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International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter

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INTERNATIONAL ORGAN TRAFFICKING CRISIS: SOLUTIONS ADDRESSING THE HEART OF THE MATTER

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Abstract: The grave inadequacy of current international attempts to curtail organ trafficking signals the need for a new approach in the form of a fundamental paradigm shift. Instead of continuing to focus efforts solely on criminalization, countries must devise a broad scheme aimed at decreasing organ shortages. These shortages fuel the illegal organ market, as people desperate for life-saving transplants travel internationally to purchase organs. Until the demand for this underground market subsides, traffickers will continue to exploit inconsistent legal loopholes in different countries by hopping across borders. To effectively address this problem, the international community must craft a new binding instrument that uniformly criminalizes organ trafficking while simultaneously encouraging domestic legislation to address the organ shortage.

INTRODUCTION

Universal organ shortages have catalyzed a thriving underground market for organs, which has generated human rights abuses, public health disasters, and transnational crime.[1] While most commentators believe that curtailing organ trafficking requires a coordinated global effort, few policymakers agree on what that effort should entail.[2] Coun-

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[1] *See* UNITED NATIONS & COUNCIL OF EUR., TRAFFICKING IN ORGANS, TISSUES AND CELLS AND TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF THE REMOVAL OF ORGANS 5 (2009), *available at* http://tdh-childprotection.org/documents/trafficking-in-organs-tissues-and-cells-and-trafficking-in-human-beings-for-the-purpose-of-the-removal-of-organs; Dean L'hospital, *The Medium-of-Exchange Paradigm: A Fresh Look at Compensated Live-Organ Donation*, 2 HUM. RTS. & GLOBALIZATION L. REV. 1, 1 (2009); Ranee Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, 28 PACE ENVTL. L. REV. 1, 2–3 (2010); Erica D. Roberts, *When the Storehouse Is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should Not Be Ignored*, 52 HOW. L.J. 747, 749, 777 (2009).

[2] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 96 (recommending creation of a binding international treaty to prevent trafficking in organs, tissues, and cells); L'hospital, *supra* note 1, at 20; Elizabeth Pugliese, *Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Efforts*, 24 J. CONTEMP. HEALTH L. & POL'Y 181, 197 (2007); Roberts, *supra* note 1, at 789 (recommending stricter U.S. laws

tries have adopted many policies to address the illicit sale of human body parts, but competing cultural values and disparate enforcement have yielded inconsistent results.[3] Moreover, globalized markets, communication, and transportation enable traffickers to move their operations fluidly, taking advantage of legal loopholes.[4] As a result, enforcement in one country merely prompts traffickers to seek other countries with more favorable legal environments.[5]

The challenge inherent in constructing a coordinated global solution to organ trafficking is rooted in confusion over the scope of the problem itself.[6] News reports on the subject frequently focus on the kidnapping that results in stolen organs,[7] drawing more attention to human trafficking for the purpose of organ removal rather than the larger problem of trafficking in organs, tissues, and cells (OTC).[8] Human trafficking for the purpose of organ removal involves the coercive transport of an individual and subsequent organ removal.[9] By contrast, in OTC trafficking organs are obtained by coercion and then sold for transplant.[10] The international community has established binding legal standards for human trafficking for the purpose of organ removal,[11] but has paid significantly less attention to the broader problem of OTC trafficking.[12] Thus, while international organizations condemn OTC trafficking, they have failed to construct an international legal instrument to address the problem.[13]

This Note explores the possibility of a more effective global anti-OTC-trafficking regime by evaluating as a model the current framework that combats human trafficking for the purpose of organ removal.

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against transplant tourism and sanctions against states that allow and encourage the practice); Erica Teagarden, *Human Trafficking: Legal Issues in Presumed Consent Laws*, 30 N.C. J. Int'l & Com. Reg. 685, 688 (2005).

[3] *See* United Nations & Council of Eur., *supra* note 1, at 30; Panjabi, *supra* note 1, at 5; Roberts, *supra* note 1, at 749–50; Teagarden, *supra* note 2, at 686–87.

[4] *See* F. Ambagtsheer & W. Weimar, *A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward*, 12 Am. J. Transplantation 571, 572 (2011); Panjabi, *supra* note 1, at 4; Roberts, *supra* note 1, at 775.

[5] *See* United Nations & Council of Eur., *supra* note 1, at 57.

[6] *See id.* at 11.

[7] *See, e.g.*, Dan Bilefsky, *Seven Charged in International Organ-Trafficking Ring Based in Kosovo*, N.Y. Times, Nov. 16, 2010, at A4.

[8] *See* United Nations & Council of Eur., *supra* note 1, at 11.

[9] *See* Leslie P. Francis & John G. Francis, *Stateless Crimes, Legitimacy, and International Criminal Law: The Case of Organ Trafficking*, 4 Crim. L. & Phil. 283, 285–86 (2010).

[10] *See id.*

[11] *See* United Nations & Council of Eur., *supra* note 1, at 97.

[12] *See id.* at 96.

[13] *See id.*

Part I outlines the growth of the global underground market for organs, highlighting the difference between OTC trafficking and human trafficking for the purpose of organ removal. Part II discusses the various international and domestic legal regimes that have attempted to quell both types of trafficking. It contrasts the apparent lack of international law concerning OTC trafficking with the more comprehensive system that prohibits human trafficking for the purpose of organ removal. Part III analyzes whether a binding multilateral treaty, as proposed by the Council of Europe and the United Nations (UN), would reduce the prevalence of OTC trafficking. After evaluating existing treaties' effectiveness in reducing human trafficking for the purpose of organ removal, Part III concludes that similar methods would fail to address OTC trafficking effectively. Rather, a multilateral treaty should aim to remove the cause of the underground market by reducing the organ shortage itself.

I. Background

A. *Snapshot of International Organ Trafficking*

Trafficking in organs is a growing, lucrative enterprise much like the illicit markets for weapons, humans, and drugs.[14] The media has sensationalized myths concerning organ trafficking since the 1980s,[15] reporting both exaggerated kidnapping accounts and reliable reports of underground organ markets.[16] Although the precise scope of the problem remains shrouded in uncertainty, the international community recognizes organ trafficking as a human rights and public health concern.[17] The underground organ trade constitutes ten percent of worldwide organ transplants, producing between $600 million and $1.2 billion in illicit revenue each year.[18]

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[14] *See* Ambagtsheer & Weimar, *supra* note 4, at 572.

[15] *See* U.N. Secretary-General, *Preventing, Combating and Punishing Trafficking in Human Organs: Rep. of the Secretary-General*, ¶ 85, U.N. Doc. E/CN.15/2006/10 (Feb. 21, 2006) [hereinafter UN Organ Trafficking Report].

[16] *See id.*

[17] *See id.*; Panjabi, *supra* note 1, at 6; Roberts, *supra* note 1, at 777.

[18] Ambagtsheer & Weimar, *supra* note 4, at 572; Dominique Martin, *The Long Road from the Kidney Bazaar: A Commentary on Pakistan's Progress Towards Self-Sufficiency in Organ Transplantation*, PORTAL J. Multidisciplinary Int'l Stud. (July 2011), http://epress.lib.uts.edu.au/journals/index.php/portal/article/view/1833/2515.

Although organ trafficking centers routinely shift locations, several countries have gained notoriety as hotbeds.[19] Pakistan, one of the largest "kidney bazaars" in the world, has a thriving underground market supplied by impoverished citizens.[20] A legal vacuum led to the growth of kidney transplants in the late 1980s:[21] because there were no national laws or systems to address organ donation, commercial kidney transactions quickly became prevalent.[22] Today, brokers work with hospitals to locate impoverished donors, who provide approximately 2000 kidneys each year.[23]

Egypt is also a center for organ trafficking, with more than eighty percent of kidney transplants involving commercial donors.[24] As in Pakistan, the absence of laws and transplant systems made OTC trafficking the leading method for organ procurement in Egypt.[25] Unlike Pakistan, however, where donors are predominately Pakistani citizens, Egypt's organ vendor pool is comprised of both impoverished Egyptian citizens and sub-Saharan African refugees.[26]

Increasingly, organ trafficking rings involve actors who operate simultaneously in multiple countries to recruit donors and recipients.[27] India, China, Egypt, Iraq, Turkey, Pakistan, and the Philippines all constitute such organ supply countries.[28] Patients from the United States, the United Kingdom, Canada, and other wealthy countries travel to organ supply countries to purchase organs in the underground market.[29] Such transactions represent OTC trafficking because donors do not typically travel from their home country.[30] For example, in 2008, Indian authorities disbanded a ring of doctors, nurses, paramedics, and hospitals that had performed 500 illegal transplants on foreigners using predominantly impoverished Indian donors.[31]

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[19] *See* Coal. for Organ Failure Solutions, Sudanese Victims of Organ Trafficking in Egypt 6 (2011) [hereinafter COFS Report]; Panjabi, *supra* note 1, at 56.

[20] *See* Farhat Moazam et al., *Conversations with Kidney Vendors in Pakistan: An Ethnographic Study*, Hastings Cent. Rep., May–June 2009, at 29, 30.

[21] *See id.*

[22] *See id.*

[23] *Id.*

[24] *See* COFS Report, *supra* note 19, at 6.

[25] *See id.*

[26] *Compare id.* at 6–7, *with* Moazam et al., *supra* note 20, at 30.

[27] *See* Ambagtsheer & Weimar, *supra* note 4, at 572; Francis & Francis, *supra* note 9, at 286.

[28] *See* Martin, *supra* note 18.

[29] *See* Ambagtsheer & Weimar, *supra* note 4, at 257.

[30] *See id.*; Francis & Francis, *supra* note 9, at 285–86.

[31] *See* Dominick Tao, *Worldwide Market Fuels Illegal Traffic in Organs*, N.Y. Times, July 30, 2009, at A26.

Instances of human trafficking for organ removal are also prevalent.[32] This type of trafficking involves the transport of humans through threat, force, or other coercion, including payment.[33] For example, in November 2008, Yilman Altun, a Turkish national, was transported to a clinic in Kosovo, where his kidney was removed and transplanted into an elderly Israeli who paid the clinic more than $100,000.[34] When Altun subsequently collapsed at the airport, authorities traced his operation to a network of organ traffickers.[35] The Kosovar clinic offered up to $20,000 for organs from impoverished Turkish, Russian, Moldovan, and Kazakh nationals; most victims never received compensation.[36] Trafficking rings are not limited to the developing world; U.S. federal authorities uncovered a trafficking ring when they arrested Levy-Izhak Rosenbaum for arranging the sale of a kidney for $160,000.[37] The subsequent investigation revealed Rosenbaum's practice of importing foreign donors and selling their organs to U.S. citizens.[38]

B. *The Birth of Organ Trafficking*

Although organ shortages catalyzed the underground market[39] for organs, globalization, technological advancement, and economic inequality have made it thrive.[40] As a result, approximately 5000 ill patients from developed countries buy illicit organs every year.[41]

Doctors performed the first successful organ transplant in 1954, and technological advancements have since increased success rates.[42]

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[32] *See, e.g.*, Bilefsky, *supra* note 7; Tao, *supra* note 31.

[33] United Nations & Council of Eur., *supra* note 1, at 13.

[34] *See* Bilefsky, *supra* note 7.

[35] *See id.*

[36] *See id.*

[37] *See* Tao, *supra* note 31.

[38] *See id.*

[39] *See* Roberts, *supra* note 1, at 767 (distinguishing underground markets that provide illegal goods from black markets that provide legal goods while circumventing governmentally mandated taxes).

[40] *See* L'hospital, *supra* note 1, at 9; Panjabi, *supra* note 1, at 8–9; Roberts, *supra* note 1, at 750.

[41] *See* Michael Smith, *A Shadowy, Sometimes Deadly Trade in Organs*, Wash. Post, May 29, 2011, at G3.

[42] *See* United Nations & Council of Eur., *supra* note 1, at 17–19; Sean Arthurs, Comment, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime*, 73 U. Cin. L. Rev. 1101, 1111 (2005) (noting new organ transplant therapies that treat more diseases and conditions); Panjabi, *supra* note 1, at 11 (noting prevalent use of drugs like cyclosporine to help patients accept organs as a factor in the growth of transplant procedures).

Unfortunately, long wait lists preclude many patients from these life-saving procedures.[43] In the United States, 110,693 patients make up the waiting list for organs, yet fewer than 15,000 donors become available each year.[44] Similar shortages exist across the globe, sparking ethical debates over compensation for live donors and laws that presume donor consent upon death.[45] Additionally, the shortage drives desperate patients underground when established wait lists fail to meet their needs.[46]

Patients' demand for organs is supplied by a vulnerable source: impoverished individuals in developing countries facing their own unique struggles for survival.[47] Living donors in such countries can provide kidneys, liver lobes, lungs, and corneas in exchange for compensation.[48] Often, the need to pay a coercive lender or buy food for survival catalyzes the decision to sell an organ through the underground market.[49] For example, Pakistani laborers' paltry salaries force them to accrue debt from their employers.[50] The loans are virtually impossible to pay off, leading laborers to essentially remain "bonded" to their employers.[51] Consequently, many have turned to the underground market in order to escape debt.[52]

Recognizing opportunity in both patients' and donors' desperation, organ traffickers have created elaborate and profitable worldwide brokerage systems.[53] The most common form of organ trafficking, "transplant tourism," occurs when patients travel to foreign countries for transplant. [54] Websites advertise comprehensive "transplant packages" prepared by brokers who retain considerable fees for their matching services.[55] For example, a U.S.-based company with ties to Colombia offers its clients comprehensive services including "travel, hotel accom-

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[43] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 19–20.

[44] *See* Smith, *supra* note 41.

[45] *See* L'hospital, *supra* note 1, at 5; Roberts, *supra* note 1, at 788.

[46] *See* Roberts, *supra* note 1, at 787.

[47] *See* L'hospital, *supra* note 1, at 10; Panjabi, *supra* note 1, at 3.

[48] *See* Francis & Francis, *supra* note 9, at 285.

[49] *See* L'hospital, *supra* note 1, at 10; Panjabi, *supra* note 1, at 3; *see also* Moazam et al., *supra* note 20, at 30–31 (explaining that workers in Pakistan who accumulate debts that are impossible to repay often decide to sell a kidney).

[50] *See* Moazam et al., *supra* note 20, at 31.

[51] *See id.*

[52] *See id.*

[53] Panjabi, *supra* note 1, at 9; Roberts, *supra* note 1, at 788.

[54] *See* Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, BULL. WORLD HEALTH ORG., Dec. 2007, at 955, 956.

[55] *See id.*

modation, meals, testing/evaluation, surgical procedures, [and] post-surgical care."[56]

C. *Effects of Organ Trafficking and Transplant Tourism*

Transplant tourism and organ trafficking have pervasive negative effects.[57] Organ trafficking exploits poor individuals who are desperate to make money for survival.[58] Because profit-motivated facilitators negotiate most transactions, donor compensation is often extremely low.[59] For example, kidney donors frequently receive less than one-third of the price that recipients pay for the organ, despite initial promises of higher payment.[60] Furthermore, donors rarely receive adequate health care after the transplant, generating negative health outcomes that impede their ability to work and worsening their long-run financial and physical condition.[61] As a result, donors rarely succeed in paying off the very debts that often lead them to sell an organ in the first place.[62]

In addition, studies have exposed the negative sociological and psychological effects of organ sales.[63] Kidney vendors frequently express regret and disgrace associated with the decision to sell a body part.[64] Communities with high rates of organ sales also shame donors, leading many to conceal their decision out of embarrassment.[65]

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[56] *See* Roger Lee Mendoza, *Columbia's Organ Trade: Evidence from Bogotá and Medellín*, 18 J. Pub. Health 375, 381 (2010).

[57] *See* L'hospital, *supra* note 1, at 10; Roberts, *supra* note 1, at 780.

[58] *See* Roberts, *supra* note 1, at 780.

[59] *See id.* at 780–81.

[60] *See id.* at 781.

[61] *See* L'hospital, *supra* note 1, at 10; Roberts, *supra* note 1, at 782–83; *see also* Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 J. Am. Med. Ass'n 1589, 1591 (2002) (finding eighty-six percent of organ donors in India experienced a decline in health after surgery); Imran Sajjad et al., *Commercialization of Kidney Transplants: A Systematic Review of Outcomes in Recipients and Donors*, 28 Am. J. Nephrology 744, 750 (2008) (finding ninety-eight percent of Pakistani organ donors reported a decline in their general health).

[62] *See* L'hospital, *supra* note 1, at 10.

[63] *See, e.g.*, Moazam et al., *supra* note 20, at 30.

[64] *See id.* at 35 (describing interviews with kidney vendors who expressed remorse for violating religious norms and shame from deceiving their families).

[65] *See* COFS Report, *supra* note 19, at 22 (describing a Sudanese victim in Egypt who regretted selling his kidney because his fiancée's family cancelled the wedding after learning of his organ sale); Moazam et al., *supra* note 20, at 35 (finding vendors expressed "profound shame at having sold a kidney" and subsequently hid the sale from their family); Sajjad et al., *supra* note 61, at 752–53 (noting a study where ninety-four percent of donors were unwilling to identify themselves as donors, even to close relatives).

With regard to recipients, the dangers of receiving medical care in developing countries can outweigh the benefits of life-saving transplant tourism.[66] Because governmental disease control agencies do not monitor underground organ trafficking, recipients risk contracting infectious diseases like West Nile Virus and HIV.[67] Tragically, transplant tourists also have "a higher cumulative incidence of acute [organ] rejection in the first year after transplantation."[68]

Transplant tourism also harms global public health policies.[69] Most notably, the underground market impedes the success of legal organ donation frameworks.[70] For example, Thai patients have difficulty accessing health care because local doctors are preoccupied with the lucrative practice of treating transplant tourists.[71] In 2007, China banned transplant tourism because wealthy foreigners—rather than the 1.5 million Chinese on the waiting list—received an overwhelming amount of organ transplants.[72]

Grisly tales of transplant tourism and conspiracy theories surrounding organ theft may also discourage individuals from agreeing to altruistic donation upon death out of fear that their bodies may be exploited.[73] This further contributes to the global organ shortage and exacerbates the underlying causes of OTC trafficking.[74] Additionally, transplant tourism and broader medical tourism facilitate the spread of antibiotic-resistant bacteria.[75] Because such bacteria are frequently found in hospitals, tourists are easily exposed and transmit these unique strains across borders upon returning to their home countries.[76] As a result of these effects, transplant tourism has drawn increasing attention to the root of the problem: organ shortages.[77]

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[66] *See* Roberts, *supra* note 1, at 777–78.

[67] *See id.* at 777; Smith, *supra* note 41.

[68] Jagbir Gill et al., *Transplant Tourism in the United States: A Single-Center Experience*, 3 Clinical J. Am. Soc'y Nephrology 1820, 1822 (2008).

[69] *See* Tamara L. Hill, *The Spread of Antibiotic-Resistant Bacteria Through Medical Tourism and Transmission Prevention Under the International Health Regulations*, 12 Chi. J. Int'l L. 273, 276 (2011); Roberts, *supra* note 1, at 778.

[70] *See* Roberts, *supra* note 1, at 778.

[71] Jon Hamilton, *Medical Tourism Creates Thai Doctor Shortage*, NPR (Nov. 29, 2007, 12:06 PM), http://www.npr.org/templates/story/story.php?storyId=16735157.

[72] Mark McDonald, *Beijing Investigates Transplants for Tourists*, N.Y. Times, Feb. 18, 2009, at A13.

[73] *See* Roberts, *supra* note 1, at 778.

[74] *See id.*

[75] *See* Hill, *supra* note 69, at 276–77.

[76] *See id.*

[77] *See, e.g.*, Panjabi, *supra* note 1, at 2–3.

II. Discussion

A. *Domestic Solutions*

Countries have implemented legislative regimes to address both OTC trafficking and human trafficking for organ removal.[78] While most regimes prohibit organ trafficking, countries differ in their approaches to enforcement, which fall into two fundamental categories.[79] Some aim to eliminate the cause of organ trafficking by reducing the organ shortage; others seek to eliminate the effects by targeting associated criminal activities.[80]

1. Attempts to Reduce the Organ Shortage

Domestic solutions to reduce organ shortages include procurement systems based on various methods of consent and incentivizing donation.[81]

a. *Altruism and Express Consent*

The advent of consistently viable organ transplant surgeries in the late 1960s prompted countries to regulate organ procurement and donation.[82] Many of these regulatory systems, however, failed to anticipate the growing demand for organs.[83] The 1968 Uniform Anatomical Gift Act (UAGA)[84] prohibited cadaveric organ donation absent decedents'

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[78] *See* United Nations & Council of Eur., *supra* note 1, at 31–32; Teagarden, *supra* note 2, at 688.

[79] *See* Cody Corley, *Money as a Motivator: The Cure to Our Nation's Organ Shortage*, 11 Hous. J. Health L. & Pol'y 93, 95–96 (2011) (describing U.S. legislation aimed at reducing the organ shortage through altruistic donation); Lisa M. Derco, *America's Organ Donation Crisis: How Current Legislation Must Be Shaped by Successes Abroad*, 27 J. Contemp. Health L. & Pol'y 154, 162 (2010) (describing organ procurement systems in Spain, Belgium, and Norway designed to reduce the organ shortage); Shaun D. Pattison, *Organ Trading, Tourism, and Trafficking Within Europe*, 27 Med. & L. 191, 193 (2008) (noting legislation in twenty-four states outlawing organ sales aimed at eliminating the effects of organ trafficking); Teagarden, *supra* note 2, at 694–95 (describing a model law aimed at eliminating criminal effects of organ trafficking by prohibiting organ trading).

[80] *See* United Nations & Council of Eur., *supra* note 1, at 31; Corley, *supra* note 79, at 95; Derco, *supra* note 79, at 162; Teagarden, *supra* note 2, at 695.

[81] *See* Corley, *supra* note 79, at 112–13; Derco, *supra* note 79, at 159, 162.

[82] *See* Teagarden, *supra* note 2, at 694.

[83] *See* Panjabi, *supra* note 1, at 13; Teagarden, *supra* note 2, at 694–95.

[84] *See generally Anatomical Gift Act (2006)*, Nat'l Conf. Commissioners on Uniform St. Laws, http://uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20(2006) (last visited May 17, 2013) (detailing the history and enactment status of the UAGA). As of May

written authorization or their families' explicit consent, thereby impeding organ supplies.[85] Although the National Conference of Commissioners on Uniform State Laws has revised the UAGA twice to allow for more flexible organ retrieval rules, the transplant waitlist continues to grow.[86]

As a result, many commentators argue that U.S. laws remain too constraining and altruistic, and will worsen the organ shortage in the long term.[87] The system for organ procurement in the United States stems from the 1984 National Organ Transplant Act (NOTA), which created the National Organ Procurement and Transplantation System (OPTN) and the United Network for Organ Sharing (UNOS).[88] Under the UAGA and the NOTA, organs cannot be sold for consideration.[89] As a result, the OPTN relies solely on altruistic donations from deceased donors who have indicated their intention to donate on identification cards or orally in the presence of two adults.[90]

Economists argue that such reliance on altruism fails to incentivize donation, inherently undermining the transplant regime.[91] Logistical obstacles also prevent an effective altruistic procurement system: despite contrary language in the UAGA amendments, most organ-procurement organizations honor family decisions over a decedent's desire to donate.[92] Furthermore, individuals often neglect to document their intentions.[93] Although the majority of Americans support organ

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2013, forty-five U.S. states had enacted a version of the UAGA, and one other had introduced a bill proposing enactment. *See id.*

[85] *See* Corley, *supra* note 79, at 95; Teagarden, *supra* note 2, at 694–95.

[86] *See* Peter Aziz, *Establishing a Free Market in Human Organs: Economic Reasoning and the Perfectly Competitive Model*, 31 U. La Verne L. Rev. 67, 69, 71–72 (2009) (noting an increase from 55,501 candidates on the U.S. national waiting list in 1997 to 100,363 candidates in 2008).

[87] *See, e.g.*, Sarah Elizabeth Statz, *Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage*, 39 Vand. J. Transnat'l L. 1677, 1688 (2006).

[88] Teagarden, *supra* note 2, at 693–96.

[89] Aziz, *supra* note 86, at 75.

[90] *See id.*

[91] *See* Richard A. Epstein, *The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation*, 37 J. Legal Stud. 459, 461 (2008) (using economic models of self-interest to explain altruistic behavior); Statz, *supra* note 87, at 1688 (noting the economic theory that rational actors react to incentives).

[92] *See* Hayley Cotter, *Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent*, 21 Health Matrix 599, 602 (2011); Statz, *supra* note 87, at 1688–89.

[93] *See* Cotter, *supra* note 92, at 603; *see also* Donate Life Am., National Donor Designation Report Card 3 (2011), *available at* http://donatelife.net/wp-content/uploads/2011/

donation, many fail to take the formal and necessary actions to become organ donors.[94]

b. *Presumed Consent and Mandated Choice*

Some countries have developed organ procurement legislation as a vehicle to reduce the organ shortage by shifting the presumption in favor of donation.[95] They have relied on one of two systemic models: presumed consent or mandated choice.[96] In a presumed-consent system, individuals are presumed to be organ donors unless they affirmatively opt out of the program by registering with a government database.[97] Spain, France, Austria, Italy, Norway, and a number of other European countries employ a variety of presumed-consent models.[98] Although not widely used, mandated choice addresses several flaws in the presumed-consent model by requiring all citizens to affirmatively indicate donation preferences in conjunction with a required activity, such as filing taxes or renewing drivers' licenses.[99] Because of its wider application, examples and evaluations of presumed consent are more prevalent than those of mandated choice.[100]

Countries employ variations on the presumed-consent model: "Pure" presumed consent requires an individual to opt out during his or her lifetime in order to avoid donation upon death.[101] Family wishes are neither elicited nor considered.[102] "Soft" systems retain the core principles of pure presumed consent, but adopt a more flexible approach.[103] For example, if patients tell family members they oppose organ donation but fail to formally register their objection before

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04/DLA-Report-BKLT-30733-2.pdf (noting that designation as an organ donor at the Department of Motor Vehicles is the most common procedure in most states).

[94] *See* Cotter, *supra* note 92, at 603; Teagarden, *supra* note 2, at 699 (citing a 1993 Gallup poll wherein only thirty percent of respondents had signed organ donor cards although sixty-three percent said they would donate).

[95] *See* Panjabi, *supra* note 1, at 13.

[96] *See* Derco, *supra* note 79, at 162; Denise Spellman, *Encouragement Is Not Enough: The Benefits of Instituting a Mandated Choice Organ Procurement System*, 56 Syracuse L. Rev. 353, 371 (2006).

[97] *See* Derco, *supra* note 79, at 162.

[98] *See id.*; Statz, *supra* note 87, at 1690.

[99] *See* Spellman, *supra* note 96, at 366, 371.

[100] *See* Statz, *supra* note 87, at 1690; Richard H. Thaler, *Opting In Vs. Opting Out*, N.Y. Times, Sept. 29, 2009, at BU6.

[101] *See* Statz, *supra* note 87, at 1690.

[102] *See id.*

[103] *See id.*

death, their organs will not be retrieved.[104] Presumed consent has had varied effects, but countries that utilize it experience drastically higher consent rates.[105]

Both France and Spain utilize soft presumed-consent models.[106] In France, the Caillavet Law and the Bioethics Law permit cadaveric organ removal for therapeutic and scientific purposes when a donor has not registered refusal.[107] Hospitals quickly and accurately determine a patient's status on a centralized computer refusal system.[108] Initially, the law prohibited doctors from retrieving organs if they learned of an objection, regardless of documentation.[109] This enabled families to evade the system and prevent organ donation by inventing objections.[110] In response, the Council of State, France's highest judicial body, issued a 1983 decision banning family members from interfering in cases where decedents had not formally opted out of the system.[111] Though the law does not place an affirmative duty on physicians to obtain consent, they continue to consult with families before proceeding with donation in uncertain situations.[112]

Spain's successful organ transplant system has been praised in Europe.[113] Similar to France's original model, Spain's soft presumed-consent system allows family members to refuse donation.[114] Yet despite this provision, Spain has extremely high donation rates compared to other countries.[115] Commentators have credited this improvement to Spain's establishment of the Organización Nacional de Transplantes (ONT), a network of transplant coordinators that facilitate organ donation.[116] ONT operates by identifying potential organ donors and speaking with their families, reinforcing the notion that more effective loca-

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[104] *See id.*

[105] *See* Thaler, *supra* note 100 (comparing ninety-nine percent consent rates under Austria's presumed-consent system with twelve percent consent rates under Germany's opt-in system).

[106] *See* Statz, *supra* note 87, at 1691, 1695.

[107] *See id.* at 1691.

[108] *See id.* at 1692.

[109] *See id.*

[110] *See id.*

[111] *See id.*

[112] *See* Statz, *supra* note 87, at 1692.

[113] *See id.* at 1695.

[114] Sean T. Gallagher, *The Spanish Model's Capacity to Save Lives by Increasing Organ Donation Rates*, 18 Temp. Int'l & Comp. L.J. 403, 408 (2004); Statz, *supra* note 87, at 1695.

[115] Gallagher, *supra* note 114, at 406.

[116] *See id.* at 410; Statz, *supra* note 87, at 1695.

tion of donors and dialogue with their families can reduce the organ shortage.[117]

Because Spain does not enforce presumed consent in cases where families object, ONT's interaction with families is critical to procurement.[118] ONT utilizes psychology and communications specialists to create transplant coordinator strategies to effectively connect with potential donors' families.[119] Of 200 surveyed families that initially refused to donate a relative's organ, seventy-eight percent were willing to donate after coordinators fully described the process.[120]

Critics of presumed consent argue that despite achieving higher donor registrations, the model weakens the legal strength of registration itself.[121] Because donor status in a presumed-consent model does not reflect an affirmative decision, doctors defer to the wishes of the deceased's family instead of the recorded registration.[122] Mandated choice addresses this problem by requiring all individuals to affirmatively indicate their preference.[123]

For example, Illinois uses a mandated-choice model that requires residents to designate their donation decision before renewing their drivers' licenses.[124] Because the law requires an affirmative indication, each individual's choice is legally binding.[125] By removing uncertainty, mandated choice enhances individual autonomy.[126] Mandated choice also removes the inertia preventing willing donors from registering.[127] As of 2009, Illinois had a sixty percent donor signup rate compared to the national rate of thirty-eight percent.[128]

c. *Organ Commoditization*

Although the global consensus opposes commoditizing organs, the wide gap between organ supply and demand has led economists to

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[117] *See* Gallagher, *supra* note 114, at 406.

[118] *See id.* at 411.

[119] *See id.*

[120] *See* Teagarden, *supra* note 2, at 726.

[121] *See, e.g.*, Judd B. Kessler & Alvin E. Roth, *Organ Allocation Policy and the Decision to Donate* 33 (Nat'l Bureau of Econ. Research, Working Paper No. 17324, 2011).

[122] *See id.* at 34.

[123] *See* Spellman, *supra* note 96, at 371; Kessler & Roth, *supra* note 121, at 34.

[124] *See* Thaler, *supra* note 100.

[125] *See id.*

[126] *See* Spellman, *supra* note 96, at 371.

[127] *See id.*

[128] *See* Thaler, *supra* note 100.

propose market-based incentives.[129] While some countries permit compensation for reasonable expenses associated with donation,[130] Iran is the only country with a legal organ market.[131] Prospective donors contact the Iranian Dialysis and Transplant Patients Association (DATPA) and undergo medical and psychological examinations before attaining its approval.[132] Donors receive one year of free health insurance and a $1200 government subsidy, in addition to $2000–$5000 from recipients.[133] Recipients without the means to pay donors often seek funding from charities and nonprofit organizations.[134]

Following the legalization of financial incentives for organ donation in 1988, Iran's kidney waitlist disappeared in just over a decade.[135] DATPA's medical screenings encouraged patients to pursue safer legal channels rather than risk buying unregulated organs in the underground market.[136] Additionally, DATPA's close monitoring displaced organ brokers and removed opportunities for financial exploitation.[137] The advent of a legal organ market destroyed the previously thriving underground Iranian market.[138] Only Iranian citizens may participate as donors and recipients, eliminating any legal opportunity for transplant tourism.[139]

Despite its success, the controversial Iranian approach has yielded negative outcomes for donors.[140] One study found that "ninety-two percent of donors said their 'surgery and recovery' was 'more painful than expected' . . . [and] eighty-five percent of donors regret their decisions

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[129] *See* Lara Rosen et al., *Addressing the Shortage of Kidneys for Transplantation: Purchase and Allocation Through Chain Auctions*, 36 J. Health Pol. Pol'y & L. 717, 720–21 (2011).

[130] *See, e.g.*, National Organ Transplant Act § 301(c)(2), 42 U.S.C. § 274e(c)(2) (2010); Derco, *supra* note 79, at 167. NOTA prohibits the sale of organs but allows "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ." § 274e(c)(2).

[131] *See* Derco, *supra* note 79, at 163.

[132] *See id.* at 163–64; L'hospital, *supra* note 1, at 15.

[133] Corley, *supra* note 79, at 113; Derco, *supra* note 79, at 164; L'hospital, *supra* note 1, at 14.

[134] Derco, *supra* note 79, at 164.

[135] *See* Corley, *supra* note 79, at 113; L'hospital, *supra* note 1, at 14.

[136] *See* Derco, *supra* note 79, at 164.

[137] *See id.* at 165.

[138] L'hospital, *supra* note 1, at 17.

[139] Benjamin E. Hippen, *Organ Sales and Moral Travails: Lessons from the Living Kidney Vendor Program in Iran*, Pol'y Analysis, Mar. 20, 2008, at 1, 4.

[140] *See* Derco, *supra* note 79, at 165.

and, in hindsight, would not have donated."[141] Despite eradicating deceitful brokers and hazardous medical conditions, Iran's legal market preserves the underground market's systemic inequality.[142] Seventy percent of donors fall below the poverty line, highlighting financial incentives' coercive effect.[143] While Iran reduces the risk of coercion by prohibiting donor solicitation, the decision to sell is often driven by dire economic need—the same pressure that forces people into the underground market.[144]

d. *Alternative Incentives: Donor Priority and Tax Breaks*

Singapore and Israel have crafted nonmonetary incentives for cadaveric organ donation by giving waitlist priority to registered donors.[145] While the systems in each country differ, they support the rationale that it is unfair for non-donor patients to receive the benefit of a transplant over a willing donor who is also in need.[146] These plans remove society's resentment of freeloaders and combine self-interest with public health goals.[147] Singapore's presumed-consent model assigns lower transplant priority to individuals who opt out of the donor registry. [148] Israel's newly implemented opt-in system conversely gives higher priority to those who have been registered as organ donors for at least three years.[149] While critics condemn the use of non-medical-factor-based organ allocation, studies suggest that donor priority positively impacts registration rates.[150]

LifeSharers, a nonprofit U.S. organization, has adopted a similar approach.[151] All members agree to cadaveric organ donation directed at other members of the network.[152] Like the Israeli and Singaporean

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[141] *See id.*; Sajjad et al., *supra* note 61, at 750–51 (noting that donors regretted selling their organs because of the resulting negative social stigma and failure to escape debt).

[142] *See* Derco, *supra* note 79, at 165–66.

[143] Hippen, *supra* note 139, at 7.

[144] *See* Derco, *supra* note 79, at 166; L'hospital, *supra* note 1, at 14.

[145] *See* Kessler & Roth, *supra* note 121, at 4.

[146] *See* Danielle Ofri, *In Israel, a New Approach to Organ Donation*, N.Y. Times Well Blog (Feb. 16, 2012, 9:00 AM), http://well.blogs.nytimes.com/2012/02/16/in-israel-a-new-approach-to-organ-donation/.

[147] Nurit Guttman et al., *Laypeople's Ethical Concerns About a New Israeli Organ Transplantation Prioritization Policy Aimed to Encourage Organ Donor Registration Among the Public*, 36 J. Health Pol. Pol'y & L. 691, 695 (2011).

[148] Statz, *supra* note 87, at 1696.

[149] *See* Kessler & Roth, *supra* note 121, at 4.

[150] *See* Ofri, *supra* note 146; *see also* Kessler & Roth, *supra* note 121, at 5.

[151] *See* Statz, *supra* note 87, at 1703.

[152] *See id.*

systems, LifeSharers incentivizes donation and addresses perceived unfairness in organ allocation:[153] roughly seventy percent of transplanted organs in the United States go to non-donor recipients.[154] Since the organization started in 2002, it has gained almost 15,000 members but has not yet facilitated a transplant.[155]

The U.S. government has also explored methods for incentivizing organ donation.[156] Under the Organ Trafficking Prohibition Act (OTPA), states have wide discretion to set incentives provided they do not issue direct payments.[157] In 2004, Wisconsin enacted a state income tax deduction of up to $10,000 to cover expenses associated with organ donation, such as travel, lodging, and lost wages.[158] Because the deduction only eliminates financial hurdles that deter donation, it does not qualify as direct payment.[159] Supporters argue that tax deductions benefit individuals in higher tax brackets, thereby foreclosing pressure on the poor to donate.[160] OTPA also allows reimbursement for funeral costs of cadaveric donors.[161] In a separate model, Pennsylvania established the Organ Donation Awareness Trust Fund to provide modest reimbursements for burial costs.[162]

2. Eradicating the Effects of the Organ Shortage

Rather than addressing the roots of the shortage, some countries have implemented a variety of laws to address organ trafficking itself.[163] Most have imposed bans on organ commercialization, with varying degrees of success.[164] Germany defines trafficking as "an activity undertaken for personal gain and oriented towards the sale of goods."[165]

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[153] *See id.*

[154] *See* Press Release, LifeSharers, U.S. Transplant Wait List Tops 90,000—LifeSharers Offers Hope (Oct. 31, 2005), *available at* http://www.lifesharers.org/pressrelease20051031.aspx.

[155] Statz, *supra* note 87, at 1703; *LifeSharers Membership Statistics*, LifeSharers, http://lifesharers.org/statistics.aspx (last visited May 15, 2013).

[156] *See* Derco, *supra* note 79, at 169–70.

[157] *See id.*

[158] *See id.* at 175; J. Andrew Hughes, *You Get What You Pay For?: Rethinking U.S. Organ Procurement Policy in Light of Foreign Models*, 42 Vand. J. Transnat'l L. 351, 371 (2009).

[159] *See* Derco, *supra* note 79, at 175.

[160] *See* Hughes, *supra* note 158, at 371.

[161] *See* Derco, *supra* note 79, at 176.

[162] *See* Hughes, *supra* note 158, at 375–76.

[163] *See* Ambagtsheer & Weimar, *supra* note 4, at 573; Francis & Francis, *supra* note 9, at 289.

[164] *See* UN Organ Trafficking Report, *supra* note 15, ¶¶ 66–72; Francis & Francis, *supra* note 9, at 289; Mendoza, *supra* note 56, at 381.

[165] *See* UN Organ Trafficking Report, *supra* note 15, ¶ 69.

Criminalizing the initial steps of organ trafficking thus enables German authorities to take preventive action before transplantations occur.[166] In contrast, the United States forbids organ sales that affect interstate commerce, but does not include organ removal in its definition of human trafficking.[167] As a result, organ trafficking does not fall under the jurisdiction of the Trafficking Victims Protection Act (TVPA), and there have been relatively few organ trafficking prosecutions.[168]

Most of the legislation against transplant tourism has focused on prohibiting organ sales within a country's jurisdiction.[169] Nevertheless, lawmakers in Canada proposed extraterritorial restrictions that would criminalize transplant tourism.[170] The proposed bill would have barred the purchase of organs abroad, emulating existing laws that punish citizens for participating in child sex tourism.[171] Despite wide support, the bill did not pass the House of Commons.[172]

Countries that are organ trafficking hubs have more recently implemented bans in an attempt to eradicate underground markets.[173] Pakistan, Egypt, Colombia, and the Philippines have all banned organ commercialization with little success.[174] In Colombia, strict confidentiality impedes the discovery of illicit transactions.[175] Brokers circumvent the ban on foreign donations by obtaining short-term marriages between recipients and vendors, and transporting Colombian organs for transplantation in neighboring countries.[176]

Many countries have attempted to quell organ trafficking by restricting transplant classes.[177] For example, India's 1994 transplantation legislation sought to discourage transplant tourism by banning live-organ donations between unrelated individuals.[178] Although intended to inhibit transplants between impoverished local residents and foreign recipients, the law permitted non-relative donations made for altruistic

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[166] *See id.*

[167] *See* Francis & Francis, *supra* note 9, at 288.

[168] *See id.* at 288–89 (noting a unique arrest for an attempt to sell an organ).

[169] *See* Panjabi, *supra* note 1, at 71, 104–05; Roberts, *supra* note 1, at 775.

[170] Julian Sher, *Transplant Tourism a Form of Cannibalism*, Toronto Star, Jan. 22, 2012, at A8.

[171] *Id.*

[172] *See id.*

[173] *See* Francis & Francis, *supra* note 9, at 289.

[174] *See* Ambagtsheer & Weimar, *supra* note 4, at 573; Francis & Francis, *supra* note 9, at 289; Mendoza, *supra* note 56, at 381.

[175] *See* Mendoza, *supra* note 56, at 381.

[176] *See id.*

[177] *See* Panjabi, *supra* note 1, at 70, 104–05.

[178] *See* Roberts, *supra* note 1, at 775.

purposes.[179] Brokers thus arranged illegal organ transactions between strangers under the guise of altruistic donations, leading the organ trade to thrive.[180] In 2008, the Indian Parliament passed revised legislation that imposed harsher penalties for violations and tightened oversight of the transplant process.[181]

China implemented similar legislation in 2007, confining live organ donations to relatives.[182] In addition, it banned foreign transplants and imposed sanctions on traffickers and hospitals engaged in transplant tourism.[183] Prior to the 2007 law, 600 hospitals performed organ transplants; today, only 163 hospitals are certified to do so.[184] Furthermore, tighter surveillance and management have enabled the government to sanction hospitals conducting illegal transplants.[185] As a result, illicit liver transplants have decreased and the World Health Organization (WHO) commended China's altruistic model.[186]

Sanctions for engaging in OTC trafficking vary across jurisdictions.[187] Imprisonment ranges from two years to twenty years, with some countries withdrawing professional licenses and imposing fines.[188] Most impose harsher sentences in cases involving aggravating circumstances such as "death of or severe injuries to the victim, use of coercion, kidnapping, acting in an organized manner, and the age of the victim."[189] Some impose liability on brokers and health professionals, while others hold organ recipients liable as well.[190]

B. *International Response*

While the international community has addressed both forms of organ trafficking, only human trafficking for organ removal has been included in a binding instrument.[191] Although OTC trafficking has

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[179] *See* Panjabi, *supra* note 1, at 71; Roberts, *supra* note 1, at 775.

[180] *See* Panjabi, *supra* note 1, at 71.

[181] *See id.* at 72.

[182] *See id.* at 104–05.

[183] *See id.*

[184] Bing-Yi Shi & Li-Ping Chen, *Regulation of Organ Transplantation in China: Difficult Exploration and Slow Advance*, 306 J. Am. Med. Assn. 434, 434 (2011).

[185] *See id.*

[186] Panjabi, *supra* note 1, at 105.

[187] *See* UN Organ Trafficking Report, *supra* note 15, ¶¶ 43–52.

[188] *See id.*

[189] *See id.* ¶ 49.

[190] *See id.* ¶¶ 50–52.

[191] UN Organ Trafficking Report, *supra* note 15, ¶ 6; United Nations & Council of Eur., *supra* note 1, at 65; Francis & Francis, *supra* note 9, at 286.

been widely condemned by international organizations, such disapprovals lack binding force.[192]

1. Condemning OTC Trafficking: Non-Binding Instruments

International organizations have vocally opposed OTC trafficking through a series of non-binding declarations and resolutions.[193] The WHO has repeatedly condemned the commodification of body parts.[194] In 1989, the World Health Assembly (WHA), the WHO's highest decision-making body, issued a resolution calling on member states to escalate legislative efforts criminalizing the purchase and sale of human organs.[195] The WHA subsequently released a set of Guiding Principles prohibiting commercial transactions involving human organs and expressing preference for cadaveric donation.[196] Despite their non-binding nature, the Guiding Principles have significantly influenced national legislation and professional codes.[197] In 2004, the WHA adopted a resolution urging member states to cooperate in eradicating OTC trafficking by coordinating their practices.[198]

International organizations with broader scopes have also addressed the issue: the UN General Assembly adopted a December 2004 resolution categorizing OTC trafficking as transnational organized crime, urging member states to adopt measures to prevent and punish it.[199] The resolution also required the Secretary-General to assess the extent of organ trafficking and summarize Member State responses.[200] In turn, the Secretary-General's 2006 report stressed the continued growth of organ trafficking while expressing uncertainty about the problem's scope.[201] The report contained recommendations encouraging member states to formulate policies criminalizing OTC trafficking and to collaborate with international law enforcement agencies.[202]

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[192] Francis & Francis, *supra* note 9, at 286–87.

[193] *See* United Nations & Council of Eur., *supra* note 1, at 65; Francis & Francis, *supra* note 9, at 286–87.

[194] *See* United Nations & Council of Eur., *supra* note 1, at 65.

[195] *See id.*; Panjabi, *supra* note 1, at 118–19.

[196] *See* United Nations & Council of Eur., *supra* note 1, at 65–66.

[197] *See id.*

[198] *See* Francis & Francis, *supra* note 9, at 287.

[199] *See* United Nations & Council of Eur., *supra* note 1, at 65.

[200] *See* UN Organ Trafficking Report, *supra* note 15, ¶¶ 1–2; United Nations & Council of Eur., *supra* note 1, at 65.

[201] United Nations & Council of Eur., *supra* note 1, at 65.

[202] *See* UN Organ Trafficking Report, *supra* note 15, ¶¶ 94–95.

International efforts have not been limited to intergovernmental bodies: in 2008, two international medical organizations held a conference in Istanbul to address unethical transplant methods.[203] The resulting Declaration of Istanbul called for the creation of legal and professional transplantation guidelines, coupled with increased oversight.[204] It also recommended that countries outlaw OTC trafficking and reduce the burden on live donors by maximizing cadaveric organ donation.[205] Although the Istanbul Declaration is non-binding, it signaled international consensus about the problem of OTC trafficking and represented significant collaboration in the international medical community.[206]

2. Human Trafficking for Organ Removal: Binding Instruments

Unlike efforts to address OTC trafficking, international organizations have made more serious efforts to combat human trafficking for organ removal.[207] The UN and the Council of Europe have utilized broader human trafficking protocols to address human trafficking for organ removal.[208] The 1990 UN Convention on the Rights of the Child prohibits the "sale of children."[209] Its 2002 Optional Protocol adds organ removal to the definition of "sale of children," thus creating the first binding international legal instrument to explicitly prohibit human trafficking for organ removal.[210]

The year 2003 saw the most important milestone in international legal measures against human trafficking for organ removal, with the entry into force of the UN Trafficking in Persons Protocol.[211] The Protocol includes organ removal in its definition of human trafficking, signaling a global consensus that human trafficking includes exploitation for organ removal in addition to sexual and labor-related purposes.[212] The Protocol also established that a victim's consent does not diminish

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[203] *See* Francis & Francis, *supra* note 9, at 287; Panjabi, *supra* note 1, at 112–13.

[204] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 74.

[205] *See id.*; Panjabi, *supra* note 1, at 115.

[206] *See* Panjabi, *supra* note 1, at 116.

[207] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 97.

[208] *See id.*

[209] *See id.* at 76.

[210] *See id.* at 76–77.

[211] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime pmbl., art. 17, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol]; UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 77.

[212] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 77; Francis & Francis, *supra* note 9, at 287.

a trafficker's liability.[213] It further requires parties to combat human trafficking through: "(1) criminalization and prosecution of acts of trafficking, (2) development of trafficking prevention programs, and (3) provision of assistance to victims of trafficking."[214]

Although a large number of countries have signed the Protocol[215] and adopted legislation criminalizing human trafficking, trafficker conviction rates have remained relatively low.[216] Even after criminalizing human trafficking, sixty-two member states have not successfully prosecuted any violators.[217] Experts estimate over two million people are trafficked each year, but in 2010, member states only achieved 4239 successful convictions.[218] Most countries have prioritized criminal prosecution over prevention and victim-assistance efforts.[219] Indeed, authorities have tended to focus on victim assistance as an information-gathering method to build successful prosecutions against traffickers.[220]

Regional organizations have also taken action: the 2008 Council of Europe Anti-Trafficking Convention established a comprehensive legal instrument to combat human trafficking.[221] Using the definition of human trafficking from the UN Trafficking in Persons Protocol, the Convention focuses on prevention and interstate cooperation.[222]

In 2009, the Council of Europe and the UN issued a joint study (UN/COE Study), highlighting the distinction between OTC trafficking and human trafficking for organ removal.[223] It emphasizes the need for different solutions to combat each form of trafficking, as they involve different types of trafficked objects: organs versus humans.[224] In weighing possible solutions, the UN/COE Study evaluates various international and domestic regimes, concentrating on the application of

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[213] *See* United Nations & Council of Eur., *supra* note 1, at 81; Francis & Francis, *supra* note 9, at 287.

[214] Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 Santa Clara L. Rev. 605, 642 (2009); *see* Trafficking Protocol, *supra* note 211, arts. 5–9.

[215] Francis & Francis, *supra* note 9, at 287 (noting the 117 signatories to the Protocol).

[216] U.S. Dep't of State, Trafficking in Persons Report 44 (2011).

[217] *See* U.S. Dep't of State, *supra* note 216, at 30.

[218] *See id.* at 44; Francis & Francis, *supra* note 9, at 289 (noting only one organ trafficking arrest in the United States in 2009); Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 Mich. J. Int'l L. 53, 65–66 (2011).

[219] *See* Todres, *supra* note 214, at 643.

[220] *See* U.S. Dep't of State, *supra* note 216, at 17, 29.

[221] United Nations & Council of Eur., *supra* note 1, at 77.

[222] *See id.*

[223] *See id.* at 5, 97.

[224] *See id.* at 11; Panjabi, *supra* note 1, at 123.

binding international legal standards for human trafficking for organ removal.[225]

The UN/COE Study concludes that the UN Trafficking in Persons Protocol and the Council of Europe Anti-Trafficking Convention contain "[a]ll relevant aspects for preventing and combatting" human trafficking for organ removal.[226] While acknowledging these instruments' failure to significantly reduce organ trafficking, the study determines that the solution to such a failure lies in generating stronger political will to implement organ-removal provisions.[227] The study also notes that publicity campaigns about human trafficking have predominantly focused on sexual and labor abuse without raising awareness of human trafficking for organ removal.[228] It therefore concludes that informing people about the risks and methods associated with organ trafficking will catalyze effective prevention.[229]

In condemning the absence of binding OTC trafficking instruments, the UN/COE Study recommends mirroring the framework of the UN Trafficking in Persons Protocol.[230] First, it calls for the inclusion of a uniform international definition that, like the definition of human trafficking, clarifies the scope of the targeted activity.[231] Second, it proposes that the instrument include a provision similar to Article 5 of the Protocol, requiring countries to criminalize conduct within the defined scope of OTC trafficking.[232] Although the UN/COE Study recognizes the need to reduce the organ shortage, it does not reference this in its discussion of binding OTC instruments.[233] Instead, it recommends that countries share best practices and pool organ procurement resources.[234]

3. Defects of Binding Trafficking Instruments

Because the Trafficking in Persons Protocol was the first comprehensive binding instrument to address human trafficking, it has had an

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[225] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 77, 97.

[226] *See id.* at 97.

[227] *See id.* at 97–98.

[228] *See id.* at 98.

[229] *See id.*

[230] *See id.* at 97 (advocating the OTC instrument follow the Protocol's framework of addressing prevention, protection, and prosecution).

[231] *See* UNITED NATIONS & COUNCIL OF EUR., *supra* note 1, at 77, 96.

[232] *See id.* at 81, 97.

[233] *See id.* at 94, 96–97.

[234] *See id.* at 94.

"anchoring effect" on subsequent treaties.[235] Yet its limited success in combating human trafficking has led commentators to question its efficacy.[236] Though some blame a lack of member state implementation and compliance,[237] others argue that design flaws make failure inevitable.[238]

First among these design flaws, Protocol's criminal law framework has drawn criticism from commentators.[239] While the Protocol aims to combat trafficking through the combination of criminalization, prevention, and victim assistance, countries have primarily focused on the first prong.[240] Some suggest that this disproportionate focus stems from inconsistent language in the Protocol.[241] For example, Article 5 uses mandatory language, whereas the provisions for prevention and assistance contain weaker obligations.[242] The Protocol's containment within the framework of an organized crime treaty further emphasizes its criminal focus.[243]

While organized crime and human trafficking do overlap, the scope of the Protocol inaccurately suggests that organized crime is the sole cause of trafficking.[244] Such reasoning has also confused national policies that attempt to simultaneously combat organized crime and human trafficking.[245] For example, restrictive policies often fail to dif-

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[235] *See* Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 Stan. J. Int'l L. 1, 15 (2004); Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 Ind. J. Global Legal Stud. 137, 148 (2006); Todres, *supra* note 217, at 63–64.

[236] *See, e.g.*, Bruch, *supra* note 235, at 16–18; Todres, *supra* note 218, at 55.

[237] *See* United Nations & Council of Eur., *supra* note 1, at 98 ("There is no need for further legal action on a global or regional level. What is really needed is strong political will to sign, ratify and implement the existing international legal instruments."); Kelly Hyland Heinrich, *Ten Years After the Palermo Protocol: Where Are Protections for Human Trafficking Victims?*, Hum. Rts. Brief, Fall 2010, at 2, 5 ("Without the implementation of the fundamental concept of the interdependence between prosecution and protection that is set forth in the Palermo Protocol, State Parties will continue to misplace their resources and efforts.").

[238] *See* Todres, *supra* note 218, at 55.

[239] *See* Todres, *supra* note 214, at 642–43.

[240] *See* Trafficking Protocol, *supra* note 211, arts. 2, 5–6; Todres, *supra* note 214, at 643.

[241] *See* Chuang, *supra* note 235, at 148–49; Todres, *supra* note 214, at 642–43.

[242] *See* Bruch, *supra* note 235, at 16–17; Todres, *supra* note 214, at 642–43; *cf.* Trafficking Protocol, *supra* note 211, arts. 5–6, 9 (stating that states "shall adopt" measures criminalizing trafficking while requiring only that states "consider implementing" victim-assistance measures and "endeavour" to further research and information).

[243] *See* Bruch, *supra* note 235, at 16–17; Todres, *supra* note 214, at 647.

[244] *See* Todres, *supra* note 214, at 647.

[245] *See* U.S. Dep't of State, *supra* note 216, at 37 (noting that states that misunderstand the Protocol's provisions often punish victims for being trafficked); Chuang, *supra* note 235, at 147–48.

ferentiate between trafficking and smuggling and lead countries to incorrectly deport or jail victims.[246] Moreover, because the Protocol relies on the Convention's definitions, it only addresses organized, transnational human trafficking, while ignoring intrastate trafficking.[247] The inaccurate scope of the instrument fails to account for the specific complexities of human trafficking.[248]

Critics thus argue the Protocol's criminal law framework narrowly focuses on "bad actors" without considering the underlying causes of human trafficking.[249] By emphasizing post hoc prosecution, the Protocol fails to address the socioeconomic realities that prompt vulnerable persons to migrate in the first place.[250] Even when countries successfully prosecute traffickers, the victims remain in socioeconomic conditions that leave them vulnerable to continued abuse.[251]

Moreover, the Protocol does not consider the demand for commercial sex, cheap goods, and labor that drives human trafficking.[252] Instead, it only addresses trafficking as an act of violence, punishing the manifestation of these demands without questioning the underlying causes.[253] Ironically, bans on organ trafficking within developed nations have increased the local disparity between demand and supply, thereby increasing demand for transplant tourism.[254] In essence, critics contend the Protocol's primary criminal focus has obviated other important viewpoints that would inform a more comprehensive and nuanced understanding of human trafficking.[255] All of these flaws provide opportunities to more effectively address organ trafficking in a binding international instrument that avoids the defects of human-trafficking treaties.[256] Yet, to date, none of the proposed solutions has been effective.[257]

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[246] *See* Chuang, *supra* note 235, at 150–51.
[247] *See* Todres, *supra* note 214, at 647.
[248] *See* Bruch, *supra* note 235, at 16–17; Todres, *supra* note 218, at 65.
[249] *See* Todres, *supra* note 218, at 65.
[250] *See id.* at 58.
[251] *See* Chuang, *supra* note 235, at 138–39.
[252] *See* Todres, *supra* note 218, at 61.
[253] *See* Chuang, *supra* note 235, at 138.
[254] *See* Francis & Francis, *supra* note 9, at 289.
[255] *See* Bruch, *supra* note 235, at 37; Todres, *supra* note 218, at 55.
[256] *See* Bruch, *supra* note 235, at 37; Todres, *supra* note 218, at 55.
[257] *See* Bruch, *supra* note 235, at 37; Todres, *supra* note 218, at 55.

III. Analysis

The need for a new international instrument to address organ trafficking presents a unique opportunity to break out of the established trafficking framework and its shortcomings.[258] The UN and Council of Europe's recommendation for combating OTC trafficking is anchored in the framework of the Trafficking Protocol.[259] Yet given the Trafficking Protocol's inherent design flaws and failure to significantly reduce human trafficking, it should not be used as a framework for a new OTC-focused instrument.[260] Instead, a new instrument should make two fundamental changes to more effectively combat organ trafficking.[261]

First, the proposed instrument should require countries to address the central cause of organ trafficking—the organ shortage—rather than focusing on the criminalization of OTC trafficking's effects.[262] National measures to reduce organ shortages have experienced concrete improvements, whereas measures to combat effects have failed to produce results.[263] By mandating more effective organ procurement plans, the instrument could significantly reduce illegal market demand.[264] Instead of merely urging countries to prevent organ trafficking, the proposed instrument should base its requirements on successful national procurement models such as presumed and mandated consent.[265]

Second, the scope of the proposed instrument should accurately reflect the subtleties and intricacies of organ trafficking.[266] Despite their differences, OTC trafficking and human trafficking for organ removal are both manifestations of the organ shortage.[267] They should

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[258] *See* Todres, *supra* note 218, at 55.

[259] *See* United Nations & Council of Eur., *supra* note 1, at 97.

[260] *See id.*

[261] *See* Bruch, *supra* note 235, at 37; Todres, *supra* note 218, at 55.

[262] *See* Todres, *supra* note 218, at 55.

[263] *See* Panjabi, *supra* note 1, at 5 ("Despite a plethora of laws and regulations, the trafficking of human organs persists and prevails worldwide . . . ."); *see also* Corley, *supra* note 79, at 99–100 ("[O]rgan trafficking and illegal payments will continue as long as the demand exceeds the supply."); Pattison, *supra* note 79, at 200 ("Illicit supply follows demand and will continue to do so whether organ trading is prohibited or permitted . . . ."); *supra* Parts II.A.1–.2.

[264] *See, e.g.*, Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors*, Hum. Rts. Brief, Winter 2005, at 20, 22 ("[C]ountries should . . . adopt presumed consent laws to increase organ supply legally, which would reduce the number of organs obtained on the illegal black market . . . .").

[265] *See, e.g.*, Statz, *supra* note 87, at 1695; Thaler, *supra* note 100.

[266] *See* Bruch, *supra* note 235, at 37; Panjabi, *supra* note 1, at 123.

[267] *See* United Nations & Council of Eur., *supra* note 1, at 55.

therefore be addressed in a single, independent, and comprehensive instrument.[268] Just as placing human trafficking within the scope of organized crime produces inaccurate assumptions, addressing human trafficking for organ removal under the umbrella of human trafficking overlooks important differences.[269] Crafting a treaty focused solely on organ trafficking, free from the umbrella of organized crime and human trafficking, would more accurately address the problem's complexities.[270]

A. *Removing Causes of Organ Trafficking*

Centering a new OTC-focused instrument on removing the causes of organ trafficking would be more effective than adopting a criminal law framework.[271] First, the criminal law framework has failed in the context of human trafficking, and accordingly will likely fail in the context of OTC trafficking.[272] OTC trafficking, like human trafficking, is a uniquely complex and globalized issue.[273] Yet just as the Trafficking Protocol fails to adequately address the underlying demand that drives human trafficking, focusing exclusively on criminalizing OTC would eclipse efforts to reduce the demand fueling the underground organ market.[274]

Furthermore, national attempts to criminalize OTC trafficking have largely failed.[275] Criminalizing the sale of organs has only expanded the illegal underground market in most countries.[276] Even strict bans have not stopped traffickers from inventing loopholes and adapting their organ sale methods.[277] Commentators compare organ trafficking to other "demand-driven" activities such as gambling, prostitution, and drug use, arguing that the most harmful aspects of these

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[268] *Cf. id.* at 97 (supporting the creation of an organ trafficking treaty while also recognizing that current human-trafficking instruments provide a sufficient legal framework for human trafficking for organ removal).

[269] *See id.* at 97; Bruch, *supra* note 235, at 16–17; Francis & Francis, *supra* note 9, at 288.

[270] *See* United Nations & Council of Eur., *supra* note 1, at 22; Bruch, *supra* note 235, at 16–17; Todres, *supra* note 214, at 647.

[271] *See* Todres, *supra* note 218, at 55.

[272] *See* United Nations & Council of Eur., *supra* note 1, at 22; Bruch, *supra* note 235, at 37; Todres, *supra* note 214, at 642–43.

[273] *See* United Nations & Council of Eur., *supra* note 1, at 22; Bruch, *supra* note 235, at 37.

[274] *See* Ambagtsheer & Weimar, *supra* note 4, at 573; Todres, *supra* note 218, at 61.

[275] *See* Panjabi, *supra* note 1, at 5, 9.

[276] *See id.* at 5.

[277] *See id.* at 70–71.

crimes actually stem from their illegality.[278] Some have proposed removing bans and instead regulating activities such as drug use and prostitution in order to remove violence and other harms associated with the black market.[279] This proposition would likely fail in the context of organ trafficking because donors who sell their organs experience negative outcomes that do not stem from prohibition alone.[280]

Instead, focusing the instrument on reducing demand while maintaining trafficking bans would more effectively address the unique contours of organ trafficking.[281] The broad range of national organ procurement frameworks should be used to inform the instrument's requirements.[282] The proposed instrument should respect unique domestic cultural interests by giving countries a degree of flexibility in crafting an effective organ procurement system.[283] Instead of requiring a single framework, the proposed instrument should mandate that countries improve organ procurement using a variety of measures.[284]

Although Iran has succeeded in reducing demand and eradicating the underground market, its model would likely fail on a global level.[285] Using financial incentives for organ donation violates religious, moral, and cultural norms and risks disadvantaging the poor.[286] Moreover, re-

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[278] *See* Ambagtsheer & Weimar, *supra* note 4, at 572–73.

[279] *See id.* at 573.

[280] *See id.*; Derco, *surpa* note 79, at 165; Sajjad et al., *supra* note 61, at 750–51 (reporting negative outcomes—such as depression, regret, and reduced physical capacity—for Iranian organ sellers).

[281] *See* Ambagtsheer & Weimar, *supra* note 4, at 573; Christian Williams, *Combatting the Problems of Humans Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 Case W. Res. J. Int'l L. 315, 317–18 (1994).

[282] *See* Everton Bailey, *Should the State Have Rights to Your Organs? Dissecting Brazil's Mandatory Organ Donation Law*, 30 U. Miami Inter-Am. L. Rev. 707, 714 (1999) (describing the U.S. framework for voluntary cadaveric organ donation); Derco, *supra* note 79, at 175 (noting the U.S. framework's use of non-financial incentives to encourage organ donation); Hughes, *supra* note 158, at 375–76 (describing the presumed-consent frameworks in several European and South American states); Statz, *supra* note 87, at 1695 (citing Spain's highly successful presumed-consent framework coupled with family outreach programs).

[283] Bailey, *supra* note 282, at 718, 723 (noting Brazil's constitutional opposition to organ commoditization); Elisheva Berman et al., *The Bioethics and Utility of Selling Organs for Renal Transplantation*, 40 Transplant Proc. 1264, 1267 (2008) (describing the Catholic Church's condemnation of organ sales); Teagarden, *supra* note 2, at 731–32 (discussing U.S. constitutional privacy and property rights that influence organ donation laws).

[284] *See* Bailey, *supra* note 282, at 714; Derco, *supra* note 79, at 175; Hughes, *supra* note 158, at 375–76; Statz, *supra* note 87, at 1695.

[285] *See* Berman et al., *supra* note 283, at 1266–67; Derco, *supra* note 79, at 163–64 (describing Iran's legalized organ market, which uses financial incentives to encourage donation from live donors).

[286] *See* Bailey, *supra* note 282, at 718 (noting that Brazil's constitution prohibits commercial transactions in human organs, tissues, and substances); Berman et al., *supra* note

quiring countries to abandon the almost universal prohibition of organ sales would inevitably result in low ratification rates.[287] Accordingly, the proposed instrument should require countries to use other means of incentivizing donation based on their unique cultural and religious priorities.[288] For example, the instrument can allow countries to adopt donor-priority systems modeled after the frameworks in Singapore and Israel.[289] It can also enable them to provide indirect monetary incentives such as tax deductions and burial reimbursement.[290]

Because altruistic donation has not produced enough organs to meet demand, the proposed instrument should require countries to establish alternative frameworks based on soft presumed consent or mandated consent.[291] Shifting the presumption in favor of donation has produced desirable results when paired with comprehensive public outreach.[292] Although requiring a pure presumed-consent system may conflict with values such as privacy and freedom of choice, soft models would be more adaptable and acceptable.[293] Mandated choice may be even more acceptable to most countries.[294] Forcing individuals to affirmatively indicate their preference effectively removes concerns about freedom of choice.[295] Indeed, mandated choice increases individual autonomy by legally adhering to the individual's donation preference.[296]

283, at 1266 (stating that commoditization of organs violates "religious and community norms"); Derco, *supra* note 79, at 166 (stating that the majority of Iranians who sell their organs are poor).

[287] *See* Ambagtsheer & Weimar, *supra* note 4, at 572 ("Almost every single country endorses the non commerciality principle in organ transplantation and has implemented it into their national laws.").

[288] *See* Williams, *supra* note 281, at 359; Kessler & Roth, *supra* note 121, at 35.

[289] *See* Kessler & Roth, *supra* note 121, at 4.

[290] *See* Derco, *supra* note 79, at 175; Hughes, *supra* note 158, at 375–76.

[291] *See* Bailey, *supra* note 282, at 714; Thaler, *supra* note 100.

[292] *See* Statz, *supra* note 87, at 1695 (noting the success of Spain's organ transplant system that combines soft presumed consent with a network of transplant coordinators); Thaler, *supra* note 100 (noting the difference in consent rates between Germany's opt-in system where only twelve percent give consent and Austria's presumed-consent system where ninety-nine percent do).

[293] *See* Bailey, *supra* note 282, at 723; Statz, *supra* note 87, at 1690; Teagarden, *supra* note 2, at 731–32 (stating that U.S. courts' openness to recognizing a family's right to possess a decedent's body does not preclude presumed consent); Williams, *supra* note 281, at 359 (recommending presumed consent as the "best, safest, and least violative method of increasing organ supply").

[294] *See* Thaler, *supra* note 100.

[295] *See id.*

[296] *See* Spellman, *supra* note 96, at 371.

The proposed instrument should also require countries to create networks for more effective donor identification and public education about organ donation.[297] Spain's success in reducing the organ shortage is attributable to the ONT.[298] Such a comprehensive donor identification system reduces missed transplant opportunities.[299] Moreover, providing family members with consistent and appropriate information about organ donation diminishes refusal rates.[300] Requiring countries to incorporate these two cornerstones of Spain's success would significantly increase the efficacy of any organ procurement system.[301]

Finally, in addition to addressing the causes of organ trafficking, the proposed instrument should require countries to adopt uniquely tailored criminal measures.[302] Instead of only banning the sale of organs domestically, countries must also discourage citizens from participating in transplant tourism by criminalizing the purchase of organs abroad.[303]

Patients who travel abroad to purchase organs experience no legal repercussions upon their return.[304] Countries should thus adopt criminal frameworks modeled after extraterritorial child sex tourism laws.[305] For example, the Sex Tourism Prohibition Improvement Act makes it illegal for U.S. citizens to travel abroad to engage in sexual activity with a minor.[306] Similarly, countries must apply extraterritoriality principles to individuals who travel abroad for the purpose of purchasing an organ.[307]

B. *Clarifying Scope: A Unified Approach*

The proposed instrument should target both OTC trafficking and human trafficking for organ removal because they are both manifestations of the same problem.[308] Instead of leaving human trafficking for

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[297] *See* Gallagher, *supra* note 114, at 409.

[298] *See id.* at 408–09.

[299] *See id.* at 411.

[300] *See id.* at 411–12.

[301] *See id.* at 409.

[302] *See, e.g.*, Roberts, *supra* note 1, at 784.

[303] *See id.*

[304] *See id.*

[305] *See* John A. Hall, *Sex Offenders and Child Sex Tourism: The Case for Passport Revocation*, 18 Va. J. Soc. Pol'y & L. 153, 166–67 (2011).

[306] *See id.* at 167. *But see* Francis & Francis, *supra* note 9, at 289 (acknowledging that individuals who engage in child sex tourism are more blameworthy than individuals who purchase life-saving organs abroad).

[307] *See* Hall, *supra* note 305, at 167.

[308] *See* United Nations & Council of Eur., *supra* note 1, at 55.

organ removal under the purview of the Trafficking Protocol, the new instrument should focus on all types of organ trafficking.[309]

Despite the UN/COE Study's conclusion that existing legally binding instruments adequately address human trafficking for organ removal, these instruments have not actually yielded successful results.[310] Commentators have criticized the placement of human trafficking within the scope of organized crime because it does not adequately reflect the contours of such a complex problem.[311] This line of criticism is further validated when considered in tandem with the fact that organ trafficking is buried under the scope of both organized crime and human trafficking in the Trafficking Protocol.[312]

The UN/COE Study correctly notes that the Protocol establishes a means for criminalizing human trafficking for organ removal, but most countries have failed to do so because the Protocol focuses more on other forms of human trafficking.[313] For example, the U.S. TVPA fails to include organ trafficking in its definition of human trafficking.[314] As a result, the U.S. State Department's 2011 *Trafficking in Persons Report* does not even mention organ trafficking.[315] Because nations that receive unfavorable evaluations are subject to mandatory sanctions from the United States, countries focus on forms of trafficking that fall within the U.S. definition while ignoring human trafficking for organ removal.[316] A new independent instrument that includes human trafficking for organ removal would clarify the scope of the issue and prompt countries to adequately address all aspects of organ trafficking.[317]

The UN/COE Study's conclusion that the two manifestations of organ trafficking require different solutions exposes the underlying bias toward a criminal law approach.[318] The need to differentiate between OTC trafficking and human trafficking for organ removal only arises in a criminal law context because of the desire to criminalize the

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[309] *See* Francis & Francis, *supra* note 9, at 288; Pugliese, *supra* note 2, at 197–98.

[310] *See* United Nations & Council of Eur., *supra* note 1, at 97.

[311] *See* Bruch, *supra* note 235, at 16–17.

[312] *See* United Nations & Council of Eur., *supra* note 1, at 97; Bruch, *supra* note 235, at 16–17.

[313] *See* United Nations & Council of Eur., *supra* note 1, at 97.

[314] *See* Pugliese, *supra* note 2, at 197–98.

[315] *See* U.S. Dep't of State, *supra* note 216, at 33–35.

[316] *See* Francis & Francis, *supra* note 9, at 288; Pugliese, *supra* note 2, at 199.

[317] *See* United Nations & Council of Eur., *supra* note 1, at 97; Francis & Francis, *supra* note 9, at 288; Pugliese, *supra* note 2, at 199.

[318] *See* United Nations & Council of Eur., *supra* note 1, at 11 ("[T]rafficking in OTC differs from trafficking in human beings for the purpose of organ removal in one of the constituent elements of the crime—the object of the criminal offence.").

different actions resulting from each.[319] Nevertheless, even in a criminal law context, the UN/COE Study notes that the two types of organ trafficking often "overlap . . . in scope."[320] Thus, while the proposed instrument should address these differences when delineating penal definitions, the broader purpose of eradicating the causes of organ trafficking would not benefit from such bifurcation.[321] The instrument's requirement that countries revise organ procurement systems to reduce the organ shortage, if successful, would diminish the demand for all types of organ trafficking.[322]

C. *Implementation*

As critics of the Trafficking Protocol have noted, departing from established treaty frameworks often proves difficult because of the anchoring effect established treaties have on future agreements.[323] In an effort to avoid great legislative change, countries often approach treaty formulation conservatively, with preference for established methods.[324] This tendency may be compounded when addressing organ trafficking because of the range of domestic frameworks for transplantation.[325] Countries may be hesitant to formulate a treaty that would force them to adhere to a different system of organ retrieval.[326]

Yet, despite these differences, organ trafficking's almost universal condemnation may bind countries together and provide sufficient incentive to craft a new treaty.[327] Moreover, the UN/COE Study signals

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[319] *See id.* at 55.

[320] *See id.* (noting that cases where an organ is removed from a living donor and then sold encompass both OTC trafficking and human trafficking for organ removal).

[321] *See id.*; *cf.* Francis & Francis, *supra* note 9, at 285–86 ("[W]e have elided the distinction between trafficking in organs and trafficking in persons for the purposes of obtaining their organs. . . . What matters is coercion coupled with transport, whether or not the transport occurs before or after the organ is removed from the victim . . . .").

[322] *See* Francis & Francis, *supra* note 9, at 285–86; Williams, *supra* note 281, at 316–17 (arguing that national legislation should seek to increase the supply of organs, which would discourage people from seeking underground market solutions).

[323] *See* Todres, *supra* note 218, at 63–64.

[324] *See* Kimberlee Weatherall, *ACTA as a New Kind of International IP Lawmaking*, 26 Am. U. Int'l L. Rev. 839, 880–81 (2011).

[325] *See* Francis & Francis, *supra* note 9, at 293.

[326] *See id.*; Weatherall, *supra* note 324, at 880–81 (noting states' conservative approaches to treaty formulation).

[327] *See* Weatherall, *supra* note 324, at 880–81.

existing interest in the international community to address organ trafficking through the creation of a binding instrument.[328]

Logistically, the treaty drafting process is often more successful if limited to a small number of countries because it decreases the need for compromise.[329] Yet, an organ trafficking instrument must have broad international support in order to manage the transnational aspects of the underground market.[330] Organ trafficking is a uniquely unethical practice, however, and may therefore attract such support for the treaty as countries wish to derive moral benefits from joining.[331] A treaty with few parties may accrue additional support if countries believe signing will improve their moral standing in the international community.[332] Organ trafficking's widespread condemnation may encourage countries to join in order to satisfy their citizens' opposition to organ commoditization.[333]

In addition to perceived improved moral standing, the instrument's focus on decreasing the organ gap would align with a country's public health interest in improving domestic organ donation levels.[334] The moral and public health benefits associated with an organ trafficking instrument will incentivize countries to join.[335] Therefore, the most effective path for creating an organ trafficking instrument may be for a small group of countries to adopt a leadership role and subsequently encourage widespread ratification.[336] Until countries successfully ratify a binding international instrument to target the root causes of the illegal organ trade, the problems associated with OTC trafficking will continue to spread across the globe.[337]

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[328] *See* United Nations & Council of Eur., *supra* note 1, at 5 (noting the UN Assistant Secretary-General's concern about the growing problem of organ trafficking that prompted the Study).

[329] *See* Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. Ill. L. Rev. 155, 178.

[330] *See* Francis & Francis, *supra* note 9, at 289; Panjabi, *supra* note 1, at 140; Sandler, *supra* note 329, at 160.

[331] *See* Ambagtsheer & Weimar, *supra* note 4, at 572; Sandler, *supra* note 329, at 177.

[332] *See* Sandler, *supra* note 329, at 177.

[333] *See* Ambagtsheer & Weimar, *supra* note 4, at 572; Sandler, *supra* note 329, at 177.

[334] *See* Ambagtsheer & Weimar, *supra* note 4, at 573; Sandler, *supra* note 329, at 178.

[335] *See* Ambagtsheer & Weimar, *supra* note 4, at 572–73; Sandler, *supra* note 329, at 177–78.

[336] *See* Sandler, *supra* note 329, at 163.

[337] Williams, *supra* note 281, at 316–17.

Conclusion

The universal organ shortage has fueled a thriving global underground market. At the national level, countries have met varying degrees of success in their attempts to eliminate the causes and effects of organ trafficking within their borders. Yet, disparate enforcement practices and inconsistent laws have done little to eradicate the global trade. The need for a binding international instrument is thus clear. Using a criminal law framework for an OTC trafficking instrument, however, would not significantly reduce the problem of organ trafficking. The Trafficking Protocol's robust criminalization requirements have only led to a limited number of prosecutions. Moreover, the Protocol's focus on criminalization has eclipsed other important considerations, such as the causes of human trafficking. Applying this failed framework to an instrument for OTC trafficking would similarly lead to few prosecutions while failing to address the underground market demand. Furthermore, continuing to bifurcate the solutions to OTC trafficking and human trafficking for organ removal would leave the instrument with an inadequate scope. Targeting human trafficking for organ removal under the umbrella of organized crime and broader human trafficking has proven ineffective.

Instead, the international community should abandon the criminal law framework anchored in the Trafficking Protocol and refocus efforts on removing the causes behind organ trafficking. Although criminal enforcement measures are necessary, the instrument must use equally mandatory language in requiring countries to adopt effective organ procurement systems. These requirements should be based on national frameworks such as presumed and mandatory consent, combined with public information campaigns that have been domestically successful. Additionally, the instrument's scope should clearly encompass both OTC trafficking and human trafficking for organ removal. Creating an instrument with comprehensive organ trafficking would both prioritize and clarify the issue, and finally provide an effective tool with which to target the international organ trafficking crisis.