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Double Prosecution of Illicit Organ Removal as Organ Trafficking and Human Trafficking, with the Example of Belgium

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Abstract
In 2015 the Council of Europe introduced a new criminal law convention to address organ trafficking. The main focus of the Council of Europe Convention against Trafficking in Human Organs is the crime of illicit organ removal. The act of illicit organ removal is also criminalised under international human trafficking instruments that consider it as a form of exploitation of a living organ donor. As both legal frameworks rely on two key concepts to determine if the respective crimes occurred, namely, valid consent to organ removal and the presence of monetary benefits, a clear overlap exists when an organ is removed from a living donor. The question arises as to whether the illicit organ removal, based on the same factual circumstances and material evidence, is sufficiently distinct for an offender to be prosecuted under both regimes simultaneously or in separate criminal proceedings, without violating the principle of ne bis in idem. This paper aims to answer that question by (1) examining the crime of illicit organ removal under both criminal regimes and (2) analysing Belgian criminal law frameworks on human trafficking and organ trafficking in the context of the applicability of the principle of ne bis in idem as developed by the European Court of Human Rights and the Court of Justice of the European Union. This analysis reveals the complexity of the issue. It also confirms the proximity of the legal definitions of both types of crimes, resulting in a considerable overlap and a clear risk of double prosecution and punishment. On the basis of these findings, recommendations are formulated on how to harmonise the application of both trafficking frameworks so as to minimise that risk.

Keywords Ne bis in idem · Double jeopardy · Organ trafficking · Human trafficking · Illicit organ removal

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Introduction

For patients who suffer from organ failure organ transplantation is the preferred, and sometimes the only, treatment. Although more than 150,000 transplants are performed worldwide, this represents less than 10% of the global need (Global Observatory on Donation and Transplantation 2020). Disparity between the need and supply of organs has resulted in patients trying to obtain an organ illegally. In 2007, the World Health Organisation estimated that 5 to 10% of all transplants worldwide were performed using an organ from the black market (Shimazono 2007). However, in the light of growing and ageing populations, the globalisation of unhealthy lifestyles, and increased mobility, current numbers might well be much higher.

Patients may try to buy an organ by soliciting a potential seller or, much more often, they rely on networks of recruiters and brokers. Generally, organ sellers are poor and vulnerable and only cooperate because they are coerced, deceived, or see it as a last resort to improve their precarious situation. They are recruited through advertisements in local newspapers or on the Internet, or they are approached by scouts who work for recruiters. Sometimes desperate individuals willing to sell an organ may themselves take the initiative and present directly to known recruiters. Organ sellers may receive anything between US$500 and US$10,000, if money is paid at all (López-Fraga et al. 2017; Pascalev et al. 2016). Taking into account that the patient pays between US$40,000 and US$200,000, it is clear that brokers, recruiters, and the collaborating healthcare professionals make huge profits, which makes illicit organ removal and transplantation one of the most lucrative illegal activities (Haken 2011).

As compared with other forms of organised crime, illicit organ removal and transplantation are exceptional in a number of ways. First, it requires the involvement of the medical profession and of healthcare facilities. Patients or criminal networks may try to use the services of the regular transplant systems by deceiving the medical professionals and the screening mechanisms. Alternatively, the criminal networks may include transplant surgeons and other healthcare professionals who operate clandestinely.

Second, illicit organ removal invariably results in a very serious violation of physical integrity and often also in considerable individual and public health risks. Many organ sellers report that their physical condition deteriorated significantly and that they also suffer from severe stigmatisation and depression (Goyal et al. 2002; Tong et al. 2012). Similarly, data of patients who illicitly received an organ reveal a higher frequency of complications, mainly attributed to severe infectious diseases, including antibiotic-resistant bacteria, which also pose a major public health threat (Anker and Feeley 2012; Inston et al. 2005).

Third, the crime has an ever expanding and a quickly changing geographical scope.[1] Patients may try to circumvent the prohibition of organ trade by travelling to countries where transplantation is poorly regulated or monitored, and where corruption is widespread. This

[1] For example, the *Medicus Clinic* case involved an international network of transplant surgeons, anaesthesiologists, other healthcare professionals, and brokers. From 2006 to 2008, this network recruited approximately 30 individuals from Moldova, Russia, Kazakhstan, Ukraine, and Belarus through coercion and false promises and transported them to the Medicus clinic, a private clinic in Pristina, Kosovo, for illicit kidney removal. There, a Turkish surgeon removed the kidneys and transplanted them into recipients coming from Canada, Germany, Israel, Poland, and the USA. In 2010, the EU Special Prosecution Office in Kosovo brought the case before court, resulting in 2013 in five convictions for human trafficking. The convictions against the two main defendants were upheld by the Court of Appeals in 2015. Pursuant to a decision of Kosovo's Supreme Court, a retrial was held in 2017, again resulting in convictions for human trafficking before the District Court. However, in 2018 the Court of Appeals cancelled that judgement and ordered a second retrial.

phenomenon of so-called transplant tourism typically involves the movement of patients from high- and middle-income countries to low-income countries where poor organ sellers are recruited and the surgical procedures take place. Alternatively, organ sellers may themselves be recruited in a third country, and travel to the country where the transplant centre is located (Shimazono 2007). Often transplant surgeons and brokers are also highly mobile, moving to new organ hubs when in former hubs the transplant laws become properly enforced. Countries in the Middle East, Western Europe, North America, and South East Asia have been identified as the main countries of origin of transplant tourists. Common destinations include Bangladesh, Costa Rica, Egypt, India, Lebanon, Pakistan, the Philippines, Sri Lanka, and Turkey (López-Fraga et al. 2017). As a result of war, political turmoil, natural catastrophe, and the refugee crisis, new organ hubs (e.g. Lebanon, Nepal) emerge and new types of vulnerable populations, including irregular migrants and refugees, are targeted (Parliamentary Assembly Council of Europe 2019a).

Four, the operational structure of the criminal groups which engage in illicit organ removal and transplantation is extremely flexible and complex. Illicit organ removal and transplantation may require the involvement of a large variety of actors, apart from organ sellers, patients seeking to obtain an organ, and healthcare professionals. The roles of these actors may not always be clearly delineated, and they may operate as part of ad hoc mobile networks without any clear criminal structure or, alternatively, they may belong to highly specialised and organised criminal groups (Budiani-Saberi et al. 2014; López-Fraga et al. 2017; Pascalev et al. 2016). These actors may include brokers who co-ordinate logistics, such as connecting to organ sellers, arranging the price, recruiting transplant surgeons and other healthcare professionals, preparing fraudulent documents, and arranging travel and accommodation. In addition, success often depends upon the support of a wide range of facilitators, such as officials in the health authority, hospital administrators, customs officers, embassy officials, police officials, local recruiters, drivers, translators, and minders, who accompany the recruited organ seller and act as enforcers.

Since the practice of illicit organ removal and transplantation was first reported in the 1980s, it has been consistently condemned by intergovernmental organisations such as the United Nations and the Council of Europe, and by professional organisations such as the World Medical Association and The Transplantation Society. The practice has proven very difficult to combat, notwithstanding a number of high-profile criminal cases that have hit the spotlight in recent years.[2] Both at the national and international levels, initiatives were taken to more effectively combat this type of crime by gradually closing the remaining legislative loopholes.

As a result, the removal of an organ without valid consent or in exchange for financial gain (illicit organ removal) is now prohibited in all countries.[3] This act is criminalised in the domestic Criminal Code or in the criminal provisions contained in domestic transplant regulations. At the international level the prohibition of illicit organ removal features in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15 December 2000, 2237 UNTS 319) (hereinafter Trafficking Protocol), and it is mirrored at

[2] See, for instance, State v. Netcare Kwa-Zulu Limited (South Africa), Medicus Clinic (Kosovo), Shalimov Institute (Azerbaijan & Ukraine), and more recent cases in Costa Rica, Egypt, Israel, and Spain (Council of Europe/United Nations 2009; López-Fraga et al. 2017; Organization for Security and Co-operation in Europe (OSCE) 2013; Parliamentary Assembly Council of Europe 2019).

[3] It should be noted that there is one exception, Iran, where a centrally organised organ market is in place.

European level in the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197, 16 May 2005) and the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, OJ L 101/1, 15 April 2011).

The Trafficking Protocol addresses various forms of exploitation, including organ removal. Article 3(a) defines human trafficking for the purpose of 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'.

In order to establish a crime of human trafficking for the purpose of organ removal all three elements of the definition must be present, including intent to exploit an organ donor by removing his or her organ(s). States bound by the Trafficking Protocol or the European human trafficking instruments have some flexibility in transposing the international definition of human trafficking into their domestic legislation. Consequently, there are some differences with regard to the composition and interpretation of its respective elements.[4]

Illicit organ removal is also criminalised by the international criminal law framework on organ trafficking, introduced by the Council of Europe Convention against Trafficking in Human Organs (Council of Europe Convention against Trafficking in Human Organs, CETS 216, 25 March 2015) (hereinafter Organ Trafficking Convention). Where it concerns a living donor, illicit organ removal is in that Convention defined as organ removal: (1) performed without the free, informed, and specific consent of that person or (2) where in exchange the living donor or a third party has been offered or has received a financial gain or comparable advantage (Article 4, §1). In addition, a number of other acts related to illicit organ removal also have to be criminalised as organ trafficking: (1) the implantation or other use of an illicitly removed organ (Article 5); (2) the preparation, preservation, storage, transportation, transfer, receipt, import, and export of an illicitly removed organ (Article 8); (3) offering of any undue advantage to, or requesting any undue advantage by, a healthcare professional, public official, or employee of a private sector entity to facilitate or perform such removal or use (Article 7, §2 and §3); (4) soliciting or recruiting donors or recipients, where carried out for financial gain or comparable advantage (Article 7, §1); and (5) attempting to commit, or aiding or abetting the commission of, any of these criminal acts (Article 9).

Since both the human trafficking and the organ trafficking frameworks deal with illicit organ removal, it is important to examine their differences and overlaps. The Organ Trafficking Convention was developed to address the limitations of the human trafficking framework in combatting activities involving the illicit removal of organs (Gawronska 2018; Gawronska 2019). For instance, the human trafficking framework only applies to illicit organ removal from living persons and does not cover illicit organ removal from the deceased. Moreover, since under the human trafficking framework the trafficked object is the person who is the victim of trafficking, it does not focus on manipulations (e.g. preparation, transportation, and implantation) of the organ itself after it was illicitly removed. Even more importantly, the

[4] In some countries the counter-trafficking instruments do not include organ removal as a form of exploitation (e.g., the USA) or, alternatively, organ removal is introduced as an aggravating circumstance (e.g., Belgium) (Allain 2014).

human trafficking framework only addresses illicit organ removal in the context of the outright exploitation of a person. When an organ was illicitly removed but the donor had not been subjected to any of the illicit means listed in the definition of human trafficking, that framework does not apply. This would, for instance, be the case when the donor has adequately consented to the organ removal and received a financial compensation. Finally, it proves very difficult to successfully prosecute cases of human trafficking in the absence of clear evidence that more direct illicit means (e.g. abduction, violence, threats to life) had been used to obtain the cooperation of a person with a view to having that person's organ removed. Because of these difficulties, persons who engaged in illicit organ removal may remain unpunished under the human trafficking framework. For these reasons, it was argued that an additional criminal law framework needed to be established so as to enable the prosecution of cases of illicit organ removal which would be difficult to prosecute as human trafficking (Huberts 2016; López-Fraga et al. 2014; Parliamentary Assembly Council of Europe 2019b).

By contrast, there is a clear overlap between the human trafficking and organ trafficking frameworks in that both may be applicable when an organ is illicitly removed from a living organ donor. The overlap exists because in order to establish the respective trafficking offences both frameworks rely on the absence of the donor's valid consent, or the presence of monetary benefits offered to a donor or to a person who is in control of a donor. In order for consent to organ removal to be valid it must be given freely by a fully informed organ donor, and it must be specific. Informed consent is a process that involves an assessment of the patient's competence to make decisions, followed by the disclosure of all relevant information and a verification that the patient comprehended the information. Consent should also be 'specific', which means that it must be clearly given with regard to an organ that is precisely identified. The Organ Trafficking Convention incorporates those requirements in Article 4, §1. Any form of undue pressure, coercion, or misinformation will render consent to organ donation invalid (Gawronska 2018; Huberts 2016; López-Fraga et al. 2014). Similarly, under the human trafficking framework consent to organ removal is nullified when it was obtained by way of coercion, fraud or deceit, or by abusing the donor's position of vulnerability (Ambagtsheer 2017; López-Fraga et al. 2017).[5]

With regard to giving monetary benefits to obtain an organ, the definition of human trafficking refers to 'the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'. This captures a situation where a person is 'sold' by traffickers to other traffickers who want to remove that person's organ. Another, more frequent scenario concerns the abuse of a person's 'position of vulnerability', which is also listed as an illicit means in the definition of human trafficking. More specifically, this involves organ donors from poor socio-economic backgrounds who feel compelled to accept a monetary offer for one of their organs in the hope to improve their precarious situation (Budiani-Saberi and Columb 2013; Tong et al. 2012). When such a financial offer would amount to abusing the donor's position of vulnerability, this makes the donor's consent irrelevant. Offering financial gain to a living donor or to a third party in exchange for organ removal will also constitute a breach of the Organ Trafficking Convention. Consequently, where means have been used that would trigger liability for human trafficking for the purpose of organ removal, including abuse of a position of vulnerability, the requirements of valid consent for organ removal will also have been violated, thereby triggering liability for organ

[5] Note that abuse of a position of vulnerability refers to "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse." (See United Nations Office on Drugs and Crime 2013).

trafficking. As a result, it is possible that the act of illicit organ removal can be prosecuted under both legal frameworks.

In this article, we will investigate how this possibility is addressed and what the consequences would be. More specifically, two scenarios will be examined. The first scenario concerns the simultaneous prosecution of a person for organ and human trafficking. The second scenario involves the prosecution of a person for organ trafficking on the basis of facts for which that person was previously convicted for human trafficking, or vice versa. Here attention will be paid to the principle of *ne bis in idem*. By way of clarification we will use as an example the criminal law approach taken in Belgium. Although Belgium has not yet registered any cases of organ trafficking or human trafficking for the purpose of organ removal, it has implemented all binding international criminal law instruments on human and organ trafficking and is one of the first countries to have in place comprehensive and up-to-date criminal law frameworks on both sets of crimes. Our legal analysis demonstrates that alleged traffickers are at considerable risk of double prosecution, which depends on a number of factors, including (1) the scope of the principle of *ne bis in idem* as defined by international legal instruments and courts; (2) the domestic courts' legal qualification of the crime of illicit organ removal; (3) the possibility that new material facts have come to light; (4) the prosecutorial policies towards certain categories of persons involved in illicit organ removal, including organ sellers and recipients; and (5) whether earlier foreign judgements are officially recognised. Noting that Belgium has a civil law system that closely resembles the systems in place in other European civil law countries, many of our findings may also be applicable to other countries.

Human Trafficking for the Purpose of Organ Removal and Organ Trafficking in Belgian Law

Criminal law provisions on human trafficking were introduced in the Belgian Criminal Code in 2005 and have been elaborated and strengthened in 2016 and 2019. The crime of human trafficking is defined by Article 433*quinquies* as the 'recruitment, transport, transfer, housing and sheltering of a person and the taking or transfer of control over that person' for one of the purposes listed later in the Article. The purpose that is relevant to our analysis refers to 'the exploitation by the removal of organs or human body material' (Belgian Criminal Code, Article 433*quinquies*, §1, 4°). Human trafficking is punished with imprisonment of between 1 and 5 years and with a fine ranging from €500 to €50.000, to be multiplied by the number of victims.

In addition, Articles 433*sexies* to 433*octies* list a number of aggravating circumstances. Several of these circumstances are particularly relevant in the context of human trafficking for the purpose of organ removal. These include (1) trafficking committed by abusing the vulnerable state in which a person finds him or herself, (2) trafficking committed by the use of threats, coercion, fraud or deception, (3) trafficking that intentionally or through gross negligence endangers the life of the victim, and (4) trafficking that results in the complete loss of an organ or of the use of an organ. In these circumstances, the penalty range is extended to imprisonment of between 10 and 15 years and a fine ranging from €1000 to €100,000 (Belgian Criminal Code, Article 433*septies*). If human trafficking results in the death of the victim, this is punishable with imprisonment of between 15 and 20 years and a fine ranging from €1000 to €150,000 (Belgian Criminal Code, Article 433*octies*).

In May 2019, Belgium adopted a Law on Trafficking in Human Organs, implementing the Organ Trafficking Convention (Law of 22 May 2019 on Trafficking in Human Organs). The Law introduced a Chapter on trafficking in human organs in Book II of the Criminal Code. The potential overlap that would occur with the provisions concerning human trafficking is positioned within new Article 433*novies*/2, which criminalises anyone who removes an organ from a living person 'without the free, informed, and specific consent of that person' or 'when, in exchange for the removal of the organ, that person or a third person, directly or indirectly, has been proposed, offered, promised or has received a financial gain or comparable advantage, even if the person has consented to the removal'. The applicable punishment is imprisonment of between 5 and 10 years and a fine from €750 to €75.000. Penalties are increased to imprisonment of between 10 and 15 years and a fine ranging from €1000 to €100,000 for aggravated organ trafficking. Aggravating circumstances include (1) organ trafficking committed by a person who abused the authority or facilities conferred by his or her functions, (2) organ trafficking committed against a particularly vulnerable person, (3) organ trafficking that intentionally or through gross negligence endangers the life of the victim, and (4) organ trafficking that has a serious negative effect on the physical or mental health of the victim (Belgian Criminal Code, Article 433*novies*/9). If organ trafficking results in the death of the victim, this is punishable with imprisonment of between 15 and 20 years and a fine ranging from €1000 to €150,000 (Belgian Criminal Code, Article 433*novies*/10).

Concurrent Prosecution for Human and Organ Trafficking

An ideal concurrence of offences occurs when a single criminal act is split into two or more offences. A person who engaged in the illicit removal of an organ from a living person may have committed an act that in Belgium can be qualified respectively as human trafficking for the purpose of organ removal and as organ trafficking. Consequently, a situation may arise where that person is simultaneously prosecuted for both human trafficking and organ trafficking.

Whether charges are accepted for both types of offences will depend on the appreciation of the criminal court judge. Allegations of crimes such as human trafficking and organ trafficking will in Belgium first be examined by an investigating judge. The investigating judge refers the report of his or her findings to the counsel chamber or, for the most serious crimes, to the chamber of indictment. These chambers consist of a judge or, respectively, a panel of three judges overseeing the judicial investigations and deciding on whether sufficient indications of guilt exist to bring criminal charges. The counsel chamber or the chamber of indictment defines the charge in the act of referral to the criminal court. A certain fact—in this case illicit organ removal—can give rise to one charge or to multiple charges (i.e. organ trafficking and human trafficking). However, the qualification indicated in the act of referral is only provisional, because the criminal court is expected to examine the facts submitted for legal determination against all possible legal qualifications. Hence, the criminal court has the last word on determining the types of offences that express the actual conduct (Court of Cassation 17.09.2013, P.12.1724.N; Declercq 2014; Deruyck 2017; Verstraeten and Verbruggen 2018). If criminal proceedings are initiated under the assumption that a given act violates organ trafficking law, the criminal court judge can be of the opinion that the same act also constitutes the crime of human trafficking, if these crimes are regarded as procedurally indivisible, given that they arise from the same material acts (Belgian Criminal Code, Article 65, §1).

In accordance with Article 65, §1, of the Criminal Code, when there is a single act that results in several offences or when there is a plurality of acts that are the successive execution of one and the same criminal intention, the criminal court has to pronounce the most severe sentence (Court of Cassation 02.12.1992, *Arr.Cass.* 1991–92, 1379; Court of Cassation 28.09.1993, *R.Cass.* 1993, 241). For example, consider the hypothetical situation of a driver who transports a person to a hospital for the purpose of having that person's organ illicitly removed by a physician. In that case, the driver could be charged with the crime of human trafficking within the meaning of Article 433*quinquies*, §1, of the Criminal Code. If the organ was indeed illicitly removed and the driver could be reasonably expected to be aware of this, that person could be charged with aggravated human trafficking under Article 433*septies*, §1, 5° of the Criminal Code. However, the same material acts—in this case, the transport of the victim—could also be prosecuted under the Chapter of organ trafficking (Verstraeten 2012). This is because, in this case, the transport could be qualified as facilitating the illicit removal of organs, which is criminalised by Article 433n*ovies*/6, §1, of the Criminal Code. If the organ was illicitly removed, the driver will be punishable for aggravated human trafficking with imprisonment of between 15 and 20 years and a fine ranging from €1000 to €150,000. At the same time, that person will be liable for facilitating organ trafficking, which is punishable with imprisonment of between 1 and 5 years and with a fine from €500 to €50.000. Most likely, the criminal court will convict the driver for aggravated human trafficking and for facilitating organ trafficking, pronouncing the most severe punishment applicable, which is the one concerning aggravated human trafficking.

Perhaps a more likely hypothesis is that of a crime involving several acts. As another hypothetical example, reference could be made to the physician to whom a patient is transferred, who then proceeds to remove an organ in exchange for money. This case does not involve a single act, but a plurality of acts: on the one hand, 'taking control over the victim' (which constitutes human trafficking within the meaning of Article 433*quinquies*, §1, of the Criminal Code) and, on the other, 'illicit organ removal' (penalised under Article 433*novies*/2 of the Criminal Code). There is a possibility that the criminal court judge would rule that these punishable acts are interrelated through a common intention, objective, and execution and that they should therefore still be regarded as a single act (Court of Cassation 19.04.1983, *Arr.Cass.* 1982–83, 451; Court of Cassation 08.02.2012, P.11.1918.F; Deruyck and De Nauw 2017). Since the intervention will have resulted in the complete loss of an organ, the physician will be liable for aggravated human trafficking, punishable by imprisonment of between 10 and 15 years and a fine ranging from €1000 to €100,000. Similarly, since it can be argued that the illicit organ removal will have a serious negative effect on the physical health of the victim, the physician may also be liable for aggravated organ trafficking, which is punishable with the same penalties. It should be pointed out that the 2019 Belgian Law on Trafficking in Human Organs is exceptional in that it introduced levels of punishment that correspond to the ones that apply to human trafficking for the purpose of organ removal. By contrast, in many other European countries, especially in those that have not yet implemented the Organ Trafficking Convention, penalties for illicit organ removal will be significantly lower. For example, the minimum penalty for organ removal without valid consent is a fine in Germany, and the minimum penalty for offering or receiving a financial gain in exchange for organ removal is a fine in the UK (German Law on the Donation, Removal, and Transfer of Organs and Tissues, §19(1); Human Tissue Act 2004, Section 32(4)). If the aforementioned case would be prosecuted in one of these countries, it can be expected that the penalty for (aggravated) human trafficking will always be the one that is imposed.

In sum, a criminal court judge who has established that concurrent human trafficking and organ trafficking charges have emerged either from a single material act or, alternatively, from a plurality of acts that are bound by the same criminal intention, would be required to apply the heaviest penalty. Importantly, the principle of *ne bis in idem* will not be compromised in these cases. Both the Belgian Court of Cassation and the European Court of Human Rights ruled that this principle would not be violated if the criminal court judge were to sentence the accused to a single penalty on account of combined acts (Court of Cassation 31.10.2000, *Arr.Cass.* 2000, 589; ECHR 30.07.1998, 84/1997/868/1080, Oliveira v. Switzerland; ECHR 24.06.2003, 65831/01, Garaudy v. France; ECHR 25.09.2003, 70579/01, Maier v. Austria). If illicit organ removal is considered to constitute two different offences, and is prosecuted in one criminal proceeding or even simultaneously by different courts, it would be impossible to claim that the accused is prosecuted several times for an offence for which he or she has already been finally acquitted or convicted. If, however, illicit organ removal is prosecuted under human trafficking and organ trafficking laws in separate criminal proceedings, it will be possible to establish violation of *ne bis in idem* if one set of proceedings was concluded before the other.

Consecutive Prosecution for Human and Organ Trafficking

The Principle of *ne bis in idem* in International Law

Although it is clear how concurrent criminal proceedings for human trafficking and organ trafficking should be addressed, the same is not true for consecutive criminal proceedings for human trafficking and organ trafficking. The reason is that conducting consecutive criminal proceedings may violate the *ne bis in idem* rule. This rule is one of the most fundamental principles of criminal law and prohibits repeat prosecution and punishment of an offender for the same act. From a criminal procedural perspective, the principle of *ne bis in idem* emerges from the principle of binding force in criminal proceedings (De Wolf 2017). If a ruling were to be issued for a second time concerning the same acts and the same person, this would jeopardise the validity of the first judicial ruling (Hoet 2004), in this way undermining legal certainty. The principle of *ne bis in idem* is introduced in Constitutions or in domestic statutory law. It is also enshrined in international human rights instruments, such as in Article 14, §7, of the International Covenant on Civil and Political Rights; Article 4, §1, of Protocol No. 7 to the European Convention on Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union; and Article 54 of the Convention Implementing the Schengen Agreement (CISA), enforced by the Annex to the Treaty of Amsterdam.

The European Court of Human Rights has ruled that Article 4, §1, of Protocol No. 7 is not restricted to the right not to be punished twice but extends to the right not to be tried twice for the same offence (ECHR 29.05.2001, 37950/97, Fischer v. Austria; ECHR 10.02.2009, 1493/03, Zolotukhin v. Russia). The Court of Justice of the EU reached the same opinion with regard to the conditions introduced by article 54 of CISA.[6] Similarly, both Courts specify that the principle of *ne bis in idem* only becomes relevant when a prosecution is initiated after

[6] The Court of Justice ruled that Article 54 CISA must be interpreted in the light of Article 50 (CJEU 29.06.2016, C-486/14, Kossowski), and it was concluded that differences, especially with regard to the enforcement criteria, are compatible with Article 50 (CJEU 27.05.2014, C-129/14 PPU, Spasic).

earlier criminal proceedings have been finalised and its sanctions have been executed or are being enforced (ECHR 10.02.2009, 1493/03, Zolotukhin v. Russia). However, although the principle of *ne bis in idem* appears to be straightforward, there is considerable uncertainty as to its exact implications.

Case law of the European Court of Human Rights reveals considerable inconsistency in interpreting the meaning of 'the same offence' when determining breach of the principle of *ne bis in idem*. More specifically, a variety of approaches have been applied, focusing either on (1) the identity of the facts irrespective of their legal characterisation (the 'same conduct') (ECHR 23.10.1995, 15963/90, Gradinger v. Austria), (2) the similarity of the legal classification of the act (ECHR 30.07.1998, 84/1997/868/1080, Oliveira v. Switzerland), or (3) the existence of 'essential elements' common to both offences (ECHR 29.05.2001, 37950/97, Fischer v. Austria).

In the face of this uncertainly, the European Court of Human Rights stated in *Zolotukhin v. Russia* that the approach which favoured the legal classification of the two offences was too restrictive. The Court concluded that Article 4, §1, should be understood as prohibiting the prosecution or trial of an individual for a second offence in so far as it arose from identical facts or facts which were 'substantially' the same as those underlying the first offence. In order to determine whether the facts in both proceedings were identical or substantially the same, it would be necessary to compare the statements of fact concerning the offence for which the applicant had already been tried with those concerning the offence of which he or she stands accused. With regard to a consecutive criminal trial, the European Court of Human Rights emphasised that it was irrelevant which parts of the new charges were eventually upheld or dismissed in the subsequent proceedings, because Article 4, §1, contains a safeguard against being tried in new proceedings, rather than a prohibition of a second conviction. The Court held that in order to know whether a new criminal proceeding would be allowed, it should first be ascertained that there is a difference between the set of factual circumstances—that involve the same defendant, are inextricably linked in time and space, and must be demonstrated in order to secure a conviction or institute criminal proceedings—which established the first conviction and the set of factual circumstances considered for the new trial.

The issue of what is meant by 'the same offence' was also considered by the Court of Justice of the EU. More specifically, the question was whether 'the same acts' as referred to in Article 54 of CISA should be interpreted according to (1) the criterion of the same material facts (factual interpretation), (2) the criterion of the similarity of legal qualification, or (3) the issue of whose legal interest is protected. In *Gözütok and Brügge*, the Court stated that only the same facts should be taken into account (CJEU 11/02/2003, C-187/01 and C-385/01, Gözütok and Brügge). This was confirmed in the *Van Esbroeck* ruling (CJEU 09.03.2006, C-436/04, Van Esbroeck). This case concerned a Belgian citizen who was prosecuted twice in two different countries for drug trafficking. In Norway he was convicted and served a prison sentence for the import of drugs. Upon his release he was prosecuted in Belgium for the export of the drugs as this was the place of origin of the drugs. The Court of Justice considered that to assess whether the unlawful acts of exporting from one state and importing into another state the same narcotic drugs are covered by the concept of 'same offence', 'only the nature of the acts in dispute and not their legal classification' should be taken into account.

Importantly, the Court of Justice interpreted Article 54 in the context of the principles of the Schengen agreement itself: freedom of moment, security, justice, and co-operation. It was reasoned that 'because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many

barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States' (Van Esbroeck, para 35). This indicated a real concern that a person would be prosecuted in multiple states for the same act while enjoying his or her right to free movement. It was concluded that in those circumstances, the only criterion that would be relevant for the application of Article 54 was identity of the material acts, which was to be understood as the existence of a set of concrete circumstances which are inextricably linked together. In subsequent judgements, the Court of Justice clarified that such an inextricable link does not require that the matter at hand (CJEU 28.09.2006, C-150/05, Van Straaten), or the facts (CJEU 18.07.2007, C-367/05, Kraaijenbrink) have to be identical, and that it does not depend solely on the intentions of the defendant.

The Principle of *ne bis in idem* in Belgian Law

The Belgian Court of Cassation has consistently ruled that the prohibition according to which an accused may not be re-convicted for an act for which he or she has previously been convicted constitutes a general legal principle (Court of Cassation 19.03.2002, P.00.1603.N; Court of Cassation 25.05.2011, P.11.0199.F; Court of Cassation 02.03.2016, P.15.0929.F). In Belgian criminal law, the principle of *ne bis in idem* has the same scope as the provisions of Article 4, §1, of Protocol No. 7 and Article 54 of CISA (Court of Cassation 17.02.2015, P.14.0201.N; Court of Cassation 24.04.2015, F.14.0045.N; Court of Cassation 22.03.2016, P.15.1067.N). It is generally accepted that the principle is applied only when the following conditions have been met: (1) a previous definitive final judgement of a criminal court in Belgium (or another party to CISA) has been issued (Court of Cassation 27.11.2007, P.05.0583.N), (2) the case concerns acts that are identical or substantially the same (Court of Cassation 24.06.2014, P.13.1747.N; Court of Cassation 22.03.2016, P.15.0736.N), and (3) the case concerns the same person (Court of Cassation 07.11.1995, P.94.0521.N; Court of Cassation 04.02.2003, P.02.0494.N).

With regard to a criminal prosecution for both human and organ trafficking, a violation of the *ne bis in idem* principle occurs in situations where a new criminal proceeding is initiated for acts that are identical to, or substantially similar as compared with, acts that have already been the subject of a final decision of a criminal court, meaning that the decision must no longer be subject to appeal (Court of Cassation 19.04.2006, *Arr.Cass.* 2006, 220; Court of Cassation 03.01.2007, *Arr. Cass.* 2007, 3). The decision of the first criminal court can result in conviction, acquittal, dismissal of the criminal charges (Declercq 2014), or suspension of the verdict (Court of Cassation 10.11.1975, *Arr.Cass.* 1976, 325). However, if the counsel chamber or the chamber of indictment were to decide to discontinue proceedings and not to refer the case to the criminal court, this would not prevent the reintroduction of prosecution at a later date for the same acts, on the condition that in the meantime sufficient indications of guilt have emerged to bring criminal charges for the same acts (Hoet 2004). Similarly, the fact that a final judicial decision is required also implies that a decision of the Public Prosecution to dismiss a case qualified as human trafficking would not hinder later criminal prosecution for the same acts, this time qualified as organ trafficking, since the Prosecutor's decision is not considered to be a final judicial decision (De Wolf 2017).

However, it is important to consider the meaning of the concept of 'final decision' (*res judicata*) as one of the conditions for establishing violation of *ne bis in idem* in the European supranational jurisprudence. In considering the question of reopening an investigation based on the same facts, this requirement will be analysed from two perspectives: (1) it should be

examined why the first criminal proceedings were closed and (2) it should be examined if the decision was final. The Court of Justice of the EU defines a 'final decision' as also including an extra-judicial settlement ('out of court') (CJEU 11/02/2003, C-187/01 and C-385/01, Gözütuk and Brügge), an acquittal for want of evidence (CJEU 28.09.2006, C-150/05, Van Straaten), or a conviction in absentia which was technically enforceable (CJEU 11.12.2008, C-297/07, Bourquain). Similarly, the European Court of Human Rights has developed a structured test (ECHR 20.07.2004, 50178/99, Nikitin v. Russia) to be applied to more complex cases—e.g. a supervisory review of judicial proceedings provided for under domestic statute. It can be concluded that if a decision was made to dismiss the case based on the merits of the case and on available evidence, reopening the investigation or continuing the investigation domestically or in another state would amount to violation of *ne bis in idem*.

Similarly, the principle of *ne bis in idem* becomes relevant when a person who has previously been convicted for acts qualified as human trafficking is subsequently prosecuted for the same acts, albeit under the qualification of organ trafficking, or vice versa. In practice, three scenarios may occur: (1) a new prosecution before a Belgian criminal court for acts for which the accused has previously been tried in Belgium, (2) a new prosecution before a Belgian criminal court for acts for which the accused has previously been tried in a non-Schengen and non-EU state, and (3) a new prosecution before a Belgian criminal court for acts for which the accused has previously been tried in a Schengen state, or in a non-Schengen but EU state. These scenarios will now be briefly discussed.

i. Consecutive prosecutions for acts of human trafficking or organ trafficking for which the accused has previously been tried in Belgium

The question remains of what Belgian criminal court judges are to do in light of the principle of *ne bis in idem* when they establish that due to a common intention, a human trafficking or, respectively, an organ trafficking charge that is brought before them also constitutes an organ trafficking or, respectively, a human trafficking offence that had been the subject of a final and binding decision from a Belgian criminal court.[7] In the theoretical case that new criminal proceedings would be considered under a different qualification, but in the absence of new factual elements, these new proceedings would be inadmissible because of a violation of the principle of *ne bis in idem*.

If, however, new facts have come to light that occurred before the earlier conviction and that were bound by the same criminal intention as the facts for which the accused had at that time been convicted, the situation is different. In the past, in such cases, criminal court judges were expected to declare the new criminal prosecution inadmissible, albeit on the condition that the offence brought before them occurred before the prior conviction (Beernaert, Bosly & Vandermeersch 2017; Court of Cassation 15 June 1999, *Arr.Cass.* 1999, 357). In 1994, however, Article 65, §2, of the Criminal Code was amended in the sense that in such a case the criminal court judge has to have a fresh look at the earlier conviction (Hoet 2004). If the judge were to deem the previous sentence to suffice as a proper penalty, a verdict stating the guilt of the accused would be issued, with a mere reference to the previously pronounced

[7] For example, consider the hypothetical case in which a person is prosecuted for the removal of organs, but the criminal court judge establishes that due to common intent, these acts constitute the extension of *other* acts that have previously been qualified as human trafficking and for which the accused has received a prior definitive conviction.

sentence (Court of Cassation 23.03.2016, P.16.0030.F). If, on the other hand, the criminal court judge would not consider the previously pronounced sentence to suffice in the light of the new facts, a different sentence could be imposed, on the condition that the entirety of the sentences does not exceed the maximum for the heaviest sentence (Belgian Criminal Code, Article 65, §2).

The Court of Cassation has repeatedly confirmed that in imposing an additional penalty, as appropriate, for these acts, a criminal court judge is not failing to respect Article 14, §7, of the International Covenant on Civil and Political Rights; Article 4, §1, of Protocol No. 7; and Article 54 of CISA (Court of Cassation 22.11.2006, P.06.0925.F; Court of Cassation 19.10.2011, *Arr.Cass.* 2011, 559; Court of Cassation 05.06.2012, P.11.1918.F). More explicitly, in 2018 the Court of Cassation ruled that when applying Article 65, §2, of the Criminal Code, a judge 'does not adjudicate or sentence the accused a second time for acts for which the accused has already been convicted or acquitted in accordance with the law and procedural law. The judge passes an additional sentence only with regard to acts brought before the court and for which the other judge has not rendered a verdict by ruling that the original sentencing was too lenient for the body of what has been and has yet to be adjudicated' (Court of Cassation 05.06.2018, P.17.1240.N/3). The Court sees nothing wrong with a criminal court judge who considers previously adjudicated acts in the current judgement, as this is necessary if the judge is of the opinion that the sentence that was passed previously is insufficient.[8]

In some cases, however, the opinion upheld by the Court of Cassation risks incompatibility with the interpretation of the principle of *ne bis in idem* given by the European Court of Human Rights and the Court of Justice of the EU. According to the Court of Cassation, taking the sentence imposed in a prior procedure into account does in itself not suffice for the application of this principle. However, in line with Article 65, §2, of the Criminal Code, violation of the principle of *ne bis in idem* may still occur if this provision is applied to acts that are part of a single body of facts, each of which is inextricably linked to the other (Audenaert 2018). Criminal court judges should therefore determine for each specific case whether the *ne bis in idem* requirement as interpreted by the European courts has been met and, where relevant, whether Article 65, §2, should be set aside.

ii. A new prosecution for acts of human trafficking or organ trafficking for which the accused has previously been tried in a non-Schengen and non-EU state

It is also necessary to consider the extent to which the *ne bis in idem* principle would impede a situation in which a person who has previously been convicted in a non-Schengen and non-EU state for acts qualified as human trafficking or, respectively, organ trafficking, is subsequently prosecuted for the same acts before a Belgian criminal court under the same qualification or for organ trafficking or, respectively, human trafficking.

Here, it is important to note that this situation is not intended in Article 14, §7, of the International Covenant on Civil and Political Rights and Article 4, §1, of Protocol No. 7. The wording of these provisions limits the application of *ne bis in idem* to the national level. It is possible then that one person can be tried twice for an offence in a different state even if he or

[8] It should be noted that in accordance with Article 99*bis* of the Criminal Code, Article 65, §2, of the Criminal Code only applies to convictions passed by Belgian criminal courts. The Belgian Constitutional Court has ruled that this does not violate the principle of equality before the law (Constitutional Court 16.01.2020, 6/2020 & 8/2020).

she has previously been convicted in another state (Trechsel 2005). This is irrespective of which law is applied to prosecuting illicit organ removal. The European Court of Human Rights, on multiple occasions, rejected complaints regarding the duplication of proceedings involving more than one country (ECHR 16.01.1995, 21072/92, Gestra v. Italy; ECHR 28.06.2001, 56811/00, Amrollahi v. Denmark; ECHR 18.12.2012, 45618/09, Sarria v. Poland). A decision to prosecute an offender for a second time using the same legal framework, or an alternative one, will ultimately lie within the discretional and prosecutorial powers of an individual state bound by Article 4, §1, of Protocol No. 7 and will not infringe on the *ne bis in idem* principle.

In short, the prohibition established in Article 14, §7, of the International Covenant on Civil and Political Rights and Article 4, §1, of Protocol No. 7 is applicable only to cases in which a person, following a previous definitive conviction or acquittal for particular acts, is prosecuted a second time for the same acts, but in the same state (Court of Cassation 26.07.2005, P.05.0767.N; ECHR 16.01.1995, 21072/92, Gestra v. Italy; ECHR 28.06.2001, 56811/00, Amrollahi v. Denmark; ECHR 22.05.2007, 35666/05, Böheim v. Italy; ECHR 18.12.2012, 45618/09, Sarria v. Poland; ECHR 04.09.2014, 140/10, Trabelsi v. Belgium; ECHR 20.02.2018, 67521/14, Krombach v. France). This implies that Belgian criminal court judges need not take into account the verdict of a foreign court with regard to the same accused concerning identical acts that were committed in part on Belgian territory or by or on a Belgian citizen abroad (Beernaert et al. 2017). Briefly stated, foreign criminal sentences for crimes committed in Belgium or by or on a Belgian citizen abroad are, at least in principle, not recognised. However, this standpoint no longer holds in all cases.

With regard to foreign criminal sentences passed in a country that is not a part of the Convention implementing the Schengen Agreement or of the EU,[9] Article 13 of the Preliminary Title of the Code of Criminal Procedure applies. According to this Article, a second prosecution in Belgium is ruled out if certain cumulative conditions have been met.

First, this provision applies exclusively to crimes situated completely in foreign territory. In contrast, prosecution before the Belgian criminal court judge would be able to proceed as soon as one of the constitutive components of the crime can be situated in Belgian territory (i.e. objective ubiquity) (Hoet 2004).

Second, prosecution before a Belgian criminal court is ruled out only if the foreign conviction was undergone by the party involved, if the period of limitation for the sentence has expired or if the accused has been granted a pardon or amnesty (Deruyck 2017). Assuming that the foreign conviction has not been implemented in full, prosecution in Belgium may take place on the condition that the custodial sentence served will be deducted from the custodial sentence passed by the Belgian court (Preliminary Title of the Belgian Code of Criminal Procedure, Article 13, §2).

Third, the final condition for impeding criminal prosecution in Belgium is that the crime for which an application has been made to the Belgian criminal court judge is identical to the crime involved in the ruling of the foreign criminal court (Beernaert et al. 2017). Note that this does not refer to identical acts, but to identical qualifications. Article 13 of the Preliminary Title thus does not pose an obstacle to a new criminal prosecution in Belgium for the same

[9] The Contracting Parties to the Convention implementing the Schengen Agreement are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

acts, as long as they are qualified differently (De Wolf 2017; Van den Wyngaert et al. 2019). More specifically, this means that if, for example, a Belgian citizen in Costa Rica transports a person to a local hospital for purposes of illicit organ removal and is subsequently convicted in Costa Rica for facilitating organ trafficking, this would not pose an obstacle to a new prosecution and possible conviction of this person upon returning to Belgium, albeit under the provisions of human trafficking.

iii. A new prosecution for acts of human trafficking or organ trafficking for which the accused has previously been tried in a Schengen state, or in a non-Schengen but EU state.

In cases involving decisions passed by criminal courts in other Schengen states, Belgian criminal courts should apply the previously discussed *ne bis in idem* provision in Article 54 of CISA (Court of Cassation 28.03.2001, P.99.1759.F). This Article replaces the regulations of Article 13 of the Preliminary Title with regard to the Schengen area (Hoet 2004). To impede a second criminal prosecution before the Belgian criminal courts, Article 54 of CISA requires that in cases involving sentences or measures that were imposed by criminal courts in other Schengen states, they must have been undergone or actually implemented, or it must no longer be possible to implement them based on the laws of the states in which they were passed (CJEU 18.07.2007, C-367/05, Kraaijenbrink; Constitutional Court 31.07.2008, 113/2008; Court of Cassation 29.04.2003, P.02.1459.N).

As indicated above, in accordance with the case law of the Court of Justice of the EU, the principle of *ne bis in idem* as contained in Article 54 of CISA does not require that the prosecuted crimes have the same legal qualification, but it does require that the material acts are identical. Equality of material acts is understood as the existence of a body of facts that are inextricably linked to each other through association in time, space, and object, regardless of the legal qualification of these acts or the protected legal interest. This interpretation was endorsed in several rulings of the Belgian Court of Cassation (Court of Cassation 28.03.2001, *JT* 2001, 631; Court of Cassation 12.01.2016, P.15.0514.N). Applied to the example above, this would imply that a Belgian citizen, who in Greece transports a person to a local hospital for purposes of illicit organ removal and is subsequently convicted in Greece (a Schengen state) of facilitating organ trafficking, can no longer be prosecuted in Belgium for the same acts, even under the provisions of human trafficking, given that a different legal qualification does not impede the application of the principle of *ne bis in idem*.

In this regard, it is also important to emphasise that the theory of 'collective crime' is not limited to the national context (Van den Wyngaert et al. 2019). For example, it is conceivable that a Belgian criminal court might rule that a crime of human trafficking committed in another Schengen country and a crime of organ trafficking committed in Belgium (or vice versa) are linked to each other through common intention, thus constituting equality of material acts. Double prosecution or conviction would be similarly ruled out in this case (Court of Cassation 27.11.2007, P.05.0583.N). Here it is important to note the issue of recognising judgements issued in another EU Member State. The Court of Justice of the EU considers that the applicability of Article 54 of CISA confirms a 'high level' of trust between the Member States with regard to recognising the transnationality of the principle of *ne bis in idem* (CJEU 11/02/2003, C-187/01 & C-385/01, Gözütok and Brügge). As to the mutual recognition of criminal sentences, for Belgium the rules are stipulated in the Law of 5 August 2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters

between the member states of the European Union (as amended by the laws of 26 November 2011 and 19 March 2012).

The situation will be similar when criminal sentences have been passed in EU Member States that do not belong to the Schengen area. For these states (i.e. Bulgaria, Croatia, Cyprus, Ireland, and Romania) Article 50 of the Charter is relevant and will effectively prohibit the second prosecution.

Issues Regarding *ne bis in idem* Involving Organ Donors and Recipients

Although the same rules also apply to the possible prosecution of donors and recipients for their involvement in illicit organ removal, there is an added complexity. Their legal position is much more diverse and, consequently, much less harmonised as compared with the one that applies to, for instance, healthcare professionals, brokers, recruiters, and facilitators. Under the Trafficking Protocol and the European human trafficking instruments, a person who is trafficked for organ removal is considered a victim. The European human trafficking instruments stipulate that victims of human trafficking should not be prosecuted or punished for their involvement in illicit activities that they were forced to engage in as a result of being trafficked (Council of Europe Convention on Action against Trafficking in Human Beings, Article 26; Directive 2011/36/EU, Article 8). When, for example, a person would be compelled to sell an organ as a direct consequence of being subjected to trafficking, that person should not be punished for organ sale. Although this principle is endorsed across Europe—including in Belgium (Belgian Criminal Code, Article 433*quinquies*, §5)—it may be less well-established elsewhere.

As regard the organ trafficking framework, the Organ Trafficking Convention leaves the determination of the legal position of the donors to the discretion of the states. In some countries, such as Belgium, these persons may be held criminally liable for selling an organ, in view of the fact that they may under certain circumstances be considered as instigators of the offence (Law of 3 June 1986 on the Removal and Transplantation of Organs, Article 17, §3). However, a number of other states, such as France and Portugal, do not criminalise organ donors for committing these offences or would under any circumstances refrain from prosecuting them, out of concern that these persons might be in a position of extreme vulnerability.

The legal situation of persons who receive an organ that was illicitly removed is similarly complex. The European human trafficking framework contains a non-binding provision encouraging states to consider the criminalisation of persons who knowingly make use of the services of victims of trafficking (Council of Europe Convention on Action against Trafficking in Human Beings, Article 19; Directive 2011/36/EU, Article 18). Currently, such a provision relating to persons who intentionally take advantage of the removal of another person's organs, when they know or should reasonably suspect that that person had been trafficked, has been implemented in only a few European countries, including the Netherlands (Dutch Criminal Code, Article 273f, §1, 7). As regard the organ trafficking framework, the Organ Trafficking Convention leaves it to the discretion of the states to determine the legal position of the recipients. As a result, in some countries, such as Belgium, Germany, and Spain, a person who accepts to be implanted with an organ that is trafficked may be held criminally liable (Belgian Criminal Code, Article 433*novies*/7; German Law on the Donation, Removal, and Transfer of Organs and Tissues, §17(2); Spanish Criminal Code, Article 156*bis*). This provision is dictated by concern that it is precisely the demand of the recipients,

and their willingness to pay criminal networks enormous sums of money, that fuels the black market. Other countries, such as Portugal, do either not criminalise the recipient or only do so when the recipient actively engaged in the solicitation and recruitment of the organ seller. This approach is based on the consideration that recipients who try to obtain an organ on the black market will normally have been driven by despair.

The different and sometimes vague approaches taken in the human trafficking and organ trafficking frameworks may have major legal consequences, such as (1) unequal standards of treatment of donors and recipients depending on the legal qualifications, and locations, of the individuals involved; (2) insufficient guidance on whether and, if so, how to take into account a situation of extreme vulnerability when assessing the possible criminal liability of donors and recipients; and (3) the risk that donors, who might otherwise have been considered victims of human trafficking, would be prosecuted for selling an organ when law enforcement authorities decide that a case of illicit organ removal would be easier to establish as organ trafficking than as human trafficking (Gawronska 2018; Gawronska 2019). The variety of approaches in addressing donors and recipients involved in illicit organ removal may also result in a higher likelihood that consecutive prosecutions are initiated and in a similar or an even more adverse outcome for these individuals as compared with the other parties involved in the illicit organ removal.

For instance, consider a hypothetical Belgian case of suspected illicit organ removal that had been qualified as human trafficking but—because it proves too difficult to establish all three constitutive elements of that crime (i.e. action, use of certain means and exploitative purpose)—is dismissed by the Public Prosecutor or discontinued by the counsel chamber or the chamber of indictment. When the prosecution would be reintroduced for organ trafficking—noting that this would only require the fulfilment of one out of two conditions (i.e. intended organ removal without valid consent, or intended organ removal in exchange for financial gain)—this could mean that the donor would risk imprisonment of up to 1 year for sale of an organ, whereas that person could have been guaranteed a victim status and non-punishment if the case would have been successfully initiated as human trafficking. In a similar way, the recipient of the organ, who knew that it had been removed under conditions of organ trafficking, would risk imprisonment of between 1 and 5 years, whereas no such provision would apply when the case would have been prosecuted as human trafficking.

Similar examples can be found with a more direct relevance for the issue of *ne bis in idem*. For instance, consider a hypothetical case of human trafficking for the purpose of organ removal where a Belgian court had acquitted an organ seller, under the presumption that that person had been compelled to engage in the organ sale and should have been regarded as a victim. When new facts come to light indicating that that person had instead taken the initiative for the sale, a new case can be brought against that person, possibly resulting in a conviction to a prison sentence. Or consider the hypothetical case of a Belgian organ seller or a Belgian recipient who has been acquitted in a human trafficking case that came before court in a non-Schengen and non-EU state, such as Costa Rica, but who would, upon their return to Belgium, still risk being prosecuted and convicted for organ sale and, respectively, organ trafficking. From the perspective of these individuals, and of the Costa Rican authorities, such an outcome would be highly controversial, especially if the organ seller was considered as a victim of human trafficking under Costa Rican law and the recipient as being in a position of extreme vulnerability. By contrast, if these persons would have been acquitted in a Schengen state, or in a non-Schengen but EU state, such as Greece, they can no longer be prosecuted in Belgium for

the same material acts, even under the provisions of organ trafficking, given that a different legal qualification does not impede the application of the principle of *ne bis in idem*.

Conclusions and Recommendations

A clear overlap in the legal composition of the crimes of human trafficking for the purpose of organ removal and organ trafficking has as a result that both frameworks may be applicable to the same factual circumstances of illicit organ removal. An analysis of the principle of *ne bis in idem* in cases of illicit organ removal that could be prosecuted under both criminal law frameworks revealed that the outcomes may vary. More specifically, the following factors are important: (1) whether the prosecution for human and organ trafficking is initiated concurrently or successively; (2) whether, for successive prosecutions, the final verdict was issued by a court in the same state and, if so, whether new facts have come to light; and (3) whether, for successive prosecutions, the earlier verdict was issued by a court in another state and, if so, whether an agreement of mutual recognition of judicial decisions exists.

In jurisdictions that have in place criminal law frameworks targeting human trafficking for the purpose of organ removal and organ trafficking, a person who has engaged in illicit organ removal can be prosecuted simultaneously for both crimes. In Belgium, the criminal court judge who is of the opinion that both trafficking offences arise from the same material acts or from material acts that are the expression of the same criminal intention has to impose the most severe punishment. This will normally be the one applicable to human trafficking.

By contrast, if a person who has engaged in illicit organ removal is prosecuted successively for human trafficking for the purpose of organ removal and for organ trafficking, the principle of *ne bis in idem* may come into play. This will be the case when the accused was convicted or acquitted in a criminal court decision that is final, that is recognised in the country where the new prosecution is initiated, and that involved factual circumstances that are identical or substantially the same as compared with the ones considered for the new trial. Consequently, a new prosecution may be allowed if the earlier verdict is not officially recognised or if new facts have come to light.

As to the latter circumstance, a criminal court may, as is the case in Belgium, reconsider the sentence pronounced in the earlier conviction when facts come to light that occurred before the earlier conviction and that had not been taken into account. However, there is some concern about the compatibility of this approach with the interpretation of the principle of *ne bis in idem* given by the European Court of Human Rights and the Court of Justice of the EU.

As to the former circumstance, a new prosecution for facts that are identical or substantially the same as the ones underlying the earlier verdict may also be allowed if that verdict is not final or officially recognised. This will be the case when the earlier verdict was issued in a country with which no agreement of mutual recognition of judicial decisions exists, such as a country that does not belong to the Schengen area or to the EU. In the absence of such an agreement, the decision to prosecute an offender for a second time is left to the discretion of the state. For instance, in Belgium the Code of Criminal Procedure indicates that in such a case a second prosecution can be initiated, unless the crime concerned was committed in its entirety abroad, has in addition the same legal qualification as the one involved in the ruling of the foreign criminal court, and finally also had resulted in acquittal or in a conviction to a sentence that had been completely undergone by the person concerned.

The demonstrated scenarios, where a second prosecution is possible because of the legal qualification of the act of illicit organ removal, or where new proceedings can be initiated for the same crime in another state under the same legal definition or an alternative one because of the national scope of the principle of *ne bis in idem*, may result in undesirable outcomes, including duplication of criminal proceedings, lack of equivalent protection for persons within the EU legal system and outside, and undermining of legal certainty aimed at protecting individuals from arbitrary treatment by the judiciary. Several steps may be taken to limit such a possibility.

First, in order to create judicial coherence in the application of both frameworks it would be worthwhile to follow the reasoning of the European supranational courts in determining what constitutes the element of *idem*, more specifically which conduct forms the basis of an offence for which the person concerned may already have been convicted or acquitted. Applying this reasoning to the crimes of organ trafficking and human trafficking for the purpose of organ removal, the common conduct that forms the constitutive elements of these (legally) different crimes are illicit organ removal, recruitment, and solicitation. Bearing this in mind, prosecutors should be mindful of those offences during their classification of the crime and during prosecution as an offender might otherwise be punished twice for having engaged in illicit organ removal.

Second, since human trafficking and organ trafficking crimes very often occur across national borders, the basic principles of criminal law should be applicable in a more homogeneous way when the prosecution of these crimes is considered. The principle of *ne bis in idem* may need to be standardised further, by making its interpretation and application even more transnational in scope, and by enhancing judicial cooperation and improving the recognition of foreign judgements. In addition, when a crime occurred in multiple states, attention should be paid to the choice of prosecuting state. Although settling a conflict of jurisdiction in criminal matters may not always be easy, it may be especially important to do so as a way to decrease the chance of double prosecution and punishment, considering that the Organ Trafficking Convention has the potential to become a global instrument.

For this reason, states which are considering joining that Organ Trafficking Convention but that are not part of the EU or Schengen area should carefully revise their human trafficking provisions in the light of their compatibility with this Convention. This revision should be performed in a way that ensures that the policy objectives are achieved without infringing upon the prohibition of double prosecution and punishment not only in technical terms but also in the spirit of the principle itself. International judicial cooperation in the prosecution of illicit organ removal should be encouraged and improved so as to allow states to verify whether an accused has already been prosecuted and punished under both or under one of the trafficking frameworks. This would make it easier to evaluate whether additional criminal proceedings, if allowed, would be in the public interest.

Lastly, bearing in mind that the decision as to how to prosecute illicit organ removal is left to domestic law, guidance on how best to prosecute illicit organ removal (i.e. as human trafficking or as organ trafficking) is urgently required (see de Jong and Ambagtsheer 2016; Gawronska 2019; Martin et al. 2016; Martin et al. 2019). This would prevent the emergence of systems of prosecution that are not harmonised and that lead to confusion in the administration of justice. This is especially relevant considering the diversity of approaches that exist towards the possible criminal liability of organ sellers and recipients, which might result in the highly unequal treatment of these individuals, depending on the domestic approach preferred. In that respect, members of the judiciary and law enforcement should receive proper training

regarding the possibility to prosecute illicit organ removal under the human trafficking and organ trafficking frameworks, so as to raise awareness of this overlap and to avoid double prosecution and punishment.

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