



## Organ Trade in the International Context

### Obchod s orgánmi v medzinárodnom kontexte

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#### Abstract:

*Organ trafficking for transplantation purposes, despite many legal regulations, still exists, what is more, it does not apply only to poor countries, but the whole world is struggling with it. Bodies for transplantation are permanently scarce resources. Paired organs are usually obtained from relatives. The situation becomes more difficult when a sick person needs a single organ, then it is usually taken from the deceased person. It is also worth noting that organs transplanted in this way are more often rejected by the recipient's organism. This article has been devoted to organ trafficking on an international basis. It presents legal regulations at the international level in the prohibition of the organ trafficking as well as under Polish law. There were discussed the positions of, inter alia, the United Nations, the European Union, the World Health Organization and the Council of Europe. There have been shown the similarities and differences in the approach to organ trafficking in the light of international law. The article draws attention to the fact that despite so many international law documents, this practice does not disappear, on the contrary, it is constantly growing. Therefore, it is worth considering the implementation of modern technologies for the production of artificial organs for transplants, as well as promote campaigns to make people aware of how important post mortem donation is.*

**Keywords:** *transplantation, organ donation, organ trade, polish law, international law*

#### Abstrakt:

*Obchodovanie s orgánmi na účely transplantácie napriek mnohým právnym predpisom stále existuje, navyše sa nevztahuje len na chudobné krajiny, ale celý svet s ním bojuje. Orgány určené na transplantáciu sú charakterizované trvalým deficitom. V prípade párných orgánov sa zvyčajne získavajú od príbuzných. Situácia sa stáva obťažnejšou, keď chorý človek potrebuje jeden orgán, v tom prípade sa zvyčajne odoberajú od mŕtvol. Je tiež potrebné poznamenať, že takto transplantované orgány sú častejšie odmietané organizmom príjemcu. Tento článok je venovaný*



*medzinárodnému obchodovaniu s orgánmi. Predstavuje právne predpisy na medzinárodnej úrovni týkajúce sa zákazu obchodovania s orgánmi, ako aj v rámci poľského práva. Predstavené boli stanoviská v tejto veci, okrem iného, Organizácie Spojených Národov, Európskej Únie, Svetovej Zdravotníckej Organizácie, Európskej Rady. Predstavené boli podobnosť a rozdiely v prístupe k obchodovaniu s orgánmi vo svetle medzinárodného práva. Článok upozorňuje na skutočnosť, že napriek mnohým medzinárodným právnym dokumentom táto prax sa vôbec neznižuje, naopak, neustále rastie. Preto je vhodné zvážiť zavedenie moderných technológií na výrobu umelých orgánov na transplantáciu, ako aj podporovať informačné kampane, vďaka ktorým si ľudia uvedomia dôležitosť darcovstva po smrti.*

**Kľúčové slová:** *transplantácia, darcovstvo orgánov, obchodovanie s orgánmi, poľské právo, medzinárodné právo*

## **Introduction**

Organ trafficking for transplantation is a complex phenomenon, but the exact scale of the problem is unknown [1]. Data published in reports are only estimated, but they allow to state that organ trafficking is not a marginal phenomenon. Moreover, the problem in recent years is constantly growing [2].

Organs for transplantation are permanently deficit resources. Analyzing the reasons for this phenomenon, one can indicate the basic regularity, which in principle concerns all illegal markets, viz. where there is demand, there is also supply. The shortage of organs for transplantation forces them to search on the illegal market [3].

Organ transplantation is an important, effective and safe method of treatment for patients with end-stage organ failure [4]. Nowadays, for many patients, a transplant is the most desirable therapy and often the only one that allows full recovery [5].

Commercialization of the human body has become a serious problem as a result of the progress of transplant medicine [6]. According to W. Rowiński, it was the excellent results of organ transplantation that made this method of treatment a victim of their own success [7].

The discussed issue is regulated by many normative acts, both on the basis of international law and under Polish law.

The aim of this article is to show the similarities and differences in the approach to organ trafficking in the light of international law.

## **1. Regulations in the international law**

The documents of the United Nations, namely the Convention against International Organized Crime of 2000 [8], and especially the Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, in especially Women and Children, are of crucial importance to the discussed issues. It is indicated in art. 3 that "trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose

of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs [9]. In the discussed article was used the concept of the use of a person by removing human organs, which is the most important, in view of this elaboration.

The presented definition is a combination of three components: defined by means of verb nouns, indicated methods and the purpose of using the victim. The first element (indicated activities) gives opportunity to be held liable, every person knowingly involved in each stage of the process of human trafficking. It is important that human trafficking in order to remove organs as opposed to other forms of this crime also requires the involvement of specialists, i.e. doctors, nurses and ambulance drivers. In addition, appropriate medical facilities are necessary. The second element is very important from the effectiveness of the whole definition' point of view. The use of one of these methods means that the victim's consent is irrelevant. Moreover, it cannot serve as a circumstance excluding the responsibility of the perpetrators. It should be emphasized here that this element is necessary only when the victim is a person over the age of eighteen. In the case of a crime of trafficking of children, the definition includes only the indicated activities and purpose [10].

It is also worth pointing out that the methods of action illustrate the way in which a person becomes a victim of crime.

Victims of human trafficking to remove organs are often recruited from the poorest inhabitants of developing countries or struggling with problems such as internal conflicts or hunger [11].

Other methods that are mentioned in the context of the discussed issue are: cheating, threatening, misleading, offering or accepting payments or benefits to obtain the consent of a person who has control over another person. These methods may be cumulative.

The last element determines the purpose for which the offense was committed. The intention is enough for the depleting the traits of human trafficking. It does not matter if the victim has been used or not [12].

Another important document in the discussed issue is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography from the year 2000 to the Convention on the Rights of the Child of 1989 [13]. It obliges States to prohibit the trafficking of children, child prostitution and pornography and criminalization in their criminal law, in the context of child trafficking, behavior such as offering, delivering or accepting a child in any way in order to transfer the child's organs for profit [14].

The ban on obtaining property benefits from human organs, tissues and cells appears in the instruments of the World Health Organization. The key regulation for this topic is the Principles regarding human cells, tissues and organ transplants created in 1991, and updated in 2010. The most important principle is that cells, tissues and organs should be transferred only free of charge, without any monetary remuneration or other remuneration of a monetary value. Additionally, it is forbidden to purchase or offer to purchase cells, tissues or organs for the purpose of transplantation or their sale by living persons or by relatives of a deceased person. This rule, however, does not

preclude the return of reasonably incurred and verifiable costs incurred by the donor [15].

The World Health Organization emphasizes that the principle prohibiting the financial benefits from the human body and its parts is crucial. Violation of this principle compromises the institution of altruistic organ donation, which should form the basis of the transplantation system [16].

Another document of international legislation is the Statement on Human Organ Donation and Transplantation of the World Medical Association of 2006, which adopted the position that the so-called financial incentives for organ donors should be banned, because they can be seen as a kind of extortion of consent to organ donation. In addition, the prohibition of organ donation for transplantation results, as in the WHO argument, from contradictions with the principle of social justice and misappropriates the altruistic basis of organ donation [17].

Another international document to be recalled is the Convention for the Protection of Human Rights and Dignity of the Human Being against the Applications of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, opened for signature on April 4, 1997, and in force since December 1, 1999.

Chapter VI and VII of the Convention regulate directly the area of transplant medicine. In addition, intermediate provisions affecting organ transplantation have been included in several other parts of the Convention. The Convention indicates that the donation of living organs or tissues for transplantation may only be carried out to obtain the recipient's therapeutic benefit and only if the appropriate organ or tissue is not available to the deceased and there is no alternative therapeutic method with comparable efficacy. Consent to carry out scientific research should relate to a specific donation and must be expressed explicitly, in writing or before the competent institutions. From this regulation, the primacy of the post-morbid transplantation model for transplantation between the living is clearly visible. Ex vivo organ exploration is to be of a subsidiary nature only if there is no appropriate organ from human corpses [18].

Extremely important provisions are contained in chapter VII of the Convention, entitled as a prohibition on profiting and using parts of the human body. According to art. 21, the human body and its parts cannot, in themselves, be sources of financial gain. It should be noted that this prohibition is a consequence of the principle of dignity of the human being adopted in the Convention [19]. Another issue raised in the convention is contained in art. 22. In the light of the norms set out in it: 'If a part of the human body has been removed during the medical intervention, it may be stored and used for purposes other than that for which it was collected only if properly informed and appropriate consent was obtained' [20].

The Convention in art. 26 provides for restrictions on the exercise of rights and guarantees that are contained therein only to certain exceptions: if necessary in a democratic society to protect public safety and public health or to protect the rights and freedoms of others, as well as to prevent crime.

The next act in the field of human tissue transplantation is the Resolution of 11 May 1978, adopted by the Committee of Ministers of the Council of Europe, regarding

the harmonization of the standardization of Member States' legislation in the context of the collection and transplantation of human tissues and organs. The Resolution is not a comprehensive act, it consists of only 14 articles, and the provisions that it contains constitutes recommendations and guidelines for the Member States of the European Union (they are not binding for these countries). The cited Resolution contains specific recommendations regarding the transplantation of tissues and organs between the living [21].

The most important recommendation was to adopt the following rules [22]:

- a) the donor should be fully informed of the consequences before transplantation,
- b) the respect for the anonymity of the both donor and the recipient (except when there is a close family or personal relationship between them),
- c) a person who wants to become a giver is required to allow consent in writing, both in terms of organs that do not regenerate or regenerate,
- d) transplantation of non-regenerating substances into living donors can only take place on the condition of genetic affinity between persons,
- e) the case where the donation entails a risk for both the life and health of the donor, it may occur only in specific circumstances, and such practices may be prohibited by the Member States,
- f) the donation of regenerating substances in the case of persons who do not have legal capacity should be limited to exceptional situations; the consent of the legal representative and the lack of previous objection, preceded by the decision of the appropriate authority, are required,
- g) the taking of substances that do not regenerate from persons who are not capable of legal actions is prohibited while, where special circumstances exist, Member States may allow such practice,
- h) proper medical examinations should be carried out before transplantation,
- i) the donation of organs should be carried out by the competent institutions under appropriate conditions that pose the least risk to the donor,
- j) prohibit the donation of organs in order to earn an income, however lost wages, expenses due to collection or preliminary research costs can be refunded.

The above recommendations have crucial importance for the discussed issue, namely illegal human tissues and organs trafficking.

The resolution clearly states that the donation of non-regenerating substances may occur exceptionally and only between genetically related persons, because in this way the chance of success of the treatment increases. On the other hand, as to regenerating substances, unrelated adults can be present in the donor-recipient relationship without any problems [23].

People participating in and deriving income from illegal trafficking in human tissues and organs treat transplantation medicine as a source of profit, income and thus do not comply with the above-mentioned rules. It is worth adding that unlawful organ harvesting by criminal groups acts mainly from living donors, however, it cannot be ruled out that some of them commit post-morbid transplants [24].

In Chapter III of the Resolution, the Council of Europe has made recommendations regarding post-morbid transplantation. In the light of art. 10 it is not possible to remove organs from deceased persons if there is a clear or even alleged

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objection of the deceased, which often results from religious or philosophical beliefs. Otherwise, exploration is allowed in the absence of express or implied objections [25]. In the next article, the Resolution refers to the harvest of organs from a deceased person, where the function of an organ other than the brain can be artificially maintained and there is no compulsory autopsy [26]. It should be emphasized here that in the annex of this Resolution, cerebral death was assumed as the death criterion [27].

In the following, the Resolution defines the principles for organ transplants for diagnostic, therapeutic and scientific purposes, and also draws attention to the anonymity of the donor and recipient [28]. In addition, the final article clearly states that the transfer of human substances cannot be related to obtaining any income. It is worth noting that in the context of the discussed issue, the above-mentioned article is of great importance.

The provisions of the Resolution also set out the requirements regarding the equipment of the institution, the qualifications of the staff and the technical conditions of the operations.

Similar solutions are also indicated by the Resolution of the World Health Assembly in 1987, and the Resolution of the Executive Board of the World Health Organization. A lot of space has been devoted to the problems of commercialization of transplants. Trade in the human body or its parts was forbidden. The use of announcements regarding the procurement of organs was unacceptable. Also, physicians should refuse to participate in transplants if the organs designated for it came from trade [29].

The regulations on trafficking in human beings include, also, the Convention on Action against Trafficking in Human Beings of 2005. The document contains a definition of trade similar to that contained in the Palermo Protocol. The Convention points out that the consent of the victim of human trafficking to the intended use, as defined earlier, is irrelevant, if any methods were used: threat, use of force or other forms of coercion, abduction, deception, fraud, abuse of power or exploitation of weakness, giving or receiving benefits or payments [30].

In addition, the discussed issue was addressed in other resolutions and recommendations of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, among others recommendation 1611 relating to organ trafficking in Europe, recommendation 7 for organ smuggling [31].

Another European document that deserves attention is the European Parliament Resolution of 22 April 2008 on organ donation and transplantation. This resolution states that organ and tissue trade is a form of human trafficking and thus constitutes a serious violation of fundamental human rights, human dignity and bodily integrity. The resolution calls for a change in criminal law, which will improve the prosecution of those responsible for trafficking in human organs. He strongly opposes the donation of organs, which is motivated by financial considerations, because it brings the organ's gift to an ordinary commodity, and thus constitutes a violation of human dignity [32].

Resolution in point 23. calls on states to make the rules on transplantation of organs from live unrelated donors strict, in order to ensure system transparency and the exclusion of illegal organ selling or pressure on donors. He points to altruistic motives of organ donation for transplantation. In Article 50, he calls on the

Commission to combat the trafficking in human organs and tissues that come from mentally handicapped people, minors and prisoners who have been subjected to the death penalty. Resolution in point 51, 52 calls for combating the so-called Transplant tourism, especially the adoption of long-term strategies to combat social inequalities, which are the main source of disposal of organs for financial rewards [33].

The resolution recommends the creation of national control registers for living donors, patients with transplants and transplantation procedures, which should be constantly updated. Furthermore, it underlines the importance of cooperation between the Member States, the competent authorities of the country concerned and professionals in the health sector. It obliges security staff to refrain from facilitating organ trafficking and underlines the importance of raising public awareness about donation and organ transplantation.

It is also worth mentioning The European Parliament and Council Directive 2010/45/EU of 7 July 2010 on standards of quality and safety of human organs intended for transplantation. This directive in Article 13 provides that organ donation should be voluntary and unpaid. However, nothing prevents the living donors from receiving compensation, provided that it is strictly limited to covering the costs incurred and income lost in connection with the act of donation [34].

Particular attention should be paid to the Council of Europe Convention against Trafficking in Human Organs [35], adopted by the Committee of Ministers of the Council of Europe on 9 July 2014. It is worth noting that it is a treaty in the field of international criminal law, combining criminal law, medicine and human rights [36].

The main objective of the Convention is to prevent and combat human organ trafficking by providing criminalization of certain activities. It is also worth pointing out here other goals listed in art. 1 namely, protection of victims' rights and cooperation at international and national level.

The subject scope of the Convention goes beyond the problem of organ trafficking in the context of transplantation, including organ trafficking for other purposes as well as other forms of illegal organ procurement and transplantation.

It is worth noting that the authors of the text of the Convention did not create for the purposes of its definition the concept of "organ trafficking". However, they have exchanged actions that alone or in connection with other behaviors contribute to organ trafficking.

It should be emphasized that the conventional concept of "organ trafficking" refers not only to organ transplantation, but also to other methods of its use.

Chapter II of this document contains provisions on substantive criminal law, which are undoubtedly the core of the entire treaty. They contain a number of states' obligations to formulate their criminal law in such a way that it is consistent with Convention and realizes its goals. The obligation to criminalize includes: - indelible removal of organs, - use of illegally taken organs for implantation or for other purposes, - implantation of organs outside the national transplantation system or in violation of basic principles of national transplant law, - illegal solicitation, recruitment of donors or recipients, offering and demanding undue payments benefits -

preparing, securing, storing, transporting, transferring, receiving, importing or exporting illegally removed organs, - inciting or aiding and attempting [37].

The convention also introduces requirements to ensure a transparent, national system of transplant services and equal access to them [38].

## **2. Regulations in the Polish law**

The Polish legislator refers directly to the Palermo Protocol ratified on August 18, 2003, and enlisted the acquisition of cells, tissues, organs into a legal definition of the purpose of human trafficking. The reason for the introduction of the definition was the need to implement international obligations resulting from the ratification by Poland of the following agreements [39]:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, in particular Women and Children,
- Council of Europe Convention on Action against Trafficking in Human Beings, prepared in Warsaw on May 16, 2005.

According to the wording of art. 115 § 22 of the Criminal Code [40], human trafficking is the recruitment, transport, supply, transfer, storage or reception of a person using:

- violence or unlawful threat,
- abduction,
- deception,
- misleading or exploiting a mistake or inability to properly understand the action taken,
- abuse of dependency relations, use of a critical location or state of helplessness,
- giving or accepting a property or personal benefit or her promise to a person who carries or supervises another person,

for its use, even with its consent, in particular in prostitution, pornography or other forms of sexual exploitation, at work or services of a compulsory nature, in begging, in slavery or other forms of exploitation degrading human dignity or in order to obtain cells, tissues or organs contrary to the provisions of the Act. It should be added that if the behavior of the offender concerns a minor, it is trafficking in human beings, even if the methods or measures listed in the points listed above have not been used.

The formulated in this way settled doubts, which were raised in the doctrine as to the object of trade as well as the continuity of the procedure [41].

A single transaction fulfills the statutory requirements of human trafficking in order to obtain cells, tissues or organs (a one-off undertaking that concerns one person carried out for a specific purpose of using the victim) is enough [42].

It is worth noting that the concept of "human trafficking" under art. 115 § 22 of the Criminal Code in the context of illegal trafficking of cells, tissues or organs, it will not apply to situations where the subject of the transaction will be cells, tissues or organs obtained from the dead. On the other hand, in the light of the analysis of the features defining causative actions, the codex term "human trafficking" refers

to transactions involving live beings, and therefore also - adequately - parts of the body derived from living beings.

It is also worth mentioning that according to art. 189a of the Criminal Code criminal liability is incurred both for activities in the field of the statutory recognition of human trafficking (including the illegal acquisition of cells, tissues and organs), as well as for behaviors that are preparations for such trade. The discussed article in § 1 reproduces that a person committing human trafficking shall be punished by imprisonment for a period not shorter than three years. In turn, according to § 2 of this article, whoever is preparing to commit an offense specified in § 1, shall be subject to punishment by imprisonment of between three months to five years [43].

## **Conclusion**

Analyzing the above-mentioned documents of international law, the following similarities and differences in the approach to organ trafficking can be noted, namely: both the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 and The Council of Europe Convention of 16 May 2005 on Action against Trafficking in Human Beings do not apply to trade in organs strictly, but only to human trafficking to remove organs. Hence, J. Kapelańska-Pręgowska and P. Chrzczonowicz rightly notice that these two phenomena should not be equated, because although they have the same goal, the method of achieving it, is different.

It is worth noting that the Protocol of 2000 and the Council of Europe Convention of 2005 only apply to cases of use of a person by donating its organs (without its consent), do not refer in turn to the situation in which the donor consents to the donation of his organ for which he receives remuneration. The Convention on Human Rights and Biomedicine, on the other hand, stresses the creation of uniform rules and procedures for legal transplants, but there are no explicit obligations regarding prosecution, criminalization and counteraction of organ trafficking.

The Council of Europe Convention against Trafficking in Human Organs has complemented the gap in the protection of human rights, enriching the existing system, with a detailed instrument of a criminal law nature. The convention does not include the definition of the term 'organ trafficking'. However, it contains activities that, alone or in connection with other behaviors, make up the organ trade.

In contrast, the Resolution of the European Parliament of April 22, 2008 states that organ and tissue trade is a form of human trafficking.

Despite numerous international documents prohibiting organ trafficking and a fairly common opinion that this phenomenon violates the fundamental principles of intercourse, the international trade in organs does not disappear, but on the contrary gains in strength.

Organ trafficking raises many controversies not only in legal but also in ethical or social nature. However, more and more often people in the face of life threatening their loved ones reach for the most drastic solutions, also related to entering the crime

scene and attempting to illegally buy organs for transplantation. Due to the high demand for organs necessary for transplantation, arguments are increasingly presented for the sake of its official marketization, but this problem still remains unresolved due to the great ethical controversy. It is obvious that reducing the number of organs available legally causes an increase in prices on the so-called "Black market", which undoubtedly increases the criminal activities, because the economic attractiveness of such illegal procedures increases.

It is worth paying attention to the fact that there are more and more campaigns explaining people about the possibility of post-mortem organ donation, but it is also a question of individual beliefs and such actions - though extremely necessary - are certainly still insufficient considering how many people are waiting for new organs.

Another chance for even a partial solution to the problem could be the implementation of modern technologies for the production of artificial organs for transplants. Researchers around the world are still testing new solutions, but this is certainly a matter of a relatively distant future, and it seems that leaving the problem under consideration in the current legal framework will unfortunately still result in the development of illegal criminal activities serving organ trafficking for transplant purposes.

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