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Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal

Abstract

Although illicit organ removal is not a new crime, globalisation and economic inequality, underpinned by shortages of organs, have amplified this problem to such an extent that governments are now urged to take comprehensive punitive measures. Some manifestations of illicit organ removal are already considered criminal offences under domestic transplant legislations and under the framework of human trafficking. At the same time, illicit organ removal has also been categorised as a form of organ trafficking by the Council of Europe Convention against Trafficking in Human Organs, which calls upon governments to establish as a criminal offence a broad range of illicit organ- and transplant-related activities. As the crime of illicit organ removal lies at the centre of both human trafficking and organ trafficking, questions arise as to the exact differences between the two frameworks, their overlaps and their legal consequences. This article aims to provide answers to those questions by conducting a comparative analysis of both legal frameworks in terms of their development, scope, criminal law provisions and implementation. This analysis is followed by an examination of their overlaps and the consequences of prosecuting under either framework. A set of recommendations is presented aimed at implementing both legal frameworks in a way that guarantees effective prosecution while maximising the protection of victims.

Introduction

Organ transplantation is the preferred and sometimes the only treatment for patients who suffer from organ failure. The increasing gap between the number of patients in need of an organ and the number of organs obtained through altruistic donations has created an unresolved tension between demand and supply. This organ shortage encourages desperate patients to go outside the domestic transplant system to buy an organ. The World Health Organisation (WHO) estimates that up to 10% of all transplants worldwide are performed using an organ from the black market.¹ However, this statistic is 10 years old, and in the light of the existing shortage of organs worldwide, ageing populations, growing numbers of unhealthy communities, and increased mobility, this number may well be much higher.

Organs obtained on the black market usually come from poor, uneducated, and vulnerable donors.² To have their organ removed, these donors receive anything between USD\$500 and

¹ Y Shimazono, 'The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information' (2007) 85(12) *Bulletin of the World Health Organization* 955.

² E. Pearson, *Coercion in the Kidney Trade? A Background Study on Trafficking in Human Organs Worldwide*(Deutsche Gesellschaft für Technische Zusammenarbeit, Eschborn, 2004), pp. 15–17; A Tong, J

USD\$10,000; if they are paid at all.³ Often donors only cooperate because they are deceived or coerced.⁴ Illicit removal of an organ frequently leads to negative health consequences for organ donors,⁵ which may cause a further decline in their standard of living.⁶ In addition, implantation of these illicitly obtained organs results in increased post-transplant risks to organ recipients.⁷ Moreover, they undermine the value of altruistic donation and the confidence of the public in the authorised transplant system.⁸

The illicit removal and transplantation of organs can be conducted within domestic borders and internationally. They tend to occur in places with transplant regulations that are marred with loopholes or weakly enforced. They can be conducted by specialised and organised criminal groups, or be orchestrated by mobile networks operating without any clear criminal structure. A common feature of both *modi operandi* is the participation of transplant surgeons and other medical professionals, including directors of transplant units, nursing staff, and lab technicians. Frequently, these illicit activities are enabled by corrupted members of law enforcement and public officials who facilitate illegal entries and turn a blind eye to forged documents and the illegal operations of transplant clinics.⁹

Reports on the incidence, characteristics, and harmful effects of illicit organ removal have put the issue high on the international agenda, prompting discussions on how best to define and combat these abuses. As illicit organ removal can take different forms and as it is situated at

Chapman, G Wong et al., 'The Experience of Commercial Kidney Donors: Thematic Synthesis of Qualitative Research' (2012) 25(11) *Transplant International* 1138, 1149.

³ M López-Fraga, K Van Assche, B Domínguez-Gilet al, 'Human Trafficking for the Purpose of Organ Removal', in R Piotrowicz, C Rijken, B Uhl (eds), *Routledge Handbook of Human Trafficking* (London: Routledge, 2018), 120; A. Pascalev, J. de Jong, F. Ambagtsheer et al., Trafficking in Human Beings for the Purpose of Organ Removal: A Comprehensive Literature Review, in F. Ambagtsheer & W. Weimar (Eds.). *Trafficking in Human Beings for the Purpose of Organ Removal: Results and Recommendations* (Lengerich: Pabst Science Publishers, 2016), pp. 15-68

⁴ M López-Fraga et al (n 3), 120, 125; A Pascalev et al. (n 3), 15, 36.

⁵ M Goyal, R Mehta, L Schneiderman et al., 'Economic and Health Consequences of Selling a Kidney in India' (2002) 288 *JAMA* 1589; L Turner, 'Commercial Organ Transplantation in the Philippines' (2009) 18 *Cambridge Quarterly of Healthcare Ethics* 192.

⁶ D Budiani-Saberi, F Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' (2008) 8 *American Journal of Transplantation* 925, 929; J Koplin, 'Assessing the Likely Harms to Kidney Vendors in Regulated Organ Markets' (2014) 14 *American Journal of Bioethics* 7.

⁷ A Anker, T Feeley, 'Estimating the Risks of Acquiring a Kidney Abroad: A Meta-analysis of Complications Following Participation in Transplant Tourism' (2012) 26(3) *Clinical Transplantation* 232; N Inston, D Gill, A Al-Hakim et al., 'Living Paid Organ Transplantation Results in Unacceptably High Recipient Morbidity and Mortality' (2005) 37(2) *Transplant Proceedings* 560.

⁸ G Danovitch, A Leichtman, 'Kidney Vending: The "Trojan Horse" of Organ Transplantation' (2006) 1 *Clinical Journal of the American Society of Nephrology* 1133, 1135; K Van Assche, 'Combating The Trade In Organs: Why We Should Preserve The Communal Nature Of Organ Transplantation' in B Van Beers, S Sterckx, D Dickenson (eds), *Personalized Medicine, Individual Choice and the Common Good* (Cambridge: Cambridge University Press, 2018), 77, 107-110.

⁹ F Ambagtsheer, M Gunnarson, J de Jong et al., 'Trafficking in Human Beings for the Purpose of Organ Removal: A Case Study Report' in F Ambagtsheer, W Weimar (eds) (n 3), 91-116; M Bos, *Trafficking in Human Organs* (Brussels: European Parliament, 2015), 16-27; Council of Europe/United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (Strasbourg: Council of Europe, 2009), 57-60; M López-Fraga et al (n 3), 120, 123-125; Organization for Security and Co-operation in Europe, *Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings* (Vienna: Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2013), 27-33; A Pascalev et al. (n 3), 15, 39-48. United Nations Office on Drugs and Crime, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal* (Vienna: United Nations, 2015), 24-45.

the intersection of transplant law, criminal law, and human rights law, a variety of attempts have been made to define the exact scope of the problem and the most appropriate legal framework to address it. The removal of an organ is illicit when certain unlawful means have been used to perform it. From the perspective of transplant law, this would be the case when removal takes place without valid consent or in exchange for financial gain. From the perspective of criminal law and human rights law, this would be the case when the donor or the organ itself was trafficked.

Here reference is made to the criminal law frameworks of human trafficking and organ trafficking. In accordance with the framework of human trafficking, organ removal is illicit when coercive, fraudulent or deceptive means have been used to make the donor give up the organ. By contrast, the framework of organ trafficking, recently codified by the Council of Europe Convention against Trafficking in Human Organs, builds on the definition of illicit organ removal as expressed in transplant law. It requires countries to establish as a criminal offence the ‘illicit removal of human organs’, defined as organ removal from a living or a deceased donor that takes place without valid consent or in exchange for financial gain or comparable advantage. As the criminal law frameworks of human trafficking and organ trafficking approach the issue of illicit organ removal from different perspectives, questions arise as to the exact differences between the two frameworks, their overlaps, and their legal consequences.

This paper aims to provide answers to those questions. First, I will focus on the topic of illicit organ removal as it is addressed in transplant regulations. Due attention will be given to the sanctions that countries have introduced in their transplant regulations for breaches of the principles of free and informed consent and non-commercialisation. Second, the development and scope of the criminal law frameworks of human trafficking and organ trafficking will be discussed. Because the framework of organ trafficking has only very recently been established, I will closely examine the Convention that forms its foundation. In addition, examples will be given of the ways in which countries have implemented the human trafficking and the organ trafficking frameworks in their domestic penal codes. Third, I will analyse the overlaps between the human trafficking and the organ trafficking frameworks and the consequences of prosecuting illicit organ removal under either the human trafficking or the organ trafficking framework. By way of conclusion, I will offer a set of recommendations for a more harmonised implementation of both legal frameworks with a view to more effectively prosecute illicit organ removal and protect its victims.

1. Transplant legislation and illicit organ removal

1.1 International legal instruments on transplantation

From the end of 1960s, following the first successes in organ transplantation, domestic regulatory bodies and legislators started to introduce minimum safeguards to ensure the voluntary and altruistic nature of organ donation. The requirement that valid consent to living organ donation could only be given if it is free and informed and if no financial inducements are involved, became the cornerstone of the newly developing transplant regulations.¹⁰

¹⁰ Note that, with the exception of Iran, all countries have introduced a prohibition of organ sale and purchase.

International organisations and professional societies, including the World Health Organisation (WHO), the World Medical Association (WMA), and the Transplantation Society (TTS) solidified the principles of free and informed consent and non-commercialisation through a number of non-binding instruments.¹¹ At the European level, the Council of Europe and the European Union issued legally binding instruments that regulate the conditions for organ donation and transplantation in considerable detail.¹²

1.2 Illicit organ removal in domestic transplant law

Building on these international legal instruments, domestic transplant legislations uphold the requirements of altruism and free and informed consent by introducing provisions that explicitly prohibit the sale and purchase of organs and the removal of organs through the use of coercion, fraud or deception. Criminal sanctions can be found either in the transplant laws themselves or in penal codes. Despite ongoing efforts to harmonise the implementation and enforcement of the requirements of altruism and free and informed consent, domestic legislations show considerable differences in scope and detail.

For instance, some countries that have provided criminal sanctions for the removal of an organ from a living donor without valid consent, restrict the scope of this provision to organ removal through the use of force. In these countries, such as Georgia, Moldova, and Russia, no specific criminal sanctions are in place for organ removal where consent has been invalidated by means such as threat, fraud, and deception.¹³ In other countries, such as Ukraine, organ removal from deceased persons without valid consent has not been established as a criminal offence.¹⁴ Still other countries, such as Serbia and Turkey, have different provisions that establish as a criminal offence organ removal from a living donor without valid consent and organ removal from a deceased donor without valid consent.¹⁵ Alternatively, some countries, such as Romania, have introduced one general penal provision which covers both organ removal from a living donor and organ removal from a deceased donor in the absence of valid consent.¹⁶

¹¹ Council of Europe, 3rd Conference of European Health Ministers, *Organ Transplantation* (1987) Appendix II; The Ethics Committee of the Transplantation Society, 'The Consensus Statement of the Amsterdam Forum on the Care of the Live Kidney Donor' (2004) 78(4) *Transplantation* 491-492; The Ethics Committee of the Transplantation Society, 'The Ethics Statement of the Vancouver Forum on the Living Lung, Liver, Pancreas, and Intestine Donor' (2006) 81(10) *Transplantation* 1386-1387; WHO, *Preventing the Purchase and Sale of Human Organs* (1989); WHO, *Guiding Principles on Human Organ Transplantation* (1991); WHO, *Guiding Principles on Human Cell, Tissue, and Organ Transplantation* (2010); World Medical Association, *Statement on Live Organ Trade* (1985); World Medical Association, *Declaration on Human Organ Transplantation* (1987); World Medical Association, *Statement on Organ and Tissue Donation* (2012; revised 2017).

¹² Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (1997); Council of Europe, *Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin* (2002); European Union, *Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on Standards of Quality and Safety of Human Organs Intended for Transplantation* (2010).

¹³ Georgia, Criminal Code, Article 134; Moldova, Criminal Code, Article 158; Russian Federation, Criminal Code, Article 120.

¹⁴ Ukraine, Criminal Code, Article 143.

¹⁵ Serbia, Criminal Code, Article 80; Turkey, Criminal Code, Article 91.

¹⁶ Romania, Code of Public Health, Article 155.

Similarly, different approaches exist with regard to criminal sanctions for organ removal in exchange for financial gain or comparable advantage. Some countries, such as Kyrgyzstan and Montenegro, have not introduced criminal sanctions that explicitly target the offer or receipt of a financial gain or comparable advantage in exchange for organ removal, although these acts are prohibited in their transplant laws. Other countries, such as the United States, have introduced one overarching provision establishing criminal sanctions for selling, buying, and other commercial transactions with regard to organs.¹⁷ Still other countries, such as the United Kingdom, have in place detailed provisions covering all possible scenarios where in exchange for the removal of an organ a person offers or receives a financial gain or comparable advantage.¹⁸

There is also a considerable variation in the sanctions that are provided. For organ removal without valid consent, the minimum penalty ranges from a fine (Germany) to 7 years of imprisonment (France), and the maximum penalty ranges from one year of imprisonment (Belgium) to 12 years of imprisonment (Spain).¹⁹ For offering or receiving a financial gain or comparable advantage in exchange for organ removal, the minimum penalty ranges from a fine (Germany, United Kingdom) to 5 years of imprisonment (Turkey), and the maximum penalty ranges from one year of imprisonment (Belgium) to 12 years of imprisonment (Spain).²⁰

Moreover, domestic provisions may have jurisdictional limitations which do not allow the prosecution of a citizen or resident who has performed or been subjected to illicit organ removal abroad. In order to prosecute crimes that occur in multiple jurisdictions, countries need to establish extraterritorial jurisdiction.²¹ However, the establishment of extraterritorial jurisdiction in the context of illicit organ removal is uncommon.

Countries that apply extraterritorial jurisdiction to illicit organ removal committed by their nationals, regardless of the illegality of that act in the foreign country concerned, include Germany and Israel.²² Countries that do so, subject to the requirement that the act is also a criminal act in the jurisdiction in which it occurs, include the Netherlands and Turkey.²³

Since the norms on safe and ethical organ donation and transplantation prescribed by international organisations and professional bodies lack harmonisation, direct enforcement mechanisms, and internationally agreed sanctions, criminal activities may shift to territories with the weakest regulation and enforcement, which makes prosecution difficult.

¹⁷ United States, Title 42 of the U.S. Code § 274E.

¹⁸ United Kingdom, Human Tissue Act 2004, Section 32.

¹⁹ Belgium, Law on the Removal and Transplantation of Organs, Article 17, §3; France, Criminal Code, Article 511-2; Germany, Law on the Donation, Removal, and Transfer of Organs and Tissues, §18(1), 1; Spain, Criminal Code, Article 156bis.

²⁰ Belgium, Law on the Removal and Transplantation of Organs, Article 17, §3; Germany, Law on the Donation, Removal, and Transfer of Organs and Tissues, §18(1); Turkey, Criminal Code, Article 91(3); United Kingdom, Human Tissue Act 2004, Section 32(4).

²¹D Martin, K Van Assche, B Domínguez-Gil et al., ‘Prevention of Transnational Transplant-Related Crimes – What More Can be Done?’ (2016) 100(8) *Transplantation* 1776-1784.

²²Israel, Organ Transplantation Law, Article 36(b); Germany, Criminal Code, §5, 17.

²³The Netherlands, Criminal Code, Article 7(1); Turkey, Criminal Code, Article 11.

2. Human trafficking

2.1 The Protocol to Prevent, Suppress and Punish Trafficking in Persons

These inconsistencies have contributed to a situation where so-called “transplant tourism” has flourished.²⁴ By the end of the 1990s, a growing number of cases involving removal of organs from vulnerable persons by using deception and force prompted the United Nations to include illicit organ removal as a form of exploitation in its Protocol to Prevent, Suppress and Punish Trafficking in Persons (henceforth: UN Trafficking Protocol).²⁵ This legal instrument spells out three elements required to establish human trafficking: an act, the use of certain means, and the purpose of exploitation. More specifically, the UN Trafficking Protocol defines human trafficking for organ removal as 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 (...) the removal of organs”.²⁶

The UN Trafficking Protocol further stipulates that the consent of the victim is irrelevant when one or more of the means listed in the definition of human trafficking are used to exploit a person. Moreover, when the organ is removed from a child,²⁷ it is only necessary to prove the act and the purpose of exploitation and not that any of the illicit means had been used. While it is left to domestic law to determine the culpability of victims of human trafficking, it is a well-established practice not to impose penalties on victims of human trafficking for their involvement in unlawful activities to the extent that they have been compelled to do so as a result of being trafficked.²⁸ In this regard, it is important to note that

²⁴ In accordance with the Declaration of Istanbul, updated in 2018, “transplant tourism” is defined as cross-border travel for transplantation that “involves trafficking in persons for the purpose of organ removal or trafficking in human organs, or if the resources (organs, professionals and transplant centres) devoted to providing transplants to non-resident patients undermine the country’s ability to provide transplant services for its own population”. See The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2018 Edition,

<https://www.declarationofistanbul.org/images/Policy_Documents/2018_Ed_Do/2018_Edition_of_the_Declaration_of_Istanbul_Final.pdf>accessed 19 March 2019. For more information on the updated Declaration, see D Martin, K Van Assche, B Domínguez-Gil et al., ‘A New Edition of the Declaration of Istanbul: Updated Guidance to Combat Organ Trafficking and Transplant Tourism Worldwide’ (2019) 95(4) *Kidney International* 757-759; D Martin, K Van Assche, B Domínguez-Gil et al., ‘Strengthening Global Efforts to Combat Organ Trafficking and Transplant Tourism: Implications of the 2018 Edition of the Declaration of Istanbul’ (2019) 5(3) *Transplantation Direct* e433.

²⁵ United Nations. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime* (2000). With regard to children see the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the UN Convention on the Rights of the Child* (2000). Article 3.1 (a)(i)(b) of that Protocol requires States parties to prohibit, in the context of the sale of children as defined in Article 2, the offering, delivering or accepting, by whatever means, a child for the purpose of transfer of organs of the child for profit.

²⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 3(a). See also A Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010), 29.

²⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 3(c).

²⁸ See OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* (Vienna: Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2013); United Nations High Commissioner For Human Rights, *Principles and Guidelines on Human Rights and Trafficking* (2002), Principle 7; Working Group on Trafficking in Persons, *Report on the Meeting of the Working Group on Trafficking in Persons* (2009), para 12.

the UN Trafficking Protocol also provides for the protection of, and the assistance to, the victims of human trafficking.

The UN Trafficking Protocol is one of the most important international tools that require Parties to establish as criminal offences specific activities that involve the physical exploitation of vulnerable persons. It is also one of the most widely ratified criminal law instruments. Currently, the crime of human trafficking for the purpose of organ removal can be prosecuted by 173 countries that have ratified the UN Trafficking Protocol,²⁹ subject to including organ removal as a part of the human trafficking offence in their domestic legislations. At the European level, the Council of Europe and the European Union have mirrored the definition of human trafficking in the Council of Europe Convention on Action against Trafficking in Human Beings,³⁰ and, respectively, in EU Directive 2011/36/EU.³¹ Importantly, these legal instruments offer stronger protection to victims of this crime.³²

2.2 Human trafficking in national law

At the domestic level no two definitions of human trafficking are identical.³³ In the great majority of countries, organ removal is included as a possible form of exploitation in the definition of human trafficking. Crucially, in a few countries, such as the United States, this is not yet the case.³⁴ In other countries, such as Hungary, organ removal is included in the criminal law provisions on human trafficking, but as an aggravating circumstance that attracts higher penalties.³⁵

In several countries, some of the means listed in the international legal instruments on human trafficking have been omitted from the national definition. For instance, in Belarus and India, the means of abuse of a position of vulnerability has not been included.³⁶ Some other countries, such as Argentina and Slovenia, have not incorporated any illicit means in their definition of human trafficking, but consider their use as an aggravating circumstance.³⁷

Framing illicit organ removal in the context of human trafficking highlights its especially egregious nature and, because the focus is on the ruthless exploitation of a person by violating that person's physical integrity, it also enables more severe punishment. This is reflected in the criminal law provisions on human trafficking that have been introduced in national legislation. For human trafficking, including for the purpose of organ removal, the minimum penalty ranges from four months (Finland) to eight years of imprisonment (Italy), and the

²⁹ See for the list of ratifications <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 19 March 2019.

³⁰ Council of Europe, *Convention on Action against Trafficking in Human Beings* (2005).

³¹ European Union, *Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims* (2011).

³² Note, for instance, that Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 8 of Directive 2011/36/EU introduce the principle of non-punishment of victims of human trafficking.

³³ J Allain, 'No Effective Trafficking Definition Exist: Domestic Implementation of the Palermo Protocol' (2014) 7(1) *Albany Government Law Review* 111.

³⁴ United States, Title 22 of the U.S. Code § 7101.

³⁵ Hungary, Criminal Code, Article 192.

³⁶ Belarus, Criminal Code, Article 181. In India, reference is made to abuse of power, which does not necessarily cover the same mode of exploitation. See India, Criminal Code, Section 370(1), 5°.

³⁷ Argentina, Law 26.364 for the Prevention and Punishment of Trafficking in Persons and Assistance to its Victims, Article 1; Slovenia, Criminal Code, Article 133(2).

maximum penalty ranges from six years of imprisonment (Norway, Russian Federation) to twenty years of imprisonment (Italy).³⁸ However, some countries consider the purpose of organ removal to be an aggravating circumstance in the context of human trafficking, resulting in considerably higher sanctions. This is, for instance, the case in Kyrgyzstan, where human trafficking for the purpose of organ removal is punishable with fifteen to twenty years of imprisonment, and in Malta, where the punishment is imprisonment for a term of six to twelve years.³⁹ Alternatively, some countries have established as an aggravating circumstance the negative health consequences of human trafficking. For instance, where human trafficking would result in serious health consequences – which may occur if the organ has indeed been removed – the maximum penalty is increased in Belgium from five to fifteen years of imprisonment and in the Netherlands from twelve to eighteen years of imprisonment.⁴⁰ When it would result in the death of the victim, the maximum penalty is increased to twenty years of imprisonment in Belgium, and to life imprisonment in the Netherlands.⁴¹

While the human trafficking framework sets a clear and enforceable legal standard to prosecute illicit organ removal as a form of exploitation and to impose severe sanctions, there remain challenges to its enforcement. During the negotiations of the UN Trafficking Protocol there did not seem to have been a clear understanding of how illicit organ removal actually occurred, nor of how this type of exploitation differs from other forms of organ-related abuses. Prior to the inclusion of the concept of “exploitation through the removal of organs” in the definition of human trafficking, this act was not legally defined. The meaning of the concept was to be drawn from the context of the crime of human trafficking itself. Since the interpretation of what constitutes illicit removal of organs is subject to the limitations of the scope of the UN Trafficking Protocol, it is important to note that human trafficking for the purpose of organ removal does not cover: (1) commercial dealings with human organs independent from coercive financial offers to a living donor; (2) illicit organ removal from deceased persons; and (3) use (which will normally be implantation) of an organ that was illicitly removed.

From a practical perspective, it is recognised that investigating and prosecuting human trafficking offences can be a complex and challenging process.⁴² One difficulty lies in satisfying the element of the means, especially with regard to proving the abuse of a position of vulnerability as a way to recruit and exploit a donor.⁴³ In addition to the abovementioned obstacles, illicit organ removal under the human trafficking framework has been considered a

³⁸Finland, Criminal Code, Section 3(1); Italy, Criminal Code, Article 601; Norway, Criminal Code, Section 257; Russian Federation, Criminal Code, Article 127.1(1).

³⁹Kyrgyzstan, Criminal Code, Article 124(3); Malta, Criminal Code, Article 248C.

⁴⁰Belgium, Criminal Code, Article 433quinquies, § 2 and Article 433septies, 5°; the Netherlands, Criminal Code, Article 273f(1)&(4).

⁴¹ Belgium, Criminal Code, Article 433octies, 1°; the Netherlands, Criminal Code, Article 273f(5).

⁴² See, A Gallagher, P Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line’ (2008) 18(3) *International Criminal Justice Review* 318, 343.

⁴³ See, M López-Fraga, B Domínguez-Gil, A Capronet al., ‘A Needed Convention against Trafficking in Human Organs’ (2014) 383(9936) *Lancet* 2187-2189. Note that the abuse of a position of vulnerability is one of the most ambiguous and ill-defined terms in the definition of human trafficking. The practice of countries in establishing human trafficking for the purpose of organ removal based on the abuse of a position of vulnerability as a sole means is still to be firmly established. See, United Nations Office on Drugs and Crime, *Issue Paper on Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons* (New York: United Nations, 2013).

marginal phenomenon, when compared to the enormous scale of human trafficking for sexual and/or labour exploitation. Consequently, it can be argued that human trafficking for the purpose of organ removal “continues to have trouble gaining traction as a recognized transnational criminal norm”,⁴⁴ which is reflected by the fact that only a few cases worldwide have been successfully prosecuted under this framework.⁴⁵

3. Organ trafficking

3.1 The development of the Convention against Trafficking in Human Organs

From early 2000 the Council of Europe considered various measures to strengthen and harmonise legal and policy responses to the whole range of activities related to illicit organ removal. More specifically, an urgent need was recognised to solidify the principles of free and informed consent and of non-commercialisation, through dissuasive criminal sanctions that could be uniformly applied by its member states.⁴⁶

In 2009, a study conducted jointly by the Council of Europe and the United Nations considered human trafficking for the purpose of organ removal as a small part of the bigger problem of trafficking in organs and confirmed that the human trafficking framework presented limitations in addressing activities involving the illicit removal of organs. The study pointed out that confusion existed among the legal and scientific community between trafficking in organs and human trafficking for the purpose of organ removal, and underlined that solutions for combating both types of trafficking have to be different because the trafficked objects are different: in the former case it is the organs, and in the latter case, it is the person.⁴⁷ It was recommended that, in order to address this legal confusion, steps needed to be taken to provide for an internationally agreed definition of trafficking in organs and to

⁴⁴ D Budiani-Saberi, S Columb, ‘A Human Rights Approach to Human Trafficking for Organ Removal’ (2013) 16 *Medicine, Health Care, and Philosophy* 897.

⁴⁵ See, for example, *In the Matter of Lufti Dervishi et al.* (Court of Appeals of Pristina) PAKR 52/14, 6 November 2015 (*Medicus* case). After a retrial in 2018 the Court again handed down convictions for human trafficking for the purpose of organ removal. See ‘Kosovo Convicts Two in Organ-Trading Trial’, *Balkan Insight*, 24 May 2018 <<https://balkaninsight.com/2018/05/24/kosovo-organ-trafficking-medicus-trial-verdict-05-24-2018/>> accessed 19 March 2019. Similarly, in a case of illicit organ removal in Costa Rica several defendants were convicted for human trafficking. See ‘Tribunal impone 12 años de prisión a exjefe médico de CCSS por extracción ilícita de órganos’, *La Nación*, 4 December 2017 <<https://www.nacion.com/sucesos/judiciales/tribunal-impone-12-anos-de-prision-a-exjefe-medico/ZZE4MSFWE5CRNAYUKICRTIDC5A/story>> (in Spanish) accessed 19 March 2019.

⁴⁶ It should be noted that in the academic literature different approaches have been proposed. It has, for instance, been suggested to draft an international legal instrument encompassing both organ trafficking and human trafficking for the purpose of organ removal, which, in addition to criminal enforcement measures, would require countries to address the organ shortage by adopting effective systems of organ procurement. See E Kelly, ‘International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter’ (2013) 54(3) *Boston College Law Review* 1317, 1341-1342. Other authors have proposed to focus more on tackling the root cause of the problem by promoting deceased and living organ donation and by, controversially, decriminalising organ purchase and sales. See F Ambagtsheer, W Weimar, ‘A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward’ (2012) 12 *American Journal of Transplantation* 571, 574; F Ambagtsheer, *Organ Trade* (Rotterdam, PhD dissertation Erasmus University Rotterdam, 2017), 173-184. Another proposal involves the development of an international legal instrument that specifically prohibits travelling abroad for illegal organ transplants. See T Adido, *Transplant Tourism. An International and National Law Model to Prohibit Travelling Abroad for Illegal Organ Transplants* (Boston: Brill, 2018), 170-174. See in this regard also D Martin et al. (n 21); A Manzano, M Monaghan, B Potrata et al. ‘The Invisible Issue of Organ Laundering’ (2014) 98(6) *Transplantation* 600, 602-603.

⁴⁷ Council of Europe/United Nations (n 9), 55.

develop a clear understanding of the connection between organ trafficking and human trafficking for the purpose of organ removal.⁴⁸ As a result, an *ad hoc* committee of criminal law experts was established to draft a Convention against Trafficking in Human Organs.

The Council of Europe Convention against Trafficking in Human Organs (henceforth: the Convention) was adopted on 9 July 2014, opened for signature on 25 March 2015, and entered into force on 1 March 2018. It is open for signature to member states of the Council of Europe and, upon invitation, also to non-members.⁴⁹ The Convention aims to supplement the prohibitions contained in international legal instruments on transplantation as they have been transposed in domestic transplant laws. More specifically, existing prohibitions would need to be harmonised and extended so as to cover the whole range of activities involving the illicit removal of organs and these prohibitions would need to be enforced by criminal sanctions.

3.2 Definition and scope of organ trafficking

More specifically, under the umbrella of “trafficking in human organs” the Convention requires countries to establish as criminal offences under their domestic law a broad range of acts related to illicit organ removal.⁵⁰ The centrepiece of the organ trafficking crime is the offence of “illicit removal of human organs”, defined as organ removal: (1) performed without the free, informed and specific consent of the donor or, in the case of the deceased donor, without the removal being authorised under its domestic law; or (2) where, in exchange for the removal, the donor or a third party has been offered or has received a financial gain or comparable advantage (Article 4.1). Other activities to be established as criminal offences include: (1) the implantation or other use of such an illicitly removed organ (Article 5); (2) the preparation, preservation, storage, transportation, transfer, receipt, import, and export of such an illicitly removed organ (Article 8); (3) the illicit recruitment or solicitation of a donor or a recipient (Article 7.1); (4) the offering and requesting of undue advantages to, or by, healthcare professionals or officials with a view to performing or facilitating such removal or implantation or other use (Articles 7.2 and 7.3); and (5) attempting to commit, or aiding or abetting the commission of, any of these criminal acts (Article 9). The Convention does not directly address the trade in organs, although it does address offering and receiving financial gain or comparable advantage in exchange for the removal of an organ (Article 4.1). No consensus was reached on the issue of criminal liability of organ donors or recipients in case they are found in breach of this provision. The issue was ultimately left open for the ratifying countries to decide.⁵¹

The Convention also provides for two provisions encouraging countries to consider establishing as criminal offences activities that relate to organ removal (Article 4.4) or

⁴⁸ Council of Europe/United Nations (n 9), 57-60.

⁴⁹ Council of Europe Convention against Trafficking in Human Organs (2015).

⁵⁰ Note that the Convention does not establish a succinct definition of organ trafficking as it was not possible to agree on one. See also C Huberts, ‘Un organe à quel prix? Genèse et analyse de la Convention du Conseil de l’Europe contre le trafic d’organes humains’ (2016) 96(6) *Revue de Droit Pénal et de Criminologie* 605; A Pietrobon, ‘Challenges in Implementing the European Convention against Trafficking in Human Organs’ (2016) 29 *Leiden Journal of International Law* 485, 487.

⁵¹ Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs, para 29.

implantation (Article 6) performed outside the domestic transplant systems or in breach of essential principles of domestic transplant regulations.

As to the provisions regarding sentencing, the Convention requires sanctions for natural and legal persons to be effective, proportionate, and dissuasive.⁵² Natural persons found guilty of violation of Article 4.1, and, when applicable, Articles 5, 7, 8, and 9, are to be punished with a minimum penalty of at least one year of imprisonment. This is, more specifically, required to provide for the possibility of extradition.⁵³ A legal person liable under Article 11 can face criminal, administrative or civil sanctions. Countries are provided with the flexibility to introduce higher penalties, including through the establishment of aggravating circumstances.⁵⁴ In assessing a sentence, courts are allowed to consider previous sentences imposed by foreign courts.⁵⁵

3.3 Differences with human trafficking

As will be discussed in the following Section, the provisions related to illicit organ removal and illicit recruitment or solicitation may overlap with the human trafficking framework when an intervention upon a living organ donor is involved. However, contrary to the human trafficking framework, the Convention also covers additional acts. For instance, illicit organ removal from deceased donors is covered under organ trafficking but not under human trafficking, unless a living donor was trafficked first and subsequently died as a result of the organ removal.

In addition, activities performed with the illicitly removed organ, such as its preparation, transportation, and implantation, will not be covered under human trafficking. An exception may exist with regard to the use of an illicitly obtained organ if that organ was removed from a victim of human trafficking. In accordance with the international legal instruments on human trafficking that have been issued at the European level, countries may consider adopting measures that allow the prosecution of anyone who knowingly uses services provided by a person who is a victim of trafficking.⁵⁶ Here the primary end user will be the organ recipient, who knowingly purchases an organ removed from an exploited organ donor. In addition, it may be possible to prosecute other end users, for example owners of transplant clinics who did not directly participate in the trafficking process (e.g. the recruitment and use of illicit means to control a victim) but rather benefited from having victims delivered to their facility for the purpose of organ removal. Similarly, a person who knowingly performs an activity with the illicitly removed organ from a victim of human trafficking might still be criminally liable, for instance under the domestic criminal law provisions related to accessories or conspiracy, or under the criminal law provisions that apply to domestic transplant regulations.

Moreover, as indicated, the Convention also covers transplant activities that are performed outside the domestic transplant systems or in breach of essential principles of transplant law.

⁵² Council of Europe Convention against Trafficking in Human Organs, Article 12.

⁵³ European Convention on Extradition (1957), Article 2.

⁵⁴ Council of Europe Convention against Trafficking in Human Organs, Article 13.

⁵⁵ Council of Europe Convention against Trafficking in Human Organs, Article 14.

⁵⁶ Council of Europe Convention on Action against Trafficking in Human Beings, Article 19; Directive 2011/36/EU, Article 18(4).

Because of the exclusive focus on domestic transplant regulations, no similar provision can be found in the human trafficking framework.

When we compare the sanctions prescribed by the Convention for the illicit removal of an organ with the sanctions for the illegal removal of an organ in the context of human trafficking that have been outlined above, the difference seems significant. However, when several organ trafficking charges are brought collectively, or if a single offence would carry a higher penalty than one year of imprisonment, criminal sanctions may in fact be comparable with the sentencing regime that applies to human trafficking.

3.4 The implementation of the Convention in national law

Currently, 24 countries have signed the Convention, of which 7 have already ratified it, after implementing its provisions in their national legislation.⁵⁷ Of those countries that have implemented the Convention or are in the process of implementation, three approaches can be discerned. Some countries, such as the Czech Republic, already had in place very detailed criminal law provisions on illicit organ removal and therefore did not find it necessary to make changes. Other countries, such as Italy, have introduced in the criminal code one general article on organ trafficking that follows the one on human trafficking.⁵⁸ Still other countries, such as Belgium, have opted for an exhaustive list of new criminal law provisions closely resembling the different provisions of the Convention.⁵⁹

The few examples of dedicated organ trafficking provisions that are already available indicate that countries have taken the opportunity to introduce penalties that are considerably higher than the ones that already applied to illicit organ removal in their transplant legislation or criminal code. For instance, where in Italy the punishment for illicit organ removal, as indicated in the transplant law, had been imprisonment for a term of three months to one year, the new article on organ trafficking in the criminal code allows for imprisonment for a term of three to twelve years.⁶⁰ Similarly, in Belgium the new provisions on organ trafficking in the criminal code stipulate that illicit organ removal is punishable with five to ten years of imprisonment, whereas the applicable provisions in the transplant law stipulated a term of imprisonment of between three months and one year.⁶¹

4. Overlaps between the human trafficking and the organ trafficking frameworks

4.1 Overlaps in scope

The Convention introduces four standalone offences (Articles 4.1, 4.4, 6 and 7.1) and five offences involving activities committed in connection with the relevant stand-alone offence (Articles 5, 7.2, 7.3, 8 and 9). As indicated earlier, some of these offences can correspond with provisions on the illegal removal of an organ as defined by human trafficking law.

⁵⁷ See for the list of ratifications <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=czzYGs7r> accessed 19 March 2019.

⁵⁸ Italy, Criminal Code, Article 601bis.

⁵⁹ Belgium, Criminal Code, Articles 433novies/1 to 433novies/10.

⁶⁰ Italy, Law on the Transplantation of Kidneys between Living Persons, Article 7; Italy, Criminal Code, Article 601bis.

⁶¹ Belgium, Law on the Removal and Transplantation of Organs, Article 17, §3; Belgium, Criminal Code, Articles 433novies/1.

Consequently, in a situation where a living organ donor is the subject of an illicit organ removal, human trafficking and organ trafficking frameworks can overlap. Importantly, both frameworks rely on similar principles in determining the crime of illicit organ removal (i.e. the lack of valid consent and the presence of a monetary gain in exchange for an organ).

Moreover, the design of the crime of illicit organ removal under the organ trafficking framework resembles to a considerable extent the one that applies to the crime of human trafficking for the purpose of organ removal. More specifically, the Convention breaks down the three element definition of human trafficking and addresses the following illicit conduct as stand-alone offences: (1) the recruitment and solicitation (cf. the act element in human trafficking) of a person with a view to illicit organ removal, to the extent that recruitment and solicitation were carried out for financial gain; and (2) organ removal where abuse is made of a person's position of vulnerability by offering financial gain, or where consent is invalidated by other means (cf. the means element in human trafficking).

When we compare the provisions of the Convention with those that have been introduced by the international legal instruments on human trafficking, it becomes clear that a direct overlap will arise in three scenarios: (1) removal of an organ from a living donor without valid consent; (2) removal of an organ from a living donor who is persuaded into donating in exchange for financial gain or comparable advantage; and (3) solicitation or recruitment of a living donor for financial gain or comparable advantage. In what follows, these scenarios will be discussed in more detail.

4.2 Removal of an organ from a living donor without valid consent

The first scenario occurs when an organ was removed from a living donor without that person's valid consent. In investigating an (alleged) case of removal of an organ from a living donor without that person's valid consent, both the Convention and the international legal instruments on human trafficking subject the possible consent of the donor to a specific test.

Where consent was given, the crime can still be established if it can be shown that consent was irrelevant (human trafficking) or invalid (organ trafficking). As to human trafficking law, consent is considered irrelevant when one of the means listed in the definition of human trafficking has been used. Once the three elements of the human trafficking offence are established, including the illicit means used to recruit and exploit a person, an organ donor is considered to be a victim, regardless of whether that person had consented to the organ removal.

Similarly, in the context of organ trafficking the Convention provides criteria to verify the validity of consent. In accordance with the general principles of transplant regulations, consent is declared invalid where the removal is performed without the free, informed, and specific consent of the living donor.⁶² By default, where the consent of an organ donor is considered irrelevant under the human trafficking law, it will also be invalid according to the criteria provided by the Convention, since the use of the illicit means to recruit the donor (e.g.

⁶² The definition of consent in the Convention is modeled on the definition of consent as stipulated in Article 5 of the Convention on Human Rights and Biomedicine: "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time."

coercion, abduction, fraud, deception) to will make that person's consent involuntary and/or uninformed.

4.3 Removal of an organ from a living donor for financial gain or comparable advantage

The second scenario where both trafficking frameworks would be triggered concerns the removal of an organ from a destitute person who is persuaded into donating the organ by the promise of payment. Under the organ trafficking framework, this constitutes illicit organ removal since financial gain or comparable advantage was offered to the intended donor in exchange for the organ.⁶³ A violation can occur irrespective of the donor's consent. In a situation where the act element of the human trafficking definition is satisfied,⁶⁴ and a financial offer has been made that makes abuse of a position of vulnerability of the intended donor, this would also constitute a crime under the human trafficking framework.

Moreover, the overlap between the human trafficking and the organ trafficking framework can occur when financial gain has been offered to obtain an organ and the definition of human trafficking in domestic law does not contain the means listed in the international legal instruments on human trafficking, for instance because they are considered as aggravating circumstances. When this is the case the offence can be established under human trafficking law if there is a proof of intent to exploit someone by removing an organ and a proof of the act element (e.g. recruitment, harbouring, or transporting the organ donor). Such an act performed with the intent to illicitly remove an organ will also constitute an offence under the organ trafficking framework. Consequently, where the definition of human trafficking under national law does not contain the element of means, there could easily be an overlap with organ trafficking.

4.4 Solicitation and recruitment for financial gain or comparable advantage

The third scenario that may result in an overlap occurs when, irrespective of whether the organ removal is actually performed, a living organ donor was solicited or recruited for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party. Under the framework of organ trafficking, recruitment and solicitation are linked to providing financial benefits with a view to having a person's organ removed. Under the framework of human trafficking, the recruitment of an organ donor is listed under the act element of the definition and "is to be understood in a broad sense, meaning any activity leading from the commitment or engagement of another individual to his or her exploitation".⁶⁵

However, the mere act of recruitment of a living donor for financial gain does not in itself entail the crime of human trafficking. This will only be the case if during the recruitment process one of the coercive, deceptive or abusive means listed in the definition of human trafficking has been used. In practice, illicit recruitment of an organ donor most often involves

⁶³ Council of Europe Convention against Trafficking in Human Organs, Article 4.1(b).

⁶⁴ It could be argued that in case of illicit organ removal there will always be an element of an act as defined by the UN Trafficking Protocol. For instance, an organ donor will have to be admitted to some sort of medical facility for the organ removal, will have to be transported, and be harboured for several days before and after the surgery, either in a hotel, a safe house or a transplant clinic.

⁶⁵ Council of Europe/United Nations (n 9), 78.

abuse of that person's position of vulnerability and will indeed fall within the scope of human trafficking. As highlighted above, recruitment of a living donor for financial gain will also constitute human trafficking in countries where the illicit means listed in the international legal instruments on human trafficking are not retained in the domestic definition of that crime, but only if there is a clear intent of exploitation.

5. The choice of trafficking framework and its legal consequences

The exact extent of the overlap between the provisions on human trafficking and those on organ trafficking will greatly depend on how human trafficking offences (modelled on the UN Trafficking Protocol and, in Europe, on the human trafficking instruments issued by the Council of Europe and the European Union) have been transposed and are being interpreted at national level. Since definitions of human trafficking may vary greatly between countries, it may be challenging to establish clear boundaries between organ and human trafficking and to allow a criminal law approach that takes sufficient account of the often-precarious position of the donor.

Where abuse of a position of vulnerability is not introduced as an illicit means in the definition of human trafficking, it may be very difficult to prosecute for human trafficking in cases where the living donor had not been clearly subjected to coercion, deception or fraud. In this situation the offence of organ trafficking may be much easier to prove. Moreover, where abuse of a position of vulnerability is introduced, prosecutors and judges may diverge on how decisive they consider the donor's dire personal circumstances to be. If that person went along with the exploitation in the absence of overt physical coercion and having received money, it might be argued that the transaction was voluntary. Under such circumstances, it may be necessary to examine whether the donor had been in a position of vulnerability which was abused. If, for example, the donor was in a desperate economic situation with no real alternative but to accept the monetary offer, this would need to be treated as a case of human trafficking. However, if the economic situation of the donor is not considered to be sufficiently grave for the financial offer to be truly coercive, thus resulting in a lack of acknowledgement of an abuse of a position of vulnerability, it may prove impossible to establish the case as human trafficking.⁶⁶

Of similar importance are the attitudes and habits of prosecutors and judges. Since the core offence of organ trafficking consists of an act of illicit organ removal and the presence of a minimum of one out of two conditions (i.e. absence of valid consent, or offering financial gain or comparable advantage), establishing organ trafficking will often be easier than establishing human trafficking, which requires proof of three elements.⁶⁷ More specifically, in the absence of outright coercion it may be difficult to prove that one of the illicit means listed in the definition of human trafficking had been used to obtain the organ, especially

⁶⁶ Note, for instance, that the burden of proof as to the existence of a position of vulnerability may lie directly with the donor, who may have to demonstrate that all legitimate measures (e.g. social security aid; financial assistance from family and friends) had been exhausted that could have improved his or her socio-economic position.

⁶⁷ S Gawronska, 'A Critical Look at the Council of Europe Convention against Trafficking in Human Organs and What It Means for the Global Fight against Organ- and Transplant-Related Crimes' (2018) 8(3) *European Criminal Law Review* 313.

considering the uncertainty about the scope of the concept of abuse of a position of vulnerability. Due to these challenges and because prosecutors are already accustomed to prosecuting illicit organ removal under the criminal law provisions of domestic transplant legislation, the offence of illicit organ removal is more likely to be prosecuted as organ trafficking, even where it would also be a prosecutable offence under the human trafficking framework.

When the illicit activities outlined above would fall within the scope of both human trafficking and organ trafficking under national law, choosing to prosecute the case either as human trafficking or as organ trafficking can have major repercussions for the persons involved. Although recruiters, brokers, healthcare professionals, and anyone else involved in the exploitation can be held criminally liable under both frameworks, the applicable punishment will generally be less severe when the case is prosecuted as organ trafficking. As indicated above, because of its focus on the physical exploitation of a living person by way of coercive, deceptive or abusive means, human trafficking seems on average to carry higher penalties.

Importantly, the choice of trafficking framework will have the biggest impact on the organ donors themselves. Under the human trafficking framework donors who are considered victims of human trafficking will not be held criminally liable for accepting monetary or other benefits in exchange for an organ to the extent that they have been compelled to do so as a result of being trafficked. The fact that donors may even have taken the initiative by having advertised a willingness to sell an organ or by approaching a broker will be considered irrelevant if they have been subjected to one of the illicit means listed in the definition of human trafficking. As victims of human trafficking they will be entitled to protection from prosecution, to assistance in recovery, and to compensation.

By contrast, under the organ trafficking framework it remains unclear when an organ donor would be recognised as a victim entitled to protection or, on the contrary, whether that person could even be held criminally liable.⁶⁸ It can be argued that, where coercion or deception would have been used or clear abuse of a position of vulnerability would have been made, this would provide a solid basis to grant organ donors the status of victims of organ trafficking. This status may protect them from being prosecuted and may make them entitled to the same protective measures that apply to victims of human trafficking. However, the Convention leaves this matter open for the countries to determine in accordance with their domestic law. In this respect, it is important to note that in the criminal law provisions that already apply to domestic transplant regulations the sale and purchase of organs is an offence and that in those countries donors who have received payment will be at risk of prosecution. It is therefore readily conceivable that countries that implement the provisions on organ trafficking as stipulated in the Convention would keep the possibility to prosecute paid organ donors, potentially even when under the human trafficking framework that person might have been considered a victim.

⁶⁸S Columb, F Ambagtsheer, M Bos et al., 'Re-Conceptualizing the Organ Trade: Separating "Trafficking" from "Trade" and the Implications for Law and Policy' (2017) 30(2) *Transplant International* 209, 211; F Yousaf, B Purkavastha, 'Social World of Organ Transplantation, Trafficking, and Policies' (2016) 37(2) *Journal of Public Health Policy* 190, 194.

6. Conclusions and recommendations

As the first international legal instrument to address organ trafficking from a criminal law perspective, the Convention requires countries to elevate activities related to illicit organ removal to the rank of a criminal offence in a uniform and harmonised way. By including broader transplant-related offences, it aims to close loopholes that existed in international transplant regulations and to address limited scope of the human trafficking framework. However, in its attempt to supplement the human trafficking framework, the organ trafficking framework results in a considerable overlap since cases involving exploited living organ donors may be prosecuted under both. More specifically, the three scenarios presented above show that under certain circumstances the illicit removal of an organ from a living donor and the illicit recruitment and solicitation of a living donor infringe upon both the human trafficking and the organ trafficking framework. That legal analysis also showed that the extent of this overlap may vary from country to country.

Comparison of the human trafficking and the organ trafficking framework reveals that, while they both have the capacity to prosecute a wide range of stakeholders involved, the way in which illicit organ removal is defined under each framework has an impact on the prosecution of the crime and on the protection of those who have been harmed. However, there is limited guidance on which framework should be applied in scenarios where a living organ donor is directly involved in the crime. As a result, there is a real risk that the organ trafficking framework will be applied in a way that negatively impacts on organ donors and recipients, and on crime control in general.

Consequently, the question arises as how to effectively prosecute illicit organ removal without violating the human rights of the person whose organ has been removed. If illicit organ removal can be established as a human trafficking offence, that framework should be used as the primary tool. The human trafficking framework generally carries a more severe punishment for offenders and provides more comprehensive measures to protect and assist victims. In addition, the application of human trafficking law fits within the purpose of the Convention to supplement and not to replace that framework. If possible under the domestic legal system, secondary charges can then be brought under the organ trafficking framework. In this way, both frameworks can be applied in a harmonised way.

However, in light of the comparable ease which attends the establishment and prosecution of the crime under the organ trafficking framework, careful attention would need to be paid to the legal position of the organ donor. If the crime involves a living donor and that person's pre-existing vulnerability is evident but, because of problems in establishing the facts of the case, no charges were filed for human trafficking; it would be appropriate to take a victim-centred approach. In doing so, the organ trafficking framework could benefit from the suggestion, incorporated in the international legal instruments dealing with human trafficking, that the means that have been used to elicit the donor's collaboration always invalidate the possible consent given by that person. In this scenario both legal frameworks are used in a complementary way so as to effectively address prosecutorial challenges while still maximising the protection of the donor.

A situation might occur whereby illicit organ removal fails to be prosecuted as human trafficking and the abuse of a position of vulnerability, or the use of other subtle means, is not considered to be sufficient to invalidate the victim's consent. To address this possibility it is important to develop criteria to establish the victimhood of organ donors under the organ trafficking framework. In this regard, a clear understanding of the concept of abuse of a position of vulnerability, as introduced in the context of human trafficking, and of the concept of free and informed consent, as defined in transplant regulations, is important.

Despite the differences in how consent is framed and operationalised in the context of each trafficking framework, the common element is the requirement to assess whether an organ donor has been sufficiently informed about the organ removal and has consented voluntarily. During the evaluation of the facts to determine the type of crime, the consent test will play a key role. In this regard, when choosing to prosecute under one rather than the other trafficking framework, it could be useful to take into account the methods for testing the consent of the donor that are applied in the other trafficking framework. For example, when facts are analysed to establish whether an organ donor has been trafficked, criteria of valid consent derived from organ trafficking law could be used to determine if the victim had been properly informed and, consequently, whether the element of deceit can be established. Proof to that effect might be provided if the person had been given information in a language or in a manner that he or she could not understand; if the person was not informed of the possibility to withdraw consent at any time; or if the person had not given consent that was specific as to the nature of the organ that would be removed. Moreover, other essential requirements of transplant regulations could also be applied in the determination of the validity of consent, such as those that concern the evaluation of the donor's decision-making capacity or the involvement of independent medical experts or authorising bodies. On the other hand, if the facts are considered from the perspective of organ trafficking, the definition of human trafficking could provide additional criteria so as to ascertain that no illicit means had been used to ensure the collaboration of the victim. In that respect, the concept of abuse of a position of vulnerability may be especially useful.

As to the bigger question of avoiding misapplication of the two criminal law regimes when prosecuting illicit organ removal and related activities, it is of immense importance to strengthen the implementation of the human trafficking framework. Countries must revise their human trafficking laws to ensure that organ removal is included as a form of exploitation and to include all relevant illicit means that could be used to control an organ donor. Utilisation of the human trafficking framework, where possible, would avoid the risk that vulnerable organ donors are prosecuted, which is a real possibility under organ trafficking law. Moreover, strengthening the application of human trafficking law will also enable better fulfilment of one of the other main objectives of organ trafficking law, which is addressing the *de facto* immunity of medical professionals and other facilitators engaged in illicit organ removal.

In order to minimise the potentially adverse impact on vulnerable organ donors and to maximise the complementary operation of both legal frameworks, each jurisdiction should give proper consideration to the overlaps and the unresolved issues that have been identified

above.⁶⁹ Countries that wish to ratify the Convention should first conduct an analysis to preclude potential clashes of laws and inconsistencies in policy, and to determine the impact on prosecution and on the rights of the persons involved.

Finally, law enforcement officers, the judiciary, front line responders, policy makers, and medical professionals should be provided with proper training and guidance to help them in developing a clear understanding of the distinct nature of both crimes and of their respective roles and responsibilities under each framework. This should ensure that illicit organ removal is prosecuted under the most appropriate criminal law regime. To that aim, experts from both fields – human trafficking and organ trafficking – need to develop a working partnership to exchange information and to establish channels for cooperation that could benefit the implementation of both legal frameworks.

⁶⁹ In the light of the international dimension of most instances of organ trafficking and human trafficking for the purpose of organ removal, it should be noted that in order to maximise the complementary operation of both trafficking frameworks, international cooperation should also be improved. See L Kalb, S Negri, ‘The Criminal Justice Response to Organ Trafficking and Trafficking in Human Beings for Organ Removal’ (2017) 1(2) *Journal of Trafficking and Human Exploitation* 183-206.