim of harvesting or removing their organs cannot be seen as merely a problem of demand or supply (Budiani-Saberi &

Columb, 2013). The problem can also not be reduced to being merely a problem of criminal justice, organised crime or even a problem of the victims who are abandoned or voiceless (Budiani-Saberi & Columb, 2013). The trafficking of human beings for the purposes of removing their organs is a form of abuse and another avenue in which human trafficking manifests itself. In light of this, a number of initiatives were put in place and are still being put in place to ensure that those found guilty are prosecuted. Numerous initiatives aimed at addressing the trafficking of human beings for the purposes of removing their organs started being developed since the 1980s. The concerns of organ snatching, or organ trafficking was brought to the attention of the World Health Organization (WHO) in 1987 and since, WHO made efforts in updating the guiding principles aimed at ensuring that human trafficking for the purposes of organ harvesting is stopped (Budiani-Saberi & Columb, 2013).

After having noted the exponential growth in the buying and selling of human organs, the 40th World Health Assembly which convened in May 1987 put in a request for the Director General to have a feasibility study of coming up with appropriate guiding principles pertaining the issue. This request led to the development and endorsement of what became the first WHO Guiding Principles on the issue of Human Organ Transplantation. A resolution which became known as resolution WHA44 was passed in 1991. The resolution came up with principles which outlined a framework under which donations of organs by the deceased could be made with the aim of ensuring that the organ donations would increase while at the same time outlawing the receiving or giving material gains for an organ.

The sale of organs was first banned in 1987 by WHO. Under resolution WHA40.13 organ trade was affirmed as "…inconsistent with the most basic human values and contravenes the Universal Declaration of Human Rights (UDHR) and the spirit of the WHO Constitution" (Yea, 2010). In 1991, the WHO Guiding Principles were established; they were updated in 2010. These guidelines declared that organs can be "donated freely, without any monetary payment or other reward of monetary value" (WHO, 2010). In line with this, some regions also banned organ trade. Article 21 of The Council of Europe Convention on Biomedicine and Human Rights stated that "the human body and its parts shall not give rise to financial gain" (Council of Europe, 1997).

These key principles also became key reference in influencing the crafting of various legislations on organ trafficking in different countries. For instance, in India,

a country known for a lot of cases of organ trafficking the Human Organ Transplantation Act (HOTA) of 1994 was developed in line with the standards that were set in the WHO Guiding Principles. Issues concerning the exploitation of persons for the purposes of removing their organs gained attention in the UN in the year 2000. Following the response of Colombia to review the principles of 1991, WHO re-examined the matter in 2003 and 2004 and a new resolution known as resolution WHA57 was passed. The resolution was adopted with the aim of urging member states to continue harmonising their laws with the WHO Guiding Principles. Under this, specific mention was made by WHO (2004) for member to:

> ….take measures to protect the poorest and most vulnerable groups from 'transplant tourism' and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs.

Although during that time, the Principles had not yet established a strong definition, the term 'organ trafficking' was use in describing the use of material enticements for an organ removal. It was then recommended that this should be criminalised and outlawed. In 2007, the WHO facilitated informal consultations across different regions of the world and an updated WHO Guiding Principles known as WHA63 were passed in 2010 (Budiani-Saberi & Columb, 2013). The surge in live donations from donors who are not related to the recipients led to further concerns regarding the extent of commercial transplants for living individuals. The version that was updated was crafted with the aim of reflecting current issues in organ transplanting notably transplants of organs from living individuals and the surging use of human tissues and cells (WHO, 2010).

The language used in the WHO Guiding Principles against organ trafficking have in some way facilitated some of the understanding regarding the ways in which organs move from one place to the other (Budiani-Saberi & Columb, 2013). For instance, the WHO Guiding Principles reiterate the importance of ensuring that the trafficking in human materials is prevented. The Principles also note that the shortage in the supply of human materials has spurred the commercial trafficking of human materials. The WHO Guiding Principles also acknowledge the fact that the commercialised trafficking of human materials is from donors who are living and not biologically related in any way to the recipients. The WHO Guiding Principles also

acknowledge that commercial trafficking of human material is closely related to human trafficking (Budiani-Saberi & Columb, 2013).

2.14.2 The Declaration of Istanbul

A short while after the formal worldwide consultations to come up with updated Guiding Principles the issue of trafficking with the intention of removing organs began to become an issue for discussion among professionals. The aim here was to come up with a working definition of the term of the term organ trafficking and other related concepts (Budiani-Saberi, 2007). The TTS and the ISN made efforts in organising a summit in May 2008 with the aim of addressing the issue of human trafficking with the aim of harvesting organs. Held in Istanbul, Turkey, the summit was attended by over hundred and fifty representatives of various medical and scientific bodies, social scientists, ethnicists as well as government representatives. This meeting led to what became known as the Istanbul Declaration (Budiani-Saberi, 2007).

The Istanbul Declaration came up with an array of Principles aimed at guiding the practices of organ transplantations as well as proposal to lay out the goals of ensuring that trading in organs is prevented (Budiani-Saberi & Columb, 2013). The Istanbul Declaration was endorsed by then endorsed by a number of professionals and their organisations as well as government agencies. It is critical to note that the conceptualisation of what became known as organ trafficking in the Istanbul Declaration does not indicate that the amalgamation of the act, means, and purpose is essential for a certain case to be seen as a trafficking crime. However, the Istanbul Declaration focuses on the process of exploitation that can spur an organ removal. The Declaration was not aimed for the purposes of prosecution as is the conceptualisation of a trafficking crime given in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Istanbul Declaration rather focuses on the issue of donor safety and notes that ‘a positive outcome for a recipient can never justify harm to a live donor’ (The Declaration of Istanbul, 2008).

The Istanbul Declaration makes a distinction that is there among what is known as transplant tourism, transplant commercialism and travel for transplantation. It is critical to note that this was a critical development in combatting the transplant practices which are exploitative. In addition, the Declaration made an emphasis on the

vulnerability of live donors and in the end seeks to promote fair access to health care and ensure that people do not lose their lives due to organ failure (Budiani-Saberi & Columb, 2013). Just as what is seen in the WHO Guiding Principles nonetheless, organ trafficking is represented as an issue of demand and supply in the Istanbul Declaration. It is important to note that though it is of vital importance to encourage deceased and altruistic organ donation, ensuring that the donor pool/ organ supplies improves only addresses part of a much wider issue which is grounded in the key issues over human rights and criminal justice.

In 2006, a new body which became known as the International Transplantation Society (TTS) started working together with the WHO with the aim of ensuring that these principles become fully functional. In 2008, another body known as the International Society of Nephrology (ISN) joined hands with TTS and WHO and the Istanbul Declaration on Organ Trafficking and Transplant Tourism (The Declaration of Istanbul) was developed (Budiani-Saberi & Columb, 2013). It is also through the media and the work of several civil society organisations where awareness of organ trafficking was raised with more efforts also done in helping some victims of organ trafficking. Further, the issue of trafficking for the purposes of organ trafficking has also been addressed by the United Nations Office on Drugs and Crime (UNODC) through making efforts in addressing the issue in its criminal justice resources on trafficking in human beings (Budiani-Saberi & Columb, 2013).

Although these measure helped in ensuring that the trafficking for the purposes of organ removal is a reality and a problem that needs solving, the problem still continues. The continued persistence of the problem could be as a result of the fact that the demand for organs outpaces the supply of the organs (Budiani-Saberi & Columb, 2013). Another problem could be simply due to the fact that trafficking human beings with the aim of harvesting their organs is simply a lucrative trade that has very high returns for those who do it. Further, successes scored in the transplanting of organs during the 1950s created a platform for anyone regardless of family or biological ties to donate an organ (Budiani-Saberi & Columb, 2013). Human trafficking for the purposes of harvesting organs knows no boundaries. It has been happening and continue to happen across different countries and continents. With improvements in information technologies and means of transport, donors and recipients could be

separated by oceans. In other words, geography and biological ties ceased to matter that much for both donors and recipients (Budiani-Saberi & Columb, 2013). In the context of such developments in recent decades, the technologies of transplanting organs continued to be developed and so is the demand of the organs. Hence organ transplantation in recent years has ceased to be simply restricted to cities in the West. The process has also become common place in places in the non-Western world as well (Budiani-Saberi & Columb, 2013). It is a truism that the major source of most organs are third world countries.

However, studies show that trafficking usually takes place within boundaries. Where it happens, victims are often left without any legal recourse or nay form of remedy which is effective. Most organs are harvested from individuals who are poor and vulnerable who are wooed into trafficking traps because of poverty. The removal of the organs is usually done surreptitiously which makes it extremely difficult to come up with the accurate statistics of the cases of organ trafficking globally (Budiani-Saberi & Columb, 2013). Nevertheless, estimates has it that thousands of cases of organ trafficking take place annually around the globe.

Thus, though the Declaration of Istanbul forbids organ sales and calls for the ban of any "financial considerations or material gain" for organ donation(s). These international standards are, however, not binding legally. Various states have adopted domestic penal codes aimed at penalising organ trafficking. For instance, The Human Tissue Act of the UK 2004 states that "commercial dealings in human material for transplantation" are illegal (Human Tissue Act, 2004). In the United States, the National Organ Transplant Act states that, "it shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce".

The Human Transplantation Act of India established in 1994 regulates the "removal, storage, and transplantation of human organs for therapeutic purposes" and prevents the "commercial dealings in organs". In a similar vein, the Organ Harvesting and Transplant Law (2010) of Egypt forbid the illegal removal of organs for financial gain. Nevertheless, despite the global prohibition of organ trading novel reports of

illicit organ sales have been recorded and the rates of persecution have been low (Moniruzzaman, 2012).

The proliferation of information technology and the advertisement of the selling of organs on the Internet has been making it difficult to enforce laws which prohibit organ trade (Appel, 2005; Mendoza, 2010; Mchale, 2013). Srivastava (2020) has pointed out that it is common in India to find ads for assistance in finding organs. One ad he quoted guaranteed to find someone seeking an organ a kidney within sdven days. The process was simple, he asserted. “Just contact us and say what you want, then we will send you a donor's medicine file and his/her picture, and then remain only the price and conditions for exporting the donor to you” (Srivastava, 2020, quoting an ad he found on eBay). Both the internet and the process of organ transplantation have been some of the most miraculous discoveries of the 20th century, but the combination of the two has brought tragedies along with the miracles. Srivastava refers to this as a paradox as well as a contradiction: It is a miracle which everyone welcomes, to be able to give a second chance at lives that once would have been lost, but people are still afraid to donate organs, so the miracle becomes an urban legend of sorts. We all know it exists, but how to get the miracle is a completely different story.

Not everyone who needs a transplant can get one, and many people die waiting for one. It is, in a sense, a video game of the most perverse sort, in which only 40% of the players will find what they seek, and one member of the playing field will die every 90 seconds (Jingwei et al., 2010). Because there are so few organs for the number of needs, organs have been commercialised. Whenever commercialisation of a profitable product occurs and the market is desperate, organised crime is rarely far behind. As Srivastava (2020) relates, this is the case in organ trafficking: the technology that saves lives has aligned human rights against the very survival of a number of humans. Israel was, for many years, unregulated in the organ market. Now, Srivastava suggests, India is poised to provide large numbers of living donors in this threat that will both save, and end, human lives (Srivastava, 2013).

But jurisdictional problems, online privacy, and the right to anonymity make it very difficult to monitor and implement laws against organ trading that is done online (United Nations General Assembly, 2000; Broadhurst & Chang, 2013). Further, most of the laws which prohibit organ trafficking are delimited to violations done within the

borders of certain countries (Cohen, 2011; Ambagtsheer, *et al.*, 2013). An array of gaps concerning the issues of consent constrain the practical application of national anti-trafficking laws.

Earlier, the Palermo Protocol and the United Nations Convention against Transnational Organized Crime (UNODC, 2000b) was quoted; it states that "The consent of the victim of trafficking in persons to the intended exploitation set forth in the subparagraph (a) of this article shall be irrelevant" if the person was recruited, given transportation, transferred, or kept, or if an individual receives the person from someone else, if there have been threats of use of force, or of being kidnapped; or if there is fraud or deception. Further, if the recruiter gives the so-called donor payments or some type of benefit, or even if they give the benefit to someone who then convinces the person to 'donate', this is legally considered exploitation of the individual.

This presents somewhat of a paradox, since living donors tend to be reluctant to voluntarily part with their organs. They may donate to family or very close friends; a few altruistic individuals may register for to be donors for strangers. They may well be willing to do a donate-after-death declaration. In large degree, however, living people want keep their own organs. Further, in many cultures and religions, the body is supposed to be intact for burial. In these cases, even if the individual has somehow parted with tradition and left documentation that he or she wishes their organs donated after death, the relatives may threaten the hospital or doctors and thus prevent the donation. This dynamic results in an even scarcer distribution of organs and a dire lack of needed transplants. In 2010, for example, Jingwei et al. (2010) estimated that as many as one person every 90 minutes was dying while they were waiting for a transplant. Today, however, in the United States alone, people now die every 84 minutes waiting for a transplant (OrganDonor.gov, 2020). Every nine minutes, someone is added to the list of people waiting for transplants. Every person that dies can save up to eight additional lives, depending on the mode of death.

One legitimate donor can yield up to *lifesaving* organs. A person who has not been severely damaged in an accident, for example, can yield a heart, two lungs, a liver, a pancreas, two kidneys, and intestines (OrganDonor.gov, 2020). They can also yield non-lifesaving organs such as skin, pancreas, and corneas. With today's improvement

in transplant technology, they may also be able to yield a face, a pair of hands, and an abdominal wall.

2.15 Defining the Players and their Roles

The acquisition, sale and transplantation of organs does not occur in a vacuum. At the barest minimum there must be a person from whom the organ(s) are taken, whether for money or against their wishes, as well as someone to take the organ (the supplier or harvester). From this point there is someone who accepts the organ (the recipient) and a doctor and staff who insert the organ. There may also be a seller, or an intermediate who takes the organ from the harvester and sells it to the doctor or recipient (Ambagtsheer et al., 2014).

The real problem, however, is discerning what is 'real' and what is 'anthropological interpretation'. Watters (2014) considers Scheper-Hughes' investigation of the organ trade to be "a test case for a new kind of anthropology." Anthropology typically studies a single set of peoples and their relationship with geography and other people. This type of anthropology studies "a globalised, interconnected black market—one that crossed classes, cultures, and borders, linking impoverished paid donors to the highest-status individuals and institutions in the modern world" (Watters, 2014). Anthropology originally sought to develop what Watters and Scheper referred to as a "taxonomy of human social behavior," (Watters, 2014). The study of human organ harvesting far exceeded that style of study. In defining the players and their roles, and discerning what was real and what was interpretation, and even whether organ harvesting existed or whether it was a metaphor, similar to the 'urban legend' of more "civilised" societies, it became very difficult to sort out the pieces.

This type of study was far more than determining kinship relations. Instead, Scheper-Hughes led people away from an objective humanitarian study into a subjective interpretation of reality and a "'moral model' based on the simplistic duality of the oppressed and the oppressor" (D'Andrade, in Watters, 2014). The problem is not lack of allegations of organ stealing and black-market organ transplantation; the problem is finding anything beyond anecdotal evidence. Scheper-Hughes and others have reported seeing many people with surgical marks that they attribute to having their

organs taken, but discerning whether the organs were donated correctly, or whether they were sold on the black market becomes problematic. Further, even if the organ is sold on the black market and the person receives money for their organ, it is difficult to determine if the person truly made a voluntary sale, whether the sale was coerced, or even whether the sale was the result of untoward pressures of economic inequalities. Part of the problem of maintaining scholarly dispassion, or even of gaining evidence that the police units could use later, was that "When one researches organised, structured and largely invisible violence, there are times one must ask if it is more important to strictly follow a professional code or to intervene" (Scheper-Hughes, in Watters, 2014). It appears from the less-than dispassionate findings of Scheper-Hughes and her colleagues that it is easier to find (and perhaps get testimony from) individuals who were talked into selling their organs, than individuals who had them out-right stolen, or traded for ransom is. This difficulty is one reason the Palermo Protocols were developed, in order to add coercive donations and sales to the overall definition of human trafficking or human organ trafficking (Watters, 2014).

Despite the reality that Scheper-Hughes has been treated with derision in many sectors, she was able to meet with police in South Africa and provide names of victims of organ harvesting schemes as well as names of hospitals where the transplants took place. The South African police were able to eventually cross reference subpoenaed hospital files and billing records and to develop a case against Netcare, the largest hospital group in the country. The hospital was found guilty of participating in more than one hundred illegal transplants (The Guardian, 2010; The Telegraph, 2010) with one particular kidney surgeon participating in 90 of the surgeries. The charges, however, were made based on the South African Human Tissue Act, rather than international charges. And, while six other employees of the hospital system were originally charged, the charges were also eventually dropped (The Guardian, 2010; The Telegraph, 2010; Watters, 2014).

The reports from the Telegraph and the Guardian illustrate the difficult in determining who is involved in these kinds of crimes, and how difficult it can be first to determine who has done what, and secondly, how to get a conviction. Even though the crimes took place in 2001 and 2002 (The Guardian, 2010; The Telegraph, 2010), and were investigated by Scheper-Hughes beginning in 2003 (Watters, 2014). In 2005,

South African doctors were first arrested in the case (Sidley, 2005). The information at that time was that the Brazilian police had already secured convicts relating to the same transplantation racket. The South African case involved transplantations that occurred in South Africa, but involved recipients in Israel, and donors from Brazil (Sidley, 2005).

At the time Sidley (2005) wrote his journal article, the hospital itself had not been charged with anything, and had announced that it was a "victim of wrongdoing" and would be happy to give evidence in the case if the court called them in (Sidley, 2005: para. 10). The law in South Africa allows a living donor to donate an organ if the donor and the recipient are related and if no money changes hands (Sidley, 2005). This is different from the United States, for example, where organ needs are frequently publicised and living donors are actively sought. In the United States, donors cannot receive any money for the act of donation, and the recipient's insurance pays the donor's medical bills (Glazier, 2018).

The interactions of the individual groups illustrated in this section, and their actions, serve to define the players and their roles in what occurs in an organ trafficking situation. The conditions may vary – some organs are removed in the desert (as in the Sinai), while others are removed in nice, sanitary hospital settings (as in South Africa). Some organs are bought and paid for, albeit under duress to the organ-owner, and others are stolen. The only things that are consistent in organ trafficking are coercive power, money or property exchanged for the organs at some (perhaps multiple) points along the line, and the purchasing power of the individuals who are the final recipients of the organs.

2.16 The key concepts and terms that guide the key instruments on organ trafficking

It is important to note that organ trafficking is usually seen as a subset of human trafficking by the United Nation. A generic definition of human trafficking in which organ trafficking is seen as a subset of human trafficking is thus given in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

Women and Children[6]. A more nuanced definition of human trafficking for the purposes of organ trafficking was developed in 2008 at the International Summit on Transplant Tourism and Organ Trafficking. The definition was derived from Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and was as a result established as part of the of the Declaration of Istanbul against human trafficking for the purposes of organ removal. This definition reads of human trafficking for the purposes of organ removal stated:

> *Organ trafficking is the recruitment, transport, transfer, harbouring, or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation (The Declaration of Istanbul 2008).*

It is useful to reiterate that the definition of human trafficking for the purposes of organ removal is in sync with the definition of human trafficking that was given in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Budiani-Saberi & Columb, 2013).

It is important to note that the way human trafficking for the purposes of organ removal was defined in the Declaration of Istanbul does not wholly refer to trafficking of organs independent of persons. Albeit cells and tissues remain usable for very long periods and usually travel after being removed from their donors, in commercial transplants, organs are usually not transported independent of persons in commercial transplants (Budiani-Saberi & Columb, 2013). Once they are removed from a person they are immediately transplanted. As a result, most abuses of those trafficked for the

[6] This is also known as the Palermo Protocol or the Trafficking Protocol and supplements the United Nations Convention against Transnational Organized Crime or the Organized Crime Convention. The definition of organ trafficking under this protocol is given under Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UNODC, 2000b).

purposes of removing their organs takes place when the recipient awaits and the transplant is done (Budiani-Saberi & Columb, 2013).

2.16.1 Consent

Viewed generally, what seems reasonable is that one has the right and freedom to donate or even sell his or her organ if she or he so wishes. Nevertheless, pragmatically, it is very rare that such a decision is done through a singular choice that is rational (Budiani-Saberi & Columb, 2013). What is critical to note is that when confronted with the option to sell say a kidney after facing destitution, the choice to sell become to some extent insignificant. This issue is made clear in the Conference of the Parties to the United Nations Convention against Transnational Organized Crime when it stated:

> …what might appear to be consent by a victim is nullified or vitiated by the application of any improper means by the trafficker. Furthermore, consent of the victim at one stage of the process cannot be taken as consent at all stages of the process and without consent at every stage of the process, trafficking has taken place (United Nations, 2011).

In most cases, the situations in which 'consent' is said to have been sought, usually, and individual's vulnerability would have been exploited (Budiani-Saberi & Columb, 2013). In other words, individuals would not have agreed to such sales if certain pressing conditions would have not existed. Thus, just as in all other cases of human trafficking, consent in situations of organ trafficking is not about free will. Rather, it is as a result of manipulation of those vulnerable especially those who are very desperate (Budiani-Saberi & Columb, 2013). In most cases, when a victim of organ trafficking is said to have consented to having his or her organ removed, this does not essentially entail that the victim of organ trafficking would have understood what comes out of the operation procedures. Usually, victims are misinformed and duped into giving consent.

2.16.2 Payment

The issue of payment also forms the key pillar of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children states that the reception of payments or any kind of benefits form part of the exploitation that human trafficking for the purposes of removing organs is known for (Obokata, 2005). Much the same as persons trafficked for domestic slavery can get paid and still be seen as a victim of trafficking in human beings, what is relevant is not the payment of the amount of money paid. What matters is the individual's vulnerability that is normally manipulated and controlled with the aim of insuring that the person works as a slave and in some cases for sexual exploitation and organ harvesting (Budiani-Saberi & Columb, 2013). In a similar vein, in the context of debt bondage or what is known as bonded labour, consent as well as payment does not deem the practice acceptable.

In addition, selling organs is a criminal offense in numerous countries no matter the amount of payment one would have received. Although it can be argued that the sale of organs can be seen as exploitation, even in cases where the intention to exploit is not very evident, it is critical to note that the sale of an organ which is unsolicited can still be regarded as trafficking (Budiani-Saberi & Columb, 2013). It can be considered as trafficking where an individual is received for the purpose of removing an organ through either payment or benefits to ensure that the consent of a person is achieved[7]. Additionally, though the actual process of removing and organ is not in its own respect considered as exploitation, what makes it exploitative is the removal of an organ in cases where a position of vulnerability exists and the traffickers use their knowledge of that vulnerability in recruiting, transporting, transferring, harbouring or receiving a person with the aim removing an organ (UNODC, 2012a, b).

Due to vulnerability as a result of gender, ethnicity, migration status, administrative situations, debt bondage and unemployment, some people end up being coerced into selling their organs (UNODC, 2012a). Those who lure people into selling their organs notably, criminal gangs, corrupt doctors and corrupt government officials take advantage of this vulnerability and lure those vulnerable to sell their organs. This partly explains why organ trade has continued growing within and across countries (Budiani-Saberi & Columb, 2013).

[7] See UNODC 2000b, Art 3(a)) for a fuller detail regarding this.

2.17 Overview of International Law on Organ Trafficking

As a process and a practice, human trafficking is a collection of crimes and not a single offence. Human trafficking is a criminal process and not a mere event of crime (Bales, 2005). Trafficking in human beings always involves servitude, debt bondage among other issues which lead to the abuse of human rights (Jordan, 2011). Those who fall victim of human trafficking aimed at removing organs generally have their rights abused. Their rights are usually abused since they are usually not given the right to move freely, are usually denied of health care, are at times denied food, are beaten, forced to live under inhumane conditions and some usually die after having their organs removed. Some are first sexually abused and, in the end, have their organs removed (Coalition of Organ-Failure Solution. (COFS), 2011). Basically, victims of organ trafficking are denied their fundamental freedoms and rights.

It is therefore evident that all the rights that a human being has and enshrined in a number of international instruments are abused. What is important to note is that the criminalisation of human trafficking whether it being aimed at sexually exploiting the victim, force the person into servitude or to remove an organ is firmly established in the International Human Rights laws. The various international instruments that criminalise human trafficking include the Convention on the Elimination of All Forms of Discrimination against Women of 1979[8]. Human trafficking is also prohibited in the Convention on the Rights of the Child (1989) as well as the Optional Protocol on Sales of Children, Child Prostitution and Child Pornography (2000)[9]. Various regions in across the globe have also come up with their independent conventions which include the Charter of Fundamental Rights of the European Union (European Parliament 2000), the Council of Europe Convention on Action against Trafficking in Human Beings (2005), the American Convention on Human Rights (1969), the Inter-American Convention on International Traffic in Minors (1994), and the South Asian Association for Regional Cooperation (SAARC), Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2000) and the Ouagadougou Action Plan of Africa.

[8] See Article 6 of this Convention regarding the issue of human trafficking.

[9] Specifically, Article 3(a) (i) (b) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000) obliges all states which are signatories to this protocol to make sure that the 'transfer of organs of the child for profit' are criminalised regardless of these crimes being committed domestically or internationally.

Human trafficking for done with the aim of organ harvesting does qualify to be a crime against humanity. Such an act is part of an abuse of human rights. In such a context, the International Criminal Court (ICC) does have the jurisdiction over trafficking if a given country is not able or shows the unwillingness to ensure that the victims are justly treated (Obokata, 2005). In addition, it is also very important to note that organ trafficking is a health issue and people have rights to health. As stated in the International Covenant of Economic, Social and Cultural Rights (ICESCR), health is not only confined to physical, and mental condition. The right to health in the ICESCR infers to one's ability to be healthy and in order to realise it, one should have access to food, a job, bodily integrity among other issues.

Regardless of this rather commonplace mantra on the need to fight trafficking, very little is done when it comes to deal with organ trafficking concretely and decisively (Columb, 2015). No efforts have been made in trying to pass legal instruments outlining the specific values and ends, if any, such instruments are supposed to attain, let alone the exact settings in which a legal instrument specific to organ trafficking should apply or the functions it should achieve. The resounding catchword on 'fighting human trafficking', as it turns out, offers a narrow lens when it comes to dealing with organ trafficking. The definition included in the existing instrument (the Palermo Protocol, adopted in 2000, and other anti-smuggling laws) does not offer a straightforward conceptualisation of organ trafficking or a vibrant depiction of its own potential institutional renditions.

The Palermo Protocol and other existing instruments on human trafficking seem to overlook other variables such as migration patterns, human agency, socio-economic conditions and cultural variances when it comes to conceptualising human trafficking. Though it cannot be doubted that people who are trafficked can suffer from life-threatening forms of violence, selective attention to the remarkable circumstances of human trafficking, mostly with a sturdy sexual component, fails to capture the diverse situations and milieus which foster exploitation of different classes. In a nutshell, this discourse epitomises a standard vision and approach to the problem regardless of the vitally important intersections of identity, agency, politics and culture. The history of the Palermo Protocol, the United Nations Convention on Transnational Organized Crime and the Trafficking Victims Protection Act (TVPA 2000) depict that these

instruments were mostly crafted as a response to the tenacious lobbying of abolitionist feminist groups and conservative Christian groups who were opposed to sex-work.

The major aim of these groups was anchored on the 'moral crusade to abolish prostitution'. The major argument in this approach was that women only resort to 'prostitution,' or selling their bodies for sex, because they do not have the same socio-economic opportunities as men. Prostitution at its deepest level is seen as representing the subjugation of females to the dominance of males. On the other hand, the religious rights groups were mainly concerned with the threats of commercial sex to family, marriage and moral order. Key to the arguments against human trafficking by these groups was the belief that all sex-workers were in actual fact inactive victims of predacious men whose suppression had made women prostitutes. This argument fed into the governmentality of regulatory agencies and politically motivated NGOs who correspondingly intend to stiffen controls on migration and eradicate the sex trade. It can be argued that without the pressure exerted by these groups, it is improbable that trafficking as a phenomenon would have been elevated outside the boundaries of political argument to the mainstream of political concern (United Nations General Assembly, 2000; Berman, 2006; Agustín, 2007; Weitzer, 2011; Blanchette, Silva, & Bento, 2013).

2.17.1 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons

The Trafficking Protocol was the first multidimensional treaty which clearly recognised human trafficking for organ removal as a practice that should be criminalised and punished (UNODC, 2000a. 2000b). The Trafficking Protocol was established as a response to the dangers posed by 'transnational' organised criminal networks who were involved in human trafficking. The protocol was not established to account for local actors who are involved in illegal activities such as organ trading. The chief aim of the Trafficking protocol was to bring State Parties into agreement as to what makes up human trafficking in order to embolden the coming together of national methodologies to crime control. The protocol also sought to enable cross border collaboration in investigating and prosecuting trafficking offences that encompass one or more states.

As an example, in order to extradite an offender, the principle of double criminality must apply first. This requires the requesting state to have laws analogous to that of the state in request. Under the terms of the Protocol the offence of trafficking can only be established where an action (recruitment, transportation, transfer, harbouring or receipt of persons) followed by the means (threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person) for the purpose of exploitation (in this case, the removal of organs) can be proven. Under Article 3 (c) the means are irrelevant in any case involving a child (UNODC, 2000a).

Under the terms of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, human trafficking as a criminal offence can only be established in cases where actions such as recruitment, transportation, transfer, harbouring or receipt of persons are established (Budiani-Saberi & Columb, 2013). Under the same protocol, these actions should be followed by the threat or use of force or other forms of coercion10 (Budiani-Saberi & Columb, 2013). This can also include actions such as abduction, fraud, deception, abuse of power or of a position of vulnerability and also the giving or receiving of payments or any other benefits with the aim of achieving the consent of a person with the intention to exploit that person.

Adopted in 2000, the Palermo Protocol has repeatedly been attacked on a number of fronts. Behind the attacks is the fact that the protocol does not foist binding obligations or issue dilatory orders to Member States when it comes to providing remedies to a trafficking victim. The Palermo Protocol only reminds a signatory State of its responsibility. It sanctions states when they fall short in protecting the confidentiality, privacy, and identities of the victims and states' failure to provide assistance to victims (Jordan, 2002). Although the protocol has provided a number of important remedies, it has been seen as falling short in making sure that signatory states are held accountable for the breaches which might occur (Obokata, 2005). Thus, albeit the Palermo Protocol has been hailed for coming up with novel issues which

[10] Coercion as a key issue in the process of human trafficking takes various forms. Though coercion is usually synonymised with the issue of force, wooing someone who will be vulnerable into getting his or her organ removed through using money can also amount to force.

differentiates human trafficking from human smuggling, the issue of implementation still proves problematic and contentious.

The decision to include 'the removal of organs' came rather too late. The decision to include 'the removal of organs' came during the deliberations done during the 9th session of the *Ad hoc* Committee on the Elaboration of a Convention against Transnational Organised Crime (United Nations General Assembly, 2000). In backing of suggestions which were put forward by the US and Argentinian presidents during the deliberation of the first meeting of the Committee, numerous delegations made the request that the manipulative consecrations which were stated under Article 3 (a) must encapsulate the trafficking in human organs as well as the removal of tissues (United Nations General Assembly, 2000). As a result, a decision was made to 'to include such a reference for purposes of further discussion' (United Nations General Assembly, 2000)[11].

Unlike other exploitative purposes which were specifically referred to in the Trafficking Protocol, organ trafficking was not originally taken into consideration or included under the international law. That being the case, there was no prior legal definition of organ trafficking. This, together with the fact that the issue of organ removal was factored in in the last drafting stage of the Protocol, shows that the issue

[11] What is critical to note is that in its original format, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children did not exclude the issue of organ trafficking. Despite the addition of the issue of organ trafficking in the protocol, the issue of organ trafficking is still seen as not been at the epicentre of the issue of human trafficking. Unlike other exploitative purposes which were clearly mentioned in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, human trafficking for the sake of removing an organ was originally not considered in international law. As a result, the issue was not legally defined. In light of this, there was no nuanced provision which targeted the specific medical, ethical and legal dimension that trafficking for the purposes of human trafficking represents. Not much was understood during the development of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of how trafficking for the purposes of removing organs takes place. There was no distinction made between the activities involved in organ trafficking. Resultantly, the fundamental scope of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as it applies to the trafficking of human beings for the purposes of removing organs were not well defined and well elaborated. In light of this, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is seen as generally not in a position to address the issue of human trafficking in a direct way. As a result, a number of suggestions especially through coming up with new instruments to address the issue have been put forward. See Budiani-Saberi and Columb (2013); Columb (2015) for more on this.

was included in international law, notwithstanding the fact that it was poorly conceptualised and understood. This is seen with the non-appearance of clear provisions which target the precise medico-legal and ethical problem presented by organ trafficking (Columb, 2015: 33). There was no differentiation made between the various practices which are involved in the organ trade such as organ sales and transplant tourism. The following report by the Conference of Parties to the Convention was the one to clarify the fact that organ trafficking and cells or tissues which are independent of the body was not included in the Trafficking Protocol. As a result, the Trafficking Protocol is only relevant in cases where trafficking for organ removal takes place. For Columb (2015: 33), how precisely the 'removal of organs' becomes a criminal activity or how *prima facie* a consensual agreement to sell an organ becomes exploitive and consequently a trafficking crime is not explained (Columb, 2015: 33).

In 2010, efforts were made to develop extensive commentaries to the UN Principles and Guidelines on Human Trafficking with the aim of providing a very clear definition on the issue of legal status through identifying the key aspects that could be tied with the aim of establishing international legal rights and obligations (Budiani-Saberi & Columb, 2013). Though these were relevant to the regulation of trading in human organs, the initiatives did not however address the issue of organ trade in a direct way. What was developed instead committed in targeting trafficking for sex and labour without necessarily addressing the issue of organ trafficking. Given the heightened awareness of networks on organ trading across the globe, a panel on the issue was set up and convened in February 2008. This issue became known as UN Global Initiative to Fight Human Trafficking (UNGIFT). In the aftermath of this, the United Nations Office of Drugs and Crime (UNODC) came up with a 'toolkit' in the same year to ensure that human trafficking is combatted. The issue of organ trafficking formed Chapter 9 of this toolkit. The toolkit described the trafficking in organs as majorly driven by abject poverty and abuse of those who will be facing abject poverty (UNODC 2008). The toolkit then made efforts in outlining about four steps which could be employed to prevent human trafficking with the aim of organ harvesting (Budiani-Saberi & Columb, 2013).

The steps that were suggested in the toolkit provided a very important framework in response to human trafficking for the purposes of organ harvesting. The toolkit particularly illustrated the vitality of the need for the victims to be protected and

given assistance where necessary. Nevertheless, a key shortcoming of these steps is the fact that no additional guidance is given for the interpretation, implementation as well as the enforcement of the existing instruments and statutes to ensure that organ trade is prohibited. Further, no additional guidelines are given in the supporting of victims of human trafficking from being trafficked. As a result, ensuring that there is a balance between the interests of those who receive the organs with the interests of those who donate is a key challenge that was also identified. Nonetheless, instead of elaborating on how this is achievable, the toolkit made reductive analysis of the issue of organ trafficking. This was also done through framing the issue of organ trafficking within the prism of the economic paradigm of demand and supply hence urging states to come up with measures aimed at increasing the supply of organs and not necessarily making efforts in ensuring that the rights of the victims of organ trafficking are respected (Budiani-Saberi & Columb, 2013).

Since the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is chiefly the tool to control the crime of human trafficking, has a human rights dimension. Bodies on human rights which include inter alia Office of the High Commissioner for Human Rights (OHCHR) and the United Nations High Commissioner for Refugees (UNHCR) played a speculative role in the drafting of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. In this regard, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children sees people who are trafficked as victims of crimes which are very serious. For instance, Article 2(b) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, states that helping and ensuring that those trafficked are protected through respecting their human rights is one of the principal purposes of the protocol (Budiani-Saberi & Columb, 2013).

In addition, Article 6(a) puts forward a number of strategies that states should take in the protection of those who fall victim of trafficking. Article 6(a) urges states to make considerations in implementing measures aimed at assisting those trafficked through cooperating with civil society organisations to ensure that there is socio-psychological and physical recovery of those who would have fallen victim to human trafficking. Article 6(b) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, also requires states to

make sure that their own legal systems come up with measures that would ensure that the victims of human trafficking are compensated for the damage that they would have suffered from the process of human trafficking (Budiani-Saberi & Columb, 2013).

It is however critical to note that it is not mandatory under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children for states to ensure that the victims of human trafficking are compensated after having been trafficked. Rather, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children urge states come up will all legislative measures which are which would ensure that there are remedies available for victims of human trafficking12 (Budiani-Saberi & Columb, 2013). When it comes to the issue of repatriation of the victims human trafficking, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children obliges states to ensure that repatriation of victims of human trafficking should ensure that the repatriation is safe13. It is important to note that other key provisions such as Article 3(b) which highlight that 'consent of the victim to the intended exploitation…shall be irrelevant' in instances where any of the listed means are taken into consideration are very important in addressing the gaps in the domestic transplantation laws, that see those trafficked for their organs as willing participants in the transplant practices done commercially. It is critical to note that the provisions of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children do apply to both legal and natural persons (UNODC 2000b: Art 10). As a result, medical centres which take part in the illegal transplant of organs are subject to penalties. This is however contingent on a given state's interpretation and the consequent enforcement of these laws in that particular state's domestic penal codes (Budiani-Saberi & Columb, 2013).

In addition to the provisions of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children noted above, Article 14 (1) notes that nothing in the Protocol shall affect the obligations, rights and responsibilities of states and individuals under international humanitarian and human rights law (Budiani-Saberi & Columb, 2013). Principally there, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women

[12] See Legislative Guide Part 1 para 368.
[13] See UNODC 2000b: Art 8 (2) for more detail on this.

and Children highlights the specific processes that states can undertake in line with the universally accepted principles of the International Human Rights Law to ensure the prevention, suppression and punishment of offences of trafficking. In Europe for instance, the Council of Europe Convention on Action against Trafficking does impose very strong obligations on state parties to the Convention to ensure the prevention, protection and prosecution of all trafficking offences[14]. Contrary to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Council of Europe Convention on Action against Trafficking does include a monitoring mechanism with the aim of ensuring that what is stipulated in the Convention is implemented and upheld.

One can argue that the substantive scope of the Protocol when it comes to its applicability to organ trafficking, and related practices, is out-dated. The fact that Article 3 (a) includes the only reference to organ trafficking in the Protocol, where the term 'removal of organs' is listed as a form of exploitation, is in itself indicative of the lack of consideration given to this issue prior to its inclusion (Columb, 2015: 33). The Trafficking Protocol mostly serves prosecutorial goals. The insertion of open-ended terms such as 'the abuse of power' or of 'a position of vulnerability' speaks to the definitional elasticity States Parties are given when it comes to prosecuting suspected cases of human trafficking.

The Medicus Clinic case is revealing in this regard. In this case, the Appeals Panel of the EULEX Court in Pristina confirmed the charges of human trafficking against the defendants on the basis that the particular means involved constituted an abuse of a position of vulnerability. It was argued that the person who had come to Kosovo to donate their organs did not do so to assist a family member or for any of the usual reasons that people in a civilised society chose freely to donate their organs. They did so because of their position of vulnerability. To suggest that a person would travel to a foreign country, endanger their health through such invasive procedure on the say

[14] For instance Article 5 (1) of the European Trafficking Protocol highlight that each and every state which is party to this protocol shall take measures aimed at preventing and ensure that trafficking is combatted. Additionally, Article 12 (1) obliges states to take any other measures which may be necessary to help the victims of human trafficking with their physical, social and psychological recovery after having been trafficked. Article 19 of the European Trafficking Protocol provides for the prosecution of any individual who uses the services of human trafficking victim knowing too well that that person is a victim of trafficking.

so of a stranger runs contrary to common sense unless there was a tremendous financial need (Columb, 2016; Lewis, 2010).

Although the Trafficking Protocol makes commitments as to the rights of the victim, states are only urged to cooperate with civil society organisations so as to facilitate the provision of the psychos-social and the physical recovery of the victims of human trafficking (UNODC, 2000a). The Trafficking Protocol does not oblige a state to assure compensation for a victim of trafficking and other related remedies. Rather, the protocol obliges states to take into consideration all vital legislative measures in order to pursue such remedies (UNODC, 2004). Further, one of the major shortcomings of the Protocol is the unavailability of any kind of monitoring mechanism by which to ensure that the implementation of the provisions of the protocol are done in an effective manner.

The same problems can be seen at a regional and state levels. In the EU, the Council of Europe Convention on Action against Trafficking also enumerates the removal of organs as a form of exploitation that constitutes the purpose element of human trafficking. Although there are great similarities with the Trafficking Protocol, the European Trafficking Convention makes some notable developments. The European Trafficking Convention represents a victim-centred or human rights approach to human trafficking. As such the language in the Convention reflects much stronger obligations to adhere to provisions intended to protect victims Nevertheless, the anti-trafficking framework remains limited in its reach, particularly relating to the organ trade (Council of Europe, 2005).

The human rights approach has been critically important when it comes to how several states mediate their criminal policies with provisions that take account of a victims' situation. Still, it should be recognised that granting victim immunity from criminalisation, operating victim shelters, and institutionalising special visa regimes for trafficked individuals would be dependent on the outcome of criminal proceedings (Chuang, 2010). While estimations of trafficked persons are in their millions, far fewer cases are ever taken to court; only a few victims are identified (Steinfatt, 2011; Weitzer, 2011). Of those who are identified the most extreme cases are the only ones to go to trial. In these cases, only the most 'deserving' victims get the necessary help (Brennan, 2005; Chacón, 2005; Blanchette, Silva & Bento, 2013). Further, reintegration mostly

amounts to lengthy administrative procedures that lead to the involuntary repatriation of victims (Chuang, 2010; Snajdr, 2013). In most instances, the oratorical appeal of the discourse on human rights is made use of in making the impression that affirmative deeds are being done by governments which are sympathetic to end human trafficking (Mutua, 2001; Douzinas, 2007). In light of this, Columb (2015: 35) noted:

> Critically however, the anti-trafficking framework is individualistic in its approach attending (in the best-case scenario) to the *post ante* consequences of a criminal act. An *ex-ante* approach is needed that attends to the economic conditions and legal rules that leave individuals vulnerable to varying degrees of exploitation. Given the covert and complex nature of the organ trade it is difficult to see how organ sellers (whether subject to trafficking or not) will benefit from an anti-trafficking perspective.

Though the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children has loopholes and weaknesses, its main strength lies in its ability to bring states together under a single and common definition of human trafficking with the aim of ensuring that trafficking is combatted in all its forms. It is however critical to note that in the human trafficking with the aim of organ harvesting is generally misunderstood and poorly defined in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Although a number of states have ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, they have not been in a position to ensure that their obligations to address organ trafficking are fulfilled. Most domestic laws generally focus on human trafficking done for the purposes of sexual exploitation. In most countries, organ removal is not regarded as a crime. In this context, the ability of states to prosecute organ trafficking offences is negatively impacted in a direct way. Additionally, the ability of the victims of human trafficking to pursue legal redress is also impaired.

2.17.2 UN Convention Against Transnational Organised Crime

Other instruments have driven the topic somewhat differently. One of the most important among these is the Convention against Transnational Organized Crime

(UNCTOC – 12 December 2000). The UNCTOC is regarded as one of the key instruments which are important in the trafficking against human beings. The Convention states the actions which can be regarded as making up what is called human trafficking and also stipulates the measures which should be taken in dealing with the trafficking in human beings.

The UNCTOC presents an extensive list of recommended rules and practices which ought to be taken by states in situations of human trafficking. For instance, one of the critical issues noted in this convention is the acknowledgement that human trafficking is mostly transnational in nature[15]. That being the case, concerted efforts through collaboration between states on an international level should be prioritised. Collaboration as conceived by the UNCTOC is seen as an integral part towards the needed effectiveness in dealing with the issue of human trafficking. The other example is the Protocol against the Smuggling of Migrants by Land, Sea and Air a convention which is intricately linked the Palermo Protocol and also supplements the United Nations Convention against Transnational Organised Crime. This protocol also aims to make sure that trafficking is dealt with in a sustainable manner. As the protocol notes, smuggling is an integral part of human trafficking. The protocol then notes that disrupting smuggling networks is therefore important in making sure that human trafficking does not occur. Based on these instruments and other initiatives, trafficking is seen as a serious issue which need concerted global action.

One can go much further into reviewing other initiatives and instruments which deal with the issue of trafficking in order to get an appreciation of what their scope and reach is, but that would be redundant. In any case and at any rate, these protocols follow a general pattern of being all encompassing and too broad in scope. Thus, the issue of human trafficking seems to resonate across the discourse of migration nowadays. It is just regarded as one of those issues which form part of the whole 'illegal migration crisis' which has characterised the 21st century (notably in Europe). Apart from a being a peripheral issue, though, surging incidences of organ trafficking seem to have become a heuristic device, 'a microcosm of the microcosal' and a lens that tells useful things about the legal interpolations which are inherent in the

[15] Debates in this regard have however been seen. Some have argued that human trafficking is not only transnational. It takes place within the borders of countries and efforts should be made in dealing with it both as a transnational and national crime.

international laws on human trafficking. Organ trafficking is not an unfamiliar phenomenon to be sure. Nevertheless, it seems not to be fully investigated enough to warrant an independent instrument to deal with it as this study intend to do.

Academics, in some instances, seem to have developed an uneasy attitude towards this seemingly under-researched phenomenon which one might regard as 'callous and heinous' act. Being 'callous and heinous' does not obviously mean that this crime is not happening. Rather, it is a crime which is happening in a way which depicts that huge sums of money are poured in and transactions in some cases are being done under the watch of governments. This might be the case since it takes sophisticated machinery to extract organs for the purposes of transplanting to other human beings. In most cases, those who have the capacity to pay for organs are the rich. Some might be citizens of the developed countries. Payment of these services are at times done through banking formal channels in these developed countries and should be traceable as a result.

2.17.3 The Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol)

Due to its very nature, the issue of human trafficking whether with the aim of harvesting organs, for servitude or organ harvesting is a transnational crime that needs coordinated global efforts. In this context, different countries have come up with a multiplicity of coordinated responses with the aim of ensuring that those falling victim to the crime get help. As a result, a number of normative and legal frameworks which are not only confined to ensuring that justice prevails in the field of human trafficking but also in the field of migration were developed and continue to be developed. The normative frameworks that were developed and continue to be developed are both legally binding and some are not legally binding. One of the critical instruments which is of paramount importance in this regard is the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol).

Since it is related to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against Smuggling of Migrants by Land Sea and Air focuses on protecting people entering a

foreign country illegally or without authorization. Instead of criminalising those entering a country without authorisation, the protocol obliges states to rather criminalise the smuggling that takes place because it is the smuggling that is usually associated with the crime of human trafficking (Mollema, 2013). However, as other protocols are, the Protocol has loopholes in that it only seeks to criminalise smuggling that is carried out by organised criminal groups. In light of this, those who are smuggled and end up being trafficked are not given enough protection. Victims are not given safeguards that are found in human rights laws, refugee laws and international humanitarian laws when it comes to ensuring that they are protected from the worst forms of ill treatment that is usually associated with the crime of human trafficking.

2.17.4 Regional responses to organ trafficking

Years after the enunciation of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, a number of legal frameworks both regionally and internationally were developed and continue to be developed regarding the issue of human trafficking (Budiani-Saberi & Columb, 2013). For instance, the Council of Europe Convention on Action against Trafficking in Human Beings or the European Trafficking Convention of 2005 is one of the notable Conventions which was developed and improves from the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. In contrast to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Council of Europe Convention on Action against Trafficking in Human Beings came up with a group of experts whose duty is to act against the crime of human trafficking. The duty of this group is to monitor the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings through what are known as country reports. An important provision found in the Council of Europe Convention on Action against the crime of human trafficking is the illegalisation of sales in organs. Article 19 of the Council of Europe Convention on Action against Trafficking in Human Beings obliges states to punish any person who makes use of the victims of human trafficking with the full knowledge that the person offering those services is a human trafficking victim (Budiani-Saberi & Columb, 2013).

In this respect, any person who receives an organ which would have been trafficked is held liable by the states which are party to the European Trafficking Convention. Outside Europe, the Israeli Organ Transplant Act (2008) gives a jail term of up to six months or a financial penalty to any person who receives or pays for an organ from any individual who will not be his or her relative. In other areas and regions, a number of initiatives which involve governments, the academia, corporations, civil societies as well as the media have emerged with the aim of developing effective tools aimed at fighting against the crime of human trafficking (Budiani-Saberi & Columb, 2013).

In a similar vein, Africa has also been making strides in trying to fight human trafficking. One of the laudable efforts it has made it to come up what is known as the Ouagadougou Action Plan. The Ougadougou Action Plan was born out of the collaboration of the member states of the African Union and what is known as the European Union Partnership on Migration, Mobility and Employment (MME). The MME was born out of the EU-AU Summit to fight against human trafficking that was held in Lisbon, Portugal in 2007. The key strategies discussed at this summit was to come up with actionable and inclusive measures through collaborations between transit, origin and destination countries in order to fight human trafficking. The discussion then led to a follow up meeting in Ouagadougou, Burkina Faso and an action plan called the Ouagadougou Action Plan was born. The Ouagadougou Plan got support from the Joint Africa-European Union Strategy for Partnership and the Lisbon Action Plan.

Much the same as what the European Trafficking Convention did, the Ouagadougou Action Plan also approved what is laid out in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. In much the same as what the European Trafficking Convention does, the Ouagadougou Action Plan also places its emphasis on prevention, protection and prosecution of those found guilty of trafficking in human beings. The Ouagadougou Action Plan places emphasis of coordination and cooperation between various countries in order to fight human trafficking. To achieve its aims of fighting trafficking, the Ouagadougou Action Plan places emphasis on the need to educate, train and ensure that there is capacity building in order to raise awareness on the issues of human trafficking. The Ouagadougou Action Plan notes that women and girls are the most vulnerable to human trafficking. As a result, the Action Plan places emphasis on the need to ensure

that women and girls are empowered if human trafficking is to be fought successfully (Gallinetti & Kassan, 2008). What is critical to note in the Ouagadougou Action plan is that the plan is victim centred and holistic in its approach (Mollema, 2013).

In addition, the Ouagadougou Action Plan urges AU member states to come up with rehabilitation centres aimed at assisting the victims of human trafficking to recuperate and recover after being trafficked (Gallinetti & Kassan, 2008). In its protection mandate, the Ouagadougou Action Plan expects member states not to criminalise the victims of human trafficking. Instead, states are expected to help those who would have fallen victim to human trafficking by providing them with legal aid and other related help which will be essential for their recovery. What is also of paramount importance in the Ouagadougou Action Plan is that the plan actually expect member states to come up with appropriate legislative and other necessary measures. They will ensure the safe stay of countries in the territories they would have been trafficked into (in cases of trans-border trafficking) either temporarily or permanently if that is what they would have chosen (Obokata, 2005).

In much that same as what is stipulated in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Ouagadougou Action Plan obliges member states to ensure that administrative, criminal or civil liability of legal persons or their representatives for trafficking offences in addition to liability of natural persons is provided (Mollema, 2013). Under the Ouagadougou Action Plan countries which are party to this Action Plan are expected to improve their domestic legislations and make sure that all the proceeds of human trafficking are seized and used to help victims. The Action Plan expects states to improve their domestic legislations and ensure that all victims are protected and compensated and ensure that justice is served through punishing the offenders. In addition, the Ouagadougou Action Plan also expects member states to come up with National Task Force whose duties will be on monitoring and reporting progress of the National Action Plan to regional and international bodies. The Ouagadougou Action Plan also expects member states to "consider the establishment of joint investigation units and enact laws for the extradition of traffickers" (Mollema, 2013: 211).

The Ouagadougou Action Plan expects these special units to be established within standing law enforcement structures, with a specific obligation to target operational activities towards fighting human trafficking. Further, the Ouagadougou Action Plan also sets the base for the establishment of a special regional unit whose

task will be to coordinate efforts to combat trafficking in all its forms. The Ouagadougou Action Plan was signed in November 2006 by representatives of the EU and the AU and binding between the two organizations. Despite its efforts in ensuring that human trafficking is fought, the plan does not however place much emphasis on organ trafficking.

2.18 Rationale and Motivation of Study

The study is not an empirical study in the literal sense of it. It is clearly improper to carry out an empirical inquiry when making an inquiry on the legal principles which should inform how the issue of organ trafficking should be dealt with. Since this thesis touches upon the normative standards on the issue of organ trafficking, it actually steps backwards and may not fit in the empirical study category. Thus, despite not being properly designated as 'empirical,' it does engage in a type of institutional analysis. This is done by way of illustrating the formal structures of the respective bodies pertaining the issue of human trafficking and also, when relevant, taking some of their decisions and other outputs into consideration. In a nutshell, the study fosters a legal inquiry that is conceptual, descriptive and critical. It stipulates, in view of contemporary academic literature, the features that make up the legal governance of human trafficking. The thesis also considers standards that help formulate a vantage point from which to evaluate concrete regimes on human trafficking. It depicts, through those categories, the existing legal instruments on human trafficking. In the end, the research proceeds to a tentative assessment of the relevant instruments which govern human trafficking and thus extend to trafficking of human organs as a subset of human trafficking.

2.19 Aim and Objectives of the Research

The aims and objectives of the research are based on the complexities of any discussion of organ trafficking, because it extends not only from the area of origin of the crime, but throughout the international arena. The organs themselves are a product, and they are procured or supplied from the area of origin, processed, and delivered to the receiving agent. The research is bifurcated; it is both descriptive and critical. The aim of this thesis is to inquire into the principles that (should) inform the crafting of a standalone international protocol on organ trafficking.

A number of general research questions evolved that will be used to guide the research. All of the questions are interrelated, but they speak to different avenues of the research. The research asks:

- What is organ trafficking?
- What is the current legal situation as it relates to organ trafficking?
- What are the desirable legal principles which should be taken into consideration when dealing with organ trafficking on an international level?
- How far will these current legal principles protect the people from organ trafficking?
- How appropriate would it be to have changes to the legal principles used in fighting against trafficking in organs?

The first question, *what is organ trafficking*? forms the theoretical framework of the research. The second question considers the status quo, and asks *what is the current legal situation as it relates to organ trafficking*? The third question considers the future as it asks *what are the desirable legal principles which should be taken into consideration when dealing with organ trafficking on an international level*? The fourth question is a descriptive question, and asks *how far will these current legal principles protect the people from organ trafficking*? The final question helps form the final analysis and suggestions for the future, as it asks *how appropriate would it be to have changes to the legal principles used in fighting against trafficking in organs*?

It is critical to note that the first two questions are influential and adjuvant to the two others. Thus, in a way, they correspondingly provide the analytical and evaluative frameworks on the foundation of which a solid narrative and a tangible normative valuation of issues will be carried out. Surely, an array of secondary questions are encapsulated by the above stated questions. Some of these questions include: why advance an independent instrument to deal with the issue of organ trafficking? What is wrong with the existing legal frameworks which deal with the issue of human trafficking? Why is organ trafficking so important as to warrant an independent

instrument? Why not just expand the existing instrument and simply emphasise the issue of human trafficking? Does the nonchalant issue of organ trafficking moderate the passions associated with the current efforts to fight human trafficking? Is organ trafficking a pressing issue? Is it apt enough an issue to warrant attention which can prompt an enlightening description of current institutional arrangements? Or is it more suitable to address international concerns from the normative point of view?

In answering the above stated questions, the researcher might need analytical categories to describe the salient legal issues which are inherent in an inquiry of this nature. How the scope of each question is calibrated therefore dictates the path in which this inquiry will take. In light of the approach delineated in the foregoing, methodologically, this study cannot fit within a single set of orthodox nomenclatures of legal research. This is so because this study cannot be seen as a purely on pure theory of international law nor is it strictly sociological. However, it does discuss the contradictory principles rooted in the crafting of some international institutions, specifically an independent instrument on organ trafficking. That being the case, an inquiry of this nature borrows other issues and key concepts which are indispensable if a proficient navigation of the issues under investigation is to occur.

2.20 Theoretical Framework: Linking Organ Trafficking, Forced Migration

The realities of organ trafficking, especially when the organs are removed from a human without permission, have widely been accepted as principally harsh, difficult and, perhaps most importantly perilous (Bvirindi & Landa, 2016). For these reasons, there have been genuine calls for collaborative efforts and solidarity among various stakeholders when it comes to dealing with people confronted with perilous situations of human trafficking. There is almost an unwritten moral convention of exercising humanity when it comes to dealing with people who will be trafficked. Setting aside any related but precarious ethical concerns, and providing help to victims of human trafficking, especially those released by the traffickers with life threatening medical conditions, has insistently presented an array of dilemmas. An array of actors, a number of international Conventions, other legal instruments asserting to govern the issue of human trafficking eventualities, and the often-vague interaction between these instruments and domestic law compound the complexity of dealing with organ trafficking. The practical concerns relating to the welfare of the people who need help

are mostly given only insufficient attention; this study develops recommendations not only for modification to trafficking law but also for future research.

Certainly, recent reports of people who need help before being trafficked illustrate this situation, which is characterised by complete unwillingness to give assistance. For instance, surging border patrols and surveillance by the EU and the USA aimed at repelling illegal migrants as well as the failure to help people in distress in high seas has been compounding the situation. These repulsive border patrols have been heavily criticised as having contributed to human trafficking and human smuggling (Pécoud & de Guchteneire, 2006).

One of the most worrying aspects of tight border controls has been the surge of people who employ the services of smugglers to facilitate their journeys to the Europe, the USA and Australia. The increase in human smuggling has led to increased incidences of human trafficking. Given that the issue of organ trafficking is at the epicentre of this thesis, a solution to organ trafficking could be provided by building an independent convention or protocol which deals with this but is still within the nexus of human trafficking and smuggling.

This convention or protocol, however, must not function in a vacuum. Attention must thus be paid to the related conventions. Linking the surge of the organ trade to broader politico, cultural and socioeconomic factors will help centre the fight against organ trafficking. In light of this, this thesis aims to advance a more substantive analysis of the various aspects of organ trading. It does this by examining the conceptual bias of the organ trafficking discourse and critically evaluating the principal conditions underneath the organ trade. The thesis investigates the assumptions that are made in regard to this problem by establishing the actors who make these assumptions and defining what their purposes are. To that end, a number of areas must be discussed; the case of Ethiopia and Eritrea is one example, in which governmental take-over led to a destabilised government; the destabilisation led to escalation and the escalation to mass genocide and forced migration. All of these factors led eventually to famine and to trafficking, first in human trafficking and finally in organ trafficking. The case of South Africa, Brazil, and Israel is another example of organ trafficking, this time spurred by the uneven socio-economic status of the various parties involved.

Turning a blind eye to organ trafficking or trying to wrap in under the cover of human trafficking without treating it as a standalone violation will tend to depress the impetus to take robust action against organ dealers. It will not help to adopt an instrument/protocol to deal specifically with this crime, if the legislatures fall short in grasping critical issues relating to the crime.

This thesis investigates the many facets of organ trafficking. It dedicates a leverage to the inquiry into the principles that (should) inform the crafting of a standalone international protocol on organ trafficking. In general, and within its delimited scope, this thesis seeks to participate in this collaborative intellectual enterprise of examining and exploring the legal issues which surround crafting a new instrument which specifically deals with the issue of organ trafficking. The reasons for carrying out a study of this natures were given in Chapter One.

2.21 Summary

An introduction to the general topic of organ trafficking was introduced in this chapter. Issues relating to the definition of human trafficking and organ trafficking were reviewed, and the rationale and motivation of the study were considered. The aims and objectives of the research were given, and the structure of the study was provided. The theoretical framework that links organ trafficking and forced migration was considered. Finally, abbreviations utilised in the study were listed for the reader's ease of use, and definitions of various aspects of organ trafficking were provided. In the next chapter, humanitarian interventions of the international community are explored, with an emphasis on the conflict between Eritrea and Ethiopia.

CHAPTER THREE

HUMANITARIAN INTERVENTION OF THE INTERNATIONAL COMMUNITY

3.1 Introduction

Slavery, in one form or another, has existed as long as humans have existed. Weaker humans have always fallen prey to the stronger (Makisaka, 2009). In the first chapter, the history of slave trafficking was described. Slavery was linked to human trafficking, and human trafficking was tied to organ trafficking. In this chapter, humanitarian intervention in refugee assistance is introduced; in order to understand how much legal principles will protect people from organ trafficking, the link must first be made to protecting *all* displaced persons. In a variety of nations, the emergencies that can develop from forced migration and from natural disasters can result in a wide variety of emergencies, including genocide. The case of Eritrea and Ethiopia is explored and a series of cases relating to organ trafficking, and humanitarian interventions of the international community in these cases, is presented.

According to Cella (2005, 6) the United Nations has not been particularly effective at keeping peace in the Horn of Africa, particularly as it relates to Ethiopia and Eritrea. Border disputes between the two nations have been active since 1993, when Eritrea became independent, and which resulted in a war that lasted from 1998 to 2000. However, the battles between tribes in Eritrea and Ethiopian have gone on for generations and announcing that the border dispute had been solved did not really solve the issues. In fact, although the United Nations (UN) helped negotiate a peace agreement (the Algiers Peace Agreement of 2000) and establish a boundary commission (the Ethiopian-Eritrean Boundary Commission [EEBC]), they were not effective at actually accomplishing anything. The boundaries the Commission proposed were not accepted by either nation or the result was that the border dispute was not only unsettled but hostile (Heintz 2010, 3). The UN established a Mission in Ethiopia and Eritrea (UNMEE) in 2000, hoping to further curtail hostilities, but this project also failed.

Whenever there is a long-term dispute such as the one in Ethiopia and Eritrea, it is safe to say that there are multiple factors at play. There is not one cause, and rarely if

ever is only one party responsible for what has occurred. Instead.it is likely that a poor distribution of social power causes conflict, particularly an international conflict (Moravcsik 2004, 1). Disenfranchisement is a significant motivator for disaster.

In considering the background to the most recent conflict (from 1993 on), it is important to understand that there was little to no international intervention prior to the early 1990s. However, disputes between Ethiopia and Eritrea not only existed during that time frame, but they fed the actions that would later become flat-out war. Further, there were actions in Ethiopian and Eritrea that led to further disputes and conflicts in the Horn area of Africa.

One readily accepted concept is that different cultural groups in an area can typically co-exist in a relatively small area. There is generally not conflict unless something happens that disrupts the status quo. In other words, as long as there are no changes, then there is little conflict. However, when a group or an individual seeks to either unite groups that are accustomed to operating separately or seeks to split apart groups that are accustomed to living and working together, the change creates conflict (Mitchell 2005). Mitchell also pointed out that some changes create conflict, while other changes can make conflict stronger, and yet other types of change can help resolve conflict that has existed for the long term. Based on this observation or contention, it would seem like conflict, over the long term, would be a continuum or spectrum, rather than having a clear beginning or end. Change can cause conflict in the beginning, but eventually change can help resolve the conflict (Mitchell 2005, 3).

Some authors (Moravcsik 2004, 1) asserted that poor power distribution led to conflict especially in the international arena. From a strictly logical point of view, it is not unreasonable to believe that as a nation develops economically, things would get better for the residents and peace and prosperity would evolve. The reality, however, is that economic development in poor nations tends to bring strife between individuals and groups, largely because the goods that are produced or acquired end up being unevenly distributed. Thus, people that had adapted their style or mode of living to the old status quo would change, and perhaps become marginalised, under new regimes (Olson 1963).

For his part, Olson developed a number of ideas relating to conflict, including the concept that one way to prevent conflict was to manage change. If the situation in Eritrea/Ethiopia were to be viewed through this lens, then it would suggest that the governments of these two nations did not manage change adequately. As Olson suggested, however, any time there is change there will be one individual or group who wants to 'restore' the status quo, by removing the reforms that led to the change. There will also be accelerators, who want to increase the amount of change and make the change occur more quickly. There will be supporters, who support the idea of change, and resisters, who oppose the change. In a situation such as Eritrea/Ethiopia's there was a combination of these types of groups, and the changes that might have been acceptable if they were allowed to proceed at a slower pace became devastating when accelerated. One of the points to emphasis is that it does not matter whether the influence was political, economic, or international; it is the stress or pressure that makes the difference, not where it comes from. One key point, however, is to understand that a government is not like a commercial enterprise; instead, it will sit back and decide to either intervene or refuse to intervene in problems in order to manipulate the situation into what it believes is the best standing for the government in power.

The Horn of Africa is home to a number of nations: Djibouti, Eritrea, Ethiopia, and Somalia. According to Schlee (2003, 343) there has been conflict between these nations for centuries. The theories discussed so far would suggest that these nations had a historically uneven distribution of power, or they endeavoured to make changes politically that eventually led to violence. The term 'politically' in this context can entail anything from tribal or family groups to national groups.

Between 1961 and 1991, Eritrea fought a 30-year war for independence from Ethiopia. The United Nations established a transitional government in order to try to expedite Eritrea's independence from Ethiopia, which was established by a referendum in 1993. New leaders took their place in both nations, and they made promises to adapt new methods of change and to make reformations that would bring them more in line with the modern world. At the same time, all the unresolved differences between the nations were still unresolved (Abbink 1998, 551). Olson's (1963) theories would lead to the suggestion that with no changes in the sociological differences and political

differences, the nations would still be subject to the same violence and instability that they were experiencing prior to independence of Eritrea. Even as the two nations were jostling to find a new reality, the new reality was based in the old politics. One of the main parties in the battle for independence was the Tigray People's Liberation Front (TPLF). They had tried to force the determination of Eritrea as a federation, and not as a separate nation. However, when the Front was removed from power, Eritrea was declared an independent nation rather than a Federation. The strife and stress remained active, even though it may not have been as obvious or evident as it had been during the fighting.

After Eritrea's independence was solidified, a single party politic system, the People's Front for Democracy and Justice (EPLF) was put into place. Isaias Afwerki was put into place as the leader. Budjra's analysis of the situation was that the single-party system had so under-represented marginalised groups that the basic causes of internal conflict had been obscured, and the hostilities between Eritrea and Ethiopia were actually made worse. This contributed to the inability of the UN to assess the situation and led to a lack of inability to make informed policy decisions (Budjra 2004, 17).

The ongoing tensions in the two nations have led to what are essentially psychological factors contributing to long-term stress and dissatisfaction in the area. The inability to resolve the overall political situation between the two nations put Eritrea in a bad position in the Horn of Africa. At the same time, the combination of colonial rule and a period of British mandate led to a strong self-image among the Eritreans. Unfortunately, the Eritreans had already been stereotyped by the Ethiopians and were considered arrogant and disrespectful of other nations (Abbink 1998, 554). Eritrea, for its part, has asserted that it cannot and will not tolerate being the victim of hostilities from other nations in the area and on the horn. There is a clear difference of opinion as to whether the Eritreans are offensive and aggressive, or whether they are assertive. It is understandable why the TPLF tried to get the various nationalities that surrounded the border of Ethiopia and Eritrea to band together, especially since the religions in the area (Muslims and Christians) have contributed to the dis-ease. Despite all the arguments that the two nations should work their issues out, the conditions already cited made it very difficult, if not impossible, for the Afar, Tigreans, Saho, and

Kunama peoples to bind together. The people of the Tigray and the people of Eritrea have such a long and unpleasant history that they were never able to reach agreement on what was going to happen with the Badme border town (Abbink 1998).

In 2002 the Eritrean National Assembly voted that there would be no additional political parties, solidifying the one-party political system. Several questions arise; the first is whether or not a single-party system can possibly represent all of the residents of the nation. The second is whether or not a one-party system can avoid functioning as, or being perceived as, a dictatorship. Among other issues, a one-party system lacks checks and balances; it is also very unlikely to be transparent. Both Eritrea and Ethiopia tend to be authoritarian, and this type of system tends to depend on nepotism and loyalty of one's followers, especially in terms of distribution of the financial or economic resources.

When Eritrea and Ethiopia split, it put Eritrea into a bad position economically. The country had been dependent on Ethiopia for so long that it did not have a well-established food production system; due to the environment there were not a great number of resources available (Abbink 1998). The Ethiopian government made it clear to Eritrea that no help would be forthcoming as far back as 1997 the government of Ethiopia had decided to make changes to the economic policies that it held regarding Eritrea. Once it had announced policies that would limit any availability of funds to Eritrea, it made it clear to Eritrea that the border was a solid, closed border. In retaliation, Eritrea added extra port fees each time Ethiopia planned to use its ports. While this does not sound like it would be a crisis, the reality is that Ethiopia is land-locked, and had no ports. Much of its supply chain depended on having access to Eritrea's ports. The port actually comprised one of the income sources for Ethiopia, so raising the port fees was an economic burden. As Eritrea raised the port fees and Ethiopia was forced to accept, the two countries had a strong economic tie even though they were in conflict. The level of economic dependence made the situation much worse than it might otherwise have been.

3.2 Ethiopia's History and how it Interrelates with Eritrea

Until 1974, Ethiopia had an emperor. Unlike much of Africa, Ethiopia was not colonised. The nation was a feudal society, and it was ethnically diverse with a number

of ethnic groups, particular tribal groups. There were numerous local language groups, and at the time there were more than 80 individual ethnic groups. In 1930, Haile Selassie became emperor and seemed to be modernising the nation and bringing it into the modern era. Selassie developed a governmental structure that had not existed previously; he set up a judicial system and developed and codified laws and succeeded in passing a constitution. Unfortunately, Selassie was unable to understand the nation's economic needs and the political needs. This combination left him with no way to deal with the crises that beset the nation, mostly in response to his neglect.

3.2.1 Emperor Haile Selassie's End

There was a massive famine in Ethiopia that continued from the 1950s through the 1970s. Selassie ordered grain to be brought into Addis Ababa to relieve the famine, but the Tigray and Wollo regions were neglected. The people were left to starve. They did not take this without dissent. They revolted, and organised groups rebelled. In Wollo, however, while the peasants and roaming tribes revolted, the real issue was that the middle classes from Addis Ababa and the student groups took up the banner of political action. The Wollo famine, combined with the political actions of regular people in Addis Ababa contributed greatly to Selassie's eventual overthrow.

In 1952, Eritrea and Ethiopia, which had been separate nations, united into a federation. However, the United Nations's resolution establishing the federation were seen by the educated populace as being a violation of previous promises by the UN that would acknowledge Eritrea as a sovereign nation. Ethiopia was the stronger of the two parties of the federation simply because it was more economically advanced with a stronger political framework. Ethiopia began to dominate the actions of the union. In 1962, Haile Selassie took steps to dissolve the federation between the two nations; he terminated the parliament of Eritrea, and annexed Eritrea for Ethiopia. This act was the trigger for the war between the two nations, that would last thirty years and lead to mass atrocities (Heintz 2010, 2).

By the time revolution occurred in 1974, the nation had gone through economic stagnation and the people had been marginalised for over 80 years. In early 1974, the rebellions and demonstrations were widespread; students, intellectuals, Muslims, labour unions, the military, and even taxi drivers were taking part (United States Bureau of Citizenship and Immigration Services 1999). Workers went on strike. Still, Haile

Selassie either would not give in to the people's demands (or perhaps did not know how to). The military rebels had solidified into a Provisional Military Administrative Committee (PMAC), which called itself the Dergue. The Dergue was comprised of approximately 120 military officers. It took over, abolished Parliament, suspended the Constitution, arrested prominent members of the government for crimes against the population, and arrested the Emperor.

This military action was essentially the end of private enterprise. All banks and other institutions, all industry, and all land was taken over for government purposes (United States Bureau of Citizenship and Immigration Services 1999). In the beginning the intent was noble, and so was the implementation; the slogan of the revolution was "without blood" and the Dergue intended to uphold that slogan. It did not take long, however, for the military group to infight. Mengistu Haile Mariam rose to power, and achieving control though bloodshed became the norm.

3.2.2 Mengistu Haile Mariam Comes into Power

The original intent, at least of some of the Dergue, seems to have been military control. The general that led the uprising, General Aman, was killed when Mengistu Haile Mariam, who was also an officer, ordered him to be arrested and put in jail. Aman resisted, and was killed. That same day 60 more officers and government officials were executed. While the popular but controlled opinion seems to have been that the arrest of Aman was warranted and that crimes had been committed, no one had expected there to be immediate executions. At this point, many people fled from Ethiopia, while others armed themselves and took up the fight (United States Bureau of Citizenship and Immigration Services 1999).

When Aman died, another General took his place. General Teferi Banti took power. Mengistu had not learned his lesson with General Aman. He once again sought to undercut the leadership. Mengistu instead sought to maintain control of the Dergue, although in an unofficial position. In early 1977, Mengistu made plans for Teferi to be executed. To ensure that his point was made, Mengistu also ordered six of the highest-ranking members of the government to be executed. Once the executions took place, Mengistu took power officially. At this point he was the head of the Dergue as well as the declared Head of State. He changed his tactics somewhat and began a campaign to

ensure that opposition groups would be looked at as being the antitheses of what the citizens would want for their lives.

3.2.3 The Opposition Groups

The opposition groups that existed had sprung up when the Dergue took an autocratic rule and utilised violence to achieve their ends. Interestingly, the opposition groups were not just right-wing, nor were they solely left-wing. There were groups representing a variety of political leanings, as well as unofficial or guerilla groups that conducted violence attacks using guerilla warfare. These latter groups tended to represent the opinion that succession should occur. The two biggest groups had only minor differences and had supported the revolution, led by the Marxists, against the previous Emperor, Haile Selassie.

Despite their similarities in terms of political ideology, the Ethiopian People's Revolutionary Party (EPRP) and the All-Ethiopia Socialist Movement (MEISON) took completely different tacks in how to achieve their political goals. In point of fact, they became strong rivals because of the different approaches. The EPRP decided that the Dergue were fascists and needed to be eradicated. To that end, they began a guerrilla campaign. In the end they assassinated not only the leaders of the organisation, but also its supports. MEISON, however, decided that it would support Mengistu's new government.

3.2.4 Internal Terror Groups and Mass Purges

Mengistu declared that the EPRP's assassination campaign was "the White Terror". The Dergue, on the other hand, promised that every time EPRP killed one of their members, they would kill a thousand of the counterrevolutionaries (United States Bureau of Citizenship and Immigration Services 1999). In the long run, this is essentially what happened; the Dergue may have attempted to kill off EPRP members the year before, but once Mengistu took control, the Dergue was given a free hand. The Dergue were called the "Red Terror," and they were indeed terrible. Mengistu launched the Red Terror campaign in 1976 (Human Rights Watch, 1999). It was a two-year campaign of death and destruction, with a plan for three waves of action. Each of the waves had a different purpose, but during the overall campaign, literally tens of thousands of Ethiopians were not only arrested but were tortured and executed. Mengistu had a firm hand in this process; he developed secret police to help both

himself and the Dergue. He also gave weapons to local officials that he believed would support the Dergue, as well as to local governments. His stated goal was to eliminate those he considered “enemies of the revolution”.

In the beginning of the onslaught of Red Terror, if someone was suspected of being a member of EPRP, they became a target of the group. In particular, young individuals with even a modicum of education were regarded as being counterrevolutionaries and targeted for extinction. More than 2500 young people were killed during the first wave; detentions of additional men, women, and children were detained. Hoffman et al. (1994: 5) stated that:

> Hundreds of people, often teenagers, were arrested and detained in kebele headquarters or military facilities. A large percentage were tortured. Many of these prisoners were detained under truly unspeakable conditions, packed by the hundreds into airless, lightless cellars, where they could hear the screams of those being tortured while they awaited torture themselves. Many of those executed were simply left by the roadside with Red Terror slogans attached to their bodies to terrify potential opponents. Others were simply "disappeared."

Perhaps even more horrifying is that “Relatives of those killed were forbidden to mourn or compelled to pay for the killers' bullets before family members' corpses would be released” (Hoffman et al. 1994, 5; Human Rights Watch, 1999). Yet more was to come; EPRP in Addis Ababa was effectively destroyed by mid-1977 and Mengistu launched the second wave of the plan.

In the second Red Terror wave, Mengistu carried out a two faceted plan. In the first facet, Mengistu ordered the killing of all of the members of MEISON and local government members who were believed to have had more loyalty towards MEISON than to the Dergue. In October 1977 a large number of people had been killed; the number of deaths was estimated to be between 3,000 and 4,000 people. By the end of the calendar year, there were no more MEISON members in high-level government jobs; they had all been removed. In the second facet of the second phase of the plan, EPRP members in rural areas were killed.

The third wave of the Red Terror lasted another three to four months. While just as many, or even more, people were killed between October 1977 and spring of 1978,

Mengistu's people were more discrete. Bodies were no longer being left on the street, and the executions themselves were not designed to attract a public audience. However, between the secret police working for Mengistu and the security guards associated with the army, 30,000 people were put in prison, and 5,000 students were murdered. Human Rights Watch (1999) argues that by this point, civilians were being killed deliberately; hundreds and thousands of them died.

During the third phase, there were additional actions as well. Even though Mengistu's actions concentrated on the area surrounding Addis Ababa, where more than 10,000 people were killed, Mengistu concentrated on having leadership of various Peasant Associations killed or displaced during 1978 (United States Bureau of Citizenship and Immigration Services, 1999). The leaders were primarily jailed, but there were indeed executions. Further, although not officially a part of the planned phase, landlords in the area, merchants and traders (especially grain traders) as well as shopkeepers, were targeted for detection, assassination, or for being forced out of business. Because they were so integral to business actions of the area, the death or absence of these individuals was one of the factors that contributed to the development of famines in the 1980s (United States Bureau of Citizenship and Immigration Services, 1999).

3.2.5 Forced Relocation

It has not been possible to determine exactly how many people were killed, put in prison, or forced to evacuate the nation. However, it is known that in Addis Ababa in 1977, more than 10,000 people were killed. It is estimated that in 1977 and the following year, a similar number of people in the provinces were killed. Even more people than this were put in prison, were tortured, or became refugees (United States Bureau of Citizenship and Immigration Services, 1999). Ironically, the ruling parties in Ethiopia suppressed news of the war, uprisings, and abuses for nearly 30 years (De Waal 1991, 1).

During the time the Dergue were in power, war and mass murder continued. At one point, the Dergue were fighting in Eritrea and Ethiopia, but also fought a war against Somalia. Somalia had taken advantage of the situation caused by the genocide in Eritrea and attacked the Ogaden area (Human Rights Watch 1994, 7). At this point the Dergue were fighting a number of insurgencies, all ethically based. The Somalians

were attacking in the east, the Oromos in the south, and the Tigrayans in the north. One of the similarities in all the wars was massive human rights violations and abuse against civilian populations.

All of the war activities associated with massacres and genocide also damaged the infrastructure, the land itself, private buildings, villages, and governmental centres. The army killed villagers en mass and bombed market towns and poisoned drinking wells. As the damage occurred, the rural population that survived had to leave. In both Eritrea and the Tigray regions, most of the farm animals were killed. In one day alone, the town of Hawzen in Tigray was attacked by airplanes and helicopters. The bombing, which went on all day long, killed over 2,500 civilians (Human Rights Watch 1994, 7). This number was confirmed by the Special Prosecutor's Office (SPO) of the UN, working in conjunction with the forensics team from Argentina. The documentation was later utilised in prosecution of Mengistu by the International Court.

What might otherwise have been a time-limited drought was escalated into a ravaging famine by the government's military actions, actions of the counterinsurgency, and policies of social control. While Ethiopia was accustomed to droughts, the country was also accustomed to being able to mitigate their damage by a combination of trade policies and migration of residents. When crops died or when it was impossible to plant, farmers simply left their farms and moved on to areas with living crops, where they worked as migrant workers. During periods like this, the smaller traders would buy and bring foods from areas that had surplus crops (Human Rights Watch 1994, 8).

This time, though, the damage to the countryside was immense. Damage from drought could be extensive; coupled with the attacks, the damage was insurmountable. The government had restricted migration as well as trade. Farmers who lost crops were unable to move around to find work. Farmers who had stores of grain had them confiscated. The military and town governments were given the grain that farmers were relying on to take them through the next season. What made this situation particularly heinous was that the government took international famine relief that was provided and diverted it to counterinsurgency groups. Food aid that was intended for the population was diverted to the military. The stores were moved into secure areas. Further, the army

blocked aid access to areas that were not directly controlled by the army and the government (Human Rights Watch 1994: 8).

The government decided to force resettlement for a large portion of the population, with the goal of taking away popular support for the insurgents. The Dergue forcibly relocated over 600,000 people, and it is estimated that 100,000 died either during the relocation or because of lack of food in the resettlements. The resettlement camps were also full of disease. The total numbers of dead may never be completely known. What is known is that larger portions of the population either suffocated on the relocation trip, were crushed in the crowd, or succumbed to disease and starvation once they reached their destination (Human Rights Watch 1994: 9).

3.3 Course of Eritrean and Other Refugees as a Result of the Conflict

As this chapter has shown thus far, Eritrea has essentially been under siege for many years. Residents of the area are politically repressed and kept under guard by the military. There are no rights, no way to make a good living, and really nothing more than a bare-bones existence (Mekonnen and Estefanos, 2011). At the present time, there may be as many as 30,000 political prisoners in Eritrea, or as few as 10,000. In addition, there are approximately 40,000 who has been put in prison with any type of a trial. Approximately 15% of the population, or 600,000 people, are members of the military. If one considers that only 24% of the original population of Eritrea remains in the country, *including* those who are incarcerated or in the army, the numbers are shockingly high (Mekonnen and Estefanos, 2011).

When a nation has few economic outlets, and what most people would consider a ‘normal’ society no longer exists, then anomie, or a breakdown of standards and moral structure, takes place. Anomie becomes the norm. One of the problems that plagued international peacekeepers and investigators is that Eritrea and Ethiopia refused to comply with normal standards for international record-keeping. As a result, it has been very difficult for investigators to acquire any type of accurate records. Instead, many of the ‘records’ are simply educated estimates by trained individuals. Complicating the issue is that when people can escape captivity and get free, they escape. Once they escape, they are prone to falling prey to human traffickers in the Sinai Dessert (Van Reisen and Rijken, 2015).

Some years ago, Mohamed Rashid, a Bedouin tribal leader in the Sinai, spoke to a journalist and asserted that he had investigated a house belonging to people suspected of being human traffickers, and found a mass grave of Eritreans (Mekonnen and Estefanos, 2011). When Rashid found Christian inscriptions on the walls, he concluded that the victims of the massacre had been in a great deal of despair while they were still alive, but that they had desperately prayed for survival. The Eritreans, it was concluded, had been held captive for some period of time, long enough to inscribe the walls.

By 2009, there were nearly 12,000 Eritreans seeking asylum in Israel (Weldehaimanot, 2011). When Eritreans decide to go to Israel, they typically meet with individuals who can help them connect to human smugglers. The smugglers agree that they will help the individuals get the whole way to Israel, assuming they leave Eritrea. However, this is a scam of sorts: once the refugees leave Eritrea and enter Sinai, the smugglers raise the price that the parties have agreed upon to help them with safe passage. Individuals who do not have the new cash price are taken as captives. As Mekonnen and Estefanos (2011) point out, other Eritreans believe they will outsmart smugglers and simply make the passage alone. Instead of them making safe passage, however, the travelers are intercepted. They are kidnapped before they ever get to their destination (Mekonnen and Estefanos, 2011). The net result is the same: one way or another, the refugees become captives at the mercy of the smugglers.

Once captured, the refugees are kept in bare subsistence. They are contained in open areas given only minimal food or water; there are no sanitary facilities. Women are repeatedly raped, and men and women alike are forced to work in marijuana fields (Mekonnen and Estefanos, 2011; Pleitgen and Fahmy, 2011). The captors set an amount of payment for each person, typically from $20,000 USD to $30,000 USD (Pleitgen and Fahmy, 2011). Refugees are required to make telephone calls to ask friends and families to pay their release fees. If it appears the family is at all reluctant, then the refugee will be tortured while they are on the phone so that the family can hear the screams. If the family is still reluctant to pay or insists they do not have the money, the torture is increased. If all demands for payment fail, the individual will have their organs taken to pay the fee. The individuals may be tortured or have their organs taken in front of the other refugees in their unit, in order to convince these individuals that their captors are quite serious and that paying is by far the easiest solution. Mekonnen

and Estefanos (2011) reported that mass graves have been found in the general area of known camps.

Unlike the criminal groups that kidnap Eritreans and hold them for ransom (which can include organ theft), the Bedouin tribes that steal organs do not do so simply for criminal reasons. The conditions the Bedouin tribes live in are very little better than the conditions the kidnapped Eritreans endure. Over half the Bedouin tribes are living in poverty. Billions of dollars have been used to try to develop tourism in this general region, but the money has not trickled down to the Bedouins or the local economies. The number of jobs is not growing, and tribe members still cannot get jobs. When Mubarek was President, he took and sold large tracts of the region. Even though the Bedouins had legally owned their lands, the land was sold, nonetheless. Not only did the Bedouins lose their land and their homes, but in losing their farmland, the Bedouins also lost their way of making a living. Further, they did not get any of the money from the sales, leaving them completely bereft (Gerges, 2012).

Given that the Bedouins now live-in poverty with very little access to jobs or even to modes of survival, they must do whatever they can to survive. They perceive that harvesting and selling organs is part of a fight for survival. The Bedouins smuggle arms to Gaza, as well as goods. They help smuggle immigrants who come up from Africa and Egypt and who wish to go to Europe. They grow marijuana and heroin. The area is now a haven for jihadists, soldiers of fortune, and criminals (Gerges, 2012). Tunnels that were used for smuggling food and arms still exist in an area that was once home to Hamas and the Palestinians. The tunnels serve as a conduit for modern crime and smuggling (Gerges, 2012). Many of the Bedouins still support Hamas and similar groups.

From the perspective of survival there is little difference between the Eritreans and the Bedouins; the Eritreans chose to leave Eritrea and became captured prisoners, but the Bedouins chose to stay in their area and they too are essentially prisoners. Both groups seek other ways to survive., there is little difference in the conditions facing the Eritreans and the Bedouins. The Eritreans largely chose to flee Eritrea, while the Bedouins chose to remain in their area and seek alternative means of survival. The ways of trying to survive have caused clashes between the groups, but the conditions and reasons that led to the clash are certainly similar.

The map in Figure 1 shows the location of the countries under discussion. To get to the Sinai, on the way to Israel, refugees from Eritrea must travel through the Sudan to Egypt. From Egypt, the refugees travel through the Sinai and into Israel, assuming they are fortunate enough to be able to survive the final portion of the trip. Given the rural nature of the area, combined with desperate tribal groups that patrol the desert, refugees face a great many challenges. The trip is approximately 2564 km from Ethiopia to Israel, or 1593 miles. The road trip, assuming a fairly straight line of travel, would be 22 hours by vehicle; a healthy individual with plenty of food and water can walk 5 to 10 miles a day, leaving a trip on foot that could take from 159 to 319 days.

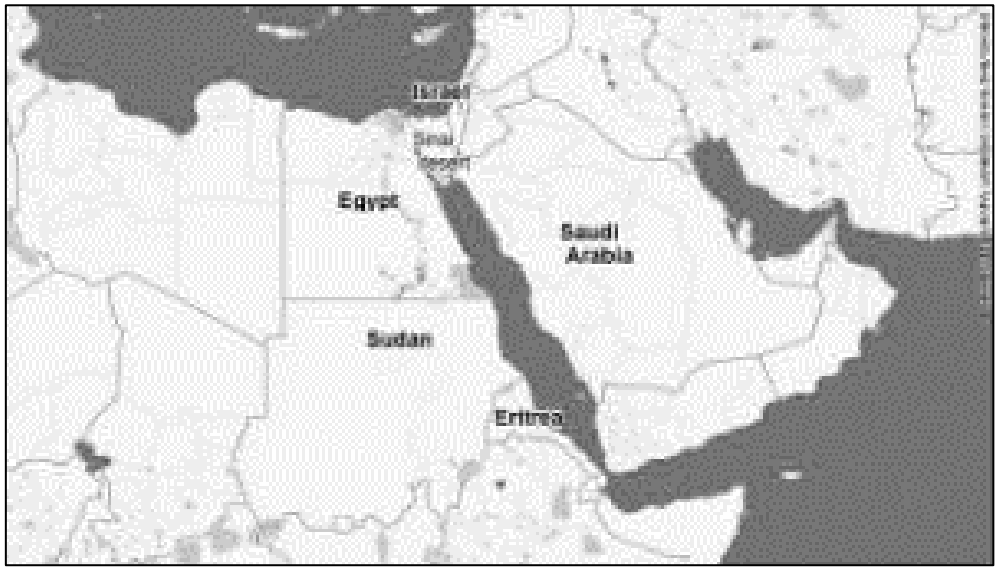

Figure 1. Map of the Region (Source: CNN 2011)

During this travel time, refugees are essentially unprotected. As discussed earlier, even if they have hired someone to guide and ostensibly protect them, these individuals are not safe; they can easily be waylaid and kidnapped by a group intending[16] to use them for purposes of human trafficking, including organ trafficking. Refugees who are captured must pray that their families will gather the money to free them.

[16] Whether the intent is manifested before or after the group is waylaid and kidnapped is irrelevant; the key is that they group would not be stopped and captured if there were not nefarious purpose.

Within the last decade, the media has reported that immigrants in the migration corridor from Eritrea to Israel[17] are afraid that they will be kidnapped and will lose organs and/or body parts. Empirical information is very difficult to locate, and much of the data that can be found is conflicting. Even the World Health Organisation produces materials that conflict not only with other materials that they have produced, but also clash with materials from private humanitarian agencies. In general, humanitarian agencies estimate the numbers of illegal organ thefts to be far higher than do governmental agencies. There is a great deal of information relating to organ transplants and even to illegal organ sales, but little research relating to human organ trafficking. The emphasis seems to have been on how many sales of organs are illegal, rather than on where the organs are being 'sourced'.

This lack of investigation indicates a serious problem, particularly when the situation is observed with a wholistic perspective. Because of the political machinations of actors in the area, mass forced immigration occurs; criminal elements take advantage of the weakened nature of the individuals migrating, and humans end up being trafficked. Some of the individuals are trafficked for purposes of prostitution; others are trafficked for slave labour; others are trafficked for organs. Some unfortunate individuals, particularly women, are trafficked in all three categories.

At this point, most people are aware, at least to some extent, of the possibility of human trafficking, particularly of women and girls for prostitution, and regardless of the global region. Less well known is the trafficking of humans for slave labour, or for the illegal harvesting of organs. While the United Nations, the World Health Organisation and various national level organisations are beginning to accept that people are being trafficked for organs, but there is a great deal of need for additional research.

3.3.1 Development of International Legal Concerns

The term 'forced migration' is a relatively recent term. The International Association for the Study of Forced Migration (IASFM) was founded in 1994 to form a community of individuals to study the issues of forced migration, develop the process of formulating better policies, and administering refugee programs. The organisation

[17] For all practical purposes, immigrants or migrants in this area are victims of forced migration.

also serves an educational function. According to the IASFM (2019), the problem has become more pronounced since the Cold War ended.

The United Nations Refugee Agency (UNHCR) argues against the use of words referring to 'forced migration'. They point out that at the international level there is no consensus or legal definition of the word 'migrant'. They explain their argument thusly:

> The 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families defines the term 'migrant worker'. See also Article 11 of the 1975 ILO Convention Concerning Migrations in Abusive Conditions and the Protection of Equality of Opportunity and Treatment of Migrant Workers (No. 143) and of the 1979 ILO Migration for Employment Convention (No. 97); as well as Article 1 of the 1977 European Convention on the Legal Status of Migrant Workers. (UNHCR 2016, note 1).

Still, the agency acknowledges that some agencies and policymakers, as well as international organisations, do use the word 'migrant' in a way that will cover both the categories of migrants and refugees, as well as asylum-seekers. The issue, they assert, is that using this term is very confusing to lay people. The confusion, they suggest, could delay the awards of aid or slow down the process of getting help. When people hear the term migrant, they argue, they believe that the migrants are moving voluntarily. Since refugees and migrants have completely different rights, using the terms interchangeably can confuse the issues immensely (UNHCR, 2016).

UNHCR uses the term refugees for people who are "outside their country of origin because of feared persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require 'international protection'." (UNHCR 2016, #2). UNHCR uses the terms *perilous* and *intolerable* to describe the conditions that these individuals have been submitted to. It is too dangerous for these individuals to go home and thus they are applying for sanctuary; to deny sanctuary may be fatal.

Individuals who fall into this category are protected by a group of laws and actions referred to as "international refugee protection" (UNHCR 2016, #3). In short, these individuals need extra help to be safe, but they are not getting it from their own nation. UNHCR (2016) point out that the Universal Declaration of Human Rights states

that everyone can seek asylum, but the term asylum was not defined until 1951 in the Convention Relative to the Status of Refugees. A number of legal documents helped to hone the definitions of asylum, including the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. These documents, taken together, establish rights and obligations of refugees, while establishing the principle of *non-refoulement,* or the rule that refugees cannot be forced to return to a situation where their lives would be endangered, or the likelihood existed that they would be incarcerated.[18] The principle of non-refoulement is considered to be the basis of protection and treatment of refugees.[19]

3.3.2 Problems with Definition of Terms

The argument has been made that the 1951 Convention is no longer current given the sociological circumstances today. UNHCR (2018) argues that the Convention is still accurate and still a key instrument of human rights. The problem with protecting refugees, the UNHCR asserts, is not the Convention but rather is requiring that the states comply with the provisions of the Convention.[20]

It can be difficult to know how many migrants or asylum seekers there are in any area at any point; the organisations which collect the statistics may well use different definitions of 'international migrant' (UNHCR 2018). This is another reason the UNHCR suggests that organisations stick to the definitions of terms that it advises. The UNHCR may not be keeping up with the times, however; while they concede that there can be a number of reasons that people might choose to migrate, they state emphatically that if people are experiencing "natural disasters, famine, or extreme poverty" (UNHCR 2018, #6) then these individuals are *not* considered refugees under international law and would not have the protects refugees enjoy.

[18] At the time of this writing, in the United States President Trump has been denying migrants and refugees the right to apply for asylum. The United States Supreme Court has ruled that his actions are appropriate until they make a final ruling. Their decision that Trump can refuse to accept applications for asylum is based on the idea that if a refugee has passed through other countries on the way to their target nation, they should have applied for asylum in the nation they landed in. This ruling means that refugees from Eritrea would have to apply for asylum in the Sudan if the rule were applied internationally.

[19] By requiring migrants and refugees to return to one of the countries they have passed through on the way to the United States, President Trump would not be violating the principle of non-refoulement, which would only apply to the refugee or migrant's home nation.

[20] Based on this comment it would not be surprising to see international law challenge of humanitarian law on asylum against the United States.

The UNHCR does assert that migrants are protected by international human rights law, law that stems from "their fundamental dignity as human beings" (UNHCR 2018, #7). Still, they insist that there is a profound difference between migrants and refugees and argue that the term 'forced migration' simply does not have a place in legal terminology. However, people traveling together may be a mix of refugees and migrants. They suggest using the term *mixed movements*, *mixed flows*, or *composite movements* to describe groups of refugees and migrants travelling together. They argue that the use of the term *mixed migration*, which is also frequently used, is only going to confuse people and needs to be avoided (UNHCR 2018). The term *mixed migrant* is even more strongly refuted. Finally, the UNHCR states that whether or not one is a refugee or migrant is determined by their country of origin, and not by leaving one host nation to go on to another one.[21]

3.4 Historical Background of Humanitarian Intervention and Human Security

There is to some extent a clash between the definition of trafficking and the operationalisation of the term. For example, the International Labour Organisation (ILO) has pointed out that there is international debate over whether or not the term of trafficking requires involvement of someone who is being moved and recruited, or whether the trafficking only involves the process of exploiting the individual at the end of the journey. They have also pointed out that many people are confused as to whether or not trafficking for exploitation has to involve coercion (Makisaka 2009). There should, however, be no confusion; the language in the Palermo Protocol and the United Nations Convention against Transnational Organized Crime (UNODC, 2000b) is very clear when it states "The consent of the victim of trafficking in persons to the intended exploitation set forth in the subparagraph (a) of this article shall be irrelevant" if the person is recruited, given transportation, transferred, or kept, or if an individual receives the person from someone else, if there have been threats of use of force, or of being kidnapped; or if there is fraud or deception". Further, if the person doing the recruiting is in a position of power over the person being recruited, or if there is an abuse of power, then the person is exploited. If the person doing the recruitment gives the payments or some type of benefit to someone who legitimately controls the recruit in order to get their consent (for example, a parent, guardian, uncle, or boss), it is

[21] Based on this assertion by the UNHCR, their interpretation of policy differs dramatically from that of the United States.

exploitation. Exploitation can include a number of fields: prostitution, any type of sexual exploitation, forced labour or services, slavery or anything resembling slavery; servitude, or the removing of the recruited person's organs (UNODC, 2000b). Further, The UNODC establishes that "recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation" is trafficking, regardless of any other circumstances (UNODC 2000b, 1). For this purpose, a child would be any human under the age of 18 (Makisaka 2009).

In the context of such clarity, exploitation of a person which amounts to trafficking is multidimensional. Human trafficking in this case is clear. What however remains problematic and very difficult to pin down is organ trafficking. In other words, given the clandestine nature of the process as well as the consent that sometimes accompany it, the nature of exploitation inherent in organ trafficking is difficult to establish. Organ trafficking remains poorly understood and has in most cases been permeated by sensationalism and extremism (Meyer, 2006). Fully comprehending and understanding the key processes of organ trafficking especially the exploitation aspect of it is very difficult given the dynamism and fluidity or the shifty modes in which the crime manifests. Thus, regardless of where it takes place, organ trafficking involves a lot of different activities which have made it very difficult to fully understand the exploitation aspect of it.

3.5 International Community: Refugees of Eritrean/Ethiopian Conflict

Although Eritrea has not existed very long from a legal standpoint, its history has been checked with instability, violence, conflict, war, poverty, and a very poor economy (Mekonnen and Estefanos 2011). Once Eritrea was determined to be an independent nation, the mass exodus from within its borders stopped, but since the border crisis in 1998-2000 the situation once again reverse, with forced migration reflecting the worst political crisis in the nation's fight for independence (Mekonnen and Estefanos 2011).

After 2009 human trafficking increased exponentially, exposing thousands of Eritreans to acts of abuse, including abuse from Bedouin organ traffickers in the Sinai Dessert. It was only in the year 2010 that human rights workers and reporters who were working with refugees identified illegal organ harvesting, particularly by Bedouin tribes, as being an emergent issue. There is little disagreement that the Sinai Desert that

borders Egypt and Israel (see Figure 1) has become a centre of human trafficking. The incidents of illegal organ harvesting and sexual torture, however, came as a surprise (Mekonnen and Estefanos 2011). The conditions that led to human trafficking and organ trafficking in the Sinai were discussed earlier in this paper; this section concentrates on the violations that have been occurring to the Eritreans who have chosen to travel through the Sinai.

Sawa, a village in Eritrea in the west, is the home of the biggest military training camp in Eritrea. Mekonnen and Estefanos (2011) believe that the high rate of militarism is the major cause of forced migration as well as being a starting point for human rights violations. When Eritreans are forced into military service, either in the Eritrean army or at the Sawa Training Centre, they frequently become victims of human rights abuses.

Both males and females are forced into military service; it is for an indefinite period, and it is rare to find anyone under the age of 50 who is allowed a legal exit visa (Human Rights Watch, 2009). The Central Intelligence Agency of the United States (CIA) (CIA, 2019) lists the official service length as being 18 months, but from a practical standpoint, most individuals are not released at their end of service. While it may sound as if conscription would mean a guaranteed income, this is not necessarily true; the wage is only a survival wage; it is not a large enough wage if the soldier has a family. When students reach the 11th grade, they are placed in Sawa Military Camp; in this way, they start their military training, and the government has little difficulty locating inductees who might otherwise be hard to find. Fessaha (in Shani, 2018) states that at the present time, individuals are expected to serve until age 50, an age confirmed by Gittleson (2012). Individuals who do try to evade service are put in prison with political prisoners and religious prisoners, and are subject to torture, forced labour, and degrading treatment.

In determining why Eritrea has so many citizens that seek to escape its borders it is helpful not only to consider the issue of indefinite servitude to the military, but also to consider the state of the nation as a whole. The CIA, which updates its information regularly, is able to provide information that is illuminating. The natural hazards are severe and include droughts, earthquakes, volcanoes, and swarms of locusts. The States

is plagued with deforestation, desertification, erosion, and overgrazing. The CIA classifies it as a "persistently poor country" that has severe food shortage (CIA 2019).

The country is also rated at high degree of risk for major infectious diseases, including bacterial diarrhea, hepatitis A, and typhoid fever, as well as vector borne diseases such as malaria and dengue fever. Besides the droughts and lack of arable land (only 6.8% of the country), the country also has a severe lack of farmers due to a combination of required military service and displacement. Since the government prioritises military spending over food production and its poor foreign exchange, food insecurity is a tremendous issue (CIA 2019). Despite governmental efforts, the exchange rate fluctuates, and very little hard currency is available. While the adult obesity rate is one of the lowest in the world (183) at 5%, the percentage of children under age 5 who are underweight is one of the highest in the world (second place) (CIA 2019).

The inflation rate is high (9%), the public debt is more than 131% of the gross domestic product (GDP), unemployment is high, half of the population is below the poverty line, and the country has a high rate of import relative to exports. Less than half of the population has electricity, and the country has no oil reserves, refined petroleum products, or natural gas. There are very few landline phones, very few cell phones, and only 2% of the homes have internet service. The government controls the media.

The CIA has commented, however, that "reliable statistics on Eritrea are difficult to obtain," which is not surprising given the state of the nation. It has also flagged Eritrea for trafficking in persons, with the comment that many of those trafficked are trafficked domestically. This is a reference to the conscription program for the army, that is frequently abused. The state department does note that Eritrea is a Tier 3 nation: it does not comply with international standards for elimination of human trafficking and will not make an effort to do so. Further, the government will not investigate reports of trafficking, nor will it prosecute traffickers. While the government hosts events to raise consciousness about trafficking and puts out posters, it does not seem to understand what the crime really entails. The CIA commented that the nation seems to think that human trafficking and transnational migration are the same thing. Eritrea has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations

Convention against Transnational Organized Crime, but has thus far not signed the Protocol.

The CIA (2019) has revealed that organ trafficking is becoming a problem for Eritreans:

> In the last few years, Eritreans have increasingly been trafficked and held hostage by Bedouins in the Sinai Desert, where they are victims of organ harvesting, rape, extortion, and torture. Some Eritrean trafficking victims are kidnapped after being smuggled to Sudan or Ethiopia, while others are kidnapped from within or around refugee camps or crossing Eritrea's borders. Eritreans composed approximately 90% of the conservatively estimated 25,000-30,000 victims of Sinai trafficking from 2009-2013. (CIA 2019, Demographic profile).

3.6 Trafficking in the Sinai

Medonnen and Estefanos (2011) conducted a great deal of field research into the issues of the region, including interviewing over 100 victims of human trafficking. Their research, conducted using open-ended narratives, yielded a great deal of informative but disturbing information. The two researchers interviewed several children as well as adult males and females. According to Medonnen and Estefanos, the individuals they interviewed (over the telephone) were still being held hostage by the Bedouins in the Sinai.

Medonnen and Estefanos (2011) reported a general pattern: the individuals were seized and tortured for extortion. The women were normally raped multiple times by the traffickers. In some cases, the victims' organs, especially kidneys, were removed to be sold by the traffickers. When the unwilling donor victims died, they were simply dumped in the desert, where they either decomposed or were eaten by animals. As Mohamed Rashid, the Bedouin tribal leader discussed earlier, reported, some of the victims were simply dumped into mass graves. This is a general pattern of victimisation that Medonnen and Estefanos (2011) reported. "Eritrea has become a most important case study in showcasing how a combination of excessive militarism, authoritarianism and social anomie, can lead to a speedy fragmentation of societal fabrics and state apparatus," according to Medonnen and Estefanos (2011: 8). In order to keep Eritrea

from failing completely, strong steps need to be taken immediately. As long as Eritrea's government does not acknowledge that trafficking even exists in Eritrea, the population will be endangered as well.

The Eritrean government has undoubtedly been complicit in some of the problems that its citizens are facing. In the 1990s, female ex-freedom fighters began to leave Eritrea and go to the Middle East as domestic workers. The exodus was stimulated by the government, which literally demobilised its ex-freedom fighters without regard to how they might be affected or whether or not their human rights might be violated. With no support from the government, many of them took up commercial sex work or agreed to go to the Middle East as household workers. These workers ended up being poorly treated and even abused (Medonnen and Estefanos, 2011).

While the international governmental report reflected that both men and women were leaving Eritrea "voluntarily" to go to Yemen, the United Arab Emirates (UAE) and Bahrain, these individuals were entering involuntary servitude. In many cases they worked very long hours for little pay, their employers took their passports, they were forbidden from leaving the home in which they were employed, they did not receive wages (even low ones) and they were abused mentally, physically or both. There were reports that women from Eritrea were sent to the UAE as part of a prostitution ring, with many of them recruited for prestigious or respectful jobs but then forced into prostitution or domestic work (Medonnen and Estefanos, 2011).

At least one high ranking government official in Eritrea admitted that the migration of many of these workers was "facilitated" by the Labour office. The official admitted knowing that the conditions were coercive, and that the debt would be excessive; the women were, in fact, forced to pay recruitment and transportation costs that far exceeded what they could afford. In addition, they were forced to pay return costs in advance, should they decide to return to Eritrea. The net effect was to make it nearly impossible for the women to go anywhere. The Labour Office also admitted that they had advised the women migrants that they would have their movements restricted and be forced to work excessively long hours, but they told the women that these conditions were acceptable because it was an effort at lowering unemployment. The United States also found a female victim of this employment scam that had been held

against her will, captive, in a trafficker's home for twelve years (Medonnen and Estefanos, 2011).

The combination of war, conscription, and HIV/AIDS cases left large numbers of children homeless, parentless, and on the street. Child prostitution was the inevitable result, along with begging for money and working as bar maids. Members of the UN Peacekeeping force stationed on the border were reported to be purchasing sex services from both women and children. The army also took children as soldiers. The treatment of children as cheap labor was ubiquitous. In one notable case, the Eritrean government served as traffickers for child jockeys, who were then sent to the Gulf states under cover of Eritrean diplomatic passport (Medonnen and Estefanos, 2011).

The number of individuals who are reporting actions of organ traffickers is rising. Much of the evidence is anecdotal, however. Organs must be treated carefully in order to be viable for buyers. Thus, it appears that medical personnel must be involved in the process. The organs are removed from their owner, and the organs are preserved under refrigeration to ensure a longer span of viability. In one case, a doctor died in crash and police discovered a number of mini refrigerators in the doctor's vehicle, containing human organs. This was documented by news sources, and certainly suggests that trafficking was involved.

Saleh and Samir (2011), workers with Youm7 News, were told that when migrants' bodies are discovered, over half of them are missing organs. An activist who washed and shrouded bodies stated that the "kidney, liver, cornea, and sometimes the heart" were the most likely to be harvested. Once the organs are preserved and stored under refrigeration they are smuggled into Egypt and the buyers deposit money into hospital accounts. Saleh reported that more than once, these hospitals' licenses had been pulled.

The worst forms of human trafficking take place in the Sinai. The strip between Sawa and the Sinai is an epicentre of death and torture. Fisseha (2015) presents an interesting hypothesis, however. He suggests that:

> …it is possible that the traffickers themselves may believe they are merely providing for the continued existence of tribes that would otherwise have little

> opportunity to survive in a region that is destitute of jobs and resources. (Fisseha, 2015: Abstract)

Fisseha (2015) makes a very cogent point, one supported by other analysts throughout this document: slavery has never died, it has merely changed forms. Human trafficking has also existed for numerous generations, if not from the time that humans evolved upon the world. Human trafficking has increased as the world has become more globalised. Today, the labour market is severely imbalanced; there is political upheaval all over the world. Governments are in transition, the levels of human migration are increasing, and the economy that has evolved on a global basis do not make a distinction between products and even services that are illegal, or ones that are illegal. At the same time, evolving criminal networks can be so complex and convoluted that it is difficult or nearly impossible to determine which individuals and companies are corrupt, and which ones are merely innovative and forward thinking (Albanese, 2007:56). In a similar fashion, unless there have been rumors of organ traffickers in an area, refugees might have no concept of commoditisation of their organs in lieu of merely accepting payments for 'safe travels' in the Sinai Region. This highlights a very troubling consideration of the medical and social critiques discussed in Chapter One, relating to reality that evolves from what is essentially fiction.

3.7 Summary

In Chapter Two, humanitarian intervention of the international community was considered. The history of Eritrea and how it intertwines with Ethiopia was reviewed, along with Haile Selassie's reign and the terrors of Mengistur Haile Mariam. A political review of Eritrea was conducted, and the legalities of the terms of forced relocation were considered in an effort to develop the background required to answer the research questions. The course of refugees travelling through the Sinai was considered, along with international legal concerns. Trafficking in the Sinai was summarised. The development of the conditions that led to human trafficking and organ trafficking was explored at length, and complicity of the government of Eritrea was suggested.

In the next chapter, treatment of refugees in the Sinai, and particularly the legal interventions and considerations, will be investigated. In particular, the responsibility to protect (R2P) will be treated.

CHAPTER FOUR

TREATMENT OF REFUGEES IN THE SINAI

4.1 Introduction

The chapter discusses the key issues regarding the treatment of refugees who are in most cases victims of human trafficking in the Sinai. The chapter examines these key issues regarding the treatment of refuges in a bid to fully unravel the exploitative nature of their treatment and how the exploitation leads to organ trafficking. It examines the political and social issues which drive and orient the process of trafficking in the Sinai Region. This examination is underpinned by the fact that although the Sinai is part of Egypt which is party to the relevant international conventions and protocols against human trafficking, the Sinai region is inhabited largely by the Bedouin tribes who have their own traditions. This tradition one should note, help shape the political and social context of the region which in the end have ramifications of how refugees are treated.

The importance of this chapter is in demonstrating that although international conventions against human trafficking and the general ill-treatment of human beings do exist and Egypt is party to some of them, the way refugees are treated in the Sinai Region goes contrary to what is enshrined in these instruments. The chapter thus demonstrates the ways in which the treatment of refugees in deviate from what is stipulated in the conventions. Efforts and special attention are paid in discussing how the UN's Right to Protect (R2P) principles can be fully understood and applied in the context of the ill-treatment of refugees in the Sinai Region.

4.2 Degree of Treatment of Refugees *vis-á-vis C*rimes Against Humanity

The OHCHR, established in 1951, was created to protect refugees throughout the world. At the time the OHCHR was established, there were already over a million refugees that it was believed would be handled by the UNHCR. By 2007, when Fact Sheet 20 (OHCHR, 2007) was written, the UNHCR was responsible for over 17 million refugees, and over two million were being taken care of by United Nations Relief and

Works Agency for Palestine refugees in the Near East (UNRWA). An additional 25 million people were defined as being internally displaced. In 50 years', time, the number of displaced individuals had dramatically increased.

Even as the number of refugees changed, so did the demographic of the refugees. In 1951, most refugees were European and were males or males and their families. By 2007, 80% of the refugees were women and children, and were travelling from Africa and Asia. In the past, refugees tended to travel individually; by 2007 they were travelling in groups or waves (OHCHR, 2007). One of the biggest problems relating to the mass exodus in 2007 was that most of the refugees did not meet the legal definition established in the Convention to define Status of Refugees. In 1951, refugees were largely victims of persecution, typically for reasons of race or politics. By 2007, refugees largely did not fit the established definition of "victims of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion" (OHCHR, 2007: 1). As in 2007, the 2019 refugees are fleeing natural and ecological disasters, as well as searching for a much better economic situation.

In 2018, Eritrean activists described the treatment of refugees who travelled through the Sinai as being "some of the greatest crimes against humanity in our time" (Shani, 2018: title). An Eritrean doctor, Alganesh Fessaha, who founded the Ghandi Charity aid organisation, reported that rape was literally ubiquitous; women, children, and little girls were raped. Family members were forced to have intercourse with other family members. Fessaha described the action of captors as treating the captives as if they were sex dolls and acting as if they were filming porn (Shani, 2018).

Fessaha reported that the worst of the actions were taken against Eritrean refugees who were trying to cross the border to get into Israel (in Shani, 2018). As described earlier in this paper, and illustrated with a map, the distance from origin in Eritrea into the border of Israel was an extremely long chain. In order to get from Eritrea into Israel, the refugees paid Sudanese Bedouin smugglers, who promised them they would reach the safety of Israel.[22] Instead, Bedouins in Sudan sell the refugees to

[22] This is, unfortunately, a behavior that takes place all over the world when dealing with refugees: they typically pay a native of the area an exorbitant amount of money to get them safely to their destination. Arriving safely may, or may not, happen; many of the horror stories from the Americas involve paid escorts who abandoned refugees in the desert.

Bedouins from Egypt. The refugees then change hands a number of times when traveling from Sudan through El Arish and to the border of Israel (Shani, 2018).

At this point, some of the refugees are murdered; others are tortured and held for ransom. Fessaha described refugees being tied up, having boiling plastic dropped on them, being sexually abused in an extreme manner, and being burnt with hot irons. At the height of the torture, the Bedouins call the captives' families and tell them there is a ransom for the release of their loved one. The captives cry and scream, and the family members typically agree to pay the ransom. If they are not convinced immediately, they typically are after several calls. Fessaha alleges that the amounts of ransom demanded began at $1,000 per head but are currently nearing $60,000 per captive (in Shani, 2018).

Many times, families do not have the demanded ransom. At this point, the kidnappers take the captives and sell them to people who are organ brokers. Their organs are removed. A few lucky captives have their organs removed, are sewn up, and may survive. Many of the captives simply have their organs removed and are dumped in the desert (Fessaha, in Shani, 2018). Fessaha also suggests that many Eritreans who make it to Israel after surviving the Sinai are now marked for deportation.

Fessaha also asserts that she was arrested and told she would be killed. She states she was put in a jail cell so narrow that she could only stand and could not sit down. If she fell asleep, she would be hit with a baton on her lower legs to wake her. Fessaha pointed out that her suffering was 'nothing' when compared to the suffering of the individuals who were actively tortured and had organs removed. She began a mission to rescue refugees and was able to convince immigration officers in Egypt that the 'illegal immigrants' who had made it to Egypt would be removed to Ethiopia. Fessaha states that over 1,000 refugees were rescued from the Bedouin tribes, and these individuals were sent to Canada and Australia, where they were admitted as refugees. However, she states that thus far they know of over 8.000 people who have been killed in the Sinai and the majority had their bodies cut up and their organs harvested and marketed (Fessaha, in Shani, 2018).

There has been no success in determining where the organs were taken, although Fessaha "assumes" the organs were going to Saudi Arabia. Of the bodies that

were found, the majority were unable to be identified; eventually Fessaha was allowed to bury the bodies that had been dumped in the desert, most of them without any type of identification (Fessaha, in Shani, 2018).

The key point is to understand that these incidences are not isolated; they are organised. Fessaha insists that the Eritrean authorities must be involved, because refugees had to cross the border 10 times between Eritrea and Sudan. People are taken from the crossing in police or army vehicles; thus, the police and army must know what is going on. She asserts that because of the magnitude of the number of deaths, it would be impossible to continue without the Eritrean President, Isaias Afwerki, knowing about it (Fessaha, in Shani, 2018).

4.3 Implications of UN Responsibility Relating to Organ Theft in the Sinai

One of the positions of the United Nations, that all nations have sovereign rights and thus have the rights to control what happens within their own borders, is both a strength and a weakness. It is possible to hypothesise that few nations would have ceded any sort of control to the United Nations if they did not believe that they would be allowed to maintain their own sovereignty. The right to sovereignty is considered so important that it is incorporated in the UN's Charter. No nation is allowed to intervene in domestic issues of another nation (state) (United Nations, 1945).

The United Nations requires nations to protect residents of other nations when they seek help This is referred to as Responsibility to Protect, or R2P. This requirement ties signatory nations to the requirement to protect residents of other nations when they are under attack or when there is some other problem that causes a dramatic loss of life and limb to the residents.

When the United Nations does not require, however, is for nations to protect residents of other states when the organisation or group that the residents or citizens need protection from mis their own nation. State crimes were simply omitted from the long list of situations that signatories agreed to protect residents from. A great deal of international discussion has gone into developing language that would both protect citizens and protect nations' sovereign rights. The situation seems relatively clear when a nation is attacked by another nation; the nations that are signatories to the agreement are duty bound to attempt to protect the attacked residents. However, as Fisseha (2015)

points out, there is a problem: sometimes, attacking a nation is a fiscal goal or process, rather than being related to human rights abuses or acts of war. Sometimes, attempting to protect a nation or populace could make everything worse; other times, residents that are developing their own 'fight back' or independence plan may not wish to be 'rescued'.

When the government of a nation is profiting from the military action or the humanitarian violation, they may not want help for their residents. There is a great deal of discussion that this may be the situation with Syria in 2019. The practical economic application of allowing crime is that local governments inevitably profit. This is particularly so in the case of forced prostitution, human trafficking for employment or conscription purposes, and for organ trafficking or sales. (It must be assumed for the moment that it would be very difficult to determine which organs were voluntarily sold to provide for one's family, and which were being stolen, in a war zone. Based on these assertions, trying to 'help' or protect the local populations will damage the local economy, even if it is based on illegal activities. Fisseha (2015) believes that in an area as poor as the Sinai, there would be such a potential impact that local tribes, even those being harvested or attacked, might not be willing to accept humanitarian aid or police or military intervention.

The Responsibility to Protect has steadily evolved since its adoption in 2005 in the World Summit Outcome Document (United Nations, 2005). The three pillars include the responsibility of every state to protect its own populations, the responsibilities of the international community, and the requirement to take "timely and decisive" actions if a state is blatantly failing to protect its residents.

4.4 Responsibility of State to Protect is own Population

The responsibility of every nation is to protect the individuals who live within its borders. The United Nations refers to this as an "enduring responsibility" and asserts that this responsibility is applied regardless of whether or not the people inside the borders are nationals (United Nations, 2009: 8). The residents are to be protected from war crimes, genocide, ethnic cleansing, and crimes against humanity. Further, the UN states that residents must be protected "from their incitement" (United Nations, 2009:8). This curious turn of phrase suggests that the United Nations had already

become concerned that uprisings within the nations, or fights between peoples, could become a critical issue of survival for some groups. It is also possible that the phrase means 'the incitement of war crimes, genocide, ethnic cleansing, and crimes against humanity." This is a tremendous difference of interpretation; in one way of interpreting, all of the negative actions are coming from outside or from other groups. In the other, the incitement can come from incitement internally, which would imply that civil wars would be included.

This is a tremendous difference, and one which has been discussed in various online forums and academic meetings. Fisseha (2015) notes that the application itself is quite different and may account for some of the international community's reluctance to protect, when it would appear on the surface to be obvious that protection needs to occur[23].

4.5 Responsibility of the International Community

In the Summit (United Nations, 2005), the language asking the nations to take action to protect is firmly established in Section 138, "We accept that responsibility and will act in accordance with it." Further, 138 establishes that the international should encourage the states to exercise their responsibility and to work with the United Nations to develop some type of plan to have an "early warning capability" (United Nations, 2005: Section 138). Clearly the goal was to have a mechanism in place by which the international community could report concerns that they had noticed, prior to the eruption of major activities that might harm the residents. However, there is one phrase which may moderate or change the meaning of the intent. The remaining language moderates the apparent hard requirement to protect by saying "The international community should, *as appropriate*, [emphasis mine] encourage and help States to exercise this responsibility" (United Nations, 2005: Section 138).

[23] Debates regarding the issue of responsibility to protect are fully discussed by Garwood-Gowers (2013). On his part, Garwood-Gowers (2013) discusses the debates regarding the legality and the illegality of the invocation of the R2P principles under resolution 1973 in 2011. Under this resolution, the North Atlantic Treaty Organisation (NATO) was given the mandate to impose a no-fly zone in Libya with the intention of protecting civilians from a possible genocide by the Libyan leader Muammar Gaddafi after a popular uprising against his rule. Though the intervention was a success in overthrowing the Libyan leader, Garwood-Gowers (2013) noted, debates ensued with Russia, China, Brazil and other questioning the parameters of intervention by NATO. The chaos that came after the Intervention by NATO led China, Russia and Brazil to question the legality and even the effectiveness of the R2P principles in protecting civilians.

What is appropriate? Appropriateness would be situationally dependents, and could change from nation to nation, situation to situation. Further, the phrase seems to imply that what might be appropriate for one nation to insert themselves in might not be appropriate for another nation to intervene in. Would intervention be geographically dependent? For example, would it be appropriate for nations in the region to intervene, but perhaps not nations on another continent? At the same time, it could be argued that nations which are more geographically removed might have a more objective view of what is occurring in a nation, and thus whether or not intervention would be warranted. Fisseha (2015) points out that the first pillar of R2P places the main responsibility of protecting residents of Eritrea firmly with the national government of Eritrea. This mandate will be discussed at length later in this paper.

Philosophical questions aside, the international community is required to take action to help endangered populations. The mechanism in place to help these populations is the United Nations Security Council. Prior to intervention by the Council, the requirement to intervene on a non-military basis is invoked. If humanitarian assistance is not successful and capacity building has not achieved the desired ends, then the UN Security Council can gather a force to "help maintain the safety of the State's peoples" (Fisseha, 2015: 21). This is not taken as a mandate to take aggressive military actions; rather, these troops are referred to as a Peacekeeping Force; their goal is to keep the peace and protect the people.

Paragraph 139 of the UN's World Summit outcome (United Nations, 2005) states that collective actions, taken through the Security Council, should be taken:

> …on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (para. 139)

Protection is important, but prevention may be even more so. Nations will never be truly independent if they have not been able to build the capacity that will allow themselves to protect their own populations. While the nations should not hesitate to take military action if it becomes necessary, efforts at non-military assistance and capacity building must be paramount.

4.5.1 Responsibility to take Timely and Decisive Actions

The documentation associated with R2P and discussed here makes it clear that the UN prefers to handle protection issues through "dialogue and peaceful persuasion" (UN, 2009: para. 51). The preference of peaceful persuasion does not always work; at some point, time will run out and action must be taken. How is the time determined? The UN requires timely and decision action even as it establishes that "non-coercive and non-violent response" must take place first (UN, 2009: para. 51).

Early intervention, or dialogue through 'peaceful persuasion', can include a number of steps that will convince the state to take its required action. The UN can also take non-military steps to further encourage the state to protect its peoples. The UN can take non-military interventionist steps without asking permission from the Security Council. The Council, however, can take steps of its own; they can launch a fact-finding mission and if the situation warrants, they can appoint a special rapporteur to investigate and perhaps intervene. The appointment of a special rapporteur may actually send a 'message' to the government of the state involved that they are failing to meet the requirements established in R2P. One of the realities is that if the process has reached this point, the state is unlikely comply unless there is some way of enforcing the requirements. The first step to encourage nations to comply is the levelling of sanctions. Too often, however, sanctions do not work, and the level of 'encouragement' must be upped.

If a state has not responded to sanctions, it may be necessary to refer the matter to the International Criminal Court, especially if incitement has occurred. The prevailing guidance at this point would be the Rome Statute. There may be benefits to having the message delivered in person as it is less likely to be ignored. Unfortunately, many times in the past the United Nations has failed to pursue the reporting by other nations that mass murder or genocide may be on the slate. The United Nations (2009) pointed out that many years ago, the Khmer Rouge in Cambodia began to call for cleansing of the social system. Inciters used the radio system to urge residents to 'purify' what they referred to as "masses of the people" from Cambodia (UN, 2009: Para. 54). In the early part of the 1990s, similar incitement took place in the Balkan Islands; in 1993 and 1994, the same pattern was established in Rwanda just prior to genocide. During this time, the special rapporteur and the Assistance Mission of the

UN had notified the UN that this type of incitement was occurring, specifically on Radio Mille Collines. However, their cautions were ignored. The United Nations relied on the individual nations to take 'timely and decisive actions' to protect, and the nations failed to do so. The same tragedy occurred late in Darfur, Democratic Republic of the Congo, and Somalia. Later, the same situation began to develop in Cote d'Ivoire and Kenya. This time, the UN reminded community leaders and political leaders in these areas that they could be prosecuted if an investigation revealed that people in the area were violating international law and they were inciting it or allowing these inciters to continue their actions.

One of the more interesting points of A/63/677 (UN, 2009: para. 55) is that incitements, by their nature, are public. They are not kept quiet; they are a call to arms. Thus, these actions should be easy to identify, and determining who is conducting the activities should also be possible. Once the individuals behind the incitement are revealed, in theory it would be possible to gain support for stopping the action, on an international level. The UN (2009) also pointed out that if there are Peacekeepers in the area or if a neighbouring country will allow it, or there is some way of broadcasting from offshore, then messages of incitement could be countered with the broadcast of positive messages and messages urging the people to resist, as well as providing information on who can help and how.

These types of broadcasts have been central to successful campaigns since the invention of the radio. Hitler was able to use radio broadcasts to his success, and Iva Toguri D'Aquino held thousands of Allied soldiers enthralled with her broadcasts during World War II. Mildred E. Gillars, or Axis Sally, conducted Nazi propaganda broadcasts, while D'Aquino, or one of the women known as Tokyo Rose, broadcast propaganda that she later insisted was sarcasm and intended to uplift soldiers (Biography, 2019). Their broadcasts were countered by American propaganda broadcasts and the Allies attempted to jam their radio signals. The point is, however, that action was taken; they were not allowed to broadcast with impunity.

Eventually, D'Aquino was pardoned by US President Gerald Ford, and her US citizenship was restored based on the discovery that those testifying against her had committed perjury. Gillars, as well as D'Aquino, served their time in US jails and both remained in the United States, their home countries, until their deaths. Both Sally and

Rose concentrated on making soldiers feel homesick and encouraging them to dessert and go home, or at a minimum to be so distracted they were a danger to themselves and others on the field. Gillars' conviction was not overturned; D'Aquino's attention was overturned after she served it. The television show MASH presented a depiction of Tokyo Rose's broadcasts, suggestion that Tokyo's broadcasts reminded soldiers of what they were fighting for, rather than demoralising them. The show also implied that Tokyo Rose was passing coded messages to Allied commanders and serving for the Americans, something that D'Aquino argued later. Their information is presented here to show that this type of propaganda has been in use for many years, and the idea of counteracting the propaganda rather than merely allowing it to continue has been utilised as long as there has been radio propaganda. Thus, the UN's suggestion to use counterprogramming messages is nothing new, and there is certainly no reason that nations should not use this method as part of counterprogramming propaganda. Still, talk is not an end to itself, and blocking propaganda may well be inadequate. Failing to take additional steps to protect is an egregious crime, and one which should not be consistently ignored.

4.6 Extent of Harvesting Organs from Forced Immigrants in the Sinai Desert

To a very large extent, it is very difficult to determine with any accuracy how many victims of organ harvesting there may be, much less harvesting from forced immigrants in the Sinai Dessert. Any time an issue comes to the forefront of the media and the intersection of media and politics, a chasm evolves between what the academic field accepts as being valid data and what the media reports as true. In the case of organ harvesting, even statistics from the World Health Organization and other official data-gathering agencies can vary widely.

Much of the detailed information in this paper has been garnered from Campion-Vincent (2002), and from Fessaha (in Shani, 2018). Campion-Vincent is considered to be one of the most intense researchers in the field, while Fessaha has worked in humanitarian intervention in the area. Campion-Vincent asserts that the rumors of organ trafficking became in intense in approximately 2009, while Fessaha states that from her personal experience and from what she has witnessed, organ trafficking in this area is a reality, not a rumor. Fisseha (2015) reminded readers that not all trafficking is organ theft. It is possible for organs to be purchased legally in

some nations, and organs can be purchased illegally, but not rise to the level of organ theft. Even though Fessaha (in Shani, 2018) has seen bodies in the desert that are discarded after organ removal, this does not necessarily mean that the organs were stolen. This is a very difficult principal for people in upper socioeconomic circles to internalise; it is, however, a circumstance that would be readily understood by desperate people in the lower socioeconomic areas. As it is frequently stated, desperate people do desperate things. Thus, even if friends and family members believe a relative would 'never do such a thing as sell their organs,' there is no way of knowing if they would or would not.

The only exception to this may be when a body missing its organs is identified as being victim of a kidnapper who held them for ransom. It is not unrealistic to suspect that if the individual was held for a vast ransom and their family could not afford it, then the organs may have used to pay off the ransom. The question would remain, however: Did the kidnapper 'steal' the organ(s), or did the organ's owner (or host body) decide to allow the kidnapper to harvest them to pay off the ransom, hoping desperately to survive? While this may seem to be a moot question, or a minute difference, it is not; and the answer to this question may well provide information that can be used to target organ traffickers not only in the Sinai, but around the world.

The UNODC (2015) has created a toolkit for assessing trafficking in persons, for the purpose of removing their organs. The toolkit provides, in part, dialogues and checklists for interviewing not only potential victims and witnesses, but potential trafficking members and participants. As UNDOC (2015:84) states:

> As per article 3 of the Trafficking in Persons Protocol, the consent of a person to the organ removal is irrelevant where any of the means - threat or use of force, coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving payments or other benefits to achieve the consent of a person having control over another person – have been used.

Addressing this definition, provided in the Trafficking in Persons Protocol (UNODC, 2000a), it appears that the use of power is one of the most important criteria that defines the difference between voluntary and involuntary provision of organs. Regardless of whether the person who provides the organ does so to pay a 'ransom' or

whether the organ was blatantly stolen, the use of force and coercion was involved. The people may have been abducted; fraud was used in either case, as well as deception, and the abuse of power was immense.

The UNODC (2015:84) also pointed out that "giving or receiving payments or other benefits to achieve the consent of a person having control over another person" is illegal. This is an interesting statement, however, as it leaves open the possibility that the individuals who are taking the organ may have been coerced with money in an effort to get them to talk the victim into providing an organ. This suggests that the person seeking to acquire the organs may tempt an individual in control using money to induce them to *take* the organ(s) from the owner(s), regardless of whether the owner will give up the organ voluntarily or whether they are injured or killed in the process.

The UNODC (2015) argues that there are two types of consent involved in organ harvesting, in addition to consent that is either present or not present in trafficking of persons. Clear consent must be provided; it can be written, or it can be sworn in front of some type of official body. However, the person has not given valid consent unless they have unless they have both been provided with information about the procedure and the risks and given time to consider it. The legal standard is that of 'informed consent'. In evaluating removal of organs in a less-than-official setting, the two types of informed consent would be consent relating to the operation itself (the person's health impacts, impact on employability, and survivability of the procedure) as well as consent to consider the evaluation process of the donor themselves. When UNODC officials conduct an investigation, they do so after the organ has been removed. In such cases, the person who lost the organ might not be alive to provide testimony.

The UNODC continues to investigate as many cases of reported organ trafficking as it can. There are numerous cases of human trafficking in the corridor between Eritrea and Israel, but many of these cases involve torture rather than organ theft. If Fessaha (in Shani, 2018) is correct, then these cases of violence are likely precursors of the development into organ theft.

There were torture camps inside the Sinai as far back as 2012. The Bedouins were known to be kidnapping African refugees and torturing them. Gittleson (2012)

investigated the situation in the Sinai for the Atlantic. He interviewed various Africans who had been held as hostages in the Sinai. Ksamet (in Gittleson, 2012), a young woman from Eritrea, stated that she was tortured nearly every day. Her family was told they needed to pay a ransom as $25,000. Each week that the ransom was not paid (while the family and friends tried to raise the money), the level of torture increased. In 2012, the Bedouins had 1,000 people being held captive, and the Egyptian police were holding at least 500 more.

These numbers were provided by an Eritrean activist how had interviewed hundreds of Eritreans who had been held hostage and released. According to the activist, people began migrating through the Sinai in 2006 but at that point they were mainly Sudanese migrants. In 2008, Eritreans began to arrive in the area as well, seeking to find asylum in Israel (Gittleson, 2012). According to Gittleson, one of the first motivations for the mass exodus was mandatory military service until age 40 or 50. Gittleson also pointed out that the Eritrean government had made it nearly impossible for people to leave Eritrea legally (Gittleson, 2012).

Many individuals who were kidnapped and kept in the Sinai were not intending to go to Israel. While a minority of the travelers had given Israel as a final destination, the majority were headed for areas that were nowhere near the nation. In Ksamet's case, she and her fiancé, both of whom were fleeing military service, intended to go to Khartoum. Instead, they made it to within a dozen miles of the Eritrean border when the smugglers paid to help her sold her to Rashaida tribal members. The Rashaida tribe of Sudan and Eritrea had a reputation for running both people and weapons up the coast of the Red Sea. Ksamet's fiancé escaped; she did not (Ksamet, in Gittleson, 2012).

Tortures applied to those kidnapped included electrocution, being burned with plastic, being hung by the air, being raped, being burned in the genital area, and being sodomised with heated objects. Captives who still failed to comply were treated with having their organs harvested. Gittleson (2012) reported that the Bedouins typically hold their captives for months; many of the captive die and are thrown into the desert. It is estimated by refugee organisations that over 4,000 died between 2008 and 2012 (Gittleson, 2012). Gittleson also reports that 84% of the Eritreans who ask for refugee status achieve it, but in general, Egypt and Israel will not allow Eritreans to even apply. The reason for this is both political and economic. Egypt considers Africans in the sub-

Saharan region as being migrants seeking a better economic status, while Israel has declared that Eritrean migrants are "infiltrators" (Gittleson, 2012; Estrin, 2018). Infiltrators are individuals with few skills, who are a drain on society, and who will disturb the nation of Israel's Jewish culture.

Their suspicion of these migrants notwithstanding, over 57,000 people from Eritrea and Sudan made it into Israel and were allowed to stay. The majority arrived between 2008 and 2012. Approximately 20-30% of these individuals had been tortured in the Sinai. When the Israelis decided to close their borders, the Israeli military was directed to only let individuals into the country who had signs of being tortured. In order to stop the heavy immigrant flow, Israel built a fence along the border and codified law that would allow detention of border crossers for up to three years – without a trial. According to Gittleson (2012), this was effective in dramatically decreasing the number of individuals who were seeking asylum.

African migrants who have not been accepted into Israel are currently being given the choice of being deported or being put in jail. Any requests for asylum that were submitted for consideration before 2018 will be considered, but single males who either had asylum denied or who never submitted an application are being ejected or jailed (Estrin, 2018). Individuals being deported will receive a one-way plane ticket and $3,500 USD in cash. Israel made a public announcement that the individuals would not have to go back to their home nations. Instead, the country asserted, the deportees would be sent to a country "that in the last decade has developed greatly and absorbs thousands of returning residents and immigrants from various African countries (Estrin, 2018: para. 12). Migrants who left voluntarily would be allowed to keep any money they made in Israel. Migrants who would not self-deport received less cash and were not allowed to keep money earned in Israel.

If, as the migrants allege, the deportations are based as much on skin color and socioeconomic status as anything else, the deportation plan hints at discrimination and future genocide. It is a difficult situation, because most countries agree that nations have the right to set their own 'standards,' but disagree with Israel's standards. From a practical standpoint, the Israeli plan may not work; if potential deportees are allowed to choose jail over relocation, the jails will immediately fill (Estrin, 2018). One also

wonders if placing migrants in jail, without a trial, for an indefinite period, would meet the requirements of international law.

As discussed earlier, one of the greatest problems with determining the extent of organ trafficking from forced immigrants in the Sinai region is that it is very difficult to prove that the alleged trafficking is occurring. Van Reisen and Rijken (2015) have conducted extensive research on this topic and determined that there is no doubt that torture and mistreatment occurs, and that captive are *threatened* with organ removal. Egyptian television YOUM7-TV produced a documentary broadcast that included photographs purported to be linked to organ trafficking. In December of 2011, that broadcast was converted to an article in the Egypt Independent. The article stated that in order for organs to survive removal, the attendance of medical staff was required. This, in turn, implies that the medical teams either had the permission of the government, or the government was looking the other way. It simply is not practical to assume that organ transplants could occur in any other way. This contention was supported with an article by Pleitgen (2011) which cited that there were evidence bodies without organs were being dumped in the Sinai.

Pleitgen's work, along with Fesseha's (in Shani, 2018), the television documentaries, was enough for CNN to produce a documentary which was later awarded for investigative coverage of organised crime. This in turn attracted the attention of the Parliament in Europe, which issued the European Parliament resolution on Human trafficking in Sinai, in particular the case of Solomon W. (European Parliament, 2012). This resolution is contained in its entirety in Appendix A. It is of particular interest because, again, *there was no evidence that human organ trafficking occurred*. Rather, there was only the word of Solomon W. Yet the European Parliament believed Solomon W., and issued a resolution on Human trafficking and for Solomon's protect (European Parliament, 2012).

4.7 International Assistance of Refugees from Eritrean/Ethiopian Conflict

Fisseha (2015) points out that the first pillar of R2P places the main responsibility of protecting residents of Eritrea firmly with the nation (i.e.., the government of Eritrea.) However, as migrants travel through additional nations, the governments of those nations become responsible for the safety of those within its

borders. Thus, refugees from Eritrea would fall under the protection of both Eritrea and Ethiopia. As the refugees continued to travel, their safety and need to be protected would be expanded to each of the nations they traversed. This requirement will be discussed at length later in this paper.

4.8 Discussion

At some point, to allow organ harvesting to continue would be to fail in the international responsibility to protect (R2P), and this consideration is carefully reviewed. Using sanctions is not always adequate; travel to and from the country can be blocked, and financial transfers intercepted. The trade of luxury goods can be prevented, and the flow of arms can be restricted. Police equipment, which could easily be used against civilian residents, should be considered. If the regime of the nation involved is an authoritarian one, the sanctions would need to be applied early in order to impress the gravity of the situation on the regime, as well as to make the regime leaders reconsider the idea of acceleration or escalation (UN, 2009: Paras. 57 and 58).

4.9 Summary

In the foregoing chapter, the treatment of refugees who travelled through the Sinai was discussed. What happened to these refugees was considered, from rapes and beatings to organ thefts. The implications of the UN's responsibilities relating organ theft in the Sinai was considered. The clash of the responsibility to protect with the right to national sovereignty was considered, and the responsibility of the international community was reviewed. The development of 'early warning capability' was established, along with the appropriateness of encouraging the States to exercise the responsibility to protect those inside their borders, in part by spotting warning signs early. The reality that when dialogue and peaceful persuasion does not always work was explored, as well as the requirement to take action even when there is little opportunity that peaceful intervention will work.

It was established that it is very difficult to determine the extent of organ harvesting from forced immigrants in the Sinai. The division between media reports and academic rigor was discussed. The toolkit developed by UNODC to be used in

assessing trafficking in persons for the purpose of organ removal was reviewed, and the basis of force, coercion, deception, and fraud in human and organ trafficking was considered. Violence and torture as a precursor to organ theft was introduced. In the case of Eritrean forced immigrants, the importance of sociological features of the society, including mandatory military service for an indefinite period of time, were considered in the evolution of being immigrants who are electrocuted, raped, burned, sodomised, kidnapped and held captive, and paying ransom with their organs.

There is a great deal of evidence that people are threatened with having their organs removed, but there is no evidence that the removal occurs other than one or two witnesses. Still, the European Parliament believed this witness, and issued a resolution on Human trafficking and for protection of the witness. Regardless of whether the immigrants have their organs removed or whether they are just being threatened, there is an international responsibility to protect (R2P), and this consideration was carefully reviewed. How and when to apply sanctions is a critical question.

In the next chapter, the concept of crimes against humanity is analysed, as well as how organ trafficking would fit into these crimes.

CHAPTER FIVE

ANALYSIS OF CRIMES AGAINST HUMANITY

5.1 Introduction

Chapter Four is essentially a description of and analysis of crimes against humanity as established in the Rome Statue (1998) as well as the Convention Against Torture and the Convention Against Torture General Comments No. 2.

The vitally of this chapter is to fully explain in great detail the key issues that are relevant to the protection of human beings against crimes such as torture and other inhumane treatments. This explanation is done with the aim of fully understanding crimes against humanity in the context of organ trafficking. A discussion given in this context is important since the key issues discussed in the foregoing chapters on human trafficking and organ trafficking, constitute crimes against humanity. Fully discussing this in great detail in this chapter will help in illuminating the key issues and pillars of trafficking and how it qualifies to be a crime against humanity.

5.2 Legal Definition of Crimes Against Humanity

Part 2 of the Rome Statute, Article 7, provides definition of crimes against humanity. While 11 categories of crimes are defined, a crime against humanity does not exist unless the act(s) are committed as a systemic attack or widespread attack against a particular civilian population, a population which has knowledge of the attack.

The 11 crimes include:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or a forcible transfer of the population[24];
5. Either being imprisoned or deprived severely of physical liberty by violating the basic rules of international law;

[24] Such as the transfer of population that occurred in Nazi Germany, where Jews and other specified groups of people were forcibly placed on trains and transferred.

6. Torture;
7. Rape, forced prostitution, sexual slavery, forced sterilisation, forced pregnancy, sexual violence of great magnitude or gravity;
8. Group persecution based on gender, religion, culture, ethnicity, national origin, race, or political activities, or any other grounds that international laws regard as being impermissible;
9. Forced disappearance of persons
10. Apartheid
11. Inhumane acts which cause great suffering and pain, or serious injury to bodies or to someone's mental health or physical health (Rome Statute).[25]

5.3 Basic Elements of Crimes Against Humanity

The Rome Statute specifically defines the basic elements of the crimes against humanity. The definitions are provided in Article 7 paragraph 2 (Rome Statute). Crimes which constitute what are called crimes against humanity include murder, extermination, and imprisonment or other extreme forms of deprivation of one's freedom in ways that violate key rules of international law. Crime against humanity in this article also include torture, sexual assault or rape, sexual exploitation or sexual slavery. The crimes also include forcing someone into prostitution, forcing someone into being pregnant, forcibly sterilising someone and any other forms of sexual violence. Crimes against humanity also include persecuting a certain identifiable group based in either national, ethnic, political, racial, gender, religious and cultural reasons. Enforced disappearance of a person who might have a different opinion is also regarded as a crime against humanity under this article. Apartheid or any other forms of ill-treatment which will lead to suffering or serious bodily harm, either physically or mentally to an individual constitute what can be termed crimes against humanity. Specifically, paragraph 2 of the Rome Statute explains in great detail these various crimes against humanity.

[25] This section is not an exact quote but is very similar to a-I in Part 2, Article 7 of the Rome Statute. Because the terminology is so specific it is nearly impossible to rewrite it.

5.3.1 Attack Directed Against Civilian Population

An “attack directed against any civilian population" includes behaviours or acts that are referred to in Article 7 paragraph 1 when concentrated on a civilian population. In specific, the Rome Statute defines this attack as referring to State or organisational policies that are “against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack” (Rome Statute, Article 7 paragraph 2 (a)). Under paragraph 2 any attack which will be directed against civilians which will be sanctioned by the State of by any organization constitute a crime against humanity. Attack of civilian population in this regard can be understood from a multiplicity of standpoints. In the context of this study, the enslavement and holding of refugees at ransom can constitute an attack against civilians. In the contexts of state sanctioned violence as seen in the Rwandan case where the ethnic Tutsi were attacked by the Hutu which constituted the majority of the population in Rwanda, such acts qualify to be called genocides or attacks directed against civilian populations.

5.3.2 Extermination

Extermination is any act that inflicts actions that interfere with conditions suitable for life. This would include the deprivation of food access or medicine access, when these acts are planned to destroy a population or part of the population (Rome Statute, Article 7 paragraph 2 (b)). Extermination is a crime which usually comes through the sanctioning of a government or organisations whose intentions are the systematic destruction of a given population. Under the Rome Statute, these acts are crimes against humanity which should be condemned and criminalized in all respects. As the cases of refugees in the Sinai region show, refugees are usually exterminated or killed after having been enslaved and having their organs taken away from them. Extermination comes through the denial of proper medication and even food before and after the removal of organs.

5.3.3 Enslavement

In the context of the Rome Statute, enslavement means the exercising of a power that takes the ‘right’ of ownership of a person and includes exercising power of ownership during the trafficking of people, especially when it is women and children

(Rome Statute, Article 7 paragraph 2 (c)). In this case, human trafficking (especially of women and children) is included as an act of enslavement. Enslavement as are other crimes stated and listed in the above paragraphs are prohibited and ought to be done away with. Instances of enslavement usually come with human trafficking. As what the treatment of refugees in the Sinai Region shows, the holding of refugees as ransom under inhumane conditions constitute enslavement. Under the conditions these refugees will be held, most are denied their personal freedom and are forced to work and in most extreme cases to donate their organs.

5.3.4 Deportation

Deportation includes the forced transfer of a population, particularly when the group of persons is resident in an area where it is lawful for them to live. When the people are forcibly expelled or coercive actions are used to remove them from the area that they lawfully reside in, without the presence of any grounds permitted under international law, then they are deported or there has been a 'forcible transfer of population' (Rome Statute, Article 7, paragraph 2 (d)). One example of this, perhaps the mostly widely known example in the world, is the mass extermination of Jews, Gypsies, and homosexuals during World War II. However, is should be noted that at the time these actions occurred, they were not considered to be crimes against humanity; it was not until the Nuremberg Trials that it was established that all humanity would be protected by the Nuremberg Charter (United Nations, 1951). (Khan, 2017). At the Nuremberg Trials it was ruled that German Nazi leaders who had forcibly deported civilian populations had not only committed a war crime, but a crime against humanity. Further, the Fourth Geneva Convention, adopted in 1949, prohibits mass movement of people out of or into of occupied territory under what it calls 'belligerent military occupation'" (Courses.lumenlearning.com, 2016).

Another concept must come into play in this discussion, however. The concept of 'adverse citizenship' should be considered when dealing with deportation or forced transfer. The idea of adverse citizenship is similar to that of adverse possession, in which a group can live in an area (albeit illegally) so long, paying taxes, and with the acquiescence of the government (if not permission), leading to the right to citizenship. This would apply to families or communities that have moved into an area, been

allowed to stay, contributed to the community, and thus can claim 'adverse citizenship' (Khan, 2017). Thus, a group that is not necessarily in a nation legally but who has been allowed to stay, would fall under deportation or forced transfer of populations rather than being considered removal of an illegal population.

5.4 Torture

Torture, in this context, is the deliberate infliction of severe pain and/or suffering, regardless of whether the pain is mental or physical, on a person or persons under the control of the group that is being accused of the crime (Rome Statute, Article 7, paragraph 2 (e)). However, it is not considered torture if it is pain or suffering that only occurs as a result of lawful sanctions, or in conjunction with lawful activities. The Treaty further specifies that if the torture is 'incidental' to lawful activities, then it will not be considered torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[26]). This concept, and its ramifications, will be further examined in the Discussion chapter.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985) states that it is considered torture when the pain and suffering is inflicted for a variety of purposes such as getting information from third parties, getting confessions, punishing the person being tortured for something he or she has done or a third party has done, or for discrimination. The acts must be condoned or consented to by a public official or someone that is acting in an official capacity (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and individuals cannot justify their actions by asserting they were 'following orders'.

The prohibition against torture applies in a number of locations and is not limited to national boundaries. If a party has military members, they are bound by the provisions, as are the ships, airplanes, military bases, and detention centers. Peacekeeping operations are bound by the prohibition against torture, as are healthcare facilities and the industries at large. Torture cannot take place in schools, day care centers, embassies, or any area under the protection of signatories, as well as nations

[26] The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27(1). See https://www.ohchr.org/en/professinalinterest/pages/cat.aspx

that have ratified, accessed, or been successionists to the Convention (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2, hereinafter referred to as General Comment No. 2). As the General Comment No. 2 pointed out, "the absolute and non-derogable character of this prohibition has become accepted as a matter of normal and customary law. The General Comment No. 2 also implements the requirement that the Nations must take steps to prevent and/or punish acts of torture (General Comment No. 2). Article 2, paragraph 2 also states that there are no conditions whatsoever under which a State can justify acts of torture. The General Comment No. 2, Section II paragraph 5 points out that this includes "any threat of terrorist acts or violent crime as well as armed conflict, international or non-international."

The General Comment No. 2 discusses the "eradication of torture and ill-treatment" (p. 2) and argues that the somewhat vague 'ill treatment' is also non-derogable. Paragraph 3 of General Comment No. 2 describes "cruel, inhuman, or degrading treatment or punishments" as being "interdependent, indivisible, and interrelated". These treatments will be hereinafter referred to as 'ill treatment' when considered in total; if the treatments are being considered individually, they will be referred to individually. However, as the General Comment No. 2 points out, the topics are so interdependent that it can be very difficult indeed to separate them; in some cases, they are virtually interwoven. The question may be asked as to why ill-treatment, which seems to be of a lesser level of intensity than torture, is given the same level of attention. The answer is that the Committee believes that there is such an ill-defined division between when ill-treatment stops and torture begins, that sometimes it is not clear whether the conditions represent really poor treatment or whether they extend to torture. Further, the conditions that lead to ill-treatment frequently facilitate torture. In order to prevent torture, then, ill-treatment must also be prevented. It is also true that mistreatment, ill-treatment and torture exist on a continuum that is continually evolving. Just as methods of torture and the ways of treating people poorly change, so should the measures of preventing these ills.

It is important to remember that each nation which is a signatory to United Nations Conventions is encouraged to pass their own laws, which support the UN conventions but do so in a manner that is tailored for the nation. In addition, 20 nations

ratified the Convention, 83 are signatories, and there are 169 parties. Table 1 illustrates nations discussed at other locations in this document, and provides the signatory date (if any), ratification date and whether or not the ratification was by accession. The final column shows whether or not the country signed or ratified the optional protocol which was developed in 2002 and based on the Comment No. 2.

5.4.1 Signature Date

The signature date does not signify the date the country agreed with the Convention. It essentially means the date that the country decided that it would continue with the process of developing a convention or referendum (United Nations, 2018). Even more importantly, the signature dates indicates that on this date, the country has agreed that they will use good faith and refrain from acts that are contrary to the purpose of the treaty while the process evolves (United Nations, 2018, citing Arts.10 and 18, Vienna Convention on the Law of Treaties 1969).

Table 2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Selected Nations

Flag	Country	Signature	Ratification	Accession	Optional Protocol Date
	Brazil	23 September 1985	28 September 1989		12 Jan 2007
	Egypt		25 June 1986	X	
	Eritrea		25 September 2014	X	
	Israel	22 October 1986	3 October 1991		

	Palestine		2 April 2014	X	
	Russian Federation	10 December 1985	3 March 1987		
	South Africa	29 January 1993	10 December 1998		20 Jun 2019
	South Sudan		30 April 2015	x	30 Apr 2015***
	United States	18 April 1988	21 October 1994**		

* Ratified as the Soviet Union

**With reservations, and without signing the 2002 protocol

***This was an accession

Sources: EveryCRSRReport.com

5.4.2 Ratification

Ratification is the act by which a nation or state indicates consent to be bound to a treaty, provided parties intended to show their consent. If the treaty is only bilateral, the instruments are exchanged between the parties. However, if the treaties are between a number of nations (i.e., multilateral), then the designated depository will gather all of the ratifications, notifying the various parties that specific ratifications have been collected. Within the individual states ratifying the treaty, the steps are taken to pass internal legislation giving internal effect to the treaty (United Nations, 2018, citing 2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969).

5.4.3 Accession

Accession signifies that a state which did not originally sign a treaty has reconsidered, and now that other parties have negotiated and signed the treaty, the state wants to join them. Generally, this occurs after the treaties have the force of law, but

occasionally the Secretary General will accept accession prior to formal entry. The treaty itself, for example, might limit the number of states that can enter accession, or define the total number of states (or the condition of the states) that will be allowed to enter accession. If the treaty itself does not have this language, then the states that have been doing the negotiating will have to agree to the accession (United Nations, 2018, citing 2 (1) (b), 15, Vienna Convention on the Law of Treaties 1969).

5.4.4 Forced Pregnancy

Forced pregnancy refers to the illegal confinement of a woman who was made pregnant through the use of force, assuming that the goal was to affect the racial or ethnic composition of a population or creating severe violations of international law. However, there are troubling questions surrounding gender issues (particularly relating to rape, oppression, and forced childbirth). These issues will be discussed in the section on Gender. In the areas in this study, the question is not so much of forced pregnancy as of forced abortion. If, for example, women soldiers serving as concubines become pregnant, they are forcibly aborted (Shari, 2018).

5.4.5 Persecution

Persecution, in this context, is the deprivation of fundamental human rights, contrary to international law, because a person is a member of a particular group or collective organisation (Rome Statute, Article 7, paragraph 2 (g)). This persecution could be on the grounds of their political activities or affiliations, ethnic or racial background, religion, gender, national origin, or other grounds that the international law might recognise. Further, the persecution could be in conjunction with any crime under the Court's jurisdiction.

5.4.6 Apartheid

The crime of apartheid applies to any inhumane acts committed by systematic oppression through an institutionalised regime of one racial group over another group or groups and committed with the intent of maintaining the original racial balance (Rome Statute, Article 7, paragraph 2 (h)). In 1973, the United Nations' General Assembly developed the International Convention on the Suppression and Punishment

of the Crime of Apartheid (ICSPCA), which now has 31 signatories and 107 parties. The Assembly officially made apartheid a crime against humanity (United Nations, 1976). The Assembly formally defines apartheid as including "similar policies and practices of racial segregation and discrimination as practised in southern Africa" and would include the denial to life and liberty of members of a particular race or racial group, the infliction of mental harm as well as bodily harm, or the subjugation of these peoples by torture or cruel and unusual treatment or punishment, including arbitrary arrest and imprisonment without legal justification (United Nations, 1976).

Conditions of apartheid include enforcing living conditions that are intended to cause their physical destruction (United Nations, 1976, Art. II (b)), and imposing any legal measures that would prevent a particular racial group from living a full life within the country, as well as denying basic freedoms and human rights (United Nations, 1976, Art. II (c)). Any type of deprivation based on race is forbidden (United Nations, 1976, Art. II (d)), as well as exploiting a racial group for forced labor (United Nations, 1976, Art. II (e)), or persecuting organisations or people, or depriving them of basic rights, simply because they oppose apartheid (United Nations, 1976, Art. II (f)). [27]

5.4.7 Enforced Disappearance

Enforced disappearance refers to the intentional 'disappearance' of person or persons, with the support of the State or a political organisation within the State. The enforced disappearance (arrest, abduction or detention) goes hand in hand with insistence that the State or group knows nothing about what happened to these persons, where they went, or what their fate was. The net effect is that the person or persons are gone, no one knows where they are, and they do not have legal protections. According to Rome Statute, Article 7, paragraph 2 (i)), these people are normally removed from society and from the law's protection for an extensive timeframe.

[27] It is of interest that a map of signatories to the 1973 Convention show that there is a nearly direct correlation of nations that have made sexually related discrimination of homosexuals and transsexuals legal, and countries which have ratified the 1973 International Convention of Suppression and Punishment of Crime of Apartheid. In other words, countries which have made gender crime illegal have *not* signed the 1973 Convention on Apartheid. This suggests an avenue of future research.

5.4.8 Gender Implications

Although the category of gender was mentioned briefly in the section relating to persecution (General Comment No. 2), its importance in the humanitarian world and in the world of simple human rights cannot be overstated. It is in the realm of gender that torture, and persecution begin to clash with legal and moral obligation. Certain groups of people, among them women and individuals with transgender identity or sexual orientation differences, are at risk of being marginalised, discriminated against, or worse. Men can also be subjected to gendered violations, particularly in Eritrea, (Freedomhouse.org, 2019) and any category of human can be subjected to violations of their person based on whether or not they appear to conform or not conform to the gender behaviors that other people perceive them to be. This category of violations can be particularly difficult to deal with from a legal and societal point of view in part because the violations deal not only with actual violations, but perceived violations based on perceptions of how people should act (General Comment No. 2, p. 6). Further, once an individual has been raped or violated, the perception of them as an unclean promiscuous individual increase. For males, the perception that they are less masculine increases if they report the rape. Yet, if they do not, they may suffer long-term health consequences.

One of the problems with gender-related issues is that there are frequently serious differences between what the UN Committee defines or decrees and what the various national laws are, related to gender. The Committee has asked that all states bring their definition of gender-related crimes or perceptions into line with the UN's definitions, but as of 2019 that has not occurred. As an example, it is not illegal to discriminate against people for their sexual orientation and gender identity in most of the world (France-Presse, 2019, citing Equaldex). Discrimination is illegal in some contexts in most of the Americas and a minority of countries in Africa and Asia. In the vast majority of Asia, the Middle East, and Africa, as well as some nations in South America, discrimination against someone for their sexual orientation and gender orientation is not illegal (France-Presse, 2019, citing Equaldex).

Throughout the world, there are twenty-nine states where gay marriages are legal. Although Israel does not allow gay marriage, it does recognise homosexual

marriages that have been performed in areas where these marriages are legal. In addition, there are eleven nations that have approved civil unions for gay or homosexual marriages, but not religious unions (France-Presse, 2019, citing Equaldex). The majority of the nations discussed in this paper are not on either of these lists.

Homosexuality, as well as identities that are non-gender conforming, is illegal in at least 73 nations (Avery, 2019). Some countries prosecute these 'crimes' consistently, others do so only upon occasion. Some of the countries that prohibit homosexual acts are the home of repressive religious regimes; others are tourist destinations (Avery, 2019). Many of the nations that legislate homosexuality as a crime only hold male homosexuality or homosexual acts as being criminal (The Week UK, 2019). The majority of the nations discussed in this paper still hold homosexuality and homosexual acts to be illegal.

There are a number of countries where homosexual acts are punishable by death. In Yemen, single gay men are punished with lashes, and gay women are put in prison for up to three years. However, married gay men can be put to death (Byrnes, 2019). In Iran, homosexuality can be punished by death, as occurred in January 2019. Brunei recently strengthened their Islamic laws and made both adultery and homosexual acts capital crimes. After world-wide protests, the Sultan announced there would be a moratorium on enforcement while the policy is reviewed (Byrnes, 2019). In Mauritania, where homosexuality has always been a crime, the laws were recently amended to make homosexuality a capital crime. In Nigeria, the Same Sex Marriage (Prohibition) Act of 2014 banned gay marriages, operation of gay clubs or supports, and public displays of affection of gay people. Nationally, the penalty for these crimes is prison, but each state in Nigeria can have its own laws and 12 of these states have made homosexuality a capital crime (Byrnes, 2019). In Qatar, same sex relations are illegal, but if the affair involves extramarital sex, the penalty can be death. In Saudi Arabia, same sex relations are not typically executions with the first conviction, but with second convictions, execution can result (Byrnes, 2019). In Saudi Arabia, executions for homosexual acts are quite possible, including honor killings. Even speaking of homosexuality is forbidden. In Somalia, same sex intercourse is illegal; other homosexual acts result in prison. However, in 2012 the law was changed to make Sharia law the primary legal interpretation, meaning that flogging or death is now the

result of homosexuality (Byrnes, 2019). In the Sudan, punishment for a third conviction and imprisonment for homosexual acts is death. In the United Arab Emirates, the language defining penalties for homosexual acts is somewhat unclear, but it appears that these acts are punishable by death. Homosexual acts in Pakistan are 'merely' punished with life in prison (Byrnes, 2019).

5.5 Crimes Considered as Crimes Against Humanity

While there are 11 specifically defined crimes against humanity, Genocide is considered a crime against humanity under the category of extermination. One of the questions is whether or not the level of organ harvesting rises to the level of genocide, given that victims may or may not survive. If Fessaha (in Shani, 2018) is correct, then over 8,000 people have not survived organ theft thus far. Briefly considering the impact of organ harvesting and relating harvesting to the crimes against humanity, organ harvesting could be considered murder for financial gain. It is a type of extermination, with targeted groups being those individuals who are fleeing from one area to another. Victims are frequently enslaved before being harvested; they are used for slave labour or sexual labour and held for ransom in many cases. If the ransom fails, the captors will receive their investment from the selling of the captive's organs. The victims face nothing less that torture, typically before the harvest when they are being held for ransom, but also during the operation and afterwards, when there is likely to be inadequate anaesthesia and certainly inadequate medical care. Note that the case in South Africa, which was mounted through a hospital system, may differ in this regard. The majority of the reported victims have been found in unmarked multi-human graves in the Sinai. It is not outside of the likelihood that the victims were raped or used for sexual slaves before the harvest. Certainly, there have been inhumane acts committed upon the victims of a harvest that have caused a great deal of pain and suffering. If organ harvesting is allowed to continue unabated, it may well eventually rise to the level of extermination of a group of people, in this case the financially disadvantaged and marginalised.

5.5.1 Considering the Case of China

The key to determining what is, or is not, an enforced disappearance relates strongly to having the authorisation or support of the state when depriving someone of liberty and concealing their disappearance, or by placing a person who has disappeared outside of the normal protections of the law. The Report of the Working Group on Enforced or Involuntary Disappearances, sponsored by the Human Rights Group (HRG) of the General Assembly of the United Nations (United Nations 2020), reports that 58,606 cases of enforced disappearance have occurred in 109 nations, with 46,271 disappearances in 92 states remaining unresolved. The Human Rights Group began tracking these cases in 1980. It is unknown how many of these cases may relate to forced removal of organs related to organ trafficking, but many of the disappearances have occurred in nations that are reputed to have active organ traffickers.

China has been one of the most frequently accused nations relating to the crime of human organ harvesting or trafficking. As of 2019, China has reported that it has stopped using the organs of executed prisoners for a formal organ donation program. China was responsible for 68 of the individuals who disappeared in 2019 and reported to the HRB (United Nations 2020). China has been increasingly falling under the oversight of independent non-governmental groups as well as humanitarian groups, however. For a number of years now China has been being investigated by the independent group 'ChinaTribunal,' which is comprised of a number of citizens from the United Kingdom as well as other locations. Licas News, which is one of the investigative reporting groups associated with independent Catholic charities, has also been investigating the actions that China has been taking relating to the harvesting of organs from unwilling participants (Corr 2020).

Corr (2020, paras. 4, 5) summarised the current conditions in China thusly:

> The problem in China is indeed immense, and there is increasing attention to the issue in part because of how practitioners of the Falun Gong spiritual practice have been targeted for forced organ harvesting based on their beliefs. There is plenty of evidence of forced organ harvesting in China, and likely some overlap between the Falun Gong and death row inmates as organ sources.

Corr, then, believes that there is significant evidence that the forced removal of organs from death-row inmates is not only based on criminal status, but on members of a specific spiritual group. If this is indeed the case, then the Chinese government, in its participation (or at a minimum acquiescence) would be participating in group persecution, leaving the way open to possible prosecution in this area of definition.

Corr (2020) quotes Macquarie University clinical ethicist Wendy Rogers as stating that independent investigators are identifying prisoners 'of conscience,' which would be members of a particular spiritual group or religious leaning. These prisoners, Rogers asserts, are gathered up and then killed by the government for their organs. Worse yet, there is no due process at all for members of this group. Instead, they are lumped in with prisoners who have received a death sentence. Both groups are then executed under the terms of Chinese law (Corr, 2020).

As of 2019, China denies that they source organs from convicted death row inmates, although they have admitted that from 2005 to 2015 this was common process. However, in 2017, the Chinese government admitted openly in a conference with the Vatican that they were still taking organs from prisoners and sourcing them (Corr, 2020). Corr argues that any attention to organ trafficking must also include "countries like Pakistan, India, the Philippines, Bolivia, Brazil, Peru, Colombia, Moldova, Turkey and Iraq," (Corr, 2020 in A Global Problem). These nations, he reports are so poor that the residents frequently feel that there only way to survive is to sell organs to survive financially. In Corr's world view, this is economic compulsion which involves force. In 6.2, this perception is discussed further. It is Corr's view that when the money made importing organs for countries like the United States, Canada, Europe, the Middle East and Australia is considered, more lives could be saved with the money spent to extract *an* organ from someone in a poor company. Thus, although transplant tourists seem to be providing money for a country, they could be using the same money to actively save lives. Who does Corr hold responsible? Not only the traffickers and brokers, but also people who do not plan to donate their organs after death, or do not take proactive steps to donate these organs.[28]

[28] Elsewhere in this research, it is discussed that families sometimes actively interfere with the post-death donation process, even when the individual has signed the appropriate governmental documents to allow his or her organs to be donated after death.

In 2008, the Declaration of Istanbul's steering committee issued a statement that indicated it believes that the very significance of organ transplantation is threatened by organ trafficking and the resultant transplant tourism. There is a need, then, to avoid victimising the world's poor so that the life-saving aspects of organ transplantation are not overshadowed by the spectre of organ sales and theft. The United States, Canada and the Parliament of Europe are all taking steps to keep individuals linked with human organ trafficking out of their nations (Corr, 2020).

The China Tribunal, largely populated by members of the lords from Great Britain, has been pressuring the government of the UK to take a firm approach to China based on its inappropriate organ harvesting. The Tribunal has concluded that the Communist Party of China (CCP) is singling out members of the Falun Gong and harvesting their organs. Investigation has shown that this particular group has been subjected to unusual blood draws, forced transplantation, and even death. Given increasing numbers of government sanctioned deaths among the Uyghurs and other Muslims of Turkish extraction, it seems likely that the Uyghurs and Muslims are also being singled out in actions that would result in both genocide and enforced disappearance. Part of the evidence suggesting this is that the Chinese have developed a biodata collection of records forced from over 19 million Uyghurs. The records contain the data that is essential to any medical organisation that is trying to match the individuals with organs, to the individuals who will receive organs. It is well known that the Muslim population in China was being moved to centers where they would be re-educated. Having large number of individuals in the centers (it is estimated up to 3 million) makes it easier to gather the individuals for harvesting when it is needed. Christians and Tibetans may also be at risk. In one case, Corr (2020) insists a request was received from Saudi Arabia that their patients were searching for Chinese organs that were halal. The Chinese have actually established a lane in the Xinjiang airport to give priority to service for individuals making organ transfers (Corr, 2020). The YouTube application has a number of interviews from major news organisations confirming this information.[29]

[29] See Sidiq, E. New evidence: China is "slaughtering Muslims on demand" to satisfy global demand for live organ transplants, at https://www.youtube.com/watch?v=Tpya1Bv8YUQ, and CBS News, 2019, Rare look inside China's internment camps holding more than 1 million Muslims, at https://www. youtube.com/ watch?v=ujk8spsLA_Q as examples.

In 2016, David Kilgour and David Matas, two attorneys from Canada, spoke before Australia's parliament and ask them to pass a motion condemning China for organ harvesting from prisoners (McGuirk, 2016). McGuirk pointed out that China insists it does not use prisoners for organ harvest now (see contrasting opinion above), but the Chinese legal system is anything but transparent. Thus, it is very difficult to determine whether the nation does or does not harvest organs appropriately. The reality exists, however, that within days of seeking an organ in China, one can be procured within days. It seems extremely unlikely that China is following international rules relating to transplants. As McGuirk suggests, "the quantity of organ transplant operations in China cannot be supplied by voluntary donations and death row executions" (2016, in Forced organ harvesting in China, para. 8).

How can we conclude that the Chinese are still not telling the truth about using death row prisoners for forced organ donations, as well as Uyghurs? There are several indicators that this is the case. First, the Uyghurs are forced to have blood tests and physical exams other prisoners do not. Given that the Uyghurs do not smoke nor do they drink, it seems likely that this in an indication that the health data is needed for another, more nefarious purpose. In 2019, Robertson et al. (2019) published an article which reported that it was likely that the Chinese government was being dishonest, or reporting false or manipulated data, when it asserted that it no longer used prisoners for forced organ harvesting. Robertson and his team used a forensic statistical examine to consider two datasets from China that provided organ donation data for the years 2010 to 2018. The first dataset was provided by the China Organ Transplant Response System (COTRS); the second was published by China's Red Cross Society (Robertson et al. (2019). The research team searched for evidence the data had been manipulated. They used mathematical formulas, internal ratios, data artefacts, and consistency checks. In addition, they tested five regions worth of data for coherence, plausibility, and consistency. Once these tests were completed, they checked hospital data in the five regions to determine if the two sets of data were consistent.

The results showed that the COTRS data were had extremely smooth growth rates, to the point that is would be extremely unlikely that the data was 'real'. It too nearly resembled a quadratic equation. When the data for deceased donors was measured, the researchers found that the deceased donors' data also resembled a

particular mathematical formula very closely, although it was not quadratic. The researchers concluded that it was likely that the data was manipulated in a manner that it would resemble smoot equations, apparently being reasoned that data with no outliers would not attract attention. In considering the results, a certain portion of nonvoluntary donors were misclassified as being voluntary donors. At the same time, genuine voluntary donor response was accompanied by cash donations. These findings are important because China's 'apology' for using forced donations was accepted based strictly on a promise or guarantee that China would do better in the future. The apology and the reacceptance of China was based on the nation's assurance that it would pass a statistical analysis of donor databases.

> Given that this data appears to have been falsified, international medical organisations may wish to reassess their stance. The welcoming of China's organ transplantation system into the international medical community has been based on trust; in light of our findings, we believe this trust has been violated. (Robertson et al., 2019, Conclusion).

Robertson et al.'s (2019) research suggests that China is still a danger to individuals with a death sentence, or who are detained members of the Uyghurs race. Members of the Uyghurs race are a minority. Most of them are Muslim minorities and China which is a predominantly not Muslim see the Uyghurs as a threat. Most people within the Uyghur region are either detained or persecuted simply because they are different and constitute a minority. In this context, China is seen as a danger to individuals from the Uyghurs race.

5.6 The Way Forward Regarding Crimes Against Humanity

It is both impossible and undesirable to develop a single document that reflects all present and future crimes against humanity. As technology develops and the levels of human knowledge increase, there will be more crimes that develop and other ways to accomplish them. Crimes against humanity, like all crimes, are ever evolving; they are not static. They change with technology and the environment. Organ harvesting, for example, would have been undreamt of prior to Shelley's Frankenstein (1817). Crime-fighting organisations, particularly those on the international level such as Interpol and

Europol, should have their finger on the pulse of crime and be prepared to track new developments even as they begin to develop.

However, there are several current trends that bear watching. Among them, a priority should be to determine if there is a linkage between traditional organised crime and the sale of illegally harvested or acquired organs. Determining the level of involvement, if it exists, should provide an indication of how the approach to combatting the crimes against humanity should evolve.

5.7 Where Does Organ Trafficking Fit?

Organ trafficking and its application in the Sinai, described by Fessaha from her position as a humanitarian worker, fits into an overall system of humanitarian crime in the Sinai region. Organ trafficking, while listed by the United Nations as a crime, is difficult to detect and prosecute (UNHCR, 2013). Taken in combination with other crimes against humanity that are occurring in the region, it becomes more obvious that there is a large and systemic problem. Consider that all residents of Eritrea are required to join the service at 16. Females who are physically attractive are used as concubines for higher ranking officials. If they become pregnant, an abortion is performed, as senior officials and officers have wives and children of their own (Shari, 2018). Soldiers are not allowed to take leave until they have been in between two and three years. As a result, it can be very difficult to reproduce, and the new generation is very small indeed. The only way to escape the military is for women to become pregnant before the time that they are expected to report for service. Fessaha believes that this overall program of deprivation is deliberate, and it is intended to stop the future. There are not universities; all the schools are military schools. This seems to be the way that Afwerki controls his nation (Fessaha, in Shari, 2018).

The fear of the government is so severe that even people with a home will move from household to household, sometimes staying home and sometimes staying with friends. Residents in Eritrea do not want to do anything that causes them to get registered in any formal or official paperwork. If they do, they can be found by the government; if they can be found by the government, they may be taken by the government. This, according to Fessaha, forms the basis for silence of individuals who manage to escape Eritrea: they are afraid that if they speak out or report the conditions

in the nation, then their remaining family members may be taken and ransomed or killed (Fessaha, in Shari, 2018).

At the present time, Afwerki, the president, is afraid of his own citizens. He hires Ethiopians as guards and spends a great deal of time trying to maintain the support of politicians in other nations. As Shani pointed out, the question may well be how to stop Afwerki, not how to stop refugees from going through the various areas (Shani, 2018). The link between violent leadership and crimes against humanity is undeniable; placed in this context, the link between violent leadership and organ trafficking can also be surmised.

5.8 Summary

In Chapter Four, an analysis of crimes against humanity took place. The basic elements of crimes against humanity were considered, as well as the legal definition of these crimes. Each of the elements of crimes against humanity were defined and described. Gender implications were discussed at length, and the way forward to regarding of crimes against humanity was considered. Finally, the implications of organ trafficking in crimes against humanity were introduced.

Through discussing and reviewing the various Conventions and Protocols relating to torture the chapter noted that torture forms an integral part of crimes against humanity. The discussion has shown that torture is directly linked and connected to the crime of human trafficking. This is evidenced by how refugees are treated in in the Sinai Region by smugglers who demand for ransom for their smuggling activities. Under their captivity, refugees are usually held in inhumane conditions in which they are tortured and ill-treated. The implications of this is clearly the flagrant violation of the prohibition of torture enshrined in the above discussed Conventions. In the next chapter, the UN's rights and responsibilities in intervention are considered.

CHAPTER SIX

THE UN's RIGHT TO INTERVENE

6.1 Introduction

Way before the enshrining of the R2P principles and their promotion by the UN, various attempts to protect the vulnerable were made especially by the Papacy. This chapter examines the UN's right to intervene. It traces how the UN right to intervention came about and discusses what it means in the context of the need to protect the vulnerable in this case, the victims of organ trafficking. The basic claim of intervention by the UN is that whenever a state is unwilling or is unable to protect its vulnerable population, intervention is a necessity and should be done by the UN or any other power which will be acting under the aegis of the UN. It is however critical that more often than not, intervention has spurred a number of concerns relating to its effectiveness. In some cases, the parameters of the actual intervention have spurred debates and concerns.

The key questions that drive and orient this chapter include: What are the key aspects of intervention by the UN? Are there any parallels between how intervention was understood before the enunciation of the UN and after the enunciation of the UN? If there are any parallels how is intervention understood, then and now? Is there any significant evidence that is available to suggest that intervention done under the tutelage of the UN can ensure that the vulnerable populations are protected? Clarifying these and other questions regarding intervention will be helpful in enhancing a critical understanding of the issue of intervention of the AU in the context of human and organ trafficking.

6.2 R2P principles: The key issues involved

In earlier chapters, it was established that the Responsibility to Protect was established in 2005 in the World Summit, and that the goal of R2P in the World Summit was to help states care for their population in a human way (United Nations 2005). The Summit allows various members of the international community to fill the void relating to humanitarian protection if a state is unable to for any reason. However, at the time of the Summit, the need to establish verbiage including trafficking in human organs had

not yet been established. What *had* been established was the there was a clash between a nation's right to sovereignty and the right of humans to control their bodily autonomy. Resolution 60/1 of the General Assembly sought to establish very common values for a people, including tolerance, freedom, equality, and the respect for human rights.

Prior to the 2005 Summit, the UN had declared that when there was excessive human suffering in a nation, intervention could take place by justification of Chapter VII of the UN Charter, under the basis of a "threat to international peace and security" (United Nations, 1945). Indeed, in the 1990s, the UN intervened in Liberia (United Nations, 1992), Somalia (United Nations Digital Library System,1993), Sierra Leone (United Nations Digital Library System, 1998[30]), Kosovo (United Nations Digital Library System, 1999), Rwanda (Refworld, 1994), and Haiti (United Nations Digital Library System, 1994). The number of interventions based on this ground began to represent a "trend" and the need for a formal mechanism for intervention on humanitarian needs was recognised. Responsibility to Protect was that mechanism for intervention. Responsibility to Protect is not a law; it is a framework for conducting the process of humanitarian intervention.

The other side of the issue, however, is that the resolution also reaffirms the sovereign rights of the various States. It affirms the right of the States to have self-determination, "political independence," and "territorial integrity" (United Nations 2005:1-2). It does not take a great deal of analysis to realise that the provision of the responsibility of intervention clashes with the rights of being independent, the ability to control the State's own politics, and to have integrity of the territory. Further, the responsibility to intervene doesn't appear to be limited to governmental agencies; increasingly, non-governmental organisations (NGOs) assist with humanitarian interventions and essentially have a role in the responsibility to protect. Thus, they become part of the R2P in the context of assisting with safety and security of residents of a given state.

[30] This action continues to be modified and any of these resolutions may have been superseded by newer actions.

6.3 Intervention to Protect Sovereignty or to Protect Lives

From the very beginning, the UN has held that nations have sovereign rights and that these rights give States the ability to control both their own borders and the lives of the citizens within the borders. Nations are very reluctant to give up these rights. There is a deep, abiding belief in many parts of the world that the UN is attempting to depopulate the world, that it is intending to take person freedoms, and that it is the 'New World Order' that will take away private property and establish socialism or communism worldwide under the heading of 'sustainable development'.[31] Thus, Nations are not likely to give up their sovereign rights to the United Nations, and it is likely that even when they do, the residents will not necessarily trust the UN interventions.

In the Congo, peacekeepers became part of the conflict (O'Reilly, 2013). A year later, in the Congo, residents charged that the peacekeeping force knew they were being attacked, but did nothing (Human Rights Watch, 2014). Failures in Rwanda, Bosnia, Haiti, Congo, Somalia, Angola, Mali, Cyprus, Syria, Darfur, and others have led residents to ask what the point of having UN peacekeeping help is, if it does not help (McGreal, 2015). At the same time, others remember when the UN was successful at helping nations and wonder why it cannot do so now. The overall effect is one of mistrust and active disdain on the part of the Nations.

Part of the question is whether the UN should intervene to protect sovereignty, or to protect lives. Others questions whose lives should be protected. McGreal (2015) cited the case in Rwanda, 1994, when the UN had been notified that genocide was being planned and that the UN's Security Council was removing its troops instead of staying to protect the population. The Tutsis were expecting the UN to protect them, but the UN command decided it was more important to keep foreign visitors safe. They abandoned the Tutsis and instead, began escorting foreigners to the airport so that they could fly out of Rwanda (McGreal, 2015). The Tutsis actually begged to be killed by the UN troops' guns rather than to be left to be killed by machetes carried by the

[31] Media coverage in recent years has included *Agenda 21: a Conspiracy Theory*, *Agenda 21: The UN Conspiracy that Just Won't Die*, *Who is Behind Agenda 21? | The Alien Presence Pacifies Us*, *Skeptoid: Agenda 21: Death by Sustainability*? and many others.

militia. The troops left; within hours, the Tutsis died by gun and blade (McGreal, 2015).

In 2016, a similar event occurred when 8,000 Muslim males were killed in Srebrenica, in Bosnia. Today, the UN insists that protecting civilians is their priority, but the UN Security Council has an extremely political setup, and these politics prevent prompt action. Further, the governments that need help still argue over who will have command of the troops that are placed in their countries (McGreal, 2015). It appears that the governments are as mistrustful of the UN and its troops as the residents of the States are. In both cases, it is reasonable to question whether sovereignty is being protected or whether lives are being protected. It is also appropriate to ask if *either one* is being protected.

The UN's position that nations have sovereign rights, and thus the right to manage or control their own jurisdiction, has been held consistently since the UN was first convened. The position is very clear:

Luban (1980) stated that:

> Each state, according to international law, has a duty of non-intervention into the affairs of other states: indeed, this includes not just military intervention, but...any "dictatorial interference in the sense of action announcing to the denial of the independence of the State" (Luban, 1980: 164, citing Lauterpacht, 1950).

Loosely interpreted, this would mean that no state has the right to intervene in what other states do, not just from a military perspective but from any interference that would prevent the other state from being fully independent.

In the 1945 Charter, it states in Article 2(7) that no one should intervene in another nation's domestic jurisdictions (United Nations, 1945). Originally, the United Nations only allowed intervention by other nations in domestic matters if the country itself was allowing something to occur within its boundaries which would be a "threat to international peace and security" as established in Chapter VII of the UN's Charter (UN, 1945). Yet before the UN's Charter came into being, thinkers of the time had already suggested that there needed to be some way that other nations could intervene if a nation either allowed or supported great human suffering As early as 1905,

Oppenheim had suggested the idea that there might be a need for intervention in cases of great human suffering (Jennings & Watts, 1992).

After the end of the Cold War, the question of sovereign rights was not so readily accepted by the international community and by scholars. The UN began to receive more requests to intervene in actions of various nations. Member states started to question whether or not intervening for humanitarian reasons would contradict the sovereignty doctrine. In the beginning the UN simply looked the other way.

However, it is appropriate to consider the historical context of the time. Between 40 and 50 million individuals globally had died during World War II. Hitler, Mussolini, and Hirohito from Japan had formed the Axis powers; France, Great Britain, the United States, and the Soviet Union (with assistance from China) formed the Allies. The Tripartite Pact linked Germany, Italy, and Japan in what they characterised as a defensive alliance (Dülffer, 1980). The original goal of the Pact was to keep the United States from entering the conflict, which later became the World War II. Eventually, Hungary, Romania, Slovakia, Bulgaria, Yugoslavia, and Croatia signed the Pact. The Tripartite Pact called for the signers to assist one another using all political power, economic power, and military means if any of the signers were attacked by a power that was not already involved in the war in Europe or the Japanese conflict. This excluded the Soviet Union, which was active in both wars, and was essentially a shot across the bow at the United States to warn them to keep out of World War II.

Once the Japanese attacked Pearl Harbor, the Tripartite pact was invoked. Thus, when on December 8 the United States declared war on Japan, it effectively declared war on Germany and Italy as well. As the war progressed, and atrocities against the various minority groups grew, the German government conducted a campaign of terror against its own people. Janowitz (1946: 141) pointed out that "The mass of the German people have no interest in admitting more than a minimum knowledge." The German people did, however, have some knowledge of these camps because the Reich told the public of the camps and warned the public that the camps were very significant. Further, every community had members who were randomly taken to concentration camps. It was a policy of the Nazis to take a 'sample' portion of the population to camps to remind the people that the camps existed, and thus intimidate them. One of

the jingles the Nazis used to threaten residents of communities (Janowitz, 1946: 141) was:

Dear God, make me dumb
That I may not to Dachau come.

Those interviewed for Janowitz's project, however, insisted that despite the threats and vile reports from returning community prisoners, the average German citizen thought that reports of the violence were greatly exaggerated. They conceded that the prisoners undoubtedly had to work hard and might not be getting lots of good food, and even that the prisoners might be occasionally beaten. They knew the prisoners had to yell "Heil Hitler" in a chorus (Janowitz, 1946). Yet the vast majority refused to acknowledge that the camps were anything other than penal colonies, and the guards anything more than a few "overzealous guards" (Janowitz, 1946: 142). Even the Germans that understood these camps were more than prisons still insisted they did not know the extent of what they were. Only three people in the study admitted that they knew of the conditions.

Janowitz (1946) concluded that it was psychological repression that made the Germans unaware of these conditions, with a full three quarters of the population stating that they knew there were camps but not that there was anything wrong in them. Janowitz's group, in the form of participatory research, conducted a campaign of education to teach the participations what occurred, where, the conditions, and how many victims died. In the end, out of the entire set of research participants of 100 individuals who were a representative sample of the population, only three people out of the 70 who were civilians felt that the German people had any guilt in what occurred. Further, of the three, two felt that once the Nazis seized power the people became helpless and should not be charged in any way. The third individual reported that the guilt of the people came from not knowing what happened but failing to keep control of their leaders (Janowitz, 1946). Many of the participants did not believe anything happened, but 'if it did' it was a natural offshoot of war, to wit "Nazi atrocities as the inevitable consequences of war" (Janowitz, 1946: 145).

While there are undoubtedly other instances in history that would provide examples of the difficulty that can be faced in attempting to intervene for humanitarian reasons, the example of the Nazis and their impact on the populace is an exemplary

one. Janowitz's 1946 study provides a great deal of information relating to perceptions of people of the incidents of the time and collected shortly after the incident. This is a rare chance to understand the perceptions of residents relating to atrocities being committed around them on a regular basis. Such citizens would be very unlikely to ask for intervention or help, and indeed, if help were offered, they might deny they needed it, might refuse to accept it, or might even fight the groups offering help. The next step is to what would happen if other nations stepped forward and offered help, even if it had not been requested.

After the Cold War ended, the United Nations began to see an increasing number of requests that they intervene in the actions of other nations. The debate as to whether or not sovereign rights of nations prevented this intervention became quite heated. The UN generally did not intercede. However, as time passed, more human rights violations were reported, and the UN began to consider whether the human rights of the subrogated or tortured individuals was more important, or whether national sovereignty was important.

The question of sovereign rights became hotly debated as member nations questioned whether or not humanitarian interventions contravened the sovereignty doctrine. Initially the UN looked the other way, but more and more cases of human rights violations came to light. It became easier to question whether the rights of humans or the rights of sovereign nations should remain supreme. It seems certain that if humanitarian intervention had taken place in Germany immediately following the war, not only would the other nations have objected, but the residents of Germany would have protested mightily.

Applying the criteria of a 'just war' may to some extent help answer the question of whether or not to intervene. There are three times that criteria in a *just war* apply. The first is in the right to go to war, or *jus ad bellum*; the second is the right conduct in war, or *jus in bellum*; the third is *jus post bellum*, or the right conduct when dealing with morality of post-war settlement and reconstruction. Guthrie and Quinlan (2007) characterise these periods as going to war and waging war; by inference, the third period, just post bellum, would be recovering from war.

Under *just war* criteria, a nation that goes to war must first meet a certain set of moral requirements for going to war. They must behave in an appropriate fashion going to war, during the war action, and in the reconstruction period after the war. To some extent, this discussion applies to each of the three stages of war, simply because a humanitarian intervention can occur at any stage, and once begun, is likely to continue after the war.

Although the question of the "just war" had been debated for years, but after World War II and the reality of Hitler's leadership, the question of whether or not a nation could rightfully allow its own citizens to be abused and mistreated began to be considered. There had long been some sense that a nation could not enter *other* countries and abuse those residents. Once World War II had occurred, however, there was a greater awareness that it gave way to some extent to a debate on morality of allowing a sovereign or leader to abuse his or her own citizens. This consideration took on more and more importance as the number of cases of genocide, mass murder, ethnic cleansing, or crimes against humanity rose. As of March 2020, there were 22 'situations' that were being investigated by the International Criminal Court, the Court of Prosecution for UN's humanitarian crimes. Among the situations include:

Table 1. ICC Situations relating to humanitarian crimes.

Nation	Referral Date	ICC investiga-tion opened	Focus	Regional Focus
Democratic Republic of Congo	April 2004	June 2004	War crimes and crimes against humanity since 2002	Eastern DRC, Ituri region; North and South Kivu Provinces
Uganda	January 2004	July 2004	Warm crimes and crimes against humanity since 2002	Northern Uganda
Darfur	March 2005	June 2005	Alleged genocide, war crimes and crimes against humanity committed in Darfur	Darfur/Sudan with refugees in Eastern Chad and throughout Europe

			since 2002	
Central African Republic	December 2004	May 2007	Alleged war crimes and crimes against humanity in violence in CAR since 2003 and 2003	Throughout the Central African Republic
Kenya	March 2010		Alleged crimes against humanity committed in context of post-election violence in 2007/2008	Provinces in Kenya: Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province
Libya	February 2011	March 2011	Alleged crimes against humanity and war crimes committed in the context of the situation since 2011	Throughout Libya
Cote d/Ivoire	April 2003, when Cote d/Ivoire accepted ICC jurisdiction	October 2011	Alleged crimes against humanity committed in context of post-election violence in 2002 to present	Throughout Cote d/Ivoire
Mali	July 2012	January 2013	Alleged war crimes committed in Mali since January 2012	Gao, Kidal and Timbuktu regions; Bamako and Sévaré, in the south
Central African Republic II	May 2014	Sept 2014	War crimes and crimes against humanity in the context of renewed	CAR

		violence beginning 2012	
Georgia	October 2017	Alleged crimes against humanity committed in Burundi	Both in and out of Burundi
Bangladesh / Myanmar		Alleged crimes against humanity committed against the Rohingya people	
Afghanistan		Alleged crimes against humanity committed in Afghanistan since May 2003	
State of Palestine			In Phase 2 of the investigation
Ukraine		Alleged crimes committed in protests since 21 November and other events since February 2014	
Venezuela I & Venezuela II	February 2020	Referral from Venezuela regarding the situation in that country	
Columbia			In Phase 3 of the investigation
Guinea			In Phase 3 of the investigation
Iraq/UK		Alleged war crimes committed by UK nationals in the context of Iraq conflict 2003 – 2008	

Source: ICC (2020)

In the table above, the situation of Venezuela I and Venezuela II represents a departure from the typical ICC case; in this case, the leadership of Venezuela wrote a letter to the ICC asking for a referral under Article 14 of the Rome Statute, regarding to the situation in its own nation. While this is the right of a State who is a party to the Rome Statute, it is possible to see from the list of the ICC cases that this is a more atypical utilisation of the ICC.

The ICC also prosecutes individuals that may be guilty of crimes associated with the situations listed in the table. They have been responsible for several successful prosecutions, while others are still in process and still others are unable to proceed because the alleged perpetrator cannot be located. Under the ICC's operational rules, the accused has to be present in the courtroom in order for the prosecution to continue. Thus, if the alleged perpetrator runs from prosecution, a warrant is issued, but the process cannot continue until the alleged perpetrator is located and returned for prosecution.

Such is the case with Sylvestre Mudacumura, being prosecuted in association with war crimes encompassed in the situation in the Democratic Republic of the Congo, illustrated in the table above. Mudacumura, who remains at large, was the Alleged Supreme Commander of the Army for the Forces Démocratiques pour la Libération du Rwanda. He is suspected of nine counts, in the context of crimes allegedly committed in the Democratic Republic of the Congo (DRC). According to the Case Information Sheet for Mudacumura, he has been charged with murder, mutilation, cruel treatment, torture, outrage upon personal dignity, attack against civilians, pillaging, rape, and destruction of property (ICC, 2018). All of these crimes are regarded as crimes against humanity in one regard or another.

In chapter four, the elements of crimes against humanity were discussed. In review, these crimes included murder; extermination; enslavement; deportation or a forcible transfer of the population; either being imprisoned or deprived severely of physical liberty by violating the basic rules of international law; torture; rape, forced prostitution, sexual slavery, forced sterilisation, forced pregnancy, sexual violence of great magnitude or gravity; group persecution based on gender, religion, culture, ethnicity, national origin, race, or political activities, or any other grounds that international laws regard as being impermissible; forced disappearance of persons;

apartheid; and inhumane acts which cause great suffering and pain, or serious injury to bodies or to someone's mental health or physical health (Rome Statute).

In chapter four, the concept that the projected number of deaths from organ theft might rise to genocide was discussed, along with the reality that organ harvesting could be considered murder for financial gain. Organ harvesting frequently includes enslavement or kidnapping for temporary use as slave or sexual labour. Victims are tortured, both before the operation and through the inadequate use of anaesthesia and inadequate medical care. For these reasons, the harvesting of organs from unwilling participants would be considered crimes against humanity in genocide, enslavement or kidnapping, torture, and slavery or sexual slavery.

In discussing the question of whether the UN refers to intervention to protect sovereignty or to protect lives, the UN in recent years has entered nations more often and earlier in a humanitarian case than it did in previous years. The UN was not established until after Hitler's Germany, and it was established in part to help nations by providing an avenue for intervention should it be necessary. Again, referring to the nation of Germany post-World War II, as an example, intervention (in this case by the Allies) did not occur until many months after the atrocities began. The attitude of the German citizens was reviewed earlier in this section, with the intent to provide context for the contention that there is a clash between the need to allow sovereignty and the need to protect human lives.

Paramount to understanding why it can be exceptionally difficult for humanitarians to intervene, evidence was presented that was collected in the post-war period by Janowitz (1946). Janowitz's study showed unequivocally that under difficult circumstances, citizens might well be unable to reconcile their sense of morality and their guilt with the crimes they were witnessing with their own eyes, making it difficult to provide any 'evidence' of wrongdoing for courts or humanitarian groups to use as leverage for justification for intervention.

6.4 The Tension Between Sovereignty and Human Lives

Still, even if the UN has decided, albeit on a case-by-case basis, that sovereignty does not supersede the need to protect lives even in cases where the populace may not recognise that they need protected, there is a still a certain tension between sovereignty and protection of these human lives. Wellman (2012) suggests that the clash between sovereignty and human rights and lives is the clash in the core values of human rights versus states' rights. With so many nations failing to protect human lives, Wellman (2012) argues that it is now time to resolve the differences between human rights and sovereignty. Wellman argues that human rights are taken far less seriously than they deserve. If they are treated the way that they deserve, then they would be taken seriously indeed. At that point, he posits, no nation would have a legitimate interest in objecting to outside observers intervening in its internal affairs to alleviate human rights' violations. However, he suggests, even this point of view leaves room for state sovereignty (Wellman, 2012).

Wellman's (2012: 119) perspective is that state sovereignty is "a country's moral dominion over its self-regarding affairs – a right of self-determination which includes a claim against external intervention." Human rights, however, he perceives as the protections that guard against the "standard and direct threats to leading a minimally decent human life in modern Society" (Wellman 2012: 119). Addressed from this perception, he suggests, it becomes easy to understand why human rights would clash with sovereign rights. Further, he believes that if most nations are left to their own devices, they will not protect the rights of their constituents. This may be because they do not wish to protect their constituents' rights; it may be because they cannot protect their rights. Further, he asserts that many times, it is the state that actually poses the threats to the ability of the citizens to lead these "minimally decent human lives" (Wellman, 2012: 119). The central question, according to Wellman, is whether or not we are morally bound to accept that the state has sovereignty when it is reasonable to believe that if we intervene, we will be able to avoid having the state violate human rights.

There is little disagreement that human rights should prevail over the rights of an illegitimate state. Because rights of sovereignty are vested in legitimate states, there are no rights vested in illegitimate states. Whether or not all legitimate states should

have rights is sometimes debated, but according to Wellman (2012), most theorists believe that all legitimate states should have rights of sovereignty and thus to self-determination. The problem then becomes to determine what would make a state legitimate (Wellman, 2012).

Wellman (2012) provides a theory which he says is somewhat outdated: a state would be considered if it had the moral consent of those that were in the jurisdiction it was claiming. He argues that more recently, the concept is accepted that only states which are fully functional from a political standpoint should be considered legitimate. He extends this argument in defining the concept of being fully functional to mean that the chief legitimising function is to provide justice to the residents of the state. Thus, residents who receive justice would live in a legitimate state; those who did not receive justice would not live in a legitimate state.

The problem with this concept is that it is a somewhat circular argument; to say that it is legitimate because it is just but can only be just if it is legitimate, seems impotent. Instead, a better argument would be two-pronged. First, the state would be functioning at a level that it could provide justice to the citizens, in a competent manner; secondly, it would have the moral consent of the individuals being governed. Both conditions would need to be fulfilled for the state to be legitimate. It is important to note, however, that the state might not be providing justice at the highest levels; it would need to be competent or satisfactory, but not necessarily expert. Part of the legitimate political functionality would be that the human rights of the citizens were being respected.

Wellman (2012) suggests that one way to understand the distinction is to consider the nations of Norway, and of Somalia. Norway may not have a perfect government, but it functions at a far higher level than Somalia. Norway would thus be competent or satisfactory and have the acquiescence of most of the citizens. Thus, it would be a legitimate nation and should be immune from outside interference. In a case like Norway's, it should remain free from outside interference even if it was possible that the interference could benefit the state or the people and do more harm than good.

One might take the idea of interference even further. For example, Wellman (2012) suggests that perhaps there were one person being tortured inside Norway, and

another nation wishes to help the person being tortured. If Norway says not, they cannot help, then the state's legitimacy should be questioned. Thus, a state is legitimate only if it is able to allow the help without coercion. If a state that wishes to interfere asks to do so, to help the one individual being tortured, and the state says yes, then the state that voluntarily accepts assistance is legitimate. This presupposes, however, that the action of the assisting party is proportional to the need of the individual being tortured and does not interfere with other parts of the state's functionality and sovereignty.

6.5 Right to Sovereignty of the Bedouin Tribes

In determining whether or not the Bedouin Tribes have a right to sovereignty, it is helpful to examine the sociological background of the tribes themselves. Blunt and Blunt (1879) studied the Bedouin Tribes and concluded that they were a pure form of democracy and indeed perhaps the purest form of democracy in existence in the 1870s. Blunt and Blunt (1879: 408) suggest that the tribe could be characterised by the words "liberty, equality, and fraternity," and that liberty encompassed both natural and individual freedoms. When the Blunts wrote their book, individual Bedouins refused to be fettered with any type of duty to anyone, even to his tribal members. The Blunts describe the Bedouins as accepting no limitation of their personal sovereign rights, but rather able to act in their own best interest and to act at will. Bedouins who became unhappy with the tribe were able to leave their tribe, and no one would question them nor punish them. However, if the member stayed with the tribe [voluntarily] he had to follow the rules the tribe set up. In turn, he was able to take part in all of the tribal discussions. If he decided he could not agree with a tribal decision, he was free to leave. One reason that a member might leave was if he or she felt their independence was confined.

The net effect of this tribal organisation was that no one complained about what occurred in the tribe, because they were always free to simply leave. There were no concerns about overly strict governance, for the same reason; should the government make overbearing decisions, people would leave. Blunt and Blunt (1879) reported that upon occasion, a group of Bedouins would disagree with the majority of the tribe and would simply leave and form a new group. There was no repercussion to this, because everyone was allowed to do as they chose. As a result, tribal groups tended to be small.

During wars, it was not tribal loyalty that kept the tribe together, it was a more practical application: the fear of being attacked. During the period of time that Blunt and Blunt observed the tribe, the tribal setting numbered 12,000 tents. There was a war going on, and they wish to be protected. When the group decided to leave, however, 500 tent families remained behind. Even though the 500 were now in danger, they simply accepted that they were doing as they pleased and as they had the right to do. The tents were their castle, the Blunts agreed (1879). The Bedouins were free of taxes, there were no police, and they did not want to give up independence. They would do so, however, for the right of protection. Otherwise, they would be pillaged by other tribes.

The system of governance developed in the 1800s is still nominally in place in the Bedouin tribes. There is a sheykh, who was originally elected; the son, brother, or uncle succeeded the sheykh when he died. If there was an extraordinary soldier in the tribe, they would (rarely) replace the sheykh at the tribe's united request. The Bedouins preferred weak leaders to strong ones, as the strong leader might search for power but the weak one would simply represent the tribe.

The sheykh solved tribal disputes, mediated arguments between husband and wife, and took care of the tribal business. While he was paid by some degree by being able to take an extra share of whatever booty the tribe took, he could not levy taxes nor hire police or anyone to maintain his interests. The tribal leaders seldom took advantage of their positions, because people would leave. When the tribes made enemies, they remained enemies for generations. However, disagreements inside tribal family units were transitory.

Today, the sheykh is a Sheik; he interfaces with other tribes and the state, as needed. The Bedouin live in Israel; if they live outside of Israel, they are registered as refugees. They now live in Gaza, Hebron, Sinai, Jordon, and the West Bank of occupied Palestine (Amara and Nasasra, 2015). In the West Bank, the Bedouin are nomad. They have lost their original land and are largely uneducated. Amara and Nasasra (2015) refer to them as marginalised. Since 1948 they have been subject to forced displacement, land expropriation, and numerous human rights violations. In general, they live in very poor conditions, they lack basic services, and are threatened with having their homes demolished. In Israel, the government will not recognise any of the historical rights of ownership, and since the Bedouin did not recognise any form

of government so they did not get land titles, they are now very vulnerable to anything the Israeli authorities decide to do to them. The more that their land is taken over and controlled, the more Bedouins are displaced and are forced into urbanisation. The more settlements that are constructed, combined with the building of the wall, and the more access to Jerusalem is restricted, the worse conditions the Bedouins live in (Amara and Nasasra, 2015).

To some extent, however, the different Bedouin groups have different sets of legal protections. How they are protected will depend upon the laws in the various jurisdictions in which they landed. Bedouins now in Jerusalem came from Palestine in 1948 and thus are protected by the UNRWA mandate. Many were moved a second time and are considered to be internally displaced persons, protected under international law for this condition as well. According to Amara and Nasasra (2015:10), "These protections are developed in soft law documents such as the UN Guiding Principles on Internal Displacement." However, other Bedouins live inside Jerusalem; many of them are considered Israeli residents or entitled to residency if they have not yet claimed it.

Article 4 of the Fourth Geneva Convention defines the status of the Bedouins as 'protected persons' as part of International Humanitarian Law. Bedouins are also protected by International Human Rights Law. International Human Rights Law in Palestine is co-applied with International Humanitarian Law. In addition, Bedouins are classified as Indigenous People and as such are afforded additional protections under international law (Amara and Nasasra, 2015). Bedouins on the West Bank are regarded as being refugees from Palestine. They have little access to services, to utilities, or to transportation or roads. They also may not be able to have access to medical care or educational facilities.

Most of the schools in the West Bank that Bedouins have access to are under threat of being demolished. The population is under Israeli control. More than half of the Bedouins that live in this area are food insecure. They receive aid from UN food agencies, from UNICEF, from the International Red Cross, and the UNRWA (Amara and Nasasra, 2015). They also receive tents when their homes are demolished. The Palestinian Authority (PA) is limited in what it can do since the area is under Israeli jurisdiction, so many of the Bedouin needs go unmet. Anything that the PA does do must first be approved by Israel; if they do not get the money, food, educational

materials or even structures approved, they can be legally destroyed by Israel (Amara and Nasasra, 2015). The United Nations Development Plan (UNDP) has reported that the Bedouins on the West Bank are not recognised as being indigenous persons by either the Palestinians or the Israelis; because of this, they do not have any kind of formal voice. In January 2013, the Palestinian minster insisted that destroying Bedouin homes was a war crime and he pledged to provide support for the Bedouin communities to be allowed to stay on their land. Because of the limits placed by the Israelis, however, there is very little the Palestinians can do. Whether or not this situation is legal is described in the next section.

6.6 Humanitarian Intervention: Is it Legal?

There has been a great deal of analysis relating to whether or not humanitarian intervention in the case of the Bedouin community would be legal. A large part of the issues relates to which community the Bedouins actually belong. The nature of the area of occupied Palestine lends itself immediately to a discussion of what would be legal or legal, to whom, and why. The overlapping and interlocking nature of the geographic area housing Bedouins complicates this issue tremendously because of claimed 'ownership' of both Israel and Palestine. The case can be summed up with this one sentence: Israel says that the Fourth Geneva Convention is not applicable as a matter of law; the UN's General Assembly, the Security Council, and the International Red Cross say that the Fourth Geneva Convention applies.

There issue regarding the legality and illegality of humanitarian intervention has spurred debates. Most of the debates on intervention usually revolve around the issues of sovereignty. Under international law, for intervention to be legal, there has to be consent from the authority which controls the territory in which intervention will be done. In cases where intervention is done without the consent of the political authority in which intervention is done, intervention is seen as illegal. With the enunciation of the R2P principles however, intervention can be sanction by the UN if the state is unwilling or unable to carry out the intervention (Mamdani, 2010). It (intervention) that is done without the consent of a given state is usually done for humanitarian purposes especially with the aim of protecting civilians from crimes against humanity such as genocides (Mamdani, 2010).

6.6.1 Case for Illegality

The Hague Regulations of 1907 (Hague Regulations, 1907), the Geneva Conventions of 1949 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 [Geneva Convention]), and the Additional Protocols of 1977 (Protocol Additional I, 1977; Protocol Additional II, 1977), serve as the basis of applicable International Humanitarian Law (IHL). Section III of the Hague Regulations and Section III of the Fourth Geneva Convention as well as the First Additional Protocol (Protocol Additional I, 1977) set the applicable laws on occupation of the Palestine/Israel areas of contention.

At the time of the beginning of armed conflicts in 1967, Israel, Jordon, and Egypt were all parties to the Fourth Geneva Convention (Benvenisti, 2012). Israel refused to accept that the Fourth Geneva Convention would be applicable to the occupied area of Palestine, because it argued that the occupied Palestinan Territories had never belonged to a state that was a party to the Convention. Because Jordon had control over the West Bank at this time, but they were not recognised as having sovereign rights by the international community when Israel took control of the occupied area, Israel argued that the Convention would not apply (Amara and Nasasra, 2015).

The Harvard Program on Humanitarian Policy and Conflict Research International Humanitarian Law Research Initiative (herein after HPCR) pointed out that there is historical perspective for Israel's objections. HPCR (2004) suggests that Iraq in Kuwait, Russia in occupation of Afghanistan, Indonesia's occupation in East Timor, the US occupation of Granada, and the US occupation of Panama were all contested; occupying powers seem to believe that if they concede the law applies to them, then the law may have implications that exceed the law of occupation for the territories they are occupying.

Through the years, Israel has occupied a number of territories in the region. They have, at times, occupied the Gaza Strip, the West Bank (which they renamed Judea and Samaria), and East Jerusalem. They have occupied the Sinai Peninsula, southern Lebanon, and the Golan Heights. Each time they have argued that the Fourth Geneva Convention (Geneva Convention, 1949) does not apply. Instead, Israel argues

that it will follow humanitarian provision of the Convention, and the Israeli Supreme Court uses the lens of the Convention to evaluate treatment by the military of individuals in occupied Palestine. Further, the Supreme Court of Israel has held that the Hague Regulations of 1907 must be followed, as well as the Additional Protocols of 1977. Still, however, Israel insists that it has full legal jurisdiction and decision-making for Area C, the occupied areas.

Israel bases its arguments on the status of the territories prior to occupation. In 1967, the Gaza Strip was occupied by Egypt, while Jordan occupied the West Bank (Imseis, 2003). Israel's contention is that the Fourth Geneva Convention, enumerated in Article 2, does not apply to all occupations and particularly to occupied Palestinian Territory (OPT) (HPCR, 2004). Israel asserts that the Convention's rule on occupied territories do not apply because there are not two High Contracting Parties when Israel took over. Article 2 of the Convention states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (Geneva Convention, 2016: paras. 1-2).

When Israel reads these directives, they believe that because Gaza Strip and West Bank were not in the control of a High Contracting Party when Israel grabbed them, the Convention would not apply. Similarly, they argue that Egypt and Jordan only occupied these territories because of the war in 1948. Prior to the 1948 war, the territories were under control of the British Mandate via the League of Nations. Thus, they argue, Egypt and Jordon were not sovereigns over the territories. Because of this technicality, they assert, they did not remove a sovereign power when they came in and occupied OPT (HPCR, 2004).

The way that Israel interprets Article 2, in order for the Fourth Geneva Convention to apply (since it applies to civilians in occupied territories), it would be

necessary first for there to be a sovereign nation to remove. Israel believes that occupation "is a transitory state ending with the return of the occupied land to the legitimate sovereign" (HPCR, 2004: 4), Thus, if there are no sovereign rulers that the area could be returned to, in Israel's eyes they are not an occupying power. The Israeli government believes the nations of Gaza, Samaria, and Judea are *sui generis* (beyond the law) (HPCR, 2004). Yet they still argue they follow the humanitarian provisions, while simultaneously arguing they do not apply. At the same time, they are unable to provide a list of what provisions they follow. Upon occasion, the ICRC has been allowed to provide aid, especially to detention areas. This has occurred for more than 50 years as of this writing.

6.6.2 Case for Legality

Under International Humanitarian Law (IHL), the Bedouin should be under full protection, including the right to not be forcibly transferred, and that their possessions should not be destroyed (HPCR, 2004). Under the classification of International Human Rights Law (IHRL), Israel, as well as Palestine, ratified a number of conventions that should be protecting the Bedouins. According to Amara and Nasasra (2015), these include:

- the International Covenant on Civil and Political Rights (ICCPR),
- the International Covenant on Economic, Social and Cultural Rights (ICESCR),
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- and the Convention on the Rights of the Child (CRC) (Amara and Nasasra, 2015:14).

In 2014, Palestine joined these treaties; the nation of Palestine also joined the Rome Statute in January, 2015 (Amara and Nasasra, 2015).

Both IHL and IHRL apply to occupation as well as during armed conflict, and both of these systems protect civilians. In some cases, IHL and IHRL overlap. IHRL should not be in doubt at all, regardless of how Israel regards the Territories or who

they assert they belong to, since both Israel and Palestine signed the agreements. Israel has repeatedly been warned by the ICJ that as long as it claims power over Palestine, the ICESCR requires it to meet humanitarian requirements (Stubbins, 2008).

The Israeli Supreme Court disagrees with the Israeli government and has sought to ensure that the Israeli government is bound by the "Laws of War," and has ruled that even if there are issues related to sovereignty, they would still be required to follow the Laws of War as long as they are in control of the occupied territories (HPCR, 2004). On May 30, 2004, the Court ruled that:

> The military operations of the [Israeli Defence Forces] in Rafah, to the extent that they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907…and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. (HPCR, 2004: 5)

According to the Israeli Supreme Court, the Hague Convention and Regulations reflect customary law more than do the Geneva Conventions. However, Articles 23, 64, and 78 of the Geneva Conventions are applicable in the occupied territories, as are the detention provisions of the Fourth Geneva Convention (HPCR, 2004).

A number of international organisations strongly support the contention that Israel is responsible for applying the Fourth Geneva Convention to the OPT. Among these organisations are:

- State Parties to the Geneva Conventions;
- UN bodies (General Assembly, Security Council, Economic and Social Council, Commission on Human Rights);
- ICRC;
- International Non-Governmental Organizations (HPCR, 2004: 6).

The Palestine Liberation Organization also supports Israel's responsibility for the occupied areas given the occupation and Israel's insistence that it is in control of the areas.

6.7 Summary

The applicability of humanitarian law to the occupied Palestinian territory clashes with Israel's perception of its responsibilities under the law. However, given that Israel concedes that it should be providing humanitarian relief, and the rulings of its own Supreme Court, Israel's arguments for failing to make adequate provision for those in the occupied territories pale. The international community is nearly unanimous in its condemnation of Israel for failing to make adequate provision for residents of the occupied territories, especially the Bedouin tribes. It is safe to say that humanitarian provisions of international law should be enforced, residents of the occupied territories should be allowed to live in peace without fear of having their possessions and homes destroyed, and human rights should be given to each of the residents.

CHAPTER SEVEN

ORGAN TRAFFICKING IN EGYPT: A SINAI LINK

7.1 Introduction

As the research has shown thus far, there is a great deal of media attention to the topic of organ trafficking but little empirical evidence of how much organ trafficking may, or may not, occur. In December, 2016, the Administrative Control Authority of Egypt reported that 25 people or more had been arrested that week as participating in an international organ trafficking ring. The arrestees included doctors, nurses, and professors, and the authorities reportedly found not only gold bullion but millions of dollars (BBC News, 2016). The arrests highlighted one difficulty not only with Egyptian transplant law, but with the law from other nations as well: the money that the participants make far exceeds the fines and actually makes prison sentences worthwhile (IMTJ, 2018). The international organ trafficking ring, which eventually involved 45 practitioners, was selling body parts that would eventually end up in Europe.

The eventual trial saw 37 people convicted, and 3 people cleared. On individual died before the trial could begin. The 37 individual convicted were sentenced to prison for terms ranging from three to 15 years. The case had focused on private hospitals and private health centers, some of which were licensed and some of which were not. Both transplants and organ harvesting took place in these centers, with many of the organs going to wealthy foreigners both inside their own countries and inside Egypt. Twenty of those convicted received jail sentences for 3 years, and a fine totally 200,000 Egyptian pounds, or 12,700 USD. Eleven were sentenced to seven years in jail; they were fined 300,000 Egyptian pounds or 19,051 USD. Six of those convicted were sentenced to 15 years in jail; they also received fines of 500,000 Egyptian pounds, or 31,752 USD (Reuters, 2016).

7.2 National and International Law on Organ Trafficking

One of the difficulties in determining laws and impacts of national and international law on organ trafficking is the vast amount of misinformation that is not only available, but ubiquitous. Some reports, such as the one by Win (2018) assert that there are very few nations with laws that laws that govern organ donation, while also

arguing that lack of donation law leads to organ trafficking. Earlier in this research, the Palermo Protocol to the UN Convention Against Transnational Organized Crime, and specifically Article 3(a) was discussed in the context of organ removal. Gallagher (2010) argues that there are essentially three prongs to the elements necessary to find someone guilty of trafficking in organs (THBOR). These elements include that an action must be taken by a group or individual, they must have the means to achieve the action, and the purpose of the action must be exploitation. The 2005 Convention on Action against Trafficking in Human Beings emphasizes that taking of an organ is exploitation, in a form specifically defined as an element of trafficking (Council of Europe, 2005). Further, additional conventions forbid not only the trafficking of organs, but trafficking of body parts and tissues.[32]

At the international level, there is no binding law which prevents selling the body of a human or any of its parts, even for financial gain. However, the various conventions and assemblies have consistently called for the sale of these items to be prohibited. The Declaration of Istanbul (2008) argued that the issue of transplant commercialism should be widely discussed, in the context of a practice by which the organs of a human body became a commodity that could be bought or sold, or that could be used for gain in one way or another. WHO (2010) released the *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, which had been released years earlier. The updated guide prohibited the purchase of organs, but more importantly prevented the *sale* of organs. Without this specific guidance, it was difficult for people to understand that there was indeed a link between human trafficking and the sale of human organs.

Today, most nations criminalise not only the purchase of organs, but the sale. The process of legal organ procurement is heavily regulated and departing from these protocols that have been established can result in violation of the national regulations. One of the biggest problems with prosecuting organ trafficking is that there is a

[32] While the trafficking of body parts and tissues is inevitably a subset of human organ trafficking, this type of trafficking is not addressed, specifically in this research. While the researcher acknowledges the value of studying body parts and human tissues in relation to human trafficking and organ trafficking, the decision to omit extensive discussion and data of the topic was made in order to focus the research on types of organ trafficking that were more likely to occur in the Sinai region. Thus, even though the case studies and examples utilized in this research may not apply specifically to the Sinai, the lessons learned from the case studies are extremely pertinent. The inclusion of body parts and tissues in this specific research would not provide as much value to the topic. It is acknowledged, however, that the trafficking of tissues and body parts might well be the topic of additional research in the future.

difference between charging organ sales and procurement as a trafficking offense, as opposed to charging them as a transplant offense. Thus, to maximise the severity of the punishment and to deter the recommission of the crime, the charges should be in the area of THBOR whenever possible. The problem, of course, is that it can be more difficult to prosecute as THBOR; it is also more difficult to investigate these incidents as THBOR crimes, because the participants in the crimes are well aware of the difference between organ violations, and THBOR crimes.

Complicating the issue overall is that the individuals who are the heads or directors of organ trafficking rings or groups usually take a great deal of care to ensure that in an organ theft scheme, the individuals that are targeted do any of the forms that would typically be required in a legitimate donation transaction. In other words, one of the ways to obfuscate prosecution for these crimes is to ensure that the paperwork involved looks like a legitimate donation.

Most people are aware that one of the elements for conviction of a crime in most nations is ‘intent’. An accidental car accident which kills someone would not carry the same penalty as an accident which was deliberately arranged with the intent to kill the passenger. The same is true with THBOR. If the elements of threat or coercion exist, or if the ‘donor’ has been abducted or deceived, if the person is a victim of abuse of power or is in a position where they are subservient or vulnerable to the person who wants the organ, then ‘intent’ exists and negates the volunteer nation of the transaction. If the ‘donor’ has been offered a financial incentive that is outside of the bounds of the law or offered some kind of benefit in order to get them to consent to the transaction, then they have been coerced.

The case of illegal organ trafficking in the context of Moldova and Israel, later in this chapter, illustrates this concept well. One of the important points of consent is that it is not a valid consent (or legitimate consent is invalidated) if the agents of the operation have misled the ‘donors’. In the case of Moldova and Israel, for example, not only were several of the ‘donors’ mislead as to how they would feel physically after the operation, and how they would recover, they were also misleading as to the general state of their health or any precautions they would have to take after their organ was removed. As a result, it was clear that the victims in that case would not have consented

to the removal of their organ, had they been aware of the truth of donation. This element helped fulfill a charge of fraud against the traffickers.

The Council of Europe has asserted that the level of economic desperation of the targeted donor, including how marginalised they are, can lead to fulfillment of the abuse of vulnerability (Council of Europe, 2005). In the Sinai, for instance, those experiencing forced migration from Eritrea are certainly vulnerable. Being part of a minority, or a member of a persecuted religious group, as well as being a member of a group that is suffering from economic desperation can all result in the designation of abuse of vulnerability. In essence, if the individual (or individuals) are so downtrodden that they are afraid for their own survival, they are naturally more likely to fall victim to any manipulator who is able to convince them that they can help them out. To such as victim it must seem as if the individual in the position of power holds a magic wand, as if by waving it, the problems the potential donor is experiencing will all disappear. In the Moldova/Israel case, it is easy to see why the victims became victims. Certainly, four of the five intended donors were in those marginalised groups. They were a single mother, with almost no income, or fathers with no way to support wives and children. They were in ill health or experiencing some level of physical incapacity that interfered with their ability to earn a living in their society. They had exhausted their resources and were living in areas that had little to offer in the way of government assistance. In short, they were extremely vulnerable to overtures from anyone that appeared to be able to take them from their current level of desperation and raise them to a level of being able to survive. The Council of Europe (2005, para. 83) stated that:

> … "abuse of a position of vulnerability [means] abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological...or economic. The situation might, for example, involve […] economic dependence […]. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited".

The next paragraph in the Council of Europe's (2005) Explanatory Report suggests that proving the abuse of vulnerability might be fairly easy. It is defined as abusing economic insecurity when an adult is trying to make things better for themselves or their family. The net result is that if a donor believes they have consented

to selling an organ, but they have really been pressured because they are hurting financially, then the consent is not real. It is, instead, abuse of power.

This is exactly what happened in the Medicus case, described in Chapter one. The Confirmation judge had dismissed trafficking charges, believing the individuals had consented to organ removal. However, when the case went to Appeals, the charges were reinstituted, after the Court found that there had been abuse of someone in a vulnerable position, by an agent in a position of power (Columb, 2016; Lewis, 2010). The Appeals court, in their ruling, pointed out that to travel to a foreign nation and sign over an organ just because a stranger told them to would be ludicrous. No one would do that unless they were vulnerable for some reason. Indeed, the individual involved in the case argued that he needed the money; he was deep in debt. He wanted a better life. He met a stranger in a park; the stranger offered him money in return for an organ, and he got on the plane to go donate his organ. He agreed before the operation that he would be returned home via airlines shortly after the operation. Further, he did all of this without any form of a contract. There was no way to even ensure he would actually be paid. The Appeals court concluded that no one would do this unless they were coerced.

One question that naturally arises from this analysis is whether or not the age, mental health, intelligence or education would make a different in determining whether or not the person had been abused because they were vulnerable. Individuals with a lower intelligence, or who have a low level of education, might not see anything wrong with agreeing to the above scenario. They might not be able to discern that there was something 'wrong' with the transaction. Thus, it is possible that even if the person does not have any of the conditions that were blatantly established by the Court or by the Council themselves, there may be other conditions that would render the person vulnerable for the purpose of this Protocol. There are times that an individual is interrogated by the police, for example, and it is immediately obvious that they lack the mental capacity to be involved in one effort or another. If this were the case in dealing with organ trafficking, it might save a great deal of time and effort to simply have an officer of the court or even a police officer speak with the victim. If it is immediately clear there are functional deficits (including the possibility of age-related infirmity), then the potential for prosecuting these cases might rise dramatically and the investigatory time might decrease.

7.3 Factors Contributing to Organ Trafficking

Roughly 30 years ago, the trafficking in organs began. Organ transplantation is, without a doubt, one of the wonders of the modern medical world (Bos, 2015). With the development of transplantation, hundreds of thousands of people across the globe gained the possibility of continued lives or lives with a greater level of quality of life, than was ever possible in the past. However, as Bos reported, transportation has ceased to be considered as a positive act for thousands of individuals and is something to fear for many others. Transportation is no longer the purview of a family's contribution after a death, or even of organ sharing through formal hospital process, but is now feared for the possibility of organ theft in the night. The organ's true owner may, or may not, survive after being grabbed or assaulted, having their organ(s) harvested under less than optimum performance, and being stitched up and abandoned, reportedly sometimes in a tub of ice, but other times in a body dump.

Martin et al. (2019) pointed out that we are in danger of leaving a legacy of the vision of "impoverished victims of organ trafficking and transplant tourism," when it really should be "a celebration of the gift of health" from individuals, to individuals (p. 60). This is within the context of the goals of the Declaration of Istanbul. According to Bos (2015) argues that we are getting better at tackling organ trafficking, but a better criminal justice response to organ trafficking needs to be developed. The goal should be to disrupt trafficking, and ideally to end it. In order to accomplish this goal, however, it is necessary to understand what the root causes of organ trafficking are.

The key stimulation for organ trafficking is, bluntly, a lack of supply of donor organs that are available to be transplanted. Subsidiary points to this would include the reality that where the organs are available may be a mismatch with where the organs are needed. It is all good to say that the various nations are working on increasing the number of donors and even in becoming what Bos calls "a level of self-sufficiency" in donation and in transplantation. The problem is that no matter how much a nation promotes the awareness of the public, and no matter how many people are willing to donate upon their deaths, and even when the nation works with its neighbours to increase the organ exchange pool, this methodology is not going to work. The demand is too high, and the supply is too low. There are volumes and volumes written on the concepts of supply and demand in the context of economics.

Calandrillo (2004:69) argues that there must be some type of incentive for people to donate their organs, or we face "the reality that most suitable organs are taken to the grave with their owners instead of donated to those whose lives hang in the balance." Unfortunately, today's laws are written in such a way that the very thing that increases donations – money – is illegal to exchange for organs. No problem, Calandrillo responds: give free drivers' licenses to people with donor promises, give tax breaks in return for donor documents, and so on. He considers paired organ exchanges to be less efficacious, but still better than the status quo.

There seems to be little doubt that people understand that the need for organs is the driving factor in organ trafficking. However, two things are necessary in an economic exchange: the supply, and the demand. The previous paragraphs established that there is a strong demand throughout the world. However, the problem or issue is the supply. Bluntly stated, there is a "worldwide shortage of donor organs available for transplantation" (BOS 2015: 60). Thus far, all of the procedures and plans that have been implemented in order to alleviate the shortage have made minor inroads into improvement, but these improvements are minute compared to what needs done.

Another factor that contributes to organ trafficking is rooted in the concept of the 'haves' and the 'have nots'. The developed nations have a huge demand for kidneys and other organs, demands that cannot be fulfilled with current transportation plans and regulations. As a result, transplant tourism has become popular, whereby individuals from the developed societies (for example, Europe, Australia, the Gulf States, and North America) travel to what are referred to as less developed or third world nations in order to not only acquire bargain-rate organs but to gain discount surgeries. Targeting vulnerable populations essentially provides the money that drives trafficking and makes the facilitators in these nations continue their activities that guarantee the profit that motivates them (Bos, 2015). Bos points out that it is ethically unacceptable to allow the wealthy minority of the inhabitants in the globe to use poor people, the poor majority, to be a source of replacement body parts. Another solution must be developed.

The year 2005 saw transplant tourism, along with human organ trafficking and commercialisation (Danovitch et al., 2013: 1) become the most pervasive influences on transplantation therapy worldwide. In 2005, Pakistan, Egypt, India, and the Phillipines' poor were the most common sources of organs. Colombia supplied the most organs

from donors who were already deceased, and China supplied a significant source of donor organs from executed prisoners (Danovitch et al., 2013). It was the rise of transplant tourism associated with this unusual 'donation' method and hosts that led to the development of the Declaration of Istanbul (Danovitch et al., 2013; see also see Article 3; Declaration of Istanbul, 2008: 1228).

The sale of organs seems to have begun in the 1980s, and gradually developed from back street sales in very poor companies to transplant tourism, in which the recipients who sought the organs travelled, sometimes around the world, into a clinic that was able to facilitate the exchange of organs for [very little] money, from some of the world's poorest peoples. Candidates for these transplants who were wealthy or who had managed to arrange a source of funding came from the Gulf, Israel, Europe, and North America; in addition to the states already mentioned, they flew into Asia, South Africa, Latin America, and Eastern Europe. This type of transplant tourism typically took place at clinics and 'for profit' hospitals who were so bold that they advertised online, or used organ brokerage services (Danovitch et al., 2013).

In April 2008, 150 professional representatives, including ethicists, met in Istanbul to discuss the problems related to organ sales, organ trafficking, and transplant tourism. The meeting resulted in the development of the Declaration of Instanbul (2008) in May 2008. Over 130 professional groups, including governments, transplant groups, and medical societies, chose to adopt the Declaration (Capron and Delmonico, 2015).

7.4 Illegal Organ Trafficking Context of Moldova and Israel

In 2007, Israel took legal action against five unlawful trafficking in human organs crimes. In the case of *Haifa C.C 4044/07 The State of Israel v. Muhammed (John) Ben Taha Jeeth (Alen) et al.*, Israel prosecuted a case with five victims and two defendants. Defendants 1 and 2 were accused of trafficking in people for the purpose of organ harvest. The prohibition of Trafficking in Persons of Article 377A (a) (1) of the recent amendment to the Penal Law 5737-1977 was used as a basis for the prosecution.

The case was regarded as a precedent because it is difficult to get someone who sells an organ to take the buyer into court (Lundin, 2012). In this particular case, two of the people accused of a crime were sentenced in Israel; one of the accused was a doctor

from Moldava and was arrested in the Ukraine and extradited back to Israel in 2009. Lundin asserted that there was a pattern to the crimes, that could be spotted in one was familiar with organ trafficking. The first step was to find 'donors,' who in this case were to be paid. The organisers were careful; they did not advertise money for the organs. Instead, the advertisements, in Arabic, stated:

> Wanted – kidney donor of any blood type – blood type unimportant – a monetary prize during the convalescence –Dr. Muhammed 054–4423827 (see *Haifa C.C 4044/07).*

The ads were placed in *Panorama* and *Kol Al-Arab* newspapers; a copy of the original ad, in Arabic, is found in Lundin (2010). Note that the donors are offered a 'monetary prize' during convalescence. While the individuals who answered the ad were given an offer that involved the brokers paying for a kidney, they were given a physical to ensure they were healthy. Some of the individuals accepted the offer of the two 'doctors', but some did not. The ones that did not accept immediately generally reported feeling that they felt forced to sell a kidney and that they had been threatened. By this point all the individuals responding to the ad were given more tests and were moved to the Ukraine. In the Ukraine, they met a Dr. Zis, who took the kidney from the bodies of the individual. The kidneys were transferred into patients who also were not from the Ukraine; these patients paid between $125,000 USD and $135,000 USD for the ownership of the new kidney and the operation to install it (Lundin 2010, 2012; *Haifa C.C 4044/07).*

Every individual who sold an organ reported receiving both physical and emotional harm, and they all reported that they did not receive the amount of money they had been promised for their kidney. All of the victims were low or extremely low income; most had limited education levels and reported being in distress over their life circumstances (*Haifa C.C 4044/07;* Lundin 2010, 2012*).* The victims are listed in the next sections.

7.4.1 First Victim

An uneducated and illiterate single mother of two who occasionally made money as a housekeeper, victim 1 was told she would receive $7,000 USD for a

kidney. She changed her mind, and the two defendants went to her home and forced her, saying she would be able to 'enter paradise' after giving up a kidney. The defendants would not return her passport. She was given $3500 USD, but the second defendant took it from her for 'safekeeping'. She never got any money, because the second defendant refused to return it. She still has pain, and she has a large scar (*Haifa C.C 4044/07, Lundin 2010, 2012).*

7.4.2 Second Victim

A distressed and depressed 21-year-old male with an 8th grade education, working in a slaughterhouse, victim 2 was told he would receive $7,000 USD for a kidney. He was promised money and an 'excursion', which turned out to be the trip to Ukraine. He was promised to become the defendants' business partner. He and the first victim flew to the Ukraine via Ben Gurion Airport. The defendants subtracted all his 'costs' from the promised $7,000, leaving him only $500. He was threatened by the defendants and was afraid to go have stitches removed. Instead, he removed them himself. He is not strong enough now to go back to his previous work and is contemplating suicide, as he has pain, fatigue, and weakness (*Haifa C.C 4044/07; Lundin 2010, 2012).*

7.4.3 Third Victim

A medically unemployed 25-year husband and father experiencing debt and instability, victim 3 was told he would receive $7,000 USD or more for his kidney. He agreed, underwent tests, and had his passport taken by the defendants. The defendants later took him to the Ukraine via Ben Gurion Airport. Five days after the operation he was returned to Israel and given an envelope of money. However, the other defendant took his money. An argument ensured and the defendant gave him $3,500 USD and told him to come for the rest the next day. The next day no one was at the location; he could not collect the remaining $3,500 USD. Defendant showed up later and took him to have his stitches taken out (*Haifa C.C 4044/07; Lundin 2010, 2012).*

7.4.4 Fourth Victim

A 25-year-old engaged man working in the field of home improvements, this victim answered the ad and decided to *donate* his kidney, making the decision for altruistic reasons. The decision was made based on a wide variety of false representations. This victim flew with the defendants to the Ukraine where Dr. Zis operated. This victim was told the scar would disappear after the operation. Instead, the scar was 30 cm (11.81 inches) and not getting smaller. The victim still experienced pain and fatigue seven months post-surgery (*Haifa C.C 4044/07; Lundin 2010, 2012).*

7.4.5 Fifth Victim

A 28-year-old unemployed married male, unable to feed his family, had a type 0 kidney and was a welcome addition to the operation for this reason, as type 0 was a premium find. He was offered $7,000 USD and told his travel and medical costs would be taken care of. However, he was able to line up a job interview and thus decided to decline the operation. When he was not hired, he contacted the defendants and told them he had changed his mind. On the day he was scheduled to fly to the Ukraine the defendants were placed under arrest and the victim kept his kidney, without any payment of course.

7.5 The Illegal Organ Trafficking Charges

At least 32 witnesses were called for the court case (*Haifa C.C 4044/07; Lundin 2010, 2012).* The indictment took place under Article 377A (a) (1) of the recent amendment to the Penal Law 5737-1977, which prohibited trafficking in persons. The charge involved transnational trafficking by an organised criminal group, for the purpose of removal of human organs. The victims were transported, transferred, and harbored (since they were kept in a location and setting where they could not leave). The means was via threats of force or other coercions, abuse of power to individuals in a state of vulnerability, and the use of fraud and deception. The sector in which the exploitation took place was organ and tissue removal (*Haifa C.C 4044/07,* Keywords*).*

There were two defendants originally charged in the case. The first defendant in the case was using the pseudonym of Dr.Muhammed; his real name was Muhammed

Ben Taha Jeeth. The second defendant was listed as D2, et al., or listed as a partner. Both of the defendants were male (*Haifa C.C 4044/07)*. There were a number of charges for each defendant. Defendant 1 was charged with five crimes. In the final verdict, both defendants were found guilty of charges which earned them a sentence of four years in prison.

Muhammed's first charge was of "Executing a transaction in a person for the purpose of removing an organ from his body" (*Haifa C.C 4044/07)*. The charge was made under Section 377A(a)(1) and section 29 of the Penal Law 5737-1977 on the prohibition of Trafficking in Persons. The second charge was of causing grievous injury, charged under Sections 333 and 29 of the Penal Law. The third charge was exploitation of vulnerable populations, charged under Sections 431 and 29 of the Penal Law. The fourth charge was "Obtaining something by deceit under aggravating circumstances" (*Haifa C.C 4044/07),* charged under Sections 415 and 29 of the Penal Law. The final charge was of impersonation of a medical doctor and the use of a false medical title. This charge was made under Section 3(a) and 48 of the Doctors Code 5737-1976, as well as Sections 5 and 49 of the Doctors Code.

The second defendant received four charges. All of the charges were the same as Muhammed's (*Haifa C.C 4044/07)*; the second defendant was not charged as impersonating a medical doctor or using a false medical title because he had not presented himself as a doctor during his dealings with the victims.

Victim 2, the 21-year-old unemployed male with health issues, agreed to testify against the defendants, as did victim 1, the single mother. Lundin (2010, 2012) asserted that it was very unusual for a victim of organ trafficking to agree to testify, for a variety of reasons. First, it is very unusual for the defendants to ever go to trial. Second, victims are frequently converted into organ brokers and given a territory, which not only keeps them implicit in the crime but also involves their families. Third, many of the victims feel shame that they were so poor they felt they needed to sell part of their body. Finally, many of the victims are humiliated after being swindled and are unwilling to testify about it, because this would mean exposing their humiliation. For these reasons, the Haifa case was extremely unusual.

7.6 Organ Sales and 'Entrepreneurship'

Moldova, a republic bordered with Romania and Ukraine, is a poor country. A full 25% of the residents of Moldova left the country in search of a way to support their families. Those who remained in the early 2000s, after the fall of the Soviet Republic, were generally more than willing to participate in illegal activities if it provided a way for the families to survive. Not only did residents commonly prostitute themselves, but they entered into illegal labour agreements (which may well have been considered trafficking agreements under international law), but they also sold organs. According to Lundin (2010, 2012), most of the local residents were aware of who had sold kidneys, but it was also commonly known that no one wanted to talk about it. Lundin also related that there are areas in which local residents are essentially serfs or indentured servants and feel forced to sell their own organs to the individual that owns the land on which they work. Once the individuals have sold their organs, they are free from the agreement with the farmer, and the farmer takes the organs and sells them further. At this point, several things can happen. The former serfs realise they have stumbled on to a money-making opportunity, and they seek other individuals who are willing to sell their organs, while they personally serve as brokers and exploit these individuals. Alternately, or perhaps in addition, the farmer realises he can make additional money by expanding his organ purchasing business into other areas, and he thus becomes an 'entrepreneur' (Lundin, 2010, 2012).

From the standpoint of governmental participation, or at a minimum tolerance, in many areas the government simply 'fails to notice' that the illegal sale and procurement of organs is occurring. Trading in organs brings in more money to the area or nation and may decrease resident dependence on what is very limited public assistance. The presence of a supply of inexpensive organs and transplant workers may increase transplant tourism, which also shores up local economies. In some nations, the government itself sells organs from deceased prisoners. Westall et al., (2008), revealed that in the early 2000s, a number of nations would take organs from executed prisoners and sell them to attempt to lower the long waiting lists for transplants in the Asian nations, while at the same time increasing the government's coffers. In the early 2000s, it was known that Taiwan, Singapore and China all commonly used organs taken from deceased patients (Westall et al., 2008).

With the outrage against the use of organs from executed convicts, other methods had to be found to solicit and locate organs, while at the same time locating transplant patients who could pay for the organs. According to Capron and Delmonico (2015), there were several pathways established that were used to retrieve and transplant organs. Patients who lived in Europe or in the Middle East travelled to Turkey, where they received organs from local 'donors'. In the past ten years that pathway changed slightly, with young males from the former Yugoslavia being lured into Romania and Moldova, where their organs were removed and transferred to Turkey to the waiting clients. Kids from young men in Brazil were extricated and transferred to waiting clients in South Africa (Sidley, 2005; Capron and Delmonico, 2015), including being used in the Netcare victims in South Africa (Sidley, 2005; Shimazono, 2007). Today, however; all that has changed; traffickers, clients and 'donors' no longer rely on established routes and agents or agencies. Instead, they use a tool that virtually everyone, no matter their income or location, has access to the internet. Whether individuals have phones, computers, or library or office access is irrelevant; they can answer ads and seek out organ clients.

As of the time of this writing, China has the largest transplant tourism globally, but outrage from other nations resulted in China's reporting that it had stopped using organs from prisoners who had been executed (Capron and Delmonico, 2015). Stopping the use of organs from executed prisoners also ended the progress of sourcing organs through courts and then prisons. In that process, the payment went to the organ sourcer (prisons or hospitals) rather than to the family of the individual with the organs. When these types of ethically questionable sources stopped, the demand for organs did not decrease. It just became more difficult to find 'donors.' While patients were willing to pay over $150,000 for a transplant tourism package, the donors received very little of that money. Instead, the brokers and hospitals kept the money (Capron and Delmonico, 2015).

7.7 Global Ramifications of Organ Trafficking

As Section 6.2 shows, organ trafficking must be treated in the context not only of global trafficking but of economic impacts. Organ trafficking is essentially a system; the system involves both economics and quality of life implications. One half of the dichotomy makes money through selling of organs from a broker and putting them into

a customer; the framework behind systems theory is that there are a number of very complex processes that that interrelate and influence the effectiveness of the total process. The interrelationships of these components can be investigated, which is what is occurring in this paper. They can be understood, analysed, and enhanced. General systems theory, developed by Ludwig von Bertalanffy (1956), considered the interdependency of various elements of science which could be investigated separately. Bertalanffy generalised his theory, to show that it was relevant to a wide variety of disciplines ranging from business to science.

Systems theory shifts the attention from a part to the entire system of operation (Mele, Pels, and Polese, 2010). The elements of the system are connected with a focus towards shared purpose. Systems can be open and accept input from outside; they can be closed, and *block* input from the outside. Two relatively new systems exist. A viable system model (VSM) is a system model where the entities have become adaptable so that they can survive in an environment that changes. Thus, the system model that applies to organ trafficking would be the viable system approach (VSA) (Mele et al., 2010) or model (Beer, 1972). In the viable system model (VSM), the system learns through feedback and can, if necessary, change its own behavior. While VSM seems that it would apply to human organ traffickers, who have learned to adapt new behaviors and have learned the ability to cope with change made necessary in order to either evade law enforcement, or to envelop law enforcement and bring them into the organ trafficking web, the reality is that VSA and VSM concentrate on both sub- and supra-systems that would not be applicable to the organ traffickers. The open system is thus more applicable.

Trafficking of human beings for the purpose of organ removal has become a global issue. People tend to regard illegal organ removal as being the kidnapping of humans in order to steal their organs. However, there is a larger phenomenon involved. Organs can be taken from living persons; they can be stolen from deceased persons. Human tissues and cells can be trafficked, and organs can be removed under conditions that are not legal, but do not involve force or coercion (Bos, 2015). Many times, these types of actions are either overlooked, or noticed but not prosecuted. From a global perspective, any phenomena that is tolerated or allowed to proliferate without being

checked, and which contributes to the widening gap between individuals with higher incomes and individuals in lower income nations or areas essentially contributes to

7.8 Organ Trafficking: Preventative Measures

In 2006, a joint assessment team sponsored as part of a UNODC project launched with the goal of assessing referral practices to help victims of trafficking in Moldova and assisting them in any way that might be possible. The intent was to be able to develop an outline of the UNODC's response plan as of 2008. Myanmar was chosen as the location for the assessment because was chosen because it was a border area where it was believed trafficking routinely took place. Other groups investigated Romania, South-Eastern Europe, Kosovo, and Albania because they were in the same region. The UNICEF (2006) report, co-sponsored by the Interministerial Working Group for the Coordination and Assessment of the Activities to Prevent and Combat Trafficking of Human Beings, studied policies that were already in place at that point and being utilised to combat human trafficking. While the report concentrated in general on the ability to combat human trafficking, human organ trafficking was addressed as a subset of trafficking in general.

One of the more interesting findings of this report was that young girls were actually better informed on the topic of trafficking than the rest of the population. It was not clear to the authors of the UNICEF (2006) report, however, whether the knowledge of trafficking was accurate. The important point was that over 90% of the young female population had heard of human trafficking, mostly through television. If this this study were repeated today it is more likely that the internet would be a larger source of information. When the girls were asked whether they would, in general, prefer a job in Romania or abroad, 33.7% answered that they would prefer a job in Romania, but they admitted that to them, this meant they would probably be exposed to prostitution. Of the girls who preferred a job abroad, 14 % stated that they were concerned they would be exposed to trafficking of organs (UNICEF, 2006:88). It is of concern that a number of girls who stated they would prefer a job abroad would go to a private employment agency (5.7%). From a practical standpoint, utilising a private agency would increase the chance that the girls would be end up meeting someone that was involved in human trafficking.

While 85% of the girls that were interviewed had heard of the trafficking of human beings, most individuals had a social perception that trafficking involved the buying and selling of humans, forced prostitution, and the sale of children. Only 9.6% related the trafficking of human beings to the trafficking of organs. Further, half of the individuals that were interviewed felt that in order to get a job they wanted overseas; they would be willing to break rules that might otherwise have kept them safe. The rule that most people (36.6%) were willing to break was that they would declare a different purpose at their border control points, rather than the real purpose for the visit. Nearly as many (34.2%) felt that they would stay behind after their visa dates had been exceeded. The most concerning finding for this group was that the Romanian population is able to understand cycles of migration will be the model for living in the future and agree that they would be willing to leave their nation to have access to the basic living factors. Concurrent with this, there is a social perception that people who have migrated are successful (UNICEF, 2006). The impact of this belief is that these "successes" then serve as a motivator for others to begin the migrant cycle.

UNODC (2008) has produced an anti-trafficking toolkit. It is divided into several areas that are pertinent to human trafficking considerations. First, the legal framework must be established, the problems assessed and various strategies to prevent human trafficking (including organ trafficking) established, and the international criminal justice systems assessed, and mutual aid and cooperative practice agreements signed. Law enforcement and prosecution paths need to be solidified, and ways of identifying victims established. The identification process will require a wide variety of techniques, to suit numerous problems and challenges related to the establishment of who the victims are (or were).

Once the victims are identified, their immigration status must be determined, and the decision made as to whether or not to integrate the victim into the nation they are in, or whether to return them to their original nation, and try to seek reintegration. If return is sought, the refugees who are victims must be protected. A victim assistance plan, which can be quite different from person to person, must be established (UNODC, 2008). The needs of someone who has been sexually trafficked will be quite different from someone who has been used for labour or is a victim of organ trafficking. Most individuals who have travelled across international lines will need

materials assistance, language assistance, and psychological assistance. Women who have been forced into prostitution will need appropriate care. Individuals who have survived an illegal organ transplant may need everything from HIV/AIDS testing to skills training and education, shelter, rehabilitee, and education in the form of integrated services (UNODC, 2008).

7.8.1 Techniques for Disruption

UNODC (2008) suggests that one way to keep the numbers of victims of human traffickers from swelling is to use disruptive techniques. The key of disruptive investigative techniques is to disrupt the human trafficking operations that have been established, and in the process forcing traffickers to reveal themselves, either deliberately or accidentally (UNODC, 2008:185). One reason for using disruptive techniques is that some national laws prohibit taking proactive actions against a criminal group (UNODC, 2008). When this is the case, or when the area has features that make surveillance impossible, or when the lack of resources make proactive actions difficult, disruptive techniques are a good substitute. These types of operations can be less expensive than other interventions but are also faster to conduct. Disruption typically interferes with the activity but does not stop it. Most usually, the individuals who have their operations disrupted will eventually move to another area. However, it may be necessary for the operation to be disrupted repeatedly in order to make it impossible for the traffickers to operate. The combination of disrupting 'business', combined with techniques for education and relocation and integration have the possibility of dramatically lowering the amount of human or organ trafficking in an area.

7.8.2 Techniques for Education

Educational programs can be local, national, regional, or multi-agency and joint training initiatives. Educational programs can be aimed strictly at education, but they can also be aimed at disrupting whatever criminal elements may be at place in a location, or whatever organised criminal groups have set up in an area. UNODC (2008: 186) suggest that "local police agencies; immigration services; customs agencies; ministries of foreign affairs, health, environment and labour; fire services; local municipal authorities; airlines and other carriers" may all need to work together to disrupt, and continue disrupting, the trafficking process. Educational programmes will

typically be used as preventative measures and are used to educate people before they become involved in situations in which they may fall prey to traffickers of one type or another. However, these programmes can also be used as disruptive interventions. In general, education is used to reach out to individuals that are at risk of becoming in victims of trafficking (UNODC 2008). Since trafficking is a crime, any educational technique that is used for keeping individuals for participating in crime may be of effect in preventing people from falling victim to trafficking of various types.

Police and crime fighting organisations need to be educated in methods of identifying victims, discovering records of their past, and on providing social services to improve the lives of these victims while a final outcome is determined. In general, education can relate to prevention, or to mitigation and resettlement. Prosecutors and court officers should be educated as to the risk of trafficking, signs of trafficking, and legal rights of individuals who have been trafficked, either through sex trafficking, labor trafficking, or organ trafficking. The general public should also be educated, for it is the general public that will be the eyes and the ears of police and the courts (UNODC 2008). Providing both academic education and vocational education can greatly improve outcome for victims of trafficking.

Another level of education that is sometimes overlooked is that of personal safety, in terms of HIV prevention, rape prevention, and women's empowerment. Education and intervention should also involve drug abuse prevention programs. The UN also recommends "General education about corruption, the harm it causes and basic standards that should be expected in the administration of public affairs" (UNODC 2008:431). Helping world residents recognise governmental corruption may help keep individuals from become victims not only of corrupt officials but also from becoming victims of organised crime members who may depend on corrupt governmental agents in order to operate illegally.

UNODC (2008) suggests that effort be put into focusing on the education of crime, and on targeting specific groups with specific messages. Groups that may wish to enter migration should be given a great deal of advance information so that they can determine where they wish to go, and how they intend to get work. Helping the migrant population understand what a valid offer of work would look like, as opposed to an offer designed to lure people into servitude or the sex industry, is a necessity. General

safety rules, such as never going out at night alone, must be transmitted. Women and girls should be educated as to bodily autonomy and the right to either abort a pregnancy or to carry the pregnancy, which they see fit. Preventing pregnancy is another area for education. The idea of remaining vigilant and demanding accountability must also be addressed (UNODC 2008).

For many years, UNICEF sponsored the Meena Communication Initiative (MCI) which began in 1991 and exists in limited use today. Meena was a fictional nine-year-old girl who lived in South Asia with her family as part of a larger communication. The Meena Communication Initiative sought to gather the attention of every age group but was particularly designed to be attractive to young girls. The materials were developed by UNICEF and were originally developed at a central office. In latter years, however, the Meena program was decentralised and control was given to individual nations so that conditions which were of particular to residents of those nations could be addressed (Chesterton, 2004).

Chesterton's report, an evaluation that was commissioned by UNICEF Regional Office for South Asia (ROSA), evaluated the educational efficacy of the Meena program. It evaluated the program in the four nations that had supported MCI for the longest periods of time. This included Nepal, Bangladesh, India, and Pakistan. It considered MCI in terms of the key outcomes for achieved reach, knowledge, awareness, life skills, and perceptions. It described how the Meena process had been implemented, the financial costs and returns, and the potential to expand the program and keep it sustainable (Chesterton, 2004). The findings confirmed that Meena initiative was very appealing to children, especially in South Asia, and were able to create awareness of life skills and to communicate the rights of children and girls. The findings showed that context played a strong role in influencing how the children and their parents interpreted the findings and were able to apply them to their village. The researchers found that local poverty conditions, the social norms of the area, how local adults regarded child rights, and local concerns for the safety of children who were attending school made a great deal of difference as to whether or not the knowledge taught by MCI was actually adopted. It was this factor that led to the realisation that Meena needed to be decentralised, so that the educational project could be more pertinent to people in different geographic areas, where the needs would be different.

A reevaluation in 2019 of Meena Community Initiative in Bangladesh found that the program's momentum was not sustained. The last program developed was aired in 2011. However, Meena is still known in nearly every household. The program is considered one of the most effective ever in UNICEF (UNICEF 2019). The 2019 evaluation determined that it would be possible to bring in new stakeholders, establish a better ownership strategy, and form partnerships (using groups like Sesame Street Foundation as examples) (UNICEF 2019). In short, the MCI format might be very effective indeed in impacting people's beliefs about human trafficking, organ trafficking and labor trafficking, taught on an educational level that children would understand. In conjunction with this, it should be possible to provide educational materials by email or text to parents and family members. The entire family and community would benefit by such an initiative.

7.8.3 Laws of the Various Nations

In 2010, the Egyptian Parliament passed a law regulating organ and tissue transplants, in particular when they go from deceased donors to living patients. However, once the nation determined that the traffickers were able to exploit legal loopholes and preferred to take the fine rather than stop their very profitable actions, Egypt modified their law to provide tougher penalties. At the time this research was conducted, if an illegal act of organ removal occurs on a living person, the medical person or persons committing the act can be put in prison for no more than 10 years. The fine would be substantial. However, if the patient dies as a result of the surgery, the fine becomes huge and the medical practitioner is put in prison for life. The revised laws states that transplanting an organ or even a portion of an organ, or *tissue*, into a human being is prohibited unless there is no other option to save the patient's life, and the transplant does not pose danger to the donor.

Brazil has a convoluted history of attempting to regulate organ transplantation. In 1997, Brazil passed a law called an 'opt out' law that made every suitable resident of Brazil an organ donor (Csillag, 1997). The only way to avoid organ donation was to document opposition to the donation prior to death. Further, Brazil had what is called 'hard consent' meaning that even the families could not override the consent. By late in 1998, however, Brazil had abolished presumed consent in organ donation (Csillag,

1998) due to public outcry. In Sweden, adoption of a 'presumed consent' system saw organ donations fall from 13.4 donors per million of population to 12.7 donors per million of population over a five-year period (Bäckman et al., 2002). In France, when corneas were removed from a deceased 19-year-old accident victim under a presumed consent with opt-out law, public outcry was so loud that the rate of voluntary donations fell more than 20 percent (Thaler and Sunstein, 2008). Further, the nation ended up revising their donation law and, in 1994, enacting new law that severely limited the opt-out system by weighting the law in favor of the deceased's family's opinions.

Bird and Harris (2010) suggested that with only a 60% rate of organ donation from brain dead donors, it is time to reconsider how donation works in the UK. They argue that donation should take place unless the donor opted out while alive. This, they argue, would increase the number of organs available for use. One of the problems, they suggest, is that unless a program similar to this is used, the decision of whether or not to donate actually becomes the decision of the *relatives* of the deceased. In France, in the Tesniere case discussed above, the law that limited the effect of opt-out and weighted the laws in favor of the deceased's family, essentially gave the rights of decision to the family. The Caillavet law that had given the opt-out system priority because of the needs of the public at large was replaced with the Bioethics law, which gave the balance of the decision-making back to the family.

The Bioethics law requires doctors to approach the families of the dead to be certain that even if the deceased had not opted out, the family could give input as to what the deceased had really wanted. In essence, since a living donor is then not available to establish whether or not they wanted to donate, the family is giving hearsay testimony as to the victim's wished; the donor cannot countermand them. If the family says the presumed donor did not want his or her organs used, regardless of whether or not the deceased did, the families have the final say (Thaler and Sunstein, 2008).

While the Bioethics law intended to bypass a problem with the Caillavet law, which put the family's feelings behind those of society, the Bioethics law required someone who had decided not to donate to sign the register at the front entrance of the hospital. It was, thus, impossible for the presumed donor to do. Doctors were forced to approach families and to accept their wishes. By using a computerised registry to track patient wishes, the nation intended to remove some of the contentiousness of the death

and organ harvesting process. What really happened, though, is that after the Tesnieres problem, doctors were essentially reluctant to discuss the situation with parents, for fear that the hospital will be opened to legal challenge. Since organs cannot be considered donated without checking with the family, France is losing the use of a number of viable organs (Thaler and Sunstein, 2008).

China is a complex case as it relates to organ transplants. Prior to 2005, executive prisoners were the main source of organ 'donations' in China (Shi, Liu, and Yu, 2020). From 1960 to 2005, the Chinese were essentially exploring their options for transplantation. Like other nations, the demand for organs exceeded the supply of organs from the civilian population. Complicating the issue was the lack of norms, guidelines, registration systems, or even trained transplant surgeons. As surgeons were sent to the United States and Europe to learn to do transplants, the need for a system of transplantation controls became more obvious.

7.8.4 Duties of Law Enforcement Agencies

As discussed in Chapter 3, not all trafficking is organ theft. It is possible for organs to be purchased legally in some nations, and organs can be purchased illegally, but not rise to the level of organ theft (Fisseha, 2015). Further, regardless of what the law states, terms that do not mean the same thing are frequently used interchangeably by people who are discussing trafficking and organ removal, even if the people are professionals like doctors or police. In fact:

> Terms like 'organ trafficking', 'illegal organ trade', 'transplant tourism', 'organ purchase' and others are often used interchangeably with trafficking in persons for the purpose of organ removal, even where they would not refer to the same phenomenon (UNODC 2015:5).

As UNODC (2015) pointed out, that organisation established the meaning of the terms in the way they would be used in Article 3(a) of the Trafficking in Persons Protocol (UNODC 2000a). Article 3(a) established that:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or

> of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the **removal of organs**' (UNODC 2015:5).

Duties of law enforcement agents would thus be within the description of the terms established in the paragraph above. In 2013, the UN Economic and Social Council and the General Assembly produced resolutions that requested UNODC collect and analyse data that related to organ removal during trafficking in persons. Member States were encouraged to provide any evidence that they acquired based on the process of trafficking in persons, especially when it involved trafficking in persons for the removal of organs (UNODC 2014; UN.org 2014).

There is a tremendous interest in organ trafficking and organ theft in the contexts described above. However, like organised crime, this is a crime that remains largely hidden. It is not well understood; it is difficult to identify, difficult to pursue, and difficult to control or prosecute. The process of organ transfer is complex; it is technical and cannot really be accomplished without the participation of medical professionals (UNODC 2015). However, this researcher contends the opposite -- that a wide variety of individuals could be trained to harvest organs with a modicum of success, assuming the individuals had some type of basic education. Anyone who had worked with animals medically, had been a phlebotomist, had served as a medical technician in the army or civilian worlds – even someone with first aid experience – would likely be able to be trained to remove an organ, especially if they were not concerned with the survival rates of the 'donors'. Thus, this crime would be fairly easily accomplished, but fairly easily hidden, particularly in areas with wide rural spaces, deserts, or that were generally uninhabited.

Duties of law enforcement agencies include fighting the ability of anyone, whether independent workers or members of organised crime, to harvest organs illegally. It can also include, on the macro level, impeding the ability of transplant tourism to function. Police and customs should report violations of travel documents that have been forged and securing border crossing at the appropriate borders. If police

or customs officers are accepting bribes, then it is incumbent on other, honest officers, to report them and ensure that charges against them are pursued. As Pascalev et al (2016) pointed out, when an airplane lands from another nation, people should be demanding passports. If no one is demanding passports, it is time for questions to be asked as to what the crime being committed is, as well as who the other participants are. Mendoza (2011) studied the underground organ economy in the Philippines. It was most common for police or for government officials to get involved in the organ trade if other members of their families were also involved, for example as service brokers. In return, the police or the government officials would receive money from hospitals and from local agencies if they recommended these agencies for participation in the transplant chain (Mendoza, 2011).

In other areas, physicians and hospital owners work hand in hand in the illegal organ trade, and law enforcement officers support them. One of the reasons for this is that even the participants in the chain were caught *in flagrante*, they have been allowed to continue their activities because they the doctors, hospital owners and police receive a huge benefit from the large amount of money that the illegal organ trade brings in. The amount of money is so significant that there have been allegations that embassy officials in some richer nations participate in developing commercial transplants in poorer nations (Shimazono, 2007).

7.8.5 Duties of the Courts

Laws are not enough to end the organ trade (Capron and Delmonico, 2015). Not only do nations themselves have laws regulating the organ trade, but the United Nations also has agreements; there are a half dozen Declarations and Protocols, all of which attempt to regulate human trafficking, organ trafficking, organ sales, and the illegal transfer of human organs. Unfortunately, the courts are slow; they are busy. Any actions by the courts takes a great deal of time. There also must be extensive evidence gathering. Many of the individuals involved in these cases do not want to testify. The first duty of the court is to prosecute crimes, but this is, for all practical purposes, an extremely slow and ineffective process. In the case of illegal organ trafficking context in the context of Moldova and Israel, the court was very surprised to even find someone willing to testify. Further, despite having witnesses/victims who were willing to testify, and being able to achieve a conviction, the sentences were abysmal. In the Israeli case,

32 witnesses and five victims (two testifying), along with nine formal charges, earned the two defendants only four years each.

In the case that was reported from Egypt, 45 practitioners were arrested and charged with organ trafficking. The money that the participants were making actually far exceeded the fines, making crime literally pay. The convicted individuals actually felt they had been paid for their prison time. Eventually 37 people were convicted, with the longest term being 15 years. Twenty of those convicted received jail sentences for 3 years, and a fine totally 200,000 Egyptian pounds, or 12,700 USD. Eleven were sentenced to seven years in jail; they were fined 300,000 Egyptian pounds or 19,051 USD. Six of those convicted were sentenced to 15 years in jail; they also received fines of 500,000 Egyptian pounds, or 31,752 USD (Reuters, 2016). In cases such as these, the court needs to levy the maximum prison sentences and fines and take away professional licenses of those involved. The courts need to act as swiftly as possible, and as consistently. The courts must also consider the totality of the evidence, both direct and indirect, rather than requiring an absolute standard of proof. One expert witness investigating the possibility of Falun Gong genocide asked "'Why would detained Falun Gong practitioners receive specific physical examinations (including x-rays, ultrasound, blood tests) while at the same time being subjected to brainwashing, labour work, torture or torture death?" (Dr. Trey, in China Tribunal, 2019:19). The answer is that indirect evidence suggests that China is building up its living donor supply. *The courts must be willing to address totality of the evidence in organ trafficking cases, particularly if the individuals in the case show evidence of torture.*

Should individuals who sell their organs be prosecuted? One argument is that the individual who feels driven to sell their organs is probably desperate; there is a rich/poor dichotomy that a very poor individual will feel cannot be surmounted. Many times, the poor individuals that sell their organs do not get the money they were promised; they end up not only defrauded, but without an organ. This argument makes these individuals victims and holds that they should not be prosecuted. The other side to this argument is that the organ seller is doing something illegal; they know it is illegal when they do it, and they do it anyway. Even though many of these individuals are uneducated, it is a rare individual indeed who would not understand that surgery is painful and there can be repercussions. Thus, from this perspective, the argument that

these people are victims would not be valid. From this perspective, they were individuals looking to make a dollar, who did not care if the transaction was illegal. Neither of these arguments, of course, would be valid in the example of the individual who has their organs stolen in the desert by the Bedouin tribes. It would likely to apply in the case of the individual who was placed in a desert camp and tortured, or who had an organ removed in lieu of a ransom for freedom. It may help, however, to prosecute individuals who sell their organs for fiscal reasons. The court may also be more likely to gain the cooperation of individuals who were defrauded after selling an organ if it is clear that if the 'victim' is caught they will be prosecuted unless they testify. In the long run this may be the most effective method of ensuring that the witnesses and information are available to charge the members of the organ trafficking team.

7.9 Sanctions and Deterrence: What Will Work?

Jacob Lavee, the Director of the Heart Transplantation Unit at the Sheba Medical Centre in Israel led an educational initiative to make certain that patients who needed a transplant but were self-pays knew where their organs were coming from if they chose to go to China and buy a transplant. Lavee argued that if patients were able to set up an appointment to go to a hospital in China and have a [heart] transplant that matched their medical needs on a given day two or three weeks in the future, there was only one possible place the heart was coming from: it was selected from living stock, torn form the body of an individual killed just for that purpose (Lavee 2020). Once Lavee's team took the time to educate patients thoroughly as to where the transplants were coming from and how they were being acquired, the number of patients seeking Chinese transplants through appointment medical tourism completely stopped in Lavee's practice.

It may well be that the solution to these types of transplants, or at least a solution to the reduction in these types of transplants, is to discuss ethics with the patients in one's care and, as Lavee and his staff did, ensure that the patients know not only where the organ(s) are coming from but how they are retrieved. Appealing to the greater good may have more impact than any type of judicial deterrence.

7.10 Summary

In this chapter the national and international laws relating to organ trafficking were investigate, as well as factors that contribute to organ trafficking. Illegal traffic

context and charges, as well as organ sales and the concept of entrepreneurship, were also considered in Chapter six. The global ramifications relating to organ trafficking were reviewed, as well as taking preventive measure to decrease organ trafficking. Preventive measure may include techniques for disruption, as well as for education. The laws of the various nations are presented, and the duties of law enforcement agencies as well as the courts are considered. The idea of sanctions is reviewed, and the chapter summarised. In the next chapter, increasing the availability of the legal organ supply is presented as an alternative to an increasingly inadequate supply.

CHAPTER EIGHT

INCREASING AVAILABILITY OF LEGAL ORGANS

8.1 Modification of National and International Laws

Potential modification of national and international laws seems to center around the possibility of offering some type of legal remuneration for "donation" of organs. There is no real international 'law' relating to the sale of organs; the various protocols are voluntary agreements. One of the difficulties of prosecuting organ -related crimes is that, as some of the cases discussed in this research have established, a well organised criminal transplant group will have members on two or three continents or countries; they may have surgeons in Israel, transplant patients in the United States, and be soliciting organs in China. Deciding which laws to apply and where to apply them is a challenge. It is a matter of jurisdiction not only over the subject matters but of venue.

It would be of benefit to establish consistent laws relating to the utilization – and perhaps purchase – of organs. At present the majority of the laws that address organ utilization apply to the prosecution of organ-related crimes. It is, perhaps, time to establish treaties or cooperative agreements relating to the provision of organs, the distribution of rights to the organs, the utilization of a set of criteria for how the organs should be distributed, and to whom. In this proposed conceptualisation, the more facets of the agreement that could be established, the more likely the organ provision process is to operate successfully.

8.2 Donation of Organs, Sales, and Consideration of the Black Market

Few individuals would argue that the human organ procurement system is adequate, just as there are few who would argue that it does not need modification. Most individuals would agree that the organ trade has been criminalised (Lundin, 2010, 2012). The question then becomes what type of changes should be made to the system to decrease the attractiveness of using refugees and the marginalised for donations, both legal and illegal. There is an active global black market in organs. There needs to be a way to decrease this black market. Organs are necessity in life, but it is not acceptable morally and/or ethically to simply allow the system to be self-regulating and to

consider black market organs as a solution to the shortage. The current altruistic donation system is not providing enough organs. The alternatives appear to be to either decrease the need, increase the supply of legal organs through sales, or increase the supply of organs through donations.

Many people argue that the solution to the organ transplant shortage is *not* to forbid organ purchases. This section considers the sale and donations of organs and the relative procurement systems. In particular, in higher income nations, where rates of kidney disease also tend to be higher, the supply of organs that have been donated is far outstripped by the demand. It is, many groups argue, possible that by allowing tightly controlled purchase options, the supply and demand would equalise (Capron and Delmonico, 2015).

8.2.1 The Realities of Organ Donations

There are a number of hard realities associated with organ donation. One of the first realities is particularly applicable to the Bedouin tribes and the theft of organs in the Sinai. That reality is that the longer a medical technique has been in existence, the safer the technique gets and the higher the rate of survival becomes. The more that the process of organ transplantation is understood and the more that the experts understand about how and why organs are rejected, the more successful the process becomes. Organ transplantation is a relatively 'new' technology; it was only in the 1960s that any successful transplants occurred at all in humans (Hentrich, 2014).

Since the 1960s, transplants have become more common although it is difficult to say that they would be considered commonplace. The concept of the transplant, however, is well known; most people in the industrialised nations understand the basic concept of the transplant and also of transplant rejection. They understand that transplant waiting lists are long, that organs come from donors (living or dead) and that the chances of having an organ when one needs one are not particularly good for items like kidneys. The perception of organ transplants in extremely rural or non-industrialised areas may be completely different. As the research thus far has shown, the idea of organ transplants in an area like Ethiopia, Eritrea, or the Sinai is much more reminiscent of the 'urban legend' or modern folklore than it is of a description of a

valid medical procedure. To an individual in the Sinai, it is horrifying to consider that they may wake up one morning with a massive wound, missing a kidney. Surely it is difficult to connect the long waiting lists for organs in nations like the United States and Israel with waking up in massive pain, or with losing a relative due to organ theft. The connection is not one that would be made in the height of the pain and terror. Yet, it is the connection that links victim, organ expediter, organ remover, surgeon, and patient.

The voluntary organ donation system is very simple. In the United States, for example, when an individual gets a driver's license they are asked if they wish to become an organ donor. If they say yes, a statement to that effect is put on their driver's license. In theory, if they are fatally injured or taken into an emergency room in a comatose state, the physician will see the donor's mark and the individual, if dying, will be kept alive while the organ donation system is activated. Once activated, the person is allowed to die, the organ is harvested, and will be transferred to the location of the recipient (if the recipient is not close enough to come to the donor's hospital).

When an individual is placed on the wait list for a donation, their blood is typed and matched, and the type of organ that will most likely suit them is notated. The data is entered not only into the prospective recipient's file and electronic file, but also into the donor database. As the organ becomes available, the computer is able to match the donor and recipient and is also able to determine how to get the organ and the recipient together. Thus, a recipient in one area and a heart from another may be flown to a location that is halfway between the two, and the surgery will take place. Prospective recipients must be ready to go for surgery at virtually any time, in case they are lucky enough to be matched to a donor. Time is absolutely of the essence in these cases.

The nearly unanimously implemented system that exists at present is a simple voluntary donation mechanism, where organs are given either after death or during life in the case of those that are not needed by the donor to survive (one of two kidneys and portions of the lungs and liver). Donating to a specific person sidesteps the issue of waiting on a long list for an organ and is more frequently practiced between family members, whereas donating to a non-relative is not as commonplace. Waiting for an organ from an unrelated donor can take months or even years depending on the organ and availability. Thousands of people die every year waiting for a kidney, heart, liver,

or other organ, and there are a growing number of people on the waiting list for transplants.

8.2.2 Solutions for Organ Donations

One contribution to the set of solutions related to organ donations is the concept of swaps. This can be a global exchange, organ vouchers, or paired exchanges (Lo, Sonnenberg, and Abt, 2019). Lo et al. (2019) presented four possibilities for organ transplantation. Some of the pathways are already being utilised. Global paired exchanges and vouchers for advance organ donations would work with kidney donations. For liver transplantation, a liver paired exchange is one possibility. Trans-organ exchanges are a possibility, as well as trans-organ exchanges.

Another possibility is the one now being practiced in Iran. Iran has sought to decrease THBOR by establishing what is essentially a regulated organ market. As long as they follow the rules that the government has established, brokers can seek private kidneys from live donors. The regulated market does allow sales of organs for profit, and it allows the resale of organs for financial gain. It also provides protection in the market for both the buyers and the sellers. A regulated market tends to reduce the lists of people waiting for organs, because they are more readily available. Iran is seeing that their waiting lists are decreasing since the point that they developed a regulated market.

There are arguments against regulated organ markets or indeed against any type of legalized organ market. Most of the arguments relate to the moral issues of exploitation of low income or marginalised peoples. A number of analysts have differing perspectives, however. Satel (2011) argues that a sound market for living donors already existed as of the time of the writing of her article. The laws that prevent utilization of private living donations are, in Satel's opinion, dangerously. All these laws do, she believes, is drive the organ market further underground. In 2011, an organ broker who was born in Israel but who had emigrated to Brooklyn NY pleaded guilty in the New York federal court to being an illegal kidney broker. He had arranged transplants for three patients, who each paid him $160,000. The 'donors' were marginalised Israelis who came into the United States to make the donations.

Allegedly, neither the doctors nor hospitals knew that the broker had been paid to arrange the kidney deal.[33]

Satel (2011) believes that it is a surprise that there are not more organ brokers in the United States. Globally, there are a vast number of brokers, and as of 2011 it is estimated that globally, 10% of all transplants were done with black market organs. Satel argued that there was essentially a "transcontinental network of criminal rings in former Soviet republics such as Azerbaijan, Belarus and Moldova, along with South America, Israel, Egypt, the Philippines and South Africa" (2011, para. 3). The buyers, sellers, patients, donors, and even doctors move from nation to nation, with patients, donors, and the actual operation rarely occurring in the same nation. The donors rarely receive their promised payment, and also receive adequate medical care only rarely. It is common for donors to be threatened with their lives if the transplant ring believes that they might back out.

There is one consistency, however, through all organ sales: one person is trying to buy an organ so they can live, and one person in poverty is trying to sell an 'extra' organ so that he or she can live. It is Satel's argument that it is morally wrong to try to prosecute anyone who tries to sell one of their own organs so that they can essentially save their own life. In the case just described, the broker's defense was that "his lawbreaking was benevolent: 'The transplants were successful, and the donors and recipients are now leading full and healthy lives.'" (Gregory, 2011, para. 1). Indeed, as the broker's lawyer pointed out, it is legal to pay a donor for sperm, for blood, and for eggs (certainly the basis of all life), yet illegal to pay for a complete organ. If the process works for eggs, sperm and blood, the attorney questioned why it would not work for organs. Gregory argues that if the underground market were forced out into the light and regulated, the buyers and sellers would behave in a far more consistent and safe manner. Gregory even suggested that if one considers the idea that a woman's body is under her own control (referring to abortion) then one might question why 'my body my choice' does not apply to organs, and whether that discrimination would even be legal.

[33] One of the problems with the allegation that hospitals could be doing these types of surgeries without knowing where the organs are coming from or where the donors are coming from is that the vast amount of information required to do the surgery would seem to preclude this type of ignorance, unless it was deliberate. If it is deliberate, then the hospital and the physician would be complicit in the crime.

Still, Budiani-Saberi and Golden (2009) argue that to provide any type of incentive or to allow a regulated organ market would lead to human rights violations and would present nearly insurmountable ethics challenges. Regardless of the nature of the payment, and even if the patient is ensured and excellent medical care given, even a market that is regulated still takes advantage of disadvantaged individuals who may feel pressured to provide organs, by their need for money if nothing else (Budiani-Saberi and Golden, 2009). According to Budiani-Saberi and Golden, providing material incentives makes the chances that the "poor and disadvantaged" will be taken advantage of much higher. In addition, they state that "Employing material inducement to procure organs from a certain segment of a population may also damage society's trust in medicine and transplantation and simultaneously undermine efforts to secure and enhance altruistic donation," (Budiani-Saberi and Golden, 2009:2). These two authors present an additional argument that must be considered: most countries have banned commercial organ donation as being inappropriate. Thus, the countries that adopt the idea of commercial organ donation are looked at askance, similar to the way many countries are looking at Iran's solution to the organ shortage problem.

In the next few subsections, possible solutions for organ donation schemes are reviewed.

8.2.2.1 Paired Exchanges

In Canada, there are three types of exchanges in the Kidney Paired Donation (KPD) program, which is voluntary. Professional education provided by the Canadian Blood Services (2019) described the varieties of exchanges. In the first type of exchange, the paired exchange, Donor 1 wants to donate a kidney to Candidate 1, who may be a friend, a relative, or even completely unknown to Donor 1. Unfortunately, when the testing is done, Donor 1 and Candidate 1 are not a match. At the same time, Donor 2 has been tested and wants to donate to Candidate 2, but again, they are not a match. If Donor 1 is a match to Candidate 2, and Donor 2 is a match to Candidate 1, a paired exchange is established (Canadian Blood Services, 2019).

An N-Way Exchange or Closed Change system operates very much like the paired exchange, but there can be any number of exchanges in a chain of exchanges. In this type of exchange, the Donor in the last pair actually donates to Candidate 1. Thus,

an entire chain of donations and exchanges is accomplished (Canadian Blood Services, 2019).

A Domino Exchange or Chain is very similar to an N-Way Exchange, but it begins with a non-directed anonymous donor (NDAD) rather than with an exchange for a relative or friend. The anonymous Donor one donates to the candidate of the first registered donor/recipient pairs. The donor of the first registered pair donates to the recipient of the second registered pair, and so on. When the donation gets to the last registered pair, the donor goes to a person who is on the transplant waiting list. In this way, a larger number of non-matching donor/recipient pairs can be served, as well as taking a person off of the transplant waiting list (Canadian Blood Services, 2019). Non-directed, or anonymous donors, have resulted in 62% of the KPD transplants being completed through the domino process (Canadian Blood Services, 2019). Because the people who enter domino exchanges do so as a single individual, rather than as a designated pair, the capacity to serve people on the transplant list is increased.

Australia and New Zealand offer a paired kidney exchange (ANZKX) program (Organ and Tissue Authority, 2019). In the Australian program, the doctor and the recipient register with the ANZKX program, and the recipient provides their medical history and takes a number of medical tests. If they pass these tests and are approved, the program is described in detail, and the recipient signs a statement of understanding and participation. The proposed recipient, assuming he or she is transplant eligible, must have someone who knows them or is a family member who is willing to donate an organ, but can't because of an incompatibility of tissue type or blood issues. The prospective donor must agree to donate a kidney to someone else (since the preferred recipient is a mismatch).

8.2.2.2 Global Paired Exchanges

Global paired exchanges are in use in various nations. The goal is to expand the possibility of exchanges by developing an administrative guarantee of an exchange when a voluntary potential donor is not a match (Lo et al., 2019). Not all countries offer this possibility at this point, as the administrative expenses can be very high, and thus out of the range of possibilities for many people. When a donor match is found in a low income situation or nation (and thus unable to travel to donate), the global exchange

allows participation in a resource that overcomes this difficulty. Essentially the global exchange matches nations that have funding for organs and transplants to nations that do not have funding but have organs. In this way the pool of organs expands outside of national boundaries. There are several advantages to this type of exchange. AS the pool expands, so does the chance of finding a match. Thus, complicated matches may be possible that might otherwise result in a death. The removal of financial donation barriers may induce more people to donate. Finally, when a GPE match is made, quality of life increases for the participants (Lo et al., 2019).

8.3 Increasing Research on Transplantation

One of the primary problems with organs and meeting the demand with an adequate supply is that even in a carefully monitored medical setting with excellent cleanliness and adequate follow-up care, rejection is a real possibility. In attempting to determine a specific rate of rejection, another issue became clear: there is no agreement, or even near agreement, as to what the rejection rates of various organs is. There seems to be little disagreement that kidneys and livers are less likely to reject than hearts and lungs, but the transplant protocols are completely different (Madariaga, Kreisel, and Madsen, 2015). As Madariaga et al. (2015) stated, “it is clear that all transplanted organs are not created equal” (p. 2 of author manuscript). In addition, the likelihood or rejection can change based on whether or not the recipient has had other transplants. Organs have different tendencies to be rejected without receiving additional treatment. The difference of various reject tendencies is based on their reaction to major histocompatibility complex (MHC) barriers. For example, if “murine skin, the heart, intestines, lungs, and helpatocytes” are transmitted across the MHC barriers, they are largely rejected (Madariaga et al., 2015, p. 2). However, the liver and kidneys would commonly be accepted across those barriers. Further, kidney transplant patients retain the transplants at a 70% rate if immunosuppression treatment is discontinued, approximately nine years after transplantation took place.

Of the liver transplant patients, only 8 to 33% of the patients have operational tolerance of the livers after nine years once immunosuppressants are removed, but 60% of the patients who were pediatric patients at the time of the liver transplants can be

weaned without immunosuppressants (Feng et al., 2012). When recipients of heart transplants are considered, sans immunosuppressants, there are only anecdotal reports of survival; the same is true of lung transplants post immunosuppressant weaning (Chandrasekharan, Issa, and Wood, 2013). Interestingly, however, if organs that are highly prone to tolerance of transplants are transplanted at generally the same time as organs that are not tolerant of transplants, they can actually impact those organs and cause them to be more receptive to transplants. This is particularly true of a kidney/heart pairing and has even been designated as "kidney-induced cardiac allograft tolerance (KICAT)," provided that the kidney has been in place for a minimum of eight days prior to transplant. Although research is underway to help detect rejection earlier, as of 2020 the most common way to detect rejection is to wait for symptoms and then test the organ with a biopsy. This is a complex procedure which simply takes too long after the rejection process begins. With the advent of easier rejection detection methods, it may be possible to lower the rejection rate as well.

While these interactions and tolerances are likely to be noted in an experienced hospital setting, they are equally unlikely to be noted in a non-hospital setting. While the research that has been reviewed thus far has tended to indicate that the organs that are bought or illegally stolen are removed with good medical technique and then taken to hospitals or hospital centers, it seems unlikely from a practical point of view that field extractors can do more than simply guesstimate the blood type and qualities of the blood of the unwilling donors. The goal would then be to find someone who could 'use' the organs that were stolen but did not match the current need. In cases where organs were purchased illegally, the purchasers would be in a better position to run medical tests on the 'donors,' thus matching potential donors to needy purchasers.

If the organisers of such a plan to purchase organs put a great deal of effort into the process, it would be possible to set up an organ purchase plan that would be parallel to the current legal organ donation plan in terms of safety and security of the donors and recipients. However, this would essentially lower the levels of profits made by the facilitators. This assumes of course that the current facilitators, who work for hospitals, have their salaries paid by the hospitals or the organisations that work with organ donations, and any facilitators under a new pay-for-organ plan would also have salaries paid for by hospitals or organ organisations. This type of plan would necessitate the

termination of the ability of private individuals to facilitate sales. It would depend upon the ability of government organisations to stop the sale of organs on the black market and migrate these sales to a legitimate sales vehicle. Safety needs to be paramount for the donators as well as for the recipients.

8.4 Technological Possibilities

In 2015, it was reported that certain types of antibodies present in the blood of recipients would make rejection of the organ(s) more likely to reject earlier after transplantation (Jordan, 2015; Lefaucheur et al., 2015). By the next year, it was anticipated that that discovery could provide new treatments so that organ transplants could have lower rates of transplant rejection (Zhuang et al., 2016). By 2019, research had been conducted that suggested that T-cells could be engineered to make rejection less likely in transplant recipients (Jayachandran et al., 2019). In mid-2019, it was announced that a new blood test had been developed that could detect potential rejection simply by conducting a blood test, rather than waiting for symptoms and then biopsying the organ (Kaminski et al., 2020; Van Loon et al., 2019).

All of these improvements in the 'medical' aspect of transplantation technology would improve the safety of the process and make failure of the transplants much less likely. However, it should be reiterated that black market organ buyers or snatchers would be unlikely to have access to these technologies, unless they were somehow legitimised by becoming affiliated with a hospital or medical organisation. This seems an unlikely possibility, especially given the uneducated state of the Bedouin tribes, and the criminal bent of other organisations which steal organs.

8.5 Summary

In Chapter seven, possibilities for increasing the availability of legal organ donations are discussed. Both positive and negative aspects of organ donation schemes are reviewed, along with the potential modification of national and international law, the hard realities of organ donations, and the desirability of increasing research or transplants. In Chapter eight, the issues revealed in the research are discussed, the findings are considered, conclusions presented, and future research suggested.

CHAPTER NINE

REVIEW, DISCUSSION, AND CONCLUSIONS

9.1 A Review of Eritrean Issues

In the beginning of this dissertation, the idea that organ trafficking in the Sinai, originally intended to be viewed through the keyhole of forced migration, had far further reaching implications than the researcher ever imagined. The issue of organ trafficking in the Sinai came to the attention of the world in 2010 or 2011, when Mekonnen and Estefanos (2011) first reported that Mohamed Rashid, a Bedouin leader in the Sinai, was reporting that he had found a mass grave of Eritreans under the house of people that were rumoured to be human traffickers. There were, Rashid reported, Christian writings on the walls above the victims' bodies. To Rashid, this suggested that the victims had been despairing, but supplicating to their God while they were alive. Rashid also believed that if the Christians had time to write on the walls, this had not been a short-term confinement.

By 2014, the United Nations was reporting that they had identified 510 pathways into human trafficking, involving 124 nations. Half of the victims were women, and a third were children. The remainder, males, were generally taken for work as hard labor – or used for the harvest of organs. By this point, Sub-Saharan Africa represented one of the highest areas of origin for human trafficking. The area surrounding Egypt is one of the oldest areas in the world in terms of human trafficking. The Christian Bible speaks of the slavery that was rife in the region. In the time the Bible was being written, it was common for female slaves to give birth to the children of the slave owners. Thus, Egypt has a history not only of forcing the humans that they kidnap into slavery, but also exploiting them sexually. These two categories, present in the ancient world, are also part of the basic elements of crimes against humanity that exist today. At the time of the historical Egyptians, the surrounding territories were subject to attacks against the civilian population, extermination, enslavement and then deportation, torture, forced pregnancy, persecution, and apartheid. Certainly, there were gender implications; the leader of the slaves was always male but being 'blessed' to raise the children of the Pharaohs awarded some of the women a certain level of protection.

Today, while the nature of the crimes has changed, they still exist. Women are trafficked in the area for sexual exploitation, a crime that is mostly ignored by the government. The utilization of various trafficked women, particularly from former Soviet bloc nations, encompasses both sexual exploitation and forced labor as the women are forced to strip in nightclubs, or work in brothels. At the same time, the number of Eritrean migrants arriving in Egypt has skyrocketed. Thousands of Eritreans are captured and become victims of traffickers in their trek from Eritrea to their intended targets of Israel or, more eventually, Europe. Although Mekonnen and Estefanos (2011) brought the issue of human trafficking among Eritrean migrants to the attention of the public in 2011, it had been brought to the government's attention roughly five years prior, and then ignored. Egypt exhibited no intent to consider the Eritreans as serious victims of crime; rather, they simply considered the issues to be related to immigration and thus not worthy of the attention of the staff. It was only when Egypt entered revolution, and the report from Mohamed Rashid came to the attention of Mekonnen and Estefanos (2011) that the government paid the situation any concern. Journalists came in from other nations, documentaries were produced, and reports of stolen organs and dead Eritreans reached the international media. Humanitarians and activists redoubled their efforts to provide information to both the government of Egypt and journalists who had begun to seriously study the issue from a humanitarian-activist standpoint.

Throughout this research, a number of areas were discussed. In Ethiopia and Eritrea, a destabilised government led to escalation of differences relating to tribal groups and religious beliefs. The destabilisation led to escalation; the escalation to mass genocide; mass genocide led to forced migration. Forced migration led to famine, and famine led to a group of people who were so demoralised, so desperate that they would either do anything to survive, or just the opposite. Some of the Eritreans reached the point where they would do nothing to survive. Both sides of this desperation of humanity led to a group of humans that were in danger of falling prey to any type of human vermin that presented itself. Famine led to trafficking; the Eritreans had absolutely nothing left to sell except their bodies. Some Eritreans were not forced into prostitution; rather, they were forced into hard labour, and from there into organ 'donation'. With many of them entrapped, beaten, and tortured, Eritreans without the cash to pay off their tormentors were held for ransom from family and friends. When ransom attempts failed, their organs were removed and sold. and forced migration. All

of these factors led eventually to famine and to trafficking, first in human trafficking and finally in organ trafficking. The case of South Africa, Brazil, and Israel is another example of organ trafficking, this time spurred by the uneven socio-economic status of the various parties involved (Scheper-Hughes, 2004, 2014). In the case of the Eritreans, media reports suggest that Christians in particular were singled out; organs removed, they were left to die. Mass graves were found in the Sinai dessert (Van Reisen and Rijken 2015), but also under a house where individuals suspected of being human traffickers lived (Mekonnen and Estefanos 2011).

As journalists and humanitarians began exploring the situation in the Sinai, including speaking with individuals who purported to be victims of heinous crimes, the problem was brought into the public's eye in particular with documentaries and similar works. One of the first, and most well-known, documentaries is supported on You Tube by the Eritrea help Network (Pleitgen and Fahmy, 2011). CNN, which produced the documentary, was one of the first organisations to take the accusations of organ trafficking seriously. The documentary, produced in three parts, horrified a number of human rights activists, who began looking into the situation in the Sinai seriously.

Saleh and Samir (2011) spoke with journalists and provided an insider's view of what was occurring in the region. They asserted that it was only a small fraction of the Bedouins that were involved in the torturing and trafficking of Eritreans, but the result was just as deadly. The issue was that refugees from Eritrea were intercepted on the way to their hoped-for new land of Israel. Saleh and Samir asserted that the town of Ah-Mahdia had long been the center of the smuggling world in that region, with refugees who were unfortunate enough to be captured virtually guaranteed a life of misery, and a loss of organs – or worse. When the team revisited the area in 2012, they reported that conditions were improving somewhat, largely due to the efforts of a group of chiefs who banded together to stop the trafficking and organ theft. The video is sobering, at best; You Tube has placed warnings over the beginnings of the materials to alert people to the difficult nature of the materials. All of the victims who agreed to speak with the producers told essentially the same story: they were captured on the way to Israel, they were tied and tortured, they were deprived of sleep, and they were held for ransom. If the ransoms were not paid by friends or family, they had their organs taken (Saleh and Samir, 2011).

Looking at the situation in retrospect, it appears that what was depicted as alarmist perceptions at the time was not, in fact, adequate. The situation was far more

serious that it seemed. In the video by Pleitgen and Fahmy (2011) all of the participants, from the refugees to the tribal leaders who had rescued and were protecting them, emphasised the extreme danger to both the refugees and the leaders who were protecting them. The refugees, who had left a volatile situation in Ethiopia, were facing a situation in the Sinai that was much worse. It was not until sometime in 2012 that the traffickers that were operating in the Sinai were slowed down or stopped by the military (El-Behairy, 2012). Although the formal reason for the military's entry into the Sinah was to stop the forces who had attacked Rafah, a welcomed side effect was breaking the criminal element that had taken hold of the area. President Morsy of Egypt called for the restoration of national security in the area, stating that national security had been threatened by "the security situation" in the northern Sinai (El-Behairy, 2012, para. 3).

During the raid, 32 criminals were killed; one was injured. Thirty-eight suspects were arrested and questioned. Of these, 22 were released as being not involved. While these figures are impressive, the government estimated that between 400 and 600 criminals were living in the area. During the raid, the group found and destroyed 31 tunnels that led into Gaza as well as a large number of guns, including rifles, machine guns, and larger items such as antiaircraft mortars, tanks, and anti-tank mines (El-Behairy, 2012). The second phase of the operation was planned to determine where the criminal activity was occurring and to eliminate it. Once the criminals were removed, it would be possible to develop the Sinai. Israel was reported to be working with Egypt to remove the threats in the area, with the goal of committing to international treaties, without compromising Egypt's safety and operations. The media was told that it would receive regular reports, in order to ensure that there were not "conflicting or inaccurate reports" released that would result in changes to public opinion (El-Behairy, 2012).

If one reads between the lines, it appears that the Egyptians had tired of the allegations of criminal activity, including human trafficking and organ trafficking, and decided to do something about it. By using vague language (i.e., 'criminals', 'criminal elements', 'suspects', and 'outlaws'), the spokesman was able to obfuscate what really occurred.

The Human Rights Watch website (2020) provides a mini history of what has occurred in the Sinai region, from Eritrea to Israel. From 2008, when Egypt was shooting African migrants trying to cross into Israel (and Israel was forcibly returning those migrants who made it across the border), to calls for Egypt to held migrants who

were being abused by traffickers in 2010, the Sinai area has long been a hotspot. The abuse continued through 2012, when the UN Security Council increased its presence in the Sinai in an effort to free migrants and extended into 2014 when the Council asked Egypt and Sudan to prosecute human traffickers. It is absolute that the issues in the Sinai are not over, although they may be more visible, and even less pressing in need. Still, the issues that led the Eritreans who were attempting to enter Israel into this devastating position continue, if not in the Sinai then into other areas.

And there, perhaps, is the problem. Even if the government of Egypt continues to press the criminal element, and Egypt and Israel work together to stop the torture and human trafficking of Eritreans, the individuals who are conducting these horrible acts do not leave voluntarily. If arrested, charged, and sentenced, they will simply take up operations in another area when they get out. Human organ trafficking is too profitable to simply walk away from. Traffickers simply move to another area and begin their 'business' again. They get better at what they do, profits increase, and the government's ability to stop them seems even more unlikely. The problem of human trafficking is a conundrum.

One of the contributing factors in the Sinai region is that the Eritreans are not given the same attention and human rights that members of other national groups are. The nation of Egypt argues that the problems which are presenting themselves are related to illegal immigration, rather than to human trafficking. On the other end of the route, however, the Ethiopians push for the Eritreans to abandon their area and move into another territory. The problem has, in one sense, ceased to be a humanitarian issue and become a political issue.

Even though Egypt really has taken steps to help stop human trafficking from the standpoint of implementing laws and educating the populace, the numbers of Eritreans continue to stream into the Sinai. Given that Egypt concentrates on helping the victims of human trafficking that are natives of Egypt (and still considers the Eritreans illegal immigrants), the non-Egyptian victims are not getting enough help, if any. In addition, as one considers how to stop human trafficking, a great deal of the decision as to what approach to take depends strictly on the perspective of how to address the problem. The groups of Eritreans who are flooding into Egypt include women and girls who have been forced into prostitution, or who may have been subjected to forced labour. The women and girls may have been sexually abused, even if they have not been forced into prostitution. The children have been abused. Violence

against women is rife. Very little attention is paid to why these immigrants have left Eritrea, and why they have decided to progress through the Sinai and Egypt on the way to Israel.

9.2 Evolution of Protective Law and Protocols

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (referred to as the Trafficking Protocol) was essentially built on other treaties:

- The 1904 International Agreement for Suppression of White Slave Traffic;
- The 1910 International Convention for the Suppression of the White Slave Traffic
- The 1921 International Convention for the Suppression of Traffic in Women and Children
- The 1933 International Convention for the Suppression of the Traffic in Women of Full Age; and
- The Geneva Convention of 1949 for the Suppression of the Traffic in Persons and the Exploitation of Others.

Each of these treaties, and their successors, formed the basis for the web of law and regulation that can be used to combat human trafficking and organ trafficking.

In 1902, the League of Nations came up with a plan to make an international consensus in the fight against what was termed white slavery. The first anti-slavery agreement was developed in Paris and was signed two years later by sixteen nations. It was eventually ratified by a hundred governments. The International Agreement for the Suppression of the White Slave Trade 1904 (White Slave Traffic Agreement) addressed the recruitment of white women for prostitution using fraudulent and abusive means. The agreement defined human trafficking for prostitution purposes as a moral issue that was linked to human slavery. The goal at this point was to stop the forceful transfer of women from Europe into brothels in the colonial empires. Even in 1904, the need for rehabilitation of victims was noted; the Agreement provided for the victims to be referred to charities if private individuals could not be found to provide security for the

ladies following their retrieval. While the stated aim of the Agreement was to stop what was referred to as white slavery, the real function of the agreement was to collect information on how many women were being entered into prostitution across international borders. Eventually this document served as the basis for the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, which was intended to aggressively fight the trafficking of women (Office of the United Nations High Commissioner for Human Rights, 1926).

It is of note that as of this particular time in history, the concern was only for 'white' women. Although it was an international agreement, it would not have covered most individuals from the African continent (i.e. Eritrea) or the Middle East (Sinai, Egypt, Israel). Still, the development of any type of protective agreement was a first step to the protection of individuals from human traffickers.

The 1904 Act proved fundamentally ineffective, perhaps because it was worded in such a manner that it was more effective as a data collection device. The scope of the agreement was broadened in 1910 (1910 International Convention for the Suppression of the White Slave Traffic). The new Convention included verbiage that women and girls could not be trafficked inside national boarders, as well as international borders. Again, the emphasis was on the protection of 'white' women and children, rather than on women and children in general. From this perspective as well, the Convention was Eurocentric. The Convention emphasised the need to protect members of the white race.

In 1921, the trafficking of boys was also merged into the agreement with the International Convention for the Suppression of Traffic in Women and Children of 1921 (1921 Convention). The 1921 Convention (European Commission, 2019). addressed trafficking but also expanded protections against the moral harm of prostitution. The title of the Agreement also changed; for the first time the designation of white protection was dropped. Non-white women, as well as non-white children of either gender were now given the protection of the law. It is ironic, then, to note that in including the protections to non-whites, the writers of the agreement failed to define exactly what trafficking was. Thus, while the idea or concept behind the agreement was quite important, the way that it was enacted lacked enforcement ability. The title of these first three agreements or convention signified that the government of the world

were finally making an effort to work together, for the protection of women and later, children.

Beginning in 1921, the conventions did not focus on age so much as they did on defining the victim. The ages of victims prior to 1933 generally focused on the vague definitions of 'women', or 'children'. The first three treaties, as well as the 1933 International Convention for the Suppression of the Traffic in Women criminalised all recruitment for the purpose of prostitution across international borders. The emphasis was on using women and children as sexual objects, although the titles utilised the term 'slavery'. This emphasised, in its own way, the degradation of women; there was no concern about them being forced to work being a laundress or cooking for a ranch. There was only the concern that the women or children might be forced into prostitution.

The 1933 Convention also established that an alleged consent by a trafficked woman was not constitute a defence to the crime of international trafficking. The standards of the 1933 Convention emphasised that the evils of prostitution and trafficking could degrade the value of a human, as well as the welfare of their families and the communities in which they lived. Again, the Convention was limited to concerns about cross-border trafficking in order to enter individuals into prostitution. The goal sought to provide criminal penalties for anyone who aided or abetted the entry of anyone into cross-border prostitution, regardless of whether or not the person had indicated they consented. Each nation that was party to the agreement was allowed to set its own legal penalties. Both prevention and punishment activities were left to the individual nations.

At this point in history, the conventions were non-binding. In addition, the individual nations were asked to report statistics relating to trafficking but they were not required to do so. There was no international body that monitor how the agreement would be implemented. In addition, this was not a particularly popular agreement, and because it was not widely ratified it did not have a lot of clout. It is also notable that this agreement did not provide for assistance or rehabilitation of victims at all. Rather, it only provided for the identification of numbers of victims, suggesting that the trend was to blame the victim rather than assist her. All of the responsibilities in this

agreement were vested in immigration and border control,[34] again suggesting that this was being considered a criminal act aimed more at the activities of the women than of the people trafficking them. By vesting responsibility under immigration and border control, it seems clear that the intent was to keep women (and children) of ill repute out of 'respectable' nations. Importantly, this Convention did add the suggestion that information be exchanged by the appropriate agencies in the member nations. Prosecutorial cooperation was established by this agreement.

The Fourth Geneva Convention, which was adopted in 1949, prohibited the mass movement of people into or out of territory occupied under what it referred to as 'belligerent military occupation'" (Courses.lumenlearning.com, 2016). Article 4 of the Fourth Geneva Convention defines the status of the Bedouins as 'protected persons' as part of International Humanitarian Law. The Bedouin tribes that participated in human organ trafficking in the Sinai are protected by International Human Rights Law. International Human Rights Law in Palestine is co-applied with International Humanitarian Law. Bedouins are classified as Indigenous People and as such are afforded protection under international law (Amara and Nasasra, 2015). The Bedouin tribes that live on the West Bank are refugees from Palestine. Israel argues that the Fourth Geneva Convention is not applicable as a matter of law; the UN's General Assembly, the Security Council, and the International Red Cross say that the Fourth Geneva Convention applies to these tribes. This is important in the context of Eritrea, because the Eritrean refugees were essentially in the same position in their native country. However, when the Eritreans got to Israel, despite international refugee law, they were not accepted to the extent that they were asked repeatedly to leave. Israel and Egypt both attempted to evict the Eritreans, and the Eritreans remain to this day the source of constant concern and intervention by the humanitarian community.

The governments of Israel and Egypt were in a very precarious position regarding any involvement of the Bedouins with human trafficking, organ trafficking, and crimes against humanity. Under the prevailing rules of the time, the

[34] See Article 10

9.3 A Discussion of Smuggling vs. Human Trafficking in Eritrea

Human smuggling is related to human trafficking. Before the United Nations definition of human trafficking was established, trafficking in persons was often viewed as human smuggling and a type of illegal migration (Laczko, 2002: 2). It is this type of illegal migration that the nation of Egypt asserted was happening with the Eritrean peoples. All of Egypt's policies towards the Eritreans were designed with the belief that Eritreans were merely involved in illegal migration. It is impossible to know, of course, whether Egypt truly did not understand the difference between illegal migration and human trafficking, or whether they wanted to function using the wrong definition for some ill-established purpose. What it is possible to discern is that Egypt's actions when asked to intervene on behalf of the trafficked Eritreans revealed that they really did not wish to become involved with these 'illegal migrants'.

Using the four elements of distinction between human trafficking and smuggling, (Gallagher, 2001: 1000; Obokata, 2005: 20) it becomes clear that the Eritreans were trafficked and were not involved in smuggling. The question of consent arises. Certainly, the Eritreans consented to leave the area of Eritrea/Ethiopia; the map shown earlier in this document reflected that a great deal of effort and thought was required to get to the Sinai and into Israel. The refugees from Eritrea had to travel through Sudan and up into Egypt. From this point, the refugees traveled through Sinai and on into Israel. However, the trip was so long and so difficult that many of the Eritreans did not survive this long. Combined with the stresses of the natural environment were the fears of the tribal groups that occupied the area. The Bedouins were an extremely poverty-stricken family of tribes that sought to do whatever they could to acquire resources to survive.

Under the best circumstances possible, a trip on foot would take from 159 to 319 days, depending on the health of the individuals, the time of year, whether or not it was possible to get rides for part of the way, and whether or not adequate food and water was available. There is no possibility *at all* that the travelers were not consenting to the trip. The element of consent would be of question later in the trip, however, if the migrating groups met up with a band of Bedouins or criminals. At that point, the

question of consent would become quite obfuscated; even if the Eritreans stated that yes, they would like to proceed with the tribal groups, their acquiescence might signal a desire to avoid angering the approaching criminals, rather than a true consent. In a similar manner, failing to fight back when attacked might signal a desire to survive, rather than a lack of desire to fight back.

The next element to be considered was that of exploitation. What phenomena of exploitation existed in this case? Certainly, taking the Eritreans captive, tying them up, and holding them for ransom signifies exploitation. For the captives that did not have anyone to pay ransom, the stakes were higher; organs were removed and sold. It is impossible to look at this as anything other than exploitation. Whether the Eritreans were simply tied up and kept captive pending a potential ransom payout, or whether they were exploited for labour is irrelevant; in this case, it is the exploitation that is key.

The elements of profit generation have already been discussed. The entire purpose of taking the Eritreans captive was to generate profit. Whether that profit came from prostitution, labour, ransoms, or payment for organs was irrelevant. The final element, that of destination, can be difficult to decipher. It is not uncommon for a group of migrants to change the direction of their migration, pick a different destination, or simply reach a spot that seems welcoming and decide to stay there. Thus, determining whether the group meets the destination element is difficult.

The difference between trafficking and smuggling is also complicated by the reality that in either case, an organised group can move the person or persons from one area to another. If the travelers have an agreement with someone or with a group to take them to a certain location and that group suddenly changes direction or refuses, have they progressed from smuggling to trafficking? Not necessarily. The weather may be such that the group refuses to risk lives by travelling into a storm. In such a case, smuggling and trafficking would remain different definitions. The key is whether or not it is possible for the travelers to remain voluntarily associated with the second, criminal group. In the event of smugglers, the smugglers will finish escorting the travelers to a location, and the two groups will typically part ways. If the group is being trafficked, however, the criminals will stay with them in the hope of gathering more profit. The travelers are a client of the smuggler; they are a captive of the trafficker.

While the people being smuggled consent to their smuggling (and frequently pay a fee to have the smuggling occur), trafficked persons do not consent. Earlier in this paper, the whole argument of consent was discussed at length. The chief concern is whether or not someone who says they will do so something really has the capacity to consent if they are being pressured, influenced, or paid. While this is a philosophical question and still under debate, the international legal analysis suggests the answer is no. Smuggling essentially involves the crossing of transnational borders, which may not necessarily be the case with trafficking (Obokata, 2005: 21). Human trafficking does not require the crossing of a border as long as transfer from one place to another exists. Differences between human trafficking and human smuggling become less clear when the hired smuggler is also a trafficker intending to deceive the client/the travelers into forced labour conditions (Piper, 2005). However, this point emphasises the need for revised language and legal applications in the context of law revision.

One of the problems in the Eritrean case is that it can be very difficult for refugees to get help when they are human trafficking victims. This is because most of victims of trafficking appear to be illegal migrants to the general public. One of the big issues is that individuals who are migrants or refugees are perceived to be illegal migrants as well. The combination of being a refugee and a trafficking victim nearly condemns the victim to being considered as acting illegally on a level of voluntary action. It is very difficult for many people to understand that refugees are not illegal migrants. However, it is also possible (if not probable) that victims of organ trafficking may be illegal migrants who used the services of smugglers to facilitate their journeys to destination countries.

Smugglers in this type of situation typically demand exorbitant fees. When fees are high at the beginning, or raised during the travel process, it puts the migrants in a precarious position. The fees have to be paid somehow, if they were not paid in advance. Ironically, if the fees were paid in advance, the smugglers may increase the fees as a form of extortion. Either way, the migrants or refugees will need to pay the fees to be released. Many of them end up paying the fees with kidneys.

One of the difficulties with investigating and charging the entire process is that existing anti-trafficking and anti-smuggling laws may be somewhat limited in scoop. In particular, the Palermo Protocol and the various anti-smuggling instruments are general

in nature; they do not give organ trafficking the level of serious concern that they deserve. Further, the instruments are considered to be binding in some countries; other nations do not recognise them as binding. In order to make valid progress in resolving anti-trafficking and smuggling disagreements, there must be a global effort to do so. At the time of this writing, there is still a lack of global coordination to fight trafficking, suggesting that the individuals for are responsible for the crimes are actually more organised than those fighting them. The longer that trafficking continues unabated, the more difficult it will be to develop a plan for a systemic approach to eradication. The first issue in fighting trafficking and smuggling effectively is to realise that the current instruments are not effective, the process to utilise them is not consistent, and the instruments are not binding to all countries (Bassiouni et al., 2010).

Human smuggling is the illegal facilitation of border crossing. Smuggling always involves illegal entry while trafficking may entail the legal *or* illegal entry of individuals (Obokata, 2005). When people are being smuggled but the entry into a nation is illegal, it is a key that human trafficking is part of the equation. Human trafficking victims will typically be well documented and will have papers for legal entry, but which have been taken away and kept by the traffickers. The smuggled individual, however, usually pays a fee and separates from the smuggler once the fee is completely paid off and the person has entered the country that was their intended destination (Hosken, 2006). The smuggling relationship typically ends once the fee is paid and the border is crossed; human trafficking usually ends when the victim dies, or escapes through legal or illegal means (Mollema, 2013).

Traffickers treat humans as a commodity that can be exchanged for some form of profit. Smugglers, however, make a profit from the individuals that the smuggler is helping to enter a country. Traffickers gain financially from exploiting their victims, but smugglers gain profit by providing an illegal service. Human trafficking violates the individual's human rights, but the individual who is being smuggled is benefiting from an illegal service. The service itself is a crime because it is typically in opposition to the entry laws of the nation or region. For groups that are trying to protect migrant workers, it can be difficult to tell the difference between smuggling and trafficking, and the distinction may not even be necessary. The individuals need help and need rescued. However, if the group(s) providing the help are more invested in the political meanings,

for example of border control and sovereignty, the distinction is critical (Gould and Fick, 2008). Further, if the concern is more for establishing legal precedent that simply rescuing the victims, it will be critical to determine whether or not the individuals are being smuggled, or trafficked, as well as what kind of trafficking is taking place. As established earlier in this research, it is also possible that an individual fits into more than one legal category and would have the protection of more than one set of laws and regulations.

Still, understanding the fine line between smuggling and trafficking can be critical. When Eritreans decide to migrate to Israel, they typically meet with someone who can facilitate a meeting with human smugglers. If a deal can be worked out, the smugglers will help the individuals get to Israel. However, the smugglers that typically travel this route are not honest; they are criminal on more than one level. When the refugees leave Eritrea, and cross into the Sinai, the smugglers will raise the agreed price, citing the difficulty in providing a safe passage. Anyone who cannot pay the new price will become a captive. This process was described earlier in the research, as well as earlier in this section. An alternate scenario is Eritreans who simply assume they will be able to figure out how to get to Israel alone. Eritreans who do not pay smugglers to help them get to Israel are inevitably set upon; they are kidnapped and incapacitated (Mekonnen and Estefanos, 2011). One way or another, the refugees are likely to spend time as someone's captives.

Once captured, the refugees are kept in conditions of bare subsistence. They are barely fed and given little water. There are few or no sanitation facilities. Women are raped repeatedly, and both genders are forced to work, particularly in areas that are producing drug crops (Mekonnen and Estefanos, 2011; Pleitgen and Fahmy 2011). Every person is given an amount that they must pay to the captors to 'earn' their release. This amount is typically $20,000 USD to $30,000 USD (Pleitgen and Fahmy, 2011). Refugees are required to make telephone calls to friends and families to ask them to pay their ransom. Refugees are tortured so that the family will hear them screaming and be more likely to pay. If the family still cannot or will not pay, then the torture is increased. Eventually the individual will have their organs removed to pay the ransom. In some cases, the surgery has actually taken place in front of other refugees, so that they understand how serious the traffickers are about getting their money. Areas

that have been identified as being trafficking camps sometimes have mass graves outside of them (Mekonnen and Estefanos, 2011).

Given that the Bedouins now live-in poverty with very little access to jobs or even to ways to survive, they must do whatever they can to survive. They perceive that harvesting and selling organs is part of a fight for survival. Egypt provides a thriving environment for human trafficking and is a source, transit, and destination country. Egypt has unfortunately failed to enact any effective laws that would deter human traffickers. Instead, Egypt holds to the belief that when Eritreans are trafficked into Egyptian territory, the crime is smuggling (by the smugglers) but also illegal entry (illegal migration) by the Eritreans. As long as the problem is regarded this way, the international community is likely to stay out of Egypt's 'business,' leading one to wonder if the government of Egypt is sharing in illegal profits from the trafficking.

The Egyptian government has also admitted that it believes that if there is heavy crime, such as trafficking, in the Sinai, the international reputation of the country would be tarnished. It is quite ironic that the Egyptian government has allowed crime to continue so long in Egypt that it had to launch a major operation (El Behairy, 2012) to even scrape the surface of the criminal operation. It would suggest that Egypt's reputation has already been damaged, and that the reported trafficking was lost in the series of crimes that the Egyptian government discovered. As a result of this reluctance, traffickers operated freely in Sinai until 2012 when military attention and operations in the Sinai forced the reduction of the crime.

With the number of provisions in international legal instruments that address human trafficking, including multilateral human rights law treaties, one might expect that the documents would be foolproof. There is a thin line differentiating between crime trafficking and smuggling. Compared to the definition of trafficking mentioned earlier in this research, it is clear that smuggling, while similar in action, does not involve the same purposes as human trafficking. To smuggle is to bring someone across a national border illegally, and at the person's request. The 'victim' is not exploited; they are paying for a service. The victim may have signed a contract voluntarily with the smuggler, but no one contract safe passage with a trafficker.

9.4 Gender Issues

The category of gender and sexual orientation differences was discussed at length, relating to persecution by the various nations or groups. Torture and persecution overlap in the field of gender, transgenderism and sexual orientation in the field of human rights and legal and moral obligations. Women and children appear to be mostly at risk, but men can be subjected to gender violations, and can also be attacked and raped. In recent years, increasing numbers of males are reporting being raped by peacekeeping forces, police or military forces of countries that they are living in, or on the trail to a new country.

Two issues can be pinpointed: the first is that people can be subjected to violations of their persons based on another individual's or individuals' perceptions of their gender identity or sexuality. Something as simple as wearing the wrong clothing one day or cutting hair short to avoid insect infestation can be enough to heighten perceptions of them to other people. Thus, poverty or the horrors that an individual encounters or are necessitated by forced migration or by fleeing one's persecutors could actually lead to the perception of others that one is non-gender conforming. The result could be discrimination or ill-treatment simply based on the perception of the viewer, of a condition that *if it existed* should not be an issue regardless and would still be illegal to discriminate against.

The second issue relates to the rape of males and the legality of homosexual sex. In the majority of nations mentioned in this paper, homosexual sex is illegal. In some of these countries, it is not only illegal, but also punishable by death. In particular, several of the states have systems of law that make the use of force in involuntary homosexual acts (male on male rape) more likely to result in a conviction of capital crime for the aggressor. Why, then, would the states fail to prosecute these aggressors? It seems evident that if crimes against immigrants or forced migrants are not being condoned, then the men raping male immigrants or forced migrants would be prosecuted for these crimes. Importantly, if the aggressors believed that they would be prosecuted (and thus killed by the state) it would be likely to deter at least some of them. Against the conclusion is that these crimes are either condoned by the state (at a minimum) or

actively supported by the state. In the Sudan, punishment for the first and second convictions of homosexual activity is imprisonment; punishment for the third conviction is death. Thus, if the Sudan were not actively condoning the actions of males who attack and rape immigrants passing through their region, it is unlikely these actions would continue.

In the review of conditions in Eritrea, it was determined that all residents of Eritrea are required to join the service at 16, but physically attractive females serve as concubines, or sex slaves, for high-ranking officials. If these women become pregnant, they are forced to abort. At the same time, soldiers cannot take leave to go home and start their own families. The birth rate is down, and the next generations are exceedingly small. This appears to be a case of genocide, with an overall program of generation suppression by the leader, Afwerki.

Afwerki fears his own citizens. His guards are from outside of the country; he solicits support from other nations rather than his own people. The question may be stopping Afwerki, rather than stopping refugees from going through areas of Eritrea. If Afwerki is stopped, the violence may stop. Further, many of the refugees that are fleeing Eritrea may well stay in the nation. There is a link between Afwerki's violent leadership and crimes against humanity, particularly in terms of gender issues both within the country and of refugees fleeing the country. There is a further link between gender issues and genocide in Eritrea, with the suppression of future generations both in the form of forced abortions on concubines of important men, and in refusing to allow husbands and wives to conjugate by preventing visits. With a link between gender issues and genocide, and violent leadership and crimes against humanity, based on the research contained in this document, the link between violent leadership and organ trafficking can also be surmised.

9.5 Resolving the Research Questions

A number of general research questions evolved that were used to guide the research. All of the questions were interrelated, but they addressed different avenues of the research. There were five basic research questions. Each one is resolved below.

- What is organ trafficking?

  The formal term used by the UNODC to describe organ trafficking is the 'trafficking in persons for organ removal' (2018: 30). Lundin (2012:1) argues that the best definition of organ trafficking is "an illegal means of meeting the shortage of transplants."

- What is the current legal situation as it relates to organ trafficking?

  The number of transplants needed far exceeds the number of legal transplant sources under the current state of law, regardless of the nation in which the transplant needs to take place. New pressures are being put on lawmakers to deal with the issue through the passage of laws meant to decisively deal with the rapidly developing issue. The Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime) and the relevant anti-smuggling instruments are too general and do not address the issue of organ trafficking with the seriousness it deserves. Finally, these instruments are binding to some countries and non-binding to others.

- What are the desirable legal principles which should be taken into consideration when dealing with organ trafficking on an international level?

  All displaced persons must be protected. A poor distribution of social power causes conflict, particularly an international conflict (Moravcsik 2004, 1). Disenfranchisement is a significant motivator for disaster, and much of today's low-income population in developing nations is disenfranchised. As a result, illegal sales and trafficking has become a huge part of the global economic market (Lundin, 2012). The lack of global coordination suggests that trafficking in organs has been happening without much being done to abate it. The first problem is that the instruments relating to anti-trafficking and anti-smuggling are not binding to all countries (Bassiouni et al., 2010).

Secondly, the scope anti-trafficking and anti-smuggling laws is too narrow. By insisting on definitions that severely limit what types of actions qualify in a particular category, the current system of law fails to accommodate difference. Yet, differences and how we accommodate them mark the quality of a system of law.

- How far will these current legal principles protect the people from organ trafficking?

  The current legal principles protect the needy populations from organ trafficking, but they need clarified to make prosecution of organ trafficking cases easier. The goal needs to be to be able to successfully prosecute cases of organ trafficking as part of an overall reduction in trafficking.

- How appropriate would it be to have changes to the legal principles used in fighting against trafficking in organs?

  There need to be changes to the legal principles in order to increase the number of successful prosecutions of organ trafficking cases, as well as preventing new cases of organ trafficking.

9.6 Conclusions

The definition of the term organ trafficking needs to be reconsidered in light of the reality that some organs are being stolen from the owners without permission, while others are being taken by coercion or by tempting people who have economic issues. In either case, the practical application is that it is illegal to steal organs, and it is illegal to sell organs. Thus, a new term that encompasses both meanings should be developed, or the term '*organ trafficking*' needs to encompass both meanings. The UNODC's formal term of 'trafficking in persons for organ removal' can encompass the process of organ trafficking, rather than being limited to the kidnapping or stealing of persons in order to remove their organs. It may also be helpful to use data categories of *organ trafficking by physical force*, and *organ trafficking by economic force*. In these cases, the first term

would involve organs that are taken without their host's permission, and the second term would mean using economic pressure as coercion for illegal purchase of organs.

9.7 Future Research

The implications of the trafficking of body parts and tissues was not addressed specifically in this research. The trafficking of tissues and body parts might well be the topic of additional research in the future, particularly as more and more possibilities for the use of tissues becomes part of the medical repertoire. Legal implications of the trafficking of tissues and body parts, as well as ways to acquire better tissues and body parts, needs to be explored. One question that should be investigated is the kinds of legal ramifications of using undifferentiated cells that may be carrying DNA from the original donor. What legal complications would the use of stem cells carry, on the owner/carrier's involvement in a crime? As we continue to stretch the bounds of organ trafficking and organ ownership, all of these types of issues need to be considered.

It is possible that technology in the near future will allow the growth of organs in the laboratory. This is one area of future research, from a medical standpoint. From a legal standpoint, the question of who would then own these tissues and organs, after the patient's death, will need to be explored and established in advance. The question arises as to whether we would inadvertently open a market for a completely different kind of organ trafficking.

The recommendation is also made that a global health organization, perhaps the World Health Organization, needs to develop an international database of DNA from stolen or trafficked donor organs, linking them to their original 'donor' when possible, even if tracked only by a pseudonym or code number. In this way, it would be possible to develop some level of safety for patients, even in illegal harvesting or trafficking of organs. Doctors should be made responsible for entering this data into the database at the time of the transplant. It might be necessary to require that if the doctor does not have access to both DNA panels (from an original person and the organ), then the operation cannot continue. This would not stop illegitimate field operations but would provide an extra layer of safety against questionable transplants in hospitals and transplant clinics.

9.8 Document Summary and Conclusion

This research has investigated organ trafficking in the Sinai, particularly as viewed through the keyhole of forced migration. The implications of organ trafficking for humanitarian intervention were considered, and the current treatment of refugees in the Sinai was reviewed. An analysis of crimes against humanity took place, in the context of the UN's right to intervene. Organ trafficking in Egypt, with the link to the Sinai, was detailed. A case study of illegal organ trafficking, in the context of Moldova and Israel, was provided. Methods of increasing the availability of legal organs were contemplated, and the entire dissertation was synthesized. Recommendations for the future were included.

A case study of Eritrea/Ethiopia and organ trafficking in the Sinai was presented as part of this research, along with a mini case on Moldova and Israel, as well as South Africa's Netcare. The Medicus case was briefly discussed, and China's approach to the organ donation problem was considered.

9.9 SUMMARY

The law on an international level has always been a theatre of a lot of institutional research for the past few years. The virtually special basis upon which laws have been crafted to stamp out organ trafficking, the more clandestine the enterprise has become since those involved in the enterprise usually come up with newer strategies aimed at ensuring that the lucrative trade continues. Thus, no matter how much research and resources have been availed to various governments, donor organisations, researchers and civil society groups a sense of delicacy and ineffectualness still lingers on regarding the best strategies that can be employed to fight and win organ trafficking. To a large partaking, fighting organ trafficking is hampered by the fact that that the demands in organs is surging in an increasingly unequal world. In such a context, the fight against trafficking in organs becomes too difficult to fight because vulnerability continues in a context where the ultra-rich need the organs and willing to pay for them

regardless of the prohibition of the whole enterprise on a global level. In other words, the greater the efforts the global community has made in stamping out organ trafficking, the higher the demand of organs in a world where organ failure seem to be on the surge[35].

A response to the increasing incidences of organ trafficking has as a result pushed for greater international efforts to ensure that more is done to keep at pace with the new developments in which organ trafficking manifests and occurs. The need to come up with that more robust policy regime in which organ trafficking is confronted with the seriousness it deserves is what this study aimed to do. What the study aimed at doing is not novel. Since the late 20th century, a multiplicity of studies has been published which are both empirically driven and more theoretical in orientation all of which aimed at dealing with the issue of organ trafficking. Coming up with workable instruments aimed at stopping the problem of organ trafficking remains key to all these efforts.

Organ trafficking and its effects on the victims should not be taken for granted. The way it has been understood however denote quiet distinct understandings and the ways in which different country understand them vary as well[36]. These variances in how the issue is understood entail that the issue has mostly been a hostage to numerous rhetorical trends by various institutions, governments and even individuals. In light of this, this study has dedicated its efforts in unpacking what organ trafficking is and how it manifest. The study has also attempted to have a systematisation of what all the global efforts that have been done over the years aimed to achieve and, in the end, identify what they have managed to achieve and what they have fallen short in achieving. This the thesis attempted at achieving through reviewing the various discourses and documents that have been written on the subject over the years.

The way available instruments are crafted seem to be informed more by the biomedical research instead of human rights research. It is within this milieu that this study aimed to inquire into the principles that should inform a standalone protocol

[35] Though there are numerous explanations to explaining why organ failure seem to be on the surge, research has it that due to poor diets among the ultra-rich and the general population of Western societies in the context of MacDonaldisation diseases such as diabetes and hypertension are on the surge. This surge has as a result spurred multiple incidences of organ failure hence surges in the demand of organs for transplantation.

[36] For instance, organ trafficking in Iran is not even seen as a crime. See Budiani-Saberi and Columb, (2013).

on organ trafficking from a multidisciplinary perspective. Though the principles that were proposed here may have their own loopholes, they could illuminate the discourse of organ trafficking that can lead to a workable instrument which is much improved from what currently exist. As what the discussion on the existing principles highlights, what is currently available somewhat strays from the realities of organ trafficking especially among migrants from the horn of Africa who aim to reach Europe via Egypt and Israel.

Thus, the more the current instruments continue to lean more towards biomedicine, the more difficult the issue of organ trafficking becomes difficult to contain. Thus, at the transnational level, combining the biomedical research on organ trafficking and the human rights research can be productive if a more nuanced and state of the art instrument against organ trafficking is to be arrived at. To be sure, it is trite to overlook the human rights side of issues to organ trafficking if organ trafficking is to be fully dealt with. Hence, a finer instrument in which the issue of human right takes the centre stage should be developed through further qualification of the human rights dimension of the issue of organ trafficking. What has been propounded and put forward in this study has hopefully provided an important grounding from which valid and powerful issues that can inform a new instrument on organ trafficking can be found.

9.9.1 What is new?

If one makes an effort in suggesting a new protocol on organ trafficking which fuses a human rights flair to the largely biomedical leaning protocol on organ trafficking, what would the protocol look like? How should one balance the surging demand of organs by those who are desperately in need of those organs and the need to ensure that the human rights of those trafficked for their organs are protected? In other words, what are the implications of this standalone protocol on what already exists? On the national level, the answers to these questions can only be answered if efforts are first made in ensuring that a workable international protocol on organ trafficking is put in place. Laws on the national level simply need to be aligned with the best practices that would have been adopted on a global level. The study has in this regard made efforts through an extensive integrative review of literature to search for a baseline through which this global instrument can be arrived at. As highlighted in the thesis, this novel baseline calls for the granting of feasibility considerations when putting forward proposals for reforms on institutions as this study did. It was noted that the proposals of

institutional designs beyond the state as what was attempted in this study does involve numerous theoretical stakes regarding what the plurality of global institutions such as laws should be like. It was noted that the changes to the existing instrument (s) on organ trafficking that will carry the most cherished normative ambitions on human rights will should not be rooted in mere sloganeering. What this instrument should carry must be closely linked and bound to traditional legal thought and informed by institutional experiences which will ensure that what suggested brings the real change that victims of organ trafficking deserve. What however comes to mind is how to come to terms with the resultant new order which is born out of the suggestions made. This thesis has made efforts in answering those questions in a succinct way above.

9.9.2 The limits of the proposed instrument

The route to proposing a new international instrument on organ trafficking consists of step-by-step discussion of the key issues inherent in human trafficking as an umbrella occurrence in which organ trafficking is nested as a subset. The only sensible to formulating the key principles is proceeding in small steps. What was proposed was not a total overhaul of what already exists. The expectations of what was proposed is never so conceited. What is important however is to fully understand the nature of the normative propositions of the proposed principles. Surely, questions will always be asked regarding the neutrality or the novelty of what was proposed to what already exists. What was proposed was purely instrumental and borrows from both the biomedical discourse and the human rights. In light of this amalgamation, the proposed principles can be as important and as critical as the goals it aims to serve be these goals be rights based, biomedical, constitutional, democratic or efficiency enhancing. It can be argued that, the principles that were proposed may be used to meet any goal be it biomedical or human rights goals. In other words, the proposed principles are basically oriented towards due process when it comes to offering an elaboration the nexus between human rights, biomedical law and institutional designs which may ensure that the issue of organ trafficking is dealt with in a sustainable manner. This it aimed to achieve through ensuring the moulding of a policy regime in the direction of the normative commitments whatever they can be.

The goal the proposed instrument aim to achieve may be contingent features to which procedural tools on fighting organ trafficking may be attached. It is however too farfetched for one to claim that the proposed principles satisfy every

loophole that might be inherent in the existing policy regime on organ trafficking. What is proposed is however complementary to what exists and could work towards achieving the intended goals as maybe a second-best option given the fact that the first best may remain very untenable and counter-productive in the for a very long time to come. Thus, once one admits that coming up with a purely perfect instrument with no loopholes can be normatively empty, one may in the end admit that what was proposed in this study may in fact be important to what is needed given the grim realities of organ trafficking in the Sinai Region and even beyond.

In this context however, a number of questions can be asked regarding the proposed ideas. Some of the questions asked may include: Can this instrument just be about a thin and managerial idea of efficient and responsive administration? Can it retain any appeal in the context of fast changing issues on organ traffciking? As already highlighted, it would certainly be naïve if not misleading to argued and suggest that an instrument proposed on a global level regarding global instruments is free of presupposing some values of its own. The academic orientation of the person doing the proposals surely has a bearing on the content of what ends up being proposed. What this suggests therefore is one might not be in a position to argue for the superiority of one form of theory or instrument over another regardless from a normative theory. As a result, in order to take a stand on what the proposed instrument stands for, might call one to ensure that some substantive value comes on board. Thus, vindicating a value of such kind is a condition to keep the normative appeal of the whole project. In the context of one being pushed to justify the instrument proposed in this study, one might need to excavate the deeper normative premise of what is proposed. This should be the case since apodictic statements regarding its importance and novelty in addressing the issues that need attention within the international law on organ trafficking may fail to stand by justificatory order. The proposed instrument would as a result better articulate its key pillars as what the study attempted to do. Doing so nevertheless should not and cannot ignore larger ideals regardless of how controversial it might be to spell them out and at the same time identify the next institutional step can be within a gradualist approach of procedural reform. Without this, the instrument proposed risked remaining a manipulable and hence untrustworthy an instrument to take on board and work with. Doing so does not nevertheless entail losing the virtues key to the instrument.

If one is to be able to judge whether an institution needs any changes as what this study has established, a line between definitive objectives and guidelines for

immediate action must be drawn somewhere. Ensuring that this reaches fruition does not need to go as far as making the instrument proposed purely instrumental as this would possibly weaken instead of weakening the whole project. In this context therefore, a reading of the instrument proposed which is more convincing may regard is as an attempt to ensure that there is a common ground from the bottom-up and to come up with a normative level playing platform from where one can assess.

This study chose three particular institutions within the area of human trafficking in its bid to describe and probe their weaknesses in addressing the issue of organ trafficking. These instruments are the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the WHO Guiding Principles on the issue of Human Organ Transplantation and the Declaration of Istanbul. The exercise was informed by the analytical grounding that was set up in the first too chapters of this study. The main reason behind choosing these three instruments was their very distinct but very critical roles they have played in the field of human trafficking and organ trafficking in particular. The three have played a part though in different ways in: structuring the policy and science discourse while striking a balance between the two (the WHO Guiding Principles), facilitating the global initiatives of fighting against human trafficking (the United Nations Protocol), and ensuring that there is cooperation between developing and developed countries in finding a common ground on organ trafficking (Declaration of Istanbul).

Coming up with a novel instrument after describing and probing each of these three institutions one can expect would require a complete overhaul of what these instruments laid out. As a matter of fact, the analysis made has shown that the existing instruments address issues in their own way. The intention was however not to recycle what is embodied in these instruments. Putting the particularities of these three institutions aside, nonetheless, the issues addressed in these three instruments have been oriented towards strikingly similar goals with no clear-cut efforts made in decisively dealing with the issue of organ trafficking. As parts of the thesis have shown, reforms which have been made so far have all been informed by convergent expectations of a surging pool of people who need transplants and biomedical solutions to an otherwise human rights problem among other issues. In such a context, the principles embodied therein have unfortunately become official rhetoric of what has been done so far to deal with the issue of organ trafficking. It is within this context

where this study suggested the changes or additions to what already exists with the aim of improving and not necessarily supplanting.

Though what is proposed can have weaknesses, what becomes unfairly reductionist is viewing the proposed principles as a mere reverberation of commonplace fashionable principles. In this context, the proposed principles cannot be conceived as free-floating list of suggestions aimed at improving the way in which the issue of organ trafficking should be treated. Since the proposed principles do not intend to supplant what already exist, they instead check the extent to which there is an intramural manifestation of those well-regarded and deep procedural values in the three instruments which were under scrutiny in this study. Just like any other instruments that need consistent reworking and reconfiguration so that they keep in touch with the new realities that emerge as new realities which need attention emerge on the ground the existing instruments remain works in progress. They remain works in progress in that they need to keep pace with the new issues that emerge everyday as well as the new issues that need attention regarding the issue of organ trafficking. The reforms that were as a result proposed were more or less distinguishing instantiations of that same set of technical principles.

What is important to note is that the three instruments which were under scrutiny on the whole fairly meet some of the key issues in addressing the issue of organ trafficking. What remains critical to ask are the achievements these have scored in stamping out organ trafficking. In this context, the study invited, first and foremost, institutional introspection of each of these. Though there may be weaknesses in what this study suggested, the suggested issues are in a position to capture the important dimensions of the newer forms organ trafficking is taking using the Sinai Region as the case study. This was done through interrogating the new modus operandi of the smugglers cum traffickers and established how these complicate issues and make what already exist on the issue of organ trafficking fall short in addressing the key issues which have since emerged. Thus, far from being celebratory, the proposed principles in this study have made effort in identifying the type actions that might need consideration when dealing with the issues of organ trafficking in the 21st Century.

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APPENDIX A

European Parliament (2012)

European Parliament resolution on Human trafficking in Sinai, in particular the case of Solomon W. B7-0158/2012

The European Parliament,

- Having regard to the 1948 Universal Declaration of Human Rights,

- Having regard to Article 3 of the European Convention on Human rights of 1950;

- Having regard to the 2000 UN Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime;

- Having regard to Article 6 and Article 9 of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" 2003;

- Having regard to the Brussels Declaration on Preventing and Combating Trafficking in Human Beings, adopted on 20 September 2002;

- Having regard to Convention on Action against Trafficking in Human Beings 2005;

- Having regard to Article 2, Article 6.1, Article 7, and Article 17: "Everyone has the right to the protection of the law against such interference or attacks" of the International Covenant on Civil and Political Rights;

- Having regard to the 1951 UN Convention Relating to the Status of Refugees and the 1967 protocol thereto;

- Having regard to the declaration of 21 September 2010 by Catherine Ashton, Vice-President of the Commission/High Representative of the Union for Foreign

Affairs and Security Policy, on political prisoners in Eritrea;

- Having regard to Rule 122 of its Rules of Procedure;

A. Whereas the Sinai Desert is a traditional transit route for people from Ethiopia, Eritrea, Somalia and sub-Saharan Africa, escaping political turmoil,

B. Whereas African refugees crossing the Sinai Desert to escape from political turmoil are subject to arrest, torture, rape and other ill treatment by the traffickers operating in the Sinai;

C. Whereas last December a group of people was kidnapped outside a UN refugee camp in Sudan by human traffickers of the Rashaida tribe: 27 of them were from Eritrea, including four girls and a woman with a small child, who were taken to Al Mahdya near Rafah in the Sinai, Egypt;

D. Whereas within the group, in particular women were battered and mistreated and some of them were killed and their bodies were thrown into desert and only Mr Solomon, an Eritrean 25-year-old man has escaped from the hands of his kidnappers.

E. Whereas Mr Solomon witnessed human traffickers' activities such as murders, tortures, rapes and organ trafficking of African refugees from Eritrea, Ethiopia, Somalia,

F. Whereas Mr Solomon is in danger, as the human organ traffickers are in close pursuit of him,

G. Whereas the Egyptian authorities failed not only to protect refugees but also border police shoot at unarmed African migrants who attempted to cross the Sinai border into Israel, killing at least 22 since January;

H. Whereas police arrested hundreds of migrants, primarily Eritreans, Ethiopians, and Sudanese, and detained them in police stations and prisons in Sinai and Upper Egypt without access to the Office of the United Nations High Commissioner for Refugees, thereby denying them the right to make an asylum claim;

I. Whereas the Sinai desert border has become a trafficking route for African migrants and asylum-seekers, notably thousands of Eritreans who each year flee the country, with many heading for Israel;

1 Urges the Egyptian authorities to rapidly intervene in order to provide effective protection and secure the life African migrants, crossing the Sinai Desert,

2 Calls on the Egyptian authorities to provide a of special protection to Mr Solomon, as the human organ traffickers are in close pursuit of him, as he revealed to the international community the illegal activities of human traffickers,

3 Urges the Egyptian authorities to allow officials of United Nations High Commissioner for Refugees to go out from Cairo for protecting the life of Mr Solomon and other refugees who are kept prisoners;

4 Urges the Egyptian authorities to take all necessary measures to stop torture and extortion and human trafficking of African refugees in the country and to bring to court those responsible for these action,

5 Urges the Egyptian authorities to stop shooting at unarmed African migrants who attempt to cross the Sinai border into Israel and to stop denying them, primarily Eritreans, Ethiopians, and Sudanese refugees and others refugees the right to make an asylum claim;

6 Calls on the Egyptian authorities to open independent investigations on the killings and ill treatments of migrants and asylum seekers and ensure that these crimes do not remain unpunished;

7 Calls on the Egyptian authorities to fully implement the principles of the Conventions, through its national legislation, to which Egypt is Party i.e. the 1951 UN Convention relating to the Status of Refugees (and its Optional Protocol 1967) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as the International Convention on the Protection of the Rights of all Migrants Workers and Members of their Family in 1993 (entered into force in 2003);

8 Calls on the Egyptian authorities to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons;

9 Calls on Egypt, Israel and all countries fight against human smuggling and trafficking in Sinai taking into consideration the necessity to remove barriers to mobility that lead migrants to take such dangerous paths; urges Israeli authorities to stop its policy of forcibly returning to Egypt, in violation of international refugee law;

10 Welcomes Egypt's efforts in combating human trafficking specially the establishment of 'the National Coordinating Committee for combating and preventing trafficking in persons' in the year 2007, and calls on all countries to resume their efforts in facing the challenge of human trafficking crimes world wide, and to respect relevant national laws;

11 Calls on the High Representative of the Union for Foreign Affairs and Security Policy to put this topic with high priority on the agenda of political dialogue with Egypt and to urge its government to combat human trafficking and to uphold its obligations under international refugees conventions, so as to promote international cooperation on action against trafficking in human beings;

12 Instructs its President to forward this resolution to the High Representative / Vice-President, the Council and the Commission, to the Governments and the Parliaments of the Member States, to the Egyptian Government, to the UN Secretary General and the UN Human Rights Council.

ANNEXURES

Annex 1

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime[37]

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international
instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

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1 A/RES/55/25 (Annex II), 8 January 2001

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational
Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

(*a*) To prevent and combat trafficking in persons, paying particular attention to women and children;

(*b*) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(*c*) To promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms

For the purposes of this Protocol:

(*a*) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual
exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

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

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

(*d*) “Child” shall mean any person under eighteen years of age.

Article 4
Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5
Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(*a*) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(*b*) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(*c*) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

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

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(*b*) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States
Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(*a*) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(*b*) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(*c*) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues
and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11
Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12
Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(*a*) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(*b*) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13
Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14
Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15
Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16
Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one-member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters

governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one-member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17
Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18
Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed

amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus
have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19
Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20
Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

Annex 2

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime[38]

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

Recalling General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and
development,

Convinced of the need to provide migrants with humane treatment and full protection of their rights,

[38] A/RES/55/25 (Annex III), 8 January 2001.

Taking into account the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

Concerned at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

Also concerned that the smuggling of migrants can endanger the lives or security of the migrants involved,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1
Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2
Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3
Use of terms

For the purposes of this Protocol:

(*a*) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(*b*) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

(*c*) "Fraudulent travel or identity document" shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(*d*) “Vessel” shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

Article 5

Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Article 6

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(*c*) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (*b*) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(*a*) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(*b*) Participating as an accomplice in an offence established in accordance with paragraph 1 (*a*), (*b*) (i) or (*c*) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (*b*) (ii) of this article;

(*c*) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (*a*), (*b*) (i) and (*c*) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (*b*) and (*c*) of this article, circumstances:

(*a*) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(*b*) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

3. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

II. Smuggling of migrants by sea

Article 7
Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

Article 8
Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(*a*) To board the vessel;

(c) To search the vessel; and

(*c*) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Article 9
Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(*a*) Ensure the safety and humane treatment of the persons on board;

(*b*) Take due account of the need not to endanger the security of the vessel or its cargo;

(*c*) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(*d*) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(*a*) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(*b*) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

III. Prevention, cooperation and other measures

Article 10

Information

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(*a*) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

(*b*) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

(*c*) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

(*d*) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

(*e*) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

(*f*) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (*a*), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12
Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(*a*) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(*b*) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13
Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

Article 14
Training and technical cooperation

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the 200 object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international
organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(*a*) Improving the security and quality of travel documents;

(*b*) Recognizing and detecting fraudulent travel or identity documents;

(*c*) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(*d*) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(*e*) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

Article 15
Other prevention measures

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

Article 16
Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment
or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article

6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of

informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Article 17
Agreements and arrangements

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

(*a*) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

(*b*) Enhancing the provisions of this Protocol among themselves.

Article 18
Return of smuggled migrants

1. Each State Party agrees to facilitate and accept, without undue or unreasonable
delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

IV. Final provisions

Article 19

Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 20
Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21
Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration
organizations provided that at least one-member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one-member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary- General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 22
Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 23
Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus
have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 24
Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 25
Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

Annex 3

Recommended Principles and Guidelines on Human Rights and Human Trafficking[39]

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.

3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

Preventing trafficking

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.

5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.

6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

[39] E/2002/68/Add.1, 20 May 2002.

Protection and assistance

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.

10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.

11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

Criminalization, punishment and redress

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts and related conduct.

13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.

14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties.

States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.

16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

Recommended Guidelines on Human Rights and Human Trafficking

Guideline 1: Promotion and protection of human rights

Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.

States and, where applicable, intergovernmental and non-governmental organizations,
should consider:

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.

2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes.

3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.

4. Taking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.

5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.

6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.

7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.

8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.

9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.

10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights based anti-trafficking strategies.

Guideline 2: Identification of trafficked persons and traffickers

Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.

States are also obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the

detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.

2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

3. Ensuring cooperation between relevant authorities, officials and nongovernmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.

4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.

5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

Guideline 3: Research, analysis, evaluation and dissemination

Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis. It is essential that all parties involved in developing and implementing these strategies have and maintain a clear understanding of the issues.

The media has an important role to play in increasing public understanding of

the trafficking phenomenon by providing accurate information in accordance with professional ethical standards.

States and, where appropriate, intergovernmental and non-governmental organizations,
should consider:

1. Adopting and consistently using the internationally agreed definition of trafficking contained in the Palermo Protocol.

2. Standardizing the collection of statistical information on trafficking and related movements (such as migrant smuggling) that may include a trafficking element.

3. Ensuring that data concerning individuals who are trafficked is disaggregated on the basis of age, gender, ethnicity and other relevant characteristics.

4. Undertaking, supporting and bringing together research into trafficking. Such research should be firmly grounded in ethical principles, including an understanding of the need not to re-traumatize trafficked persons. Research methodologies and interpretative techniques should be of the highest quality.

5. Monitoring and evaluating the relationship between the intention of antitrafficking laws, policies and interventions, and their real impact. In particular, ensuring that distinctions are made between measures which actually reduce trafficking and measures which may have the effect of transferring the problem from one place or group to another.

6. Recognizing the important contribution that survivors of trafficking can, on a strictly voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact.

7. Recognizing the central role that non-governmental organizations can play in improving the law enforcement response to trafficking by providing relevant authorities

with information on trafficking incidents and patterns taking into account the need to preserve the privacy of trafficked persons.

Guideline 4: Ensuring an adequate legal framework

The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.

States should consider:

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.

2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureau, employment agencies, travel agencies, hotels and escort services.

3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.

4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.

7. Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings.

8. Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked.

9. Ensuring that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law.

10. Guaranteeing that protections for witnesses are provided for in law.

11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.

Guideline 5: Ensuring an adequate law enforcement response

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.

An adequate law enforcement response to trafficking is dependent on the cooperation
of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.

States and, where applicable, intergovernmental and non-governmental organizations
should consider:

1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.

2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness.

3. Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony.

4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.

5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

6. Implementing measures to ensure that "rescue" operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.

7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combating trafficking and protecting the rights of victims.

8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent 1egal counsel; protection of identity during legal proceedings; identification of options for continued stay,
resettlement or repatriation.

9. Encouraging law enforcement authorities to work in partnership with nongovernmental
agencies in order to ensure that trafficked persons receive necessary support and assistance.

Guideline 6: Protection and support for trafficked persons

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.

6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the
capacities of law enforcement agencies in this regard.

7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

Guideline 7: Preventing trafficking

Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.

States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:

1. Analysing the factors that generate demand for exploitative commercial sexual

services and exploitative labour and taking strong legislative, policy and other measures to address these issues.

2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.

3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.

4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.

5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.

6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.

7. Examining ways of increasing opportunities for legal, gainful and nonexploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.

8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.

9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

Guideline 8: Special measures for the protection and support of child victims of trafficking

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.

2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.

3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation

with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.

6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.

7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.

8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.

9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.

10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

Guideline 9: Access to remedies

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for

trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature.

2. Providing information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands.

3. Making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel

The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organizations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation. They are also required to investigate thoroughly all allegations of trafficking and related exploitation and to provide for and apply appropriate sanctions to personnel found to have been involved in trafficking.

States and, where appropriate, intergovernmental and non-governmental organizations,

should consider:

1. Ensuring that pre- and post-deployment training programmes for all peacekeeping, peacebuilding, civilian policing, humanitarian and diplomatic staff adequately address the issue of trafficking and clearly set out the expected standard of behaviour. This training should be developed within a human rights framework and delivered by appropriately experienced trainers.

2. Ensuring that recruitment, placement and transfer procedures (including those of private contractors and sub-contractors) are rigorous and transparent.

3. Ensuring that staff employed in the context of peacekeeping, peacebuilding, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect they may have been trafficked. This obligation also covers complicity in trafficking through corruption or affiliation with any person or group of persons who could reasonably be suspected of engaging in trafficking and related exploitation.

4. Developing and adopting specific regulations and codes of conduct setting out expected standards of behaviour and the consequences of failure to adhere to these standards.

5. Requiring all personnel employed in the context of peacekeeping, peacebuilding, civilian policing, humanitarian and diplomatic missions to report on any instances of trafficking and related exploitation that come to their attention.

6. Establishing mechanisms for the systematic investigation of all allegations of trafficking and related exploitation involving personnel employed in the context of peacekeeping, peacebuilding, civilian policing, humanitarian and diplomatic missions.

7. Consistently applying appropriate criminal, civil and administrative sanctions to personnel shown to have engaged in or been complicit in trafficking and related exploitation. Intergovernmental and non-governmental organizations should, in

appropriate cases, apply disciplinary sanctions to staff members found to be involved in trafficking and related exploitation in addition to and independently of any criminal or other sanctions decided on by the State concerned. Privileges and immunities attached to the status of an employee should
not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.

Guideline 11: Cooperation and coordination between States and regions

Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare.

2. Offering, either on a bilateral basis or through multilateral organizations, technical and financial assistance to States and relevant sectors of civil society for the purpose of promoting the development and implementation of human rights-based anti-trafficking strategies.

3. Elaborating regional and sub-regional treaties on trafficking, using the Palermo Protocol and relevant international human rights standards as a baseline and framework.

4. Adopting labour migration agreements, which may include provision for minimum work standards, model contracts, modes of repatriation, etc., in accordance with

existing international standards. States are encouraged effectively to enforce all such agreements in order to help eliminate trafficking and related exploitation.

5. Developing cooperation arrangements to facilitate the rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of residence.

6. Establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation.

7. Developing procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned States. In recognition of the value of direct contacts, provision should be made for direct transmission of requests for assistance between locally competent authorities in order to ensure that such requests are rapidly dealt with and to foster the development of cooperative relations at the working level.

8. Ensuring judicial cooperation between States in investigations and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. This cooperation should include assistance in: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgments.

9. Ensuring that requests for extradition for offences related to trafficking are dealt with by the authorities of the requested State without undue delay.

10. Establishing cooperative mechanisms for the confiscation of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.

11. Exchanging information and experience relating to the implementation of assistance, return and integration programmes with a view to maximizing impact and effectiveness.

12. Encouraging and facilitating cooperation between non-governmental organizations and other civil society organizations in countries of origin, transit and destination. This is particularly important to ensure support and assistance to trafficked persons who are repatriated.

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