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„Combating Trafficking in Human Beings for the Purpose of Organ Removal: A Country Analysis of India, Pakistan and the United States of America“

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Abbreviations

CESCR	Committee on Economic, Social and Cultural Affairs
CoE	Council of Europe
HOTA	Human Organ and Tissues Transplant Authority
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPC	Indian Penal Code
NCRB	National Crime Records Bureau
NGOs	Non-Governmental Agencies
ODRIA	Organ Donation and Recovery Improvement Act
ONT	National Transplant Organization
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
PMP	Per Million Population
TDCs	Transplant Donor Coordinators
THBOR	Trafficking in Human Beings for the Purpose of Organ Removal
THOA	Transplantation of Human Organs Act
TVPA	Victims of Trafficking and Violence Protection Act
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNTOC	United Nations Convention against Transnational and Organised Crime
US	United States of America
WHO	World Health Organisation

INTRODUCTION

Trafficking in Human Beings for the Purpose of Organ Removal (THBOR) is one of the most heinous crimes and forms of human trafficking in our present day society. Since the introduction of organ transplantation there has been a growing shortage of organs for those who need them the most. Everyday more individuals are in need of an organ transplant due to renal failure or liver disease, with the largest demand being for organs being kidneys. However, many people are not willing to donate an organ especially while living because of the known medical side effects and risks that come from living organ donation.

However, the removal of organs is nothing new. Before transplantation there was body snatching or grave robbing for the purpose of dissection or research. The first case of grave robbing is recorded in 1319[1], however it did not become popular until later centuries. Body snatching occurred relatively quickly after the body had been placed in the grave as the fresher the body the better it was for medical schools to use for research, study and the teaching of anatomy.[2] In the beginning dissection was a punishment that was kept for the worst offenders, while it was often seen that those who were hanged would also be dissected.[3] Despite the use of hanged criminals as tools for medical research and education there was still a shortage of bodies which brought about the human body being seen as a commodity and the phenomenon of body snatching began.

When items from one individual's body began being transplanted into another it was not organs immediately. Before organ transplantation came the transplantation of human teeth. With little concern for side effects wealthy clients would line up at dentists to

[1] J. B. Frank, 'Body Snatching: A Grave Medical Problem', *Yale Journal of Biology and Medicine*, vol. 49, no. 4, 1976, p. 399.
[2] R. Richardson, 'Human Dissection and Organ Donation: A Historical and Social Background', *Mortality: Promoting the Interdisciplinary Study of Death and Dying*, vol. 11, no. 2, 2006, Available from Taylor and Francis (accessed 2 May 2018), p. 154.
[3] ibid., p. 155.

have teeth from child 'donors' transplanted into their mouths.[4] Transplantation was not rudimentary forever, as it was quick to advance. The first successful transplant of a kidney occurred in 1954 between twin brothers[5], after this first successful transplant there were more to follow. This was a momentous turning point in the field of medicine however it brought about many struggles and harsh realities for people around the world. With the establishment of successful transplantations there was also a heavy shortage of organs for those who needed them. Resulting in the return of the thought that a body can be a commodity and the selling and trafficking of organs began. It is now one of the most horrific crimes that could happen to a person. As the majority of individuals who have their organs removed to be transplanted in another are in dire circumstances that lead them to make this decision.

1. Purpose

The end of THBOR is something that should have occurred many years previous. However it still very prevalent today and is becoming increasingly problematic. There are many societal structural problems that feed into THBOR as well as cultural and political problems. Therefore in many ways until these societal problems are addressed there is little end in sight for this extreme human rights violation. It is important to delve deep into the problems that lead people to be trafficked for the purpose of organ removal and discuss ways in which this can be combated.

Currently in the subject there exists a number of international documents that touch on the subject of THBOR. These documents help to define what exactly can be considered THBOR. However, there is ongoing debate on what can be considered THBOR and what cannot be. That topic will also be discussed upon in this thesis in showing the separation of THBOR and organ trafficking and investigating the definition provided for in the Palermo Protocol. The purpose will also be to show the importance of organ donation and

[4] ibid., p. 158.
[5] C. F. Baker and J. F. Markmann, 'Historical Overview of Transplantation', *Cold Spring Harbor Perspectives in Medicine*, no. 3, 2013, Available from NCBI (accessed 29 May 2018), p. 8.

raise awareness of THBOR for those with little knowledge of the topic. In my research I have discovered that although a number of people know about illegal organ removal their knowledge tends to be very limited and they are not aware of a difference between organ trafficking and THBOR. Awareness raising in this topic is also very important that the persons who are victims of THBOR are seen as being victims of trafficking. As in many situations they are not seen as victims because they receive money for their organs even if that is not a sufficient amount or in turn prevents them from participating in normal daily life. This however will be touched in further detail later in the paper.

Along with a detailed discussion on the definition of THBOR this thesis seeks to discuss the national legislation that exists within the three countries of focus. As each country has established different laws in regards to illegal organ removal and sale it is pertinent that they are analysed. Laws pertaining to trafficking in human beings will also be discussed and evaluated in order to clearly dictate the connection between the two that results in THBOR. The analysis will aim to provide recommendations to the focus countries on how to better the situation for persons who are victims of THBOR and also for those who may fall victim to this heinous crime in the future. The thesis will also provide recommendations on how to decrease the demand for illegally secured organs.

All of this information will be used to answer the main question of the thesis which is:

> *How and to which extent have states responded in turn with their state obligations in the protection of persons who are trafficked for the purpose of organ removal?*

2. Methodology

In order to write this thesis many different sources were used. The main sources were academic articles with a focus in human rights as well as international covenants, declarations, protocols and more. I did consult medical journals in order to understand

the results of organ removal and the negative implications of the removal. These documents will be used to evaluate India, Pakistan and the United States of America to determine if they are performing their state obligations to the fullest extent. This thesis will have a strong legal approach as there will be an analysis of the States individual laws and acts and their effectiveness in curbing the problem. I used qualitative data for this research, as I did not see the usefulness of quantitative data for this thesis topic except to show the difference in organ donation rates per country.

3. Structure

In the first chapter I will analyse and define what Trafficking in Human Beings for the Purpose of Organ Removal is along with the inclusion of the international documents which discuss the topic by using examples. I will also discuss the separation of THB for the purpose of organ removal and organ trafficking. To conclude the first chapter I will discuss the state obligations of India, Pakistan and the United States. The second chapter will consist of an analysis of the human rights that could be violated during the act of THB for the purpose of organ removal. The specific human rights that I will focus on are:

- Right to Health
- Right to Remedy
- Right to Work
- And Non-punishment of Trafficking Victims

The third chapter will focus on the two supply states, India and Pakistan and their responses to the act. This will include the legal documents that both states have implemented in regards to organ removal and trafficking in human beings as well as an analysis of their application. The fourth chapter will continue with a country analysis however, this chapter will approach the United States of America as the demand state. The legal documents that have been implemented as well as an analysis of their response to THBOR.

The fifth chapter will consist of the overall conclusions gained from the analysis of the individual countries, their legal documents and the case studies provided for in the first chapter. This will also consist of a determination of whether or not the states have fulfilled their state obligations. The sixth and final chapter will consist of good practices from other countries in ways that could help to decrease THBOR and will also consist of recommendations for the supply and the demand countries on how to combat the crime.

1. Definition of Trafficking in Human Beings for the Purpose of Organ Removal

Trafficking in human beings is no new phenomenon. Over centuries, across cultures and lands people have been transported often against their will. However the definition of what exactly can be considered trafficking in human beings in constantly up for debate. This is due to the fact that there are many different ways in which a person may be trafficked. There is only one definition which is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) which is written in Article 3 as:

> "'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."[6]

To look further into this definition examples and personal experiences will be provided from both India and Pakistan on organ removal and why according to the definition provided for in the Palermo Protocol it could be considered THBOR.

In determining if something can be considered trafficking or not the first thing to do would be to look at the Palermo Protocols definition of trafficking. The key aspects that can be pulled from the definition is that in order to consider something trafficking it must first meet three criteria. The criteria includes there being an act, a means, and a purpose in order to qualify as an act of trafficking. The first aspects consists of an act, this can be regarded as the first section of the definition in which it discusses what is done, such as recruitment or transfer of an individual. Following the act is the means which is the next section of the definition in how it is done. This can be a range of reasons from coercion, threat or abuse of a vulnerability to the offering of money to gain consent. The final criteria is the purpose, in this case specifically the purpose is the

[6] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003), 2237 UNTS 319, Article 3.

removal of organs. It is also important to note that trafficking in human beings for the purpose of organ removal does not only occur in a transnational aspect it also occurs nationally.[7]

In many instances illegal organ removal occurs when a broker offers money to an individual for their organs. Despite the receival of money it can still be classified as THBOR. The discussion of consent is challenging and despite not being explicitly addressed in the Palermo Protocol it is mentioned in the Legislative guide to the Convention and Protocols. In the guide it is stated as "Once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence."[8] This payment would therefore fall under the means criteria of trafficking as the payment can be considered as coercion or as taking advantage of someone who is in a vulnerable position. The Vienna Forum in 2008 discussed THBOR as "a medical human rights abuse and paid donations were often inherently exploitative".[9] Often many individuals in India and Pakistan agree to have their organs removed for a sum of money because of their current monetary status. Completely unaware of the challenges and struggles they will face after their organ is removed.

Across the world it is often the poor and vulnerable who are the targeted for organ removal via monetary or material gains.[10] In many ways the individuals who are targeted see the money they are offered as the only way to get out of their current situation. In Pakistan brokers often make promises for better futures.[11] The majority of these individuals are

[7] D. Budiani-Saberi and S. Columb, 'A human rights approach to Human Trafficking for Organ Removal', *Medicine, Healthcare and Philosophy*, vol. 16, no. 4, 2013, Available from NCBI (accessed on 27 May 2018), p. 904.
[8] UNODC, *Legislative guides: For the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto*, New York, 2004, p. 270.
[9] The United Nations Global Initiative to Fight Human Trafficking, 'The Vienna Forum Report: a way forward to combat human trafficking', 2008, http://www.un.org/ga/president/62/ThematicDebates/humantrafficking/ebook.pdf, (accessed 22 July 2018).
[10] ibid.
[11] F. N. Yousaf and B. Purkayastha, ''I am only half alive': Organ trafficking in Pakistan amid interlocking oppressions', *International Sociology*, vol. 30, no. 6, 2015, available from Sage Journals (accessed on 17 February 2018), p. 642.

also illiterate[12], the illiteracy is a disadvantage that the organ brokers take advantage of when negotiating the organ removal. With no other way to make money they are an easy target for the brokers. However, the consequences of having their organs removed are dire. Often after the removal the men become more prone to disease and fall ill are not able to work after their kidney is removed which leads to more loans being taken out and then even more debt gained by the families.[13] This is a horrific situation that typically leads to the person being worse off after the organ removal than they were before.

In 2016 there was a large case involving individuals in Pakistan who had been trafficked for the purpose of organ removal. 24 people were rescued from an apartment where they were being held by the kidney gangs in Rawalpindi, Pakistan. However, this case was unlike many others. This was because the majority of persons who were being held at the apartment, some as long as four months, had been promised jobs.[14] The entire time the persons were held in the apartment they were not allowed to leave and were told the police would be, they were also told they would receive 2,300 pounds upon the removal of their kidneys. [15] One man said how during the months he spent in captivity his family suffered and in the end they were left penniless.[16]

To understand whether or not this can be considered THBOR the three conditions mentioned in the Palermo Protocol must be met. The first aspect is an act, in this situation it consists of the recruitment of the individuals to go to the city for jobs and can also consist of the harbouring aspect. The means of this case are the deception from the promise of jobs and also the threat that the police would beat them up and kill them if they escaped or said anything. The final element of this is the purpose, which in this case is the removal of organs. Despite the fact that the persons were offered money upon the removal of their kidneys this is still considered THBOR because it meets the three trafficking criteria. In the scenario that a person who is offered money to sell their kidney

[12] ibid., p. 643.
[13] ibid., pp. 644-645.
[14] R. Evans, 'Pakistani police rescue 24 from organ trafficking gang', *BBC*, 24 January 2017, Available from http://www.bbc.com/news/health-38722052, (accessed 12 April 2018).
[15] ibid.
[16] ibid.

the three conditions can be looked at in another way. In this way the act is the recruitment of the person but also the forging of documents for it to seem legal. The means is the use of the payment to coerce the individual as they are in a situation of vulnerability and payments to garner consent of a person. The final act the purpose is organ removal.

It is a similar story in many cases in India. As work becomes harder to find and desperation ensues a person becomes more likely to consent to having their organ removed in exchange for monetary payment due to debt[17]. However that in India the majority of organ sellers are women who sold their kidney during a time of family struggles so that the men in the family would be able to continue working.[18] India was often regarded as a hotspot for organ exploitation has seen a decrease in foreign transplants since the enactment of the 1994 law banning the organ trade, however this decrease in India has caused an increase in neighbouring countries such as Pakistan and the Philippines.[19] The selling of one's organs is often common knowledge in India. It is often seen that former organ sellers will provide information and often there are multiple brokers that are all placed in one town or village[20], very clearly seeking out poor, struggling villagers. The most commonly reported reason for the organ sale is to relieve incurred debt which resulted from marriage, family deaths, lack of work, or medical bills.[21]

Despite women making up the majority of those who sell their organs, men also participate in the act. One case is of a young man with very little schooling who after moving to the main city for work to support his family had his organ removed. His name Jatav and the meagre earnings he was making in the city was not enough to support his

[17] D. A. Budiani-Saberi et al., 'Human Trafficking for Organ Removal in India: A victim-centered, evidence-based report', *Transplantation*, vol. 97, no. 4, 2014, Available from NCBI (accessed 18 February 2018), p. 381.
[18] Yousaf and Purkayastha, ''I am only half alive'', p. *643.*
[19] Y. Shimazono, 'The state of the international organ trade: a provisional picture based on integration of available information', *Bull World Health Organ,* vol. 85, no. 12, 2007, Available from Semantic Scholar (accessed on 26 May 2018), p. *957.*
[20] Budiani et al., 'Human Trafficking for Organ Removal in India', p. 381.
[21] ibid., p. 383.

family back home who had incurred more than 10,000$ worth of debt.[22] Jatav tells of how he was sweet talked into having his kidney removed being told that he would be compensated enough to pay off his family's debt and help with finding a better job after, however, in the end he never received any money and was ignored by the people who originally promised to help him.[23] Jatav was brave though, when he heard of another transplant being planned he tipped off the police and the operation was ended and the entire scheme of the organ transplants is now referred to as the "Great Indian Kidney Racket" and now Jatav is under police protection while he looks for a job.[24]

In this case the act is the recruitment and transport of the individual as he was brought to the medical centre for the procedure. The means is the deception and fraud from the promise of money and a job. The promise of money and a job can also be seen as the taking advantage of someone who is in a dire situation in order to gain consent. Therefore as mentioned before from the legislative guide that when deception, coercion or one of the other mentioned means of the protocol consent is no longer considered applicable. The final condition which consists of the purpose of exploitation is the removal of organs. Hence, this could be considered a case of THBOR as the criteria falls in line with the Palermo Protocol.

In other situations some individuals do not know that their organs are even being removed. While waking up without a kidney or other organ is thought to be a myth, just on the outskirts of Delhi that was exactly the case. When a thirty-three man woke up without a kidney he was the victim of THBOR, organ theft. Multiple other men were also there and their stories were all the same. They had been promised food, shelter and work and in the end they were betrayed. They had been brought to an apartment with medical equipment for blood tests for work which was what they were told and after receiving a

[22] S. Bengali and M. N. Path, 'Duped into selling his kidney, this 23- year old exposed an illegal organ racket in India', *LA Times*, 15 September 2016, http://www.latimes.com/world/la-fg-india-kidney-snap-story.html, (accessed 27 April 2018).
[23] ibid.
[24] ibid.

shot they woke up in excruciating pain to find their organs removed[25]. This case discusses the deception of those who had their organs removed. The men in this situation are direct victims of THBOR because they had no idea their organs were being removed as they simply thought they were undergoing medical tests for the jobs they were promised.

1.1. The Demand behind Illegal Organ Removal

Increasing rates of renal failure, liver disease and other illnesses have expanded the need for organs for transplantation. In many areas around the world there exists limited resources for transplant organs. However, the United States of America (US) is one country that leads the demand for organs. Overall the possibility to ever end the need for organ transplants is far from possible. Organ failure cannot always be predicted, it can strike at any time from children and adults to the elderly and the cause is not always easy to determine. In the US there are 114,893 people currently awaiting an organ transplant[26], while even more are awaiting organs in India, many of those people may never receive the live saving organ they so desperately need. Everyday more people are being added to the list which only increase the ever widening gap between supply and demand.

Often in healthcare rich countries there is a drastic difference between the supply and demand of organs for transplant. The US being one of the wealthiest countries in the world is struck very hard with the lack of organs for transplantation. In regards to organ donation the US has an opt-in policy.[27] The opt-in policy is a simple policy in which a person can decide that when they die their viable organs will be removed and transplanted into another person. A person can opt-in for organ donation either in the hospital if they are undergoing medical or care or can do so before. Such as in New York State when you receive a driver's license you have the ability to decide then if you will be an organ donor

[25] K. Russo, 'Indian Victims Relate Horror of Kidney Theft, *ABC News,* 1 February 2008, Available from http://abcnews.go.com/Health?story?id=4224506, (accessed 19 May 2018).
[26] Organ Procurement and Transplantation Network, [website], 2018, https://optn.transplant.hrsa.gov/, (accessed 20 April 2018).
[27] The Economist, [website], 2008, https://www.economist.com/node/12380981, (accessed 24 April 2018).

and you select the appropriate box.[28] The other option that exists is when you are in the hospital and unresponsive or brain dead your immediate family members have the ability to decide upon your behalf for your organs to be donated.

The lack of donated organs and individuals unwilling to become organ donors is shocking as it is known that by participating in organ donation you are potentially saving the life of not just one but many people. As by donating you could potentially save the lives of eight people and help a number more with tissues.[29] There have been studies done on why persons decide not to be organ donors. One of the most reason for refusal to become an organ donor is the belief that it will preclude you from the afterlife in terms of religious reasons. This is an interesting topic because in many religions such as Christianity and Islam organ donation is seen as one last act of selflessness in order to help another being but some claim religion as a reason for not to donate in order for the body to remain intact for burials.[30] However, one study that was done listed the mistrust of the medical profession as one of the largest reasons for the refusal to become an organ donor[31]. One reason behind medical mistrust was that by becoming an organ donor the doctors would be less likely to save them or would prematurely declare death in order to remove the organs.[32]

Following with this belief the second most reason to not become an organ donor was belief that the rich or that celebrities would be favoured in the receiving of the organs.[33] Many people also did not want their organs to go to those who caused the illness and could have prevented getting sick such as smokers and alcoholics.[34] Another reason behind lack of donated organs is that individuals are worried their organs may go to a

[28] Department of Motor Vehicles, [website], 'Organ Donation in New York', 2018, https://www.dmv.org/ny-new-york/organ-donor.php, (accessed 24 July 2018).
[29] UPMC Health Beat, [website], 'The Impact of One Organ Donor', 2015, https://share.upmc.com/2015/04/the-impact-of-one-organ-donor/, (accessed 24 July 2018).
[30] ibid.
[31] S. E. Morgan et al. 'In their own words: The reason why people will (not) sign an Organ Donor Card', *Health Communication*, vol. 23, no. 1, 2008, p. 26.
[32] ibid.
[33] ibid.
[34] ibid., pg. 29.

foreigner rather than to someone from within the US as there are cases of foreigners travelling to the US to receive deceased organs[35] there are no reports of foreigners travelling to receive organs from living donors. There were others reasons behind the unwillingness to become an organ donor however those were mentioned in sparingly low numbers. The lack of supply leads to persons searching for the organs they so need elsewhere which leads to the phenomenon that is known as transplant tourism, an act where a person travels to another country to have an organ transplanted.

In India the main reason behind the lack of donated organs is the aspect that for a living donation it must be a family member providing the organ.[36] In many cases it is unlikely for a family member to donate the organ which results in a massive shortage of organs for transplantation. Unfortunately, there is no understanding of why family members refuse to donate organs. This is true for not only living donation but also deceased donation as many individuals do not make the decision before hand and then it is left up to the family.[37] In some scenarios and religions it is important for the body to remain intact for burial which makes organ donation post-mortem something that does not occur often which increases the lack of organs available for donation.[38] The reasons behind refusal to become an organ donor are in the end the decision of every individual person. In order to increase the number of those willing to be organ donors in the United States we must work for a better understanding of what organ donation is, and work to curb the fears that exist within society of organ donation.

[35] M. L. Volk et al., 'Foreigner's Traveling to the U.S. for Transplantation May Adversely Affect Organ Donation: A National Survey', *American Journal of Transplantation*, vol. 10, 2010, p. 1470, https://pdfs.semanticscholar.org/f99b/c65f52b7e491ce962b81769d57ba15ff00c3.pdf, (accessed 24 July 2018).
[36] Bengali and Path, 'Duped into selling his kidney'.
[37] J. Groot et al., 'Decision making on organ donation: the dilemmas of relatives of potential brain dead donors', *BMC Medical Ethics*, vol. 16, no. 64, 2015, p. 10, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4574465/pdf/12910_2015_Article_57.pdf, (accessed 22 July 2018).
[38] The Economist, [website], 2008, https://www.economist.com/node/12380981, (accessed 24 April 2018).

One of the main demands for organs in India and Pakistan is for use in transplant or medical tourism.[39] Unfortunately in regards to transplant tourism, it is an often occurrence that after the transplantation the health of the person who received the organ diminishes,[40] because the organ being received may not always be a match for the recipient or a healthy organ for transplantation. This establishes an ethical dilemma for the doctors in the US when the patient returns and needs follow up medical care.[41] In the case of one individual the botched transplantation he had overseas caused him to need a number of surgeries and procedures and even a whole new organ in the end.[42] While it often causes medical problems for the recipient it also negatively impacts those who are providing the organs. As in one circumstance persons who are providing the organs and receiving approximately 800$ while the person who is receiving the organs is purchasing it for 100,000$[43] and potentially even more. This gross disparity between purchase price and what the person is receiving is appalling. Despite the laws that exist in multiple countries where transplant tourism exists it still occurs underground.

Transplant tourism negatively impacts those who are providing the organs because they are often victims of THBOR. One of the main ways as previously stated is that those who become victims of THBOR are coerced, bribed, forced or using other means are brought into the act of organ removal and that is often how individuals are brought into providing organs for the use in transplant tourism.[44] One of the main problems that comes with living organ donation that the victims participate in is declining health conditions after

[39] Directorate-General for External Policies, 'Trafficking in Human Organs', European Parliament, July 2015, p. 8, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf, (accessed 22 July 2018).
[40] J. A. Akoh, ''Key Issues in Transplant Tourism', *World Journal of Transplantation*, vol. 2, no. 1, 2012, p. 14, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3812925/pdf/WJT-2-9.pdf, (accessed 1 July 2018).
[41] T. D. Schiano and R. Rhodes, 'The Dilemma and Reality of Transplant Tourism: An Ethical Perspective for Liver Transplant Programs', *Ethics and Liver Transplantation*, vol. 16, 2010, p. 114, https://aasldpubs.onlinelibrary.wiley.com/doi/epdf/10.1002/lt.21967, (accessed 4 July 2018).
[42] ibid.
[43] ibid.
[44] E. S. Albaran, N. Duarte and D. Santos, 'Transnational Trafficking of Organs Tissues and Cells', *The Global Observatory of Transnational Criminal Networks*, Research Paper no. 13, 2017, p. 14, https://www.researchgate.net/profile/Eduardo_Salcedo-Albaran/publication/322341030_Transnational_Trafficking_of_Organs_Tissues_and_Cells/links/5a54ebcea6fdcc30f86b84f2/Transnational-Trafficking-of-Organs-Tissues-and-Cells.pdf, (accessed 27 July 2018).

the removal.[45] Those who have their organs removed for the use in transplant tourism and those who are victims of THBOR often do not receive proper medical care in the wake of the removal which further negates their health.[46]

1.2. Separation of Trafficking in Human Beings for the Purpose of Organ Removal and Organ Trafficking

There are key separations between THBOR and organ trafficking or trafficking in organs. One of the key differences exists in which THBOR is discussed in the Palermo Protocol however organ trafficking or trafficking in organs is not. A joint study by the Council of Europe (CoE) and the United Nations (UN) further evaluates the two. It is important to separate THBOR from organ trafficking because they both require different responses to combat them. In terms of the act the one thing that separates them is that in THBOR always involves human trafficking however trafficking in organs can occur without the act of human trafficking.[47] While the definition for THBOR is clearly stated in the Palermo Protocol there is no internationally agreed upon definition for trafficking in organs.

The CoE Convention against Trafficking in Human Organs provides for a definition on what trafficking in organs is, and is the only international treaty to do so.[48] The definition provided for here is stated as:

> "The illicit removal of organs: - removal without the free, informed and specific consent of the living donor, or, in the case of the deceased donor, without the removal being authorized under its domestic law, OR - where in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage, OR - where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage. The use of illicitly removed organs; The illicit solicitation or recruitment (of organ donors or recipients), or the offering and requesting of undue advantages; The preparation, preservation,

[45] Akoh, ''Key Issues in Transplant Tourism', p. 14.
[46] Schiano and Rhodes, 'The Dilemma and Reality of Transplant Tourism', p. 114.
[47] UNODC, 'Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal', Vienna, 2015, p. 17.
[48] ibid., p. 18.

> storage, transportation, transfer, receipt, 19 import and export of illicitly removed human organs; Aiding or abetting and attempt."[49]

This definition helps to further clarify what trafficking in human organs is. A key aspect of this is that trafficking in human organs can occur without trafficking in human beings. In order to be considered trafficking in human organs it must occur illicitly without consent of either the living or deceased donor. It also includes the receiving of any financial gain or other advantages and the illicit recruitment of donors. It also consists of the transport, harbouring, sale and more of organs. Despite this definition in some ways seeming to fall into line with the Palermo Protocol definition there are some stark differences. In the CoE definition there lacks the deception, coercion or other means that are necessary in order to qualify as THBOR. The two definitions seem to be easily differentiated in many cases however the two terms are used interchangeably and create problems for law enforcement investigating cases.[50] In many cases special effort[51] is needed in order to prove whether it is THBOR or organ trafficking, however more effort is needed to prove THBOR due to the three requirements that need to be matched in order to be classified as THBOR.

One argument that could be made in terms of these definitions is the act of payment. As the CoE definition includes financial gain as criteria for trafficking in human organs one can argue that if a person receives any sort of payment for their organs than it cannot be considered THBOR. The financial gain can only be looked at from this aspect if the three criteria of trafficking are not met. If there is no coercion, deception, or taking advantage of a vulnerability behind the financial gain or payment then it cannot be considered THBOR, however it can be classified as trafficking in human organs. If any of those factors exist and the other two factors of the act and purpose then it is to be considered trafficking. The differences between THBOR and trafficking in human organs is hard to differentiate without clear knowledge of the subject and it would be of key importance to increase the knowledge on these two subjects especially for those who are investigating

[49] ibid.
[50] ibid., p. 19.
[51] ibid.

claims of THBOR and organ trafficking in order to be able to acknowledge the differences.

1.3. State Obligations

1.3.1. India and Pakistan

Every State has requirements or obligations to their citizens. India and Pakistan who act as the supply countries are the two in which the majority of organs come from.[52] These two countries have the main obligation to protect, the private person as well as a group has the right to be protected from any human rights violation and that is the responsibility of the government. The State must perform its obligation to protect those residing within their borders from human rights violations by third parties.[53] Every person residing within a States territory has a right to recognition as a person before law which would therefore grant the person the right to be protected by that State.[54] This encompasses all persons regardless of their nationality or other factors.

The obligation to protect is strongly discussed in the Palermo Protocol. The protocol specifies that States must provide assistance and protection to victims of trafficking. Some of the obligations that are stated in the protocol are that the State should consider the implementation of measures to assist in the recovery of the victims, the providing of information on court or administrative proceedings, the protection of privacy, providing physical safety for the person while they are within state territory and the ability to gain compensation for the damages they suffered.[55] This section of the protocol discusses how States should respond after persons are found to be victims of THBOR. This involves a

[52] D. Campbell and N. Davison, 'Illegal Kidney Trade Booms as new organ is sold every hour', *The Guardian*, 27 May 2012, https://www.theguardian.com/world/2012/may/27/kidney-trade-illegal-operations-who, (accessed 27 June 2018).
[53] OHCHR, Fact Sheet no. 31 Right to Health, Geneva, 2008, https://www.ohchr.org/Documents/Publications/Factsheet31.pdf, (accessed 2 May 2018), p. 26.
[54] International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976), UNTS 171, Article 16.
[55] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003), 2237 UNTS 319.

high level of security and protection for the individual person in order to keep them safe from any harm that could come.

The protocol goes further as well to discuss the obligations that the State has before the act of trafficking takes place. Protection prior to the act of trafficking is discussed upon from articles 9 to 13. Article 9 states that states must establish policies, programmes and other measures in order "to prevent and combat trafficking in persons; and to protect victims of trafficking in persons, especially women and children, from re-victimization."[56] India and Pakistan have the obligation to protect the people that reside within their borders whether residents or not from becoming or being re-victimised as victims of trafficking. The protocol states the necessity behind increasing education and awareness of exploitation and also the need for cooperation between governments and Non-governmental organisations (NGOs) in order to better protect those who are vulnerable. Article 10 discusses the need for interagency and governmental support across borders to tackle the crime of trafficking. It continues on to discuss that law enforcement needs to be trained in prevention of trafficking, prosecution of traffickers, and protection of victims of trafficking.[57]

Article 11 states that States must increase control of their borders and increase security measures to prevent trafficking across borders. A good establishment in the protocol is the desire for States to consider establishing in accordance with their domestic law the refusal to allow entry into their country to persons who have known connection or involvement with violations listed in the protocol.[58] This is a good step in victim protection measures if the states follow through with the suggestion. The last two articles that discuss protection are about legal documents. Article 12 says that States must take all necessary measures to ensure that their documents are secure and hard to manipulate or fake and Article 13 says that upon request of another State, one State must ensure the validity of a travel or personal document that is suspected in the use of trafficking. This

[56] ibid., Article 9.
[57] ibid., Article 10.
[58] ibid., Article 11.

is extremely important for THBOR. In India specifically organs can only be transplanted within the family so for victims of THBOR documents are forged in order for them to be seen as family members of the recipient[59] which is a direct violation of the Palermo Protocol.

Both States have made strides to uphold their obligation to protect in some ways. There has been legal implementation in national legislation in both India and Pakistan to curb the sale of illegal organs. Despite this stride there has not been the introduction of legal standards to protect those who are trafficked for the purpose of organ removal. The only international legal measure that specifically relates to THBOR and victims of THBOR is the Palermo Protocol, however, the Protocol has been signed and ratified in India it has not been signed by Pakistan.[60]. The crime continues to happen in both countries, and as shown later in the analysis of legislation chapter neither country is fully performing its obligation to protect.

The obligation to fulfil consists of the States taking positive actions to promote, facilitate and provide the rights[61] granted to those residing within their borders. To achieve this obligation States must introduce legislative, judicial and educative measures. Both countries have implemented legislative measures to try and combat illegal organ removal and sale and have had some success with the legislation which will be discussed in further detail in forthcoming chapters. In what is known as India's Great Kidney Racket in Dehradun the lead doctor behind the illegal acts was sentenced to 7 years imprisonment for the illegal activities.[62] However, a year into his sentence he was granted bail and

[59] S. Sharma, 'Why kidney rackets in India flourish with impunity', *Hindustan Times*, 4 October 2017, Available from https://www.hindustantimes.com/health/why-kidney-rackets-in-india-flourish-with-impunity/story-QeqPZEFqdRU7EtThQpuwCK.html, (accessed 3 May 2018).
[60] United Nations Treaty Collection, [website], https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en, (accessed 27 July 2018).
[61] B. Saul, 'Unpacking the legal obligation to respect, protect and facilitate the work of ESC rights defenders', ISHR, [website], 2016, para. 13, https://www.ishr.ch/news/unpacking-legal-obligation-respect-protect-and-facilitate-work-esc-rights-defenders, (accessed 8 July 2018).
[62] N. Pant, 'The fall, rise and fall of kidney racket kingpin Dr. Amit Kumar', *Hindustan Times*, 17 September 2017, Available from https://www.hindustantimes.com/india-news/the-fall-rise-and-fall-of-kidney-racket-kingpin-dr-amit-kumar/story-hgMheixL8H9l6k1KTNeNCN.html, (accessed 5 May 2018).

evaded police until September 2017 when he was arrested again and was accused of continuing the illegal operations and sale of organs.[63] He is set to go to trial again for his crimes. Pakistan has also seen some success in their obligation to fulfil with the arrest of two doctors, and two foreigners for their part in the illegal sale of organs.[64]

Despite this seemingly good occurrence there is also a glaring failure that exists with this case. As the two doctors had previously been involved with the illegal sale and implementation of organs[65] it can be seen as Pakistan failing in their obligation to fulfil in the prior years the doctors were knowingly involved in the trade and they did nothing to prevent those doctors from continuing to participate in the crime such as investigative follow ups to check in on what they are doing. With this India and Pakistan are making strides towards the obligation to fulfil. India and Pakistan have the obligation to protect against THBOR as well as the proceeding rights that are violated as a result of this. Such as the right to health, medical care, remedy and non-prosecution.

1.3.2. The United States of America

The US is in a different situation in regards to their State obligations. This is primarily because THBOR often does not occur within the States borders. While India and Pakistan have the obligation to protect against THBOR the US has a different take on the problem because they are in a different sector of it. The participation of the US in THBOR is primarily a position of need or demand. There is a weak supply of organs for organ donation in the US creating a high difference between the supply and demand. Due to this many US citizens, or residents travel to foreign locations in order to purchase an organ for transplantation.[66] The US has obligations to the persons residing within their borders however these obligations do not fully extend to those outside of their borders. Though,

[63] ibid.
[64] S. Hasnat and S. Cheema, 'FIA busts illegal organ trade gang in Lahore', *Dawn*, 30 April 2017, Available from https://www.dawn.com/news/1330209, (accessed 29 May 2018).
[65] ibid.
[66] K. A. Bramstedt and J. Xu, 'Checklist: Passport, Plane Ticket, Organ Transplant', *American Journal of Transplantation*, vol. 7, 2007, p. 1698, https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1600-6143.2007.01847.x, (accessed 24 July 2018).

if an individual from one of these countries or another was to be brought to the US for the removal then the US has the obligation to protect and fulfil the rights of those persons.

Despite this the US does have some obligations to those residing within their borders. The main obligation for the US would be to fulfil. The right to an adequate standard of living is primary to US citizens as it includes the right to health. The obligation to fulfil consists of the state adopting legislature, judicial, administrative, promotional and budgetary measures in order to fully realise the rights[67] of the people. With the high need for organs in the US and the health problems that cause the need for the organs not being addressed it can be determined that the US is not completing its obligation to fulfil. If the US was proactive in addressing the organ shortage then by effectiveness could decrease the demand for organs procured from victims of THBOR. The obligation to fulfil would also consist of implementing measures to disallow/prevent US citizens or residents from taking advantage of those in foreign countries for their organs. Fulfilment can also consist of measures to educate those residing within the US on the importance of organ donation which could curb the need for illegally secured organs.[68] This is stated by the Palermo Protocol in which the country has a role in terms of decreasing the demand for THBOR and could fulfil this by implementing the above measures and by establishing legislation that punishes those involved in trafficking.

Within their borders as well though the US has the obligation to protect those individuals who are brought to the US for the purpose of organ removal. There has only been one known case of individuals being brought into the US for the purpose of organ removal and that can be accustomed to the popularity of transplant tourism where the US national travels abroad for the organ transplantation. This case involved Israeli nationals being brought to the US in order to provide organs[69] to desperate buyers in the US. The US has an obligation to protect those who are trafficked into the US for the purpose of organ

[67] OHCHR, Fact Sheet no. 31 Right to Health, p. 27.
[68] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9.
[69] D. Porter and C. K. Johnson, 'First Case of Organ Trafficking in US?', *NBC News*, 24 July 2009, http://www.nbcnews.com/id/32132371/ns/us_news-crime_and_courts/t/first-case-organ-trafficking-us/#.Wz8ofyN96uU, (accessed 6 July 2018).

removal. The state according the Palermo Protocol has the obligation to protect those who are trafficked and protect them from anything that can occur after the act of trafficking happens.[70]

There are many cases of THBOR happening across the world. As shown many of those cases are present in India and Pakistan with one specific case happening in the US. The demand behind THBOR exists because of many different reasons particularly the lack of organs available for transplantation. THBOR is directly approached by the Palermo Protocol which encourages States to do what they can to combat it. The States also hold particular obligations in regards to those who are victims of THBOR. It is important to discuss the rights of the victims that may be infringed upon because of THBOR. This will be approached in the following section.

[70] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003), 2237 UNTS 319.

2. Rights of the Exploited

Multiple human rights conventions, covenants, protocols and more have been established which explicitly state the rights that individuals possess. Despite the widespread nature of these conventions the rights listed in them are often interfered with. For this thesis the most relevant covenants are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) as well as the Palermo Protocol and also the Universal Declaration of Human Rights (UDHR). However, it is important to note that the US has signed but not ratified the ICESCR therefore they cannot be held accountable for violations of rights from that covenant. Unfortunately as the UDHR is not legally binding due to a proclamation clause at the end of the preamble[71], however, it is key to note what is stated in the declaration as it acts as a base for following covenants and treaties.[72] Specific rights are also mentioned in the individual state constitutions and will be approached in this section. For victims of THBOR the main rights that are interfered with are the right to health, the right to remedy and the right to work.

2.1. Right to Health

Organs are necessary for human life, without certain organs a person will die or be confined in a hospital in order to stay alive. Due to modern advancements in medicine and organ transplantation it was made possible for those whose organs have failed to live longer. This however, does not come without problems or complications as more people seem to need an organ than the rate of availability which leads to the illegal buying and selling of organs and overall THBOR. As crime ensues in the black market for organs so does the interference of human rights that are experienced by the victims of THBOR. The right to health is stated in the ICESCR in article 12 as the obligation of the state to

[71] M. A. Glendon, 'The Rule of Law in the Universal Declaration of Human Rights', *Northwestern Journal of International Human Rights*, vol. 2, no. 1, 2004, pg. 4, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1008&context=njihr, (accessed 19 May 2018).
[72] M. Van Alstine, 'The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law', *Maryland Journal of International Law*, vol. 24, no. 1, 2009, p. 66.

"recognize the right of everyone to the enjoyment of highest attainable standard of physical and mental health"[73].

Deaths from living organ donation or more specifically kidney removal (nephrectomy) are rare[74] in most cases when the donor is a willing participant who receives the best medical care during and after the surgery. Unfortunately there is little research on the range of negative health impacts for victims of THBOR as in many cases the extent of the problem is still unknown. This is due to individuals often being afraid of embarrassment, or fear some sort of criminal charges being pressed against them because of the illegal sale and not reporting what has happened.[75] Someone who is a victim of THBOR usually does not receive any postoperative medical care and if they do receive care it tends to be of poor quality.[76] One victim in Pakistan described the pain following the surgery as well as the sorrow that followed as due to the pain he struggled to work and support his family.[77] Due to improper care after the removal of organs the persons are more likely to fall ill. This not only impacts their right to health but also many of the other rights they possess.

Living organ donation is a selfless act in which a part of your own body is removed for the sake of another person. However, there are negative health effects for the donor and those present for a willing donor who has access to medical care and treatment are even more widely present for those who have their organs removed in relation to THBOR. The state must recognise the right of the person to attain a high level of health and therefore must establish ways to prevent this right from not being attainable. With THBOR the most prevalent right that may be violated is the right to health.

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[73] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Article 12.
[74] S. C. Jacobs et al., 'Living Donor Nephrectomy', *Current Opinion in Urology*, vol. 9, no. 2, 1999, p. 116.
[75] A. Manzano et al., 'The invisible issue of organ laundering', *Transplantation*, vol. 98, no. 6, 2014, p. 601.
[76] J. de Jong, 'Human Trafficking for the Purpose of Organ Removal', Phd Thesis, Universiteit Utrecht, 2017, p. 65.
[77] Yousaf and Purkayastha, ''I am only half alive'', p. 646.

The right to health is immediately relevant in regards to those who are victims of THBOR because their health usually rapidly declines after the organ is removed[78]. It is also not just their physical health that declines but also in many cases their mental health which can result in negative impacts on the person's life. One key aspect on the right to health is the requirement of the state to make sure all services, goods and facilities are accessible to all persons and are of a good quality[79]. This means that supplies or goods must be available in a sufficient supply within the state, that services and facilities must be available readily throughout the state and be safe and easily accessible by persons. Finally, good quality means that the staff is trained, the medical and equipment are up to date and there is proper sanitation and safe drinking water.[80]

The right to health is known as "absolute and inalienable"[81] which means that is exists for any person from the moment of birth to death. The UDHR mentions the right to health in article 25 as a part of the right to an adequate standard of living.[82] The right to health as mentioned in the ICESCR directly relates to those who are victims of THBOR. Their right to an attainable and adequate standard of health tends to not be achieved because of the organ removal. After their organs are removed the health of the person usually decreases which leaves them in a vulnerable state and more susceptible to disease and infection and increases the possibility of having to take out more loans as they cannot work due to their failing health.[83]

States possess certain obligations in order to ensure that those residing within their borders are able to fully realise a person's right to health. General comment no. 14 has a section dedicated to the State obligations in the implementation of the right to health. The

[78] Budiani et al., 'Human Trafficking for Organ Removal in India', p. 383.
[79] OHCHR, Fact Sheet no. 31 Right to Health, p. 4.
[80] ibid.
[81] S. Sylkina et al., 'Problematic aspects of international standards regulating human rights to health and medical care', *Journal of Legal, Ethical and Regulatory Issues*, vol. 21, no. 1, 2018, p. 1, https://www.abacademies.org/articles/Problematic-aspects-of-international-standards-regulating-human-rights-to-health-and-medical-care-1544-0044-21-1-161.pdf, (accessed 23 May 2018).
[82] OHCHR, Fact Sheet no. 31 Right to Health, p. 1.
[83] OSCE, 'Trafficking in Human Beings For the Purpose of Organ Removal in the OSCE Region: Analysis and Findings', Vienna, 2013, pg. 29.

ICESCR recognises that a State does not have the ability to immediately fulfil or realise every right mentioned in the Covenant therefore they have the obligation to progressively realise the rights mentioned but must in the meantime take deliberate and appropriate steps for this realisation to occur.[84] In terms of the right to health the State has the obligation to in the terms of THBOR protect and fulfil the right to health of the individuals involved. The general comment discusses the obligation of the State to ensure that medical treatment is equally accessible to everyone and that they must work to protect those in society who are vulnerable or marginalised.[85] This can be looked at in regards to what is stated above as trafficked persons are a vulnerable group and many of those who become victims of THBOR were already vulnerable or marginalised.

The Palermo Protocol and the right to health are directly related particularly in regards to the victim protection measures that are discussed within the Protocol. It is encouraged by the Palermo Protocol that States take appropriate measures to provide recovery measures for victims of human trafficking including "medical, psychological and material assistance".[90] However, despite the mention and encouragement for the States to take measures to protect the health of the victims of trafficking there is no requirement of the States to respond to the infringement on the right to health of the victim of trafficking.[91] The right to health is quite important to victims of human trafficking particularly those what are victims of THBOR. In general comment no. 20 it is mentioned by the Committee on Economic, Social and Cultural Rights (CESCR) that trafficking victims are a group in which the rights of the covenant directly apply to.[92] The factsheet on human trafficking directly mentions that the right to health is impacted by trafficking[93] and also that

[84] CESCR, General Comment no. 14, 'The Right to the highest attainable standard of health (article 12)', 2000, E/CN.4/2000/4, p. 9.
[85] ibid., p. 10.
[90] Palermo Protocol, Article 6, Subsection 3.
[91] S. Oram et al., 'International Law, National-Policy Making, and the Health of Trafficked People in the UK', *Health and Human Rights*, vol. 13, no. 2, 2011, p. 4, https://pdfs.semanticscholar.org/2f83/acbebb20bb3b236dd805193c645cd80fe02c.pdf, (accessed 19 July 2018).
[92] CESCR, General Comment No. 20, 'Nondiscrimination in economic, social and cultural rights (Article 2)', 2009, E/C.12/GC/20.
[93] OHCHR, Fact Sheet no. 36, 'Human Rights and Human Trafficking', New York and Geneva, 2014, https://www.ohchr.org/Documents/Publications/FS36_en.pdf, (accessed 19 July 2018), p. 4.

appropriate assistance and protection afforded to the victims would include health care.[94] Unfortunately, the Special Rapporteur on the right to health does not discuss THBOR and on the visit to India, which is a hot-spot for THBOR and it is not mentioned at all.

Despite this, there was a discussion by the Special Rapporteur on trafficking in persons, especially women and children on THBOR. In the report the Special Rapporteur recognises that the health of victims of THBOR has been shown to deteriorate throughout their life and that they often require immediate and continuing medical care after the removal takes place.[95] The Special Rapporteur continues to say that currently there are no States that have implemented the proper measures to provide for this type of need from the victims and that there are very few civil society organisations that are working on this problem.[96] This is important to recognise because the Special Rapporteur makes it public in the international sphere that victims of THBOR experience negative health effects after the removal. The report discusses the protection of victims of THBOR and the specific needs that relate to the organ removal. These needs relate particularly to follow-up medical care[97] because many people experience negative health effects after the removal. The Special Rapporteur says that States must do what they can to provide medical care to victims of THBOR and not just immediate medical care but also long term care.[98]

It is also necessary that States adopt appropriate legislation to realise the right to health for those residing within their borders. States should adopt a national health plan which would outline how the State is going to go about realising the right to health.[101] Every person who resides within a country's borders has the right to full enjoyment of health and the State needs to take the proper measures to facilitate the achievement of that. The core obligations of the States are discussed in the General Comment and those consist of

[94] ibid., p. 21.
[95] UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children', 2013, A/68/256, https://www.ohchr.org/documents/issues/Trafficking/A-68-256-English.pdf, (accessed 19 July 2018), p. 16.
[96] ibid.
[97] ibid, p. 22.
[98] ibid.
[101] ibid.

the State providing primary health care, ensuring access to everyone with special attention to vulnerable or marginalised groups and the establishment of the national action plan.[102]

In regards to the ICESCR States should take every measure possible to achieve the full realisation of the right to health. This would mean guaranteeing accessible and affordable healthcare to those who reside within their borders and in connection with the Palermo Protocol particularly to trafficking victims. Victims of THBOR should be provided with medical care following the discovery of the removal and also long term healthcare. This is because organ removal is permanent and can have long lasting consequences and effects on the person who the organ is taken from. It is pertinent that the States do what they can to achieve their obligations.

2.2. Right to Remedy

The right to remedy is mentioned in multiple international documents and is closely related to access to justice which is a basic principle of the rule of law. In order for individuals to experience the fulfilment of their human rights there must be access to justice in the possibility that there is a violation of those rights. For victims of THBOR there is the expectation that they will be able to receive justice for the crimes committed against them. There are many challenges that exist in achieving remedies or justice for victims of THBOR. One of the main causes of this is the unwillingness of victims to go forward to the police when the crime has been committed from fear that they themselves will be punished[103] as the selling of organs or the receival of money for organs is illegal in all countries besides Iran. Victims may also be unaware of their rights in an international but also a national way or been purposefully misinformed of their rights[104] by the traffickers. Victims are also fearful of their traffickers and believe that if they come forward they are potentially putting themselves and their families at risk of retaliation

[102] ibid., p. 12-13.
[103] A. Manzano et al., 'The invisible issue of organ laundering', p. 601.
[104] Department of Health and Human Services, 'Resources: The Mindset of a Human Trafficking Victim', USA, p. 1, Available from https://www.acf.hhs.gov/sites/default/files/orr/understanding_the_mindset_of_a_trafficking_victim_1.pdf , (accessed 23 May 2018).

from the traffickers.[105] The scenarios listed above are some of the reasons to why the full extent of the THBOR is unknown and also why receiving remedies is complicated.

Right to remedy is mentioned in the UDHR and the ICCPR, although it is not mentioned in the ICESCR. It is also mentioned in the Palermo Protocol which deals specifically with the protection and rights of trafficking victims. The UDHR sees the mention of right to remedies or justice in articles 7 and 8. Article 7 states that all are equal before law and are entitled to equal protection by law from violations of their rights[106]. While article 8 states that everyone has the right to an effective remedy for violations of rights provided to them by law or the constitution[107]. This grants individuals a right to receive justice and remedy for the violations of their rights. The next mention of remedies is found in the ICCPR in article 2 which builds off of what is found in the UDHR.

The ICCPR states that States must ensure an effective remedy if their rights are violated determined by competent authority, the establishment of potential judicial remedies and the guarantee that the remedies will be enforced when granted.[108] Both of these however only relate to rights that are listed in their respective declaration or covenant. Therefore, for the UDHR articles 7 and 8 could be referenced when the rights of article 25 the adequate standard of living, and article 23 the right to work are hindered in terms of THBOR. The rights that are violated during THBOR within the ICCPR is Article 8 which discusses the prohibition of slavery, servitude, forced labour and more.[109] As removal of organs can be considered a form of modern slavery as stated by the working group on the contemporary forms of slavery which was established by the UN.[110]

[105] UNODC, 'Assessment Toolkit', p. 51.
[106] Universal Declaration of Human Rights, (adopted 10 December 1948), 217 A (III), Article 7.
[107] Ibid., Article 8.
[108] International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976), UNTS 171, Article 2.
[109] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Article 8.
[110] J. Allain, 'Contemporary Slavery and Its Definition in Law', in Bunting A., Quirk J. (eds.), *Contemporary Slavery: Popular Rhetoric and Political Practices*, Vancouver, Canada, University of British Columbia Press, p.59.

Despite the ICESCR being one of the most relevant covenants for human rights there is no mention of the right to remedy or justice included. However, in the preamble of the covenant it is mentioned that in going along with the UDHR includes appropriate redress and remedies for violations of rights and government accountability.[111] The CESCR continues to expand on the meaning of the covenant and includes in general comment no. 9 that although judicial remedies are not always necessary and that administrative remedies may be possible they must be "accessible, affordable, timely and effective".[112] The inclusion of these words further expands on the right to access to justice. The relevant possible violations that can occur with THBOR within the ICESCR that relate to potential remedies are article 6 and 7 the right to work, and article 12 the right to health. These three international documents all relate to access to justice and the right to receive a remedy if a person experiences a violation of one of their rights. Victims of THBOR should have access to justice and remedies for what has happened to them.

The Palermo Protocol and its overlying instrument the UN Convention against Transnational and Organised Crime (UNTOC) both discuss the right to remedy or justice. The UNTOC mentions this as to "establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention".[113] While article 6(6) of the Palermo Protocol says that States must ensure that their domestic legal system includes mechanisms that work in favour of the trafficked persons to gain compensation for the crimes that occurred against them.[114] Both the main convention and the supplemental protocol discuss the necessity for victims of a crime or human rights violations to receive remedy or justice. Together the convention and the protocol create a strong base for the protection of the right to remedy for victims of THBOR by requiring States to provide compensations for the crimes committed against them. With the

[111] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Preamble.
[112] CESCR, 'General Comment No. 9' on 'The Domestic Application of the Covenant, (3 December 1998), E/C.12/1998/24.
[113] United Nations General Assembly Res 55/25, (8 January 2001).
[114] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003), 2237 UNTS 319, Article 6.

establishment of the right to remedy as a treaty based right the failure of the State to provide remedies causes a breach of the instrument and can be held responsible.[115]

The right to remedy is particularly challenging for victims of THBOR. This is because victims of trafficking offences can be criminalised for their participation in the trafficking and other offences related to the trafficking which inhibits the possibility of them receiving access to justice or remedy for the trafficking offence.[116] Also if the victim is afraid to go to the police because of potential repercussions being taken against them this furthers the possibility that the victims of THBOR and other trafficking offences will not receive justice or remedy. Victims of THBOR are especially susceptible to this because if there was any receival of money they can be prosecuted for selling their organs. Remedies or access to justice for those who are victims of trafficking is an important measures which would help alleviate some of the suffering that they incurred under the hands of the trafficker(s). In many circumstances victims of THBOR and other trafficking offences do not have knowledge of their rights and therefore do not know how to go about obtaining redress for the crimes committed against them.[117]

It is necessary that States approach access to justice and remedy for victims of trafficking in order to achieve their State obligations. In order to provide access to justice and remedy to the victims the States should do a number of things. States should spread information throughout the public in regards to the remedies available for them under international law, establish measures to decrease any inconvenience for the victims, ensure their safety from retaliation, provide assistance to the victims and make sure all legal options for redress are available to them.[118] The States must take appropriate means to protect those

[115] A.T. Gallagher, 'The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy', *Paper Submitted for the Expert Consultation convened by the UN Special Rapporteur on Trafficking in Persons, especially women and children*, Bratislava, 2010, p. 5.
[116] UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children', p. 18.
[117] OHCHR, 'Principles and Guidelines on Human Rights and Trafficking', 2002, E/2002/68/add.1, Guideline 9.
[118] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 2006, A/RES/60/147, p. 6.

from trafficking and if it does occur then provide them with proper care after the trafficking ensues. This consists of providing remedies and access to justice to the victims. This would consist of reparations which are proportional to the suffering that the persons experienced.[119] The resolution states that the person or party who is responsible for the trafficking needs to pay however, if they are unable to do so then the State must establish national programmes to provide for this.[120] If a State is able to achieve these measures in providing remedy and access to justice to victims of THBOR they are moving in the right direction for victim protection measures.

Reparations or compensation for trafficking victims is not the only form of redress that can be provided. Another form would consist of rehabilitation of the victim. This relates to also the right to health as one form of rehabilitation for the victim would consist of psychological and medical care.[121] This is because the right to health is impacted during the trafficking and the State must take all appropriate measures to address the infringement on that right. Two other forms of remedies are satisfaction which consists of full disclosure of what happened and a public apology.[122] One final form consists of guaranteeing non-repetition which involves taking appropriate actions to address the crime of trafficking and supporting the victims from being re-trafficked.[123] This would relate to the obligation to fulfil by implementing legislative measures to combat the crime at its source and work to prevent the reasons why individuals result to participating in THBOR in the first place.

As mentioned above access to remedies and access to justice are directly related to one another. This relates to the failure of States to properly investigate claims of human

[119] ibid., p. 7
[120] ibid.
[121] Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'Providing Effective Remedies for Victims of Trafficking in Person', Vienna, 2016, p. 11, https://www.unodc.org/documents/human-trafficking/ICAT/ICAT_Policy_Paper_3._Providing_Effective_Remedies_for_Victims_of_Trafficking_in_Persons_2016.pdf, (accessed 20 July 2018).
[122] ibid., p. 12.
[123] ibid.

trafficking resulting in the inability for victims to receive justice or remedies.[124] The provision to providing justice to the individuals encompasses receiving remedy after the act of trafficking occurs. States should do everything in their power in order to help victims of THBOR receive remedy however, in order for that to occur the person must first achieve justice. As in many circumstances the remedies consist of something that must be provided through legislation and a court hearing. Such as the provision of monetary reparations to the victims would require court or judicial involvement.[125] Therefore the State should take legislative and judicial measures to help victims receive remedy. The receival of remedies and access to justice is of key importance to victims of THBOR because it can help in easing the suffering that was experienced during the act of trafficking.

2.3. Right to Work

The right to work is mentioned as well in multiple international documents. The right to work is an important aspect for victims of THBOR. The ability to work is very important as it provides individuals the opportunity to support not only themselves but also their families. There is high potential that the right to work will be infringed upon, the potential infringement however does not only occur after the trafficking but it can occur before. The initial violation of the right to work by the State can lead to further infringements of the right to work and other rights such as the right to health because of THBOR. One of the first mentions of the right to work is in Article 23 of the UDHR says that everyone has the right to work, free choice of employment, favourable working conditions and the right to protection from unemployment.[126]

In many cases one of the reasons why people result to organ removal is because of vulnerabilities related to poor working options that cause an inability to support themselves and their families.[127] The unemployment, or underemployment is related to

[124] ibid.
[125] ibid., p. 18.
[126] Universal Declaration of Human Rights, (adopted 10 December 1948), 217 A (III), Article 23.
[127] OSCE, 'Trafficking in Human Beings', pg. 28.

the means that are used in the process of trafficking because it is a position of vulnerability which can be used also as coercion to bring the individuals into the trafficking.[128] The two types of employment as listed above occur before the trafficking happens are root causes of THBOR. Therefore if this violation is addressed it could prevent the trafficking from occurring in the first place as in accordance with the UDHR definition individuals have the right to employment and also the right to favourable working conditions. The possibility for employment with fair wages would make it so individuals do not go into debt to support their families or themselves and therefore have a lower risk at being coerced into having their organs removed.

The right to work is also mentioned in the ICESCR in article 6 which says that states must "recognize the right to work, which includes the right of everyone to the opportunity to gain living by his work… and will take appropriate steps to safeguard this right".[129] While article 7 of the covenant says the persons have the right to favourable conditions of work which includes "remuneration… fair wages… a decent living for themselves and their families… safe and healthy working conditions… and rest, leisure and reasonable limitation of working hours".[130] These articles relate strongly to the ability of the person to work before THBOR occurs and also after the act. As stated above the right to work is often impacted before THBOR occurs as it is one of the reasons for THBOR in the first place. The potential violation of article 7 occurs when the wages the persons make can barely support themselves yet alone a family.[131]

The inability to support a family is directly discussed amongst General Comment No. 23 by the CESCR. In many instances the persons who are victims of THBOR do so because the wages they make are not enough to support a family, pay off their debts, arrange marriages and more.[132] This cause of poverty such as unfair or inadequate wages which leads a person to organ removal could be considered an infringement upon article 7 of the

[128] ibid.
[129] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Article 6.
[130] ibid.
[131] Yousaf and Purkayastha, ''I am only half alive'', p. 644.
[132] ibid., p. 645.

ICESCR. This is due to the section of article 7 that discusses both remuneration and fair wages. Minimum wage is discussed in a way in such it must be established so it can provide a decent standard of living for the workers and their families.[133] Therefore the fact that many individuals who experience coercion for organ removal only agree to do so because the wage they make is not enough to support their families.

This right can be infringed upon by the individuals who employ the persons but also by the government as they are not fulfilling their obligation to protect. This is because it is up to the State to make sure that third parties such as the employers do not infringe upon these rights.[134] This also applies to the obligation of the State to fulfil as the state must adopt and enforce legislation in order to guarantee those rights are achieved by all.[135] This is important because it specifically discusses the obligation of the States in regard to the realisation of article 7 of the ICESCR. It also shows that the states can partake in violations of this right when they fail to complete their obligations.

The right to work is also strongly impacted after the act of trafficking occurs. In many situations THBOR leaves the person worse off than before which impacts their ability to work. As one of the main sources of work for individuals in Pakistan is hard labour in the brick kilns after the organ removal they are often not able to work here because they are to ill or feeble.[136] While States have no obligation to provide individuals with work they do hold the obligation to make sure that the work that is being done by individuals residing within their borders is acceptability and is of decent quality.[137] The aspect in particular related to this is safe and favourable working conditions.[138] In many circumstances the working conditions are not ideal for anyone regardless of their

[133] CESCR, 'General Comment No. 23' on 'The Right to Just and favourable Conditions of Work (Article 7)', (2016), E/C.12/GC/23.
[134] ibid.
[135] ibid.
[136] F. N. Yousaf and B. Purkayastha, ''I am only half alive'', p. 646
[137] CESCR, 'General Comment no. 18' on 'The Right to Work (Article 6)', (2006), E/C.12/GC/18.
[138] ibid.

involvement in THBOR.[139] These unfavourable working conditions make it challenging for individuals to work after they have had their organs removed but also relate to how they can be coerced into organ removal as stated above. As unfavourable working conditions can encompass wages as well and participating in THBOR is an attractive opportunity to individuals who do not make high wages. THBOR can directly violate articles 6, and 7 of the covenant.

The Palermo Protocol also discusses the right to work in article 6(3)(d) that discusses that states should consider the implementation of measures to provide employment and other opportunities.[140] After the act of trafficking ensues it is important that the state provides services to the victims to help them in their recovery. One of the ways in which a state can assist in the protection and recovery of victims is providing them with the ability to work or the opportunity to gain employment after they have been trafficked. In accordance with the articles listed in the covenant the Palermo protocol furthers it with the recommendation that the states include proper services to help victims of THBOR. The Special Rapporteur also makes brief reference to the right to work in regards to human trafficking and THBOR in which it is stated that States should work with civil society organisations in order to provide victims of THBOR with access to work in the long-term.[141]

Similar to the two rights as listed above it is important that the States take the appropriate measures in order to fully realise the right to work for everyone residing within their borders. Unlike the other two rights the right to work is affected before the act of trafficking ensues. The ICESCR stresses that everyone has a right to be able to make a living doing their work and in many circumstances as seen above the reason for being coerced or consenting to the organ removal is because money was offered and the

[139] S. Ghayur, 'Labour Market Issues in Pakistan: Unemployment, Working Conditions, and Child Labour', *The Pakistan Development Review*, vol. 35, no. 4, 1996, p. 789, http://www.pide.org.pk/pdf/PDR/996/Volume4/789-803.pdf, (accessed 2 July 2018).
[140] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6.
[141] UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children', p. 22.

individuals were not able to support themselves with what they were currently doing for work. It would be valuable for the State to take measures to guarantee that a person can make a living no matter the work and to make sure that work is of favourable and acceptable conditions. The right to work is also impacted after the act of trafficking occurs as individuals often cannot go back to work because of the negative effects the removal had on their health which leads to what the Special Rapporteur suggests in which the State works with civil society to help these individuals with employment. Therefore, States should take the appropriate measures to protect the individuals residing within their borders from potential third party infringement of a person's right to work before and after the trafficking ensues.

2.4. Non-Punishment of Trafficking Victims

One glaring topic that is discussed in the field of human trafficking currently is the non-punishment of victims of human trafficking. Unfortunately, while the Palermo Protocol has no specific provision for non-punishment of victims of human trafficking it does discuss protection for victims of trafficking. This is a very important topic to discuss because it begs the question of where to draw the line between who is a victim and who is a perpetrator of a crime. It brings wonder to exactly who can be considered a victim. In order to identify someone as a victim of THBOR one must look at the Palermo Protocol. If the three measures (act, means, purpose) exist then a person must be seen as a victim of human trafficking. The working group on human trafficking discusses the importance of State's adopting non-punishment measures for those who are victims of trafficking.[142]

One of the struggles with non-prosecution or punishment of victims of trafficking is first the identification of trafficking victims. In many cases trafficking victims are seen as undocumented migrants and therefore risk being uninformed about their rights as

[142] Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking', Vienna, 2010, CTOC/COP/WG.4/2010/4, p. 2.

trafficking victims and risk deportation or punishment because of their actions.[143] This can relate to THBOR as discussed in many circumstances documents are forged for the travel of the person and for the removal to occur which could be prosecuted. This is dangerous because it opens up the potential for victims of any form of trafficking to be prosecuted for something they participate in during the act of trafficking. In many States, trafficked women themselves have been prosecuted for their involvement in prostitution despite their aspect of usually being forced into prostitution.[144] This can also relate to organ removal as in many cases the individuals are coerced, forced, deceived or many other reasons into the organ removal. As those who participate in organ removal may be prosecuted because of violating the law for the falsifying of documents. The key aspect though will be the receival of money for their organs despite its relation to human trafficking.

THBOR and non-prosecution or punishment are related as across the world the selling of one's organs is forbidden. As discussed later in this paper in the three specific focus countries it is illegal for anyone to receive money for their organs. Therefore, there is technically the violation of this law and the receival of money could constitute for prosecution of these individuals. Non-prosecution or punishment falls within the objectives of the State in order to identify, protect and assist victims of trafficking.[145] A second main objective of the State is to properly investigate trafficking situations and if a victim is prosecuted for their involvement then proper investigation of the trafficking claim did not occur.[146] Therefore, if someone claims to be a victim of THBOR and their cases are not properly investigated they risk being prosecuted for receiving money for their organs because they were not identified as victims. Trafficking and non-prosecution

[143] E. Pearson, 'Human traffic, human rights: redefining victim protection', *Anti-Slavery International*, 2002, p. 40, http://www.antislavery.org/wp-content/uploads/2017/01/hum_traff_hum_rights_redef_vic_protec_final_full.pdf, (accessed 13 July 2018).
[144] ibid., p. 41.
[145] M. Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation*, vol. 1, no. 1, 2017, p. 53, https://www.uitgeverijparis.nl/scripts/read_article_pdf.php?id=1001296261, (accessed 21 July 2018).
[146] ibid.

or non-punishment of victims are strongly connected with one another and all relate with victim protection measures.

It is very important that States do not prosecute those who are victims of human trafficking. The Office of the High Commissioner for Human Rights (OHCHR) issued specific guidelines on human rights and human trafficking. The guidelines state that "trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons".[147] This discusses that the entrance into a country illegally cannot be prosecuted if they are victims of trafficking, which relates to the individual whose organ is being removed being brought into the country where the transplantation will occur.

It also specifies that if a person commits a crime while being trafficked such as the receival of money for organs where it is banned then that person cannot be prosecuted. This however relates to consent of a person in their involvement with the crime and whether it was indeed consensual or not. In the case of human trafficking though nothing can be considered consensual because it consists of fraud, deception, coercion and more which invalidates the perceived consent. Therefore, if you are a victim of THBOR you cannot be prosecuted for any crime that occurred because of the trafficking such as the receival of money for the organs. The only time in which a person could be prosecuted or punished for the receival of money for their organs is when the means of the Palermo Protocol definition are not met.

Human trafficking is closely connected with human rights in terms of enforcement of the law and the rights of victims of THBOR are included in international law and international treaties.[148] As discussed in this document there is strong connection between

[147] OHCHR, 'Principles and Guidelines on Human Rights and Trafficking', p. 1.
[148] R. Piotrowicz, 'International Focus: Trafficking and Slavery as Human rights Violations', *Australian Law Journal*, vol. 84 (2010), pp. 812, 814; R. Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', *Intercultural Human Rights Law Review*, vol. 4 (2009), p. 175.

THBOR and human rights as a number of rights are violated in connection with the act of THBOR. By punishing a victim of THBOR or any other form of trafficking it can be considered an infringement upon a person's human rights. This is due to non-prosecution falling primarily under the category of victim protection.[149] By prosecuting a victim of THBOR the State is not fulfilling its obligation to protect the victim. If a victim of trafficking is prosecuted for their involvement in a crime then they are not able to fully exercise the rights that are granted to them[150], this consists of all the rights which are discussed in this chapter.

In order to achieve non-prosecution or punishment of trafficking victims the State should work towards establishing measures for victim identification. The victim identification would make it so persons who are suspected of a crime are not punished or prosecuted because of their status as a victim. It would also be valuable for the State to adopt legislative measures that do not allow for punishment or prosecution of victims. The Special Rapporteur on Human Rights says that States must ensure that victims are not punished or prosecuted for offences relating to the States laws on organ sale.[151]

Overall the main rights that relate to THBOR are the right to health, the right to remedy, the right to work and non-punishment of victims. The rights are strongly discussed in international documents such as the UDHR, ICESCR, ICCPR and the Palermo Protocol. The rights of the victims of THBOR have the possibility of being violated before, during and after the act. It is important to understand how to victims are so negatively impacted and how the violations of their rights can harm them for the future and also how violations of their rights before the organ removal can cause them to agree to the removal. It also shows how the states may not be fulfilling their obligations to those individuals who

[149] Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons', p. 3.
[150] A. T. Gallagher and N. Karlebach, 'Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice', Background Paper, OHCHR, 4 July 2011, https://www.ohchr.org/Documents/Issues/Trafficking/Geneva2011BP_GallagherAndKarlebach.pdf, (accessed 23 July 2018).
[151] UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children', p. 22.

reside within their territories. It is important that the rights of the individuals are respected. The next section will explain and analyse the legislation that exists within the supply countries on what they are doing to combat the sale or purchase of organs, and possibly THBOR.

3. Supply Country Responses

Every State has different responses to crimes that occur within their territory, for the crime of THBOR there are no exceptions. The two focus countries of this thesis are India and Pakistan. This section will provide a comprehensive overview of the legal documents that have been implemented in their respective countries on the topic of organ removal and transplantation and human trafficking. Following this discussion there will be an analysis of the documents and their implementation in their respective countries. In order for there to be proper implementation of legislation there needs to be cooperation from all aspects of society.[152] As there is no guarantee that these legal documents will have a positive impact on the victims, it is important to understand the negative outcomes for the victims and why these may occur. In the analysis the organ donation laws will be discussed to evaluate their relationship to THBOR and how the organ donation laws may affect THBOR and if there has been any decrease in THBOR since the establishment of the Acts. There is a strong link between the organ donation laws and THBOR because in many cases in these countries the organs that are being used for donation are from victims of THBOR.[153]

3.1. India

3.1.1. Transplantation of Human Organs Act and Amendments

The buying and selling of organs is not a new occurrence in India. Therefore, the Transplantation of Human Organs Act (THOA) was enacted in 1994[154] and became one of select countries to have a law on human organs.[155] It was enacted in the States of Goa, Himachal Pradesh, Maharashtra and all the union territories, it was later adopted by all states except Jammu, Kashmir and Andhra Pradesh.[156] THOA discussed multiple

[152] K. M. Bile et al., 'Human organ and tissue transplantation in Pakistan: when a regulation makes a difference', *Eastern Mediterranean Health Journal*, vol. 16, 2010, p. 164.
[153] UNODC, 'Assessment Toolkit', p. 22.
[154] The Transplantation of Human Organs Act and Rules (India) 1994.
[155] S. K. Agarwal, 'Evolution of the Transplantation of Human Organ Act and Law in India', *Transplant Journal*, vol. 94, no. 2, 2012, p. 111.
[156] ibid.

different aspects of organ transplantation, extending from the recipients to the donors and others. There are two main aspects of the THOA that relate to THBOR. Those are the rules that clarify who can and cannot be an organ donor and the punishments that exist upon potential violations of the act. However, there is nothing in this act that discusses THBOR or the forced removal of organs from living persons. It does however, mention the removal of organs from post mortem bodies but that does not apply in this situation.

The act has strict rules that regulate who can and cannot be donors. When the act was established in 1994 one of the reasons was to curb the problem of buying and selling organs.[157] To do this the THOA enacted the policy that donation from a living body can only occur in specific circumstances. In THOA this is stated in Section 9 as

> "If any donor authorises the removal of any of his human organs before his death under sub-section (1) of Section 3 of transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee".[158]

This rule clearly states that unless you are a direct relative of the recipient or retain a close personal attachment to the recipient you cannot have your organ removed for that person without authorisation. This is to help combat the buying and selling of organs that had been occurring in the years prior to the enactment of THOA. In order to get authorisation for the organ removal there is a process the donor and the recipient must participate in. The application must be made jointly and the Authorisation Committee will make a decision on whether or not the applicants have met the criteria of the act and can therefore approve the removal, however the Committee can also refuse the removal if they do not believe the criteria is met.[159] This is an important aspect in combating THBOR in India, as it makes it illegal for anyone to receive organs that are not of a direct family member or without prior authorisation from the proper authorities. It is also against the Act to participate in any form of organ removal without authorisation.[160] This gives the

[157] ibid., p. 110.
[158] The Transplantation of Human Organs Act and Rules (India) 1994, Section 9.
[159] ibid.
[160] ibid., Section 10.

authorisation committee quite a bit of authority because it they are in complete control over who can receive an organ and who can participate in organ transplantation.

With the restrictions on who can or cannot become an organ donor there are also strict punishments if the laws stated in THOA are violated. The list of punishments is excessive and begins with anyone who participates in organ removal without proper authorisation can be sentenced with up to five years imprisonment along with a fine of up to ten thousand rupees.[161] If the person involved with organ removal without authorisation is a medical practitioner, then their name is reported to the proper authority where action will be taken which can include suspension of the person for two years upon a first offence and then permanently for any following violations.[162] This is meant to push away persons from participating in organ removal without proper authorisation as it could land them in jail, with a fine or being barred from ever legally participating in organ removal again. The first punishment while however also valid for those in the medical profession also relates to those who are not. Such individuals can either be connected to the hospital or not "for purposes of transplantation, conducts, associates with, or help in any manner in, the removal of any human organ".[163]

The Act goes further in its punishment section to list what can happen to other violators of the Act. Section 19 of the Act lists a number of ways in which a person can participate in a violation of the Act and then joins them together with a punishment at the end of the article. The list of possible violations extends to people who can either be considered a broker to a donor.

> "(a) makes or receives any payment for the supply of, or for an offer to supply, any human organ; (b) seeks to find a person willing to supply for a payment any human organ; (c) offers to supply any human organ for payment; (d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ; (e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or (f) publishes or distributes or causes to be published

[161] ibid., Section 18.
[162] ibid.
[163] ibid.

> or distributed any advertisement, -- (a) inviting persons to supply for payment of any human organ; (b) offering to supply any human organ for payment; or (c) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d)...".[164]

This is a long list of activities that persons can participate in for it to be considered a violation of the Act. A multitude of the violations are one that would be done by brokers, such as the recruitment for the organ removal or the offering of payment for the organs. The other possible violations target those who have received money for their organs or offer their organs in exchange for money which could mean that a person who is a victim of THBOR could be prosecuted under THOA. THOA however, does not discuss individuals who according to the definition stated in the Palermo Protocol used money to gain consent from a person for the removal of their organs. This can however be attributed to the fact that the Protocol was not created until a number of years later and there was not at the time a solid definition for human trafficking. The punishment for any of the above listed violations is a prison term of no less than two years but no more than seven and a fine no less than ten thousand rupees and no more than 20 thousand.[165]

In 2011 India introduced The Transplantation of Human Organs (Amendment) Bill. This was established in order to improve and update the original Act of 1994. Section 9, which is relevant to THBOR experiences, had some changes done but only one relates to THBOR. One of the key additions to section 9 is that the authorisation committee must not grant permission in any case in which a foreign national is receiving an organ or tissue from an Indian native unless they are near relatives for living donation.[166] It is unclear if there were any regulations on foreigners receiving organs before this amendment. This is an important addition because it prevents foreign nationals from coming to India in order to receive organs that they could not receive in their own state. There must also be full approval from the authorisation committee if there is a biological connection between the

[164] ibid., Section 19.
[165] ibid.
[166] The Transplantation of Human Organs (Amendment) Bill 2011, (India), Section 7.

donor and the foreign national recipient if the donor allows the removal of organs prior to their death.[167]

The relevant change which occurs for section 18 is an extension the punishment that can be given to those who participate in organ removal without proper authorisation. The punishment is changed from two to seven years imprisonment and a maximum fine of ten thousand rupees to up to twenty years and up to twenty lakh rupees.[168] This extends the punishment drastically and puts further pressure on those who may violate the Act for their own personal gain. This applies for people who are facilitating the act of organ removal but are not having their organs removed, such as brokers. It extends the second punishment for medical practitioners from two years to three years and the addition a fine of five lakh rupees.[169] Nothing is changed in the statement where the person will have their name removed from the name of register either temporarily or permanently. The increase in the punishments for those who violate the act can be assumed to have been established in order to further discourage persons from participating in illegal organ transplantation.

Section 19 also sees changes in which a whole section is added that is dedicated to human tissue. It is the same as the previous section 19, however there is a new addition which includes the phrase human tissues not human organs.[170] Unfortunately, in the amendment of the initial Act there is no reference to the possibility of THBOR. It is important to note that in the case of tissue removal, it is not possible to do it, while the person is still living so it has to be post mortem. However, THBOR does not only include living donors as it can occur post mortem and during the initial organ removal the victim may die[171] which increases the possibility for more to be removed.

[167] ibid.
[168] ibid., Section 18.
[169] ibid.
[170] ibid., Section 19.
[171] UNODC, 'Assessment Toolkit', p. 59.

There is another additional to the original 1994 Act which is known as the Transplantation of Human Organs and Tissues Rules, 2014. One of the key aspects included in the 2014 edition relates to what the authorisation committee must look at in regards to determining if an unrelated donor/ recipient combination can participate in the transplantation. Those following measures for the authorisation committee includes:

> "When the proposed donor and the recipient are not near relatives, the Authorisation Committee shall,- (i) evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other person; (ii) prepare an explanation of the link between them and the circumstances which led to the offer being made; (iii) examine the reasons why the donor wishes to donate; (iv) examine the documentary evidence of the link, e.g. proof that they have lived together, etc.; (v) examine old photographs showing the donor and the recipient together; (vi) evaluate that there is no middleman or tout involved; (vii) evaluate that financial status of the donor and the recipient… and any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing; (viii)...; (ix) ensure that the near relative or if near relative is not available, any adult person related to donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ or tissue, the authenticity of the link between the donor and the recipient, and the reasons for donation, and any strong views or disagreement or objection of such kin shall also be recorded and taken note of."[172]

This section is very important because it for the first time lists the stipulations for unrelated organ donation. It provides not only what the authorisation committee will base their decision on when it comes to allowing the transplantation between unrelated donors and recipients it shows a strong focus on payment or compensation for the organs. As in many cases of THBOR the person who has given consent for organ removal because of their need for financial gain.[173] This is why the committee must focus on the possibility of compensation as a strong component to why a person may be donating their organs. The new rules create strong obligations to prove the personal attachment to the recipient in order for the transplantation to succeed unfortunately brokers have found a way to get around this. This is due to the advancement of technology in which documents to prove

[172] Transplantation of Human Organs and Tissues Rule 2014, (India), Section 7.
[173] Yousaf and Purkayastha, ''I am only half alive'', p. 641.

the connection between the donors and recipients can be forged.[174] The examination of the reasons behind why the person wants to donate is important, although this also has the potential for falsehoods. As the brokers can work with the donors to establish falsities in the story of why the donors are donating.[175] This would mean the authorisation committee is the first to come across THBOR and could prevent it.

Section 14 of the new rules lists that when there is an unrelated donor recipient combination then the residency status of the donor must be verified and if there is any question of organ trafficking in the case the proper investigative authority must be notified.[176] Despite this section mentioning organ trafficking as shown earlier in the paper, there is a distinction between organ trafficking and THBOR and the mixing of the terms can be volatile. This is also the first mention of organ trafficking that occurs in the organ laws of India; however, despite the desire to protect possible victims, there are no exact provisions to protect them or use the exact term of THBOR. The unrelated donor/recipient combination is again discussed in section 19 where it states that if the transplantation is not approved by the authorisation committee of the hospital the state or district level authority must be consulted for the authorisation.[177] It can also be assumed that the punishments as edited in the 2011 Act remain the same as there was no mention of them in the 2014 provisions.

While overall the documents for organ removal and transplantation are very detailed and provide a strong aversion for people who are considering illegally participating in organ transplantation, people still participate in it. It also, unfortunately does not approach THBOR although it does mention organ trafficking. India is also currently in the process of passing their first legislation focused directly on trafficking in persons[178], this bill does

[174] A. Pascalev et al., 'Trafficking in Human Beings for the Purpose of Organ Removal: A comprehensive Literature Review', Available from HottProject (published December 2013, accessed 6 June 2018), pp. 42-44.
[175] ibid.
[176] Transplantation of Human Organs and Tissues Rule 2014, (India), Section 14.
[177] ibid., Section 19.
[178] M. Rahman, 'Analysing the Trafficking of Persons Bill 2018: Is it a step forward for India?' Qrius, 6 April 2018, https://qrius.com/trafficking-of-persons-bill-2018-a-step-forward-for-india/, (accessed 16 June 2018).

include the topic of THBOR. In Article 2 of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill[179] the definition of trafficking that is used is the one that is stated in the Indian Penal Code (IPC), Section 370 that any form of trafficking for exploitation is forbidden[180] and that would encompass THBOR as the exploitation is the organ removal. This would mean that the protection measures granted under this Bill would extend to victims of THBOR. In Article 23 of the Indian constitution it is also stated that exploitation and trafficking in human beings is forbidden[181] which would include THBOR as the organ removal is the exploitation.

3.1.2 Analysis of Application in India

The effectiveness of the original THOA and its amendments is important to analyse in order to know if any changes are being made to combat the sale and purchasing of organs and THBOR. In India, THBOR often occurs when the person, who is coerced or forced into having their organs removed, claims to have affection towards the recipient in order for the transplantation to occur.[182] This is due to the clause which states that in order for a donation to occur between an unrelated donor recipient pair, the donor must feel strong affection or attachment towards the recipient. However, before the donation can even occur it has to be determined as valid and legitimate by the authorisation committee. This is where the complication comes in with the authorisation of the transplantation. The authorisation committee states in some circumstances that it is up to the doctors who are performing the transplantation to verify the legitimacy of the affection.[183] In many circumstances doctors will still perform the transplantation even if they do not sense

[179] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, (India), Bill no. 89 of 2018, Article 2.
[180] T. Tandon, 'India's Trafficking Bill 2018 is Neither Clear Nor Comprehensive', *EPW Engage*, 17 July 2018, https://www.epw.in/engage/article/trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018-is-neither-clear-nor-comprehensive, (accessed 28 July 2018).
[181] The Constitution of India, (India), (accepted 26 November 1949, entered into force 26 December 1950), Article 23.
[182] S. Chatterjee, 'The Illegal Kidney Trade: Who Benefits?', *The European Review of Organised Crime*, vol. 4, no. 2, 2017, p. 9.
[183] S. Shroff, 'Working towards ethical organ transplants', *Indian Journal of Medical Ethics*, vol. 4, no. 2, 2007, p. 68.

affection between the donor and the recipient because of the risk that not receiving the organ has for the recipient.[184]

THOA discusses medical practitioners, brokers, sellers, buyers and more as those who may be prosecuted for violating any aspects of the act. The violations may occur in any phase of the organ removal/ transplantation. As each individual during the process of organ removal/ transplantation comes in or is involved in different aspects that occur only at a certain time and are not involved with other aspects of the crime. The brokers come in at the beginning of the crime of THBOR as the ones who find those they can coerce, force or use any other aspect as mentioned in the Palermo Protocol to convince someone to partake in THBOR.[185]

The medical professionals are involved in the actual removal and transplantation of the organ from the donor to the recipient. While the buyer of the organ is active in the process from start to bend as well as once the broker finds the donor they are active in the entire process from that moment until the end. THOA has the ability to prosecute every person who is involved in the chain of THBOR from the broker to the buyer and even the seller. This is a complicated situation because under THOA an individual could possibly be prosecuted for receiving money despite the involvement of trafficking in the situation. This is not saying that everyone who receives money for their organs is a victim of THBOR, however many are due to the coercion that is related to the decision behind the organ removal.[186]

Within THOA there does not exist any protection measures for persons who are victims of THBOR. This leads to the possibility of those who are victims of THBOR being prosecuted for their involvement in the receival of money for their organs. This however, disagrees with the Palermo Protocols stance on victim protection measures. Under the Palermo Protocol it is necessary that the States provide protection and assistance to

[184] ibid.
[185] UNODC, 'Assessment Toolkit', p. 28.
[186] ibid., p. 15.

victims of trafficking. One aspect of this, which is discussed by the working group on trafficking in persons is that States must not prosecute individuals in relation to any trafficking related offences.[187] Therefore, the fact that there are no protection measures in THOA is cause for high levels of distress to the victims of THBOR as under the law they could be prosecuted. It can also establish the aspect that those who are victims of THBOR are afraid to go to authorities with what happened to them because of fear of prosecution.[188] The Draft Bill on anti-trafficking in India has strong victim protection measures which would prevent prosecution for involvement in trafficking related offences. Because THBOR is included as a form of trafficking by using the definition of the IPC these protection measures would extend to victims of THBOR. However, because it is only in the draft stages and is not law it cannot be enforced or evaluated for its effectiveness. The passing of this Bill would be a move in the right direction for victims of THBOR.

In order to fully evaluate the effectiveness and the results of THOA it is pertinent to look at the prosecution rates under the act and if there has been a decrease in the market for illegal secured organs. Unfortunately there is little conclusive or complete data on the decrease of demand for organs in the black market.[189] In order for any investigation of a violation of the act to take place a complaint must be filed, however there is not an overarching database to keep track of these complaints.[190] While it may be more complicated to fully analyse the newer amendments made in 2014, the original aspects of the act which includes the criminal provisions were not changed, however the punishments were changed but that does not apply in the evaluation of the effectiveness of THOA. The effectiveness of THOA can be looked at from the number of prosecutions made under it.

[187] Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons', p. 2.
[188] UNODC, 'Assessment Toolkit', p. 51.
[189] D. Mehta, N. Saksena, and Y. Mittal., 'Organ Transplant Law: Assessing Compatibility With the Right to Health', Vidhi Centre for Legal Policy, 2017, p. 32 https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/59d49aa4cd39c33ba39328ac/1507105462098/171003_Organ+Transplants+Report%2BFinal.pdf, (accessed 15 June 2018).
[190] ibid.

The record keeping for prosecution that occurs within THOA is not of any better quality than the record keeping of complaints made for the Act. This is because the National Crime Records Bureau (NCRB) did not keep data on cases prosecuted under this act until 2014.[191] This right here is poor implementation as there is no recording of complaints made under THOA until years after its establishment. However there is one case before this that occurred in 2014 which was mentioned earlier in which a man named Kumar was arrested multiple times between 1994 and 2008 for transplanting organs without authorisation.[192] This is a drastic situation as it results in the inability to adequately analyse the effectiveness of THOA. Since there is no data before 2014 we will look at the data that can be acquired from 2014 on. In 2014 there were only two cases filed under the act however no arrests occurred in either of the cases.[193] These initial numbers do not provide a healthy outlook for the previous years in terms of cases being brought amongst the act.

In 2015, there was an increase in the number of cases that were brought before the act. This can be seen as a success however cases being brought in relation to the act does not guarantee prosecution. In total 15 cases were brought under the act and unlike 2014 arrests were made in these cases with 13 men being arrested and 1 woman and the number of people charged were 10 men and the one woman.[194] With the increases of cases being brought up with the act in 2015 it was also reflected in the courts. In total in 2015 there were 15 men taken to trial and 1 woman.[195] It is important to note however that despite the trial appearances in neither 2014 nor 2015 no convictions took place. While these are not strong records it can be inferred that "the Act is failing to detect and prosecute such commercial dealings"[196] and it can be assumed that the problem is much greater than is shown with these numbers. In 2016 a man referred to as Prajapati was arrested for connections to the organ trafficking ring with connections in Sri Lanka, however he was

[191] ibid.
[192] A. V. Tikoo, 'Transplantation of Human Organs: The Indian Scenario', *ILI Law Review*, vol. 1, 2017, p. 170, http://ili.ac.in/pdf/paper1017.pdf, (accessed 15 June 2018).
[193] Mehta, Saksena, and Mittal., 'Organ Transplant Law', p. 33.
[194] ibid.
[195] ibid.
[196] ibid.

later released and was not prosecuted.[197] Despite the legislation meant to stop the illegal purchasing and selling of organs the act has not been successful in curbing the problem.

After the implementation of THOA there was differing reactions across India to it. In some cases, it caused hospitals and brokers to go out of business because they did not want to get in trouble and even for two kidney farms they temporarily suspended their involvement in transplantations before returning to the field.[198] Places like the kidney farms were able to resume their activity by exploiting loopholes that existed within THOA. One of the loopholes is discussed above in which a donor will claim strong affection towards the recipient in order for the donation to be considered valid by the authorisation committee.

The reason in which persons need to search for an organ commercially is because only close family can donate their organs such as siblings, parents, spouses or children which leaves extended family as not qualifying for potential donation.[199] This however was changed in one of the amendments which opened up the ability for extended family to donate organs as well such as grandparents or aunts and uncles.[200] When donation occurred between a family member there was no need to prove affection for the recipient, just relation. Another reason for the continued violation of THOA was simply that the punishments were not enough to deter a person from participating,[201] though this was slightly adjusted with the amendment with an increase in the monetary punishment and the increase in potential jail time.

Despite the NCRB not actively recording cases brought under THOA before 2014, there are multiple instances of organ sale recorded in the media. In 2004 after the Tsunami, there was a number of individuals who sold their kidneys, primarily fisherman who

[197] Tikoo, 'Indian Scenarios', p. 170.
[198] Chatterjee, 'The Illegal Kidney Trade', p. 9.
[199] ibid.
[200] R. Dar and S. Kumar Dar, 'Legal Framework, Issues and Challenges of Living Organ Donation in India', *Journal of Dental and Medical Sciences*, vol. 14, no. 8, 2015, p. 60, https://www.researchgate.net/publication/281294004_Legal_Framework_Issues_and_Challenges_of_Living_Organ_Donation_in_India. (accessed 2 July 2018).
[201] Chatterjee, "The Illegal Kidney Trade' p. 9.

experienced a loss of livelihood due to the disaster.[202] Another case in 2006 was found to have possibly transplanted over 500 organs primarily kidneys from poor labourers, sometimes by force.[203] These cases along with the others that have been discussed throughout this thesis show that despite the establishment of THOA illegal organ selling and purchasing is still occurring. As the creation of THOA, has not seemed to deter the act of buying and selling organs throughout the country. And the few times THOA has been enforced has also not been strong enough to deter the involvement as even though there have been cases brought under THOA are so few to the actual number of individuals who participate in THBOR.

Another aspect of the act, which is ineffective, was the inability to actively establish a network for deceased organ donation which could have made strides curbing the organ trade.[204] While the 2011 amendment included a section to improve deceased organ donation, it was also very much a state responsibility to establish a program that works with deceased organ donation.[205] Deceased organ donation is currently not something that is taken advantage of in India in the way that it could be, as there are a number of deaths by traffic accidents everyday which has the potential to provide a number of much needed organs.[206]

Unfortunately, there are contradicting reports on the effects of THOA and its amendments. A bulletin issued by the World Health Organization (WHO) in 2007 contradicted results seen in previous research. Stating that after the implementation of THOA there was a decrease in the foreign recipients in India.[207] However, this did not end the underground organ trade in India. It also stated that due to the decrease in the number of foreign individuals in India for organ transplantation there was an increase in

[202] ibid., p. 11.
[203] S. Robinson, 'India's Black Market Organ Scandal', Time, 1 February 2008, http://content.time.com/time/world/article/0,8599,1709006,00.html, (accessed 17 June 2018).
[204] Chatterjee, 'The Illegal Kidney Trade' p. 9.
[205] ibid., p. 18.
[206] G. Abraham et al., 'State of deceased donor transplantation in India: A model for developing countries around the world', *World Journal of Transplantation*, vol. 6, no. 2, 2016, p. 332, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4919737/pdf/WJT-6-331.pdf, (accessed 2 July 2018).
[207] Shimazono, 'The state of the international organ trade', p. 957.

other countries such as Pakistan and the Philippines.[208] This is accompanied by the statement that approximately 2,000 individuals in India sell their organs every year,[209] however, this number could be much higher than reported.

Included in the bulletin is a chart that includes a multitude of studies which were performed to look at overseas kidney transplantation. There are a few studies mentioned on the chart are pertinent to India, one was done from 1990-96 and states that 389 individuals from Malaysia went to India to receive organs.[210] While the first four years of this study took place before the implementation of THOA, there was still three years after the implementation of THOA and patients still went to India to receive organs. While another study of ten years showed that 15 of the 16 patients from Kosovo and the Former Yugoslav Republic of Macedonia went to India for their organ transplantation.[211] This shows that despite the potential punishments that are established by THOA, individuals were still going to India to receive organs. From this it can be determined that THOA has not been fully effective in deterring individuals from traveling to India in order to participate in transplant tourism.

Here it can be seen that despite the efforts in curbing the organ trade THOA has not seemed to be able to provide any concrete results in ending the trade. In many circumstances the trade continued at the same speed in which it had before with only a slight dip after the initial enactment of THOA with it to pick back up soon after. The organ trade is still thriving in India with the poor, vulnerable and illiterate as the targets for organ removal. The act itself does nothing to provide help or support for those who were forced or coerced into organ removal as they can be tried because they received money for their organs which is illegal under the Act. This only works in the punishing of victims of THBOR instead of working to support them after the organ removal. The act also does nothing to prevent individuals from being taken advantage of in the first place from the coercion with the offer of money for their organ. There has also been no

[208] ibid.
[209] ibid.
[210] ibid.
[211] ibid.

implementation in India of any Act that specifically related with trafficking in persons however there is currently one that is being created and looked at by the Indian government. Upon further evaluation the research was not able to determine a task-force or any strong effort by the government to combat THBOR. While THOA has many strong attributes to it there also exists many failures and challenges particularly with the actual application of the act.

The obligation to protect and fulfil are important to India in regards to what they should do for those residing within their borders who are or may fall victim to THBOR. It is important that the state works to ensure these obligations. One way in which the obligation to protect and fulfil can be ensured is the establishment of legislative measures. However the obligation to protect is struggling within India as there are no victim protection measures established by THOA, however the Bill does establish protection measures but that is only in the beginning stages of becoming legislation. Along with the obligation to fulfil which would work towards granting the rights to those who are victims of THBOR. Or protect those who may become victims. In many situations as the rights of victims of THBOR are infringed upon and it is necessary for the States to do what they can in order to protect these rights from being infringed upon and providing the rights to the people.

3.2. Pakistan

3.2.1. Transplantation of Human Organs and Tissues Act

Similar to India, the sale and transplantation is not a new occurrence in Pakistan. It is often the case that those in the poor caste system of Pakistan who have trouble supporting their family or simply trying to escape debt are the ones that are taken advantage of for their organs,[212] and are therefore lead into participating in THBOR. Pakistan also implemented a specific set of rules that approach organ transplantation. The process for the Pakistani legislation started long before it was implemented and during its original

[212] Yousaf and Purkayastha, 'Barely Half-Alive', p. 641.

creation in 2007 the Act was postponed until a later date. After a few years the legislation was passed in the Senate and the President later signed the bill establishing it as law in Pakistan in 2010[213] and the legislation is to be referred to as the Transplantation of Human Organs and Tissues Act, 2009[214]. The act approaches a multitude of aspects of organ transplantation and sets specific restrictions on who can become an organ donor and to who they may give their organs to. It also stipulates the punishments that can be incurred if a person violates any section of the act with a specific section related to those who work in the commercial selling of organs.

In Pakistan in order to donate your organ while living it must be going to a person who is "genetically and legally related, who is a close blood relative".[215] However, if a person does not have a relative willing to donate an organ or is a match than the organ can come from an unrelated individual.[216] In this case the evaluation committee must evaluate the scenario to determine that the donation is voluntary.[217] The evaluation committee must make sure that the donor is providing their organ voluntarily and is not being forced or coerced. Not only must the evaluation committee determine the validity of the donation between an unrelated donor recipient pair, they must "ensure that no organ or tissue is retrieved from non-related living donors without the prior approval of the evaluation committee".[218] Along with allowing the donation to occur they must also in a way police organ transplantation to make sure it does not occur without their permission. In the case of donation after death the donors must state in writing before their death that they would like for their organs to be donated,[219] therefore Pakistan, the US and India are all opt-in countries.

It is also noted that a donation must not occur between a citizen of Pakistan and a citizen of a foreign country.[220] The only time in which a donation can take place with a foreign

[213] Bile et al., 'When a regulation makes a difference',p. 161.
[214] Transplantation of Human Organs and Tissues Act 2009, (Pakistan), Section 1.
[215] ibid., Section 3.
[216] ibid.
[217] ibid.
[218] ibid., Section 5.
[219] Bile et al., 'When a Regulation Makes a Difference', p. 162.
[220] Transplantation of Human Organs and Tissues Act 2009, (Pakistan), Section 7.

individual is in case of familial relation. In case of organ transplantation it must also not occur without a properly trained medical staff and not without a proper explanation to the donor of the potential consequences of the removal of any organs.[221] Along with the establishment of the evaluation committee there was also the establishment of a monitoring authority. The monitoring committee holds a number of responsibilities, however one of the main ones is the investigation and inquiry into any potential violation of the act.[222] This is important because it establishes a committee whose responsibility is to investigate violations of the act to compliment those investigations held by the police. As the monitoring committee cannot arrest those who violate the act they must work in close cooperation with the police. This is one of the first steps in recognising cases of THBOR as the monitoring committee has the potential to identify THBOR and prevent the removal and the transplantation from occurring.

The act also holds the punishments for violations of the act. The first possible violation that is approached in the act is a person who participates in organ removal without proper authority. Medical professions, hospitals and others must first receive prior approval in order to participate in organ transplantation. From the act any person who renders their assistance for organ removal to a facility without proper authorisation can receive a prison sentence up to ten years and a fine up to one million rupees and if the person is a registered medical practitioner then for the first offence their name will be removed from the register for three years and then permanently for any following offences.[223] The potential punishments for the commercial dealings in organs consists of:

> "(a) makes or receives any payment for the supply of, or for an order to supply, any human organs; (b) seeks to find a person willing to supply for payment of any human organ; (c) offers to supply any human organ for payment; (d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply any human organ;- (1) takes part in the management or control of a body of persons, whether a society, firm, or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or (2) publishes or distributes or causes to be published or distributed any advertisement,- (i) inviting persons to supply for payment of any human organ; (ii) offering to supply any human organ for payment; or (iii)

[221] ibid.
[222] ibid.
[223] ibid., Section 10.

> indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d), shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one million rupees".[224]

This section shows the harsh punishments for the dealings of organs. The act of buying or selling and organ is strictly forbidden. In what is stated above it is clear that any giving or receiving of money for organs is seen as a violation of the act. Anyone who offers or negotiates to pay a person, looks for a person who will accept payment for their organ or offers to provide an organ for money is violating the law. This relates primarily to brokers of THBOR as they are the ones that are looking for individuals to sell their organs. Unfortunately, the act does not in any way discuss the potential of a person being coerced or forced into organ removal and then receiving payment. Therefore, it leaves a question open of if that person will still be prosecuted for violating this act because they received payment in the end. This legislation came into existence after the establishment of the Palermo Protocol which despite Pakistan neither signing nor ratifying the Protocol it set a good base to follow for national legislation. Pakistan did pass legislation to specifically targeting human trafficking[225] however, THBOR was not discussed in that legislation.[226] The Pakistani Act is also similar to India's act to combat the illegal sale of organs in which it does not discuss THBOR within its act. There has also been no amendments to the act since its implementation into law therefore everything that is stated here remains true to this day.

3.2.2. Analysis of Application in Pakistan

Alike to India, it is important to investigate the effectiveness of the legislation that was implemented in Pakistan in order to combat the illegal purchasing of organs. However, there is a distinct difference between the Indian legislation and the Pakistani legislation. In India a person who is unrelated must feel affection towards the recipient; however, in Pakistan the evaluation committee must simply determine that the donor is voluntarily

[224] ibid., Section 11.
[225] The Trafficking legislation specific to Pakistan is explained and discussed in further detail in the subsequent section.
[226] A. Schloenhardt and J. Jolly, 'UNODC Trafficking in Persons in Pakistan: A Review of National Laws and Treaty Compliance', Pakistan, 2011, p. 22.

having their kidney removed for the transplantation to go forward.[227] Unlike India, Pakistan does not have regulations or standards to determining if the person is voluntarily donating the organ or not.

This establishes one of the first problems with the Act. As a person has the ability to claim that they are voluntarily providing their organs to an individual however in reality they are being coerced into the removal by the offering of monetary incentives.[228] As the providing of monetary incentives can cause consent or voluntary organ donation to be invalid[229] this must be looked at by the evaluation committee. This would lead to an individual being considered a victim of THBOR under the Palermo Protocol they could be prosecuted under the act because they received money for their organs. While the Protocol does not discuss exactly non-punishment of victims the working group on trafficking in persons does discuss it because non-punishment of trafficking victims is directly related to victim protection measures that are discussed within the Palermo Protocol. As discussed above in the analysis of India it is necessary that the State does not prosecute the victims of trafficking and that trafficked persons are not treated as criminals but instead as victims[230] of this heinous crime. It is interesting to note that in the Pakistani anti-trafficking Ordinance it is mentioned that protecting and assisting the victim are of key importance[231] however, there are no specific provisions in the Ordinance that cater to protection and assistance of victims other than compensation.[232]

There have been some successful implementations of certain provisions of the act. One of the main aspects is the implementation of Human Organ and Tissues Transplant

[227] Transplantation of Human Organs and Tissues Act 2009, (Pakistan), Section 3.
[228] AFP, 'Wealth, poverty propping up Pakistan's illegal kidney trade', The Express Tribune, 27 June 2017, https://tribune.com.pk/story/1445077/wealth-poverty-propping-pakistans-illegal-kidney-trade/, (accessed 2 July 2018).
[229] J. Radcliffe-Richards, 'Consent with Inducements- The Case of Body Parts and Services', in Miller, Franklin G.; Wertheimer, Alan, (eds.), The Ethics of Consent: Theory and Practice. New York: Oxford University Press, 2010, p. 284.
[230] Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons', p. 2.
[231] Prevention and Control of Human Trafficking Ordinance 2002 an Ordinance to Prevent and Control Human Trafficking, (Pakistan).
[232] ibid., Section 6.

Authority (HOTA). Their main impacts were working towards the verification and registration of hospitals which are allowed to participate in the transplantation of organs.[233]Another focus for HOTA is the evaluation of whether or not a person is actually voluntarily donating their organs or not and if there really is no family member that is willing to donate their organ.[234] This is because it is pertinent that a person is voluntarily donating their organs and not being coerced or forced into organ removal. HOTA could potentially play a large role in the identification of victims of THBOR if education on victim identification is provided.

Within two years of their creation, HOTA registered 42 hospitals or medical institutions to perform organ transplants, however the majority of organs transplanted were from unrelated donors they were performed with approval of the committee.[235] This is important because it means there is a number of approved facilities; however, this does not guarantee that there are not facilities operating under the radar or that the approved facilities are not participating in illegal organ transplantation. This relates to THBOR as it is possible that some organ removals and transplantations happen under the radar and are not performed at a HOTA registered medical centre which means that despite the establishment of HOTA there are ways around it.

Despite the desire to improve organ transplantation safety standards and requirements within Pakistan there was rebuttal on the implementation of the act. It was claimed by counter lobby groups that the aspect of the legislation that barred transplants between Pakistani citizens and foreign nationals as well as the aspect of donations only being allowed between blood relatives was un-Islamic.[237] However, after weeks of debate a court determined that the act of organ donation to non-family members fell within the principles of Islam however the aspect of organ sale is not permissible.[238] This continues with what is stated earlier in this thesis in which religion is not one of the main reason for

[233] Bile et al., 'When a Regulation Makes a Difference', p. 162.
[234] ibid.
[235] ibid., p. 163.
[237] ibid.
[238] ibid.

why persons do not donate because in many religions the act of organ donation is actually seen as a noble act. In some scenarios though religion is listed as the reasoning behind the refusal to donate organs. This falls in line with THBOR as it can be discussed one of the reasons behind the lack of organs for transplantation resulting in the need to illegally secure organs.

There were multiple challenging aspects behind the implementation of the Pakistani Act. One key aspect behind monitoring and evaluation of the Pakistani Act was that the authority had to monitor private hospitals and not public entities as much.[239] This is due to a lot of healthcare in Pakistan being privatised however, some are public. In Pakistan there also existed strong connections between medical staff and hospitals with politicians and law enforcement which negatively impacted the enforcement of the act.[240] This is because they were able to influence those in a position of power to implement and enforce the act. They did this primarily by using financial incentives that they would receive through the act of illegal organ transplantation.[241] This is existing a high level of corruption within Pakistan which allows illegal buying and selling of organs to continue. However some medical practitioners do want to see the government and law enforcement enforce the Act to a higher standard especially because the names and identities of violators of the Act are well known.[242] This is important to THBOR as it shows that there is not a large desire by the government itself to combat the illegal act because some government officials benefit from the continuing of THBOR.

It is also stated that another reason behind the lack of enforcement of the Pakistani Act is that unlike other countries that passed organ legislation, Pakistan has less of an incentive to be seen as reputable in the international sphere.[243] While countries such as Israel wanted to be seen as favourable in the international sphere Pakistan had less of a desire

[239]A. Efrat, 'The Politics of Combating the Organ Trade: Lessons from the Israeli and Pakistani Experience', *American Journal of Transplantation*, vol. 13, 2013, p. 1653.
[240] ibid.
[241] ibid.
[242] A. Efrat, 'Combating the Kidney Commerce: Civil Society Against Organ Trafficking in Pakistan and Israel', *British Journal of Criminology*, vol. 53, no. 5, 2013, p. 765, Available from Oxford Academic, (accessed on 19 June 2018).
[243] Efrat, 'The Politics of Combating the Organ Trade', 2013, p. 1653.

to be seen in that way until the backlash from the international sphere increased.[244] When the pressure from the outside became larger there was more of incentive for Pakistan to pass the organ legislation. It seems as though in the case of Pakistan there was creation of legislation but not as much done in the enforcement aspect. Especially in regards to having all stakeholders on board and in Pakistan they are not which is stated previously as government officials accept monetary offers to look the other way. This allows inconsistency within its implementation.

After the implementation of the organ laws in India in 1994 a large number of people went to Pakistan where there were no laws regulating organ transplantation and the first ones were not introduced until more than a decade later.[245] It is also interesting to note that at the beginning of the war in Iraq there was an increase in foreign nationals looking for organ transplantation in Pakistan as under Saddam Hussein's rule transplant tourism had flourished but was no longer safe after the start of the war.[246] It is believed that by 2007 there were approximately 2,000 commercial transplants with approximately two thirds of them being performed on foreigners.[247] After the implementation of the Act it came to the attention of those who were advocating for better control of organ transplantation that the Act was not having its intended effects. Despite strong advocacy and pressure to enforce the organ transplantation laws in Pakistan it seems as though the legislation is not being enforced to its full extent and that there has not been a significant reduction in the organ trade since its implementation.[248]

It is important to note that unlike India, Pakistan has implemented the Prevention and Control of Human Trafficking Ordinance which deals specifically with trafficking in human beings.[249] However, while the Ordinance discusses that only what is known as

[244] ibid.
[245] Efrat, 'Combating the Kidney Commerce', 2013, p. 770
[246] ibid.
[247] ibid.
[248] ibid.
[249] Prevention and Control of Human Trafficking Ordinance 2002 an Ordinance to Prevent and Control Human Trafficking, (Pakistan).

"exploitive entertainment, slavery or forced labor or adoption"[250] are covered by the Ordinance. Other practices such as organ removal or servitude are not covered by the Ordinance.[251] The Ordinance does however discuss victim protection. There was a National Action Plan to combat human trafficking which talked about the importance of victim protection. The plan discussed the importance of providing victims with assistance, medical care and others.[252] However, because THBOR is not discussed in the Ordinance or the National Action Plan, the victim protection measures do not exist for them.

Pakistan has main obligations as discussed above such as the obligation to protect and the obligation to fulfil. As discussed above as well, the State must ensure their obligations and one of the ways to do that is producing legislation. While they are seemingly having trouble with the obligation to protect in terms of victim protection as the law that has been implemented, does not have any victim protection measures established. While their obligation to fulfil is also struggling in the establishment of providing the rights to those residing within their borders and no mention of rights that are violated during the act of THBOR in the legal documents that deal with THBOR. The National Action Plan and Ordinance could potentially have strong implications for the obligation to protect and fulfil the rights of victims of THBOR.

Unfortunately, there seems to be a lack in research on the actual determination of statistics or numbers of the organ trade in Pakistan. While the research was able to determine some statistics for foreign transplants in Pakistan,[253] however, there seems to be little research done on the actual number of individuals who participate in the organ trade. This is due to the aspect that Pakistan does not produce or make public official numbers on how many foreigners receive organs in Pakistan each year.[254] This can be accounted though as to

[250] Prevention and Control of Human Trafficking Ordinance 2002 an Ordinance to Prevent and Control Human Trafficking, Section 2.
[251] Schloenhardt and Jolly, 'UNODC Trafficking in Persons in Pakistan', p. 22.
[252] Schloenhardt and Jolly, 'UNODC Trafficking in Persons in Pakistan', p. 39.
[253] Shimazono, 'The state of the international organ trade', p. 958-9.
[254] D. A. Budiani-Saberi and F. L. Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities', *American Journal of Transplantation*, vol. 8, 2008, p, 926,

what is stated before in which there does not seem to be strong enforcement of the Act and little motivation or desire for the Pakistani officials to follow through with the law. It is also a rather new law that cannot be fully evaluated. It would be valuable for more research to be done on the numbers of persons who are involved with the illegal organ trade.

India and Pakistan have both implemented legislation to combat the illegal sale and purchase of organs. Unfortunately, there are no victim protection measures included in the transplant law however in the potential Indian Bill there are protection measures. Without countries of demand this problem would not exist. Individuals who receive the transplants are not always from a foreign country but in many circumstances they are because of the lack of availability of organs in their home country. The US as a demand country example will be explained and analysed in the next segment on what they are doing to combat the illegal buying and selling of organs both within the territory of the US but also in regards to foreign territory.

https://pdfs.semanticscholar.org/dbf4/eaf078282c49739eddc3dff1f5c9352e83a6.pdf, (accessed 23 July 2018).

4. Country of Demand Responses

Countries of demand must have different responses to the act of THBOR than supply countries do. This is because the organs are not being recovered within their borders as the individuals from the countries of demand are traveling to the supply countries for the organ transplantation. This is known as 'transplant tourism' or 'medical tourism' in which a person travels from one location to another in order to receive an organ that they would not have received or been able to afford in their home country. The country of demand that is going to be investigated in this thesis is the United States of America. The US has implemented one piece of legislation that correlates specifically with the purchasing and selling of organs.[255] There was also an attempt at passing an additional form of legislation which discussed how to tackle predatory organ trafficking was passed through Congress but was never passed through the Senate which means it has not become law and therefore cannot be implemented. The main anti-trafficking legislation in the US is the Victims of Trafficking and Violence Protection Act (TVPA) and does not approach the topic of THBOR.[256] The TVPA though will be discussed in the analysis in regards to how it could potentially be of assistance to victims of THBOR.

4.1. The United States of America

4.1.1. 42 U.S. Code §274e - Prohibition of Organ Purchases

This law was implemented in the US in 1984 and its purpose was the prohibition of organ purchases across the country. While the code is more extensive than this section the other sections do not apply to THBOR as they focus on other aspects of organ removal and transplantation. The first aspect of this section of the code states that "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate

[255] 42 U.S. Code §274e - Prohibition of Organ Purchases, 1984, (United States of America), Subsection B.
[256] Victims of Trafficking and Violence Protection Act 2000, (United States of America), Section 103.

commerce".[257] This forbids the purchase and the selling of organs for any reason however it does state that there can be a transfer of money in such concerns of transportation, storage and travel expenses incurred by the donor, wages lost and more. However, this has to be regulated to guarantee that the donor is only receiving the amount necessary for their efforts towards the organ transplantation. If this is not regulated, it runs the risk of the expenses being over-inflated as a way to purchase the organ but claim it was just within the necessary expenses for the removal. If there is a violation of this standard than the person can receive up to five years imprisonment, a fifty thousand dollar fine or both.[258] Unfortunately this act similar to both India and Pakistan does not pertain any specific provisions for persons who are coerced or forced into organ removal and then receiving some money for it. As they may then be prosecuted under this act because of the receival of money.

In 2004 the act was updated with the Organ Donation and Recovery Improvement Act (ODRIA). One change to this act is that it allows for states, organ procurement networks, transplant centres and other organisations to receive grants to help individuals towards expenses they will incur from the organ donation. And it is stressed by the secretary of the public health department that the grants and money that is received by the organisations that when it comes to those who are donating the ones who will have a more challenging time affording the expenses themselves must take priority for the receival of expenses paid.[259] Before this occurs though the secretary must deem the donation as appropriate in order for it to take place[260] to avoid the possibility of those using the organ donation to profit or to protect those who have been coerced or forced into the donation. It is the responsibility of the secretary to make sure that the ODRIA is not being violated by the illegal selling or purchasing of organs and regulating the exchange of money to hospitals and also in providing grants and other forms of aid for organ removal.

[257] 42 U.S. Code §274e - Prohibition of Organ Purchases, 1984, (United States of America), Subsection A.
[258] 42 U.S. Code §274e - Prohibition of Organ Purchases, 1984, (United States of America), Subsection B.
[259] Public Law 108-216 - Organ Donation and Recovery Improvement Act, 2004, (United States of America), Section 377.
[260] ibid.

As both the initial act and ODRIA mention that it is illegal for anyone to knowingly acquire a purchased organ what it is not mentioned is an individual funding the basic necessities that a donor may incur during the donation process. ODRIA though does specifically mention that the states, transplant centres and other organisations are the ones that have to provide the reimbursement.[261] It could be deduced from this that while it is not the responsibility of the recipient to reimburse the expenses, but is not illegal for the recipient to reimburse legitimate expenses. The US is also a challenging country to approach as every state also holds their own organ transplant laws and has different ways to become an organ donor as the US has an opt-in program. However, the purchasing of organs is strictly forbidden in every state under national law. Despite this legislation there are no specific regulations in regards to organ purchasing organs abroad however it is conceived that purchasing organs abroad is not allowed under the initial Act. It is important to note that the ODRIA has been "authorized but not appropriated",[262] which means that there are no monetary means for the actual enforcement of the legislation provided by the government.[263]

There was another form of legislation to tackle predatory organ purchases and transplant tourism introduced to the government which passed Congress, however did not pass the Senate.[264] This piece of legislation would have declared that coercion in order to remove a person's organs would have directly violated ethical standards the US is based on and it would have also amended the TVPA to include THBOR in its definition.[265] The significance of this will be discussed in the analysis.

A similar situation occurred with a piece of legislation known as the Trafficking in Organs Victims Protection Act was introduced into Congress in 2012 but did not pass

[261] ibid.
[262] Living Donor 101, [website], 2018, http://www.livingdonor101.com/legal.shtml, (accessed 24 July 2018).
[263] ibid.
[264] Congress. Gov, [website], 2016, https://www.congress.gov/bill/114th-congress/house-bill/3694, (accessed 1 July 2018).
[265] ibid.

Congress.[266] This legislation would have also amended the TVPA to include THBOR and coercion specifically and would forbid US citizens from traveling for the purpose of participation in transplantation.[267] The US has implemented legislation in an attempt to combat the sale of illegal organ sale and purchase primarily within US territorial borders. As the involvement of the US is primarily in the aspect of transplant tourism in regards to THBOR that will be looked in the next section along with the organ transplantation Act and how the two correlate together and could potentially help to tackle the problem of THBOR across the world.

4.1.2. Analysis of Application in the United States of America

The US does not have the same problem as the other countries discussed in this thesis and that is because the purchase and sale of organs often does not occur within US territory. This is because individuals from the US are traveling to other countries for organ transplants.[268] The waiting list for an organ transplant in the US is very long and often those on the waiting list will die before they ever have the chance of receiving the necessary organs.[269] It is possible that up to 20 people die daily waiting for organs.[270]

However, there has been one documented case under the Act of Illegal Organ Sale in the US. A man named Levy-Izhak Rosenbaum admitted to three counts of illegal kidney transplantation and one count of conspiracy claiming that now all the recipients and donors were living happy and healthy lives.[271] It was claimed that he solicited the organs

[266] "H.R. 6573 — 112th Congress: Trafficking in Organs Victims Protection Act", [website], https://www.govtrack.us/congress/bills/112/hr6573, (accessed 4 July 2018).
[267] ibid.
[268] J. Gill et al., 'Transplant Tourism in the United States: A Single-Center Experience', *Clinical Journal of American Society of Nephrology*, vol. 3, no. 6, 2008, p. 1820, https://pdfs.semanticscholar.org/e92a/7fe5f5e4ad42ecd5dc141a08716028f84b64.pdf?_ga=2.136058033.1215294245.1530476242-964089219.1530476242, (accessed 1 July 2018).
[269] Organ Donation Statistics, [website], 2018, https://www.organdonor.gov/statistics-stories/statistics.html, (accessed 1 July 2018).
[270] United Network for Organ Sharing, [website], 'Data', 2018, https://unos.org/data/, (accessed 24 July 2018)
[271] The Associated Press, 'Guilty Plea to Kidney-Selling Charges', The New York Times, 27 October 2011, https://www.nytimes.com/2011/10/28/nyregion/guilty-plea-to-kidney-selling-charges.html, (accessed 30 June 2018).

from individuals from Israel who were paid. However, Rosenbaum stated that the money the donors received were for the necessary medical expenses they would incur with the removal as well as the loss of income they may experience from the removal.[272] Rosenbaum could potentially serve up to five years in prison and receive a fine up to 250,000$ for the crime which spanned international borders and involved corruption and bribery of public officials.[273] Despite being able to serve a longer amount of time Rosenbaum was only sentenced to two and a half years and could potentially be deported after his sentence has been served.[274]

While the individuals from the US did not travel to Israel for the transplantations, they themselves also committed a violation in accordance to the Act. As it is also stated as illegal to purchase the organs, those who received the organs have also committed a crime. Despite this upon further research, it was not possible to determine if those individuals had been prosecuted for their involvement in the crime. The Act itself therefore has only prosecuted one case in relation to the illegal sale of organs within the US. However, this is potentially because when someone from the US receives an illegal organ transplant, it is because they travelled to receive it. In countries such as India and Pakistan though they could be prosecuted under the organ legislation that exists in that respective country.[275]

As the primary involvement of the US in THBOR is in the form of transplant tourism that will be discussed and evaluated. A number of individuals who are victims of THBOR have their organs removed for an individual who is coming from a foreign nation.[276] Although not all of those who are receiving the organs originate from the US some of

[272] ibid.
[273] ibid.
[274] S. Henry, 'Brooklyn Man Sentenced 2 ½ Years in Fed Organ Trafficking Case', *NBC New York*, 2012, https://www.nbcnewyork.com/news/local/Kidney-Organ-Trafficking-Levy-Izhak-Rosenbaum-Brooklyn-Federal-Conviction-Sentencing-162046565.html, (accessed 9 July 2018).
[275] Hasnat, and S. Cheema, 'FIA busts illegal organ trade gang in Lahore', *Dawn*. Here it is mentioned that two foreigners are arrested in participating in the crime, showing that foreigners can be prosecuted.
[276] M. Bos, 'Trafficking in Human Organs', European Parliament Policy Department Study, 2015, p. 14, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU%282015%29549055_EN.pdf, (accessed 1 July 2018).

them do. Transplant tourism is a large ethical problem within the US in regards to the law stating that it is illegal to purchase or sell organs within its territory. A key aspect of the Act allows for prosecution of those who violate it abroad by using the interstate commerce clause of the Act because it deals with the commerce of foreign nations as well.[277] It can be violated when the organ is bought in the foreign country and then transported to the US for removal or a person is brought to the US for removal prosecution can occur.[278]

This is shown above in which the organs were purchased from Israeli individuals and then transplanted into US individuals for monetary exchange. However, if the US individual goes to a foreign country and all the monetary exchange occurs abroad under the Act the person cannot be prosecuted. A number of US transplant specialists disapprove of transplant tourism.[279] While there was an Act that was on the table in regards to predatory organ purchases and transplant tourism could help to curb this however it has never been passed. This could have strong potential outcomes in combating illegal organ purchase and sale across the world. It could further punish those who receive organs from foreign nationals whether it occurs within the US or on foreign territory.

There have been cases that have connections with US individuals participating in transplant tourism or illegal organ removal in other countries. One of the cases that involved US individuals was located in Pristina, Kosovo at the Medicus Clinic.[280] A number of the recipients came from countries other than the US but the main focus of this is on individuals who came from the US. The charges that were brought up in this case were against a number of individuals involved with the transplant process including doctors, brokers and others. The charges were for human trafficking, organised crime, unlawful use of medical authority and abuse of authority.[281] The main success comes from the guilty sentence provided by the court in Kosovo to the former owner of the

[277] E. Pugliese, 'Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Measures', *Journal of Contemporary Health Law & Policy*, vol. 24, no. 1, 2007, pp. 204-205, https://pdfs.semanticscholar.org/75b4/31fd0e9726d1dc8137c8b9084f09542b90a2.pdf, (accessed 4 July 2018).
[278] The Associated Press, 'Guilty Plea to Kidney-Selling Charges'.
[279] Pugliese, 'Organ Trafficking and the TVPA', p. 187.
[280] OSCE, 'Trafficking in Human Beings For the Purpose of Organ Removal in the OSCE Region', p. 66.
[281] ibid.

Medicus Clinic on the charges of human trafficking. Despite this case not occurring within US borders it is pertinent to understand what the US Organ Act could have done in the situation of US individuals traveling abroad to purchase organs in a foreign country. None of the cases which involve a US citizen purchasing an organ abroad have resulted in prosecution of that individual.

As stated in the section that describes the US Organ Act it is explained that a person can be prosecuted under the Act for participating in the illegal purchasing of organs outside of the US. This is because of the clause that discusses the exchange of money and how the exchange of money in foreign borders still affects the commerce within the US.[282] Therefore while the prosecution of those who helped with the organ transplants falls to the country in which is occurred the US has the opportunity to prosecute those individuals who travelled to receive the organs that were secured for the use in the illegal transplant. Despite this opportunity for the US to prosecute these individuals they did not which can be seen as the Act not being enforced to its full extent and potential. The Medicus case is not the only case in which US individuals travelled to other countries to receive organs and were not prosecuted under the Act.

However, it is not particularly easy to determine those who have participated in transplant tourism. One way to do this though would be oversight of the waitlist for those waiting to receive transplants. If a person has participated in transplant tourism they would no longer need to be included on the waitlist for organs in the US. A study was done in which it was seen that on average patients had been on the waitlist for approximately 14 months before going abroad to receive their organs and during the study period it was determined that 173 individuals received organs abroad and were subsequently removed from the waitlist.[283] Unfortunately, due to lack of information in regards to these transplants it cannot be determined how the organs were secured. However, due to the knowledge that the majority of individuals who did participate in the foreign transplants, had a

[282] 42 U.S. Code §274e - Prohibition of Organ Purchases, 1984, Subsection A.
[283] R. M. Marion, 'Transplants in Foreign Countries Among Patients Removed from the US Transplant Waitlist', *American Journal of Transplantation*, vol. 8, 2008, p. 989, https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1600-6143.2008.02176.x, (accessed 23 July 2018).

considerable amount of money[284], it is a possibility that the organs secured for the transplantation were purchased illegally.

The US ratified the Palermo Protocol and therefore they are obliged to implement the Protocol as stated. The US did establish a specific anti-trafficking act, the TVPA, which included a number of differences from the Palermo Protocol. Unfortunately though, the TVPA does not approach THBOR. The TVPA focuses on sex trafficking, servitude, debt bondage and slavery,[285] however, it does not mention THBOR in the main Act or in any of its revisions. While the TVPA was established before the Palermo Protocol there have been multitude revisions of the original Act which could have included THBOR, but did not. In terms of the Palermo Protocol it is important to note that the TVPA covers a large number of aspects that the Protocol mentions however in order to fully domesticate the Protocol organ removal must be added.[286]

The main involvement with THBOR by US nationals is with transplant tourism. The US must take efforts to control the exchange of organs and halt travel for cheaply purchased organs.[287] Congress authorised specific funds to help combat trafficking in human beings in foreign nations[288], but since THBOR is not a form of trafficking under the TVPA the aid does not go towards combating THBOR. The main focus of the US is sex trafficking, forced labour and sex trafficking of children, and it is unlikely that THBOR receives the support it needs.[289] The TVPA has a strong protection clause for those who are victims of trafficking within the US. Unfortunately though because THBOR is not mentioned under the TVPA the rights that are afforded to the victims under the TVPA[290] are not granted to victims of THBOR. If the legislation focused on predatory organ trafficking had passed, then the TVPA would have been amended to include THBOR as a form of trafficking which therefore would grant victims of THBOR the protection measures

[284] ibid.
[285] Victims of Trafficking and Violence Protection Act 2000, (United States of America), Section 103.
[286] Pugliese, 'Organ Trafficking and the TVPA', p. 197.
[287] ibid.
[288] A. Siskin and L. S. Wyler, 'Trafficking in Persons: U.S. Policy and Issues for Congress', *Congressional Research Services*, 2013, https://fas.org/sgp/crs/row/RL34317.pdf, (accessed 4 July 2018).
[289] Pugliese, 'Organ Trafficking and the TVPA', p. 198.
[290] ibid.

provided by the TVPA. It would be necessary for organ removal to be included in the definition of trafficking for proper protection of all victims of trafficking.

Nevertheless, the US has strong obligations in relation to THBOR. The obligations are mentioned earlier in this thesis. The first is the obligation to fulfil by providing those who residing within the US the ability to receive proper medical care which would in turn eliminate the need for them to travel abroad for illegally secured organs. This all leading to the decrease in demand for organs which could potentially lead to a decrease in victims of THBOR because there is no demand for the organs. It is important for the State to be able to provide the rights to those persons who reside within their borders. It is also necessary that the State does whatever they can to ensure these obligations are met.

There is a strong obligation to protect victims of THBOR that are brought to the US for the removal and transplantation. The US does have some achievements in victim protection however the victim protection standards that exist are established by the TVPA does not extend to those who are victims of THBOR. This is because the TVPA does not mention THBOR as a form of trafficking[291] in its description of trafficking. However, because the US ratified the Palermo Protocol and there are strong aspects of the Protocol that discuss victim protection it is up to the US to implement those measures of protection for the victims of THBOR. The efforts of the legislation that were established to combat the illegal purchasing and selling of organs did not include any measures to protect those who could potentially become victims or are victims of THBOR. This is a large gap in legislation as victims of THBOR are not properly protected by either the TVPA or the Organ Transplant Acts. It is important the State also does what they can in order to decrease the demand and that is not occurring currently in the US which is a gap in the enforcement of the legislation by there being so few prosecutions under the Act and little effort to increase the number of organs that are donated willingly within the US. The next section will discuss the conclusions reached from the explanation and analysis discussed with the demand and supply countries.

[291] Victims of Trafficking and Violence Protection Act 2000, (United States of America), Section 103.

5. Conclusions

Organ donations is one of the most valuable and selfless acts that a person can commit. However, on the opposite spectrum the removal of an individual's organs by coercion, deception, force or any other act is despicable. The Palermo Protocol lists removal of organs as a form of exploitation. THBOR has existed for a number of years for a long time the removal of organs was not strongly monitored. This lack of monitoring lead to the free exchange of organs and the ability for those to sell or be coerced into selling their organs. In many of these circumstances those who buy the organs are foreigners because they could not receive an organ in their own country.

One of the main obligations of the demand countries and the supply countries is the obligation to fulfil. The three countries have implemented legislation to specifically combat the illegal sale and purchase of organs. One of the primary similarities between the two Acts in the supply countries is that they have harsh punishments for those that violate the standards set within the legislation. The punishments range from a large fine to an extended stay in prison, which in India can extend up to 20 years, and in Pakistan 10 years. While India and Pakistan both have strict punishments for violators of the Acts the US is not as harsh with their penalties by only having up to 5 years imprisonment.. Despite these potential punishments the crime still occurs with very few prosecutions happening in any country.

It can be concluded from the research done in this thesis that the punishments cannot be considered a deterring effect from participating in the crime. This is jarring because the act of selling ones organs is widespread knowledge throughout the communities.[292] It is also known throughout the world that individuals have the capabilities to travel to these countries to receive organs as what is referred to in this thesis as transplant or medical tourism. This crime is continuing despite the potential harsh punishments that can be received by those who participate. US individuals have participated in the purchasing of

[292] Yousaf and Purkayastha, 'Barely Half Alive', p. 640.

organs in foreign territory and could under the Act be prosecuted for doing that. There has not been a single case prosecuted under the Act of a US individual purchasing an organ in a foreign territory, this can be seen as the Act not reaching its full potential. Due to the lack of convictions with either Act it can be determined that neither of the Acts have been successful in curbing the crime from occurring. It seems as though none of the countries are motivated to actually implement the Acts which would result in more convictions.

A distinction between the Acts relates primarily to who are allowed to donate their organs. Indian THOA made it so only those with direct blood relation or with strong affection to the recipient could donate the organ and established an authorisation committee to determine if the claims of relationship or affection were true. It would be important for the authorisation committee to receive training on THBOR. Unfortunately, a loophole around this requirement stated in THOA that can be determined. There is the possibility to forge documents and pictures that can establish a false belief of kinship or affection. Those who have their organs removed and use this loophole are often coerced by the use of monetary payments as established in this thesis. The brokers often help to falsify the documents that are being used to convince the committee to allow the transplantation to occur.[293] This loophole has allowed for transplants that shouldn't have happened to happen.

The resolution of 2011 attempted to put more stringent regulations on who could receive the organs. It was included in the resolution that foreign national could not receive the organs without prior approval from the authorisation committee. Despite the efforts foreign nationals cannot be seen as successful because the buying of organs from foreign nationals is still rampant in India. There was an addition in 2014 which further stipulations strict evaluation of the donor to make sure there are no financial incentives. However, the broker is still able to work with the person to strengthen the falsities of the story.

[293] N. Bhalla, 'Top Indian hospital says duped into removing kidneys for organ traffickers', *Reuters*, 6 June 2016, https://www.reuters.com/article/us-india-trafficking-organs-idUSKCN0YS1Z9, (accessed 18 July 2018).

Therefore the establishment of the authorisation committee has not been used to its full potential in the identification of victims and from preventing transplants that should not occur from occurring.

This loophole also exists within the Pakistani legislation. In Pakistan organ donation is only allowed between either family members or those who feel a strong attachment to the recipient. The evaluation committee determines that the person is providing the organ voluntarily and that there are no financial incentives. This allows for the illegal buying and selling of organs to continue in Pakistan because it can still be falsified consent. The establishment of a monitoring committee was to investigate any claims of persons receiving money for their organs or organ trafficking. However, THBOR is not investigated by the monitoring committee.

India, Pakistan and the US have all struggled with their obligation to protect. One of the biggest failures determined is the lack of victim protection measures in the transplant legislation. Under these the person who receives money for their organ can be prosecuted. It is not stated in the legislation that some participants in the organ removal may not be participating willingly. The legislation does not provide any protection/non-punishment measures for victims of THBOR. A key aspect of making sure that victims of trafficking are not punished or prosecuted is proper identification. However, there is no mention of THBOR resulting in no specific ways to identify those who could be victims of THBOR which would prevent prosecution or punishment of the crime in the laws that deal with organ transplantation.

One of the purposes of the Palermo Protocol is to protect the victims of trafficking[294] is not mentioned in any of the organ Acts. This is a gap in the legislation of all three countries as it fails to recognise that as a victim of THBOR they are under potential threat after the organ removal is discovered as they may be targeted and threatened if they talk to law enforcement about the removal.[295] It fails to recognise that persons are under threat

[294] Palermo Protocol, 2237 UNTS 319, Section 2.
[295] UNODC, 'Toolkit to Combat Trafficking in Persons', New York, 2008, p. 234.

from being brought into THBOR. Due to negative situations in their lives such as debt or poor pay[296] they are more susceptible than those without debt or with jobs with sufficient pay to becoming involved with organ removal. However, the Indian Bill would also establish measures to prevent human trafficking from occurring and as THBOR is covered under the Bill that would also include preventive measures for those who may fall victim to THBOR.

Pakistan and the US have legislation specifically dealing with human trafficking which has measures to protect victims but, the legislation does not mention THBOR, it can be concluded those protection measures would not cover THBOR individuals. This can be seen as the States failing to protect their rights from being infringed upon. However, in the Indian Bill, THBOR will be a covered form of trafficking which means protection measures would be available to victims of THBOR. The measures that would also be available to victims of THBOR would be rehabilitation which would fall in line with the realisation of the right to health for victims of THBOR. The proposed Bill also always for compensation to be provided to the victims[298] and for prosecution of the traffickers which is a step in the right direction for providing remedy to the victims of THBOR. However, until the legislation is passed completely there is no way to say if it will effectively provide the protection and rehabilitation measures to victims of THBOR. The passing of legislation in India and the strengthening of already existing anti-trafficking legislation in the US and Pakistan would help States with their obligation to fulfil.

Unfortunately, in the process of this research it was determined that very few NGOs work particularly with THBOR as the focus seems to lie on sex or labour trafficking. One NGO that works specifically with organ removal and THBOR is the Coalition for Organ Failure Solutions and has not published anything since 2014, which seems ineffective as the

[296] A. A. Aronowitz and E. Isitman, 'Trafficking in Human Beings for the Purpose of Organ Removal: Are (International) Legal Instruments Effective Measures to Eradicate the Practice', *Groningen Journal of International Law*, vol. 1, no. 2, 2013, p. 79, https://grojil.files.wordpress.com/2014/01/03-aronowitz-isitman.pdf, (accessed 18 July 2018).
[298] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, Clause 23.

problem is still on going.[299] While the Indian Bill does provide for strong cooperation between government and civil society[300] it is as stated above challenging to determine the effectiveness because it is still in the voting phase and is not yet law. There is also no guarantee that the Bill will be voted into law however, it would greatly improve the lives of trafficking victims in India.

There also exists no State enforced action to combat THBOR despite the knowledge of THBOR occurring within these countries. The States in question acknowledge that THBOR is present but they are not taking the appropriate measures to combat it from occurring. This severe gap in victim protection is existent within these three countries. However, the Indian Bill would establish State committees to combat trafficking[301]. The legislation to stop the sale and purchase of organs has not been implemented to its full capacity. The States discussed are not fully achieving their obligations to protect or fulfil because of the gap in enforcement of the legislation and in their lacking of victim protection measures to prevent non-punishment/ prosecution as well as the rights granted to all individuals. The inability of the States to actively combat THBOR within its territory shows a lack of initiative or drive to combat this issue. In the following and final section will be recommendations on how to improve the State response to THBOR.

[299] Coalition for Organ Failure Solutions, [website], COFS-Related Publications, 2014, http://cofs.org/home/publications/, (accessed 28 July 2018).
[300] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, Clause 3, 10-13.
[301] ibid.

6. Recommendations

6.1. Good Practices to Increase Organ Donation

There are many good practices that exist throughout the world to combat the shortage of organs for transplantation that exists in many countries. The US, India and Pakistan all have an organ shortage. This is only exasperated by the number of individuals from foreign countries that are travelling to India and Pakistan to participate in transplant tourism. To understand what can be done for countries that struggle with organ shortage it is necessary to investigate good practices in other countries to reduce the organ shortage.

Spain is one country with higher organ donation rates after the implementation of the National Transplant Organization (ONT) and the Transplant Donor Coordinators (TDCs) in 1989.[302] The Spanish organ transplant system is based on the aspect of presumed consent which is when a person, unless they state otherwise, is automatically an organ donor.[303] However, until the establishment of the ONT in 1898 the presumed consent was never fully implemented as the relatives of the individuals always had the final say.[304] After the establishment of TDCs and the ability to approach grieving families carefully was the donation rate able to rise.[305] Resulting in Spain having some of the highest rates of organ donation across the world with a deceased donation rate of 36 per million population (pmp) well above the European Union average of 19 in 2014[306] and in 2015 reaching 40 pmp.[307]

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[302] C. Rudge et al., 'International Practices of Organ Donation', *British Journal of Anaesthesia*, vol. 108, no. 1, 2012, p. 52, https://www.researchgate.net/publication/51954127_International_practices_of_organ_donation, (accessed 14 July 2018).
[303] ibid.
[304] ibid.
[305] ibid.
[306] G. Mills, 'Spain tops world organ donation rankings', *The Local ES*, 13 January 2015, https://www.thelocal.es/20150113/spain-tops-world-organ-transplant-rankings, (accessed 14 July 2018).
[307] R. Matesanz et al., 'How Spain Reached 40 Deceased Organ Donors per Million Population', *American Journal of Transplantation*, vol. 17, no. 6, p. 1447, https://onlinelibrary.wiley.com/doi/epdf/10.1111/ajt.14104, (accessed 14 July 2018).

Austria also has presumed consent legislation in terms of organ donation. However, unlike Spain where the family can override the automatic donation in Austria the family does not have that ability.[308] The only way in which a person can opt-out of the organ donation by filling out the proper paperwork or a statement in their will stating a desire to not have their organs removed.[309] It is interesting to compare Austria an opt-out country and Germany an opt-in country on their organ donation rates pmp. In 2014 Germany had 10.45 pmp for deceased donors while Austria had 24.94 pmp for deceased donors.[310] In Austria there are more deceased donors with the opt-out program than Germany with the opt-in program. This can be seen as two countries with similar cultures but two different organ procurement programmes and one being more effective than the other for deceased organ. Spain particularly promotes the opt-out programme as a way to combat organ trafficking and transplant tourism.[311] It would be important for countries to reach self-sufficiency for organ donation and transplantation to combat THBOR.

The most recent deceased donation rates are from 2017. Spain led the countries with 46.9 pmp, the US at 36 pmp, and India at 0.8 pmp with no number provided for Pakistan.[312] While the US is high in rankings in their deceased donation they are still beaten by a number of countries that have the opt-out program rather than the opt-in which is used in the US. These however, are only the preliminary numbers for 2017. There are ways to increase organ donation before death in what is known as living organ donation. Unfortunately in the process of researching good practices no good practices in regards

[308] J. Li and T. Nikolka, 'The Effect of Presumed Consent Defaults on Organ Donation', *CESifo DICE Report*, no. 4, 2016, p. 90, https://www.cesifo-group.de/DocDL/dice-report-2016-4-li-nikolka-december.pdf, (accessed 14 July 2018).
[309] Deutsches Referenzzentrum für Ethik in den Biowissenschaften, [website], last update 2018, http://www.drze.de/in-focus/organ-transplantation/modules/rechtliche-regelung-in-oesterreich?set_language=en, (accessed 14 July 2018).
[310] Li and Nikolka, 'The Effect of Presumed Consent', p. 91.
[311] Ministerio De Asuntos Exteriores, Unión Europea Y Cooperación, [website], 'Spain promotes fight against trafficking in human organs and transplant tourism', 12 July 2017, para. 3, http://www.exteriores.gob.es/Portal/en/SalaDePrensa/NotasdePrensa/Paginas/2017_NOTAS_P/20170712_NOTA095.aspx, (accessed 22 July 2018).
[312] International Registry in Organ Donation and Transplantation (IRODaT), 'Preliminary Numbers 2017', *IRODaT*, 2018, http://www.irodat.org/img/database/pdf/NEWSLETTER2018_June.pdf, (accessed 14 July 2018).

to living organ donation were determined. It is interesting to see the difference between the countries that have the opt-out program having a higher number of donations pmp compared to countries that have the opt-in program. As some countries which are known for their involvement in transplant tourism have some of the lower numbers of deceased organ transplantation. If every country was to establish the opt-out programme then the demand for organs resulting in transplant tourism or THBOR could be decreased.

Education in terms of organ donation is very important. It is important the individuals understand the value of organ donation after death. It is also necessary though to combat fears that reside within organ donation. During education of individuals it should be stressed that the organs will not go to individuals who buy them that they instead will go to people who need them the most. As it is possible to increase the number of individuals who donate their organs after death this could potentially reduce the need for organs within the respective countries. However, there is still a fault with transplant tourism. This could involve the necessity of completely banning organ transplants to foreigners unless one can prove family relation. While the family relation has currently not been successful one of the few ways to prove relation would be DNA testing in order to prove the relation.

In India specifically a number of individuals die every day in car accidents and those organs could potentially reduce the organ shortage for those who live in India.[313] However, because India is an opt-in country unless the person has opted-in they cannot take their organs without their consent. With introducing the opt-out policy similar to Spain or Austria there could be a decrease in the organ demand. The medical community could also be very valuable in terms of combatting THBOR. In which education could be provided to those who are performing the transplantations as they could recognise those who may be victims of THBOR.

[313] Abraham et al., 'State of deceased donor transplantation in India', p. 332.

Another potential way to combat the need for organs from individuals residing within the US would be to change the organ procurement policies. The US has an opt-in policy which means for their organs to be used in the case death they must first state they want their organs donated. It is possible for a family member to give permission for the organs of a family member to be used for transplantation[314] in the case of being brain dead. In the US there is a large gap between the number of organs donated and the number of organs needed for transplantation there is the potential to combat this by implementing an opt-out policy similar to other countries. The establishment of an opt-out policy would establish assumed consent with would increase the numbers of organs available for transplantation.[315] The creation of the opt-out policy could decrease the demand for illegally secured organs and the need for US individuals to travel abroad for those organs. It would be important for all three countries to combat foreigners coming to their State for legal donation from deceased donors which is seen in the US. For all three countries to target the lack of organs available within their own countries for transplantation would be the establishment of an opt-out program for deceased organ donation.

6.2. Working with the Supply Countries

In order to reduce THBOR and improve the situation for victims of THBOR there needs to be changes made throughout the supply countries. The supply countries need to be targeted for reform primarily because in many of the cases the victims of THBOR are not being brought to another country as the act of THBOR is occurring within the borders. It is also key to note that within the analysis of the legal statutes of both India and Pakistan there are changes to be made that could improve the legislation and how it is implemented. In regards to victim protection measures, prosecution of those who participate in THBOR, and advocacy and education.

[314] US Department of Health and Human Services, 'The Deceased Donation Process', [website], 2018, https://www.organdonor.gov/about/process/deceased-donation.html, (accessed 17 July 2018).
[315] J. A. Hughes, 'You get what you pay for?: Rethinking US Organ Procurement Policy in Light of Foreign Models', *Vanderbilt Journal of Transnational Law*, vol. 2, 2009, p. 379, https://www.vanderbilt.edu/wp-content/uploads/sites/78/hughes-final_x.pdf, (accessed 19 July 2018).

One of the first considerations that the supply countries should take is the suggestion from the working group on trafficking in persons (2010) to implement a non-prosecution clause for those who are victims of trafficking.[316] This should be implemented into the transplant laws so States do not prosecute victims of THBOR for their involvement in any crime related to the trafficking. A person becomes a victim of THBOR when there is the act, means and the purpose as discussed in the Palermo Protocol. The act consisting of recruitment, transport or harbouring, the means which is coercion, deception, force or use of money to gain consent. Followed by the purpose which would be the removal of organs for transplantation. Victims should not be prosecuted for the receival of money for their organ, the falsifying of documents for the transplantation to happen, the participation in organised crime or illegal border crossing if that does happen and if they are forced. This is an important because it prevents victims from being prosecuted and therefore would be more willing to come forward about the crime committed against them. This is because they would no longer be in fear of being prosecuted because of what happened to them, potentially resulting in an increase of cases prosecuted for THBOR.

In order for non-prosecution of victims to occur though there needs to also be a better system implemented for victim recognition. As it is very important that those who are victims are seen as such and not seen as criminals. This also falls in line with victim protection measures to show that if they approach the authorities that they won't be shamed for their participation in the organ removal. That after the removal victims often need time to recuperate from the removal but with proper care the victims could potentially assist in prosecution of their traffickers. The victims in order to properly recover should be provided with medical and psychological care which would not only consist of immediate care but would also consist of long term care for the victims.[317] This would work for both the supply and demand countries but primarily for the supply countries as the majority of transplants happen in the supply countries due to transplant tourism.

[316] Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons', p. 2.
[317] UNODC, 'Assessment Toolkit', p. 53.

It is also important to increase measures to help with the identification of those who are victims of THBOR and those who may become victims of THBOR, this would primarily relate to prevention of THBOR in the first place. In order to do this, it would first consist of education to show the dangers behind organ removal. By taking real life experiences it could potentially show individuals what happens if their organ is removed such as the negative health effects and the potential loss of work. The government would take measures such as working to alleviate poverty, help with underdevelopment and to increase potential opportunities for the people[318] in order to combat THBOR.

Another recommendation for the supply countries is an increase in monitoring of the number of foreign individuals who travel for organ removal. As stated above Pakistan does not release official numbers for foreigners who receive organs in their country and that could be one of the first steps in monitoring organs transplants in Pakistan. With better monitoring programmes to identify when a person is travelling to Pakistan for the removal and then investigation into determining whether that transplant was legitimate or not it could further in the fight against THBOR. It is necessary for Pakistan and India to increase their desire to combat THBOR. If the two countries increase their desire to combat THBOR using investigative procedures and the legislation that has been passed to prosecute those who participate there could potentially be a decrease in THBOR.

The final aspect that could benefit India would be passing the anti-trafficking Bill. As victims of THBOR would be protected under the Bill.[319] The Bill proposal recently passed the Lok Sabha which will next go to Rajya Sabha and if passed there will conclude with the President of the Indian Parliament.[320] The passing of this Bill would be a big step for

[318] A. Pascalev et al., 'Protection of Human Beings Trafficked for the Purpose of Organ Removal: Recommendations', *Transplantation Direct*, vol. 2, no. 2, 2016, p. 2, https://journals.lww.com/transplantationdirect/Fulltext/2016/02000/Protection_of_Human_Beings_Trafficked_for_the.6.aspx, (accessed 16 July 2018).
[319] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, (India), Bill no. 89 of 2018, Clause 2, *The Quint*, 9 July 2018, https://www.thequint.com/explainers/all-you-need-to-know-about-the-trafficking-of-persons-bill-2, (accessed 22 July 2018).
[320] TNN, 'Lok Sabha Clears Law to deal with human trafficking', *The Times of India*, 27 July 2018, https://timesofindia.indiatimes.com/india/lok-sabha-clears-law-to-deal-with-human-

victims of THBOR to receive protection and rehabilitation measures. This is especially relevant with the right to health in which a person's health is greatly impacted after the removal that the rehabilitation measures would benefit their recovery.[322] While Pakistan has implemented anti-trafficking legislation that could be improved with the introduction of THBOR as a form of trafficking. The addition of THBOR to the anti-trafficking legislation would allow for protection measures to extend to victims of THBOR. It is also especially pertinent that Pakistan signs and ratifies the Palermo Protocol in order for all the protection measures to be granted to victims of not just THBOR but for every trafficking offence. Legislative and educational measures could potentially decrease the risk of being involved in THBOR. However, the most important recommendation for the supply countries is the establishment of victim protection and non-punishment measures to make sure victims are not further victimised from their experiences.

6.3. Improvements to be made within the Demand Countries

Similar to supply countries it is necessary for the countries where the demand for organs is coming from to do something. In many scenarios THBOR is occurring because individuals from the demand countries are traveling to the supply countries to participate in transplant tourism. One of the first improvements that may be made within the demand countries is the changing of the organ transplant laws. In the US it has been illegal to purchase or sell organs for more than three decades. However, that has not stopped the crime from occurring and there has only been one case prosecuted under the Act.

The US attempted to establish laws which would combat predatory organ sales however, those did not pass. To combat the occurrence of US individuals traveling to foreign countries to receive organs secured through THBOR the current legislation should be implemented to its full capacity which allows for prosecution of US individuals who

trafficking/articleshow/65156682.cms, (accessed 28 July 2018); EasyLaw: Interesting Articles, [website], 'How Laws are Made in India- A Simple Perspective', 2012, http://easylawinterestingarticles.blogspot.com/2012/11/how-are-laws-made-in-india.html#!/2012/11/how-are-laws-made-in-india.html, (accessed 28 July 2018).

[322] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, (India), Bill no. 89 of 2018, Clause 21.

secure organs abroad. As in many circumstances after a person participates in transplant tourism they require more medical care after the transplant.[323] This not only costs the individual a large amount of money but it also results in the State spending money. With proper implementation of the organ act and prosecution of those who receive organs abroad this could discourage those who are considering transplant tourism from participating.

To prosecute those who receive organs abroad there first needs to be a system set up for identification of those individuals. This could consist of proper education for medical professionals on how to realise when organs have been secured abroad and how to approach authorities with this crime. A dilemma is incurred here though as in the US there is a strong appreciation of doctor patient confidentiality in which whatever is discussed between the doctor and the patient is of a confidential status.[324] In many cases the only times in which doctor patient confidentiality can be breached is by court order.[325] Therefore in order for doctors to be able to go to the authorities when a person has been involved with transplant tourism would require a drastic change in US law to allow for a breach of doctor patient confidentiality when the patient has been involved with this type of crime.

Another way to determine if an individual has purchased an organ abroad would be the monitoring of the organ waitlist as mentioned above. Monitoring the waitlist would also consist of some policing and investigative efforts in order to determine if the transplant the person received was legitimate or if it was related to THBOR. In order to do this a committee or investigative force would have to be established to look at these cases and determine if they are legitimate. The way to do this would consist of evaluating the person's finances and looking to see if there are discrepancies' within their finances which could lead the findings that they did indeed purchase the organ they received. It would also involve international cooperation as well. Because the investigative authority in the

[323] Schiano and Rhodes, 'The Dilemma and Reality of Transplant Tourism' p. 114.
[324] US Legal, 'Doctor Patient Confidentiality', [website], 2018, https://healthcare.uslegal.com/doctor-patient-confidentiality/, (accessed 17 July 2018).
[325] ibid.

US would need to be able to cooperate with the authorities in the country where the organ was transplanted in order to see if there was in fact involvement of THBOR. This would be a way in which the US could combat THBOR and transplant tourism from occurring by having stricter monitoring of the organ waitlist for those who have gone abroad for organs. With this it could open up the potential for the Organ Act of the US to be put into force more as it could prosecute those who receive their organs abroad in return potentially curbing the desire for those who are considering purchasing organs abroad for fear of prosecution.

A final recommendation for the demand countries particularly the US would be the establishment of a section regarding THBOR into the TVPA. The current trafficking act in the US does not approach THBOR. The TVPA provides strong victim protection measures for sexual, labour and other forms of trafficking. However, because THBOR is not mentioned within the TVPA those protection measures do not stretch to them. A specific section for THBOR would fall more into line with the Palermo protocol and would make it so those who are victims of THBOR would have protection measures granted to them, such as visas to remain in the US, medical care and other forms of protection. Some of these recommendations could potentially decrease the demand for organs within the US which would decrease the need to travel abroad for organs.

THBOR is a heinous crime that targets the weakest individuals in a society. This is an international crime that spans borders but also occurs within national borders and do not involve international actors. India, Pakistan and the US all need to make strides in order to combat THBOR. All three countries have legislation to combat the illegal sale and purchase of organs however, none of them have been effective in ending the problem. In particular, none of them have any measures to protect victims of THBOR. While there is a long way to go until THBOR will cease to exist there are ways that the States can decrease it. No person deserves to live a life where they may die because they cannot receive an organ they need but no person deserves to live a life of pain and suffering because of that.

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Abstract

Victims of human trafficking are constantly at a disadvantage in society. The purpose of this research was to identify if the three focus countries, India, Pakistan and the United States of America have fulfilled their state obligations in regards to Trafficking in Human Beings for the Purpose of Organ Removal (THBOR).

THBOR is a form of human trafficking which occurs when an individual is coerced by the offering of a monetary sum, deceived or forced into having their organs removed for the benefit of another. The research accumulates into what THBOR is and the state obligations that are held, including what rights are possessed by the victims of THBOR. The final phase of the thesis consists of an in depth analysis of the countries individual organ trafficking or organ sale laws. By identifying gaps in legislation it is able to be determined if States are fulfilling their state obligations.

To conclude the research it is pertinent that recommendations are provided for them on how to properly approach THBOR with a greater focus on victims. Maintaining focus on those who are victims of THBOR would greatly help the States to achieve their state obligations and eliminate any gaps in legislation. In the understanding that many of the gaps in legislation that were determined are directly related to victim protection and non-prosecution measures. In the case of THBOR it is necessary that the individuals involved are seen as victims instead of perpetrators of a crime.

Kurzfassung

Opfer von Menschenhandel sind konstanten gesellschaftlichen Benachteiligungen ausgesetzt. Ziel dieser Recherche war es, zu analysieren ob drei ausgewählte Länder, Indien, Pakistan und die Vereinigten Staaten von Amerika ihren Verpflichtungen bezüglich der Unterbindung von Menschenhandel zum Zwecke des Organhandels (THBOR) nachkommen.

Von dieser Form von Menschenhandel (THBOR) spricht man, wenn eine Person durch ein Geldangebot überlistet wird oder gezwungen wird, sich Organe zum Nutzen anderer entnehmen zu lassen. Die Forschungsarbeit untersucht die Definition dieser Form von Menschenhandel, die staatlichen Verpflichtungen und die Rechte der Opfer. Der letzte Teil der Arbeit bietet eine Analyse der Regelungen bezüglich Organhandel und Organverkauf in den oben genannten drei Ländern. Die Identifizierung von Lücken in der nationalen Gesetzgebung gibt Aufschluss über die Umsetzung der internationalen Staatenverpflichtungen.

Schließlich listet die Arbeit Empfehlungen für diese Länder auf, wie Menschenhandel zum Zweck des Organhandels mit mehr Bedacht auf Opferrechte entgegengetreten werden kann. Durch einen stärkeren Fokus auf Opfer könnten die internationalen Staatenverpflichtungen bessen umgesetzt werden sowie die Lücken im nationalen Recht besser geschlossen werden. Viele der identifizierten Umsetzungslücken beziehen sich auf den Bereich des Opferschutzes und die fehlende Verfolgung der TäterInnen. Im Bereich des Menschenhandels zum Zweck des Organhandels sollten involvierte Personen als Opfer und nicht als TäterInnen gesehen werden.