# Can Intergovernmental Commerce in Human Organs be Legal?

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By Anton Lovin August 23, 2018


States prefer when their national legislations conform with international law. However, assessing conformity can sometimes be complicated. One may think of a situation where national legislation mandates doing something the state has internationally undertaken not to do, and concluding treaties to serve as the international legal basis for doing so. Should such legislation be regarded as compliant with international law? Can such treaties really remove the prohibition? Such a situation is here exemplified by Ukraine's new act on organ transplantation (available only in Ukrainian). Although not yet applicable, the act poses a number of difficult questions in relation to both substance and theory.

As to the substance, trafficking in human organs, as well as any other form of human body, commodification is universally condemned on ethical grounds, and prohibited under international law. Where such acts are committed by individuals or entities, the law is relatively clear on responsibility. This clarity dissipates once the possibility of intergovernmental procurement is considered. Hence, as to the theory, a question arises as to whether a state violates international law where it permits the purchase and sale of human organs through its authorised agents in accordance with treaties concluded to that effect. To answer this question, this post will highlight the relevant provisions of Ukraine's recent legislation, which seem to contravene international standards, and analyse the normative nature of these standards.

**Ukraine's New Transplantation Act**

Brought into effect on 25 June 2018, the new Ukrainian Transplantation Act ('the Act') replaced the old transplant legislation in force since 1999 (to remain in force until 1 January 2019 when the new Act becomes fully applicable).

Article 4(1) of the Act declares the no-gain principle for transplantations. Article 20 explicitly prohibits trade in human organs and tissues; making deals for this purpose; and advertising human anatomic materials. However, the prohibition is not without exceptions. The Act acknowledges that there may be some, without stating them explicitly. Article 21 provides for Ukraine's co-operation with other states and international organisations in the field. The international exchange of human materials is mentioned as a way of such cooperation. Such exchange may either be conducted in kind or as 'purchase and sale'. The central executive body responsible for transplant policy is authorised to exchange, buy and sell human

materials ‘on commercial basis’ within the framework of international cooperation *according to a treaty* (Article 21(3)). The previous legislation nor the first draft of the Act provided for the international purchase and sale of human materials.

**State Practice on the International Exchange of Human Materials**

At face value, it could be reasonably assumed that the Ukrainian legislator relied upon some existing state practice. In reality, there is almost nothing to rely upon: treaty law on transferring transplants is scarce, while treaty provisions on possible commercial exchanges of human materials seem non-existent.

Bilateral treaties relating to transplantation are rare, both in the case of Ukraine (e.g. agreements with Georgia (Article 3), the Federal Republic of Yugoslavia (Article 1) and the Slovak Republic (Article 7) and generally. Such treaties usually provide either for capacity building on transplantation (e.g. agreements between Brazil and Uruguay, Turkey and Sudan), or are aimed at crime suppression and explicitly cover the trafficking of human materials (e.g. Agreement between Latvia and Armenia and Russia (p. 179–263). Neither of these would regulate the commercial transfer of organs.

Only two treaties directly governing interstate exchange of transplants have been identified. Namely, an Agreement between Liechtenstein and Switzerland and between Argentina and Chile. Neither agreement provides for commercialising cross-border allocations of transplants, which is prohibited by the domestic legislation of Argentina, Chile, Liechtenstein and Switzerland. Moreover, Eurotransplant and Scandiatransplant, which might be considered as potential partners for transplant exchanges, are not ‘international organisations’ within the legal meaning of the term. Rather, they are non-profit associations for the allocation of available organs and tissues across borders, while their foundational documents as well as agreements they enter into are not treaties. Ironically, even in the terminology used by such organisations, ‘paying back for an organ’ only means an even substitution (in kind).

**‘No-profit’ International Standard**

What disturbs about Article 21 of the Act is the prohibition of financial gain with respect to the human body and its parts from living or deceased donors. This prohibition is enshrined in a range of international instruments (e.g. Oviedo Convention, Article 21 of its Additional Protocol concerning Transplantation; Council of Europe Convention Organ Trafficking Convention (Article 4(1)(b,c), Article 7(1), the WHO Guiding Principles on Human Cells, Tissue and Organ Transplantation, endorsed by WHA Resolution 63.22). As a bottom line, these instruments require that ‘cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value’. The prohibition on making the human body and its parts  a source of financial gain is also set at the EU level (Article 3(2)(c)) with Member States urged to ensure that ‘the procurement of organs is carried out on a non-profit basis’ (Article 13).

The scope of the prohibition against financial gain is not uniform across instruments. Some outlaw financial gain for a donor or any third party involved in the process of transplantation (such as hospitals) (para 132), while, for instance, the non-binding, though widely endorsed, Declaration of Istanbul on Organ Trafficking and Transplant Tourism as revised in 2018 narrows the concept of financial neutrality requiring only that 'donors and their families neither lose nor gain financially as a result of donation'. As it is nowhere prohibited to pay reasonable compensation as long as it only covers technical arrangements and is not inherent in the very act of donation, this only adds to the complication.

**The Legal Problems: Ukraine and Beyond**

Although not *jus cogens*, the prohibition of financial gain is firmly established (with all its uncertainties). Yet, it does not directly bind Ukraine, at least, under the mentioned treaties. Ukraine signed the Oviedo Convention in 2002, the Additional Protocol in 2006, and, most recently, the Organ Trafficking Convention in 2017. It has not ratified any of these instruments.

Still, non-ratification does not totally rule out collisions between treaties and national law. States have an obligation not to defeat the object and purpose of a signed treaty pending its entry into force (Article 18 VCLT): a signing state shall bear in mind the purpose of the treaty (ICJ, *Reservations to Genocide Convention* 1951, p. 23) so as not to destroy its very essence (Aust, p. 119). The ECHR, for instance, applied this rule in *Ocalan v Turkey case* (para 185) confirming that national legislation shall be brought in line with signed international instruments. Therefore, Ukraine is likely to act contrary to 'the general result, which the parties want to achieve' (Dörr, p. 546) by the above mentioned treaties, namely, to prevent the 'commercialisation of parts of the human body involved in organ and tissue procurement, exchange and allocation activities' stated among the aims of the Additional Protocol, and to eradicate financial profit from transplantation sought by the Organ Trafficking Convention (Article 4(1)(b)).

However, subjecting commercial transactions with human organs to eventual treaty provisions may well have ramifications not only for Ukraine, but also for states fully bound by the above mentioned international instruments. This is especially pertinent since 1 March 2018 marked the entry in force of the CoE Organ Trafficking Convention.

The matter is one of invoking the international responsibility of a state acting in breach of some specific obligations. Namely, this is in reference to the distinction between 'mutually reciprocating' and the 'interdependent' or 'integral' obligations, suggested by G.G. Fitzmaurice's for treaties (see p. 27–28, 44–45) and essentially picked up in the ARSIWA as the difference between invoking responsibility under items (i) and (ii) of Article 42(b), roughly corresponding to 'reciprocating' and 'interdependent' obligations, and 'integral' obligations, somewhat reflected in Article 48 as *erga omnes partes* obligations, established to protect a collective interest (see paras. 106-107).

Apparently, there are no grounds to treat the no-gain principle in the field of organ donation as an interdependent obligation within the meaning of Article 42(b)(ii)), since commodification of the human body in any State Party does not influence the standing prohibition for the other parties. Hence, this obligation is not owed by the parties on an 'all or nothing basis' (p. 117). Nevertheless, such a prohibition of financial gain may well be regarded as an obligation established for the protection of a collective or, rather, an extra-state interest (see p. 126, *ICJ, Reservations to Genocide Convention 1951*, p. 23).

Consequently, there is no legal clarity as to the consequences of entering into *inter se* agreements on respective commercial transactions for State Parties to treaties prohibiting human body commercialisation. Similar situations were somewhat reflected, on a couple of occasions, in individual opinions of Permanent Court of International Justice judges (p. 910). For instance, Judge Anzilotti wondered whether states 'were in a position to modify *inter se* the provisions of Article 88 [of the Treaty of Saint-Germain], which provisions . . . were adopted not in the interests of any given state, but in the higher interest of the European political system and with a view to the maintenance of peace' (p. 64; see also the dissenting opinions of judges Van Eysinga and Schücking in *the Oscar Chinn case).*

If the no-gain principle enshrined in the treaties on transplantation indeed constitutes 'collective' obligations, states entering into agreements for commercial transactions with human organs, may be held responsible for breach of its obligations. The ILC noted that '[i]n case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach' (p. 127). Finally, there is no reason to deny the possibility that the obligation not to defeat the object and purpose of a treaty may also be 'integral'; in fact, much more likely so.

National legislation, capable of bringing about such 'partial wrongfulness', cannot be assessed as compliant with international law. Of course, it does not mean that a state is in breach by the mere fact of adoption (it would still need to act out such legislation) but for policy reasons, the non-compliance may be stated with reasonable certainty.

**The Threatened Consensus**

One may argue that the above questions are purely a product of academic curiosity. After all, the Act will only become effective as of 1 January 2019 and in order for Article 21 to become operational, Ukraine will need to conclude further treaties. The latter is likely to stir public attention and cause uproar due to the sensitivity of the subject in Ukraine and worldwide.

Still, the case of Ukraine comes in particularly handy against the background of the so called Global Kidney Donation Programme (GKEP) which has recently generated a wave of formal criticism by the CoE, EU National Competent Authorities on Organ donation and transplantation and Declaration of Istanbul Custodian Group. These are yet another

confirmation of the crystallising international consensus as to the prohibition of financial gain from organ donation, which, for obvious reasons, leaves no room for commercial procurement, treaty-based or otherwise.

## Conclusions

The 2018 Transplant Act is not in line with accepted international standards directed against the commercialisation of donations. The question, whether the respective provisions have been included deliberately or are simply a product of a faulted legislative technique, is important but irrelevant for ascertaining the Act's compliance with the applicable rules of international law. The context and drafting history make it difficult to see this as inaccurate wording or unwitting mistake. In any case, the intent to commercially procure organs and tissues only subject to a valid treaty to that effect does not really mend the apparent discrepancy even if Ukraine manages to conclude such a treaty: the prohibition of financial gain from transplantations enshrined in a number of multilateral instruments belongs to 'integral' international obligations, wherefore it cannot be (completely) obviated by separate bilateral arrangements.

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