

COMBATING TRAFFICKING IN HUMAN ORGANS FROM AN INTERNATIONAL PERSPECTIVE COMPARATIVE ANALYTICAL STUDY

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ABSTRACT

The international community realizes the seriousness of trafficking in human organs as a global criminal phenomenon. It has become a systematic crime and threatens the stability of societies and the rule of law. The report of the “World Health Organization” has indicated that the total number of human organs transplanted globally in the year 2009 has covered only 10% of estimated needs. It develops a popular market for human organs which exploits the poor and abducts women and children.

Keywords: Trafficking in Human Organs; Rule of Law; Market for Human Organs.

INTRODUCTION

The importance of the research lies in addressing a recently raised human rights issue at the international level. This topic catches prompt attention due to the increasing activities of human organs' trade around the world. This is becoming a very serious issue nowadays which attracts the attention of the international community, especially as it is a flagrant violation of human dignity and an infringement of human rights. The importance of this research area may also be realized due to its contribution to the development of tough legislation to address this violent phenomenon of human trafficking. This phenomenon is depicting the vulnerable conditions of the miserable people who may be pushed by poverty and ignorance to expose themselves to the risk of perishing or destroying parts of their bodies. The greedy agents and brokers in this field may lead to the illicit trafficking in body parts and medical doctors are responsible for these illegal activities. They break the oath of their profession and perform surgeries without adequate medical equipment and according to false information (Al-Shamali, 2013). But, there is limited research on this hot topic which also motivates us to contribute to the body of knowledge. The study tries to achieve the following objectives:

1. To shed a light on “*international treaties*” and “*conventions*” concerning the “*human organs trade*” and to review the glitches and shortcomings.
2. To highlight several “*international legislation*” and to look into the adequacy of its provisions to reduce the crime of human organs' trafficking.
3. To open the way for the legal experts and to lay the foundation stone to motivate further studies in this research domain.
4. To highlight the efforts made by the international community and by the countries to combat this type of crime.

5. To demonstrate the adequacy of international legislations and conventions to deal with such crimes.

Despite the efforts made by the international community and international organizations in dealing with this type of crime, these are not sufficient in our opinion as per the size of this heinous crime. It is inconceivable that a single state alone can eliminate this type of crime, without any support or assistance of international cooperation, to hunt down these criminal activities. Therefore, there is an urgent need to exchange information among the countries to develop an international convention that may define the methods to address this issue in international law to deal with this type of crime. This present research is trying to look at international conventions, charters, and Arab legislations to see whether these are sufficient in dealing with such crimes. We also aim to discuss the possible legal solutions to reduce this crime and to reduce the activities of the criminals in this regard. Further, it is also noticed that most literature is dealt with the phenomenon of trafficking in human organs from a legal perspective. Most of the literature is focused on the subject of transplantation of human organs. But, the international dimension of this issue got less care in the literature.

Human Organ Trade

The international community has outlawed the “*human organ trade*” because it is a flagrant violation of human rights. The Declaration of “*Istanbul on Organ Trafficking and Transplant Tourism*” in the Year 2008 (emanating from the International Summit on Organ Transplant Tourism and Trafficking in Human Organs) has defined it as:

“Recruiting, transporting, harboring or receiving the living or deceased persons or their organs by threat, use of any form of coercion, abduction, fraud, deception, abuse of authority, exploitation of a situation of vulnerability, giving or receiving by a third party the money or benefits to force the Potential donors for exploitation by those who transfer the organs for transplantation (Al-Hosi, 2018) ”.

The Egyptian legislator, in the Law No. 64 of 2010¹, and the Gulf Cooperation Council (GCC) in the draft of a unified law for the GCC States² on combating trafficking in persons have asserted that the transfer of the person through coercion, threat, fraud, deception, kidnapping or promise to give money in return of obtaining the consent of a person to remove one of its organs and give it to another person is illegal. It is observed that most of the legislations are in line with the definition of human trafficking contained in the protocol to “*Prevent, suppress and punish trafficking in persons, especially women and children and also supplementing the United Nations Convention*” against Transnational Organized Crime in the Year 2000 (Al-Qadi, 2015).

In the same way, we argue that the human organs’ trafficking is a form of exploitation, prescribed in the “*Protocol of Trafficking in Persons*”³. These activities are done by the organized criminal groups, private doctors, or brokers of organs who are working for the organized criminal groups through kidnapping to selling human organs (Qurari, 2009). This crime is also committed through deception and trick such as persuading the person to perform a necessary surgical operation. After the operation,

the person is surprised by pain in his/her body and finds out that he/she fell victim to the crime of removal of organs from his/her body (Obeid, 2002). After the emergence of “*organ banks*”, the buying and selling processes have also become very easy between hospitals and brokers (Shaaer, 2012). Here, we find that the victims are trapped due to poorness or lack of awareness and knowledge. Trafficking in human organs is a crime that takes place in secret. It is very difficult to monitor and control because the evidence that can be used in the investigation are insignificant and insufficient. So, prevention is the key to address this phenomenon (Shibli, 2013) which requires criminalization of this act in the texts of Arab and foreign legislations.

The Position of Islamic Law on the Transfer of Human Organs

The Jurists (Islamic religious scholars) differ on this subject as *one opinion* views that it is not permissible to transplant the organs except for necessity (Al-Houli, 2010). Since the dissection and transplantation of a living person are forbidden, it would be of course forbidden with a deceased person. This opinion is based on many Quranic verses like:

“And we have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created, with [definite] preference⁴”.

The *other opinion* allows the transplantation of organs (Al-Mikhlaifi, 2006) to save another human in case of need. For example, if a pregnant woman has died and her son is alive, then her abdomen would be incised from the left side and the fetus would be extracted. This opinion is based on many Quranic verses like:

“He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced (by necessity), neither desiring (it) nor transgressing (it's limit), there is no sin upon him. Indeed, Allah is Forgiving and Merciful⁵”.

This verse is evidence of the permissibility of transplantation of human organs following the principle of “*necessity permits prohibitions*”⁶. Also, the “*Islamic Fiqh Academy*” in Jeddah in 1988 has approved the transplantation of human organs provided that this is not done through the sale of organs⁷.

Arab World Efforts and Ways to Combat the Crime of Human Organs Trade

The Arab society made every effort to combat the crime of human organs’ trafficking by regulating the transplantation of human organs and preventing trafficking in several Arab legislations⁸ such as the Royal Decree of the Kingdom of Saudi Arabia No. M/40 of Law of 2009 to combat crimes of trafficking in persons and the Egyptian Law No. 5 of 2010 related to the regulation of transplantation and the prevention of trafficking in human organs as well as Iraqi Law No. 11 of 2016 on Transplantation of Human Organs and Prevention of its Trafficking⁹. In all of the above-mentioned legislations of the Arab countries, very deterrent penalties are

imposed on those who commit such heinous crime. In this regard, a very important role is played by the Agencies of the “*Council of Ministers of Justice and Interior*”, especially the “*Arab Center for Legal and Judicial Researches*”, and “*Naif Arab University for Security Sciences*” and the “*Arab Office for Criminal Police*” which was established in 1965.

The “*Arab Interior Ministers Council*” (AIMC) allocated an item on the agenda of the 10th meeting of the Specialized Committee on Emerging Crimes held in Tunis in 2002. On the call of the Member States, this meeting has floated some recommendations to include the “*laws*” regulating the trafficking and transplantation of human organs in their domestic legislation to impose the deterrent penalties to the crimes’ committers and to provide the necessary protection for victims and witnesses. This meeting has also requested the “*General Secretariat*” to launch “*awareness programs*” aimed at informing the citizens about the seriousness of crimes of trafficking in human organs, the method to prevent the crimes and to strengthen the cooperation with relevant international and regional organizations and bodies in confronting such crimes. The Commission on Crime Prevention and Criminal Justice (CCPCJ) of U.N.O. has invited to look into the preparation of “*international protocol to prevent, suppress and punish the trafficking in human organs*” along the lines of the three protocols of the U.N.O. Convention against Organized Crime. The recommendations have been adopted by the “*Arab Interior Ministers Council*” (AIMC) in its 20th session in Tunis in 2003 (Radwan, 2010). In 2004, article 9 of the “*Arab Charter on Human Rights*” has prohibited trafficking in human organs¹⁰. In 2009, the “*Council of Arab Ministers of Justice*” in its twenty-fifth session has also issued resolution No. 791 on the provisions of the pilot project to regulate the transplantation of human organs and to prevent its trafficking.

Recognizing the importance of tackling such crime because of its threat to the security and independence of Arab countries, the Arab States have reached the “*Arab Convention against Organized Crime*” in 2012, which was aimed to strengthen the Arab cooperation to prevent and to combat the organized crime across national borders¹¹. Article 12 of the “*Convention*” urges the Arab States to take the necessary legislative measures to criminalize the commitment or participation in the commitment of acts of physical extraction or trafficking in organs or organic tissue by force or circumvention. It is carried out by an organized criminal group or one of its members and a person's consent to such acts, shall not be considered as satisfactory once such means are used.

Most of the national legislations have prescribed punishments for each party involved in the crime of trafficking in human organs including a medical doctor who violates the provisions of the law in his country. The punishments can be in the form of disciplinary actions or withdrawing the doctor's name from the “*Medical Association*” and depriving him of practicing the profession in addition to the punishments stipulated in the “*Penal Code*” or laws for the human organs (Zaal, 2001). The broker will also be punished being as a partner with the doctor for this offense in national legislation (Hadi, 2003). Some countries including Egypt have also been imposed penalties on the hospitals where such heinous acts take place and have imposed additional sanctions such as closures, confiscations, and revocation of licenses. Here, we note that all Arab

countries must get rid of the “*crime of trafficking in human organs*” and devise its law to be aware of this crime and fill all legal loopholes with the provision of deterrent penalties and punishments for those who commit such crime to join the international conventions and treaties related to trafficking in human organs (Meziane, 2015).

International Efforts to Combat the Crime of Human Organs Trade

The international community is strived to combat the crime of trafficking in human organs through many international organizations as well as international conventions¹² and agreements, including:

The Palermo Protocol

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the “*United Nations Convention*” against Transnational Organized Crime-2000. It aims to take the necessary measures to combat organized crime (Sharif, 2001). The resolution of “*General Assembly*” 53/111 of 9th December 1998 has specified to establish an “*intergovernmental commission*” to develop a “*comprehensive international convention*” to combat organized crime (Willman, 2008) and to criminalize the smuggling of persons for the removal of their human organs as this trade has become popular internationally (Losano, 1998).

In 1990, the World Health Organization has adopted several principles including that no organ can be removed from an alive minor to carry out organs’ transplants. The organization has revealed that these operations are the main reason behind the growth of the human organ trade¹³. In 1991, the Member States have demanded to take the necessary measures to prohibit the sale and purchase of human organs of the living or dead body.

The General Assembly–UN, in its resolution 59/156 of 2004, has urged the Member States to take the necessary measures to criminalize and to combat the illegal trafficking in human organs and has requested to the “*Eleventh United Nations Congress on Crime Prevention and Criminal Justice*” to pay attention to this issue as well. It also requested the Secretary-General to prepare a study on the phenomenon of trafficking in human organs in cooperation with relevant countries and organizations¹⁴. In 2006, a report was presented to the United Nations’ Commission of Crime Prevention and Criminal Justice at its fifteenth session on the “*increasing phenomenon of trafficking in human organs*”. This report has contained a glimpse of this phenomenon and also has stressed the need to distinguish between the sale of organs and organ trafficking¹⁵.

The Council of Europe Convention against Trafficking in Human Organs of 2014 has proposed to criminalize the practices of human organs’ trafficking. It has called all of the member states to take all necessary and preventive measures against this crime and to cooperate in the investigation of a prosecution internationally as well (Fraga, 2014).

The European Council, in coordination with the United Nations, has conducted a joint study entitled “*Trafficking in organs, tissues and human cells for extraction of*

their organs", based on General Assembly's resolution 63/14 related to cooperation between nations and the European Council which is adopted in 2008 (Noor, 2017).

In the above discussions, we can see that the international community has not provided adequate legal solutions to address this problem, both in the international norms and agreements. So, the rules of international law still lack a deterrent sanction and punishment as most of the international conferences take the form of non-binding recommendations to the states that refuse to implement (Azouz, 2009).

International Cooperation to Combat the Crime of Human Organs Trade

The international community has taken several measures to combat the crime of trafficking in human organs through international conventions to prevent the increasing consequences of this crime at the international level. This crime has emerged as a new lucrative trade in human organs through intermediaries and brokers who may export the human body organs using forged documents. Some cases are also discovered in which the organs are extracted from the dead bodies and in some cases the children are trafficked for the trafficking and transplanting the human organs through operations (Sulaim, 2004). This matter is realized by the international community to address such crimes and to realize a need for cooperation among states (Shibli, 2013).

Judicial cooperation to combat the crime of trafficking in human organs: It is cooperation between the judicial authorities of many countries to combat this type of crime and to criminalize the offense for a punishment. There should be coordination between the judicial authorities as well to agree on the uniform standards in this regard (Qashqoush, 2006), to create the standards for international criminal jurisdiction, and to recognize it as valid for foreign judgments.

Article 5 of the Optional Protocol to the "*Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000*" requires the States' Parties to deport the perpetrators of such crimes. Further, the States should not require the existence of treaties for their extradition and should treat such crimes as "*they had been committed in the place where they occurred*" and the territories of the states are authorized to carry out their jurisdiction. Article VI requires states parties to provide the greatest assistance in investigations, criminal proceedings, and extradition of perpetrators.

Article 18 of the "*United Nations Convention against Transnational Organized Crime, 2000*" also requires that states' parties should provide legal assistance as much as possible to the investigation or the prosecution of offenses in this convention including the offense of trafficking in human organs. The state parties may also invoke the principle of confidentiality of bank accounts to refuse legal assistance to simplify procedures and conditions, to provide judicial assistance, and to the possibility of transferring imprisoned persons. In the territory of a state's party to another state to testify or to provide any other assistance in obtaining the evidence of investigation or prosecution of the offenses outlined in this Convention, the State should undertake to return this person without delay to the State from which he was transferred following the agreement between the two States (Sharif, 2001).

This is confirmed by several Arab legislations including the Egyptian legislator in law No. 64 of 2010 related to human trafficking that the judicial authorities must cooperate with similar foreign bodies about the fight against the crimes of human trafficking. Also, it may request that the necessary legal measures should be taken to trace, seize, or freeze the funds subject to the trafficking offenses. These all should also be written within the framework of the regulations established by the bilateral or multilateral agreements in the Arab Republic of Egypt, or following the principle of reciprocity. The above discussion makes clear that there must be international cooperation to refute one of the most heinous crimes which have recently emerged in the international and Arab arena.

Police cooperation to combat the crime of trafficking of human organs: States have strengthened the cooperation among their police agencies to combat the crimes of high gravity, including trafficking in human organs. Following the same way, most countries have been keen to cooperate through international conventions to combat such crimes and to punish the perpetrators (Sharif, 2001). For this purpose, some agencies have also been set up to deal with this type of crime, including the “*International Criminal Police Organization (Interpol)*”, which has also contributed to the fight against organized crime. In the meeting of Interpol held in 1995, the member States are agreed to decide on combating transnational crimes and strengthening international cooperation (Dawood, 2001). The International Symposium on Organized Crime was convened in 1988 and a specialized group was created in 1990 whose task was to provide the Member States with the necessary information on criminal organizations (Noor, 2017). In this way, we may say that “*Interpol*” made a big contribution in fighting against this crime through the use of many means such as the use of modern technology, the use of a system of cross-border surveillance by satellites, and the hunting down the criminals outside the national borders. It is also confirmed by several Arab legislations.

International cooperation in the exchange of information and in providing the training: This has been asserted by the international and Arab conventions to reduce the crime of trafficking in human organs (Eid, 2005). The conventions are emphasized for mutual legal assistance in the sense that States Parties should share and exchange information about the perpetrators of trafficking, about the travel documents to cross the international borders, and about the methods used by criminals for this purpose. The conventions have also emphasized the training of law enforcement officials and other personnel specialized in the prevention of trafficking in human organs to recognize the methods of deterring such crimes provided that human rights are respected. States Parties, which receive information, should also respond to the requests of information Giver State regarding the restrictions on the use of such information¹⁶.

CONCLUSIONS

Recently, the volume of the “*human organ trade*” around the world has increased and is making this issue as one of the most important issues in the world. It can be realized that the international community should consider it a global criminal phenomenon because of its nature of transnational organized crime. The “*human organ*

trade” is considered to be a flagrant violation of human dignity and an infringement of human rights as well. In the outcome of this present research, we reach to several findings:

1. Due to the weak restriction of web pages, the victims from developing countries are attracted.
2. Despite the existence of many international conventions and Arab legislation to prohibit the trafficking in human organs or the transfer and sale of human organs, this crime is done by the organized criminal group and the trade in human organs has been increasing in the current century.
3. Many hospitals are carrying out “*organ transplants*” without monitoring by the government agencies.
4. Literature has shown that the people who undergo the transplantation process catch serious diseases. It is happening because the health conditions are not paid attention and the necessary tests and analyses before the operations are not carried out.

RECOMMENDATIONS

1. To impose censorship on the web pages and security authorities must coordinate with the medical and health authorities at the national and international levels to combat such crime.
2. It is necessary to join “*international organizations*” and “*treaties*” to combat the trafficking in human organs as well as the issuance of national legislation to criminalize this kind of organized crime with punishments.
3. To encourage the “*Arab States*” to issue an annual report to monitor and to analyze the phenomenon of trafficking in human organs and to indicate their size, precautionary method, and international cooperation.
4. To establish a “*special body*” to follow up and to detect such kinds of crimes whose task is to uncover trade networks of human organs globally, also to monitor vital places of this trade such as operating rooms in hospitals and to follow-up the records of entry and exit of patients.
5. To allocate a special place for the transfer of human organs, taking care of both the donor and the recipient under the supervision of the Ministry of Health and to criminalize any operation which is done outside this place.
6. To develop a “*comprehensive strategy*” to combat trafficking in human beings and human organs and to implement it through strengthening national and international capacities. Also, to harmonize the use and application of the United Nations’ standards in crime prevention and criminal justice.

Despite the efforts made by the “*United Nations*”, the international efforts are insufficient to deal with this type of crime. Thus, we find that its control can only be possible through international cooperation.

ENDNOTE

1. The text of Article 2 of the Egyptian Law No. 64 of 2010.
2. The text of Article 1 of the draft common system on combating trafficking in persons for the GCC. For more details on this subject, see the first article of the Federal Law (UAE) No. 51 of 2006 on the Law to Combat Human Trafficking Crimes, Article 3 of the Jordanian Law of Prevention of Human Trafficking No. 9 of 2009, and the Syrian Legislative Decree No. 3 of 2010 Article 2 of the Djibouti Law No. 2010 on Combating Human Trafficking.
3. Combating Trafficking in Persons in accordance with Islamic Sharia Principles, UNODC New York 2010.
4. Al-Isra, Verse: 70.

5. Al-Baqara, Verse: 173.
6. Ibn Al-Subki, Al-Ashbaah Wal-Nazaaer, Publisher: Dar-el-Kutub Al-Ilmiyah.
7. Organization of Islamic Conference (OIC), Fatawas of Islamic Fiqh Academy.
8. There are many Arab legislations related to combating human trafficking, such as Bahraini legislation No. 1 of 2008 on combating trafficking in persons, Djibouti Law No. 210 of 2007 on combating trafficking in persons, Egyptian law No. 64 of 2010 on combating human trafficking, and Jordanian law on combating trafficking Law No. 91 of 2013 on Combating Trafficking in Persons and Smuggling of Migrants, Mauritanian Law No. 25 of 2003 on Combating Trafficking in Persons, Syrian Decree No. 3 of 2010 on Crimes of Trafficking in Persons, etc.
9. The Iraqi Proceedings (Official Gazette of the Republic of Iraq), No. 3305, issued on 16/5/2016.
10. The Charter on <http://hrlibrary.umn.edu/arab>
11. The Arab Convention against Organized Crime was ratified by Decree No. 36/40 of 2012 issued on 9/7/2012, Official Gazette, Issue No. 8 of 21/12/2012, and Egypt.
12. For more details, see the Optional Protocol to the Convention on the Rights of the Child, Child Prostitution and Child Pornography 2000 GC, the European Council in 1987, the Charter of Fundamental Rights of the European Union 2000 GC. See the text of the Charter on the website: www.umn.edu/humanrts/arab/eu-rights-charter.html
13. OMS, Raport Général 19 November 1990.
14. www.un.org/Depts/dhl/resguide/r59.htm
15. The report of the Secretary-General to the Commission on Crime Prevention and Criminal Justice on the prevention and control of trafficking in human organs, document E / CN.15 / 2006/10.
16. The text of article X of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000, Article 18 of the Egyptian Law No. 64 of 2010.

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