

## HUMAN ORGAN SUPPLY: REPORT ON ETHICAL CONSIDERATIONS AND BREACHES IN ORGAN HARVESTING PRACTICES

*This paper accompanies the March 22, 2023 webinar “Do No Harm: Business and Human Rights in Transplantation Medicine,” hosted by the New York City Bar Association, and co-sponsored by Columbia University’s Masters of Bioethics Program, Global Rights Compliance, and the Coalition to End Transplant Abuse in China. The webinar addresses human rights violations in organ harvesting.*<sup>1</sup>

### I. BACKGROUND ON ORGAN HARVESTING AND TRANSPLANT

Kidney transplants in the 1950s sparked ethical issues and began a long-term bioethical discourse. And the first heart transplant, in 1968, added complexity.<sup>2</sup> What were once certain deaths for patients, are now not due to advances in transplantation, but the degree to which that changes the ethical calculus is unclear. The success of the heart transplant led to changing definitions of death to include brain death in many jurisdictions, allowing the ability to take an organ while it was still able to be transplanted. New technology like improved lung perfusion technology further changes the conversation, adding to the allocation dilemmas by allowing lungs for transplant to travel further and last longer.<sup>3</sup> In the transplant of non-vital organs, ethical issues on the supply side cover live donors, sellers, and trafficking for the purpose of organ harvesting. On the demand side, improving health, exploring pharmaceutical alternatives, and using technology to create substitutes for human organs are opportunities to alleviate the pressure to

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<sup>1</sup> For information on the March 22, 2023 program, see <https://services.nycbar.org/EventDetail?EventKey=CMTE032223&WebsiteKey=f71e12f3-524e-4f8c-a5f7-0d16ce7b3314>. This paper does not cover non-organs, including gametes or blood products. The organs most commonly retrieved by forced organ harvesting are “hearts, kidneys, livers, corneas and, less commonly, parts of livers.” UN Office of the High Commissioner, Press Release, China: UN human Rights experts alarmed by ‘organ harvesting’ allegations (UN OTHCHR, 14 June 2021), <https://www.ohchr.org/en/press-releases/2021/06/china-un-human-rights-experts-alarmed-organ-harvesting-allegations>. (All websites last accessed on March 16, 2023). Kidneys are the most common organ sold by illegal and unethical trafficking. *See also* n. 40, *infra* (World Health Organization’s Guiding Principles on Human Cell, Tissue, and Organ Transplantation do not apply to the transplantation of gametes, ovarian or testicular tissue, or embryos for reproductive purposes, or to blood or blood constituents.) The use of animal organs for transplant also is beyond the scope of this paper.

<sup>2</sup> Jonsen, A. A History of Bioethics as Discipline and Discourse, in *Bioethics*, 3<sup>rd</sup> edition, ed. By Jecker, N., Jonsen, A. and Pearlman, R. (2012), p. 8.

<sup>3</sup> Divithotawela, C., Cypel, M., Martinu, T., et al, Long-term Outcomes of Lung Transplant with Ex Vivo Lung Perfusion. *JAMA Surg.* 2019;154(12):1143–1150. doi:10.1001/jamasurg.2019.4079.

#### **About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

supply human organs for transplant. The discourse around organ sales covers both vital and nonvital organs after death, live donation and sale, and even forced organ harvesting, theft of organs, and human trafficking. The literature on organ transplant ethics reveals different ideas about what constitutes best ethical practices. The World Health Organization (WHO) and the United Nations (UN) rightly consider certain aspects of organ transplant in the context of human rights and exploitation because human rights abuses and violations of laws and policies are common, and sometimes even state sponsored.<sup>4</sup>

This report focuses on the ethical considerations around the supply of human organs. A shortage of human organs (strong demand) is at the root of many of the ethical dilemmas around organ supply for transplant. The medical community and those in need of organs want to address the discrepancy between supply and demand by increasing the supply, although some alternatives on the horizon might eventually substitute for human organs for transplant. Ethical violations in the organ transplant process fall along a sliding scale from ambiguous consent to donate post-death to forced organ harvesting from live victims. Nonconsensual and involuntary donation and organ trafficking fall along the continuum.

By prevailing ethical standards and WHO and UN guidance, donations must be voluntary, with consent, and free of undue influence or coercion. There is continued ethical debate about receiving compensation for an organ, what constitutes acceptable consent to organ donation (for example, an opt-in or opt-out consent system), and transplant tourism.<sup>5</sup> Much of the bioethics debate focuses on people in need of organs rather than on exploitation and human rights.

The role of scientific discovery and the degree to which the availability of a new technique leads to mass demand and medical buy-in often go unquestioned. While organ transplantation is reserved for catastrophic organ damage, the search for medicinal or biotech alternatives continues amidst the growing quagmire of organ transplant ethics. Allocation consumes some of the airtime that could go to more dire issues. Generally, demand for an organ itself does not necessarily justify receiving one. No one is owed an organ, although when divvying them up, institutions or policies prioritize some people over others. Some argue that there is a moral requirement to support those in need of an organ and to save lives through organ donation, especially post-death donation. The bioethics literature tends to lean toward promoting the scientific discovery and saving lives, an important goal central to the medical profession. To describe the match between donor and receiver in ethical terms based on moral philosophy proves difficult, absent special relationships.

There are many ways to become sick, many medicines and surgeries are in high demand. Organ transplantation, with its problematic supply, is often assumed ethical despite being expensive, requiring significant long-term follow up, and possibly leading to less research on

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<sup>4</sup> DAFOH Special Report, 2022. <https://epochpage.com/wp-content/uploads/sites/3/2022/12/DAFOH-Special-Report-2022.pdf>; The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, p. 416-417. [https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal\\_JUDGMENT\\_1stMarch\\_2020.pdf](https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf); see also discussion at Point IIB, *infra*.

<sup>5</sup> “Transplant tourism” generally refers to traveling outside one’s country of origin in order to undergo an organ transplant where the organ is procured through the commercial organ trade or other means. Shimazono, Y., The state of the international organ trade: a provisional picture based on integration of available information, Bull World Health Organ. 2007 Dec; 85(12): 955–962; Published online 2007 Nov 1. doi: 10.2471/BLT.06.039370, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636295/>.

prevention, and pharmaceutical or technological solutions. That is not to argue it lacks an ethical basis overall. As a life-saving scientific discovery and medical technique, it deserves positive presumptions. But the supply problems and the incentives to increase organ harvesting can lead to unethical behaviors.

Like many medical procedures, depending on characteristics like diagnosis and prognosis, organ transplant starts to feel more like typical medical care the longer it is around, and in some cases, it may feel routine, and like a right nestled into a human or legal right to health care, rather than a privilege. When that happens, people line up to exercise their right and gain access, thereby showcasing the demand. The spotlight on demand draws sympathy, but there is also a need for sympathy for those exploited in the quest for organs.

In many countries with a guaranteed right to health care, those in need of organs experience long wait times. Bioethicists address the vast shortage, but more attention should be paid to the fundamental downsides of relying on organ transplant alone. Asking why transplant has become so popular and necessary is an important question. The bioethics literature fails to contextualize transplantation in the multitude of medical tasks in demand,<sup>6</sup> in lifestyle, diet and exercise, and in innovations in organ health. Organ transplant is a huge undertaking, a last resort, yet many patients go along when it is recommended, possibly reflecting a life-at-all-costs viewpoint. Organ transplant must also be viewed in the context of global poverty. An impetus to rescue the person in need of an organ often can drive some unethical behavior and excuses those who overlook the tragic circumstances that may exist for an impoverished seller or, in the worst case, the victim of murder through organ harvest (the abuse alleged and proven in China, discussed below). In the global organ transplant context, dangerous decisions in which institutions and people are complicit are occurring and call for greater attention and focus. Human organ sales are a product of poverty and exploitation and should be considered within that framework.<sup>7</sup>

## II. FORCED ORGAN HARVESTING

Human trafficking is the “recruitment, transportation, transfer, harbouring or receipt of persons” for exploitation.<sup>8</sup> The Palermo Protocol of 2000, adopted by the United Nations, exists to “prevent, suppress, and punish” human trafficking and includes the removal of organs in its description of trafficking.<sup>9</sup> Recent articles place kidney trafficking in the modern slavery context.<sup>10</sup> “The term “forced organ harvesting” means the “removal of one or more organs from a person by

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<sup>6</sup> There may be an opportunity cost to diverting vast resources to transplant; transplants may favor older patients who tend to need organ transplant more than the young.

<sup>7</sup> Gonzalez, J., Garijo, I., & Sanchez, A. (2020), Organ Trafficking and Migration: A Bibliometric Analysis of an Untold Story, *International Journal of Environmental Research and Public Health*, 17(9), 3204, <https://doi.org/10.3390/ijerph17093204>.

<sup>8</sup> United Nations, Human Rights Office of the High Commissioner, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted November 2000, Article 3, (the Palermo Protocol), <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>.

<sup>9</sup> Ibid.

<sup>10</sup> Stammers, T. (2022), "2: Organ trafficking: a neglected aspect of modern slavery", *Modern Slavery and Human Trafficking*, Bristol, UK: Policy Press, <https://bristoluniversitypressdigital.com/view/book/978144736>.

means of coercion, abduction, deception, fraud, or abuse of power or a position of vulnerability.”<sup>11</sup> It includes killing a person by removing organs without consent.<sup>12</sup> The practice has been done with insufficient anesthesia as well as after execution by shooting, aimed specifically to maintain blood flow.<sup>13</sup> It is not controversial to say that killing people to use their organs is an egregious human rights violation. The UN noted that kidnappers of Eritrean migrants killed them and removed their organs, selling them for about \$15,000.<sup>14</sup> The Coalition for Organ Failure Solutions is a trust supported by the United Nations Voluntary Trust Fund for Victims of Human Trafficking. Its mission is to identify and assist those trafficked for the removal of organs in Egypt and India.<sup>15</sup> It offers support, advocates, and envisions a solution that does not exploit people for organs. As discussed below, Global Rights Compliance, an international human rights law firm and foundation, and the International Coalition to End transplant Abuse in China (ETAC), an advocacy organization, describe the instances of forced organ harvesting in China.

### **a. Torture, genocide, and crimes against humanity**

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, is the foundation of the United Nations’ human rights framework.<sup>16</sup> UDHR Article 5 states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and Article 7 states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.” The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>17</sup> (CAT) defines torture and describes obligations to end torture. CAT Article 1 defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or

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<sup>11</sup> U.S Congress, Stop Forced Organ Harvesting Act.

<sup>12</sup> Do No Harm: Mitigating Human Rights Risks when Interacting with International Medical Institutions & Professionals in Transplantation Medicine, Global Rights Compliance, Legal Advisory Report, April 2022, <https://globalrightscpliance.com/project/do-no-harm-policy-guidance-and-legal-advisory-report/>.

<sup>13</sup> The China Tribunal p. 417, p. 415, [https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal\\_JUDGMENT\\_1stMarch\\_2020.pdf](https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf).

<sup>14</sup> United Nations Office on Drugs and Crime, Removal of Organs, [https://www.unodc.org/unodc/en/human-trafficking-fund/human-trafficking-fund\\_projects\\_removal-of-organs.html](https://www.unodc.org/unodc/en/human-trafficking-fund/human-trafficking-fund_projects_removal-of-organs.html).

<sup>15</sup> Coalition for Organ-Failure Solutions, <http://cofs.org/home/>.

<sup>16</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), <https://www.un.org/en/universal-declaration-human-rights/>. See also John F. Sears, Franklin & Eleanor Roosevelt Inst., Eleanor Roosevelt and the Universal Declaration of Human Rights (2008), <http://goodofall.org/site/wp-content/uploads/2008/06/sears.pdf>.

<sup>17</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>18</sup>

The UN Convention on the Prevention and Punishment of the Crime of Genocide requires, specifically, the intent to “destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>19</sup> The intent requirement generally would create an impediment to proving genocide in the forced organ context, although in the case of Uyghurs, a tribunal did conclude genocide is occurring. The UN website says, “The intent is the most difficult element to determine. To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group.”<sup>20</sup> The UN distinguishes harm to individuals who are part of the group from intent to eliminate the group in its entirety.

The Rome Statute, which established the International Criminal Court (ICC), defines crimes against humanity, which require a systemic attack on a civilian population that the perpetrator engages in knowingly. The crimes need not target people based on their identity, ethnicity, race, etc. The relevant acts themselves include murder, torture, imprisonment, and enforced disappearances, etc. and there is a catch-all for other inhumane acts.<sup>21</sup>

The international treaties and conventions could apply to forced organ harvesting as seen in the tribunals and the UN special meetings, but China is not a party to the Rome Treaty, so it is not within jurisdiction of the ICC.

## **b. China**

Falun Gong is a Buddhist and Daoist practice that includes spiritual teachings, meditations, and qigong exercises that became popular in China in the 1990s. The People’s Republic of China holds that Falun Gong is illegal. Because of its illegality, many Falun Gong practitioners are imprisoned.<sup>22</sup>

Uyghurs, a Turkish ethnic group originating in China, have faced surveillance including biometric data collection and imprisonment either on false charges, trumped up charges, or for no reason at all. Their language has been banned in schools. Over one million are imprisoned in camps, along with people of other Turkish ethnicity and heritage and Muslim denominations.<sup>23</sup>

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<sup>18</sup> CAT, article 1.

<sup>19</sup> Office on Genocide Prevention and the Responsibility to Protect, Genocide, <https://www.un.org/en/genocideprevention/genocide.shtml>.

<sup>20</sup> Ibid.

<sup>21</sup> Rome Statute of the International Criminal Court (1998), Article 7, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>22</sup> Madsen, R. (2000), Understanding Falun Gong, *Current History*, 99(638), 243-247.

<sup>23</sup> How China is crushing the Uyghurs, *The Economist*, video documentary, July 9, 2019, <https://youtu.be/GRBcP5Brffl>. See also Letter to Chinese State Leadership Regarding Human Rights Violations Against Muslim and Turkic Peoples in the Xinjiang Uyghur Autonomous Region, New York City Bar Association, Aug. 28, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/end-human-rights-violations-against-muslim-and-turkic-peoples-in-the-xinjiang-uyghur-autonomous-region>.

Generally, organ harvesting from executed prisoners is seen as coercive and not voluntary, although Chinese law does allow it. That is, it violates global standards and ethical guidelines, and China has declared it is no longer doing so.<sup>24</sup> Nonetheless, as discussed in detail below, there is ample evidence China continues to engage in forced organ harvesting of prisoners of conscience.

### **i. Background**

In China, transplants of kidneys, hearts, lungs, and livers grew exponentially in the early 2000s. Many of the transplants were for transplant tourists and Chinese citizens, who were assured of organs with very short wait times. There is evidence that Chinese military hospitals engage in forced organ harvesting. Chinese officials admitted to killing prisoners to obtain organs<sup>25</sup> and, in 2009, government officials stated that the prisoners were on death row and had consented to the organ donation. In 2010, China claimed it would initiate a voluntary organ donation system in 2011 and would end the use of executed prisoners' organs by 2015. Yet investigations proved that the organs came from prisoners of conscience<sup>26</sup> not on death row. (Regardless of being on death row, organ procurement from any prisoner violates ethical guidelines.) During this time, there was a noted increase in organs for transplant. An estimated 60,000 to 100,000 transplants took place from 2000 to 2014 during which time the primary victims were Falun Gong practitioners.<sup>27</sup> According to Human Rights Watch, in addition to Falun Gong, Uyghurs in China have been or are at grave risk of being victims of forced organ harvesting due to evidence of blood and organ testing.<sup>28</sup> A Uyghur tribunal later confirmed forced organ harvesting from Uyghurs.

### **ii. Tribunals**

“The continued short and specified time frames for possible transplantation combined with the continuous persecution of Falun Gong practitioners, Uyghurs and other prisoners of conscience, a legal framework that allows organ harvesting from executed prisoners with their “consent”, and an organ supply that clearly outnumbers the official statistics from the voluntary system continues to raise serious, unanswered questions as to the nature of the transplantation programme and the source of transplanted

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<sup>24</sup> Sharif, A., Singh, M. F., Trey, T., & Lavee, J. (2014), Organ procurement from executed prisoners in China, *American Journal of Transplantation*, 14(10), 2246-2252; Danovitch, G. M., Shapiro, M. E., & Lavee, J. (2011), The use of executed prisoners as a source of organ transplants in China must stop, *American Journal of Transplantation*, 11(3), 426-428.

<sup>25</sup> Robertson MP, Lavee J. (2022), Execution by organ procurement: Breaching the dead donor rule in China, *Am J Transplant*, Vol.22,1804– 1812. doi:10.1111/ajt.16969.

<sup>26</sup> Congressional Executive Commission on China, Annual Report, November 2022, p. 200, [https://www.cecc.gov/sites/chinacommission.house.gov/files/2022\\_CECC\\_Report.pdf](https://www.cecc.gov/sites/chinacommission.house.gov/files/2022_CECC_Report.pdf).

<sup>27</sup> Do No Harm: Mitigating Human Rights Risks when Interacting with International Medical Institutions & Professionals in Transplantation Medicine, Global Rights Compliance, Legal Advisory Report, April 2022, <https://globalrightscpliance.com/project/do-no-harm-policy-guidance-and-legal-advisory-report/>; David Matas and David Kilgour, *Bloody Harvest. The killing of Falun Gong for their organs* (Seraphim Editions 2009) and China Tribunal Judgment (n 39) para s455, 461.

<sup>28</sup> See e.g., ‘China: Minority Region Collects DNA from Millions’ (Human Rights Watch, 13 December 2017), <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions>.

organs.” – Global Rights Compliance, Legal Advisory Report, p. 14<sup>29</sup>

The evidence that China is continuing to harvest organs from prisoners includes a significant number of available organs that cannot be explained by voluntary donations. In December 2018 and April 2019, the Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China convened to evaluate whether China engaged in criminal activity in its organ harvesting practices. In its 562-page report produced in 2020, the tribunal validated the testimony of numerous witnesses and 2000 recorded phone conversations in which Chinese medical professionals agreed to provide organ transplants on short notice.<sup>30</sup> The phone calls made it clear that the hospitals were offering organs for sale and in some cases openly admitted the organs were from prisoners. An expert witness indicated “that organs of prisoners were harvested using four methods: 1) organ harvesting from prisoners incompletely executed by shooting, 2) organ harvesting from prisoners after lethal injection, 3) execution by organ ex-plantation (live organ harvesting), and 4) organ harvesting under the pretext of brain death.”<sup>31</sup> The tribunal found China guilty of crimes against humanity beyond a reasonable doubt in its killings of prisoners to harvest and use their organs for transplant. The tribunal concluded that there is no evidence that China has dismantled its organ transplantation infrastructure or stopped forced organ harvesting. The tribunal took place because China is not under the jurisdiction of the International Criminal Court.

In 2021 UN Human rights specialists, including eight UN Special Rapporteurs, also found China continues to engage in forced organ harvesting. “The experts said they have received credible information that detainees from ethnic, linguistic or religious minorities may be forcibly subjected to blood tests and organ examinations such as ultrasound and x-rays, without their informed consent” and that the organs most likely harvested through this regime include “hearts, kidneys, livers, corneas and, less commonly, parts of livers.”<sup>32</sup>

A Uyghur tribunal found China engaged in genocide and crimes against humanity.<sup>33</sup>

### **c. Accountability, Responsibility, and Mitigation**

The UN Guiding Principles on Business and Human Rights, adopted in 2011, call for a respect, protect, and remedy framework. The guidelines place a duty on states to protect human

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<sup>29</sup> Global Rights Compliance, Do No Harm, p. 14.

<sup>30</sup> The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, [https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal\\_JUDGMENT\\_1stMarch\\_2020.pdf](https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf) (please note that ETAC requested the tribunal.)

<sup>31</sup> Global Rights Compliance, p. 15.

<sup>32</sup> UN Office of the High Commissioner, Press Release, China: UN human Rights experts alarmed by ‘organ harvesting’ allegations (UN OTHCHR, 14 June 2021), <https://www.ohchr.org/en/press-releases/2021/06/china-un-human-rights-experts-alarmed-organ-harvesting-allegations>.

<sup>33</sup> Uyghur Tribunal, Judgment (9 December 2021) (Uyghur Tribunal Judgment) para 1, <https://uyghurtribunal.com/wp-content/uploads/2022/01/Uyghur-Tribunal-Judgment-9th-Dec-21.pdf>.

rights and on businesses to respect them. They further require organizations to remedy any human rights violations.<sup>34</sup>

**i. Human Rights Due Diligence: Recommendations for Discussion and Consideration**

The transplant industry is multi-faceted. To tackle the problem, countries should hold relevant businesses (for example, suppliers of medical equipment), educational organizations including medical schools and teaching hospitals, clinical (hospitals) and research facilities, academic research journals, and grant-making entities accountable and, unless undertaken voluntarily and transparently, impose proactive and effective obligations on them. The relevant obligations can be summed up as human rights due diligence. The human rights landscape differs by type of organization. Public entities may have more distinct obligations than businesses.

**ii. Supply Chain**

Corporations supplying materials used in organ transplant should have a human rights policy and engage in due diligence. They should attempt to remedy any problematic issues that purchasers and end-users engage in and if they cannot, they should disengage, moving to mitigation if disengaging is impossible. If a company sells organ transplant equipment, the company should ask its purchasers what their policies are and be sure the purchaser is not engaged in supplying equipment to states or hospitals that are involved in unethical organ transplant, that support or permit organ transplant tourism relying on supply by live, impoverished sellers, that purchase from organ traffickers, or that engage in forced organ harvesting. For example, selling immune-suppressants to Chinese government-run hospitals would be a red flag. The due diligence obligation should be enhanced when supplying materials specific to organ transplant, as opposed to medical devices used for a broad array of medical procedures. A lack of proof or a showing of ignorance as to product destination should lead companies and researchers to disengage until they can prove the purchaser is behaving ethically. It is not enough to say one has good intentions or did not know. The obligation requires action. The inability to find answers should not be used as an excuse. Likewise, purchasers of materials used in organ transplants, including hospitals and universities, should have policies in place to look back at the supply chain and to ensure that they are purchasing from ethical suppliers.

**iii. Academic research journals**

The academic sphere could influence ethical organ transplant by refusing to publish research generated by clinical trials that engaged in unethical practices like using organs from sales or an underground market or forced organ harvesting.

**iv. Laws**

In addition to human rights due diligence policies and guidelines, laws can contribute meaningfully to protecting human rights and ending forced organ harvesting. Laws can codify

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<sup>34</sup> U.N. Guiding Principles on Business and Human Rights (2011), [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).



ethical obligations, allowing for enforceable systemic measures. Complicity in human rights violations may be the equivalent of aiding and abetting, the threat of which may lead to increased accountability of businesses and educational institutions.

#### v. **One Example: The Stop Forced Organ Harvesting Act**<sup>35</sup>

The Stop Forced Organ Harvesting Act of 2023 is a bill pending in the United States that aims to combat human trafficking for organs, use diplomacy to establish voluntary organ donation globally, and promote human rights. The bill does so through several channels. Among other things, it would require the President to provide “Congress a list of each person that the President determines funds, sponsors, or otherwise facilitates forced organ harvesting or trafficking in persons for purposes of the removal of organs”<sup>36</sup> and sanction each person on the list. Sanctions include property blocking and denying and revoking passports and visas.<sup>37</sup>

The bill presents one approach to addressing the human rights atrocities connected with forced organ harvesting.<sup>38</sup> Over 70 human rights organizations joined a letter urging support for the bill.<sup>39</sup>

### III. ORGAN SALES

The previous sections of this report primarily addressed forced organ harvesting. This section addresses a different facet of the ethical considerations surrounding organ transplants, that is, the sale of human organs.

Selling a human organ is illegal in the United States.<sup>40</sup> The World Health Organization (WHO) asserts that sales undermine voluntariness, i.e., that a donor is not a willing donor if the donor is receiving compensation. WHO Guiding Principle 5 prohibits compensation for organ donation:

Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation,

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<sup>35</sup> The Stop Forced Organ Harvesting Act of 2023, H.R. 1154, 118<sup>th</sup> Congress (2023), <https://www.congress.gov/bill/118th-congress/house-bill/1154>.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> While this report notes this federal legislation as one example of a legislative approach to combatting forced organ harvesting, the City Bar takes no position on the bill at this time, which is beyond the scope of this report.

<sup>39</sup> Coalition to End Transplant Abuse in China, <https://endtransplantabuse.org/over-70-civil-society-organisations-urge-for-co-sponsorship-of-the-us-stop-forced-organ-harvesting-bill-of-2021/>; template of letter urging co-sponsorship, [https://endtransplantabuse.org/wp-content/uploads/2021/07/Civil\\_Society\\_Letter\\_Stop\\_Forced\\_Organ\\_Harvesting\\_Act\\_21June\\_2021.pdf](https://endtransplantabuse.org/wp-content/uploads/2021/07/Civil_Society_Letter_Stop_Forced_Organ_Harvesting_Act_21June_2021.pdf).

<sup>40</sup> Iran is the only country that officially permits compensation, regulated by district and overseen by nonprofits. Krishnan, M., Legalizing Trafficking: Iran’s Unjust Organ Market and Why Legal Selling of Organs Should Not be The Resolve, Berkeley Political Review, May 3, 2018, <https://bpr.berkeley.edu/2018/05/03/legalizing-trafficking-irans-unjust-organ-market-and-why-legal-selling-of-organs-should-not-be-the-resolve/>.

or their sale by living persons or by the next of kin for deceased persons, should be banned.<sup>41</sup>

Despite the WHO prohibition, reports and investigations suggest organ trafficking is common, difficult to detect or police, and involves complicit physicians.<sup>42</sup> Annually, an estimated 10,000 kidneys are sold in illegal markets globally and about 10 percent of all organs are illegally sourced.<sup>43</sup> Many people and institutions do not adhere to the WHO principles and engage in or ignore organ trafficking, transplant tourism, and coercion. There is a global, thriving underground kidney market. It is difficult to track the global numbers of organs trafficked for several reasons: legal, jurisdictional, and enforcement challenges, indifference to the plight of impoverished sellers (complacency), complicity and power of healthcare practitioners, and unwitting or intentional complicity of buyers.<sup>44</sup> It is possible that data scraping and machine learning techniques will help detect organ sales.<sup>45</sup> Furthermore, investigating unusual financial activities, banking customers who appear sick or unwell moving unusually large sums of money, large cash and wire transfers, and transfers between charities and organ transplant tourism destinations can uncover illegal behavior.<sup>46</sup> In addition to the use of criminal law in response, other ways of holding people accountable are important.

The debate over the ethics of selling organs continues among academics, primarily driven by people wanting to satisfy the large unmet demand. The right to sell one's own organs is supported by some scholars and people in the medical and bioethics community, despite the firm opposition by the UN and WHO. All likely agree that avoiding a premature death is good, but there is significant debate over the means by which one should do so.

#### **a. Arguments in favor of allowing organ sales**

Some argue that a market in human organs would be ethical if it were properly regulated. Their ethics arguments generally characterize the benefit to the recipient as a moral or practical good. Traditional arguments in favor of a regulated market tend to speak to the urge to save those in need of organs, the desire to allow those in poverty the ability to access the income from the organ sale, and even suggest that the poor would be disenfranchised by the inability to sell their nonvital organs. In the 1990s the International Forum for Transplant Ethics concluded that a

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<sup>41</sup> WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation, May 2010, <https://apps.who.int/iris/bitstream/handle/10665/341814/WHO-HTP-EHT-CPR-2010.01-eng.pdf?sequence=1>. The Guiding Principles do not apply to transplantation of gametes, ovarian or testicular tissue, or embryos for reproductive purposes, or to blood or blood constituents. *Id.*, p. 1.

<sup>42</sup> Global Rights Compliance, Do No Harm.

<sup>43</sup> Trey, T., & Matas, D. (2017), State-organized criminal forced organ harvesting., *JTHE*, 175, p. 176.

<sup>44</sup> Manzano, Ana, Monaghan, Mark, Potrata, Barbara, Clayton, Michelle, The Invisible Issue of Organ Laundering, *Transplantation* 98(6): p 600-603, September 27, 2014. | DOI: 10.1097/TP.0000000000000333.

<sup>45</sup> Li, M. H., Siddique, A. B., Wilson, B., Patel, A., El-Amine, H., & Koizumi, N. (2022), Identifying kidney trade networks using web scraping data, *BMJ Global Health*, 7(9), e009803, <https://doi.org/10.1136/bmjgh-2022-009803>.

<sup>46</sup> Bain, Christina, Mari, Joseph. June 26, 2018, Organ Trafficking: The Unseen Form of Human Trafficking, *ACAMS Today*, <https://www.acamstoday.org/organ-trafficking-the-unseen-form-of-human-trafficking/>.

regulated market would be beneficial.<sup>47</sup> In *The Case for Allowing Kidney Sales*, members of the Forum suggested that despite a sort of ick factor, there is not an ethical reason for a ban.<sup>48</sup> They suggested a ban creates an unregulated market and deprives the poor of the opportunity to sell their organs, contributing to the shortage, and they doubt the sincerity of those who assert that protecting the poor from exploitation is a true concern. They also suggested that in the countries where there are potential organ vendors, the Western viewpoint that finds organ selling repugnant is not prevalent. Their reasoning is shaky and notes that in some places, organ retrieval from a dead body would be even more conceptually problematic.<sup>49</sup> It does not logically follow that comparative views on retrieval from living or dead donors provide a basis to conclude that selling an organ is acceptable locally. The concept of “ethics dumping”<sup>50</sup> applies to such an argument because Westerners could then travel to countries and purchase the organs of the poor, something not generally accepted in Western countries abiding by prevailing WHO and UN ethical guidelines. The authors also wish everyone to presume a market is ethical until the naysayers can prove otherwise.<sup>51</sup>

The arguments in favor are often utilitarian, focused on the ends, including the life saved and the poverty purportedly alleviated. Some note that an “urge to survive” drives the market as buyers want to survive disease and sellers to survive poverty.<sup>52</sup>

Arguments critical of paternalism remain in the debate.<sup>53</sup> Mark Cherry presents an argument steeped in autonomy and informed consent, that adults can do what they wish as long as they understand it. To him, compensation does not interfere with consent. He finds a market efficient, effective, and morally justified. Like others in favor of a market, he perceives a hypocrisy in that so many in the transplantation ecosystem are compensated, but the donor is not.<sup>54</sup>

Many of the arguments in favor of a market claim that organ sales would improve the economic standing of the seller, but the research does not support this. Research contradicts selling

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<sup>47</sup> Radcliffe-Richards, J., Daar, A.S., Guttman, R.D., Hoffenberg, R., Kennedy, I., Lock, M., Sells, R.A., Tilney, N. (1998), *The Case for Allowing Kidney Sales*, *The Lancet*, Vol 351. (Authored by members of the International Forum for Transplant Ethics.)

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, p. 1950.

<sup>50</sup> Ethics dumping refers to engaging in exploitation or other unethical practices in low- or middle-income countries that would contradict accepted ethical standards in OECD or wealthy countries. It is generally a term used in research using human subjects. Schroeder, D., Cook, J., Hirsch, F., Fenet, S., Muthuswamy, V. (2018), Ethics Dumping: Introduction. In: Schroeder, D., Cook, J., Hirsch, F., Fenet, S., Muthuswamy, V. (eds) *Ethics Dumping*, SpringerBriefs in Research and Innovation Governance, Springer, Cham. [https://doi.org/10.1007/978-3-319-64731-9\\_1](https://doi.org/10.1007/978-3-319-64731-9_1); Macklin, R. (2004), *Double standards in medical research in developing countries* (Vol. 2), Cambridge University Press.

<sup>51</sup> Radcliffe-Richards, et al.

<sup>52</sup> See for example, Kishore R. R. (2005), Human organs, scarcities, and sale: morality revisited, *Journal of Medical Ethics*, 31(6), 362–365, p. 365, <https://doi.org/10.1136/jme.2004.009621>

<sup>53</sup> See, e.g., Semrau, L. (2017), Misplaced Paternalism and other Mistakes in the Debate over Kidney Sales, *Bioethics*, 31: 190-198, <https://onlinelibrary.wiley.com/doi/10.1111/bioe.12303>.

<sup>54</sup> Cherry, M. J. (2005), *Kidney for Sale by Owner: Human Organs, Transplantation, and the Market*, Georgetown University Press, <http://www.jstor.org/stable/j.ctt2tt3tk>.

organs as a reliable way to improve one's long-term socioeconomic conditions. As a strategy, organ selling does not generally lead to long-term economic benefit and has health risks and requires follow-up care.<sup>55</sup>

The arguments in favor of a market must be understood as overlooking or ignoring the exploitation inherent in a system that permits individuals to sell organs in the hopes of alleviating poverty. In this context, the preference for supply at any human cost violates bioethical notions of justice, fairness, and a duty to prevent exploitation. The arguments presented below oppose a market in human organs.

### **b. Arguments Against Compensation for Organs**

Some suggest that individuals living in poverty are unable to freely consent to selling an organ due to their economic condition, as generally it is those individuals who would (and do) sell an organ for money. Generally, wealthy individuals would not and do not. Whether consent can be given freely and voluntarily depends on the persuasive strength of the money to be paid. And with people in dire poverty, compensation is undoubtedly the deciding factor. It is difficult to accept the pro-market argument that a person is deciding on kidney removal freely and voluntarily when the person is impoverished. Consent to surgery based on financial desperation should not be viewed as acceptable to any medical team retrieving organs. The typical person who sells a kidney lives in poverty and often uses the money to repay debt.<sup>56</sup> A 2019 story from the Philippines described the business of hunting kidneys, i.e., roaming impoverished neighborhoods to find people willing to sell their kidneys.<sup>57</sup> The very business targets the poor specifically and meets the conditions of exploitation. An Indonesian study notes the same phenomenon: kidney hunters preying on the poor. Using criminology to discern what drives underground markets in kidneys, the study concluded that, "The decision to sell the kidney is based on the individual goal of getting money easily, quickly, and in large quantities."<sup>58</sup> The medical acceptance of such consent (when doctors engage in the retrieval or knowingly use organs procured from impoverished organ sellers) reveals complicity and active participation in exploitation. Therefore, an approach that looks to exploitation generally rather than consent specifically may be a more appropriate starting point. That is, the overemphasis on consent (and references to the usually morally correct viewpoint that adults with mental capacity can consent) distracts from the big-picture human rights breaches. Nancy Scheper-Hughes researched the aftermath of kidney sales and argues that legalizing organ

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<sup>55</sup> Goyal, M., Mehta, R. L., Schneiderman, L. J., & Sehgal, A. R. (2002), Economic and health consequences of selling a kidney in India, *Jama*, 288(13), 1589-1593; Greasley, K. (2014), A legal market in organs: the problem of exploitation, *Journal of Medical Ethics*, 40(1), 51-56.

<sup>56</sup> Moniruzzaman, M, "The heavier selves": embodied and subjective suffering of organ sellers in Bangladesh, *ETHOS*, 47 (2) (2019), pp. 233-253, <https://doi.org/10.1111/etho.12236>; Goyal, M., Mehta, R.L., Schneiderman, L.J., Sehgal, A.R, Economic and Health Consequences of Selling a Kidney in India, *JAMA*, 2002;288(13):1589–1593. doi:10.1001/jama.288.13.1589.

<sup>57</sup> Promchertchoo, Pichayada (Oct. 19, 2019), Kidney for sale: Inside Philippines' illegal organ trade, <https://www.channelnewsasia.com/asia/kidney-for-sale-philippines-illegal-organ-trade-857551>.

<sup>58</sup> Widodo, W. and Wiwik Utami (2021), The Causes of Indonesian People Selling Covered Kidneys from a Criminology and Economic Perspective: Analysis Based on Rational Choice Theory, *European Journal of Political Science Studies*, Vol 5, Issue 1.

sales would permit “one relatively privileged population [to] claim property rights over the bodies of the disadvantaged.”<sup>59</sup>

Opponents believe that Western ethicists violate tenets of moral philosophy and bioethics when they argue in favor of the ability to sell one’s organs to escape poverty. Not being in a position of poverty themselves, outsiders weighing in must recognize the desperation that accompanies the choice to sell an organ. It is arguably disingenuous for someone highly unlikely to experience extreme poverty or to sell an organ to a stranger to fight to ensure that those who do live in such circumstances have such a right. To opponents, the idea that selling a kidney is an acceptable way to earn money is repugnant. When it is professed by people at an arm’s length who are highly unlikely to need to sell an organ to make ends meet themselves, it lacks sincerity. The phrase “with friends like these, who needs enemies,” comes to mind. Is this a fight for a right on behalf of poor people that non-poor people, bioethicists, and doctors really want to commit to? It arguably violates beneficence as well as principles of justice when arguing in favor of a market where poor people supply a crucial (yet not vital) body part to people who are from wealthier countries and generally are wealthier themselves.

Many suggest that organ selling violates dignity and that proponents of compensation are too willing to tolerate exploitation, forcing “a devil’s bargain on the economically desperate of trading life and limb for sustenance.”<sup>60</sup>

In the face of arguments that bans on kidney sales are a version of unacceptable soft paternalism, opponents of organ sales argue that such bans should be distinguished from other paternalistic constraints.<sup>61</sup> In this context, as long as selling is an option through illegal organ trafficking, the very poor will continue to consider it. Organ traffickers prey on financial desperation. Indeed, organizations have been created to protect people from being preyed upon by organ traffickers, for example the Coalition for Organ Failure Solutions.

Transplant tourism is a natural outgrowth of the illegal organ trade.<sup>62</sup> It involves traveling to another country and receiving a transplant, generally from someone coerced or paid for their organ. (Some transplant travel is legitimate and exists due to specialized medical facilities and a traveler from a place of origin that has limited transplantation experience or facilities.) People from wealthy countries engage in transplant tourism, paying large fees which in turn feed a system of brokers who use kidney hunters to prey on the local poor. Transplant tourism represents about 10

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<sup>59</sup> Scheper-Hughes, N. (2005), Living kidney donation: controversies and realities: organs without borders: open markets, closed systems and the global search for living donors. In *Program and abstracts of the American Transplant Congress*.

<sup>60</sup> Joralemon, D. and Cox, P. (2003), Body Values: The Case Against Compensating for Transplant Organs, *Hastings Center Report* 33, No. 1, 27-33.

<sup>61</sup> Malmqvist, E. (2014), Are Bans on Kidney Sales Unjustifiably Paternalistic?, *Bioethics*, 28: 110-118, <https://doi.org/10.1111/j.1467-8519.2012.01984.x>.

<sup>62</sup> Danovitch, Gabriel M.; Chapman, Jeremy; Capron, Alexander M.; Levin, Adeera; Abbud-Filho, Mario; Al Mousawi, Mustafa; Bennett, William; Budiani-Saberi, Debra; Couser, William; Dittmer, Ian; Jha, Vivek; Lavee, Jacob; Martin, Dominique; Masri, Marwan; Naicker, Saraladevi; Takahara, Shiro; Tibell, Annika; Shaheen, Faissal; Anantharaman, Vathsala; Delmonico, Francis L.. (2013), Organ Trafficking and Transplant Tourism: The Role of Global Professional Ethical Standards—The 2008 Declaration of Istanbul, *Transplantation Journal* 95(11):p 1306-1312. | DOI: 10.1097/TP.0b013e318295ee7d.

percent of organ transplants. It can deprive the host countries of organs to use for local people in need of organ transplant.<sup>63</sup> Organ tourism is lucrative for the host country and allows people facing long wait times in wealthy countries to have transplants sooner.<sup>64</sup>

#### **IV. OTHER CONSIDERATIONS**

##### **a. Technology as a Tool**

Technology has both enabled organ traffickers to effectively find people willing to sell organs and helped law enforcement agencies to detect trafficking. The dark web has provided one more place where the organ trade can flourish undetected. So far, cell phones, the dark web, and the internet generally have been enabling factors in the global organ trade.<sup>65</sup>

##### **b. Decreasing demand for organs**

###### **i. Improving population health**

The demand for organs results from illnesses and conditions that destroy organ function. For example, excessive alcohol intake is related to liver disease, and high blood pressure and diabetes are the two biggest contributors to kidney failure. Heart disease that stems from lifestyle and diet is responsible for some heart failure. There are societal improvements that would contribute to good health: addressing diet, lifestyle, and the many social determinants of health is an important step in reducing demand by promoting organ health. Early detection of disease and access to preventive health care could also help.

Organs also may fail due to strong medicines like chemotherapy. Treatments with less organ toxicity might decrease the toll of medicine on the body and alleviate some of the demand for organs.

An approach to decreasing the demand for organs must include improving health. The UN Office of Drugs and Crime recognizes reducing the health conditions that cause the need for organ transplant as important to the solution to eliminating the vast illegal organ trade.<sup>66</sup>

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<sup>63</sup> Gill, J., Clark, S., Gill, G., & Richardson, C. (2023), A Survey Study to Examine Willingness to Travel for Transplantation and Consider Commercial Transplantation Among a Multi-Ethnic Cohort of Canadians. *Kidney International Reports*.

<sup>64</sup> Gill, J., Diec, O., Landsberg, D. N., Rose, C., Johnston, O., Keown, P. A., & Gill, J. S. (2011), Opportunities to deter transplant tourism exist before referral for transplantation and during the workup and management of transplant candidates. *Kidney international*, 79(9), 1026-1031. (After waiting two years, patients decided to travel for organ transplant.)

<sup>65</sup> Heintz, M. P., Yu, B., & Wijesekera, D. (2019), A Framework to Reveal Clandestine Organ Trafficking in the Dark Web and Beyond. *Journal of Digital Forensics, Security and Law*, 14(1), 2; Mendoza, R. L. (2010), Kidney black markets and legal transplants: Are they opposite sides of the same coin?. *Health Policy*, 94(3), 255-265. (Mentions kidney-for-sale websites.)

<sup>66</sup> UNODC, Toolkit to Combat Trafficking in Persons (2008).

## ii. Innovation

Research for pharmaceutical options to treat organ disease, damage, or injury is an important component. If medicines could keep organs working, patients would be able to avoid transplant.

Medical technology and even 3D-printed organs may decrease demand for human organs from humans. Substituting animal organs has its own ethical dilemmas, not discussed here. Lab-grown partial organs, organ tissue, or organoids may act as possibilities although they too can lead to ethical dilemmas. Bladders have been lab-grown and transplanted, grafted to the recipient's bladder. Lab-grown organs are slow to replace the current system, but breakthroughs in kidney tissue development may change the landscape considerably.<sup>67</sup>

## V. CONCLUSION

As a medical advancement, organ transplant has saved many lives and changed the landscape of bladder, kidney, lung, liver, and heart disease. But it comes with a human cost in exploitation and even killing. It is imperative to decrease demand for human organs both by improving public health and by discovering alternative treatments and cures for diseased, injured, or damaged organs. Concurrently, policies, guidelines, human rights due diligence, laws, and law enforcement, including the use of technology for investigation, should be used to eradicate organ trafficking, forced organ harvesting, and all exploitation associated with organ procurement. And, ultimately, alleviation of global poverty is a crucial part of any strategy to reduce exploitation in the organ transplant market.

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<sup>67</sup> Growing Human Kidneys in a Lab – Scientists Have Made a Significant Breakthrough, Brigham and Women's Hospital, September 25, 2022, <https://scitechdaily.com/growing-human-kidneys-in-a-lab-scientists-have-made-a-significant-breakthrough/>.