

Presidenza del Consiglio dei Ministri



**ILLEGAL TRAFFICKING OF HUMAN ORGANS
FROM LIVING DONORS**

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TABLE OF CONTENTS

Presentation	3
<u>Document</u>	
1. Introduction	5
2. Legislation in Italy.....	7
3. Considerations	8
4. Recommendations	13
Personal Remarks	15

Presentation

The existence in the world of illicit trafficking in human organs for transplantation is a dramatic event that represents a real danger to public and individual health and violates fundamental rights and human dignity. The general impression is that, both at national and international levels, effective tools to prevent, reduce and combat this criminal activity have not yet been adopted. This illicit affair unavoidably involves also the scientific community (surgeons, nephrologists, those in charge of transplant centres, resuscitators, etc.). It must be added that the victims of this market are with increasing frequency vulnerable persons such as prisoners, those sentenced to death, minors (children abducted in order to acquire organs). Especially in the last few decades, the flow of organs and body parts proceeds along the modern international routes traced by capital: from South to North, from the third world to the first world, from the poor to the rich. At its worst this trafficking turns into forms of expropriation, exploitation and coercion.

The World Health Organisation on multiple occasions and over the years has called on States to take measures to protect the poorest individuals and vulnerable groups from transplant tourism and the sale of organs. Currently, the Council of Europe in the process of preparing a Convention aimed to suppress the trafficking of human organs and to formulate an international legal instrument (*Projet de convention du Conseil de l'Europe contre le trafic d'organes humains*). The preparatory study recommends as of now that on the one hand there is the need for national legislature to provide for sanctions even of a criminal nature, and on the other the promotion of a more specific international convention against trafficking *strictu sensu*, so as to identify the presuppositions and conduct that characterise and define it.

Like other European Countries, even Italy despite regulations on a number of cases related to organ transplantation, has a modest system of sanctions with regard to illegal trafficking of organs. The two main regulations (Law No. 458, on 26. 06. 1967 on living donor kidney transplantation and Law No. 91 on 1. 04. 1999, on the removal of organs and tissues from cadavers) provide for sanctions exclusively for those carrying out mediation and health professionals that use the organs derived from this commercial trade, but no penalty is provided for with regard to other parties directly or indirectly involved in this illegal trafficking.

The Committee does not intend in this document to specifically analyse the problem of illicit trafficking in organs with exclusive reference to the Italian situation, but rather it wants to address the problem on a general level, prompted by the current reflection and exploration of the Council of Europe. This reflection and investigation at a transnational level, is addressed to individual States, in the belief that only by means of consistent and coherent regulations on a national and international level will it be possible to give a strong response to this widespread phenomenon.

In addition, considering that the market for human body parts presents multiple and various issues depending on whether it is a trade between living individuals or derived from cadaver donation or involving body cells and tissues, the Committee believes it to be appropriate to limit the Opinion to the

trafficking of organs from a living donor, specifically the kidney, which now appears to be the organ that is most prevalent on the market.

Having stated this the conclusion reached by the NBC in the majority of its members is that although the idea of regulation is difficult to achieve in the social and medical reality of many parts of the world, especially in poor countries, Europe at least should provide for legal regulation that is international and national with the introduction also of types of criminal offense, aimed at defining the trafficking in organs, to prevent it, to enforce the principle that the human body or its parts are not for commercial trade.

For this purpose it is hoped that States will work together on an international level to improve the practice of transplantation and organ donation and cooperate, in compliance with relevant international instruments and national law, as far possible in order to carry out investigations in relation to any offense committed on its territory and outside of it. In addition it is necessary to establish by agreement, with multilateral treaties based on the principle of double incrimination, mutual recognition of this type of offense, in order to ensure adequate collaboration between the requesting countries and the countries in which the act was intentionally committed.

The Opinion, drawn up and edited by Adriano Bompiani, Lorenzo d'Avack and Laura Palazzani, was approved at the plenary session of 23 May 2013 and also approved by Salvatore Amato, Adriano Bompiani, Stefano Canestrari, Antonio Da Re, Lorenzo d'Avack, Carlo Flamigni, Romano Forleo, Laura Guidoni, Assuntina Morresi, Andrea Nicolussi, Laura Palazzani, Alberto Piazza, Rodolfo Proietti, Monica Toraldo di Francia. Cinzia Caporale and Vittorio Possenti abstained. Luisella Battaglia, Bruno Dalla Piccola, Maria Luisa Di Pietro, Riccardo Di Segni, Silvio Garattini, Marianna Gensabella, Demetrio Neri, Giancarlo Umani Ronchi, Grazia Zuffa not present at the time of voting subsequently approved the Opinion.

Attached to the Opinion is the personal remark written by Luisella Battaglia, Lorenzo d'Avack, Silvio Garattini, Rodolfo Proietti, Vittorio Possenti, Lucetta Scaraffia by which they wished to draw the attention of the NBC to the position of the doctor or medical facility in the Country of origin, assigned with the duty to provide therapy and assistance, when requested by that patient-buyer who has acted clandestinely.

The President
Prof. Francesco Paolo Casavola

1. Introduction

1.1. Organ transplantation has marked in the process of development of modern medicine one of most important and meaningful turning points, permitting to prolong and improve the lives of patients all over the world. Especially organ donation from a living donor is considered as a supererogatory act and as such is therefore worthy of extremely high ethical appreciation, in view of the goal of solidarity that it intends to accomplish.

However, the emphasis has been on the objective dangers that are linked to this practice, so as to recommend that such a procedure always remains an exceptional circumstance, as well as ensuring the total freedom of the donation and that any and every commercialisation is fought in principle and in fact.

These principles are not always adhered to and there are many reports of "illegal organ trafficking." An unlawful act that is not always well defined in state legislation, confused with other types of criminal cases, comprising in this expression not only the buying and selling of organs and so-called 'transplant tourism' (patients from rich countries who travel abroad to purchase organs from poor people), but also the activity of intermediary organisations aimed at the illegal sale and the trafficking in human beings for the purpose of removal of organs. This helps neither the prevention nor the repression of the crime.

Then there are governments that avoid carrying out transplants on their own territory forcing their patients to go abroad, despite knowing that these are vulnerable countries, assenting to reimburse the cost of the operation, because everything is much easier and less expensive. Poor countries are the focus of the market, there are different prices for organs for the buyer in various parts of the world and equally variable is the remuneration for the donor.

This ethically and juridically illicit affair unavoidably involves also the scientific community (surgeons, nephrologists, those in charge of transplant centres, resuscitators, etc.). Added to the fact that the victims of this market are with increasing frequency vulnerable persons such as prisoners, those sentenced to death, minors (children abducted in order to acquire organs). Especially in the last few decades, the flow of organs and body parts proceeds along the modern international routes traced by capital: from South to North, from the third world to the first world, from the poor to the rich. At its worst this trafficking turns into forms of expropriation, exploitation and coercion. The data published by the World Health Organisation indicate that one-fifth of the 70,000 kidneys transplanted come from an economic transaction¹.

The worldwide existence of illicit trafficking of human organs for transplantation is therefore an indisputable fact. It is not easy to obtain 'official' data given the clandestine nature of the phenomenon. The general impression is that, both at national and international levels, effective tools to prevent, reduce and combat this criminal activity, which represents a real danger to public and individual health and violates fundamental rights and the dignity of man, have not yet been adopted.

1.2. In relation to this matter at least two different options in legal terms can broadly be found: one that believes that the body may be an object of free

¹ Indications regarding the publication of the Council of Europe, "Transplant Newsletter", 2010, vol. 15.

trade regulated by the State², the other instead believes that it is not commercially tradeable establishing buying and selling as illegal.

From the analysis of national laws (including our own) and regulations and international conventions³ it emerges as a prevalent fact that the body is excluded from market relations. Consequently the need, which has become both urgent and a priority, to combat the illegal trafficking of organs.

The World Health Organisation on multiple occasions and over the years has called on States to take measures to protect the very poor and vulnerable groups from transplant tourism and the sale of organs⁴. To address the urgent and growing problems associated with the organ trade, in May 2008, a summit was held in Istanbul with more than 150 representatives of scientific and medical organisations from all over the world in which a declaration was made (*the Declaration of Istanbul on the trafficking of organs and transplant tourism*) in order to obtain a legal and professional framework governing organ donation and transplantation activities, as well as transparent supervision by a regulatory system which guarantees the safety of the donor and recipient and respect for human dignity.

Currently, also the Council of Europe is in the process of preparing a Convention aimed to suppress the trafficking in human organs and to formulate an international legal instrument (*Projet de convention du Conseil de l'Europe contre le trafic d'organes humains*). The preparatory study recommends as of now that on the one hand there is the need for national legislature to provide for sanctions even of a criminal nature, and on the other the promotion of a more specific international convention against trafficking *strictu sensu*, so as to identify the presuppositions and conduct that characterise and define it.

This practice of illegal trafficking, as mentioned, exists alongside the parallel trade in slaves, children, women, the so-called trafficking in human beings. Therefore, the dissent against organ trafficking is contained not only in the above-mentioned protocols and conventions that explicitly condemn it, but also in the provisions and regulations relating to the incrimination of exploitation and human trafficking⁵.

² The *Universal Declaration on Human Rights*, (1948), the *Convention of the Council of Europe on Human Rights and Biomedicine* (1997, Articles 19, 21 and 22), the *Additional Protocol to this Convention concerning transplantation of organs and Tissues of human Origin* (2002, Arts. 21, 22), the *Charter of Fundamental Rights of the European Union* (2000, Article 3).

³ The *Universal Declaration on Human Rights*, (1948), the *Convention of the Council of Europe on Human Rights and Biomedicine* (1997, Articles 19, 21 and 22), the *Additional Protocol to this Convention concerning transplantation of organs and Tissues of human Origin* (2002, Arts. 21,22), the *Charter of Fundamental Rights of the European Union* (2000, Article 3).

⁴ *Resolution 44.25/1991, Resolution 57.18 / 2004 and Resolution 63.22/2010.*

⁵ The *UN Convention on the Rights of the Child* (1989), the *Additional Protocol to the UN Convention against Transnational Organized Crime to prevent, suppress and punish trafficking in persons, especially women and children* (2000); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2002), *Council of Europe Convention on Action against Trafficking in Human Beings*(2005);*Council of Europe Convention on the Prevention of Terrorism* (2005) and the *Council of Europe Convention on the Protection of children against Sexual Exploitation and Sexual Abuse* (2007), the *EU Directive on Standards of Quality and Safety of Human Organs Intended for Transplantation* (2010).

2. Legislation in Italy

The rules governing transplants from living donors and from cadavers has progressively involved a series of regulatory provisions: Law No. 235, of 04/03/1957 (removal of body parts from cadavers for therapeutic transplant purposes); Law No. 458 of 26.06.1967 (living donor kidney transplants); Law No. 644, of 2.12.1975 (removal of parts from cadavers for therapeutic transplant purposes); Law No. 301 of 12.08.1993 (removal and grafts of cornea); Law No. 91 of 04.01.1999 (removal and transplantation of organs and tissues); Law No. 483 of 16.12.1999 (partial liver transplantation) and Law No. 167 of 19.09.2012 (partial transplantation of the lung, pancreas and intestine from living donors).

A gradual legislative tendency to reduce the limits of this health care practice becomes apparent, moving in the direction of broadening the scope of lawfulness. Especially Law No. 91 of 01.04.1999 regulated the subject of transplants from cadavers in three ways: one with regard to the facilities and organisational aspects, another related to the safety of transplants, and the other concerning the method of formulation of the consent to removal.

However, a lack of regulation and a reduced system of sanctions with regard to the illegal trafficking of organs is to be noted. Law No. 458 of 26. 06. 1967 on living donor kidney transplant at Art. 6 provides that "any private stipulation providing for monetary compensation or other benefits in favour of the donor, to induce him at the time of disposition or destination is null and of no effect" and at Art. 7 provides for imprisonment from three months to one year and a fine ranging from 100,000 Lira to two million Lira to anyone who for financial gain acts as an intermediary in the donation of a kidney. Law No. 91, of 1. 04. 1999 on the removal of organs and tissues from cadavers provides for more severe penalties for anyone who procures for financial gain an organ or tissue from a person declared to be dead or more precisely acts for commercial trade: imprisonment from two to five years and a fine ranging from 20 million Lira to 300 million Lira, as well as perpetual interdiction from the exercise of the profession if the offense is committed by a person engaged in the healthcare profession. The penalty is more limited against those who commit the crime without any financial gain.

In both regulations the penalties provided for are therefore borne exclusively by those engaged in the mediation and by the health care worker that uses organs deriving from commercial trade, but no penalty is provided for as regards other parties directly or indirectly involved in the illegal trafficking.

3. Considerations⁶

The Committee does not intend in this document to specifically analyse the problem of illicit trafficking in organs with exclusive reference to the situation in Italy⁷. The NBC wants to address the problem on a general level, prompted by the current reflection and exploration of the Council of Europe. This reflection and investigation at a transnational level, is addressed to individual States, in the belief that only by means of consistent and coherent regulations on a national and international level will it be possible to give a strong response to this widespread phenomenon.

Moreover, given that the market for human body parts presents multiple and various issues depending on whether it is a commercial trade between living individuals or derives from cadavers or involves body cells and tissues, the Committee considers it appropriate to limit the Opinion to the trafficking of organs from a living donor, specifically the kidney, which is currently the most prevalent organ on the market.

Having stated this, the following is to be pointed out.

a) The Committee considers it essential to have a precise definition of the case in point and proposes that "organ trafficking" should include all those activities which, through the use of force, threat, coercion, abduction, deception, abuse of power or exploitation of a position of vulnerability, particularly economic vulnerability, are aimed at obtaining and removing organs from a living person. The payment of sums of money or other benefits to the donor or third party, either directly or through intermediaries also falls within this category.

Trafficking in organs often leads to so-called "transplant tourism" whenever there is a movement of organs, donors, recipients and specialised personnel (doctors, health care workers) across jurisdictional boundaries without authorisation from either their own Country or that of the place where the removal and implantation is carried out.

This matter involves different categories of people: sick patients, often already on dialysis as regards kidneys, willing to travel great distances and face risks to their health in order to get the transplant they need; the sellers are generally poor and in dire straits; the surgeons and medical facilities, are willing to break laws and the fundamental rules of ethics and deontology; the brokers and other intermediaries who have links with the underworld of organ trafficking and finally the doctors who in the Countries of origin provide care to patients that have made use of this market.

⁶ The NBC also recalls the many Opinions previously expressed on the subject of organ donation: *Bioethical aspects of aesthetic and reconstructive surgery*, 2012; *Kidney donation from a living donor to a stranger (so-called Samaritan donation)*, 2010; *Criteria for the ascertainment of death*, 2010; *Motion on the sale of organs for transplantation*, 2004; *NBC Opinion on the proposal for a moratorium on human xenotransplantation clinical trials*, 1999; *The bioethical problem of the kidney transplant from a non-blood related living donor*, 1997; *The anencephalic infant and organ donation*, 1996; *Organ donation for transplantation purposes*, 1991; *Definition and detection of human death*, 1991; *Donation of the corpse for scientific research*, 2013.

⁷ The National Transplant Center, queried on this point, however, referred to the NBC in a statement that, to date, from the available data that do not appear to be drop outs from the waiting lists without any traceable follow up.

The Committee reiterates, as in other documents⁸, primarily the condemnation of the commercial trade of the body as a violation of the fundamental rights to personal integrity and to health, and recommends that national Countries and international bodies should prepare regulations aimed at better containing and combating this illicit affair; to counteract and discourage the demand, punishing those who buy organs for themselves or for others, even through the configuration of specific crimes to protect the rights of the victims of these offenses; the promotion of the donation of organs, as well as the promotion of international cooperation in order to improve the practices of organ donation and transplantation.

b) As for the patient-buyers of organs, even if they are seriously ill and more or less prompted by reasons of urgency, it does not appear lawful to the NBC that they may be exempted from criminal liability when, directly or indirectly, they take possession of the body parts other people, taking advantage of the poorest and most vulnerable individuals. In the transplants from living donors this practice, if justified, endorses the idea that certain individuals do not have equal dignity and that they are merely items that can be disposed of to benefit others. Nancy Scheper-Hughes, who for many years has been fighting against the organ market, points out that this commercial trade begins the moment a weak and sick person looks at another individual, realising that there is something inside of that individual that he/she needs and which may lengthen his/her life⁹. A defined form of "neo-cannibalism" that considers the body of others as a source of disassembled spare parts with which to prolong our lives. Faced with the need to protect one's own health it is easy to give space to a "grey area" in the field of ethics, where established principles are put into question in favour of the state of emergency, and listen to the casuistries of self-justification of mere opportunity or self-interest.

Therefore, the NBC believes it necessary to prepare for a more vigorous repression of a phenomenon found to be incompatible with ethical and fundamental juridical values, and that our legislators should provide for the extension of criminal liability even toward the buyers, in order to translate juridically the moral gravity of their actions, also with the purpose of deterrence. Despite the great diversity of situations and cases, the law is called on to establish a general principle that strongly condemns organ trafficking even with regard to patient- beneficiaries who willfully do not respect the shared system at a national level. The NBC believes that in some instances it would be an effective deterrent for anyone if one had to face the prospect that, the purchasing of an organ to improve one's own health conditions, could lead to the real risk of being criminally charged on returning home from abroad.

In this context, involving the trade of organs from a living donor, additional instances of crime can be integrated, such as the crime of murder in the event of the occurrence of the death of the victim, or some aggravating or mitigating circumstances as provided for by the penal code for other offenses. In this particular case the principle of the importance of the consent of the person involved, being of sound mind and will, must not be applied as a cause of exclusion from the anti-juridical nature of the event¹⁰.

⁸ Cf. footnote 6.

⁹ N. Scheper-Hughes, *Organ trafficking in the global market*, Ombre Corte, Verona, 2001.

¹⁰ Therefore the provisions in Art. 50 of the penal code cannot apply in this case (Consent of the person entitled): "Whoever violates or risks someone's right is not punishable when he/she is acting with the consensus of the person who is validly entitled to such right".

Moreover, in most Countries, and also in our own, there does not exist to date legislation prohibiting citizens to travel abroad to purchase organs from living donors in Countries where this practice is not considered illegal. The example of Germany¹¹ is to be followed, with the insertion of an extraterritoriality clause prohibiting citizens to purchase organs anywhere in the world, even in those non-European Countries where the trade in organs is legal¹². This is in consideration that this type of commercial transaction between fully capable and consenting adults, even though very different from the use of violence, fraud, threats or abduction, aimed at the procurement of organs, still poses strong moral and legal problematicity also for many of the reasons described above.

However, should the legislator, not deem necessary the establishing of a clause of this kind, he must at least try to provide controls on the method of implementation of organ transplants carried out on the citizen outside his/her own borders, so as to discourage the temptation to travel abroad to obtain an organ by payment.

c) Other actors in this human tragedy, both moral and social, are the donors themselves, generally indicated as victims as they are desperate individuals, in highly vulnerable situations due to the economic situation and the lack of prospects, lured by mediators. We can frequently read of a "colonised" population". By searching on the internet or specialised web it is easy to find "body for sale" ("kidney for sale", "portion of human liver for sale", "lung for sale") and the doors of an increasingly expanding business burst open. In all parts of the world, especially in poor countries the spectrum of potential sellers is extremely wide and it is, above all, continuously and alarmingly in expansion.

Even in cases of personal initiative, the principle that organs can only be given as a gift, a gratuitous act to save or improve the lives of others must be reaffirmed and defended. Faced with these individuals criminal penalties do not, however, seem to be an appropriate and proportionate instrument, taking into account their particular conditions of vulnerability, that call to mind their economic hardship or that of their family members.

d) As regards prevention, it must be considered important to ensure social assistance, and a *welfare* system which are attentive to meeting the basic needs of the population.

To both categories (potential donors and beneficiaries), there should be directed a strong and effective campaign to raise awareness, and to educate to try to make individuals gain awareness of the illicitness of the act, to create a collective consciousness about the consequences of the removal operations and the fundamental rights recognised in order to protect every human person. To make it clear to those who relinquish their body parts that they deprive themselves not only of these, but they endanger their own health, their lives

¹¹ Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben, Abschnitt 7 Straf- und Bußgeldvorschriften, §§ 18 Organ- und Gewebelhandel-19 Weitere Strafvorschriften, 1997. And the Greek Government in 2003 subjected to the attention of the Council of the European Union a proposal for the prevention and repression of trafficking in human organs and tissue making it punishable as a criminal offense for all those involved in transplant tourism, including patients / clients who paid to receive the organ. The Spanish penal code has provided from November 2010 with Article 156bis that whoever receives an organ, aware of its being obtained by illicit trafficking, is punishable with a period of imprisonment from six to ten years.

¹² As in our penal code, Art. 604 provides for the offense committed abroad by an Italian citizen.

and probably even the buyers'. To reiterate that the organ trade is not simply the result of the law of supply and demand in which everyone has an advantage: those who buy, recuperate their health, those who sell, obtain money to improve the necessities of life. Even those who maintain a vision of being owner of the body should not forget that the claim to that right meets well-defined limits within international documents and legal systems and to ask the law to allow negotiation of a fair price for a kidney is contrary to everything that contract theory represents (a free and conscious will is often lacking, also lacking is the object given that organs are not legitimate consumer goods). It is also possible to ask ourselves, "If those who live in conditions of social insecurity and economic neglect on the outskirts of the new world order really are "owners" of their body"¹³.

The buyer must be conscious of the fact that whoever sells an organ in clandestine conditions is likely to reduce their life in terms of duration and that statistics show that before long the person will be in worse than average conditions of poverty. In addition, the buyer should also be aware that in many parts of the world these sellers, who are often young, have to face the mockery and ostracism of the social environment surrounding them¹⁴. Lastly, as the surgeon Ignazio Marino writes, attention should be drawn from the donors/beneficiaries, to the fact "that if a surgeon is so unscrupulous to perform a transplant in full lawlessness and in contempt of the fundamental rules of ethics and deontology, in all likelihood he will not be very meticulous in verifying the compatibility of the donor or other clinical aspects related to this delicate operation, because his interest is purely economical, and the health of the person who ends up in the operating theatre is certainly not close at heart"¹⁵. And, we might add, even after surgery.

e) Pivotal to the operations of transplantation of illegally obtained organs is the organisation which supports the operation: from the illegal procurement of the organ and recruitment of the recipient patient, to the guarantee of health treatment and the necessary transplantation procedures. Solicitation must be regarded as a criminal offense, when committed intentionally, by health care professionals and other individuals (intermediaries/brokers) in order to obtain organs outside the national transplant system, as well as offers of financial gain or comparable advantage to potential donors.

Also to be considered a criminal offense, when committed intentionally, is the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs taken in the circumstances described in paragraph 3a, considering that all these activities are essential stages in human organ trafficking.

In reference to the gravity of the violations linked to human organ trafficking it is appropriate to include the responsibility of commercial companies, public facilities and organisations that may be involved in cases of criminal action committed by any person having the power of management, representation and control inside them. The responsibility of these bodies does not exclude the personal responsibility of the individuals that belong to it.

¹³ N. Scheper-Hughes, *Il traffico di organi*, cit., p. 35.

¹⁴ N. Scheper-Hughes, *Un segreto di dominio pubblico*, VV.AA., *Pezzi di ricambio*, edited by G. Mondadori, Feltrinelli, Milan, 2010, pp. 40 ff.

¹⁵ I. Marino, *Un atto di amore*, in VV.AA., *Pezzi di ricambio*, cit., p. 152.

In all these different situations policies of deterrence must play a significant part, by providing mechanisms focused on increasing the risks and difficulties to carry out the illicit act. Above all increasing the risk means to jeopardize not only the personal assets and/or the personal freedom of surgeons, nurses, technicians, etc., through criminal sanctions but also to affect their professional reputation. As regards this last aspect deontological codes may have an important role in providing for strict penalties for offenders in this sector.

f) The legislator in counteracting these practices should include a ban on all types of advertising which encourage contacts with intermediaries/*brokers*. It is well known that clandestine trafficking relies heavily on websites which connect the donor-organisation-buyer and the net becomes the place for an exchange of information and for globalised negotiation. The control, monitoring and censorship of suspicious websites and of paper mass media is therefore required in order to thwart appealing propaganda and increase the difficulties for the seller to come into contact with criminal organisations.

For this purpose it would be useful to set up research groups specialised in the examination of internet exploitation and virtual traps, which could act as a deterrent for the online publication of advertisements by the merchants of organs.

g) Given the potentially serious consequences of the trafficking of human organs for the mental and physical health of the donors, the Committee sees a need for specific protection of these people. In particular it is deemed necessary that the victims of this market should be kept up to date regarding the state of progress of their files by the competent authorities and that they should be given the opportunity, in accordance with the domestic law of States, to be heard and to receive adequate protection when called upon to provide evidence¹⁶.

An additional commitment is to deter the transition from "victim" to "victimiser". Statistical data show that the brokers are commonly and frequently former sellers of their organs, recruited into the ranks of the mediators by being invited to establish a *partnership* in business and also through the promise of financial gain. This facilitated passage from the precarious conditions in which the donors find themselves, which, as already mentioned, the alienation of an organ is not a solution to their problems. The "intermediaries of the intermediaries" often have within the same social communities more ease in finding potential donors. Blocking this chain of assignments undoubtedly weakens the action of the traffickers, who in this way lose many of their affiliates. It is a feasible method of prevention and gives wide diffusion and prominence to the national and international penalties foreseen for brokers, and thereby increases the risks and costs of conduction of mediation.

¹⁶ As regards the system of penalties and its application valid references on an international and European level can be supplied by the various Conventions set out in note 5. At the national level, in addition to the existing specific regulations in the field of organ removal and transplantation: *Provisions against sexual abuse* (Law 66/1966); *Provisions against the exploitation of child prostitution, pornography and sex tourism as new forms of slavery* (Law 269/1998); *Measures against trafficking in persons and slavery* (L.228/2003) *Provisions relating to the fight against sexual exploitation of children and child pornography also through the Internet* (Law 38/2006); *Ratification and implementation of the Convention and the Protocols of the United Nations Convention against Transnational Organized Crime* (L. 16 March 2006, No. 146).

h) The Committee also emphasises the importance of international cooperation. A system of effective counteraction to a dynamic crime that involves the territory of several States can not be based only on state regulations, but it must be able to rely on judicial and political collaboration as well as the collaboration of the police between the countries concerned. As in other situations of transnational organised crime (take for example narcotrafficking or crimes of pedophilia) collaboration develops from the information given and exchanged between States from the need to centralise investigations and to establish databases devised for organ trafficking¹⁷.

Lastly, not to be overlooked is the need for progressive harmonisation of regulations in order to avoid that a lack or differentiated criminalisation of certain behaviour may prevent or make more difficult international cooperation between the various authorities.

In order to improve the judicial response it is therefore essential to promote more congruous international conventions against trafficking *strictu sensu*, on condition that it may be individuated in its presuppositions and clarified as regards the conduct which characterises it, in short that it is to be defined.

i) Lastly, considering that the practices that do not respect ethical principles are in part a consequence of the global shortage of organs for transplantation, our Country must undertake to support, even financially, programs capable of increasing organ donation from both living and cadaver donors.

It is reiterated¹⁸, therefore, even on this occasion that the solution of the problem related to the sick person could open up health problems for the donor. In certain regulations this is precisely what is taken into account, when this act of generosity translates into a preference criterion on waiting lists in the event of a supervening need for an organ for the actual donor. An indication that our legislators, as well as others, should consider in order to mitigate the risk that the donor may incur a deadly disease caused by the very act that had as its aim the resolution of another person's pathology.

4. Recommendations

4.1. The Committee hopes for the realisation of the project of the Council of Europe to come to an agreement among the various member States with the aim to prevent, combat and criminalise the illegal trafficking of organs, it is a threat of global dimension, which endangers fundamental human rights.

4.2. The Committee believes that, although the idea of a system of regulation is difficult to achieve in the medical and social realities of many parts

¹⁷ In Europe there is Eurojust one of the most incisive EU bodies in the field of European criminal judicial cooperation. Its establishment reflects the need to facilitate coordination between national authorities responsible for criminal prosecution and therefore provide their assistance in investigations relating to serious forms of international and organised crime involving the Member States. Joint investigation teams, in charge of conducting investigations in specific areas, have been established by the European Council at the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (2000). They are composed by the judicial or police authorities of at least two Member States. Also operational are the *Joint investigative teams* of a global nature in order to facilitate the prosecution of criminal offenses and traffickers.

¹⁸ NBC, *Kidney donation from a living donor to a stranger (so-called Samaritan donation)*, 2010.

of the world, especially in poor countries, at least in Europe juridical, international and national regulations can be provided, with the introduction even of types of criminal offences, intended to define organ trafficking, to prevent it and to enforce the principle that the human body or its parts are not commercially tradeable.

4.3. It is desirable for States to work together on an international level to improve the practice of transplantation and organ donation and cooperate, in accordance with the relevant international instruments and their national laws, as far as possible, in order to carry out investigations regarding possible infringements committed on its territory and outside of it¹⁹.

There should also be established, by agreement, with multilateral treaties based on the principle of double incrimination, the mutual recognition of the types of criminal offences, in order to ensure adequate collaboration between requesting Countries and the Countries in which the act was intentionally committed.

4.4. States should strengthen policies designed to encourage organ donation and it is also hoped that there will be cooperation on an international level to promote research into the field of regenerative medicine so that in future the achievement of such targets will make resorting to organ transplants no longer necessary.

¹⁹ In this context it is appropriate to refer to the *European Convention on Extradition* (ETS No. 24/1957) and the *Additional Protocol to the European Convention on Extradition* (ETS No. 86/1979); to the *European Convention on Mutual Assistance in Criminal Matters* (ETS No.30/1959); the *European Convention on the Transfer of sentenced Persons* (ETS No. 112/1983) and the *Council of Europe Convention on laundering, Search, Seizure and Confiscation of the proceeds of crime and financing of Terrorism* (ETS No.198/2008).

Personal remark signed by Profs. Luisella Battaglia, Lorenzo d'Avack, Silvio Garattini, Rodolfo Proietti, Vittorio Possenti and Lucetta Scaraffia

The Opinion recommends the development of an international juridical instrument with the aim and purpose to prevent and combat organ trafficking, to criminalise such acts and protect the rights of the victims of these offenses.

The members of the Committee have come to agree on a number of measures to protect the victims and to provide for a criminal offense for acts that characterise and complete the trafficking of human organs.

However, particularly delicate seems the position of the doctor in the Country of origin, assigned with the duty to provide therapy and assistance, when a request is made by the patient-buyer who has acted in clandestinity. Notwithstanding the obligation of the doctor to provide treatment, one could also consider the obligation to give notice of the illegal activity to the competent judicial authorities in order to launch an investigation.

The NBC, in discussing the problem, while requiring the supervision and responsibility on the part of the health authorities of each Country to ensure transparency and security, has decided not to address the issue regarding the obligation to report the event by the doctor or medical facility. The reasons for this choice are twofold: the appeal to classical medical ethics based on the Hippocratic tradition with its conception of the responsibility of the doctor toward the patient `to the best of his ability and judgment`, on one side. On the other, there is concern that the patient, fearing sanctions, remains in the situation of clandestinity consequently possibly worsening his health.

These arguments, although reasonable, do not include other values that are no less important and ethically respectable, full of public service values, which require specific information useful to the fulfillment of goals nevertheless provided for by law and subject to the control of public security. Above all they do not take into account the fact that this would be one of the few ways available to us to learn about the illegal market in human organs. The ethical obligation to professional confidentiality and the privacy of the patient²⁰, moreover, for doctors, could mean, their having to acquiesce to those committing an offense that is considered a crime against humanity, and "consequently become complicit as they are conscious of the commercial transaction"²¹. Especially since there is a very clear difference in treatment between donor and receiver: while the former is usually left to himself somewhere in the world the latter is monitored and protected by the same doctors that he was receiving treatment from before the illegal transplant.

Even taking into account privacy and professional confidentiality, it can be assumed that a doctor - in the face of conflicting values, both ethical and juridical - should in any case be free to decide according to the best of his

²⁰ For the Deontological Code of physicians, Art. 9 et seq. and the Penal Code Art. 622. However, the law is inclined to believe that even though the doctor is committed to confidentiality, criminal effects occur only for revelations capable of real harm to the patient (undue damage), a situation which would not be present in the event the doctor becomes aware of an offense committed by the patient himself.

²¹ I. Marino, *Un atto di amore*, in *Pezzi di ricambio*, edited by G. Mondadori, Milan, 2010, pp. 151-152.

ability and judgment, reserving the ethical obligation regarding the provision of care in situations of need in order to always ensure treatment.