

## Criminalization of Trafficking in Human Organs According to the 2014 Council of Europe Convention

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*The article explores the phenomenon of trafficking in human organs by detecting its socio-criminological features, the national and international rules aimed at repressing it, and its peculiarities with respect to human trafficking for the purpose of organ removal.*

*After identifying the subjects involved in this crime and the human rights at stake, the article examines the substantive criminal provisions of the 2014 COE Convention against trafficking in human organs, and especially those outlining the acts to be established as criminal offences of “trafficking in human organs” by the States parties. Particular attention is devoted to the advisability of using criminal instruments against organ donors and recipients, due to their poverty and health conditions that make them vulnerable and exploitable by intermediaries promoting demand and supply of organs for lucrative purposes. Furthermore, the adequacy of the jurisdiction criteria provided for by the Convention is analyzed in relation to the need to repress the connected phenomenon of “transplant tourism”.*

*In conclusion, the author proposes the introduction of an EU Directive establishing minimum rules concerning the definition of trafficking in human organs and the applicable sanctions, according to Art. 83 TFEU.*

### I. Introduction

The Council of Europe Convention against trafficking in human organs, was adopted by the Committee of Ministers on 9 July 2014 and opened for signature in Santiago de Compostela on 25 March 2015, is the first binding international criminal law convention that particularly defines and aims to suppress organ trafficking.

The main reason why there has been no adequate regulation of the criminal phenomenon of organ trafficking so far, at the international level, is the general scepticism about the actual diffusion of this criminal activity, which is often identified by the media as the kidnapping of persons in order to remove and sell their own organs, against which any actual evidence is missing<sup>1</sup>. Instead, the phenomenon has a much wider feature which also includes the forcible or spontaneous transfer of the victim to the place where he/she will undergo removal of an organ, or the transportation of the removed organ to the place where the transplantation will be performed on the recipient: these assumptions are often attributed –

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<sup>1</sup> About the myths concerning trafficking in human organs, see Council of Europe and United Nations, Joint Study, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, 2009, p. 60; S. Meyer, *Trafficking in Human Organs in Europe. A Myth or an Actual Threat?*, in *European Journ. Of Crime, Criminal Law and Criminal Justice*, 2006, p. 208.

especially in those national legal systems lacking of specific laws against this kind of trafficking – to different criminal offences such as trafficking in human beings, kidnapping, grievous bodily harm, homicide or illegal organ transplantation<sup>2</sup>.

Especially after the recent legal proceeding against five Kosovar doctors – investigated for removing organs from some citizens of Eastern Europe at the Medicus Clinic in Pristina in 2008, and convicted by the Basic Court of Pristina of the EULEX (European Union Rule of Law Mission in Kosovo), some of trafficking in persons and organized crime, others of grievous bodily harm<sup>3</sup> – the phenomenon of organ trafficking has been creating new social apprehension at the global level, thus revealing its concrete nature. It is only the last of a series, though not copious, of convictions in criminal proceedings carried out in the last decade in countries such as Azerbaijan, Belgium, Brazil, Bulgaria, Israel, Moldova, Romania, South Africa, Turkey, Ukraine, U. S. A., where individuals from anywhere in the world turned out to be involved in this criminal phenomenon as buyers, doctors or brokers<sup>4</sup>.

## II. Subjects involved in trafficking in human organs

Apparently, only two parties are directly involved in the illegal exchange of organs, namely the donor and the recipient: the former is a person who is in a situation of inferiority for reasons relating to wealth, knowledge or power and who is often induced to sell parts of his/her body from necessity; whereas, the latter is a sick individual who needs a healthy organ to survive in a social context in which the increasing demand of organs for transplantation corresponds to an insufficient supply<sup>5</sup>.

It should be pointed out that the broker is often included as a third subject in the foretold bilateral relationship<sup>6</sup>: he acts between the two parties directly involved in the exchange, not only by promoting demand and supply of organs and facilitating the conclusion of the agreement, but also by organizing the journey and the permanence of one of two parties, or both, in the place where the surgical operation will be performed<sup>7</sup>. Although the presence of an intermediary and the receipt of a financial gain for brokerage activity are generally legal phenomena also

<sup>2</sup> In this sense, UNODC-CCPCJ (United Nations Office on Drugs and Crime – Commission on Crime Prevention and Criminal Justice), Report of the Secretary-General on preventing, combating and punishing trafficking in human organs, 2006, § 11.

<sup>3</sup> EULEX, Rule of Law Mission, District Court of Pristina, 29 April 2013, in [www.eulex-kosovo.eu](http://www.eulex-kosovo.eu)

<sup>4</sup> For a close examination of the proceedings and judgments issued against organ traffickers at the international level, see the recent study of the OSCE (Organization for Security and Co-operation in Europe), Office of the Special Representative and Co-ordinator 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, 8 July 2013, p. 63 *et seq.*

<sup>5</sup> See G. Berlinguer, *Il corpo come merce o come valore*, in *Questioni di bioetica*, S. Rodotà ed., Laterza, Roma-Bari, 1993, p. 80 *et seq.*

<sup>6</sup> In the language of economics, the word specifically indicates a financial intermediary who researches and buys, on behalf of the customer, the product that offers the best value for money in the target market.

<sup>7</sup> See N. Scheper-Hughes, *Neo-cannibalismo: corpo e feticismo della morte*, in *Corpi in vendita*, N. Scheper-Hughes and L. Wacquant eds., Ombre Corte, Verona, 2004, p. 49.

in the field of medical tourism<sup>8</sup>, the involvement of the broker in trafficking in human organs makes his activity worthy of repression. In fact, the financial gain for the middle-man activity surely affects the price of the organ, thus creating an unnatural distortion in the process of will formation of concerned parties, which had already been influenced by conditions of economic or physical need<sup>9</sup>. The devaluation of their business also depends on the fact that brokers involved in organ trafficking might be parts of international criminal organizations that traffic in human beings and make huge illegal profits<sup>10</sup>.

In addition to donors, recipients and brokers, this phenomenon always involves doctors, nurses, physicians or researchers<sup>11</sup>: this is a consequence of the health implications that it entails. However, it must be noted that doctors who perform removal or transplant of the organs deriving from human trafficking, «are not involved in the recruitment, transportation, transfer, harbouring or receipt of persons, through improper means for the purpose of exploitation if these duties are assigned to brokers and intermediaries»<sup>12</sup>. Even if doctors are not found accomplices to the crime of trafficking in persons, it is necessary to criminalize them for carrying out organ removal in contrast to the law, for using organs while knowing their illicit origin, and for being corrupted in order to perform an illicit explant or transplant of human organs, as established by the 2014 COE Convention, which required States parties to take the necessary legislative measures to establish the aforementioned acts as offences attributable to trafficking in human organs.

### III. Human rights violated by organ trafficking

In addition to the dangers due to explant and transplant surgeries, the health of donors and recipients would be exposed to risks related to the activities of circulation, storage and distribution of the human organs, carried out without the guarantees of quality and safety required by the legal systems of transplant: since these activities are always carried out secretly, the donor would probably be deprived of necessary medical care post-operatively, while the receiver would suffer the risk of undergoing the transplant of an organ the safety and histocompatibility of which have not been previously tested<sup>13</sup>. As it is not certain that these human organs will be transplanted on the person originally appointed as beneficiary, the unlawful circulation of them would affect public health too, relating to all potential organ recipients.

Another human right violated by trafficking in human organs is the individual's freedom, which deserves protection against those external factors that can affect the

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<sup>8</sup> See R. G. Spece Jr, *Medical Tourism: Protecting Patients from Conflicts of Interest in Broker's Fees Paid by Foreign Providers*, in *Journal of Health & Biomedical Law*, 2010, p. 3 *et seq.*, who however affirmed that patients should be informed by broker about the effect of his/her financial gain on the price they paid for the surgical operation.

<sup>9</sup> See H. T. Engelhardt, *Il corpo in vendita: dilemmi morali della secolarizzazione*, in *Questioni di bioetica*, *cit.*, p. 131.

<sup>10</sup> On trafficking in organs as a goal of the new organized crime, see S. Meyer, *op. cit.*, p. 208 *et seq.*

<sup>11</sup> See J. A. Flores, *International Scientific Misconduct and the Legal System*, in 9 *Currents Int'l Trade L.J.*, 2000, p. 66.

<sup>12</sup> S. Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press, New York, 2008, p. 166.

<sup>13</sup> Cp. S. Meyer, *op. cit.*, p. 221 *et seq.*

self-determination of those who give or receive an organ<sup>14</sup>. In the case of the exploitation of human organs by third parties, donors and recipients are coerced psychologically: though they are not necessarily obliged to accept the oppressive proposal of the broker, the aforesaid individuals are in a condition of economic or medical need because of which they cannot reject the offer or, in any event, they cannot make a completely free choice<sup>15</sup>.

Furthermore, informed consent of donors and recipients may be affected by incomplete or misleading medical information given in view of the surgical operation<sup>16</sup>.

In addition, the human dignity of organ donors is a human right compromised by economic aspects of organ trafficking<sup>17</sup>, because this phenomenon would encourage an exploitation of individuals, degraded to mere “sources” of biological material. Immanuel Kant argued that the human beings are distinguished from animals and things because of their intrinsic value and dignity, which always requires treating humanity as an end and never as a means only<sup>18</sup>: therefore, when an individual is obliged to give – but also when he/she voluntarily sells – a part of his/her body to a recipient or broker, he/she is degraded to a mere object and deprived of his/her quality of and status as a “person”.

From this perspective, the World Health Organization affirmed that «*Payment for cells, tissues and organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation and leads to profiteering and human trafficking. Such payment conveys the idea that some persons lack dignity, that they are mere objects to be used by others*»<sup>19</sup>. According to the European Parliament, «*The removal of an organ from a donor living in extreme poverty who has invariably been persuaded to give his or her consent by the false promise of a better life, can only be viewed as a gross violation of human rights and dignity*»<sup>20</sup>.

<sup>14</sup> See R. Dworkin, *Is democracy possible here?*, Feltrinelli, Milano, 2007, p. 28 *et seq.*

<sup>15</sup> In this sense, see C. A. Erin – J. Harris, *A Monopsonistic Market: Or How to Buy and Sell Human Organs, Tissues and Cells Ethically*, in *The social consequences of life and death under high technology medicine*, L. Robinson ed., Manchester University Press, Manchester 1994, p. 139; J. Harris, *Wonderwoman and Superman: The Ethics of Human Biotechnology*, B&C, Milano, 1997, p. 190; E. Bailey, *Comment, Should the State Have Rights to Your Organs? Dissecting Brazil's Mandatory Organ Donation Law*, in 30 *U. Miami Inter-am. L. Rev.* 1998, p. 716; F. L. Delmonico – R. Arnold – N. Scheper-Hughes – L. A. Siminoff – J. Kahn – S. J. Youngner, *Ethical Incentives — Not Payment — for Organ Donation*, in *New Eng. J. Med.*, 2002, 346(25): p. 2004; R. D. Truog, *The Ethics of Organ Donation by Living Donors*, in *New Eng. J. Med.*, 2005, 353(5): p. 446; P. Garwood, *Dilemma Over Live-Donor Transplantation*, in *Bull. of the WHO* 2007, 85(1), p. 5; D. A. Budiani Saberi – F. L. Delmonico, *Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities*, in *American Journal of Transplantation*, 2008, 8(5), p. 928.

<sup>16</sup> OSCE, *Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region*, *cit.*, p. 15.

<sup>17</sup> Cp. S. Meyer, *op. cit.*, p. 227-228; S. Sterckx – J. Cockbain, *Exclusions from Patentability: How Far Has the European Patent Office Eroded Boundaries*, Cambridge University Press, Cambridge 2012, p. 307

<sup>18</sup> I. Kant, *Fondazione della metafisica dei costumi*, Rusconi, Milano, 1982, p. 126 *et seq.*

<sup>19</sup> World Health Organization, *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22.

<sup>20</sup> Draft European Parliament Explanatory Statement to the legislative resolution on the Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues (7247/2003 – C5-0166/2003 – 2003/0812 (CNS)), Explanatory Statement, p. 26.

#### IV. National regulations

Not all States in the world, including the ones mentioned earlier, have enacted laws appropriate enough to suppress the phenomenon of trafficking in human organs.

Within the United States, organ trade is forbidden by Section 16 of the 2006 Revised Uniform Anatomical Gift Act which punishes those who buy or sell human parts; nevertheless, organ removal is not included between illicit purposes of trafficking in persons, according to the Trafficking Victims Protection Act<sup>21</sup>. Conversely, Section 279.04 (3) of the Canadian Criminal Code establishes that trafficking in persons for purpose of organ removal is an offence punishable with imprisonment for a term of not more than fourteen years. In 2008, Borys Wrzesnewskij introduced Bill C-500 to the House of Commons, with the aim to amend the Criminal Code by introducing penal sanctions for Canadians involved, in Canada or outside Canada, in the medical transplant of human organs or other body parts obtained or acquired as a consequence of a direct or indirect financial transaction or without donor's consent; the bill did not, however, become law.

In Europe, Art. 601 of the Italian Criminal Code forbids trafficking in human beings for organ removal; furthermore, Italian law punishes those who trade or illicitly procure organs removed from a deceased donor<sup>22</sup>, but it is greatly lacking in terms of living donation: it provides for the criminalisation of intermediation for profit, but it does not punish illicit procurement of organs<sup>23</sup>.

The scope of application of Article 156*bis* of the Spanish Criminal Code is wider, however: the disposition, introduced by the Law No. 5/2010, punishes those who promote, facilitate, support or advertise harvesting, trafficking, or transplantation of human organs, as well as recipients who consent to the transplant knowing organ's illicit origin, albeit Spanish law fails to give a definition of "organ trafficking".

As regards the United Kingdom, the 1989 Human Organ Transplantation Act prohibits commercial dealings in human organs. Section 4 of the 2004 Asylum and Immigration (Treatment of Claimants, etc.) Act introduced the new offence of human trafficking for the purpose of organ removal, committable inside or outside the United Kingdom (Section 5, as amended by the 2007 UK Borders Act).

German law also provided for an extraterritoriality clause suitable for prosecuting citizens who purchase organs in a foreign country where the traffic is not criminalized, regardless of the principle of double punishability<sup>24</sup>.

There are many Eastern European States that have inadequate legislations on this matter: in Moldova and Kosovo, for example, there is no prohibition of trafficking in human organs, so that the illicit removal of human organs is attributable to the

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<sup>21</sup> See L. P. Francis – J. G. Francis, *Stateless Crimes, Legitimacy, and International Criminal Law: The Case of Organ Trafficking*, in *Crim. Law. & Phil.* 2010, p. 288.

<sup>22</sup> Law 91/1999, Article 22.

<sup>23</sup> Law 91/1999, Art. 22*bis*, as added by Law 228/2012.

<sup>24</sup> Strafgesetzbuch, Art. 5.

criminal offences of personal injury or trafficking in human beings; in Ukraine, art. 143 of the penal code punishes illegal activities related to transplantation of organs, in addition to the crime of trafficking in human beings (art.149).

In Asia, the ban on trafficking in human organs has only recently been introduced in the Philippines, Pakistan and China, where the removal and sale of organs from executed prisoners was an established practice until a few years ago.

Africa, Algeria, Tunisia and Zimbabwe punish organ trafficking. South African law punishes trafficking in persons for removal of body parts (Art. 4 of the 2013 Prevention and Combating of Trafficking in Persons Act) and sale or trade in human organs (Art. 60 of the 2003 National Health Act).

Australian law did not punish trafficking in human organs for a long time; in March 2013, the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 introduced a new Subdivision (BA), entitled “*Organ trafficking*”, into Division 271 of the Criminal Code, by which trafficking in persons for organ removal and organ trafficking have been criminalized (271.7A – 271.7E).

It must be clear that a series of heterogeneous but interrelated activities gravitate around the phenomenon: these range from the recruitment and transfer of donors to the illegal removal of their organs; from the use, even for the purpose of a transplantation, of the illegally explanted organs to the payment to organ donors and doctors performing the surgical operation; from advertising for the demand or supply of human organs to intermediation for profit between the parties directly involved in the exchange sometimes carried out within criminal organizations. Until now, in the absence of a binding international legal instrument, every national legislator has been free to choose which behaviours to criminalize as organ trafficking, with the result that some offensive acts have not been criminalized, or that different and inappropriate criminal provisions have been used to repress the conduct involved in the phenomenon, with a limited repressive effectiveness.

Before examining the substantive criminal law provisions of the COE Convention against trafficking in organs – which, if ratified, would absorb many of the critical profiles raised by the aforementioned national laws – it is necessary to look over the international legal instruments issued so far in order to regulate organ donation and to prevent organ trafficking.

## V. Legal instruments adopted by the European Union

Organ trafficking already contrasts with Article 3 of the EU Charter of Fundamental Rights, which declares the right to physical and mental integrity of person, the protection of the free and informed consent of the patient and the prohibition on commercialization of the human body and its parts.

Article 2, Paragraph 2, of the Framework Decision 2002/584/JHA of 13 June 2002, established that trafficking in human organs and tissues is one of the crimes giving rise to surrender on the basis of the European arrest warrant, without

verification of the double criminality of the act, provided that such an offence is punishable under the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years.

In 2003, Greece presented the *Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues* to the EU Council<sup>25</sup>. Taking into account the free movement of criminal networks between EU Member States deriving from the Schengen system, this instrument pointed out the necessity that Member States cooperate in penal matters against criminal offence of illegal trafficking in organs and tissues, and the need to harmonise the definition of the constitutive elements of the offence and the applicable sanctions. From this perspective, Art. 2 of the Initiative described a broad range of acts which should have been punished as illegal trafficking in organs and tissues by EU Member States, and Art. 4 required them to adopt effective, proportionate and dissuasive penalties, setting a minimum of ten years' imprisonment for those offences committed in aggravating circumstances, such as those where they had been carried out against a young person, or within the framework of a criminal organisation, or with causation of physical harm to victims. The European Parliament enacted a Draft Legislative Resolution by which it approved the Initiative as amended. In this way, it proposed to include into the definition of "trafficking in human organs" three wide categories of acts deserving of punishment: trafficking in human beings for the purpose of organ and tissue removal; commercial dealings in human organs and tissues; removal of organs by force, coercion and deception<sup>26</sup>. Furthermore, the EP underlined the need to remove the provision of criminalisation of living donors for selling, or offering to sell their organs<sup>27</sup>, and to punish the advertisement for «*the need for, or availability of, organs, parts of organs or tissues, with a view to offering or seeking financial gain or comparable advantages*»<sup>28</sup>. The discussions on the Initiative were suspended, pending further detailed information on the diffusion of the phenomenon within the territory of the European Union.

A resolution of the European Parliament to urge policy actions at EU level in the field of organ donation and transplantation (2009/C 259 E/01) dates back to 22 April 2008: it urged Member States to introduce criminal liability for those responsible for trafficking in human organs inside or outside the EU, since it implies a violation of human dignity and of other fundamental rights connected to it.

The Directive 2010/53/EU of 7 July 2010 in the field of organ transplantation required Member States to ensure that donations of organs from deceased and living donors are voluntary and unpaid (Article 13, para. 1). Furthermore, Arti-

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<sup>25</sup> Council of European Union, Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues, OJ C 100, 26 April 2003, p. 27.

<sup>26</sup> Draft European Parliament Legislative Resolution on the Initiative of the Hellenic Republic, Explanatory Statement.

<sup>27</sup> Amendment 31, regarding Art. 2 (2) (d).

<sup>28</sup> Amendment 34, regarding Art. 2 (2) (fa) (new).

cle 13, Paragraph 3 established that States have to prohibit the advertising of the need for, or availability of, organs with the aim to offer or seek a financial gain or another comparable advantage. According to Art. 23, Member States have to determine effective, proportioned and dissuasive sanctions to apply in case of violation of national laws adopted according to this Directive.

As part of the “Action Plan on Organ Donation and Transplantation” (2009–2015), the European Parliament Resolution of 19 May 2010 is worth being mentioned: it underlined the duty of Member States to «*intensify their cooperation under the auspices of Interpol and Europol in order to address the problem of trafficking in organs more effectively*». The EU Council, within the conclusions on organ donation and transplantation (2012/C 396/03), invited the Member States «*To support national and international collaboration, as appropriate, between transplantation authorities and police and customs services in order to detect and prevent organ trafficking*».

At present, no Directive has been adopted establishing minimum rules concerning the definition of the crime of organ trafficking and the sanctions to apply, according to the provision of Article 83 TFEU<sup>29</sup>.

## VI. Legal instruments adopted by the Council of Europe

The principles of freedom of the donor’s consent and of non-commercialisation of human body parts were already included in the Resolution of the Committee of Ministers of the Council of Europe No. 29 of 1978<sup>30</sup>. The principles included in the Resolution – which, not being binding, only recommended States parties to introduce «*appropriate sanctions*» in defence of the dispositions adopted under implementation – were then confirmed in the final declaration of the third Conference of European Ministers of Health occurred in Paris on 16 and 17 November 1987, which emphasised the need for cooperation of European States in the promotion of organ exchange programs on a strictly non-commercial basis (Articles 22–24).

In the context of the Resolution No. 3 on bioethics adopted in 1990 in Istanbul by the European Ministers of Justice and of the Recommendation No. 1160 adopted by the Parliamentary Assembly in 1991, the Ad hoc Committee of experts on Bioethics (CAHBI) was then solicited to prepare a convention on bioethics including human rights aspects: the Convention was adopted by the Committee of Ministers on 17 June 1996, opened for signature in Oviedo on 4 April 1997, and entered into force from 1st December 1999. It is the first binding international legal instrument in bioethics matters for the contracting States<sup>31</sup>.

<sup>29</sup> Although organ trafficking is not part of the list established within Article 83, the Council may, acting unanimously after obtaining the consent of the European Parliament, put it in the range of those crimes included in the legislative procedure laid down in Paragraph 1, because of the transnational character of the phenomenon and the need to combat it through common regulatory framework (Art. 83, Par. 1, Clause 3).

<sup>30</sup> Council of Europe, Committee of Ministers, Resolution (78) 29 on Harmonisation of Legislations of Member States relating to Removal, Grafting and Transplantation of Human Substances, 11 May 1978, Articles 3, 9 and 14.

<sup>31</sup> Cp. V.L. Raposo – E. Osuna, *European Convention on Human Rights and Biomedicine*, in *Legal and Forensic Medicine* 2013, p. 1405.

Article 5, requiring doctors to obtain the free and informed consent of patients to any interventions in the health field, was complemented by Articles 19, para. 2, and 20, regarding consent to organ removal from living donors. Particularly significant then, is Article 21 which stated that «*The human body and its parts shall not, as such, give rise to financial gain*».

The Additional Protocol to the Oviedo Convention, specifically concerning the transplantation of human organs, was signed in 2002. This international legislative instrument emphasized and extended the principles contained in the Convention – as results from Articles 12, 13, 14 and 17 on the informed consent of organ donors and Article 21, Paragraph 1, on the prohibition of trade in human body parts –, also establishing the necessity to prohibit advertising activities of the need for, or availability of, organs for profit (Article 21, Paragraph 2), and trafficking in organs (Article 22), the definition of which was not given.

The Council of Europe then dealt with the issue of organ trade within the Recommendation No. 1611 of 25 June 2003 on organ trafficking in Europe, by which the Parliamentary Assembly suggested that States parties develop a European strategy to combat trafficking in organs.

With the Resolution No. 1782 of 25 January 2011, the COE Parliamentary Assembly called on the international community and the governments of Belgrade, Priština and Tirana to take the necessary measures in order to shed light on trafficking in organs that seems to have occurred at the end of the nineties in Albania and Kosovo by Albanian soldiers of the Kosovo Liberation Army (KLA) against Serb prisoners.

As specified within COE Recommendation No. 2009 of 23 January 2013, the COE Convention on trafficking in human organs could be the first legally binding international instrument specifically aimed at suppressing the criminal phenomenon at issue.

## VII. Legal instruments adopted by the United Nations

As recognized in a recent joint study drawn up by the Council of Europe and the United Nations about trafficking in organs, tissues and cells, «*At United Nations level, there is no legally binding instrument which sets out the principle of the prohibition of making financial gains from the human body or its parts*»<sup>32</sup>.

The World Health Organization (WHO), the UN specialized agency on health, intervened several times on the issue of organ trafficking, drawing up the Resolutions WHA40.13, WHA42.5, WHA44.25, WHA57.18. The latest update dates back to 2010 with the Resolution WHA63.22, in which the WHO restated its opposition to the «*seeking of financial gain or comparable advantage in transactions involving human body parts*».

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<sup>32</sup> 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*, cit., p. 12.

Within the UN General Assembly Resolution of 20 December 2004 and the Universal Declaration on Bioethics and Human Rights, adopted by UNESCO in 2005, organ trafficking was then regarded as one of the transnational practices, related to human trafficking and organized crime, against which States should take appropriate repressive measures.

In February 2006, the phenomenon was taken into account by the UN Organ Trafficking Report, which analyzed existent legislative instruments aimed at punishing trafficking in human organs and promoted cooperation between Member States in combating it.

It should also be noted that Transplantation Society and International Society of Nephrology were called to an international summit on transplant tourism and organ trafficking, which was held in Istanbul from 30 April to 2 May 2008 and was attended by government officials and representatives of scientific institutions from all around the world. The Declaration of Istanbul, which is based on the principles of the Universal Declaration of Human Rights, stated that «*Organ trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity and should be prohibited*».

The contents of the Declaration were later confirmed by the aforementioned COE/UN Study of 2009 which, besides reaffirming the duty of Member States to prohibit trade in human body parts, also focused on the need to distinguish the phenomenon of trafficking in human beings for the purpose of organ removal from trafficking in human organs<sup>33</sup> and, regarding the latter phenomenon, emphasised the urgent need to draw up a binding legislative instrument at the international level, specifically aimed at fighting it even by using criminal sanctions.

## VIII. The usability of the international legal instruments issued for combating trafficking in human beings

In addition to the aforementioned regulatory interventions, the illicit removal of human organs has been indirectly contrasted with a series of international legal instruments specifically aimed at preventing and punishing trafficking in human beings carried out with this aim.

The first binding disposition, in this sense, is found in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the United Nations on 25 May 2000 and entered into force on 18 January 2002: Article 3 established that the Contracting States must cover under their criminal law: «(i) *The offering, delivering or accepting, by whatever means, a child for the purpose of [...] b. Transfer of organs of the child for profit*».

Shortly thereafter, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also referred to as the “Trafficking Protocol”), supplementing the United Nations Convention against Transnational

<sup>33</sup> On this point, see below, §§ VIII and VIII.1.

Organised Crime, was adopted by the United Nations on 15 November 2000 and then entered into force on 25 December 2003: Article 3 (a) established that «“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs». The disposition mentioned «the removal of organs» as one of the purposes of exploitation, the pursuit of which attributes the outlined behaviours to trafficking in persons.

The Trafficking Protocol, besides fighting trafficking in persons, is generally considered to be the first real regulatory instrument able to contrast the transplant tourism, regarded as «as an act that promotes human trafficking for organ removal»<sup>34</sup>. Nevertheless, this legal instrument turns out to be inadequate to suppress trafficking in human organs in the strict sense: «The Protocol does not take into full consideration trafficking in human organs, as it does not cover the transfer of organs (for profit) alone; trafficking in organs, under the Protocol, only occurs if an individual is trafficked for the purpose of organ removal»<sup>35</sup>.

Trafficking in human organs and trafficking in human beings for the purpose of organ removal are, in reality, two different phenomena, only partially converging, and therefore deserving to be regulated separately. As it was accurately noticed by the COE/UN Study of 2009, as regards the former, the illegal transfer is performed with respect to human organs; as regards the latter, the forced transfer directly affects human beings, while the removal of organs is one of the purposes of exploitation pursued by human traffickers<sup>36</sup>.

In addition to the limited repressive effectiveness of Trafficking Protocol on trafficking in human organs, another limit of this legal instrument would derive from its applicability only «where those offenses are transnational in nature and involve an organized criminal group»<sup>37</sup>, while traffic of human beings, whether finalized or not

<sup>34</sup> R. Ainley, *Organ Transplantation: A Model Law Approach to Combat Human Trafficking and Transplant Tourism*, in *Oregon Review of International Law* 2011, p. 429.

<sup>35</sup> U.N. Doc E/CN.15/2006/10, 21 February 2006, International Cooperation in combating transnational crime: preventing, combating and punishing trafficking in human organs; conf. United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), The Vienna Forum to fight Human Trafficking, 011 Workshop: Human Trafficking for the Removal of Organs and Body Parts, Vienna, 13-15 February 2008, p. 3.

<sup>36</sup> 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*, cit., p. 11.

<sup>37</sup> Art. 4 of the Trafficking Protocol. It was noticed, in a critical sense, by R. Ainley, *op. cit.*, p. 455. The need to criminalize the conducts of trafficking, regardless of the context in which they occur and of the subjects involved, was emphasized by E. M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, in 40 *Stan. J. Int'l L.*, 1, 2004, p. 16-17; J. Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, in 13 *Ind. jourm. global legal stud.*, 2006, p. 152; J. Todres, *Law, Otherness, and Human Trafficking*, in 49 *Santa Clara L. Rev.*, 2009, p. 647; Y. Van Damme – G. Vermeulen, *Criminalisation of demand-side actors of trafficking in human beings, forced labour and labour exploitation. Paving the way for assessing the feasibility and added value of a criminal justice response*, in *European criminal justice and police*, M. Cools and others eds., Maklu, Antwerpen-Apeldoorn-Portland, 2012, p. 211; E. Kelly, *International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter*, in 54 *Boston College Law Review*, 2013, p. 1339-1340.

to the removal of their organs, may occur even within the same State and even without the involvement of a criminal organization. Although the COE Convention on Action against Trafficking in Human Beings of 2005 remedied the unreasonable limitations of the Trafficking Protocol – establishing that «*This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime*»<sup>38</sup> –, the former's geographical scope is limited to the regional level, and thus is unable to overcome criticism on the shortcomings of the latter, which is a regulatory act with a broader scope, as adopted by the United Nations.

At the EU level, the Directive 2011/36/EU of 5 April 2011 against trafficking in persons, issued in accordance with Article 83 TFEU, imposed an obligation on Member States to criminalize the conducts of human trafficking and expressly included the removal of organs between illicit purposes of exploitation pursued with trafficking acts, unlike the previous Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings<sup>39</sup>.

## 1. Distinctions between the criminal offence of trafficking in persons for the purpose of organ removal and the phenomenon of transfer of consenting donors

The aforesaid definition of trafficking in persons established within Art. 3 (a) of the Trafficking Protocol is the first juridically binding definition of this criminal phenomenon, at the international level; it also inspired Framework Decision 2002/629/JHA (Art. 1, para. 1), COE Convention of 2005 (Art. 4, a.), and especially Directive 2011/36/EU (Art. 2).

According to the aforesaid definition, there are three constitutive elements of the crime of trafficking in human beings: the conducts (*the recruitment, transportation, transfer, harbouring or receipt of persons*); the coercive or deceptive methods of control, constituting the means by which the described acts must be performed (*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*); the purpose of exploitation, which – regardless of its achievement, irrelevant for the commission of the crime<sup>40</sup> – should be proved both as perpetrator's intention, at the level of *mens rea*, and as a feature of the action, which must be suitable for the achievement of the prosecuted aim, at the level of *actus reus*.

Trafficking conducts must be carried out by using coercive or deceptive means<sup>41</sup>, suitable for depriving the victim of his/her freedom of choice. Accordingly, the

<sup>38</sup> For this reason, S. Scarpa, *op. cit.*, p. 208, defined the COE Trafficking in Persons Convention as «an extraordinary step forward».

<sup>39</sup> Cp. T. Obokata – B. Payne, Implementing action against Trafficking of Human Beings under the TFEU, in *New Journal of European Criminal Law* 2012, Vol. 3, p. 306 *et seq.*, who pointed out the inadequacy of the 2002 Framework Decision, which has been subsequently bypassed by the Directive of 2011.

<sup>40</sup> In this sense, see Council of Europe, Explanatory Report on the Council of Europe Convention on Action against Trafficking in human beings, *cit.*, § 87.

victim's consent is irrelevant when it was extorted unlawfully and given not voluntarily (art. 3, lett. b, Trafficking Protocol)<sup>42</sup>: «only those persons who have undergone that process and whose consent was obtained using improper means could be considered as adult trafficking victims»<sup>43</sup>.

In the event of trafficking in human beings for the purpose of organ removal, it may be difficult to prove that victim's consent was vitiated when a donor was willing to be transferred in a place, in which he/she has undergone organ removal for financial gain<sup>44</sup>. Nevertheless, in order to conclude that the criminal offence has not been committed, it is not enough to ascertain that a donor pursued lucrative aims, but it is necessary to prove that he/she was recruited, transported, transferred, harboured or received without either suffering any physical or psychological violence or being deceived<sup>45</sup>.

The need to distinguish, at both the conceptual and normative level, trafficking of persons for the purpose of organ removal from transfer of consenting persons for lucrative purposes, was discussed in a report edited in 2010 by Committee on Crime Problems (CDPC), Steering Committee on Bioethics (CDBI), and European Committee on Transplantation of Organs (CD-P-TO), according to which the international normative instruments in the matter of trafficking of human beings – and specially Trafficking Protocol and COE Convention of 2005 – «only address the scenario where recourse is had to various coercive or fraudulent measures to exploit a person in the context of the removal of organs, but do not sufficiently cover scenarios, in which the 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 above mentioned conventions»<sup>46</sup>.

The phenomenon of transfer of consenting organ donors for lucrative purposes, since it violates human dignity, has been taken into account by the Convention against organ trafficking, but only as regards the acts of recruitment and solicitation performed by traffickers without using coercive or deceptive means: as will be observed, States parties are required to adopt legislative measures necessary to establish those two acts as criminal offences, where they are committed intentionally and with the aim of obtaining financial gain or a comparable advantage for the person soliciting or recruiting, or for a third party (Art. 7, para. 1)<sup>47</sup>.

<sup>41</sup> In this sense, see Y. Van Damme – G. Vermeulen, *op. cit.*, p. 211.

<sup>42</sup> It is also established by the 2005 COE Convention (under Art. 4 b.), by the Framework Decision 2002/629/JHA (under Art. 1, para. 2), and by the Directive 2011/36/EU (under Art. 2, para. 4).

<sup>43</sup> S. Scarpa, *op. cit.*, p. 36. About the lack of free consent of the victim of trafficking in persons, see K. Aromaa, Trafficking in human beings: uniform definitions for better measuring and for effective counter – measures, in *Measuring human trafficking. Complexities and pitfalls*, E. U. Savona and S. Stefanizzi eds., Springer, New York, 2007, p. 15.

<sup>44</sup> In this way, see S. Meyer, *op. cit.*, p. 228.

<sup>45</sup> In this perspective, see OSCE, *Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region*, *cit.*, p. 51.

<sup>46</sup> Council of Europe, Committee of Ministers' Rapporteur Group on legal cooperation (GR-J), Identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC) – Additional opinion of the CDPC, the CDBI, and the CD-P-TO, GR-J(2011)8, 26 April 2011, § 8. In this sense, see S. Meyer, *op. cit.*, p. 212.

<sup>47</sup> See below, § X.2.

## IX. The difficulty of establishing a legal definition of trafficking in human organs

According to the definition given by the Declaration of Istanbul in 2008, «*Organ trafficking is the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation*». As specified in this document, the definition was based on that of “trafficking in persons” established within Art. 3 (a) of the Trafficking Protocol. Nevertheless, the definition of “organ trafficking” has some peculiarities: on the one hand, the Declaration of Istanbul delimited the purposes of exploitation at the removal of organs, and on the other hand, it expanded the object of the behaviours by mentioning also deceased persons (namely corpses) and organs, in addition to living people.

The definition of “trafficking in human organs” given by the Istanbul Declaration is extremely wide: its scope of application covers not only trafficking acts performed with respect to human organs but also conducts of trafficking in persons for the purpose of organ removal. In this perspective, the aforesaid definition could result unnecessary and misleading because the latter conducts are already attributable to the offence of trafficking in persons, as outlined by the Trafficking Protocol and the following international legal instruments. Perhaps, the Declaration of Istanbul intended to underline that organ trafficking is often linked to coercive or deceptive transfer of the donor to the country where the removal will take place, because the unlawful transport of organs from a country to another is a complex activity to practice due to customs supervisions<sup>48</sup> and the risks of organ’s ischemic deterioration deriving from the times of “consignment”<sup>49</sup>.

Moreover, the transposition of the definition is unreasonable because it extended the entire definition contained in the Trafficking Protocol, included the mentioning of the coercive or deceptive methods of control, to those hypotheses of organ trafficking performed by transportation of dead people and organs. Nevertheless, in those cases the outlined behaviours – except that of *recruitment* of corpses and organs, requiring necessarily a contact between traffickers and either the deceased’s relatives or the living donor, and implying the possible coercion of these individuals – cannot be carried out by using the coercive or deceptive means mentioned by the Declaration: deceased’s relatives and living organ donor, once recruiting of the corpse or the organ was performed by traffickers, cannot be coerced or deceived any longer, because the use of any methods of control obviously ended at the

<sup>48</sup> Nevertheless, Council of Europe, *Trafficking in organs in Europe. Report of the Social, Health and Family Affairs Committee*, (2003 a), Sec. II, No. 15 emphasized that criminals implied in trafficking of organs often corrupt the police officers at customs.

<sup>49</sup> The sanitary risks connected with the organ transportation between two countries, was highlighted by 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*, *cit.*, p. 61.

moment of separation of those persons from the organs. Therefore, the conducts of *transport, transfer, harbouring or receipt* are not accomplishable by those means with respect to corpses and organs, which are inanimate things unable to suffer any physical or psychic coercion: these conducts can be performed through physical or psychic violence, fraud or deceit, only if they concern an individual who is alive and able to suffer violations of his/her rights to freedom and self-determination. Probably, the Declaration of Istanbul – when it described trafficking in human organs by using a definition very similar to that of “trafficking in persons” given by the Trafficking Protocol – did not consider that «the UN Trafficking Protocol, in the same way as the COE Trafficking in Persons Convention, was drafted bearing in mind other forms of exploitation related to human trafficking but not that related to illegal organ harvesting»<sup>50</sup>.

The 2014 COE Convention against trafficking in human organs took cognizance of this unreasonableness, and for this reason Articles 7, para. 1, and 8 b., required each Party to establish as criminal offences both «*the solicitation and recruitment of an organ donor or a recipient*» and «*the transportation, transfer, receipt, import and export of illicitly removed human organs*». This legislative instrument made use of the same terms utilized within the Trafficking Protocol to identify the acts of trafficking in person (introducing in addition the conduct of *solicitation* and those of *import* and *export*). Nevertheless the Convention, unlike the Trafficking Protocol, established that the objects of the second class of acts (*transportation, transfer, receipt, import and export*) are only human organs; furthermore, it chose not to require the use of coercive and deceptive methods, not even with respect to the conducts that may be directly performed with respect to donors and recipients (*solicitation and recruitment*)<sup>51</sup>, so circumscribing its own scope of application.

## X. The definition of trafficking in human organs given by the 2014 COE Convention against organ trafficking

The COE Convention of 2014 perceived the difficulty of defining a phenomenon of such broad reach in a precise and uniform way, because of the multitude of actors and behaviours potentially involved. For this reason, the legal instrument avoided formulating an all-encompassing definition of the offence, and it chose to enumerate separately each of the criminal acts constituting trafficking in human organs<sup>52</sup>: in this perspective, Art. 2, para. 2, established that «“*trafficking in human organs*” shall mean any illicit activity in respect of human organs as prescribed in Article 4, paragraph 1 and Articles 5, 7, 8 and 9 of this Convention» (Art. 2, para. 2). Nevertheless, the choice to include all of them in the unique category of “*trafficking in human organs*” is questionable: it entails a lack of precision of the used expression

<sup>50</sup> S. Scarpa, *op. cit.*, p. 166.

<sup>51</sup> On this point, see above § VIII.1., and below § X.2.

<sup>52</sup> In this way, see Council of Europe, European Committee on Crime Problems (CDPC), Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs, 9 July 2014, § 23.

due to the inhomogeneity of described acts and their different offensiveness. It would have been more reasonable to provide for an obligation to incriminate the different acts involved in trafficking in human organs, but at the same time to avoid covering all of them by the aforementioned expression. The legislative strategy adopted by the Council of Europe appears to be acceptable because the Convention did not provide for minimum rules concerning the definition of sanctions applicable to “trafficking in human organs”. If the aforesaid expression was used in such broad acceptance by a prospective EU Directive aimed at establishing an obligation to criminalize all the acts involved in the trafficking in human organs, in accordance with the Article 83 TFEU, the EU legislative instrument may not set a unique minimum threshold of criminal sanctions applicable to such different offenses, because it would cause a breach of the principle of proportionality in the strict sense.

Organ trade (also known as transplant commercialism), which is «a policy or practice in which an organ is treated as a commodity, including by being bought or sold or used for material gain»<sup>53</sup>, was not included between those acts attributed to “trafficking in human organs”<sup>54</sup>; the only reference to this phenomenon is within Art. 4, para. 1, b. and c., where the financial gain or comparable advantage offered or received by the donor or a third person in exchange for the removal of organs, took the shape of one of the alternative preconditions necessary to qualify the removal of organs as illicit. In all probability, the Convention chose not to consider organ trade as an offence of organ trafficking, in order to avoid obliging States parties to criminalize recipients and donors who buy and sell organs without the involvement of an intermediary: as affirmed by the European Parliament, «this type of commercial transaction between competent and consenting adults is very different from the use of violence, fraud, threats or abduction in order to obtain organs»<sup>55</sup>. Nevertheless, the lack of the COE Convention is open to criticism because it would also imply the impunity of brokers for either buying removed organs with the aim to sell them at a higher price, or selling organs previously purchased for lucrative purposes.

As established by all the norms referred to within Art. 2, each Party shall take the necessary legislative and other measures to establish as criminal offences under its domestic law the described acts, only if those are *intentionally* committed: this subjective offence element, since it was used in a general meaning, may be interpreted according to the criminal principles in force in the national laws, so to specify which is the degree of *intentionality* necessary to determine the criminalization of the acts: some crimes may require a very high degree of intent, whereas

<sup>53</sup> The definition is borrowed from the Istanbul Declaration.

<sup>54</sup> Instead, regarding the necessary interrelationship between organ trafficking and organ trading, see D. A. Budiani Saberi – F. L. Delmonico, *op. cit.*, p. 926. In this way, see also S. Meyer, *op. cit.*, p. 208. Conversely, organ trafficking and trade were regarded as two separate and distinct criminal phenomena by F. Ambagtsheer – W. Weimar, A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward, in *American Journal of Transplantation* 2012, p. 573.

<sup>55</sup> Draft European Parliament Explanatory Statement to the legislative resolution on the Initiative of the Hellenic Republic, *cit.*, p. 26.

others may require substantially less. Moreover, each national legal system may choose independently if it is appropriate to criminalize non-intentional acts too<sup>56</sup>.

## 1. The illicit removal of human organs

The first offence attributed to trafficking in human organs is the illicit removal of human organs (Art. 4, para. 1): the removal must be regarded as illicit, on the one hand, when the free, informed and specific consent of the donor for the surgical operation has not been given or, in case of deceased donors, when the authorization required by their domestic laws has been lacking (lett. a.); on the other hand, when a financial gain or another comparable advantage has been offered or received by the donor or a third party in exchange for the removal of organs (lett. b. e and c.): the active and omissive conducts, described within lett. a., b. and c. of art. 4, para. 1, are not regarded as offences, but as alternative preconditions to qualify the removal as illicit.

Though the criminal offence of illicit removal of organs can be committed by anyone, healthcare professionals are the subjects most suitable for carrying out the removal, because of their technical skills which enable them to perform the surgeries: since trafficking offences must be committed intentionally<sup>57</sup>, doctors may be regarded as liable, in accordance to Art. 4, para. 1, only if they removed organs while knowing the fulfilment of the aforesaid preconditions.

The first human right protected by this offence is the freedom of organ donors, violated by the lack of informed consent to the organ removal (lett. a); another right protected by this provision is the human dignity, infringed by the commodification of the human body (lett. b. and c.)<sup>58</sup>. The human rights of recipients have not been equally protected because a corresponding offence of illicit transplant of human organs, endowed of autonomous and parallel preconditions of illicitness, was not outlined by the Convention .

Articles 4, par. 4, and 6 required the Contracting States to consider taking the legislative measures necessary to criminalize the removal and transplantation of organs achieved outside of their respective transplantation legal systems. These acts are not included in the broad category of trafficking in human organs, unless they do not already incorporate one of the offences outlined in Articles 4, par. 1, 5, 7 or 8 (for example, the explant surgery performed in violation of national regulations governing the informed consent of the donor, is already attributable to the offence of illicit removal outlined by art. 4, para. 1 a.).

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<sup>56</sup> In this way, Council of Europe, Explanatory Report to the COE Convention against Trafficking in Human Organs, *cit.*, § 28.

<sup>57</sup> Except that national laws will choose to criminalize non-intentional acts: see above, § X.

<sup>58</sup> According to L.M. Puente Aba, La protección frente al tráfico de órganos: su reflejo en el Código penal español, in *Rev. de derecho y proceso penal* 2011, vol. 26, p. 135 et seq., in this event the human right to freedom is at stake, because the decision of a donor about selling his/her organs in order to overcome his/her economic needs, cannot be regarded as free.

## 2. The solicitation and recruitment of an organ donor or a recipient

The other conducts of *trafficking* may be grouped into two classes of actions: the former includes the criminal acts performed before organ removal or transplant; the latter includes those acts carried out after the illicit removal of human organs.

The *solicitation* and the *recruitment* of an organ donor or recipient for a financial gain or another comparable advantage, for the person soliciting or recruiting, or for a third party (Article 7, par. 1), are offences falling within the first class.

The victims of the offences are both organ donors and recipients.

The offence of recruitment of an organ donor is generally attributable to both trafficking in human persons and trafficking in human organs, but it specifically falls within the latter only when traffickers have committed it without using the coercive or deceptive methods described by the international legal instruments against human trafficking: Art. 7, para. 1, as previously underlined, did not make any reference to the use of coercive and deceptive means by recruiters, and therefore victim's consent may be regarded as free and voluntary. By introducing this provision, the Convention against organ trafficking accepted the suggestions arising from the report issued by the CDPC, the CDBI, and the CD-P-TO, which had required the Council of Europe to take into account those scenarios in which the donor has adequately consented to the removal of organs and, therefore, he/she has not to be regarded as a victim of trafficking in persons<sup>59</sup>.

Owing to the aforementioned reasons, the acts of recruitment and solicitation do not violate the freedom of self-determination of victims<sup>60</sup>, but they offend their dignity by exploiting them, because the perpetrators aim to take economic advantage of their economic or medical needs.

The conducts of recruitment and solicitation are typically achievable by *brokers*, whose activity of lucrative intermediation is clearly attributable to the outlined offences<sup>61</sup>. This disposition made express reference to the pursuit of a financial gain by recruiters and solicitors: in this sense, it is characterized by its precision, unlike the definition given by the Trafficking Protocol, which did not make any explicit reference to lucrative purposes of traffickers.

The provision, demanding the pursuit of any financially assessable gain or other comparable advantage, cannot cover the acts of solicitation and recruitment of donors performed by a potential organ receiver or another person whose aim is to protect health interests of the former<sup>62</sup>. Instead, this offence may be committed by any organ donor who recruits or solicits directly a recipient with the aim of

<sup>59</sup> Council of Europe, Committee of Ministers' Rapporteur Group on legal cooperation (GR-J), Identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC), *cit.*, § 8.

<sup>60</sup> Nevertheless, according to J.K Mason – G. T. Laurie, *Law and Medical Ethics*, Oxford University Press 2011, p. 545 *et seq.*, donors who decide to sell their own organs to overcome their economic needs should not be considered entirely free.

<sup>61</sup> In this way, see Council of Europe, *Explanatory Report to the COE Convention against Trafficking in Human Organs*, *cit.*, § 52.

<sup>62</sup> *Ivi*, § 53.

obtaining financial gain in exchange for the removal of the organ necessary for transplantation: although, according to the Explanatory Report, «It is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not organ donors should be subject to prosecution under this Article»<sup>63</sup>.

Organ advertisements, often carried out by brokers through press or websites<sup>64</sup>, was not taken into account by the Convention because it is already attributable to the offences of recruitment or solicitation<sup>65</sup>.

### 3. The offering and the requesting of undue advantages

Among the acts preceding organ removal it is necessary to include, on the one hand, the promising, offering or giving by any persons of any undue advantage to medical staff, public officials and persons who head up or work for private sector entities, so that they perform or facilitate an illicit removal of human organs or a transplantation of the organ illicitly extracted (“active” corruption, Art. 7, par. 2); on the other hand, symmetrically, the request or receipt by aforesaid subjects of any undue advantage to perform or facilitate those surgical operations (“passive” corruption, Art. 7, par. 3).

These two dispositions – inspired by the repressive purposes underlined by the COE Criminal Law Convention on Corruption of 1999, wherein is established the obligation for the States parties to adopt the necessary legislative measures to incriminate active, passive, public and private corruption (Articles 2, 3, 7 e 8) – pursue the aim to ensure the duties of neutrality and efficiency in the exercise of public functions<sup>66</sup>, and also «values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations»<sup>67</sup> in the private sector.

It is assumed that the advantage, in the absence of further specification, is «usually of an economic nature but may also be of a non-material nature»<sup>68</sup>. The provision only required the advantage to be *undue*, namely contrary to the law provisions that regulate public administration and work in the private sector<sup>69</sup>.

The autonomous offensiveness characterizing the crimes of corruption raises some doubts about the rationality of the choice to attribute them to the category of trafficking in human organs.

<sup>63</sup> *Ibidem*.

<sup>64</sup> This phenomenon was considered as worrying by N. Scheper-Hughes, *The Global Traffick in Human Organs. A Report Presented to the House Subcommittee on International Operations and Human Rights, United States Congress on June 27, 2001*, in [www.publicanthropology.org](http://www.publicanthropology.org), p. 5; S. Meyer, *op. cit.*, p. 220.

<sup>65</sup> In this sense, Council of Europe, Explanatory Report to the COE Convention against Trafficking in Human Organs, *cit.*, § 52.

<sup>66</sup> See Council of Europe, Explanatory Report to the Criminal Law Convention on Corruption, Strasbourg, 27 January 1999, § 32.

<sup>67</sup> *Ivi*, § 52.

<sup>68</sup> *Ivi*, § 37.

<sup>69</sup> *Ivi*, § 38.

#### 4. The use, preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

The second class includes the conducts following the illicit removal of human organs: on the one hand, the *use* of those organs for any purposes, included their transplant (Art. 5); on the other side, the *preparation, preservation, storage, transportation, transfer, receipt, import and export* of illicitly removed human organs (Art. 8), regarded as acts preparatory to the following use of organs themselves.

By outlining these offences, the Council of Europe pursued the goal to protect individual and public health, since the clandestine circulation of organs taken illegally, and then subtracted to the health checks imposed by law, could endanger the physical integrity of all the potential recipients.

Art. 5 underlined the necessity to criminalize the use of illicitly removed organs for purposes of implantation in order to ensure the punishability not only of the doctors performing the transplantation, but also of the nurses using the organ in surgical preparatory phase. The mention given to «*other purposes than implantation*» is aimed at repressing the use of illicitly removed organs out of the transplant system, by way of example for experimental purposes.

All the acts outlined within Art. 8 must be performed in respect of human organs. Consequently, the acts of *transportation, transfer* and *receipt* of a donor or a recipient in the place where they will undergo organ removal or transplant were not included in the scope of application of this provision; if any one of these conducts is performed by using coercive or deceptive means, and for the purpose of exploitation, it may be attributed to the criminal offence of trafficking in persons<sup>70</sup>.

##### a) The meaning of the act of “receipt” and its connection with the other conducts outlined within Art. 8

The meaning of all the conducts described within Art. 8 is clearly perceptible, although some doubts about the right interpretation of the term “receipt” may arise. If the expression is interpreted in the material sense, the act of *receipt* is considered to be performable only by those individuals – such as intermediaries, doctors, nurses, or third persons – who intervene in the final stage of the process of transferring of organs previously transported, transferred or imported illegally, by recovering them. If the expression is interpreted in a broader sense, however, the act may be regarded as performable by those who also receive an illicitly removed organ by transplant, though they do not perform any active conduct and the *receipt* is equivalent to undergoing the transplant (a “biological” *receipt*).

It is necessary to underline that the expression “receipt” was placed in a context of conducts relating to the material movement of the organs, accomplishable before transplant (*transportation, transfer, receipt, import and export* of illicitly removed human organs): for this reason the term should be interpreted as a material receipt – according to the former outlined interpretation –, in a logical connection with the

<sup>70</sup> See above, § 8.1.

other terms used within Art. 8. For example, the term “receive” was used in such material sense, in connection with the import of human tissues and cells, by the Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells: Art. 9, entitled “*Import/export of human tissues and cells*”, established that «*Member States and tissue establishments that receive such imports [of tissues and cells] from third countries shall ensure that they meet standards of quality and safety equivalent to the ones laid down in this Directive*».

## 5. The Aiding, abetting and attempt

Art. 9 provided for the obligation to incriminate aiding or abetting the commission of the criminal offences of trafficking established in accordance with the Convention (para. 1), when committed intentionally, and the intentional attempt (para. 2), specifying that any States ratifying the Convention may «*declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 2 to offences established in accordance with Article 7 and Article 8*» (para. 3).

The last provision was due to the differences in the criminal law systems of the contracting States<sup>71</sup>. In any event, mere preparatory acts do not fall into the concept of “attempt”, and therefore they do not warrant criminalisation, according to the principle of proportionality<sup>72</sup>.

The obligation to criminalize the intentional complicity in the offences of trafficking in human organs would make it possible to punish those conducts which were not outlined by the Convention but which are however deserving of punishment: as such, the aforesaid acts of *transportation, transfer and receipt* of donors can fall into the scope of application of Article 9, when they are accomplished not by coercive or deceptive means<sup>73</sup>, but with the intention to give a contribution to the illicit removal of human organs.

## XI. The aggravating circumstances

Art. 13 of the Convention required States parties to provide for the necessary legislative measures to ensure that some aggravating circumstances may be taken into account in order to determine the sanctions applicable to the offences outlined by the Convention, «*in so far as they do not already form part of the constituent elements of the offence*»: causation of death or serious damage to the physical or mental health of the victim (a.); commission of the offence by a person abusing his or her position (b.); commission of the offence in the framework of a criminal organisation (c.), recidivism determined by previous conviction for any offence established according to the Convention (d.), commission of the offence against a child or any another vulnerable person (e.). The expression «*may [...] be taken into consideration*» is aimed

<sup>71</sup> See Council of Europe, Explanatory Report to the COE Convention against Trafficking in Human Organs, *id.*, § 62.

<sup>72</sup> *Ivi*, § 61.

<sup>73</sup> See above, § X.4.

at ensuring that the judges of each national judicial system may consider the aggravating circumstances, without obligations to do it<sup>74</sup>.

The death or the damages to the health of the victim, caused by any offences described by the Convention (a.), are attributable to the first aggravating circumstance only if they are not already punished as events of the offences of organ trafficking according to the provisions of the domestic law of State parties.

The circumstance of the abuse of position (b.) assumes broad profiles, covering the distorted use of their own powers by public officials involved, the exploitation of trust by doctors in the relationship with patients<sup>75</sup>, and the advantaging of the factual or legal power that any third person has over the victim.

Another aggravating circumstance, complementary to the previous, is applicable when a child, intended as a person under the age of eighteen<sup>76</sup>, or any particularly vulnerable persons are the victims of organ trafficking (e.). The expression “vulnerable person” refers to any individuals who, in their family, interpersonal, economic-commercial, or working relationships, have «no real or acceptable alternative but to submit to the abuse involved»<sup>77</sup>, because of their own personal characteristics or external circumstances. The consent to any trafficking offences, eventually given by those individuals, results presumptively vitiated because they «are incapable of fulfilling the requirements for voluntary and knowledgeable consent»<sup>78</sup>.

Both donors who consent to an organ removal by way of remedying their own economic disadvantages, and recipients who buy organs in order to undergo transplantation, are weak and vulnerable, but nonetheless they should not be automatically included in the scope of application of the Article 13 (e.): all the victims of organ trafficking are presumptively vulnerable, but only some of them are particularly vulnerable. As such, the use of the adverb “*particularly*” allows the range of vulnerable persons protected by the provision to be restricted and therefore this aggravating circumstance is not overused<sup>79</sup>: it refers, for example, to individuals afflicted with impairments, disabilities, handicaps, and pregnant women.

The circumstance described within Art. 13 (c.) is applicable when any trafficking offence is performed by an individual participant in a criminal organization, whose involvement might be induced by strong economic incentives deriving from the illegal business of organ trafficking, but against which any evidence is currently missing. An analysis of the connections between trafficking offences and organized

<sup>74</sup> Council of Europe, Explanatory Report to the COE Convention against Trafficking in Human Organs, *cit.*, § 89.

<sup>75</sup> *Ivi*, § 91.

<sup>76</sup> The definition of “child” is borrowed – as specified in the § 94 of the Explanatory Report – from Art. 4(d) of the Council of Europe Convention on Action against Trafficking in Human Beings.

<sup>77</sup> The meaning of the expression “vulnerable person” is based on the definition of “position of vulnerability” given by Art. 2, para. 2, of the Directive 2011/36/EU.

<sup>78</sup> See WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation, Commentary on Guiding Principle 3, 26 March 2009.

<sup>79</sup> Against the overuse of the mean of “abuse of a position of vulnerability” in the range of trafficking in human beings for the purpose of organ removal, see J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, M. Nijhoff Publishers, Leiden 2013, p. 336: an extensive interpretation of the aforesaid expression could risk removing «the need for the ‘means’ element».

crime<sup>80</sup>, reveals that the organisational structure characterizing the latter<sup>81</sup> is perfectly compatible with the complex characteristics of trafficking in human organs: this «requires highly qualified medical professionals to carry out the transplantation, as well as intermediaries or brokers who recruit willing donors, usually out of poor communities, and find well-paying recipients, in many cases supposedly via the internet»<sup>82</sup>. Furthermore, it should be noted that the acts falling within trafficking in human organs are often performed using violence or corruptive practices: these two methods are notoriously used by criminal organisations in order to pursue their own unlawful aims<sup>83</sup>.

The last aggravating circumstance (Art. 13 (d.)) is where the defendant has previously been convicted of any one of the offences established in accordance with the Convention. This provision is interrelated with Art. 14, which required States parties to adopt the necessary legislative measures in order to consider «*final sentences passed by another Party*» when determining the sanctions for any organ trafficking offence currently perpetrated: the disposition took account of the transnational character frequently assumed by the criminal phenomenon under examination, which increases the probability that a person actually charged with trafficking in human organs, has been previously convicted in a certain country for any one of the offences established according to this Convention.

The provision applied the principle of international recidivism, but intended to safeguard the judicial discretion of national courts regarding the value of foreign judgements («*Each Party shall take the necessary legislative and other measures to provide for the possibility to take into account*»): the discretion left to the States parties is due to the difficulties to implement the internationalisation of criminal law standards in the legal area of the Council of Europe, where the judicial cooperation in criminal matters is made complex by the low levels of integration among the States parties.

## XII. The liability of legal persons

The Council of Europe recognised a possible connection between the lucrative purposes pursued by organ traffickers and the economic activities performed by

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<sup>80</sup> For an analysis of the above mentioned connection in the framework of the member States of the Council of Europe, see Council of Europe, *Combating Organised Crime: Best-practice Surveys of the Council of Europe*, COE 2004, p. 213 *et seq.*

<sup>81</sup> Criminal organization is a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or material benefit, according to the definitions given by the United Nations Convention against Transnational Organised Crime of 15 November 2000, the Recommendation Rec (2001)11 of the COE Committee of Ministers of 19 September 2001, and the EU Council Framework Decision 2008/841/JHA of 24 October 2008

<sup>82</sup> S. Meyer, *op.cit.*, p. 211. See also UNODC-CCPCJ, Report of the Secretary-General on preventing, combating and punishing trafficking in human organs, *cit.*, para. 14.

<sup>83</sup> About the constant use of those criminal methods by criminal organizations, see R. Godson – P. Williams, Strengthening Cooperation against Transnational Crime: A New Security Imperative, in *Combating Transnational Crime – Concepts, Activities and Responses*, P. Williams and D. Vlassis eds., London-Portland 2001, p. 321 *et seq.*; T. Obokata, EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal, in 40 *Common Market Law Review* 2003, p. 917 *et seq.*

legal persons (mainly those working in the health sector): Art. 11 of the Convention required States parties to adopt the necessary legislative measures to ensure the liability of legal persons for criminal offences introduced in accordance with the Convention, when these are committed for their benefit by an individual having a leading position<sup>84</sup> (para. 1) or acting under their authority (para. 2). In the latter case, legal persons are liable only if the offence was made possible by a leading person's failure to supervise an entity's subordinate staff.

Nevertheless, the provision did not establish any duty of diligence in organisation, according to which enterprises could have been exempted from liability by adopting and implementing organization and management models suitable for preventing crimes such as those established in conformity with the Convention. Although any explicit normative reference to a "subjective attitude" of the entity with respect to the outlined offences is lacking, domestic laws may establish that corporate liability must be recognised if there is an organisation fault<sup>85</sup>.

A first attempt of the Council of Europe to give relevance to a structural negligence of entities occurred with the Recommendation No. (88) 18 of 20 October 1988, which was the first general regulation of the Council of Europe about liability of legal persons for any offences committed in the exercise of their activities. Despite not mentioning the need to adopt organisation models suitable for preventing offences, paragraph 4 of the Recommendation established an organisational due diligence defense for entities, by which they might be exculpated proving the fulfilment of the duty to adopt all the measures adequate to prevent the commission of offences<sup>86</sup>: «*The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all necessary steps to prevent its commission*».

Art. 11, para. 3 of the COE Convention against organ trafficking allowed the States parties to adopt the most appropriate form of corporate liability – criminal, civil or administrative – in accordance with the legal principles in force in each national legal system; in this perspective, the aforesaid Recommendation had stated that «*consideration should be given in particular to applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require*»<sup>87</sup>.

The liability of natural persons committing offences persists in any case (para. 4).

<sup>84</sup> According to para. 1 of Art. 11, «*leading position within it base on: a. a power of representation of the legal person; b. an authority to take decisions on behalf of the legal person; c. an authority to exercise control within the legal person*».

<sup>85</sup> About a worldwide trend towards a "due diligence" model of corporate liability, see M. Pieth, Final Remarks: Criminal Liability and Compliance Programs, in *Corporate Criminal Liability: Emergence, Convergence, and Risk*, M. Pieth and R. Ivory eds., Springer, Dordrecht-Heidelberg-London-New York, 2011, p. 393 *et seq.*

<sup>86</sup> In this sense, see N. Selvaggi, Ex Crimine Liability of Legal Persons in EU. An Overview of Substantive Criminal Law, in *Corporate Criminal Liability and Compliance Programs, Volume II: Towards a Common Model in the European Union*, A. Fiorella ed., Jovene, Napoli 2012, p. 14–15.

<sup>87</sup> § 3 a.

### XIII. The applicable sanctions

According to Art. 12, para. 1, the criminal offences introduced in conformity with the Convention have to be punished with effective, proportionate and dissuasive sanctions. These sanctions must include – for those offences established in accordance with Article 4, para. 1, and, where appropriate, Article 5, 7, 8 and 9 –, when committed by natural persons, penalties involving deprivation of liberty, which may give rise to extradition: the provision referred to Art. 2 of the European Convention on Extradition of 1957, according to which «*extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty*».

Art. 12, para. 3 b. established that State parties must take the necessary legislative measures to deny the perpetrator, temporarily or permanently, the exercise of the professional activity that enabled the commission of any one of the outlined offences: this provision is aimed at implementing the effectiveness of crime prevention especially towards the doctors involved in the offences of organ trafficking.

According to para. 2, the sanctions applicable against legal persons must also be effective, proportionate and dissuasive, including «*criminal or non-criminal monetary sanctions*», and they may also include the accessory sanctions of judicial supervision of entities and disqualification of their activity<sup>88</sup>.

According to para. 3, lett. a., States parties have to provide for seizure and confiscation of proceeds, or property of an equivalent value, derived from the criminal offences established in conformity with the Convention: since organ traffickers often pursue a lucrative purpose, these sanctions – depriving perpetrators of illicit obtained financial gain – will be able to implement the effectiveness of crime prevention strategy.

Within the Draft Opinion annexed to the Report of the COE Committee on Social Affairs, Health and Sustainable Development on the Draft COE Convention against organ trafficking, the Parliamentary Assembly recommended the Committee of Ministers to add a new sentence to paragraph 81 of the Draft Explanatory Report concerning Article 12 of the Draft Convention against trafficking in human organs, in order to require State parties to take into account the condition of vulnerability of organ donors and recipients «*when deciding on the penalties that may be applied to them*», in accordance with the principle of proportion of sanctions established within Art. 12, para. 1<sup>89</sup>. This suggestion was abstractly reasonable, but worthy of criticism for two reasons: first of all, it is contradictory making reference to the aggravating circumstance that stems from the (particular) vulnerability of the victims («*any vulnerability of organ donors and recipients, as described in paragraph 94 of*

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<sup>88</sup> The accessory sanctions that must be established by States parties according to Art. 12, para. 2, of the Convention are «*a. temporary or permanent disqualification from exercising commercial activity; b. placing under judicial supervision; c. a judicial winding-up order*».

<sup>89</sup> Council of Europe, Committee on Social Affairs, Health and Sustainable Development, Report on Draft Council of Europe Convention against trafficking in human organs, Doc. 13338, 22 October 2013, § 7.2.

*this explanatory report* [which referred to Art. 13 e. of the Draft Convention], *should be taken into consideration*») in order to mitigate the punishment for the vulnerable offenders; secondly, the general condition of vulnerability of organ donors and recipients is not equivalent to the “particular vulnerability” of the victims required by Art. 13 e.<sup>90</sup>. Probably for these reasons, this recommendation was not heard by the Committee of Ministers when it adopted the Convention and drew up its Explanatory Report.

#### **XIV. Punishability of organs donors and recipients**

Except for Art. 7, para. 3, wherein healthcare professionals, public officials and persons directing and working for private sector entities were expressly mentioned as the only perpetrators of the outlined offence of passive corruption, the other acts that have to be established as criminal offences by States parties, according to the provisions of the Convention, are committable by anyone, even by organ donors and recipients. What has been said is true only in theory, because in some cases it is practically inconceivable that those two subjects are able to carry out the acts as described by the Convention.

As regards organ recipients, first of all it must be noted that the purchase of organs for transplant is a conduct not attributable to any offences: Art. 4, para. 1 b. and c. established that the offering of a financial gain or comparable advantage, in exchange for the removal of organs, is just a precondition for qualifying the surgical operation as illicit, but the provision did not regard the same offering as an offence<sup>91</sup>.

If a recipient instigates healthcare professionals to perform an illicit removal of donor’s organs, his/her conduct is ascribable to Art. 4, para. 1, in conjunction with Art. 9.

If a recipient promises, offers or gives any undue advantage to healthcare professionals so that they perform an illicit removal or transplant of human organs, his/her behaviour is attributable to the offence of active corruption described within Art. 7, para. 2. If any one of the above mentioned corruptive conducts is accomplished by an intermediary aided by a recipient acting for his/her own interest, the conduct performed by the latter is ascribable to Art. 7, para. 2, in conjunction with Art. 9 (while the conduct of the former is only ascribable to Art. 7, para 2).

As previously underlined, the offences of recruitment and solicitation of an organ donor, described within Art. 7, para. 1, are not accomplishable by a potential recipient because the provision required the perpetrator to pursue the aim to obtain a financial gain or another comparable advantage, while organ recipients propose to improve their own health conditions by undergoing a transplant.

<sup>90</sup> On this point, see above, § XI.

<sup>91</sup> On this point, see above § X.1.

An organ recipient may be liable for undergoing intentionally the transplant of an illicitly removed human organ, in accordance with Art. 8, only if the expression “receipt” is interpreted in a broad sense<sup>92</sup>.

Lastly, it is difficult to conceive that a recipient transports or transfers the removed organ to the place where the transplantation will be performed: those conducts are usually carried out by intermediaries.

As regards organ donors, the sale of organs is not attributable to any offences outlined by the Convention: the reception of a financial gain or another comparable advantage in exchange for the removal of organs constitutes – as well as the corresponding conduct of offering – just one of the alternative preconditions for qualifying the conduct of organ removal as illicit, according to Art. 4, para. 1 b.

The offences of recruitment and solicitation of a recipient, outlined within Art. 7, para. 1, are committable by a donor who aims to obtain a financial gain in exchange for the removal of organs usable for transplantation: this occurrence is possible, especially when there is not any broker to intermediate between the two parties of the agreement.

Instead, it is improbable that organ donors – who typically accept to sell their own body parts in order to improve their precarious economic conditions – can carry out the conduct of active corruption of healthcare professionals, described within Art. 7, para. 2.

Lastly, with reference to the acts performable after the illicit removal and ascribable to the offences outlined within Art. 8 of the Convention, it is not conceivable that a convalescent donor can transport, transfer or export an organ that has just been removed.

Although some offences outlined by the Convention are committable by organ donors, it does not seem appropriate to use criminal instruments against them, because of their poverty conditions: donors are vulnerable persons, exploitable by criminals who induce or force them to undergo organ removal in exchange for financial gain<sup>93</sup>. For this reason, organ donors must be regarded as victims of organ trafficking, and the provisions contained into the Convention, which is aimed at protecting the rights of victims of the outlined offences<sup>94</sup>, should not exacerbate their suffering<sup>95</sup>.

Furthermore, the criminalisation of victims of organ trafficking would make the detection of the crime too difficult, because they would be reticent and unwilling to cooperate with law enforcement.

According to the Explanatory Report, «The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraph 1, Articles 5, 7 and 9 to

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<sup>92</sup> On this point, see above § X.4.a)

<sup>93</sup> In this way, see Draft European Parliament Explanatory Statement to the legislative resolution on the Initiative of the Hellenic Republic, *cit.*, p. 29.

<sup>94</sup> As established by Art. 1, para. 1, b. of the 2014 COE Convention against organ trafficking.

<sup>95</sup> In this way, see the Draft European Parliament Explanatory Statement to the legislative resolution on the Initiative of the Hellenic Republic, *cit.*, Justification regarding amendment 31, regarding Art. 2 (2) (d).

the donor or the recipient. There is thus no legal obligation for the States to apply these provisions to the donor and the recipient»<sup>96</sup>.

It is criticisable that the European Committee on Crime Problems equated the legal positions of donors and recipients, while disregarding their different personal circumstances: in the context of organ trafficking, indeed, organ recipients have strong economic power which allows them to exploit poor donors, and to prejudice their physical integrity<sup>97</sup>. Although recipients are individuals suffering from serious health problems and needing organs transplant<sup>98</sup>, an effective policy suitable for combating trafficking in organs should advise not to ignore the need to criminalize them for carrying out trafficking acts at the expense of donors' health<sup>99</sup>.

In any event, it would have been more appropriate for the Convention to adopt a clear stance on the need to criminalize, or conversely on the advisability of not criminalizing, organ donors and recipients, for example, by establishing a non-punishment provision in favour of the victims of organ trafficking, in the same way as that established within Art. 26 of the COE Convention of 2005 for the victims of trafficking in persons.

## XV. The need to repress “transplant tourism” and the deficiencies of the COE Convention against organ trafficking

According to the Declaration of Istanbul, the licit phenomenon of “*Travel for transplantation*”, including «*the movement of organs, donors, recipients, or transplant professionals across jurisdictional borders for transplantation purposes*», takes the form of illicit “*Transplant tourism*”, if «*it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals, and transplant centres) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population*»<sup>100</sup>.

First of all, it must be underlined that the expression “Transplant tourism” is oxymoronic: “transplant” and “tourism” are two words that do not belong together<sup>101</sup>, because the term “transplant” is referred to a surgical operation aimed

<sup>96</sup> § 29: «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, under certain conditions, also be considered as having participated in, or even instigated, the trafficking in human organs». On this point, see T. R. Beard – D. L. Kaserman – R. Osterkamp, *The Global Organ Shortage. Economic Causes, Human Consequences, Policy Responses*, Stanford University Press 2013, p. 67. For a criticism about the criminalization of donors and recipients, because they are both weak and exploitable subjects, see S. Scarpa, *op. cit.*, p. 166.

<sup>97</sup> In this sense, see World Health Organization Regional Office for the Western Pacific, Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region (Manila, Philippines, 7-9 November 2005): Report, (WP)HSD/ICP/HRF/6.4/001, Report series number: RS/2005/GE/41(PHL), Manila, Philippines, September 2006.

<sup>98</sup> The vulnerability of organ recipients was highlighted by J. Harris, *Un mercato monopsonistico per gli organi umani*, *cit.*, p. 6; *Id.*, *Wonderwoman e Superman*, *cit.*, p. 190.

<sup>99</sup> In this way, see the Draft European Parliament Explanatory Statement to the legislative resolution on the Initiative of the Hellenic Republic, *cit.*, p. 26.

<sup>100</sup> The same definitions were used by the joint study of Council of Europe and United Nations, *Trafficking in Organs, Tissues, Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, *op. cit.*, p. 13.

at satisfying a health need of the patient, while the term “tourist” defines a person who takes a trip for pleasure.

Furthermore, the definition given by the Istanbul Declaration appears extremely broad and unreasonable, because qualifying the transfer of organs, doctors, brokers, or donors beyond national borders as “transplant tourism” causes semantic illogicalities. First of all, the term “tourism” has to be used exclusively in reference to persons: organs constitute separate parts of the human body, so it would be more reasonable to talk about the “transport” of them. Moreover, the locution “transplant tourism” is not suitable for indicating the conduct of donors who travel abroad in order to undergo organ removal: it is preferable to make use of the generic expressions “organ tourism” or the specific “explant tourism”, because donors do not aim to get a transplantation of organs; instead, if donors do not move spontaneously across national borders, they have to be regarded as victims of trafficking in persons, but not as tourists. The locution “medical tourism” may be used to better define healthcare professionals who go to the place where they will perform a surgical operation<sup>102</sup>, because doctors may have the undertaking of both organ removal and transplant. As regards the brokers who travel abroad in order to supervise illicit activities of trafficking, the matter is more difficult, because they are not directly connected with the surgical operation, unlike the other subjects mentioned above: brokers are neither patients nor medical experts. For this reason, it is possible to use the expression “medical tourism brokers”<sup>103</sup>, in order to distinguish them from the other persons directly involved in the surgical operation.

From this point of view, the expression “transplant tourism” is better suited to just covering the conduct of recipients who move across jurisdictional borders and arrive in a country where they will receive a transplantation of organs, bypassing their own national laws<sup>104</sup>: this is inferable from the definitions given by the COE Recommendation No. 2009 of 23 January 2013<sup>105</sup>, the United Network for Organ Sharing (UNOS)<sup>106</sup>, and WHO in range of the Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region<sup>107</sup>. Furthermore, an indirect normative indication about the need to circumscribe the

<sup>101</sup> L. Turner, Let's wave goodbye to “transplant tourism”, in *BMJ* 336, No. 7657, 2008, p. 1377, who preferred to use the expression «Cross border organ transplantation».

<sup>102</sup> In this way, see S.D. Pattinson, Organ trading, tourism, and trafficking within Europe, in *Medicine and Law* 2008, 27 (1), p. 191 *et seq.*; L. Noël, Les trafics d'organes humains: le tourisme de transplantation, in *Cahiers de la sécurité* 2009, No. 9, p. 138.

<sup>103</sup> R.G. Spece jr, *op. cit.*, p. 1 *et seq.*

<sup>104</sup> In this way, see M. Goodwin, *Black markets: the supply and demand of body parts*, 2006, p. 170; T.H. Jafar, Organ Trafficking: Global Solutions for a Global Problem, in *American Journal of Kidney Disease* 2009, 54 (6), p. 1146-1147; Y. Shimazono, The state of the international organ trade: a provisional picture based on integration of available information, in *Bulletin of the World Health Organization* 2007, 85 (12), p. 956; L. Noël, *op. cit.*, p. 138.

<sup>105</sup> § 6: «The Assembly notes with concern the practice followed by certain patients who travel abroad in order to obtain organs in return for payment, a practice widely referred to as “transplant tourism”»

<sup>106</sup> UNOS, Board further addresses transplant tourism, 26 June 2007, which defined transplant tourism as «purchase of a transplantable organ outside the United States in a way that bypasses laws, rules or processes of any or all countries involved».

<sup>107</sup> World Health Organization Regional Office for the Western Pacific, Consultation, *cit.*, which defined transplant tourism «as the purchase of a transplantable organ abroad, including access to an organ whilst bypassing national laws, rules or processes of any or all countries involved».

concept of “transplant tourism” in this way may derive from the Directive 2011/92/EU of 13 December 2011 against the sexual abuse and sexual exploitation of children, which defined the analogous phenomenon of sex tourism as «*the sexual exploitation of children by a person or persons who travel from their usual environment to a destination abroad where they have sexual contact with children*» (29). This definition suggests that the “sex tourism” is performable only by “sex purchasers”, namely those who occasionally travel outside their country of permanent residence, and move to a country characterized by a legal framework not recognising sexual relationships with children as a crime, where they exploit the young victims in a licit way.

In this perspective, if transplant tourism is similarly conceived as a criminal practice performable only by organ recipients, it takes the form of a well identified phenomenon that must be taken into account by international political authorities as an act that promotes trafficking in human organs<sup>108</sup>.

An effective international legislative strategy aimed at repressing transplant tourism must guarantee fulfilment of the legal obligations to criminalize those acts attributed to trafficking in human organs, and must implement international cooperation between State parties so that they agree on conventional jurisdiction criteria to apply in order to prevent exploitation of organ donors and ensure certainty of punishment for those offences.

## 1. The jurisdiction criteria established by the 2014 COE Convention: is an extraterritorial application of criminal law really viable?

The 2014 COE Convention disappointed the expectation of an efficient international regulation of transplant tourism<sup>109</sup>, because it neither mentioned the examined phenomenon nor laid down jurisdiction rules suitable for satisfying the need to «deter states’ own citizens from feeding the global black market»<sup>110</sup>.

It only indicated some requirements whereby States parties have to establish jurisdiction over the offences introduced in conformity with the Convention.

Art. 10, para. 1, required State parties to adopt the principles of territoriality (lett. a., b., and c.) and active personality (lett. d and e.): the former establishes that States take jurisdiction over the offences committed in their national territory, on board a ship flying the national flag of that Party or on board an aircraft registered under the laws of that State Party; the latter states that States take jurisdiction over the offences committed by their nationals (nationality principle) and persons habitually resident in their territory.

Para. 2 required States parties to endeavour to take the necessary legislative measures to establish jurisdiction over any offences committed against one of their

<sup>108</sup> This connection was underlined by R. Ainley, *op. cit.*, p. 429.

<sup>109</sup> See Council of Europe, Committee of Ministers’ Rapporteur Group on legal cooperation (GR-J), Identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC), *cit.*: «37. In the view of the three Committees, a possible group of experts to be tasked with the drafting of a new binding legal instrument should examine the phenomenon of “transplantation tourism” with a view to identifying possible solutions».

<sup>110</sup> R. Ainley, *op. cit.*, p. 456.

nationals or a person habitually resident in their territory (passive personality principle): the use of the term “*endeavour*” explains that there is not any obligation for States parties to adopt this particular jurisdiction criterion, because it is generally not imposed by the international law, and therefore takes a minor role compared with the other jurisdiction requirements<sup>111</sup>.

Each State party must choose the jurisdiction requirements which better ensure the necessity to avoid that any alleged perpetrators take shelter in legislative areas where acts of organ trafficking are not criminalized<sup>112</sup>. The purpose to guarantee certainty of punishment for these offences, through the choice of the most appropriate jurisdiction requirements, is connected to the principle “*aut dedere aut judicare*”, established within Art. 10, para. 6, of the Convention: the disposition obliged each State party to undertake proceedings against any national who is alleged to have committed one of trafficking offences with which the Convention is concerned, in cases where that person «*is present on its territory and it does not extradite him or her to another State, solely on the basis of his or her nationality*».

A reasonable application both of the rules established within Article 10, and of the obligations to incriminate all the acts outlined by the Convention, should require each State party either to punish the conducts of organ trafficking accomplished in its territory under its own domestic law, or to extradite the alleged perpetrator to a country that seeks to place the accused on trial, according to the principle of active personality.

Although the international law proclaims the duty to respect the scope of sovereignty of the State wherein an offence was committed – except for those cases established by treaties, conventions or international consuetude –<sup>113</sup>, it is necessary that each State may prosecute the crimes committed by its own nationals abroad, in legislative areas where the punishment is lighter, or where an effective repression is difficultly achievable, or where the fact is not regarded as illicit<sup>114</sup>: otherwise, there would be the risk to leave unpunished, or not adequately punished, those who violate legal rights diffusely recognized by a wide range of States or, before that, by the collective consciousness (for example, as in cases of organ trafficking, human dignity, freedom and physical integrity)<sup>115</sup>. Where any adequate protection of those fundamental rights is not provided by the legislative framework existent in the *locus commissi delicti*, the principle of active personality can be reaffirmed, also in the

<sup>111</sup> In this way, see A. Heinrich, *Das passive Personalitätsprinzip im deutschen Strafrecht*, Freiburg i. Br. 1994, p. 189 *et seq.*

<sup>112</sup> Nevertheless, if States Parties could exercise an unrestricted choice over those jurisdiction requirements, some conflicts of jurisdiction might arise: the Convention, in order to resolve such conflicts, required States parties to consult «*with a view to determining the most appropriate jurisdiction for prosecution*» (Art. 10, para. 7).

<sup>113</sup> In this way, see the Permanent Court of International Justice, *The Case of the S. S. Lotus, France v. Turkey*, 7 September 1927, judgement No. 9, §§ 45, 51.

<sup>114</sup> Council of Europe, Explanatory Report to the COE Convention against Trafficking in Human Organs, *cit.*, § 67, wherein the relevance of the active personality principle was affirmed, as established within Art. 10, para. 1, lett. d, because «*certain States in which trafficking in human organs takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework*».

<sup>115</sup> See A. Schmitz, *Das aktive Personalitätsprinzip im internationalen Strafrecht. Zugleich ein kritischer Beitrag zur Legitimation der Ausdehnung der Strafgewalt auf Auslandstaten Deutscher*, Frankfurt a. M. 2002, p. 279 *et seq.*

international law, as a reasonable exception to the principle of territoriality, regardless of its transposition in an international agreement, and of the double punishability of the conduct both in the State of nationality, and in the State where that was performed<sup>116</sup>.

Although the abstract legitimacy of the principle of active personality is generally recognized, it is undeniable that its concrete achievement is ensured only where an extension of punitive power derives from a convention or a treaty expressing an international cooperation on the issue<sup>117</sup>. The need of an international agreement on the applicability of the principle of active personality in the field of the repression of trafficking in human organs was satisfied by Art. 10, para. 1, lett. d. and e., of the Convention. Nevertheless, although this disposition is aimed at ensuring an extraterritorial repression of organ trafficking, it appears unsuitable for pursuing fully the aforesaid purposes: indeed, the COE Convention is lacking of a rule obliging States parties to remove from their national laws any clause of double criminality which subordinates the punishability of the offences committed beyond national borders to the condition that these acts are illegal both in the State of nationality and in the *locus commissi delicti*<sup>118</sup>. If the Convention had provided for such rule, the efficacy of the active personality principle and, therefore, of national laws against organ trafficking, would have been improved<sup>119</sup>. In this direction, for example, Art. 25, para. 4 of the COE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) required States parties – in order to prosecute the outlined sexual offences committed by individuals beyond the borders of their State of nationality, according to the criterion of active personality established within Art. 25, para. 1, lett. d. and e. – to

<sup>116</sup> In this way, see C. M. Scott, Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, C. M. Scott ed., Hart Publishing, Oxford, 2001, p. 55; A. Di Martino, *La frontiera e il diritto penale. Natura e contesto delle norme di "Diritto penale transnazionale"*, Giappichelli, Torino 2005, p. 203 et seq.; A. Bernardi, *Modelli penali e società multiculturale*, Giappichelli, Torino 2006, p. 34; C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press 2008, p. 89 et seq.

<sup>117</sup> See Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco*, 1923, P. C. I. J. Ser. B., no. 4, p. 24.

<sup>118</sup> According to a widespread, but narrow, interpretation of the active personality principle, a State may take jurisdiction over a crime only if the State where the offence was committed does not prosecute the alleged perpetrator, the suspect is present on the territory of the former, and the conduct is punished in both countries: in this sense, see T. Vander Beken – G. Vermeulen – S. Steverlinck – S. Thomaes, *Finding the Best Place for Prosecution. European Study on Jurisdiction Criteria*, Antwerpen-Apeldoorn, Maklu 2002, p. 12. As affirmed by M. Plachta, The Role of Double Criminality in International Cooperation in Penal Matters, in *Double Criminality. Studies in International Criminal Law*, N. Jareborg, ed., Uppsala, 1989, p. 111, the principle of double punishability is commonly recognized in national laws and is even considered to be a rule of customary international law. Nevertheless, States are not obliged to apply the aforesaid principle in their mutual relations: in this sense, see B. Swart, *Human Rights and the Abolition of Traditional Principles*, in *Principles and Procedures for a New Transnational Criminal Law*, A. Eser and O. Lagodny eds., Freiburg, 1992, p. 16.

<sup>119</sup> From this perspective, see Council of Europe, Committee on Social Affairs, Health and Sustainable Development, Report on Draft Council of Europe Convention against trafficking in human organs, *cit.*, § 7.3., where the Parliamentary Assembly had recommended that Committee of Ministers added a new paragraph to Article 10, after para. 3, worded as follows: «For the prosecution of the offences established in accordance with Articles 4 to 8 of the present Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the acts are criminalised at the place where they were performed».

« take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraph 1.d is not subordinated to the condition that the acts are criminalised at the place where they were performed» (para. 4).

Furthermore, the regulation of jurisdiction outlined by the Convention against organ trafficking may be criticised because para. 3 of Art. 10 established that: «Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraph 1. d and e of this article». Such disputable faculty for limiting the effectiveness of the active personality principle was attributed to each State party by the Lanzarote Convention only towards those who have their habitual residence in its territory (art. 25, par. 3); instead, this Convention required States parties to take the necessary legislative measures to establish jurisdiction over sexual abuses against children committed by their own nationals abroad, without recognizing any right not to apply this jurisdiction criterion.

In all probability, the 2014 COE Convention limited the efficacy of the active personality principle – in the same way as the COE Convention against trafficking in persons of 2005 did<sup>120</sup> – because the Council of Europe had felt obliged to give priority to State sovereignty over protection of the human rights violated by organ trafficking<sup>121</sup>. The fact that the Lanzarote Convention did not put such limits on the extraterritorial jurisdiction of States parties over sexual offences against children – easily performable abroad by nationals practicing “forum shopping”, in the same way as trafficking offences – implies that, in this case, the Council of Europe had chosen to give priority to the protection of the rights of children victims of sexual exploitation and sexual abuse over State sovereignty. From this perspective, it is difficult to agree on the jurisdiction rules laid down by the 2014 COE Convention, because the victims of human and organ trafficking are often children or vulnerable persons, whose dignity and freedom are deserving of protection in the same way as child’s psycho-sexual development.

## XVI. Conclusions

In light of the aforesaid observations, it is indisputable that trafficking in human organs has the typical characteristics of the “transnational crime”, expression coined by the United Nations Crime Prevention and Criminal Justice Branch in 1974 – and then clarified and expanded by Article 3, para. 2, of the 2000 United Nations

<sup>120</sup> As regards the applicability of the active personality principle, the jurisdiction rules of the 2005 COE Convention on Action against Trafficking in Human Beings (Article 31) are as criticisable as those laid down by the 2014 Convention against trafficking in human organs.

<sup>121</sup> On the relationship between State sovereignty and protection of the human rights, see H. Steinberger, Sovereignty, in *Encyclopedia of Public International Law*, R. Bernhardt ed., North-Holland Elsevier, Amsterdam 2000, p. 512; J. Donnelly, State Sovereignty and Human Rights, 23 June 2004, in <http://www.du.edu/gsis/hrhw/working/2004/21-donnelly-2004.pdf>.

Convention against Transnational Organized Crime –, in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several States, or having an impact on more than one country<sup>122</sup>.

Furthermore, the phenomenon of organ trafficking is placed against the backdrop of economic interests pursued by intermediaries in the same way as those transnational criminals that «take advantage of cheap goods or services in one state and move them across borders to another state where there is strong demand and the goods or services can be sold or hired out at a profit»<sup>123</sup>.

The aforesaid considerations emphasize the need to issue a legally binding international instrument, both at regional and at global level, which requires the States to criminalize each act attributable to organ trafficking.

In particular, the European Union should enter the field, as already affirmed, in order to establish minimum rules concerning the definition of the criminal offence of trafficking in human organs and the applicable sanctions, according to Art. 83 TFEU. The ultimate goal should be identified in the harmonization of national criminal laws and in the implementation of judicial cooperation between Member States, in order to avoid that the heterogeneity of existent national laws induces citizens of the EU – which, according to the Schengen system, have the right to move freely within the territory of the Member States<sup>124</sup> – to practice “forum shopping” and to bypass national prohibitions, so prejudicing the effectiveness of their national criminal law, and at the same time, violating the rights to dignity, freedom and health of the weak and vulnerable. From this perspective, action at EU level is fundamental for ensuring that the European Union will remain an Area of Freedom, Security and Justice<sup>125</sup>.

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<sup>122</sup> In this sense, see G. O. W. Mueller, *Transnational Crime: Definitions and Concepts*, in P. Williams and D. Vlassis eds., *Combating Transnational Crime: Concept, Activities, Responses*, Frank Cass, London-Portland 2001, p. 13.

<sup>123</sup> N. Boster, *An Introduction to Transnational Criminal Law*, Oxford University Press 2012, p. 5.

<sup>124</sup> About the difficulties to repress the transnational crime of trafficking in human beings within the European Union “without borders”, see S. Scarpa, *op. cit.*, p. 172, and more generally, A. Bernardi, *op. cit.*, Giappichelli, Torino 2006, p. 34.

<sup>125</sup> In this way, see Draft European Parliament legislative resolution on the Initiative of the Hellenic Republic, *cit.*, p. 28.