

# The Criminal Justice Response to Organ Trafficking and Trafficking in Human Beings for Organ Removal

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## I. The Key Role of International Cooperation in Criminal Matters in the Fight against Global Organ Trafficking

Trafficking in human organs (THO) and trafficking in human beings for organ removal (THBOR) are among the cruellest forms of organised crime of global concern.<sup>1</sup> These criminal phenomena represent the most obscure and least addressed forms of trafficking implying serious human exploitation and egregious violations of fundamental rights and the human dignity of the victims.<sup>2</sup>

Though frequently confused in public debate and even among the legal and scientific communities, THO and THBOR are different and separate crimes, as clearly explained in this volume<sup>3</sup> and in the reports issued by international

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<sup>1</sup> CoE, Parliamentary Assembly, Recommendation 1611 (2003) on Trafficking in Organs in Europe, 25 June 2003; UN, General Assembly resolution 59/156, Preventing, Combating and Punishing Trafficking in Human Organs, 20 December 2004; UN, Commission on Crime Prevention and Criminal Justice, Resolutions 23/2 (2014) and 25/1 (2016) on preventing and combating trafficking in human organs and trafficking in persons for the purpose of organ removal. On organ trafficking see especially the several publications by prof. Nancy Scheper-Hughes, as listed in her final contribution to this volume, 'Kidney Pirates: How to End Organ Trafficking'. See also Y. Shimazono, 'The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information', *Bulletin of the World Health Organization* 85 (2007): 955; L. Territo & R. Matteson, *The International Trafficking of Human Organs* (Boca Raton: CRC Press, 2012).

<sup>2</sup> They can also be considered as crimes against humanity: see N. Scheper-Hughes, 'Organ Trafficking: A Protected Crime?', *Al Jazeera Magazine*, November 2003, p. 13; S. Negri, 'Transplant Ethics and the International Crime of Organ Trafficking', *International Criminal Law Review* 16 (2016): 287, p. 303.

<sup>3</sup> See, in this volume, N.J. Siller, 'The Codification of Transplant-related Crimes in the Convention against Trafficking in Human Organs'.

organisations such as the United Nations (UN),<sup>4</sup> the Council of Europe (CoE),<sup>5</sup> the European Union (EU),<sup>6</sup> and the Organization for Security and Cooperation in Europe (OSCE).<sup>7</sup> In most cases, they both constitute transnational crimes<sup>8</sup> committed by organised criminal groups involving networks that operate across multiple countries. Such countries include those of origin of victims, recruiters, brokers, traffickers, organisers, facilitators, and organ recipients; countries where transplant centres, hospitals and clinics are located; and countries hosts to medical professionals such as anaesthetists, surgeons, nurses, and nephrologists.<sup>9</sup> This transnational criminal scenario also characterises transplant tourism when it implies the performance of illegal transplantations involving organ trafficking and/or transplant commercialism.<sup>10</sup>

In light of the fact that they affect all regions of the world and are not as marginal as the number of victims officially detected would suggest, THO and THBOR call for a robust and coordinated response from the international community at large. International cooperation in criminal matters is thus of crucial importance for the purpose of prosecuting organised criminal groups engaged in organ and human trafficking.

In this perspective, the aim of this paper is to provide a systematic and critical overview of the most significant cooperation mechanisms that specifically enhance and strengthen inter-State cooperation to combat THO and THBOR, while leaving aside 'general' regimes of international cooperation instituted by multilateral treaties on extradition and mutual legal assistance. To this end, our paper will explore the relevant international legal framework operating at both the global and regional levels (UN and CoE conventions and EU legislation addressing THBOR and THO), focusing on selected mechanisms and proce-

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<sup>4</sup> UN, Report of the Secretary-General to the Commission on Crime Prevention and Criminal Justice on Preventing, Combating and Punishing Trafficking in Human Organs, E/CN.15/2006/10, 21 February 2006; UNODC, Global Report on Trafficking in Persons (2012).

<sup>5</sup> CoE, Report by G. Vermont-Mangold, Trafficking in Organs in Europe, 3 June 2003; CoE-UN, Joint Council of Europe/United Nations Study, Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs, (2009).

<sup>6</sup> EU, European Parliament, Trafficking in Human Organs, Study by M. Bos (2015).

<sup>7</sup> OSCE, Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings, Occasional Paper Series no. 6 (July 2013).

<sup>8</sup> On the concept of transnational crime, see *infra* note 12.

<sup>9</sup> See, in this volume, M. del Mar Lomero-Martínez et al., 'Trafficking in Human Organs and Trafficking for Organ Removal: A Healthcare Perspective', especially Figure 1 on the modes of international organ trade and trafficking.

<sup>10</sup> However, it should be noted that transplant tourism is not illegal and may be acceptable in a few situations: firstly, if the recipient has a dual citizenship (in the countries of residence and destination) and wishes to undergo transplantation from a live donor who is a family member in the destination country; secondly, if the donor and recipient are genetically or emotionally related and wish to undergo donation and transplantation in a country not of their residence in order to gain access to better health services; and thirdly, if official regulated bilateral or multilateral organ sharing programs exist between or among States.

dures that facilitate the prosecution of traffickers in order to prevent impunity and avoid safe havens. A comparative analysis of the provisions regulating the initiation of criminal proceedings, investigations, jurisdiction and extradition will provide a critical assessment of the strengths and weaknesses of these co-operation mechanisms and the overall efficacy of the criminal justice response to organ trafficking and human trafficking for the purpose of organ removal.

## 2. International Conventions Instituting Cooperation Mechanisms Relevant to the Prosecution of THBOR and THO

### 2.1. The United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The most important multilateral convention for the prosecution of both traffickers in human beings for the purpose of organ removal and organ traffickers is the UN Convention against Transnational Organized Crime (UNTOC, hereinafter also Palermo Convention),<sup>11</sup> which is the major international treaty of global reach for the fight against transnational organised criminality.<sup>12</sup>

The UNTOC provides a global framework for international and regional cooperation in criminal matters, especially with regard to mutual legal assistance and asset recovery, establishing a strong legal foundation for countering the most common types of serious organised crime as well as emerging forms of such crime, like trafficking in human organs.

Broadly speaking, States Parties to the Convention commit themselves to taking a series of measures including the creation of domestic criminal offences, the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation, and the promotion of training and technical assistance for building or upgrading the necessary capacity of

<sup>11</sup> United Nations Convention against Transnational Organized Crime, adopted by UN General Assembly resolution 55/25 of 15 November 2000. It was opened for signature at a High-level Political Conference convened in Palermo (Italy) on 12-15 December 2000 and entered into force on 29 September 2003. It currently counts 189 Parties including the European Union.

<sup>12</sup> According to Article 3, paragraph 2, of the Convention, an 'offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.'

national authorities. The offences criminalised by the Convention are participation in an organised criminal group, laundering of proceeds of crime, money-laundering, corruption and obstruction of justice. Most of these offences are clearly related to THBOR and THO and can therefore be prosecuted along with human and organ trafficking.

The UNTOC is also supplemented by three additional Protocols which address trafficking in persons,<sup>13</sup> smuggling of migrants,<sup>14</sup> and illicit manufacturing and trafficking in firearms.<sup>15</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter Palermo Protocol) applies to the 'prevention, investigation and prosecution' of offences related to human trafficking, but only where these are 'transnational in nature' and involve an 'organised criminal group' as defined in the Convention.<sup>16</sup> It is the first global legally binding instrument which provides an agreed definition of trafficking in persons addressing all aspects of this crime. In fact, Article 3 defines 'trafficking in persons' 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 exploitation.' The concept of 'exploitation' includes 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or *the removal of organs*'. The intention behind this broad definition is clearly to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences supporting efficient international cooperation in the fight against THBOR.

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<sup>13</sup> UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by UN General Assembly resolution 55/25 of 15 November 2000 and entered into force on 25 December 2003. It is the most widely ratified Protocol, currently counting 172 Parties including the European Union. See N.J. Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (PhD Thesis, 2017).

<sup>14</sup> UN, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by UN General Assembly resolution 55/25 and entered into force on 28 January 2004.

<sup>15</sup> UN, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by UN General Assembly resolution 55/25 and entered into force on 3 July 2005.

<sup>16</sup> "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit' (UNTOC, Art. 2, subpara. (a)). See also *supra* note 12.

As to the relationships between the Palermo Protocol and Convention, Article 1 of the Protocol clarifies that the offences established in accordance with its provisions on criminalisation of trafficking in human beings must be regarded as offences established in accordance with the Convention, and that the provisions of the latter apply unless otherwise provided in the Protocol itself. Consequently, all the cooperation mechanisms established by the Palermo Convention are relevant to the prosecution of traffickers in human beings for the purpose of organ removal. In this respect, the Working Group on Trafficking in Persons established by the Conference of Parties (COP) specifically recommended that States make better use of the Palermo Convention and Protocol in combating THBOR, especially in the fields of joint investigations and intelligence gathering.<sup>17</sup>

Most interestingly, the Palermo Convention can equally be applied to THO. In fact, it should be noticed that the Convention does not limit its scope to a predetermined and rigid list of offences, but adopts instead a flexible approach which takes into account the seriousness of a crime, be it explicitly encompassed by the Convention and its Protocols or not. Through the notion of 'serious crime' as defined in Article 2, subparagraph (b) – a 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty' – the Palermo Convention can provide the appropriate legal framework for addressing new and emerging transnational crimes. Therefore, the 'serious crime' standard enables the Convention to cover currently emerging forms of crime as well as serious crimes that might arise in the future, considerably enhancing the potential use of the Convention for the purposes of international cooperation.

In this respect, it is remarkable that in its Fifth Session, held in Vienna from 18 to 22 October 2010, the Conference of the Parties launched a general debate on new and emerging forms of crime of international concern and identified a number of such crimes which the Palermo Convention could address through a dynamic interpretation of the concept of 'serious crime'. Several speakers emphasised that criminal groups had expanded their activities to include cyber-crime, trafficking in cultural property, piracy, trafficking in natural resources, trafficking in counterfeit medicines and trafficking in organs. These crimes all meet the criteria laid down by the Convention, that is involvement of several persons, existence of a real structure within the group, seriousness of the violations, stability of the criminal activity over time, obtaining of financial gains or benefits. In this connection, many participants underlined the great adaptability of the Convention thanks to its broad definition of 'serious crime' and high-

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<sup>17</sup> UN, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011, CTOC/COP/WG.4/2011/8, 15 November 2011, para. 8.

lighted the important role that it can play as an invaluable and effective instrument in tackling those new and emerging forms of crime.<sup>18</sup>

Since 2012, a new agenda item dedicated to 'Other serious crimes, as defined in the Convention, including new forms and dimensions of transnational organized crime' has been regularly examined by the COP. In particular, during the Sixth Session held in Vienna from 15 to 19 October 2012, speakers noted that transnational criminality involving trafficking in human organs was increasing because of limited national capacities to control such crime and the huge profits to be gained by such illegal activity. They thus stated that there was an urgent need to strengthen the international response.<sup>19</sup> As a result, in its resolution 6/1 the Conference explicitly encouraged States Parties to further strengthen their domestic laws to prevent and combat this and other new forms and dimensions of transnational organised crime in a manner consistent with the Convention.<sup>20</sup>

In the two following sessions of 2014 and 2016 serious concerns were raised regarding the contribution of trafficking in organs to the financing of terrorism, but the COP did not mention this issue in its final resolutions.<sup>21</sup>

In conclusion, along with the UNTOC relevance for the prosecution of THBOR and related offences (organised criminality, corruption and money-laundering), the definition of 'serious crime' has enabled the COP to identify organ trafficking as a new form of transnational organised crime which can be covered by the Palermo Convention through extensive interpretation, with a view to facilitating a more uniform approach and a better criminal justice response at the global level.

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<sup>18</sup> Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October 2010, CTOC/COP/2010/17, 2 December 2010, para. 25.

<sup>19</sup> Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its sixth session, held in Vienna from 15 to 19 October 2012, CTOC/COP/2012/15, paras 95, 119. See also Technical assistance provided to States in the application of the United Nations Convention against Transnational Organized Crime to new forms and dimensions of transnational organized crime, Report of the Secretariat, CTOC/COP/2012/7, 5 July 2012.

<sup>20</sup> COP, Resolution 6/1, Ensuring effective implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 19 October 2012, para. 16.

<sup>21</sup> Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its seventh session held in Vienna from 6 to 10 October 2014, CTOC/COP/2014/13, 13 November 2014, para. 77; Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its eighth session held in Vienna from 17 to 21 October 2016, CTOC/COP/2016/15, 7 November 2016, para. 81.

## 2.2. The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

Organ sale is also included in the offences listed in Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC).<sup>22</sup>

The Protocol supplements the UN Convention on the Rights of the Child (CRC),<sup>23</sup> which is the main international instrument for the protection of children's rights, including from all forms of abuse, violence, neglect and exploitation. It criminalises specific acts relating to the sale of children, child prostitution and child pornography, including attempt and complicity. In particular, Article 3, paragraph 1, imposes on the Parties to the Protocol the obligation to guarantee, as a minimum, that acts and activities related to the sale of children, child prostitution and child pornography are fully covered under their criminal law, whether they are committed domestically or transnationally, or on an individual or organised basis. Under subparagraph (b), this duty of criminalisation includes, in the context of the sale of children,<sup>24</sup> the 'offering, delivering or accepting, by whatever means, a child for the purpose of transfer of organs of the child for profit'.<sup>25</sup>

It is interesting to note, in this respect, that many of the States that are Parties to the OPSC are also Parties to the above-mentioned Palermo Protocol. This may raise controversial issues with regard to compliance with possibly overlapping obligations concerning the crimes covered by the two treaties that are similar. Examples would be the obligation to criminalise the sale of children for organ removal in the OPSC and the obligation to criminalise trafficking in children for organ removal in the Palermo Protocol. Most acts that meet the definition of sale also meet the definition of trafficking, but there are some situations of sale that are not trafficking and vice versa. A State that is a Party to both the OPSC and the Palermo Protocol must therefore criminalise not only acts that meet both definitions – acts that are both sale and trafficking – but also all acts that meet either definition – those that are sale but not trafficking, and those that are trafficking but not sale. These distinct obligations are very important in light of the fact that States tend to identify sale of children with

<sup>22</sup> Adopted by UN General Assembly resolution 54/263 of 25 May 2000 and entered into force on 18 January 2002. It currently counts 173 Parties.

<sup>23</sup> Adopted by UN General Assembly resolution and entered into force. States are Parties to the CRC.

<sup>24</sup> Article 2, subpara. (a) defines the sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'.

<sup>25</sup> See A. Bagheri, 'Child Organ Trafficking: Global Reality and Inadequate International Response', *Medicine, Health Care and Philosophy* 19 (2016): 239.

trafficking in children and many Parties to the OPSC have legislation prohibiting trafficking in persons, but lack legislation specifically prohibiting the sale of children. In this respect, it is useful to recall that Article 35 of the CRC obliges States Parties to take measures to prevent both trafficking and sale of children, which are similar but not identical crimes. Therefore, when it comes to children's rights in respect to organ and human trafficking, the principle of the 'best interests of the child' clearly imposes on States to guarantee the highest level of protection of child victims of THBOR and THO and to act accordingly.<sup>26</sup>

From a procedural point of view, the OPSC lays down minimum standards for protecting child victims in criminal justice processes and recognises the right of victims to seek compensation. It also contains specific provisions on investigations, jurisdiction, extradition, seizure and confiscation. Moreover, in order to prevent, detect, investigate, prosecute and punish those responsible for the offences of child exploitation, the Protocol strongly encourages the Parties to strengthen international cooperation and mutual legal assistance by multilateral, regional and bilateral arrangements, both between national authorities and with non-governmental (NGOs) and international organisations.

### **3. Regional Instruments Instituting Cooperation Mechanisms Relevant to the Prosecution of THBOR and THO**

#### **3.1. The Council of Europe Convention on Action against Trafficking in Human Beings**

The Convention on Action against Trafficking in Human Beings (CTHB)<sup>27</sup> was adopted by the Council of Europe in 2005 in order to tackle the ever-increasing Europe-wide problem of human trafficking and exploitation.

The CTHB took the Palermo Protocol as a starting point and was meant to improve the protection afforded by other instruments adopted at a global or regional level and to develop the standards contained therein. In fact, as explained in its preamble and in Article 1, the Convention is a comprehensive treaty aimed at complementing other international and European legal instruments on trafficking in human beings, focusing on the prevention of human trafficking and the protection of victims and their rights.

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<sup>26</sup> See UNICEF Innocenti Research Centre, *Handbook on the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (Florence, 2009).

<sup>27</sup> CoE, *Convention on Action against Trafficking in Human Beings*, CETS No. 197, Warsaw, 16 May 2005, in force as of 1 February 2008, ratified by all Member States of the Council of Europe, with the exception of the Russian Federation, and by Belarus as third State.



The Convention applies to all forms of trafficking, national or transnational, whether or not related to organised crime, whoever the victim – women, men or children – and whatever the form of exploitation. According to Article 4, the minimum definition of ‘exploitation’ encompasses the removal of organs along with other more common forms of exploitation such as sexual exploitation, forced labour or services, slavery and servitude. In this respect, the CTHB fully endorses the Palermo Protocol’s broad concept of exploitation.

Beyond its comprehensive scope of application, the main added values of the Convention are the recognition of trafficking in human beings as a violation of human rights and an offence to the dignity and integrity of the human being; a special focus on assistance to victims and on protection of their human rights; and the setting up of an efficient and independent monitoring mechanism. Its main purposes include, on the one hand, the harmonisation of the criminal laws of States Parties and, on the other hand, the promotion of international cooperation on action against trafficking, effective investigation and prosecution of offenders. In order to achieve these goals, Chapter IV of the Convention, which is dedicated to substantive criminal law, contains dispositions on the criminalisation of human trafficking and related conducts, Chapter V dedicated to procedural law contains specific provisions for adapting the Parties’ criminal procedure to protect victims of trafficking and assist prosecution of the traffickers, and Chapter VI prioritises and facilitates international cooperation in criminal matters, in particular extradition and mutual legal assistance, while also covering cooperation in trafficking prevention and in victim protection and assistance.

### 3.2. The European Union Directive on Preventing and Combating Trafficking in Human Beings

Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims<sup>28</sup> covers THBOR and equally endorses at EU level the same broad definition of exploitation of trafficked persons adopted by the Palermo Protocol.

This Directive confirms that human trafficking is a serious crime and gross violation of fundamental human rights and makes a firm statement that preventing and combating trafficking in human beings is a priority for the EU and

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<sup>28</sup> EU, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *Official Journal of the European Union* L 101, 15 April 2011, pp. 1-11. Framework Decisions 2002/629/JHA of 19 July 2002 was adopted by the EU after the Community had become a party to the UNTOC and its Protocols in 2000. It was meant to complement at EU level the existing UN and Community instruments used to combat trafficking in human beings but it only covered offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation.

its Members. The Directive encompasses all forms of trafficking in persons, and focuses in particular on its victims and the element of exploitation. It lays down minimum common rules for determining offences of trafficking in human beings and punishing offenders. In particular, it defines a maximum penalty of (at least) five years of imprisonment, which increases to ten years when the crime is committed against a particularly vulnerable person (e.g. a child), takes place in the framework of a criminal organisation, endangers the life of the victim, and is committed by use of serious violence. It also provides measures to strengthen the protection of victims, defining their rights to receive assistance and support, and protection during criminal investigation and proceedings (in particular when the victim is a child).

Being part of the global action against trafficking in human beings, which includes action involving third countries,<sup>29</sup> the Directive clearly recognises the essential role of international cooperation both within the EU and with other international organisations. In fact, it urges law enforcement authorities of Member States to pursue a close cross-border cooperation, including sharing information and best practices, and to maintain a continued open dialogue between national police, judicial and financial authorities. The Directive also promotes coordination of investigations and prosecutions of cases of trafficking in human beings by enhanced cooperation with Europol and Eurojust, and the setting-up of joint investigation teams. The Directive specifically supports coordination between international organisations with competence on action against trafficking in human beings in order to avoid duplication of efforts.<sup>30</sup>

It should be noticed that, just like the CTHB, Directive 2011/36/EU does not apply to offences relating to trafficking in organs, tissues and cells deriving from deceased persons, as this does not involve trafficking in persons.

### 3.3. The Council of Europe Convention against Trafficking in Human Organs

The recent adoption of the Council of Europe Convention against Trafficking in Human Organs (CTHO)<sup>31</sup> is a key step in the evolution of international law in the field of the prevention and punishment of criminal activities related to illegal transplants. It finally intervenes to bridge existing

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<sup>29</sup> See Action-oriented Paper on strengthening the Union external dimension on action against trafficking in human beings. Towards global EU action against trafficking in human beings, approved by the Council on 30 November 2009. Directive 2011/36/EU aims at pursuing action in third countries of origin and transfer of victims, with a view to fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation.

<sup>30</sup> See Recitals 2, 5 and 9.

<sup>31</sup> CoE, Convention against Trafficking in Human Organs, CETS No. 216, Santiago de Compostela, 25 March 2015, signed by 15 States and ratified only by 5 States as of November 2017.

gaps and to remedy conceptual ambiguities through a clear and quite exhaustive regulation of organ trafficking.<sup>32</sup>

The declared purpose of the Convention, as clearly stated in the preamble and in Article 1, is threefold: to contribute to the fight against organ trafficking through the introduction of new offenses siding and completing the prohibition on human trafficking for organ removal, to protect victims, and to encourage a closer cooperation between Member States and non-Members of the Council of Europe.

It contains provisions of both substantive criminal law (Chapter II) and criminal procedure (Chapter III), as well as provisions concerning protection and prevention measures (Chapters IV and V). States ratifying the Convention are requested to adopt legislative and repressive measures to ensure that a variety of intentional acts are punishable under domestic criminal law. In fact, though not providing an all-encompassing definition of 'trafficking in human organs',<sup>33</sup> the Convention mandates criminalisation of removal, transfer or use of illicitly obtained organs, as well as aiding or abetting the commission of any of the criminal offences under the definition of trafficking in human organs, whether they are committed domestically or abroad. In addition, the Convention covers the whole chain of criminal acts relevant to organ trafficking, including illicit solicitation and recruitment of donors, preparation, preservation, storage, transportation, receipt, import and export of illegally removed organs, and also aiding or abetting and attempt.<sup>34</sup>

Prevention measures mainly include the obligation for States Parties to take all necessary measures to ensure the transparency of the national transplant system and fair access to its services, the obligation to prohibit the disclosure of the need or the availability of organs and the provision of comparable remuneration or benefits, and the duty to cooperate for the collection and circulation of information on possible offenses related to transplantation.

The Convention is also particularly sensitive to the status of victims, for whom it provides specific protection measures, including the right to obtain

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<sup>32</sup> A. Bagheri & F.L. Delmonico, 'Global Initiatives to Tackle Organ Trafficking and Transplant Tourism', *Medicine, Health Care and Philosophy* 16 (2013): 887; M. López-Fragaemail et al., 'A Needed Convention against Trafficking in Human Organs', *The Lancet*, 28 June 2014, 2187; C. Byk, 'La Convention du Conseil de l'Europe sur le trafic d'organes humains', *Journal du droit international* 142 (2015): 549; A.M. Capron & F.L. Delmonico, 'Preventing Trafficking in Organs for Transplantation: An Important Facet of the Fight Against Human Trafficking', *Journal of Human Trafficking* 1 (2015): 56; S. Negri, 'La Convenzione del Consiglio d'Europa contro il traffico di organi umani: un importante strumento internazionale per la tutela della salute e della sicurezza della persona', *Ordine internazionale e diritti umani* 1, no. 2 (2016): 129; A. Pietrobon, 'Challenges in Implementing the European Convention against Trafficking in Human Organs', *Leiden Journal of International Law* 29 (2016) 485.

<sup>33</sup> Cf. the definition provided by the Declaration of Istanbul on Organ Trafficking and Transplant Tourism, available at [www.declarationofistanbul.org/](http://www.declarationofistanbul.org/).

<sup>34</sup> See N.J. Siller, *supra* note 3.

information on their case, the right to adequate medical, psychological and social assistance, the right to obtain compensation, full recognition of a *locus standi* and all procedural safeguards related to the criminal proceedings against the alleged perpetrators.

Although the significance of the Convention lies primarily in the criminalisation of organ trafficking and related crimes, the provisions on international cooperation are equally important. From a procedural point of view, some provisions especially stand out, in particular the possibility to initiate and continue proceedings *ex officio* and the obligation to cooperate and afford mutual legal assistance, to the widest extent possible, for the purpose of investigating and prosecuting the offences related to organ trafficking.

In essence, the Convention facilitates judicial cooperation between States and provides appropriate legal and operational instruments to bring to justice the whole criminal chain responsible for organ trafficking and any other illegal conduct related to clandestine transplants. It thus represents a milestone in the fight against organ trafficking and is dramatically important for several reasons: it has a global vocation;<sup>35</sup> it fills existing gaps in international law; it strengthens international cooperation in criminal law matters increasing the level of harmonisation among domestic legal systems, which is crucially important from the viewpoint of the double criminality principle. Therefore, combined with existing international legal tools against THBOR, the Convention provides a comprehensive legal framework to curtail all distinct types of transplant-related crimes.

#### **4. International Cooperation Mechanisms and Procedures for the Purpose of Bringing Organ Traffickers to Justice**

##### **4.1. General Obligation to Cooperate and General Legal Regimes of International Cooperation in Criminal Matters**

The above-described legal instruments engage States Parties and EU Member States to cooperate and offer mutual assistance, to the widest possible extent, for the purpose of combating THBOR and THO and facilitating prosecution and punishment of human and organ traffickers. They promote synergies and mutual strengthening of cooperation mechanisms,<sup>36</sup> especially

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<sup>35</sup> In fact, the Convention is open for signature by the Member States of the Council of Europe, the European Union, the Non-member States which enjoy observer status with the Council of Europe, and by other Non-member States.

<sup>36</sup> In this respect, it should be noted that Article 26, para. 2, CTHO and Article 40, para. 2, CTHB both encourage States Parties to 'conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it'.

in the fields of investigations and criminal proceedings, while tending to avoid duplication of mechanisms already provided for in general legal regimes of cooperation established by existing bilateral or multilateral agreements.

At universal level, a general obligation to cooperate is enshrined in Article 18 of the Palermo Convention, which requests States Parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention (and Protocols). Similarly, Articles 6 and 10 of the OPSC bind the Parties to the Protocol to provide each other the greatest measure of assistance in connection with investigations or criminal or extradition proceedings; to take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of child traffickers and exploiters; and also to promote international cooperation and coordination between national authorities, national and international NGOs and international organisations. At European level, Article 32 of the CTHB and Article 17 of the CTHO set a general obligation to cooperate in accordance with the Convention and through application of relevant international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic law.

Since the specific cooperation mechanisms applicable to THBOR and THO have to be contextualised in the general legal framework instituted by existing cooperation agreements, the above-mentioned Conventions also call on States to ensure consistency with other international and regional treaties on cooperation in criminal matters. To this end, they normally regulate the relationship with these treaties and often establish rules of coordination and prevalence.

For example, Article 18, paragraph 6, of the Palermo Convention clarifies that its provisions are not meant to affect the obligations stemming from any other bilateral or multilateral treaty governing, in whole or in part, mutual legal assistance. Article 6, paragraph 2, of the OPSC requires States Parties to carry out their obligations to cooperate in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. Article 17, paragraph 2, of the CTHO provides that the Parties must cooperate to the widest possible extent in pursuance of the relevant applicable international, regional and bilateral treaties on extradition and mutual legal assistance concerning the offences established in accordance with the Convention. Article 39 of the CTHB specifically regulates the relationship with the Palermo Protocol, stating that the Convention is not intended to interfere with the rights and obligations stemming from the Protocol, but rather to enhance the protection afforded by it and develop its standards.

As said before, these provisions are of special significance when coordination has to be ensured with respect to other legal instruments establishing general regimes of international cooperation in criminal matters. By way of example, suffice it to mention the substantial body of relevant instruments that are already in force in the Council of Europe region, including the European Convention

on Extradition, the European Convention on Mutual Assistance in Criminal Matters, and their Protocols, as well as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Since these treaties are cross-sector instruments applying to a large number of offences, they can also be relevant to human and organ trafficking. Therefore, as explained in the Explanatory Reports to the CTHB and the CTHO, the drafters of these conventions decided not to reproduce the provisions already appearing in the aforementioned conventions so as to avoid any confusion that might arise from setting up competing systems. Considering that the relevant general agreements in matter of judicial cooperation should have precedence, they opted to include in the CTHB and the CTHO only those provisions offering special added value in relation to the prosecution of the specific offences covered therein.<sup>37</sup> The same applies within the European Union with regard to a large number of Union measures on international cooperation in criminal matters that may be relevant to both THBOR and THO, including Framework Decision 2002/584/JHA on the European Arrest Warrant, Directive 2014/41/EU on the European Investigative Order, Framework Decision 2002/465/JHA on joint investigation teams, and Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

Against this backdrop, the following paragraphs will focus on the cooperation mechanisms established by the global and regional conventions and EU legislation addressing THBOR and THO here under consideration, leaving aside the applicable general rules contained in other relevant international and European instruments.

#### 4.2. Initiation of Proceedings and *Ex Officio* Prosecution

One of the key measures to bring traffickers to justice and ensure effective prosecution of THBOR and THO is the obligation to initiate proceedings *ex officio*.

In principle, to ensure the success of investigations and prosecutions of trafficking offences, their initiation should not depend on reporting or accusation by the victim. The aim of this rule is also to avoid that traffickers may subject victims to pressure and threat them of reprisals against family members in the attempt to deter them from complaining to the competent authorities.

Within the EU legal framework, Article 9 of Directive 2011/36/EU provides that Member States shall ensure that investigation into or prosecution of the offences covered by the Directive are not dependent on reporting or accusation by a victim and that criminal proceedings should continue even if the victim has withdrawn his or her statement. Even for crimes committed outside the

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<sup>37</sup> Explanatory Report to CTHB, para. 341.

territory of the Member State, Article 10, paragraph 3, excludes that jurisdiction be subject to the condition that prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

The same principle is also encapsulated in both CoE Conventions (Article 15 CTHO and Article 27, paragraph 1, CTHB). It is stated in stronger and more general terms in the CTHO, which textually provides that investigation and prosecution ‘should not be subordinate to a complaint and that the proceedings may continue even if the complaint is withdrawn’. This is confirmed in Article 10, paragraph 4, that states that for prosecution of the offences committed by its nationals or habitual residents each Party has to take the necessary legislative or other measures to ensure that its jurisdiction over such offences ‘is not subordinated to the condition that the prosecution can only be initiated following a report from the victim or the laying of information by the State of the place where the offence was committed’. The rule is to some extent more nuanced in the CTHB where the duty to proceed *ex officio* is limited to cases where the offence was committed in whole or in part on the State’s territory. This difference is due to the fact that some States require that in order to institute proceedings crimes committed outside their territories must be the object of a claim by the victim or of a denunciation by a foreign authority. The limitation of the obligation to initiate *ex officio* proceedings ‘at least when the offence has been committed in whole or in part on its territory’ enables these States not to modify their legislation on this matter.<sup>38</sup>

Article 27, paragraph 2, of the CTHB also regulates *ex parte* applications in case of victims who are not resident in the State receiving the complaint, which was modelled on Article 11, paragraph 2, of the EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, now replaced by Directive 2012/29/EU (Article 17).<sup>39</sup> Article 27 engages the Parties to ensure that victims of trafficking who are in the territory of a State other than the one where they reside should be guaranteed the possibility to make a complaint before the competent authorities of their State of residence. The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, has to transmit it without delay to the competent authority of the Party in whose territory the offence was committed. The aim of this provision is to facilitate the lodging of a complaint in the State of residence by imposing to the receiving authority the obligation to forward the com-

<sup>38</sup> Ibid., para. 277.

<sup>39</sup> EU, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *Official Journal of the European Union* L 315, 14 November 2012, pp. 57-73.

plaint to that authority. However, it does not place any obligation on the State of residence to institute an investigation or proceedings.<sup>40</sup>

### 4.3. Investigations

Mutual assistance in investigations is at the core of the duty of cooperation imposed by the legal instruments under consideration, as testified by Article 19 of the UNTOC, Articles 6 and 10 of the OPSC, Article 32 of the CTHB, Article 17 of the CTHO, and Article 9 of Directive 2011/36/EU.

It is also important to recall that, in order to guarantee an efficient criminal justice response to THBOR and THO, investigations into these crimes should in principle be started *ex officio* (Article 27, paragraph 1, CTHB; Article 15 CTO; Article 9, paragraph 1, Directive 2011/36/EU).

Most of the relevant international and European instruments engage the States Parties to adopt all necessary measures to start and conduct effective criminal investigations at national level and also to cooperate at the international, regional and bilateral levels.

In particular, Article 19 of the Palermo Convention encourages the conclusion of bilateral or multilateral agreements among States Parties in order to establish joint investigative bodies. It also envisages that, in the absence of specific agreements, the Parties can undertake joint investigations by agreement on a case-by-case basis. Article 20 invites States Parties to conclude such agreements for the purpose of using special investigative techniques in the context of international cooperation, including controlled delivery, electronic or other forms of surveillance and undercover operations.

Moreover, to support and facilitate investigations, Articles 26 and 27 of the Palermo Convention also envisage forms of cooperation with and between law enforcement authorities. The former provides that the Parties must take appropriate measures to enhance cooperation of offenders with law enforcement authorities, in order that these authorities may obtain information useful for investigative and evidentiary purposes, especially on matters concerning the identity, nature, structure, location or activities of the criminal groups, links with other organised criminal groups, offences that these groups have committed or may commit. The second engages the Parties to cooperate closely, including through such means as inquiries, the provision of items or substances for analytical and investigative purposes, and the establishment of channels of communication that may facilitate the rapid and secure exchange of information for the purpose of early identification of the offences and of the means and methods used by organised criminal groups.

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<sup>40</sup> Explanatory Report to CTHB, para. 278.



At regional level, with a view to facilitating the exchange of information for investigative purposes, Article 34 of the CTHB regulates the supply to another State Party of information that may assist in a criminal investigation. This provision empowers the country in possession of the information to forward it to the other country even without a prior request, within the limit of its internal law. According to Article 34, therefore, a Party is not under any obligation to spontaneously forward information to another Party; it has full discretion to do so in the light of the circumstances of the particular case. In addition, spontaneous disclosure of information does not preclude the disclosing Party from investigating or instituting proceedings in relation to the facts disclosed if it has jurisdiction.<sup>41</sup>

At EU level, Directive 2011/36/EU highlights the importance of coordination in investigations in human trafficking offences through enhanced cooperation with Europol and the setting up of joint investigation teams. It also recommends that investigating and prosecuting bodies should have access to the investigative tools used in organised crime or other serious crime cases, including the interception of communications (for example, wiretapping of telephone conversations or emails), covert surveillance including electronic surveillance, the monitoring of bank accounts and other financial investigations.<sup>42</sup>

It should be duly considered that investigations within the European Union are governed by Directive 2014/41/EU on the European Investigation Order,<sup>43</sup> which has a broad scope and can also be applied to THO.

Directive 2014/41/EU sets up a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition. It endorses a new approach overcoming the fragmentary and complex regime created by the existing instruments in this area.<sup>44</sup> This new approach is based on a single instrument called the European Investigation Order (EIO), which enables judicial authorities in one EU country (the issuing State) to request that evidence be gathered in and transferred from another EU country (the executing State). An EIO is therefore issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO with a view to gathering evidence, including the obtaining of evidence that is already in the possession of the executing authority.

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<sup>41</sup> Ibid., para. 349.

<sup>42</sup> See Recitals 5 and 15.

<sup>43</sup> EU, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *Official Journal of the European Union* L 130, 1 May 2014, pp. 1-36. It applies to all EU countries except Denmark and Ireland, which opted out.

<sup>44</sup> The Directive replaces existing EU mutual legal assistance schemes, notably the 2000 EU Mutual Legal Assistance Convention and Framework Decision 2008/978/JHA on the European Evidence Warrant.

Apart from setting up joint investigation teams, which are regulated by Framework Decision 2002/465/JHA,<sup>45</sup> the Directive aims to simplify and speed up cross-border criminal investigations in the EU and covers any investigative measure, including covert investigations and intercepting telecommunications. In particular, the European Investigation Order makes it easier to tackle a number of serious transnational offences, including THBOR and THO and related crimes. In fact, according to Article 11, paragraph 1(g), ‘recognition or execution of an EIO may be refused in the executing State where (...) the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years’. Annex D lists, among others, the crimes of participation in a criminal organisation, corruption, laundering of the proceeds of crime, trafficking in human beings, and illicit trade in human organs and tissue. Therefore, the specific significance of Directive 2014/41/EU for the purpose of investigating and prosecuting both THBOR and THO lies in the fact that it enables national authorities to overcome the limitations imposed by the double criminality principle.

Lastly, it is also important to point out that this Directive establishes a special regime of mutual legal assistance between EU Member States and takes precedence over other relevant international instruments, such as the conventions concluded within the Council of Europe<sup>46</sup> and, by extension, also over the Palermo Convention.

#### 4.4. Jurisdiction

When it comes to the legal bases of jurisdiction to prosecute human and organ traffickers, all relevant regional and international instruments adopt multiple jurisdictional rules, including both the territoriality and the nationality principles, and some variants thereto.

Concerning jurisdiction *ratione loci*, Article 15, paragraph 1, of the UNTOC, Article 4, paragraph 1, of the OPSC, Article 31, paragraph 1, of the CTHB, Article 10, paragraph 1, of the CTHO and Article 10, paragraph 1(a) of Directive 2011/36/EU adopt the territoriality principle and primarily confer jurisdiction on the State in whose territory the offence is committed (in whole or in part). With the exception of the EU Directive, the above-mentioned treaties also include a variant to the territoriality rule, conferring jurisdiction also on flag States or

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<sup>45</sup> EU, Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA), *Official Journal of the European Union* L 162, 20 June 2002, pp. 1-3.

<sup>46</sup> See Recital 35.

registration States in case the offence is committed on board of a ship or an aircraft. This additional basis of jurisdiction is considered extremely useful to assert jurisdiction on traffickers when the ship or aircraft is not located in the country's territory at the time of commission of the crime, a situation which would exclude application of the strict territoriality rule. Moreover, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.<sup>47</sup>

Concerning jurisdiction *ratione personae*, the same provisions also encapsulate both the active and the passive personality rules, conferring jurisdiction over offences committed outside the State's territory on the national State of either the offender or the victim (Article 15, paragraph 2, UNTOC; Article 4, paragraph 2, OPSC; Article 31, paragraph 1(d),(e), CTHB; Article 10, paragraphs 1(d) and 2, CTHO; Article 10, paragraphs 1(b) and 2(a) of Directive 2011/36/EU). Compulsory jurisdiction over a State's nationals for offences committed abroad – which is provided for in both CoE Conventions and in Directive 2011/36/EU – is a particularly important rule in the context of combating trafficking in human organs given that certain States where organ trafficking takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework for prosecution.<sup>48</sup>

However, it should be noted that, under the Palermo Convention and the Optional Protocol to the CRC, jurisdiction grounded on the personality rule is a power of the State and not an obligation, as testified by the use of the expressions 'a State Party *may also* establish its jurisdiction' (Article 15, paragraph 2, UNTOC) and '[e]ach State Party *may take* such measures as may be necessary to establish its jurisdiction' (Article 4, paragraph 2, OPSC). Limited to the passive personality rule, the same applies to the CTHO, which states that the Parties '*shall endeavour to take* the necessary legislative or other measures to establish jurisdiction over any offence' committed against their nationals. Moreover, in both CoE Conventions jurisdiction based on the personality principle can be the object of a reservation to the effect of limiting or completely excluding its application (Article 31, paragraph 2, CTHB and Article 10, paragraph 3, CTHO, the latter referring only to the active personality rule). Within the European Union, while Directive 2011/36/EU imposes on Member States to establish their jurisdiction over offences committed by one of their nationals, it requires that they inform the Commission where they decide 'to establish *further jurisdiction*' over the offences committed outside their territories against their nationals or habitual residents.

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<sup>47</sup> Explanatory Report to CTHB, para. 329; Explanatory Report to CTHO, para. 66.

<sup>48</sup> Explanatory Report to CTHO, para. 67.

These instruments also extend the active and passive personality rules to crimes committed by or against habitual residents although the scope of the relevant provisions is rather different. In fact, the Palermo Convention and the CTHB respectively confer discretionary and compulsory jurisdiction on the State of habitual residence when the offender is a stateless person, the OPSC confers discretionary jurisdiction based on the active personality rule, the CTHO establishes compulsory jurisdiction over offences committed by any habitual resident and discretionary jurisdiction over offences committed against habitual residents, and the EU Directive confers discretionary jurisdiction in both cases.

Turning to the exercise of jurisdiction, all relevant treaties impose on States the duty to prosecute when the alleged offender is on their territory and they refuse to surrender the person to another State having jurisdiction. This obligation stems automatically from the rejection of a request for extradition as expressed in the rule *aut dedere aut judicare*. Article 16, paragraph 10, of the UNTOC, Article 4, paragraph 3, of the OPSC, Article 31, paragraph 3, of the CTHB and Article 10, paragraph 6, of the CTHO encapsulate this rule to a limited extent, providing that the State in whose territory the alleged offender is present has the obligation to establish its jurisdiction where it refuses to surrender the person only on grounds of nationality.

Lastly, it is useful to recall that due to their transnational nature, THBOR and THO may fall under the jurisdiction of multiple States. With regard to organ trafficking and the nationality principle, for example, it may happen that more than one State has jurisdiction over some or all of the participants in an offence: organ recruiters acting in one country, brokers operating in another country, surgeons performing the transplantation in a third country, and so on. In such cases, possible conflicts of jurisdiction are resolved by way of consultation between the interested States with a view to determining the most appropriate jurisdiction for prosecution and coordinating their actions (Article 15, paragraph 5, UNTOC; Article 31, paragraph 4, CTHB, Article 10, paragraph 7, CTHO).<sup>49</sup> These consultations are meant to determine the proper venue for prosecution in order to avoid duplication of procedures or to otherwise facilitate the efficiency or fairness of the proceedings. In practice, in some cases, it may be most effective to choose a single venue for prosecution; in others, it may be best for one country to prosecute some alleged offenders, while one or more other countries prosecute others.<sup>50</sup>

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<sup>49</sup> Within the EU, such conflicts are settled in accordance with Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings (*Official Journal of the European Union* L 328, 15 December 2009, pp. 42-47).

<sup>50</sup> See Explanatory Report to CTHO, para. 74.

#### 4.5. Extradition and the European Arrest Warrant

As it is well known, extradition is a key procedure in mutual legal assistance in criminal matters. In particular, procedural extradition is crucial for the purpose of prosecution since it enables States having jurisdiction on grounds of either the territorial or the personality rules to ensure the physical presence of the alleged offender and hence to start the proceedings.

Among the international and European instruments under consideration, the most elaborate regulation of extradition is found in Article 16 of the Palermo Convention. Article 16, paragraph 1, encapsulates the double criminality rule, establishing that extradition can be sought when the crime is punishable under the domestic law of both the requesting and the requested States Parties. Paragraph 2 extends also to serious crimes not covered by the Convention, whenever the request for extradition refers to a number of separate serious crimes. Paragraphs 3 to 6 set the basic rules to make the offences covered by Article 16 extraditable offences in both non-treaty and conventional extradition. This means, on the one hand, that such offences are to be considered covered by any extradition treaty in force between the Parties and must be included by the Parties in any future treaty; on the other hand, that the Convention can be considered the legal basis to proceed to extradition when this mechanism is only applied on a conventional basis by States Parties who are not linked by any extradition treaty. In this latter case, the Parties have to expressly accept to take the Palermo Convention as legal basis for conventional cooperation on extradition at the time of deposit of their instruments of ratification, acceptance, approval of or accession; if they do not accept it, they must conclude ad hoc treaties as soon as possible.

These same rules are enshrined in Article 5 of the OPSC and Article 17, paragraph 3, of the CTHO, while the CTHB does not contain any specific provision on extradition.

Within the EU, extradition procedures have been replaced since 1 January 2004 by the European Arrest Warrant, introduced by Council Framework Decision 2002/584/JHA,<sup>51</sup> which serves the scope of providing a simplified procedure for the surrender of criminals within the European Union. The European Arrest Warrant is in fact a simplified cross-border judicial surrender procedure for the purpose of prosecuting or executing a custodial sentence or detention order. A warrant issued by one EU country's judicial authority is valid in the entire territory of the EU.

A country can refuse to surrender the requested person only if one of the grounds for mandatory or optional refusal applies. Among the optional grounds

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<sup>51</sup> EU, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), *Official Journal of the European Union* L 190, 18 July 2002, pp. 1-18.

for refusal there is lack of double criminality, but for thirty-two categories of offences there is no requirement that the act is a criminal offence in both countries. The only requirement is that it be punishable by a maximum period of at least 3 years of imprisonment in the issuing country. This is regulated in Article 2, paragraph 2, of the Framework Decision, which allows surrender of the alleged offender without verification of the double criminality test for a long list of particularly serious crimes, including trafficking in human beings and illicit trade in human organs and tissue, participation in a criminal organisation, corruption, and laundering of the proceeds of crime.

It should also be noticed that although the European Arrest Warrant substitutes extradition procedures between EU Member States, it may happen that a conflict arises between an arrest warrant and a request for extradition presented by a third country. In this case, Article 16, paragraph 3, of the Framework Decision establishes that the decision on whether the European Arrest Warrant or the extradition request takes precedence is taken by the competent authority of the executing Member State with due consideration of all relevant circumstances, especially the relative seriousness and place of the offences, and whether the requests have been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

## 5. Conclusions

Organ trafficking and trafficking in human beings for the purpose of organ removal are complex and multifaceted criminal phenomena of global dimensions. An effective criminal justice response to these transnational organised crimes cannot fall short of tackling all relevant conducts, diverse actors and multiple countries involved in the clandestine web of illegal transplantations. As discussed above, both THBOR and THO rely on a network of trafficking schemes involving recipients/buyers, donors/victims, 'organ brokers' (human traffickers or intermediaries operating also via the Internet, including health insurance agents, travel agents, transplant surgeons and coordinators, kidney patient organisations) and 'organ hunters' (very often former sellers recruited by organised criminal groups to enrol other sellers from their families or living environments), supported and aided by unscrupulous health professionals and corrupt hospitals. Bringing to justice the whole chain of organ traffickers is thus a priority in the global fight against these crimes and international cooperation in criminal matters is key to achieve this major goal.

In addition to the general regimes of cooperation established under a plurality of multilateral and bilateral agreements governing extradition and mutual legal assistance, international and European instruments addressing THBOR and THO provide for ad hoc cooperation aimed at facilitating investigation and prosecution of traffickers.

In light of the content and scope of the provisions examined in this article, it is possible to draw conclusions on the strengths and weaknesses of these cooperation mechanisms through the lens of the overall efficacy of the criminal justice response provided at both the global and the European levels.

Starting with the initiation of proceedings, it should be noted that only within the European region there are rules imposing that States investigate and prosecute *ex officio* both THBOR and THO. In this respect, it is remarkable that the rules binding EU Member States with regard to THBOR are broader in scope than those applied by CoE Members since they also cover initiation of proceedings for crimes committed abroad. On the contrary, *ex officio* prosecution of THO is solely based on the provisions of the dedicated CTHO, currently in force among five CoE countries, of which only two are EU Members.

Regarding investigations, international cooperation among States and with international organisations (especially Interpol and Europol) is strongly supported globally and regionally. At universal level, the Palermo Convention encourages States to conclude bilateral or multilateral agreements to establish joint investigative bodies and to make use of special investigative techniques, whereas at European level both CoE Conventions and Directive 2011/36/EU do not contain specific provisions on cooperation in investigations. This gap implies that other relevant regional instruments on inter-State cooperation apply, including the Council of Europe conventions on mutual legal assistance, Directive 2014/41/EU on the European Investigation Order and Framework Decision 2002/465/JHA on joint investigation teams. In this context, the EU regime provides the most efficient legal framework of mutual legal assistance in investigations, because it covers both THBOR and THO and also because it overcomes the limits stemming from the double criminality rule.

As far as jurisdiction is concerned, the legal instruments under consideration all impose the territoriality principle as the primary jurisdiction rule, in most cases encompassing jurisdiction of flag and registration States. A few instruments also engage States to adopt the active personality rule for offences committed abroad, while empowering them also to prosecute on the basis of the passive personality rule. Further variants to the nationality principle include jurisdiction of the State of habitual residence of either offenders or victims, which further broadens the scope of jurisdiction in order to enlarge the number of competent authorities. The different scope of the relevant provisions makes it difficult to assert that some are definitely more efficient than others because they all present strengths and weaknesses. However, it can be observed that both CTHB and CTHO, as well as Directive 2011/36/EU, offer the most effective response, imposing compulsory jurisdiction on grounds of both the territoriality and the active personality rules.

When it comes to extradition, it has already been pointed out that the Palermo Convention offers the most detailed regulation of extradition procedures and also serves as legal basis for both treaty and non-treaty extradition, but surrender of the requested person is conditional upon respect of the double

criminality principle. This represents a great limitation to cooperation especially in the field of THO since full criminalisation of organ trafficking and transplant-related crimes in national law is still an unmet goal both globally and regionally. Turning to the European framework, the CTHO can serve as legal basis for the extradition of alleged organ traffickers and is not limited by the double criminality requirement, however, given the very low number of States Parties, its potentiality is still unexpressed. Therefore, the best cooperation mechanism is the European Arrest Warrant system operating within the European Union, which allows a facilitated surrender of alleged traffickers regardless of the double criminality rule.

In conclusion, while European Union law guarantees the most efficient criminal justice response to both THBOR and THO, a satisfactory global response to these crimes can only be achieved by enhanced synergies and coordination of action pursuant to the cooperation mechanisms regulated by the dedicated legal instruments and in combination with the relevant mechanisms and procedures governed by 'general' regimes of international cooperation in criminal matters.