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A Critical Look at the Council of Europe Convention against Trafficking in Human Organs and what it Means for the Global Fight against Organ- and Transplant-Related Crimes

Abstract

The recent adoption of the Council of Europe Convention against Trafficking in Human Organs is a clear sign that the fight against organ- and transplant-related crimes is stepped up domestically and globally. Apart from providing the first criminal law definition of organ trafficking, the Convention is of particular importance in that it specifically aims to ensure that legal loopholes are closed and that tools are provided for international judicial cooperation. In this paper, I will examine the expected impact of the Convention on the persons involved in organ trafficking and on the suppression of organ- and transplant-related crimes in general. This analysis is conducted in the context of existing legal frameworks that already address some of the offences covered by the Convention, more specifically the framework of human trafficking and domestic transplant regulations that criminalise organ trade. On the basis of this analysis, I will present a set of recommendations regarding the implementation of the Convention.

I. Introduction

Soon after the first successful organ transplant was performed in 1954, safeguards were put in place to ensure voluntariness, altruism, and equity in organ donation and transplantation. To uphold these principles, in the early 1960s and 1970s states began to introduce rules prohibiting organ trade (i.e. offering and receiving financial gain in exchange for an organ), and set forth conditions for valid consent to organ donation. However, the number of patients in need of a transplant has since been increasing and now far exceeds the number of available organs. As a result, some patients are trying to obtain an organ by illicit means.

The first systematic infringements on the prohibition of trade in organs were brought to public attention at the end of the 1980s, and involved affluent patients trav-

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elling to developing countries to buy a kidney from poor donors.¹ This phenomenon, called ‘transplant tourism’, soon boomed and continues to raise major health, legal and ethical issues.² These involve exploitation and health risks of donors,³ health risks to recipients,⁴ harm to third persons and communities,⁵ crowding out of altruistic donations,⁶ corruption of healthcare professionals,⁷ aggravation of social inequalities,⁸ and erosion of communal values.⁹ These reports prompted professional organisations, such as the World Health Organization, the World Medical Association, and the Transplantation Society to develop guidelines laying down minimum standards to guarantee the voluntary and altruistic nature of organ donation.¹⁰ In Europe, these minimum stan-

- 1 *F. Ambagtsheer et al.*, The Battle for Human Organs: Organ Trafficking and Transplant Tourism in a Global Context, *Global Crime*, 14(1) 2013, p. 1 et seq.
- 2 Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2018 Edition (July 2018), available at https://www.declarationofistanbul.org/images/Policy_Documents/2018_Ed_Do/2018_Edition_of_the_Declaration_of_Istanbul_Final.pdf (last accessed 14 August 2018).
- 3 *M. Goyal et al.*, Economic and Health Consequences of Selling a Kidney in India, *Journal of the American Medical Association (JAMA)* 288(13) (2002), p. 1589 et seq.; *A. Tong et al.*, The Experiences of Commercial Kidney Donors: Thematic Synthesis of Qualitative Research, *Transplant International (Transpl Int)* 25(11) 2012, p. 1138 et seq.
- 4 *A.E. Anker, T.H. Feeley*, Estimating the Risks of Acquiring a Kidney Abroad: A Meta-Analysis of Complications Following Participation in Transplant Tourism, *Clinical Transplantation (Clin Transplant)* 26(3) 2012, p. E232 et seq.; *N. Inston et al.*, Living Paid Organ Transplantation Results in Unacceptably High Recipient Morbidity and Mortality, *Transplantation Proceedings (Transplant Proc)* 37(2) 2005, p. 560 et seq.
- 5 *K.A. Bramstedt, J. Xu*, Checklist: Passport, Plane Ticket, Organ Transplant, *American Journal of Transplantation (Am J Transplant)* 7(7) 2007, p. 1698 et seq.; *E.R. Kelly*, International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter, *Boston College Law Review (Boston Coll Law Rev)* 54(3) 2013, p. 1317 et seq.
- 6 *G.M. Danovitch, A.B. Leichtman*, Kidney Vending: The “Trojan Horse” of Organ Transplantation, *Clinical Journal of the American Society of Nephrology (Clin J Am Soc Nephrol)* 1(6) 2006, p. 1133 et seq.; *S.M. Rothman, D.J. Rothman*, The Hidden Cost of Organ Sale, *American Journal of Transplantation (Am J Transplant)* 6(7) 2006, p. 1524 et seq.
- 7 *D. Budiani-Saberi, S. Columb*, A Human Rights Approach to Human Trafficking for Organ Removal, *Medicine, Health Care and Philosophy (Med Health Care Philos)* 16(4), 2013, p. 897 et seq.; *G.M. Danovitch*, Who Cares? Impact of Commercialized Kidney Transplantation on the Doctor-Patient Relationship, in W. Weimar, M. Bos, J. van Busschbach (eds.), *Organ Transplantation: Ethical, Legal and Psychosocial Aspects. Towards a Common European Policy* (Pabst, 2008), p. 49 et seq.
- 8 *M. Nasir et al.*, Organ Trafficking: Do You Want a Society Where the Destitute Become a Store for the Wealthy?, *The Professional Medical Journal (TPMJ)* 20 2013, p. 177 et seq.; *L.F. Ross*, Saving Lives Is More Important Than Abstract Moral Concerns: Financial Incentives Should Be Used to Increase Organ Donation – Con, *Annals of Thoracic Surgery (Ann Thorac Surg)* 88(4) 2009, p. 1056 et seq.
- 9 *K. Van Assche*, Combating The Trade In Organs: Why We Should Preserve The Communal Nature Of Organ Transplantation, in: B. Van Beers, S. Sterckx, D. Dickenson (eds.), *Personalized Medicine, Individual Choice and the Common Good* (Cambridge University Press) (forthcoming).
- 10 World Medical Association, Statement on Live Organ Trade, 1985; World Medical Association, Declaration on Human Organ Transplantation, 1987; Council of Europe, 3rd Confer-

dards were subsequently enshrined in international binding legal instruments.¹¹ Although providing essential guidance for countries that did not yet have in place comprehensive and effective transplant regulations, these instruments lack uniform sanctions and direct enforcement mechanisms.

Clear punitive measures in the case of illicit removal of organs first appeared in the criminal law framework addressing human trafficking.¹² Concerned about the growing numbers of persons deceived, tricked, or forced to give up an organ, the drafters of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (UN Trafficking Protocol)¹³ decided to include organ removal as a form of exploitation under the definition of human trafficking.¹⁴ In Europe, the Trafficking Protocol's definition and its criminal provisions were mirrored in the Council of Europe Convention on Action against Trafficking in Human Beings¹⁵ and the EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims.¹⁶

ence of European Health Ministers, Organ Transplantation, 1987, Appendix II, para. 16; World Health Organisation, Preventing the Purchase and Sale of Human Organ, WHA 42.5, 1989; World Health Organisation, WHO Guidelines Principles on Human Organ Transplantation, WHA 44.25, 1991; World Health Organisation, WHO Guiding principles on Human Cell, Tissue, and Organ Transplantation, WHA 63.22, 2010; World Medical Association, Statement on Organ and Tissue Donation, 2012; *The Ethics Committee of the Transplantation Society*, The Consensus Statement of the Amsterdam Forum on the Care of the Live Kidney Donor, Transplantation 78(4), 2004, p. 491 et seq.; *The Ethics Committee of the Transplantation Society*, The Ethics Statement of the Vancouver Forum on the Living Lung, Liver, Pancreas, and Intestine Donor, Transplantation 81(10), 2006, p. 1386 et seq.

- 11 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No. 164, 1997; Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, CETS No. 186, 2002; Directive 2010/45 of the European Parliament and of the Council on Standards of Quality and Safety of Human Organs Intended for Transplantation, OJ 2010 L 207/14.
- 12 M. López-Fraga et al., Human Trafficking for the Purpose of Organ Removal, in: R. Piotrowicz, C. Rijken, B.H. Uhl (eds.), *Routledge Handbook of Human Trafficking* (Routledge), 2017, p. 120 et seq.
- 13 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention on Transnational Organised Crime, UNTS 2237, 2000.
- 14 Article 3(a) of the UN Trafficking Protocol provides that: "trafficking in persons is 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 removal of organs."
- 15 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005.
- 16 Directive 2011/36 of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, OJ 2011 L101/1.

Both European instruments provide for additional victim protection safeguards and stronger measures of enforcement.¹⁷

Although international and domestic transplant regulations and human trafficking provisions were able to address some of the major organ- and transplant-related abuses, some issues remained unresolved. In 2003, a report issued at the level of the Council of Europe concluded that, despite the domestic prohibition of organ trade among its member states, loopholes existed because some elements of the crime were often not explicitly criminalised. The report recommended further elaboration and harmonisation of criminal law provisions for organ- and transplant-related abuses.¹⁸

In 2008, a joint study conducted by the Council of Europe and the United Nations noted the existence of widespread confusion among the legal and scientific community about the scope of, and the relationship between, the crimes of human trafficking for the purpose of organ removal and trafficking in organs, tissues, and cells.¹⁹ The study concluded that a proper definition of ‘trafficking in organs, tissues and cells’ would be an essential first step to address this impasse, alongside the development of a better understanding of the overlaps between both types of trafficking crimes. On the basis of the study, several committees of the Council of Europe pointed out that “despite the existence of two international binding legal instruments [...], important loopholes that are not sufficiently addressed by these instruments continue to exist in the international legal framework.”²⁰ Special reference was made to the inapplicability of the human trafficking framework to instances where the organ donor “has – adequately – consented to the removal of organs or – for other reasons – is not considered to be a victim of trafficking in terms of the [...] conventions.”²¹ In addition, the joint study stat-

- 17 In terms of protection of victims of trafficking, the European instruments provide for non-punishment of victims of trafficking for crimes they commit in the course, or as a consequence of being trafficked. See Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 8 of Directive 2011/36. For more information, see A. Gallagher, *The International Law of Human Trafficking*, Cambridge, 2010; A. Gallagher, *Exploitation in Migration: Unacceptable but Inevitable*, *Journal of International Affairs* (JIA), 68(2), 2015, p. 55 et seq.; *OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings*, *Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings*, Occasional Paper Series no. 6, 2013, p. 47.
- 18 *Council of Europe (Parliamentary Assembly, Social and Family Affairs Committee)*, Report on Trafficking in Organs in Europe by Mrs. Ruth-Gaby Vermont-Mangold, COE Doc 9822, 2003.
- 19 *Council of Europe and United Nations*, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, 2009, p. 1 et seq.
- 20 Additional Opinion of the Steering Committee on Bioethics (CDBI), the European Committee on Crime Problems (CDPC), the European Committee on Transplantation of Organs (CD-P-TO) identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (Council Doc. CDPC/CDBI/CD-P-TO, 2011), para. 5.
- 21 Additional Opinion (fn.20), para. 8; See also Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs, p. 2.

ed that the human trafficking framework does not cover offences where the organ is removed from deceased persons, nor does it cover illegal trade in cells and tissues.

More specifically, human trafficking law presents limitations to combating organ- and transplant-related abuses in that it only aims to address illicit organ removal in the context of exploitation of a living donor.²² In addition, challenges exist in prosecuting human trafficking for the purpose of organ removal. These challenges primarily relate to difficulties in establishing the crime of human trafficking by proving the three required elements of the offence, namely the action, the use of certain means and the purpose of exploitation. In cases of suspicion that an organ was illicitly obtained from a living donor, it is particularly hard to ascertain more subtle means, such as the abuse of a position of vulnerability,²³ used to recruit and exploit the donor.

It was argued that, because of these difficulties, offenders often remain unpunished and that the solution can only be found in developing an instrument that would also enable the prosecution of illicit organ removal when the act may prove difficult to prosecute as a human trafficking offence.²⁴ It was also emphasised that such a new instrument would need to include preventive measures.²⁵

II. Overview of the Council of Europe Convention against Trafficking in Human Organs

1. Definition of organ trafficking

In the light of these issues, and taking into consideration the recommendations of the joint study, the Council of Europe decided in 2011 to develop a separate criminal law

22 The fundamental difference between the two cases lies in the fact that trafficking in organs is a crime where the organ and its use are the central elements. In contrast, trafficking in human beings is a crime where the exploitation of an individual is the central aspect and where a combination of three elements (action; use of certain means; purpose) has to be established. Therefore, trafficking in human beings for the purpose of organ removal can only be committed if organs are removed from living donors in one of the cases mentioned in the definition.

23 The *travaux préparatoires* to the UN Trafficking Protocol state that abuse of the position of vulnerability “is understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.” The Explanatory Report to the Convention on Action against Trafficking in Human Beings provides in paragraph 83 that the abuse of a position of vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social, or economic. The situation might, for example, involve insecurity or illegality of the victim’s immigration status, economic dependence, or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. The concept of abuse of a position of vulnerability is subject to a variety of interpretations. See, for instance, *United Nations Office on Drugs and Crime*, Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ within the Definition of Trafficking in Persons, 2013, p. 1 et seq.

24 *M. López-Fraga et al.*, A Needed Convention against Trafficking in Human Organs, *Lancet* 383 (9936), p. 2187 et seq.

25 See *Council of Europe and United Nations* (fn. 19), p. 55.

instrument to close legal loopholes and to provide tools for international judicial cooperation. The Council of Europe Convention against Trafficking in Human Organs (CoE Convention) was adopted in March 2015, entered into force in March 2018 and is open to member states of the Council of Europe and to non-member states upon invitation.²⁶ The CoE Convention does not provide a concise definition of organ trafficking, as opinions on how the definition should be structured and on what principles it should be based, were too diverse.²⁷ Instead organ trafficking is defined as a whole range of offences relating to the illicit removal of an organ. These offences include: (1) the illicit removal of an organ from living or deceased donors (Article 4(1)); (2) the implantation or other use of such an illicitly removed organ (Article 5); (3) the preparation, preservation, storage, transportation, transfer, receipt, import, and export of such an illicitly removed organ (Article 8); (4) the illicit recruitment or solicitation of a donor or a recipient (Article 7(1)); (5) the offering and requesting of undue advantages to or by healthcare professionals or officials with a view to performing or facilitating such removal or implantation or other use (Articles 7(2) and 7(3)); and (6) attempting to commit, or aiding or abetting the commission of, any of these criminal acts (Article 9).

The CoE Convention mirrors the structure of human trafficking instruments in that it contains chapters on substantive criminal law, criminal procedure (including international cooperation), protection of victims and witnesses, and prevention. However, contrary to the European human trafficking instruments, the CoE Convention does not have a reporting mechanism.²⁸ The task to monitor the CoE Convention is left to the Committee of the Parties, which is considered to be the least effective enforcing mechanism. Recognising a certain level of proximity between the scope of the CoE Convention and human trafficking instruments, it is stipulated that both legal regimes should be applied in a complementary way to provide a comprehensive framework to address organ- and transplant-related offences.²⁹ How this is to be achieved is not elaborated in the CoE Convention itself.

- 26 Council of Europe Convention against Trafficking in Human Organs, CETS No. 216, 2015.
- 27 A. Pietrobon, Challenges in Implementing the European Convention Against Trafficking in Human Organs, *Leiden Journal of International Law* (LJIL) 29(2), 2016, p. 487 et seq.; C. Huberts, Un organe à quel prix? Genèse et analyse de la Convention du Conseil de l'Europe contre le trafic d'organes humains, *Revue de Droit Pénal et de Criminologie*, 96(6), 2016, p. 605 et seq.
- 28 Directive 2011/36, Art. 23.
- 29 The preamble to the Council of Europe Convention against Trafficking in Human Organs provides that the Convention is “determined to contribute in a significant manner to the eradication of the trafficking in human organs through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking in human beings for the purpose of organ removal.” The Explanatory Report does not elaborate further on how those instruments should cooperate in a harmonised way to complement one another.

2. Substantive criminal law provisions

At the heart of the crime of organ trafficking is the offence of the ‘illicit removal of an organ’, conditioned upon the presence of at least one of two circumstances: the lack of valid consent or the presence of remuneration.³⁰ With regard to the first circumstance, the illicit removal of an organ from a living donor occurs when it is performed without the free, informed and specific consent of that person.³¹ States can go beyond this minimum requirement and introduce additional safeguards, such as requiring consent to be provided in writing and/or before an official body.³² In the case of deceased persons, removal of an organ is illicit if it is performed without the prior consent of that person when alive or, in the absence of such consent, without being authorised under its domestic law.³³ The phrase ‘authorised under its domestic law’ refers to the national law that provides conditions for organ removal after death.³⁴ Both opt-in and opt-out schemes for organ donation are consistent with the terms of the CoE Convention.

With regard to the second circumstance, the illicit removal of an organ can be established when a living donor or a third party has been offered or has received a financial gain or comparable advantage in exchange for the organ removal.³⁵ Such remuneration amounts to an illicit act irrespective of the donor’s consent. Understanding the meaning and the scope of ‘financial gain and comparable advantage’ is essential for the determination of this condition. In that respect, the Explanatory Report to the CoE Convention clarifies that financial gain should be understood broadly but does not apply to arrangements that are permitted under domestic laws.³⁶ More specifically, the CoE Convention allows for reimbursement for “loss of earnings and any other justifiable expenses caused by the removal or by the related medical examinations, or compensation in case of damage which is not inherent to the removal of organs.”³⁷

30 Council of Europe Convention against Trafficking in Human Organs, Art. 4 and Council of Europe Convention on Action Against Trafficking in Human Beings, Art. 26.

31 The definition of consent in the Council of Europe Convention against Trafficking in Human Organs is modeled on the definition of consent in the Convention on Human Rights and Biomedicine (Art. 5) and its Additional Protocol concerning Transplantation (Art. 13). As indicated in the Explanatory Report to the Additional Protocol, free and informed consent implies that no undue pressure to donate should be brought to bear on the potential donor and that this person should be informed, in an understandable manner, about the nature, purpose, risks and consequences of the proposed organ removal. Moreover, prospective organ donors have the right to freely withdraw their consent at any time prior to organ removal. Specific consent means that consent is clearly given and referring to an identified organ.

32 Explanatory Report, para. 33 citing Additional Protocol concerning Transplantation, Art. 13.

33 Council of Europe Convention against Trafficking in Human Organs, Art. 4(1)(a). The meaning of consent was drawn from the Additional Protocol concerning Transplantation, Art. 17.

34 Explanatory Report, paras. 34-36.

35 Council of Europe Convention against Trafficking in Human Organs, Art. 4(1)(b) and (c).

36 Explanatory Report, para. 40.

37 Explanatory Report, para. 39.

In this regard, it is interesting to note that some countries outside of the Council of Europe have introduced new legal methods to expand the pool of organ donors. Israeli law, for example, gives organ donors second tier priority, and their family members third tier priority on the transplant waiting list in case they would require an organ in the future.³⁸ More far-reaching and, in the light of the CoE Convention, unacceptable compensation measures have been proposed in some other countries. These proposals include reducing sentences or allowing earlier release from prison in exchange for an organ donation (U.S.),³⁹ providing tax benefits (U.S.),⁴⁰ and offering financial incentives to the family of the deceased person in exchange for the consent of organ removal (India⁴¹; Nepal⁴²). A draft guideline regarding the meaning of “financial gain or comparable advantage” has recently been adopted at the level of the Council of Europe.⁴³ It provides states with assistance in determining when material benefits would violate the prohibition of remuneration provided in Articles 4(1)(b) and (c) of the CoE Convention, or would violate the prohibition of illicit solicitation and recruitment of an organ donor or recipient, proscribed under its Article 7(1).

Moreover, ratifying states are required to criminalise the implantation of an organ that was illicitly removed (Article 5). Whether possible other uses (e.g. use in exhibitions or in private collections) of an illicitly removed organ would also be criminalised is left to the discretion of the states.⁴⁴ In addition to the illicit removal itself and the implantation or other use of such an illicitly removed organ, ratifying states are also required to criminalise the manipulation of the illicitly removed organ that takes place before its implantation. These acts of manipulation concern the preparation, preservation, storage, transportation, transfer, receipt, import, and export of the organ. States have the option to criminalise these activities in a separate article, or to introduce them as a part of the offence of attempting to commit, or aiding or abetting the commission of, an organ trafficking offence.

- 38 B. Padilla, G.M. Danovitch, J. Lavée, Impact of Legal Measures Prevent Transplant Tourism: The Interrelated Experience of The Philippines and Israel, *Medicine, Health Care and Philosophy* (Med Health Care Philos) 16(4), 2013, p. 915 et seq.
- 39 C.M. Burke, The Mississippi Decision Exchanging Parole for Kidney Donation: Is This the Beginning of Change for Altruistic-Based Human Organ Donation Policy in the United States?, *Mayo Clinic Proceedings*, 86(5), 2011, p. 414 et seq.
- 40 National Kidney Foundation. Donor Leave Laws and Tax Deductions/Credits for Living Donors, available at https://www.kidney.org/sites/default/files/LDTaxDed_Leave.pdf (last accessed 14 August 2018).
- 41 Recommendations were made to the state public health department to offer cash rewards to the donor family in exchange for donating a kidney and to the hospital where the organ is retrieved, available at <http://medlarge.com/2018/06/27/health-ministry-comes-with-offer-of-cash-prize-for-organ-donors-hospitals/> (last accessed 14 August 2018).
- 42 In 2016 the Human Organ Transplant Act 1998 was amended in Nepal to allow monetary compensation to the family or members of the brain dead patient whose organs have been used in transplantation.
- 43 *Council of Europe*, Guide for the Implementation of the Principle of Prohibition of Financial Gain with Respect to the Human Body and its Parts from Living or Deceased Donors, 2018.
- 44 Explanatory Report, para. 48.

Advertising the need for, or the availability of an organ, with a view to offering or seeking financial gain or comparable advantage is in itself not included in any of the Articles that constitute organ trafficking. Instead it is introduced in the chapter on prevention (Article 21(3)) and ratifying states are called upon to take the necessary legislative and other measures to prohibit this practice (e.g. by removing, or blocking the access to, websites where human organs are put up for sale).⁴⁵

By contrast, ratifying states are under the obligation to also establish as criminal offences: (a) the request or receipt by healthcare professionals, public officials or persons working for private sector entities, of any undue advantage to perform or facilitate illicit organ removal or the implantation of an illicitly removed organ (Article 7(2)); and (b) the promising, offering or giving of any undue advantage to healthcare professionals, public officials or persons working for private sector entities, to perform or facilitate illicit organ removal or the implantation of an illicitly removed organ (Article 7(3)).

In addition, under Article 9 of the CoE Convention, ratifying states are required to criminalise the intentional aiding and assisting in the commission of any of the crimes specified in the CoE Convention, and attempting to commit any such crime. With regard to the attempt to commit these offences, states have the flexibility to introduce a reservation not to apply this provision in the context of Articles 7 and 8.

Finally, the CoE Convention provides for two provisions that encourage but not oblige ratifying states to establish criminal responsibility for the removal of an organ (Article 4(4)) or for the implantation of an organ (Article 6) that occurs outside their domestic transplant system or in breach of the essential principles of their national transplantation law.

3. Jurisdiction

The CoE Convention solidifies the states' territorial powers to prosecute organ trafficking offences occurring in their territory,⁴⁶ and provides them with several options to also assert extraterritorial jurisdiction. With regard to the latter, the first method to assert extraterritorial jurisdiction is via the nationality principle, which allows for prosecution of organ trafficking crimes committed abroad by the states' citizens (Article 10(1)(d)) or residents (Article 10(1)(e)). The nationality principle is introduced *inter alia* to shift the burden from less equipped states, and to allow investigations to be conducted by states who have a direct interest in prosecuting the crime, as well as the resources to do so.⁴⁷ Simultaneously, states can opt out of, or limit the application of, the nationality principle (Article 10(3)). To mitigate the risk of such reservations, which would potentially hinder the investigative efforts by states whose citizens or

⁴⁵ Explanatory Report, para. 52.

⁴⁶ Council of Europe Convention against Trafficking in Human Organs, Art. 10(1)(a), (b) and (c).

⁴⁷ Explanatory Report, para. 67.

residents are involved in such crimes committed abroad, Article 10(4) provides that prosecution should not be conditioned on a report from a victim of the alleged crime, or on information provided by the state where the crime took place. However, Article 10(5) allows states that would object to the rule contained in Article 10(4) to make a reservation to the effect that extraterritorial jurisdiction over an organ trafficking offence committed abroad by one of their citizens or residents would still require the fulfilment of that condition.

The second method for states to exercise extraterritorial powers is through the passive personality principle.⁴⁸ This principle allows the prosecution and punishment of offenders for violations “aimed at or which harms the nationals of the asserting state.”⁴⁹ However, the establishment of this type of extraterritorial jurisdiction is, disappointingly, made optional. Moreover, where it is established, a prosecution would rely on the presence of a ‘victim’ who submits a complaint.⁵⁰ As it is left to the discretion of the states to determine who can be classified as a victim,⁵¹ a situation may arise where the states concerned hold opposing views on this issue. For example, one state may consider that the organ donor is a victim, whereas that same donor may be considered as an offender in another country. In such circumstances it may be difficult to assert extraterritorial jurisdiction on the basis of the principle of passive personality.

As only a handful of states currently apply extraterritorial jurisdiction to organ- and transplant-related offences, the ability to prosecute organ trafficking crimes that occur in multiple jurisdictions and involve offenders from several states would have been an important step forward. This opportunity seems to be somewhat missed in that the CoE Convention presents states with several options to limit the powers to prosecute the crime beyond their borders and, importantly, also upholds the principle of dual criminality.⁵² This does not only necessitate a high level of ratifications among states so as to effectively use the instrument in the fight against cross-border organ trafficking, but also requires a harmonised transposition of the CoE Convention’s provisions in domestic systems, so that the definitions of the offences are equivalent across jurisdictions. How this task is to be achieved without a proper monitoring mechanism remains unclear.

4. Sanctions and penalties

Sanctions for organ trafficking offences can be non-monetary (imprisonment and a ban on exercising medical activities) and monetary (fines). In the case of natural persons

48 Council of Europe Convention against Trafficking in Human Organs, Art. 10(2).

49 *Ch. L. Blakesley*, Extraterritorial Jurisdiction in International Criminal Law, in: M. Cherif Bassiouni (ed.), *Multilateral and Bilateral Enforcement Mechanism*, vol II, 2008, p. 121.

50 Explanatory Report, para. 69.

51 Explanatory Report, para. 111.

52 Note that the requirement of dual criminality was justified by the Committee of Ministers of the Council of Europe on the basis that it would encourage non-member states to accede to the CoE Convention.

committing an organ trafficking offence (i.e. an act proscribed under Articles 4(1), 5, 7, 8 and 9 of the CoE Convention), states are under the obligation to impose a minimum penalty of imprisonment for a term of one year, in order to provide for the possibility of extradition.⁵³ The CoE Convention does not specify whether removal and implantation of organs outside of the domestic transplant system, or in breach of domestic rules on transplantation should also provide for custodial sanctions.⁵⁴ Instead, a general obligation was introduced, requiring that sanctions are to be ‘effective, proportionate and dissuasive’.⁵⁵ States have great flexibility to increase the applicable penalties for natural persons, including through the introduction of aggravating circumstances.⁵⁶ In addition, Article 14 permits consideration of previous sentences imposed by national courts.

The CoE Convention also requires states to introduce criminal or monetary sanctions for legal persons, including temporary or permanent disqualification from exercising commercial activities; judicial supervision; or forcing a company into compulsory liquidation.⁵⁷ To the extent that the offences that under the CoE Convention are defined as organ trafficking are already criminalised in domestic criminal codes or in the criminal provisions of domestic transplant laws, applicable penalties seem to be on average significantly lower than those that apply to human trafficking, which range between 5 to 7 years and are sometimes even higher. However, ratifying states that are in the process of implementing the Convention seem to opt to considerably increase the previously applicable penalties.⁵⁸ As a result, final sentencing may become comparable to the sentencing regime of human trafficking, especially if organ trafficking charges are brought collectively.

Currently, states vary in the range of illicit organ- and transplant-related activities that are criminalised and in the penalties that apply in case of violations. In this respect, the CoE Convention will have the effect of harmonising criminalisation and sentencing, making all of the illicit key activities criminal offences under domestic law and punishable by imprisonment. However, as ratifying states have a great deal of flexibility in determining the exact term of imprisonment, it is conceivable that, if the gap in sentencing between states is considerable, criminal activity would shift to states that have in place lower penalties for organ trafficking. In this regard, more research is

53 This requirement is consistent with the European Convention on Extradition.

54 Council of Europe Convention against Trafficking in Human Organs, Art. 4(4) and Art. 6.

55 Council of Europe Convention against Trafficking in Human Organs, Art. 12(1).

56 Council of Europe Convention against Trafficking in Human Organs, Art. 13. See also Explanatory Report, paras. 88 and 89.

57 Council of Europe Convention against Trafficking in Human Organs, Art. 12(2).

58 For example, the Belgian draft Law on Trafficking in Human Organs provides for punishment ranging from 5 to 10 years of imprisonment and a fine of €750 to €75,000 for acts that correspond to the ones set out in Article 4(1)(a) and (b) of the Council of Europe Convention against Trafficking in Human Organs. Similarly, Article 601bis of the Italian Penal Code, as amended in December 2016, provides for a prison sentence of 3 to 12 years and a fine of €50,000 to €300,000 for “anyone who illegally trades, sells, purchases or, in whatever way and on whatever grounds, illegally obtains or deals in organs or parts of organs removed from a living person [...]”.

needed about the optimal sentencing regime that would create a more harmonised approach across Council of Europe member states and beyond.

III. Impact on persons involved in organ trafficking

1. Organ donors

The CoE Convention introduces the term ‘victim of organ trafficking’ without defining who that person is. If domestic law does not provide for the opportunity to consider organ donors as victims of organ trafficking these persons could find themselves liable under five provisions of the CoE Convention, namely: (1) the illegal removal of an organ (Article 4(1)(a) and (b)); (2) the solicitation and/or recruitment of a recipient (Article 7(1)); (3) offering any undue advantage to healthcare officials, public officials, and private entities with a view to performing or facilitating illicit organ removal or the implantation of an illicitly removed organ (Article 7(2)); (4) aiding or abetting and attempt (Article 9); and (5) where applicable under national law, advertising the availability of an organ with a view to seeking financial gain or comparable advantage (Article 21(3)).⁵⁹

At the same time, the CoE Convention recognises that organ donors could be entitled to protection and assistance as a ‘victim’. If domestic law allows these persons to be recognised as victims states are under an obligation to provide them with access to information,⁶⁰ assistance in recovery,⁶¹ and compensation from perpetrators.⁶² While those measures are satisfactory in that they maintain an approach that is in line with the European instruments on victim protection,⁶³ they only offer a basic assistance as compared to the measures prescribed by the Council of Europe Convention against Trafficking in Human Beings. For example, considering that organ trafficking can involve cross-border movements of organ donors, the CoE Convention is silent on the

59 The negotiators took note that “a number of States would – under any circumstances – refrain from prosecuting organ donors for committing these offences. Other States have indicated that organ donors could, under their domestic law and under certain conditions, also be considered as having participated in or instigated, trafficking of human organs”. Explanatory Report, para. 111.

60 Council of Europe Convention against Trafficking in Human Organs, Art. 18(a).

61 Council of Europe Convention against Trafficking in Human Organs, Art. 18(b).

62 Council of Europe Convention against Trafficking in Human Organs, Art. 18(c).

63 E.g. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS No. 005, 1950; European Convention on the Compensation of Victims of Violent Crimes, ETS No. 116, 1983; Council of Europe, Recommendation (2005)9 of the Committee of Ministers to Member States on the Protection of Witnesses and Collaborators of Justice; Council of Europe, Recommendation No. R (97)13 of the Committee of Ministers to Member States concerning Intimidation of Witnesses and the Rights of the Defence; Directive 2012/29 of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, OJ 2012 L 315/57.

treatment of victims in terms of granting them resident status, and/or the right to remain in a state's territory during ongoing criminal proceedings.

By contrast, the rights provided to victims when they participate in criminal proceedings are extensive and include access to information regarding their rights, the right to be heard (in line with domestic law), access to support services such as legal aid, protection from intimidation and retaliation, and access to non-governmental organisations that provide assistance and support to victims.⁶⁴ Article 20 further creates an obligation to protect victims who are witnesses in criminal proceedings. The noticeable difference between the limited obligations to assist victims in their recovery and in the exercise of their right to compensation and the extensive obligations to offer assistance in criminal proceedings echoes the main purpose of the CoE Convention, namely prosecution.

As mentioned above, the determination of the legal culpability and the *de facto* treatment of an organ donor (as a suspect, a witness, or a victim) is left to the discretion of the states.⁶⁵ While this approach respects the diversity of opinions between negotiating states that might consider prosecuting organ donors, and those that will refrain from doing so, it presents several challenges. First, victims of human trafficking might be misidentified or not be recognised as such and, consequently, they will by default fall under the scope of the CoE Convention. As a result, they will not be offered protection and support in those ratifying states that opt to implement the CoE Convention without awarding the status of a victim to a donor who suffered harm. Second, the CoE Convention does not have in place a mechanism that would allow differentiating between organ donors who would classify as victims and those who would not.

With regard to the first challenge, drafters of the CoE Convention took the position that cases involving a living organ donor who has been trafficked for the purpose of organ removal should not be prosecuted under the CoE Convention. The main reason would be that under the human trafficking laws an organ donor will be entitled to protection from criminalisation for offences committed in connection to, or as a result of, being trafficked.⁶⁶ An organ donor is to be considered a victim of human trafficking regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted, as long as the organ donor was forced, deceived, or otherwise compelled to sell or give up an organ.

While this sounds straightforward, one of the difficulties in enacting the principle of non-punishment under the framework of human trafficking⁶⁷ is the frequent lack of evidence to establish the three constitutive elements of human trafficking for the purpose of the removal of organs. This may be due to problems to prove that the offence was committed by abusing a position of vulnerability (one of the most common

64 Council of Europe Convention against Trafficking in Human Organs, Art. 19.

65 See fn. 59.

66 *Huberts* (fn. 27), p. 605 et seq.

67 See fn. 17.

‘means’ present in cases of human trafficking for the purpose of the removal of organs) or, for example, where there are problems with witness testimony.

It is important to point out that the challenges raised by relying on the abuse of a position of vulnerability to establish the crime is not a defect of human trafficking law. Rather, it is a matter of recognising the uniqueness of the organ donors’ circumstances that may result in their exploitation, and of attributing to the abuse of a position of vulnerability the same legal value as the use of more direct means, such as coercion or the use of force or threats. The legal value and the meaning of the abuse of the position of vulnerability (APOV) was discussed in a study by the UN Office of Drugs and Crime (UNODC) which indicated that: “there have been few cases prosecuted on the basis of the APOV being the sole means, and it is not enough to fulfil the ‘means’ element of the offence. The abuse must be sufficiently serious so as to have negated the victim’s consent.” A major step in recognising the abuse of a position of vulnerability as a genuine means to confirm the charges of human trafficking was taken by the Appeals Panel of the EULEX Court in the *Medicus* case. The 2012 Panel confirmed the charges of human trafficking against the defendants on the basis of the concept of abuse of the donors’ position of vulnerability.⁶⁸

Despite this landmark verdict, relying on the concept of abuse of the position of vulnerability is still contested. This can in part be explained by the observation that illicit organ removal is frequently not considered as an inherently evil act, but is wrongly seen by many as a ‘win-win’ situation for the organ donor and the recipient. Following this line of argument, the organ donor willingly engages in this type of criminal act rather than having been forced to it. However, such an assumption denies the severe social and economic inequalities that may create pre-existing vulnerability and may prompt vulnerable people to consider selling an organ as the only remaining option to improve their dire conditions. It is expected that, until a legal culture develops that supports upholding human trafficking convictions by resorting to the concept of abuse of a position of vulnerability as a means to invalidate a victim’s consent, cases of prosecuting human trafficking for the purpose of organ removal will remain few.⁶⁹

Consequently, cases that very much look like human trafficking but have only a small chance of being prosecuted as such, could be litigated under the provisions of the CoE Convention. This would subject this type of organ donors to the particular approach that would be favoured under domestic legislation, which might involve criminalising them for organ trade instead of considering them as victims eligible for protection. Admittedly, this is not necessarily an issue that should have been solved by the CoE Convention. However, considering that the CoE Convention is intended to supplement the human trafficking framework, more attention may need to be paid to accommodating ‘imperfect’ cases of human trafficking for the purpose of organ removal,

68 EULEX, Rule of Law Mission, *District Court of Pristina*, Decision of the Appeals Panel, Pnr. 209/10, Pnr 340/10, KA Nr 278/10 and Ex KA 309/10 (27 April 2011), pp. 5-6.

69 Office of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings (fn. 17), Annex A: Summary of cases.

in a way that provides proper protection to vulnerable organ donors under the framework of organ trafficking.

As to the second challenge regarding the treatment of living organ donors involved in organ trafficking, the CoE Convention does not give any guidance to determine or clearly distinguish between an organ donor who should be considered as a victim and an organ donor who should not be considered as such. Although the CoE Convention prescribes minimum measures of protection to counter “the potential grave consequences of victims of trafficking in human organs”,⁷⁰ it, in contrast to the European framework on human trafficking,⁷¹ and relevant instruments regarding the protection of public health,⁷² does not define who should be considered a victim.⁷³ Importantly, the CoE Convention does not seem to accommodate for circumstances that could call into question the culpability of organ donors, for example on the basis of their situation of vulnerability.⁷⁴

When considering charges under Article 4 of the CoE Convention it is unlikely that an organ donor will be prosecuted for violation of Article 4(1)(a), namely removal of an organ without a valid consent. However, the issue of consent will be examined when determining a possible violation of Article 4(1)(b), when the donor accepted financial gain or comparable advantage in exchange for the removal of an organ. Although the two key scenarios of the crime of illicit organ removal are separated under Article 4, they are closely connected. While the criteria for valid consent to organ donation are clearly defined, the question arises as to whether those criteria accurately capture and give due consideration to all the circumstances in which paid organ donors may find themselves when accepting a monetary offer. Paid organ donors very often find themselves in a situation of extreme vulnerability that can blur the voluntary nature of their consent.⁷⁵

70 Explanatory Report, para. 110.

71 The Convention on Action against Trafficking in Human Beings, Art. 4(e), defines the victim of trafficking as: “Any physical person who is subject to trafficking in human beings as defined in this Article.”

72 The Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (MEDICRIME Convention), Art. 4(k), defines ‘victim’ as “any natural person suffering adverse physical or psychological effects as a result of having used a counterfeit medical product or a medical product manufactured, supplied or placed on the market without authorisation or without being in compliance with the conformity requirements as described in Article 8.” CETS No. 211, 2011.

73 The initial draft presented by the Secretariat and inspired by the MEDICRIME Convention, referred to “a natural person suffering physical or psychological effects resulting from illegal removal or transplantation of organs”. See *Huberts* (fn. 27), p. 605 et seq, 625-626.

74 It should be noted that the Parliamentary Assembly consistently raised concerns of the possibility of penalising organ donors and recipients despite their potentially desperate social, health, or financial circumstances. See, for instance, *Committee on Social Affairs, Health and Sustainable Development*, Towards a Council of Europe Convention to Combat Trafficking in Organs, Tissues and Cells of Human Origin, Doc 13082, 20 December 2012 and Doc13338, 22 October 2013.

75 *D. Budiani-Saberi et al.*, *Med Health Care Philos*, 2013, p. 897 et seq.

In this regard, it has rightly been pointed out that: “It is perfectly possible to imagine that a person who sells his kidney in order to alleviate his poverty consents to the sale in the fullest sense, in that he is well informed of all of the options available to him, the consequences of selling his kidney and of not selling, and in all of the circumstances decisively determines that selling is the best option available to him. Indeed, if the threshold of consent imagined in this context required the vendor’s ideal or at least sound socio-economic standing, then it would be difficult to imagine even a hypothetical instance of such genuine consent. Anyone who sold his kidney in such circumstances would surely be acting extremely imprudently, if not altogether irrationally.”⁷⁶ It can be argued that the consent obtained from a vulnerable person in accordance with domestic regulation can still be defective in the sense that a paid organ donor was presented with an impossible choice between accepting payment for an organ (*de facto* nullifying voluntary consent) or accepting life circumstances that seem sufficiently threatening to seek their improvement by accepting a financial offer in exchange for an organ. The CoE Convention should have acknowledged more clearly that there is a possibility that an organ donor who consents to illicit organ removal does so out of desperation. In this way, the CoE Convention would have send a clearer message that pre-existing vulnerability should be taken into consideration and that individual circumstances should be carefully investigated and evaluated. Defining what vulnerability represents in the context of victims of organ trafficking could be aided by the body of knowledge that exists in criminal law in general and in human trafficking law in particular.

The fact that living donors who could be presumed to be victims of organ trafficking are not explicitly granted rights in accordance with international human rights standards,⁷⁷ but that defining their legal status is left to the discretion of the states, may have several undesired effects. First, the absence of pre-existing norms regarding what constitutes victimhood in the context of organ trafficking might result in uncertainty as to what steps law enforcement agencies and prosecutors should take before deciding to bring charges against organ donors. Conversely, legal counsel to living donors charged with organ trafficking would be equally uncertain as to the ability to challenge the charges brought against their clients. Second, the diversity in approach can result in unequal standards of treatment of donors based on their respective locations, even if they would have suffered the same exploitation and would have sustained similar

76 K. Greasley, A Legal Market in Organs: The Problem of Exploitation, *Journal of Medical Ethics* (J Med Ethics) 40(1), 2014, p. 51 et seq., 52.

77 The preamble indicates that the implementation of the Council of Europe Convention against Trafficking in Human Organs should be in compliance with international obligations (e.g. principle of non-discrimination). See, at the level of the United Nations, also 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

health and material damage.⁷⁸ Third, lack of a uniform definition can hinder identification of victims since donors who could qualify as victims may not consider themselves to be victims. Consequently, they may be reluctant to report their abuse out of fear of implicating themselves in the criminal act of selling an organ. This may have as a result that the crime of organ trafficking frequently goes unreported,⁷⁹ which makes detection and prosecution even more difficult. Fourth, criminalising donors who might otherwise have been considered victims may reinforce the argument advanced by the advocates of regulated organ markets that banning the purchase and sale of organs actually hurts the most vulnerable groups of the population.⁸⁰ Fifth, as previously discussed, a difference in approach between countries can cause important jurisdictional issues where crimes take place in multiple states. Sixth and last, without offering clear criteria for victimhood and providing a comprehensive framework of protection and assistance to organ donors who would be considered victims, the CoE Convention may find it difficult to fulfil one of its core purposes, namely “to protect the rights of victims of the offences established in accordance with this Convention.”⁸¹

2. Organ recipients

The situation of recipients presents a different set of ethical and legal considerations in determining possible liability and punishment. On the one hand, recipients are driven by despair to obtain an organ on the black market. On the other hand, however, it is precisely their demand that fuels the black market and it is their relative affluence that makes it worthwhile for criminals to engage in organ trafficking.

Under the CoE Convention, organ recipients can find themselves in breach of four provisions, namely: (1) the illicit removal of an organ, when the recipient offered a financial gain or comparable advantage to a living donor or a third party in exchange for the removal of the organ (Article 4(1)(b) and (c)); (2) the use of an illicitly removed organ for implantation (Article 5); (3) offering any undue advantage to healthcare officials, public officials, and private entities with a view to performing or facilitating illicit organ removal or the implantation of an illicitly removed organ (Article 7(2)); and (4) attempting to commit, or aiding or abetting the commission of, an organ trafficking offence (Article 9).

78 Note that Article 3 of the Council of Europe Convention against Trafficking in Human Organs introduces the principle of non-discrimination, mirroring Article 14 of the European Convention on Human Rights.

79 S. Meyer, Trafficking in Human Organs in Europe, *European Journal of Crime, Criminal Law and Criminal Justice* (EurJCrimeCrLCrJ) 14(2), 2006, p. 20 et seq.

80 A. Scott, W.E. Block, Organ Transplant: Using the Free Market Solves the Problem, *Journal of Clinical Research & Bioethics* (JCRB) 2(3), 2011; A. Friedman, Controversy – Payment for Living Organ Donation Should Be Legalized, *BMJ* 333, 2006, p. 746 et seq.; R.W. Major, Paying Kidney Donors: Time to Follow Iran?, *McGill Journal of Medicine* (MJM) 11(1), 2008, p. 67 et seq.

81 Council of Europe Convention against Trafficking in Human Organs, Art. 1(1)(b).

Interestingly, Article 7(1), focusing on illicit solicitation and recruitment, does not apply to organ recipients “as the purchase of an organ does not give rise to financial gain or a comparative advantage on the part of the organ buyer.”⁸² Although it can be argued that recipients are not gaining financially from soliciting or recruiting organ donors, they are gaining access to the organ itself via illicit activities. It seems that this interpretation has introduced a differential treatment between organ recipients and organ donors, since only the latter can be liable for violation of this provision. Just as organ donors and recipients may be equally liable in the case of a breach of Article 21, involving the prohibition of advertising the need for, or the availability of, an organ with a view to offering or seeking financial gain or comparable advantage, equal treatment should also be considered for organ donors and recipients when considering the scope of application of Article 7.

The CoE Convention refers to domestic legislation as a tool to determine the criminal liability of an organ recipient. It seems that, as a rule, domestic legislations prohibiting the purchase of organs criminalise recipients if they can be qualified as organ buyers.⁸³ A report issued by the OSCE notes, however, that in practice many states lean towards non-punishment of organ recipients, but this practice is not yet firmly established. Recipients have in fact been prosecuted in Singapore,⁸⁴ Japan,⁸⁵ and South Africa.⁸⁶

Additional insights into the appropriate treatment of organ recipients involved in organ trafficking can be found in the European human trafficking framework. The latter contains a non-binding provision to consider the criminalisation of persons who

82 Explanatory Report, para. 53.

83 E.g. Spanish Penal Code, Article 156bis: “1) Those who promote, facilitate or advertise the procurement or illegal trafficking of human organs or their transplantation, shall be punished with imprisonment from six to twelve years in case of vital organs, and imprisonment for three to six years in case of non-vital organs. 2) Recipients consenting to receiving a transplant knowing its illicit origin shall be liable to the same penalties as in the previous section, which may be lowered by one or two degrees attending to the circumstances of the crime and of the offender [...]”.

84 *PP v Tang Wee Sung [2008] SGDC 262*. The defendant was sentenced to a fine of \$7000 for violation of the Human Organ Transplant Act and to one day in prison and a fine of \$10,000 for violation of the Oath and Declarations Act. The judge took into consideration “the very exceptional circumstances of Tang’s extreme ill health and the aggravation that [would] result in to his health from a term of imprisonment.”, cited in SAL Annual Review, 9 SAL, Ann Review, 2008, p. 20.

85 In January 2012, a physician living in Tokyo and suffering from kidney failure was sentenced to three years of imprisonment for having paid ¥8 million to a member of the Sumiyoshi-kai crime syndicate to find a suitable kidney donor. See <http://www.pressreader.com/uae/gulf-news/20120127/283523677733753> (last accessed 14 August 2018).

86 Illicit organ removal was litigated under the domestic law prohibition on the sale and purchase of organs because South Africa had not ratified the UN Trafficking Protocol at the time. One recipient was charged under the South African Human Tissue Act and was given a suspended sentence and subjected to a fine and forfeiture. *State v Netcare Kwa-Zulu (Pty) Limited, Case No 41 (2010)*, *Commercial Crime Court, Regional Court of KwaZulu Natal*, Durban, South Africa.

knowingly make use of the services of victims of trafficking.⁸⁷ So far states have refrained from invoking this provision to criminalise and prosecute organ recipients. For example, in the *Medicus* case the prosecution team relied on the testimonies of recipients to build their criminal case against the key offenders. The decision not to criminalise the organ recipients is based as much on ethical considerations as on practical concerns of being able to successfully initiate proceedings.⁸⁸ Moreover, the circumstances that may prompt recipients to pay for a service (an organ) may differ considerably from those of persons who make use of sexual or forced labour services, making a convincing argument for a more lenient treatment of organ recipients. By the very nature of their illness transplant recipients may find themselves in a desperate situation, which should be taken into consideration in determining their liability and possible punitive sanctions.

As with organ donors, the discretion granted to ratifying states in defining the legal status of organ recipients involved in organ trafficking may cause a great diversity in the application of the CoE Convention. It may contribute to an unequal treatment of organ donors even as recipients might be involved in the same crime, and may hinder cross-border prosecution when a state would refuse to cooperate in a criminal investigation out of fear that its citizens, although not criminal liable under its own domestic law, might risk conviction abroad. Issues involving the criminal liability of organ recipients are currently much contested. In this context, it has been proposed that organ recipients should only be prosecuted if the illicit transplant resulted in serious harm to a victim,⁸⁹ or that they could be exonerated in exchange for cooperating with law enforcement and prosecution agencies.⁹⁰

A debate on the legal status of organ donors and recipients who have been involved in organ trafficking is urgently needed, as clarity on this issue is of crucial importance ineffectively combating organ trafficking and human trafficking for the purpose of organ removal, with due attention to the rights of the persons involved.

87 E.g. In 1999 Sweden became the first country in the world to introduce legislation criminalising the purchase, but not the sale, of sexual services. The prohibition of the purchase of sexual services is introduced in Chapter 6, Section 11 of the Penal Code. Similarly in 2009 Norway criminalised buying sex, including Norwegian citizens purchasing sex abroad (Penal Code § 202). The main rationale for implementing the law against commercial sex was to prevent and reduce human trafficking. See also Article 19 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 18 of EU Directive 2011/36/EU. Both instruments provide states with the possibility to criminalise persons who knowingly employ or buy services from victims of trafficking.

88 There might be difficulties in establishing that an organ recipient knew that the organ was removed from a victim of trafficking.

89 *European Parliament, Policy Department, Directorate-General for External Policies, Trafficking in human organs*, European Union, 2015, p. 65.

90 For example, Israeli prosecutors treat organ recipients as witnesses so as to facilitate criminal proceedings against medical professionals and other facilitators.

3. Medical professionals

One of the strong advocacy points behind the development of the CoE Convention was to end the impunity frequently enjoyed by the medical professionals who enable and benefit from organ trafficking crimes. Under the CoE Convention, these professionals might find themselves liable for: (1) illicit removal of an organ (Article 4(1)); (2) implantation of an illicitly removed organ (Article 5); (3) where applicable under domestic law, removal or implantation of an organ performed outside of the framework of the domestic transplantation system or in breach of essential principles of national transplantation law (Article 4(4)); (4) illicit solicitation or recruitment, or offering and requesting of undue advantage (Article 7); (5) preparation and transport of an illicitly removed organ (Article 8); and (6) attempting to commit, or aiding or abetting the commission of, an organ trafficking offence (Article 9).

A report issued in 2003 by the Parliamentary Assembly of the Council of Europe recommended to extend criminal liability to the medical teams involved, including the nursing staff and lab technicians.⁹¹ These categories of healthcare professionals will now be covered under the CoE Convention.

However, several obstacles have been identified to prosecute medical professionals. The first obstacle, identified in the OSCE report, is that “there may be just enough ethical ambiguity in the medical profession to [...] operate and lead unethical professionals to claim a ‘plausible deniability’ as a defence to their involvement in trafficking in human beings for the purpose of organ removal networks.”⁹² Although this observation was made in the context of human trafficking scenarios, it may to some extent also be applicable to organ trafficking. This would be the case because the standard of proof required to establish the involvement of medical professionals in these crimes must be ‘beyond a reasonable doubt’. If the prosecution lacks incontrovertible evidence, medical professionals can ‘plausibly deny’ allegations even if these would be true.

However, a plausible deniability defence will be harder to apply under the CoE Convention as the key offence generally requires the fulfilment of only one out of two conditions (organ removal without valid consent or organ removal in the presence of financial benefits), instead of the three elements (action, use of certain means and exploitative purpose) necessary to establish human trafficking for the purpose of organ removal. Moreover, the Explanatory Report indicates that, while states are required to criminalise acts when these are committed intentionally, they can also ‘criminalise non-intentional acts’.⁹³ Lowering the level of the mental element required for establishing

91 *Council of Europe (Parliamentary Assembly, Social and Family Affairs Committee)* (fn. 18), para. 38; *E. Pearson*, *Coercion in the Kidney Trade?* Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, 2004.

92 E.g. doctors might claim that it is not their responsibility to verify transplant documents (*Office of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings*, p. 41–42), or to familiarize themselves with the patient’s history.

93 Explanatory Report, para. 28.

liability and, hence, allowing the prosecution of reckless or negligent conduct, could address the issue of ‘plausible deniability’ often claimed by transplant surgeons and other medical professionals who deny knowledge of illicit conduct. This, however, might result in the prosecution of a wide range of administrative breaches under the criminal law regime, which in turn may raise issues of proportional punishment.

Another obstacle to the successful prosecution of medical professionals under the human trafficking or organ trafficking frameworks are regulations governing the patient-physician relationship, most notably those relating to medical confidentiality and the duty of care. Physicians who come into contact with a patient in need of a transplant may suspect that their patient is considering obtaining an organ through illicit means either domestically or abroad. Similarly, physicians may be confronted with organ recipients who ask questions with regard to the availability and safety of transplant facilities abroad, or who request medical records with a view to going abroad for an illicit transplantation. Returning patients may face medical complications that require urgent attention, or may seek follow-up care. Reporting such cases may create severe ethical and legal dilemmas for physicians who are bound by medical confidentiality. Under such circumstances physicians may apply a ‘do not ask, do not tell’ policy and shy away from taking any further action to confirm such suspicions, and to prevent or report illicit activities.⁹⁴ Undoubtedly, this scenario presents a clash of laws between, on the one hand, the patients’ right to privacy and the physicians’ perception of the obligation to provide continuity of care,⁹⁵ and, on the other hand, legal obligations to prevent and combat human trafficking for the purpose of organ removal and organ trafficking.

It should be noted that the patient’s right to confidentiality and the corresponding obligation on the part of physicians not to disclose patient information are not absolute. Indeed, exceptions may apply where withholding information may lead to severe harm to third persons (e.g. suspicion of domestic or child abuse) or could endanger public health (e.g. infectious disease).⁹⁶ The issue of how to reconcile professional obligations towards patients with the obligation to counter criminal activities in the field of organ transplantation still seems to be unresolved. Although the World Medical Association and the Transplantation Society have issued guidelines calling upon transplant professionals to actively combat transplant tourism and organ trafficking, these guidelines do not provide a definite solution to this problem.⁹⁷ A discussion of this issue is similarly absent in the CoE Convention. Without addressing this dilemma via

94 *F. Ambagtsheer et al.*, Cross-Border Quest: The Reality and Legality of Transplant Tourism, *Journal of Transplantation*, 2012, 391936, p. 3.

95 See Convention on Human Rights and Biomedicine, Art. 2 (Primacy of the human being) and Art. 3 (Equitable access to healthcare).

96 E.g. In the United Kingdom, Section 115 of the Crime and Disorder Act 1998 permits disclosure to organisations such as the police, local authorities and probation services, without, however, creating a legal obligation to do so. Information should only be disclosed if the patient consents, if there is an overriding public interest, or in response to a court order.

97 *O. Abboud et al.*, The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, *Clinical Journal of the American Society of Nephrology (Clin J Am Soc Nephrol)* 3(5), 2008,

policy-enforceable measures, the impact of these guidelines and of the CoE Convention may be greatly diminished.⁹⁸ Interestingly, the Council of Europe very recently issued a recommendation to establish a national framework “for healthcare and other professionals to communicate information about suspected or confirmed events of organ trafficking and/or human trafficking for the purpose of organ removal to the appropriate national authorities, while respecting their professional obligations to patients”.⁹⁹ However, what those measures would in practice need to amount to and how they should be implemented is not discussed.

In order to find ethical and legal solutions to the challenges presented above it is of paramount importance to initiate a dialogue among experts from the medical, ethical and criminal law fields. The aim would be to define acceptable standards and mechanisms that would not be left to the discretion of individual states but could be uniformly applied to strengthen both trafficking frameworks.

Finally, considering the aim of the CoE Convention to deter healthcare professionals from engaging in organ trafficking, it would be worthwhile to examine what would be the most optimal sentencing regime to discourage medical professionals from getting involved in illicit practices. In this respect, it should be noted that, with regard to human trafficking, some countries prescribe higher penalties for healthcare professionals who are implicated.¹⁰⁰ In addition, healthcare professionals involved in human trafficking or organ trafficking may be banned from medical practice, although this measure seems to be applied only selectively.¹⁰¹

4. (International) brokers/recruiters

Brokers, local recruiters, and other intermediates are often crucially engaged in the process of organ trafficking or human trafficking for the purpose of organ removal. Depending on their specific roles, individuals may seek out and recruit organ donors or recipients, forge documents, manage financial transactions, or transport and influence donors to submit to illicit organ removal. The CoE Convention casts a wide net of criminal law provisions to prosecute those activities.

The offence that the above-mentioned persons will find themselves most often liable for is the illicit recruitment and solicitation of organ donors and recipients, carried out

p. 1227 et seq.; World Medical Association, Revised Statement on Human Organ Donation and Transplantation, rescinded at the 65th WMA General Assembly, Durban, South Africa, October 2014, available at <https://www.wma.net/policies-post/wma-statement-on-human-organ-donation-and-transplantation/> (last accessed 14 August 2018).

98 *D.E. Martin et al.*, Prevention of Transnational Transplant-Related Crimes – What More Can be Done?, *Transplantation* 100(8), 2016, p. 1776 et seq.

99 Council of Europe Resolution CM/Res (2017) 2 on establishing procedures for the management of patients having received an organ transplant abroad upon return to their home country to receive follow-up care.

100 E.g. Belgium, China, Czech Republic, Iceland, Ireland and Panama. See also *F. Bilgel*, *The Law and Economics of Organ Procurement*, Erasmus University (Rotterdam), 2011.

101 E.g. China, Czech Republic, Iceland, Ireland and Panama.

for financial gain or comparable advantage. Those acts have already been outlawed by the majority of states in provisions prohibiting the sale and purchase of organs. However, in line with the CoE Convention, they will have to be addressed through effective, proportionate and dissuasive sanctions.

Recruitment and solicitation can also be prosecuted under the human trafficking framework, but as a standalone offence under the CoE Convention there is no need to prove the ‘means’ element required to establish the crime of human trafficking for the purpose of organ removal. Additional charges that could be brought by parties to the CoE Convention to prosecute leaders of trafficking networks and facilitators relate to: (1) the illicit removal of an organ (Article 4(1)); (2) offering any undue advantage to healthcare officials, public officials, and private entities with a view to performing or facilitating illicit organ removal or the implantation of an illicitly removed organ (Article 7(2)); (3) the storage and transport of an organ that was illicitly removed (Article 8); and (4) attempting to commit, or aiding or abetting the commission of, an organ trafficking offence (Article 9). These violations are fairly easy to establish, subject to proving the intent of the offender, as they are restricted to criminal activities involving an organ only.

Research has brought to light that the factors that are most likely to obstruct the prosecution of brokers, recruiters, and other intermediaries are the mobility of the persons concerned, and the jurisdictional difficulties in international cooperation that may consequently arise.¹⁰²

With regard to the issue of insufficient international cooperation, the CoE Convention provides the basis for initiating and strengthening cross-border collaboration. However, as the example of the human trafficking framework shows, the outcome will depend on the willingness of the states and, importantly, on the resources that they have at their disposal.

In the light of the mobility of brokers, recruiters, and other intermediaries, states should be encouraged to introduce extensive rather than limited extraterritorial jurisdiction. Moreover, it should be noted that, if states wish to pursue brokers, recruiters, or other intermediaries who are based in a third country, or are not a national of the prosecuting state, the conduct in question needs to be criminalised under the domestic laws of all states involved and to be similarly defined (double criminality). This observation highlights the importance that the substantive criminal law provisions of the CoE Convention should be implemented in a harmonised way.

5. Corporate or private entities

Licensed medical facilities can be directly or indirectly implicated in organ and human trafficking when their owners, management staff, and/or employees engage in illicit organ removal, or in the preparation or implantation of an illicitly removed organ at the

102 *OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings* (fn. 17), p. 34.

site. Corporate and private entities can also facilitate so-called ‘organ laundering’, defined as the “practice of transforming illicitly purchased organ in purchaser’s country into legitimate organs by the process of integration into mainstream financial institutions (reimbursement by insurers) and health services (transplant clinics who also offer follow-up treatment).”¹⁰³ The latter practice may, for instance, involve reimbursement by the public or private insurance of the costs of illicit activities that fall within the scope of organ trafficking or human trafficking for the purpose of organ removal.¹⁰⁴ As the organ trafficking framework covers a broad range of transplant offences, health insurance companies that participate in such practices could find themselves liable for violation of the CoE Convention under Article 4(4), Article 6 (where applicable), Article 7 and Article 9.

The CoE Convention allows legal entities to be prosecuted when the organ trafficking crime is committed for the benefit of the company, by a person in a leading position who is acting within the powers vested in him or her by the company.¹⁰⁵ In addition, in line with the condition prescribed in Article 11(2), a legal person can find itself in breach of the CoE Convention when a natural person referred to in Article 11(1) fails to adequately supervise his or her staff, and has made it possible that an organ trafficking offence was committed for the benefit of that legal person.

Under the human trafficking framework legal persons can also be prosecuted for facilitating or benefiting from the exploitation of an organ donor.¹⁰⁶ However, it has come to light that one of the obstacles to prosecute legal persons under that framework is proving that the corporation’s agent knew about the intended exploitation.¹⁰⁷ This is also the case when the medical facility’s employees only participate at the final

- 103 *A. Manzano et al.*, *The Invisible Issue of Organ Laundering*, *Transplantation* 98(6), 2014, p. 600 et seq.
- 104 For example, before recent legislative initiatives to stop this practice, insurance companies in Israel were providing reimbursement of the costs of transplants performed abroad without much consideration as to the origin of the organ and the legality of the transplant.
- 105 CoE Convention, Art. 11(a); Explanatory Report, para. 76.
- 106 The UN Trafficking Protocol relies on Article 10 of the United Nations Convention against Transnational Organized Crime that requires States to ensure that legal persons are held liable for participation in serious crimes involving an organized criminal group, and for specific offences under the Convention related to laundering proceeds of crime, corruption, and obstruction of justice. The Council of Europe Convention on Action against Trafficking in Human Beings builds on the UN Trafficking Protocol and requires that each party to the Convention ensures that any legal person can be held liable for a criminal offence that is committed for its benefit by a natural person. The natural person can either be acting individually or as part of an organ of the legal person, if they are able to exercise control over the company. The Convention requires States to ensure that a company which benefits from human trafficking committed by a person of authority within that company commits a criminal offence. The aim is to hold corporations accountable for acts committed by senior employees and directors. Similarly, Article 5 of EU Directive 2011/36/EU requires states to take all necessary measures to ensure that legal persons can be held liable for human trafficking offences.
- 107 *S. Rodríguez-López*, *Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law*, *Journal of Trafficking and Human Exploitation* 1(1), 2017, p. 95 et seq.

stage of human trafficking, namely in the illicit organ removal itself. The OSCE report that analysed existing case law of human trafficking for the purpose of organ removal in OSCE participating states found that only one legal entity had ever been charged for its involvement.¹⁰⁸ Since organ trafficking offences are defined differently as compared to human trafficking offences, more specifically by not requiring proof of the element of exploitation, it may be easier to successfully bring charges under the CoE Convention. Prosecutors, however, will have to overcome the same challenges in trying to establish the element of intent to commit the crime on the part of the natural person who is representing the legal person, as specified in Article 11(1)(a).

IV. Impact on the suppression and prevention of organ- and transplant-related crimes

Attention will now turn to the broader question of the potential impact of the CoE Convention on the suppression and prevention of organ- and transplant-related crimes in Europe and beyond. In order to do so, it is necessary to critically evaluate the arguments in favour of the development of the CoE Convention that have been presented in the introduction, namely that there is a need to: (a) establish criminal liability for organ- and transplant-related abuses; (b) define and criminalise illegal activities involving other human biological materials than organs; (c) address the limitations of the criminal law framework of human trafficking for the purpose of organ removal; (d) enforce the prohibition on making financial gain from the human body or its parts with criminal sanctions; and (e) take strong preventive measures to tackle organ- and transplant-related abuses.

1. Organ- and transplant-related crimes

With regard to the first argument, namely the need to establish criminal liability for organ- and transplant-related abuses in criminal codes,¹⁰⁹ the CoE Convention has directly addressed this gap. The broad range of offences introduced under the umbrella of organ trafficking provides for a more harmonised international criminal law regime, building on the existing criminal law provisions targeting breaches of domestic transplant regulations. The optimal outcome of this process of standardisation would be an acceleration in the legal convergence between domestic systems, which would provide states with the tools to prosecute organ- and transplant-related offences effectively and uniformly, both within and across national borders. This process may significantly improve domestic systems that currently lack transplant infrastructure or comprehensive criminal law provisions to enforce compliance with the fundamental principles of organ transplantation. However, the process of harmonisation will only succeed if these

108 Presently, the Netcare Case is the only example where a corporate entity was charged for organ- and transplant-related abuses.

109 See *Council of Europe (Parliamentary Assembly, Social and Family Affairs Committee)* (fn. 18), para. 38.

states are provided with adequate criminal and transplant law expertise and support for capacity building.

If the desired outcome of harmonising criminal law regimes fails to materialise because of, for example, low ratification rates, ratifying states may still be able to prosecute their nationals when the crime is committed beyond their borders by applying extraterritorial jurisdiction. Here, however, the effectiveness of the CoE Convention will largely depend on states not taking the possibility of making reservations under Article 10.

Bearing in mind that the joint study recommended that a separate instrument should “[...] include the idea that any organ transaction outside the national systems for organ transplantation should be considered organ trafficking”,¹¹⁰ it should be noted that this goal has been realised in Articles 4(4) and 6. These provisions could be used to address organ removal that is performed outside of the scope of the legitimate transplant system, for example, when the organ removal is performed in a non-authorised facility or is carried out for the purpose of unauthorised medical and scientific research. Alternatively, both provisions will cover organ removal and implantation that are alleged to be in accordance with the regulatory framework for organ donation and transplantation but that are in fact illegal, for example because they involve manipulations of the transplant waiting list.¹¹¹ While those provisions provide for a wide prosecutorial reach to address various breaches of transplant regulations, their implementation is optional.

While the CoE Convention also criminalises the use of the illicitly removed organ for ‘other practices’, and ‘other forms of illicit removal’, it is unclear whether the illegal removal, sale and purchase of an organ for ritualistic purposes (voodoo) or for ‘medicine murder’ (muti murder)¹¹² will fit squarely within the scope of the CoE Convention. Admittedly, it might be possible to include those crimes under Article 4(4) and 5. Regrettably, those practices are not mentioned in the text of the CoE Convention, nor in its Explanatory Report. This omission could represent a loophole in addressing illegal removal of human organs for monetary benefits.

Finally, as discussed earlier, it is important to consider the prosecutorial challenges raised by medical confidentiality. The CoE Convention does not address these issues, although they have been identified by experts as the key aspects that have a direct im-

110 See *Council of Europe and United Nations* (fn. 19), p. 97.

111 This provision could have been of particular use in the case of the alleged breach of the principle of equal opportunities in organ allocation uncovered in 2012 at the University Clinic in Göttingen, Germany. It was ruled that, while the doctor involved had breached the code of medical ethics, his action was at the time not punishable by law. See *M. Müller*, Organ scandal forces rethink of donor system, DW, 6 August 2012, available at <https://www.dw.com/en/organ-scandal-forces-rethink-of-donor-system/a-16146350> (last accessed 14 August 2018).

112 Muti murder is defined as a murder in which body parts are removed from a live victim for the sole purpose of using the victim’s body parts medicinally, *G. Labuschag*, Features and investigative implications of muti murder in South Africa, *Journal of Investigative Psychology and Offender Profiling* 1, 2004, p. 191 et seq.

pact on the identification, the prosecution, and the prevention of organ trafficking.¹¹³ In the absence of regulating these sensitive issues, the prosecution of organ- and transplant-related crimes might in practice turn out not to be easier under the organ trafficking than under the human trafficking framework. After all, the challenges will remain largely the same: convicting the healthcare professionals involved, identifying returning transplant tourists, and preventing organ- and transplant-related crimes by reporting suspicious activities to relevant authorities.

2. Trafficking in cells and tissues

The CoE Convention does not cover illegal activities involving tissues and cells, despite the recommendation in the joint study to also define and criminalise illegal activities involving other human biological materials than organs. While it was indicated that the transplant systems of the member states of the Council of Europe were too diverse, making it impossible to reach a satisfactory common ground on the matter, trafficking in tissues and cells is an area of criminal activity that is growing fast across the globe.¹¹⁴ Hence, regulations in this field are much needed and could have an immense impact on tackling exploitation and abuse. Moreover, the recommendation in the joint study was part of the appeal for a clear distinction between the crime of human trafficking and the crime of trafficking in organs, cells and tissues.¹¹⁵ It is conceivable that the original proposal to not only include organs but also tissues and cells provided a stronger argument to establish a different definition and approach of both types of trafficking and to address them in separate legal instruments. The decision not to include tissues and cells as possible objects of the crime makes the CoE Convention not only less comprehensive, but arguably also more closely aligned with the human trafficking framework than it had originally been envisaged.

Additionally, it should be noted that some states have covered the illicit removal of cells and tissues within their provisions prohibiting the purchase and sale of biological materials of human origin or even within their definition of human trafficking, which may add to the confusion. Whereas the Explanatory Report provides that the ad-hoc Committee of Experts on Trafficking in Human Organs, Tissues and Cells “recommended to revisit this possibility in the future”,¹¹⁶ the omission of tissues and cells is a considerable gap and could give rise to questions about the extent to which the original purpose of the CoE Convention was achieved.

113 *T. Caulfield et al.*, Trafficking in Human Beings for the Purpose of Organ Removal and the Ethical and Legal Obligations of Healthcare Providers, *Transplant Direct* 2(2), 2016: e60.

114 E.g. see *S. Basu*, How Nepali Women Are Forced To ‘Sell’ Their Skin To Make Rich Indians Beautiful, *YKA*, 6 March 2017, available at <https://www.youthkiwaaz.com/2017/03/how-women-from-nepal-are-trafficked-to-india-and-disfigured-to-make-rich-men-and-women-beautiful/> (last accessed 14 August 2018).

115 Explanatory Report, para. 7.

116 Explanatory Report, para. 13.

3. Human trafficking for the purpose of organ removal

Considering that one of the main reasons for the development of the CoE Convention concerned the limited scope of human trafficking for the purpose of organ removal, it should be noted that the CoE Convention has indeed expanded its definition of organ trafficking so as to also cover the illicit removal of organs from deceased persons. In addition, the CoE Convention also allows for the prosecution of cases when the organ donor has consented to the illicit removal of an organ, and is not to be considered a victim of human trafficking.¹¹⁷ This corresponds with the aim of the CoE Convention to supplement the existing human trafficking framework. However, the CoE Convention's failure to define who is a victim of organ trafficking, while recognising that some could be considered as such, may pose practical challenges. This can have a negative impact on the application and effectiveness of both legal frameworks.

Taking into account that the legal status of organ donors and recipients under the CoE Convention is left to domestic legislation that might provide for their criminalisation, organ donors may feel threatened by the possibility of being punished and may therefore not report the crime. This in turn can push trafficking crimes even more underground, aiding traffickers who will use the element of fear to silence and control their victims as chances of detection drop. It should also be noted that, despite awareness-raising campaigns and legal training to educate law enforcement, members of the judiciary and potential victims of human trafficking, the possibility of confusing human trafficking for the purpose of organ removal with organ trafficking is very high, especially among potential victims. This can result in uncertainty among potential organ donors as to their rights and responsibilities. Considering that exploited organ donors rarely see themselves as victims, they might choose not to reveal themselves to the eyes of the law, certainly if they would risk being held criminally liable.

In the light of the practical challenges associated with prosecuting human trafficking for organ removal, the CoE Convention may make the prosecution of the crime easier. As indicated above, the CoE Convention subjects the establishment of the offence of illicit organ removal only to the presence of two conditions, rather than to the three required under the human trafficking framework. In the presence of exploited living donors, illicit removal of an organ can trigger a violation of both trafficking regimes. The advantage would be that, if a case fails to be prosecuted as human trafficking, offenders may still be prosecuted under the organ trafficking framework. The disadvantage of this possibility is, however, that potential organ donors who could be considered as victims may be put in jeopardy. There is a real risk that, since law enforcement and prosecutors are more familiar with the criminalisation of organ trade in domestic criminal codes and transplant laws, and since it is easier to prosecute organ trafficking offences, the organ trafficking framework would be prioritised over the human trafficking framework.

117 Explanatory Report, para. 10.

This preference has been confirmed in the OSCE report, which concluded that “the cases reviewed for this study do reflect variation in the ways in which the criminal conduct is qualified. Several of the cases appear to reflect a narrow approach to qualifying the criminal conduct, focusing on the criminal violation of laws regulating transplants, and not addressing the trafficking and organized criminal aspects of the crimes”.¹¹⁸ Although the qualification of the crime and the applicable legal framework to prosecute offenders is left to the prosecutors, it is of paramount importance to clearly define the legal boundaries of both legal frameworks and to emphasise the need to give priority to the human trafficking framework if there are suspicions that the organ donor was exploited.

In this regard, the argument regarding the difficulty to prosecute illicit organ removal under the human trafficking framework may lose its strength when the utilisation of the human trafficking framework is improved. This will occur once the sale and purchase of organs is no longer considered as a victimless crime, and the abuse of a position of vulnerability is genuinely considered as an illicit means to exploit an organ donor. If this approach would be adopted more broadly, the CoE Convention will be especially beneficial in addressing organ trafficking crimes, by offering a supplementary legal framework that would allow prosecutors to bring additional charges for violations of transplant regulations that might also have characteristics of organised crime.

4. Organ trade

The joint study asserted that the prohibition on making financial gain from the human body and its parts is a paramount principle and that legislation on the recovery of organs from living and deceased donors should conform to this principle.¹¹⁹ Although the CoE Convention enforces the principle of the non-commercialisation of the body and its parts, it does not deal with organ trade *per se*.¹²⁰ In the CoE Convention, the prohibition of trading in organs is linked to the act of illicit removal of an organ. Only when illicit removal occurs or is envisaged, provisions that criminalise commercial activities can be applicable.¹²¹ The lack of a specific reference to organ trade (or to the general principle of non-commercialisation) in the text of the CoE Convention is surprising, considering that the prohibition of organ trade lies at the heart of any transplant system. The criminalisation of organ trade as an offence in its own right could have been a major contribution of the CoE Convention, easily becoming an international criminal law standard in the absence of other international legally binding crimi-

118 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (fn. 17), p. 35.

119 Council of Europe and United Nations (fn. 19), pp. 7, 94.

120 See also Huberts (fn. 27), p. 605 et seq.

121 With the exception of solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting or a third party, and of advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

nal law instruments which set out the principle that making financial gains from the human body or its parts should be criminalised.

5. Prevention of organ trafficking

The successful suppression of organ- and transplant-related abuses cannot be achieved through law enforcement measures alone but requires a comprehensive approach that also includes strong preventive measures. The CoE Convention lists a range of preventive measures aimed at curbing organ trafficking. These measures focus on: (1) establishing transparent domestic transplant systems; (2) providing equitable access to such services; and (3) adequate collection, analysis, and exchange of data related to organ trafficking offences between relevant bodies (Article 21(1)). Moreover, the CoE Convention requires states to provide information and training to healthcare professionals and relevant officials (Article 21(2)(a)). The Explanatory Report suggests that training activities should also focus on detecting organ trafficking.¹²² Yet, it is less apparent what healthcare professionals should do when they detect such a crime. The CoE Convention itself does not contain any suggestions as to when and how to report organ trafficking crimes. Similarly, there is no suggestion to create a national reporting mechanism for healthcare professionals confronted with (suspected) organ trafficking.¹²³

As another type of preventive measure, the CoE Convention advocates awareness-raising campaigns, which would allow the general public to be informed about the illegality and harmful aspects of organ trafficking (Article 21(2)(b)). Taking into account that minorities, people with disabilities, irregular migrants, and refugees may be especially vulnerable to becoming victims of trafficking, it would have been useful if the CoE Convention would have paid particular attention to conducting awareness-raising campaigns among vulnerable populations.

It is also unfortunate that the CoE Convention remains silent on the need to address the root causes that may put organ donors and recipients into a situation that prompts them to consider resorting to illicit activities. Admittedly, the CoE Convention is more of a criminal law instrument than a human rights instrument. However, a provision calling upon states to tackle the economic, gender and social inequalities that make people prone to exploitation would have been welcome. Similarly, as a viable strategy to prevent organ trafficking it would have been appropriate to require a clear commitment to reduce health problems that may result in organ failure, and to remove disincentives to organ donation.

122 Explanatory Report, para. 127.

123 In this regard see, however, the Council of Europe Resolution CM/Res (2017)2 on establishing procedures for the management of patients having received an organ transplant abroad upon return to their home country to receive follow-up care, adopted on 14 June 2017.

An additional preventive measure that could have been considered concerns prohibiting reimbursement by insurance companies of expenses for organ transplants illegally obtained abroad. Such a policy measure, implemented by, for instance, Israel and the Netherlands, proved very successful in deterring their residents from travelling to other countries to obtain organs from poor and vulnerable donors.¹²⁴

Recognising that the scale of organ trafficking is directly impacted by health, social, economic, and even immigration policies, the reduction of this type of crime would also require the identification of enabling factors and the introduction of counter measures at national level. At a minimum, the Explanatory Report should have acknowledged the need for a more comprehensive prevention framework, leaving it to the states to decide on how to proceed.

V. Moving forward: implementation and pressing issues

1. Implementation

It is to be expected that the implementation of the core provisions of the CoE Convention will be fairly easy for CoE member states, considering that their transplant systems and health policies are built on the same principles and that a solid legal infrastructure is already in place. If, as happened with the CoE Convention on Action against Trafficking in Human Beings, the European Union would also take steps to issue a Directive targeting this type of crime and introducing minimum punishment, the fight against organ trafficking in EU member states might become even more efficient and harmonised.

However, the situation may be considerably more challenging in countries where the regulation of the transplant system shows substantial gaps. These states might first have to take proactive measures to establish a properly regulated and transparent transplant system, incorporating the basic principles and safeguards provided by international guidelines and the CoE Convention. A similar process of legal convergence will need to be undertaken to implement a comprehensive set of criminal law provisions. Additionally, it is important to recognise differences between states in terms of law enforcement capacity to address organ trafficking. Only through enhancing those states' ability to detect, investigate, and prosecute organ trafficking, the impact of the CoE Convention will be maximised.

With regard to the more practical aspect of transposing the CoE Convention, it should be noted that introducing, in a harmonised way, new criminal law provisions in multiple states is easier to achieve when the offences are self-explanatory and self-standing, and do not require reference to other legal provisions. This is not the case with the CoE Convention, since it references several international legal instruments

124 *J. Lavee et al.*, Preliminary marked increase in the national organ donation rate in Israel following implementation of a new organ transplantation law. *American Journal of Transplantation* 13, 2013, p. 780 et seq.

and also heavily relies on existing domestic regulations. In order to implement the provisions of the CoE Convention, states will have to carefully examine their existing regulations concerning human trafficking and organ- and transplant-related abuses so as to determine the extent of the legislative changes required. Moreover, they will need to flash out potential conflicts of law and legal inconsistencies. With regard to the human trafficking framework, legislators and policy makers need to be aware of possible overlaps and their consequences for alleged victims and offenders. Concerted efforts will need to be undertaken to identify these overlaps and to determine how best to apply both trafficking frameworks so that they can address each other's limitations, function in a complementary way, and allow optimal prosecution of the crimes involved.

In the absence of guidance on how both trafficking frameworks should best be applied so as to limit the risk of prosecuting organ donors who may qualify as victims, the organ trafficking framework should only very cautiously be applied when living donors have been directly involved. While the determination of the applicable legal framework is ultimately left to domestic prosecutors to assess, a general recommendation should be issued that, when both frameworks can be used to prosecute the crime, priority should be given to the human trafficking framework, in view of the more comprehensive protection and assistance it offers to victims. To ensure that the crime is classified accurately, states should be encouraged to establish multidisciplinary teams of experts who could use expertise from different fields.

2. Pressing issues

The CoE Convention has the potential to become an international legal instrument that has a major positive effect on crime control in countries both inside and outside of the Council of Europe region. The most direct impact will of course be found in states that transpose the provisions of the CoE Convention into their domestic legal systems. States that choose not to join may still experience the impact of the Convention in the field of transplantation and crime control, as it is a first international criminal law instrument dedicated to organ trafficking and there currently are no signs that at the level of the UN specific instruments are being prepared to also address organ trafficking. For that reason it is of paramount importance to address the legal tensions between the CoE Convention and the human trafficking framework. When transposing the CoE Convention or when organ trafficking laws would be independently developed, it will be inevitable to define the legal status of victims of organ trafficking and of the recipients of an illicitly obtained organ.

One way in which these legal tensions could have been adequately addressed in the CoE Convention would have been by providing, on the basis of a similar provision in human trafficking law, that victims of trafficking in organs should not be prosecuted or punished for unlawful acts committed by them as a direct consequence of their situa-

tion as victims or where they were compelled to commit such unlawful acts.¹²⁵ Alternatively, a reference to the concept of abuse of a position of vulnerability could have been introduced under Article 4(1), stipulating that the organ donor is to be considered a victim if the illicit removal occurs by way of abusing that person's position of vulnerability. At a minimum, a reference to the concept could have been included in the Explanatory Report.

By referring to the concept of abuse of a position of vulnerability, the CoE Convention would have recognised this as a legitimate criterion to grant protection and assistance to organ donors involved in organ trafficking. This would have made it easier to reconcile the lack of a proper definition of a 'victim of organ trafficking' with international obligations to protect persons who could be considered victims. In addition, it would have provided for a more harmonised approach towards assessing the legal status of organ donors who may be involved in organ trafficking, without relying only on domestic prohibitions of selling and purchasing organs. Moreover, it would have created a safety net for those organ donors who, for example due to considerable diversity in transposing human trafficking law, are not classified as victims under the human trafficking framework. Similarly, it would also have established a basis for the development of more detailed criteria for the assessment of vulnerability as a criterion that qualifies doctors as victims. Finally, by recognising vulnerability as a condition that may prompt potential organ donors to get involved in organ trafficking, states would be under an obligation to actively improve the conditions that create vulnerability.

Admittedly, this approach may somewhat blur the lines between the CoE Convention and the human trafficking instruments, possibly making a distinction between both types of crimes more difficult. At the same time, however, introducing and defining the concept of abuse of a position of vulnerability in the context not only of human trafficking but also in the context of organ trafficking would help in identifying and protecting victims of illicit organ removal. If this approach is to be considered, it would be essential to involve a multidisciplinary group of experts from all relevant fields in the process of defining what the concept exactly means for each type of crime and how it should be evaluated.

A second proposal to address proper treatment of organ donors and recipients involved in organ trafficking is to take the Israeli approach, where the law that criminalised the sale and purchase of organs does not impose criminal sanctions on the organ donors and recipients.¹²⁶ This proposal might raise discussions about the best ways to control and deter organ trafficking, but it has proven very successful in curbing this type of crime, resulting in a considerable number of successful prosecutions. This success can be largely attributed to the fact that organ donors or recipients who may be

125 Such proposition would be in line with the call for non-punishment of victims of human trafficking. See Report of the meeting of the UN Working Group on Trafficking in Persons, CTOC/COP/WG.4/2009/2, 14-15 April 2009, para. 12.

126 Israeli Organ Transplant Law, 2008.

involved in illicit activities do not feel threatened by the prospect of prosecution, but rather actively participate in the prosecution as witnesses (e.g. *Medicus* case).

A third alternative involves the introduction of mitigating circumstances or the development of sentencing guidelines that allow great flexibility in sentencing organ donors or recipients. This approach was advocated by the Parliamentary Assembly of the Council of Europe during the drafting process. However, in response the relevant Committee of the Council of Europe indicated that mitigating circumstances would not be introduced because of the great diversity in legal systems across European Council member states.¹²⁷ In this respect, it should be noted that, although the application of extenuating circumstances does operate differently across jurisdictions, almost all European states allow for their consideration.¹²⁸

VI. Conclusion

Despite international appeals and a comprehensive body of international legal instruments on transplantation and human trafficking that have been implemented at the national level, it has proven very difficult to combat organ- and transplant-related crimes. When these crimes occur across borders – being driven by political and market dynamic, and responding to legal loopholes and weak law enforcement – effectiveness in combating them will often depend on the criminal law systems that are in place in the states that are most susceptible to this type of crime. From this perspective, it makes perfect sense to elevate organ- and transplant-related offences to the rank of international criminal offences, to address legislative gaps at the domestic level, and to harmonise criminal law systems so that states can effectively prosecute.

Some of the main reasons behind the development of a new criminal law convention were to provide a uniform definition of the crime of organ trafficking and to overcome jurisdictional obstacles in order to allow extradition and prosecution. While the CoE Convention does exactly that, it is difficult to claim that those two goals have been achieved in a manner that maximises effectiveness and ensures compatibility with other legal instruments.

Moreover, while it is undoubtedly one of the strengths of the CoE Convention that it focuses on tackling cross-border organ trafficking and on prosecuting healthcare professionals, it does not address some of the circumstances that allow this criminal activity to thrive. The latter include the challenge to report suspicious transplants as a result of issues concerning medical confidentiality or fear for prosecution on the part of

127 Draft Opinion of the European Committee on Crime Problems on Parliamentary Assembly Recommendation 2009 on ‘Towards a Council of Europe Convention to Combat Trafficking in Organs, Tissues, and Cells of Human Origin’, CPDC 2013 (1), p 2.

128 See, Study on minimum sanctions in the EU Member States, Final report Tender, JUST/2013/JPEN/0047/A4, 2015 and UN Working Group on Trafficking on 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, CTOC/COP/WG.4/2010/4, 2009, p. 2 and 5.

organ donors and recipients. The question regarding the most appropriate treatment of organ donors and recipients involved in organ trafficking is especially problematic, as there is no guarantee that their human rights will always be respected under this new criminal law framework. As compared to human trafficking instruments, the CoE Convention has established obligations about victim protection that are less straightforward and can be more easily disregarded.

In addition, if one of the central aims of the criminal justice system is to deter potential offenders through stigmatising criminal conduct and imposing dissuasive sanctions, this might be very hard to achieve in organ- and transplant-related abuses. There is a real risk that the stigma may disappear when the condemnation of this kind of activity is not uniform and many individuals are engaged in them or openly condone them. Moreover, punishing donors or recipients for their involvement in organ trafficking might be regarded as disproportionate and misguided, bearing a real risk that voices calling for a regulated organ market grow louder. If the criminal justice system is to succeed in preventing and combating organ trafficking, a debate must take place between all stakeholders to develop workable solutions to address the root causes and to properly inform healthcare professionals, potential donors and recipients, law enforcement and judiciary, and the public in general.

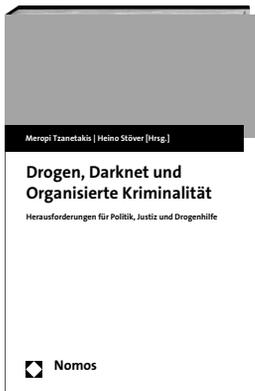
No doubt, criminalising and prosecuting undesired and harmful behaviour – which is the central focus of the CoE Convention – is an essential factor in effectively curbing crime, upholding the rule of law and delivering justice. However, it should also be acknowledged that framing organ trafficking as a list of illicit activities involving an organ may result in a reductive understanding of crime that is limited to a punitive approach. In this respect, it is disappointing to note that the CoE insufficiently seizes the opportunity to forward human rights by more broadly focusing on addressing the root causes of organ trafficking, including the reasons that underlay organ failure and shortages of organs and the socio-economic conditions that make destitute persons vulnerable to organ trafficking. This task has been shifted towards the states, that are called upon to elaborate the measures provided in the CoE Convention and to introduce a criminal law policy that gives sufficient attention to the prevention of crime.

In view of the issues that are presented above, it is difficult to accurately predict the legal impact of the CoE Convention. In order for the Convention to operate in a harmonised way with other international legal instruments and to have a significant impact on the prosecution of the crime, more work is required. Distinguishing between human trafficking and organ trafficking and defining the scope of each framework and, when necessary, a hierarchy, is a first step to build understanding required in transposing the new convention to domestic systems. Experts from all the relevant fields will have to join forces to exchange expertise to develop a flexible policy that can be tailored to individual states.

Nonetheless, the adoption of the CoE Convention has certainly put the issue of organ trafficking high on the international agenda and acknowledges the gravity of the abuse, while inviting the global community to address the problem from the angle of criminal justice. By giving this type of crime proper recognition, states and policy

makers are now required to rethink, and ideally, to strengthen their responses to organ trafficking. If the CoE Convention manages to generate enough political will and resources for states to act, this would constitute a significant step forward in realising its promises.

Drugs on the Darknet – Organized Crime 2.0



Drogen, Darknet und Organisierte Kriminalität

Herausforderungen für Politik, Justiz und Drogenhilfe

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