

# The Codification of Transplant-Related Crimes in the Convention Against Trafficking in Human Organs

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## I. Introduction

In response to a growing global concern over the commodification of human beings, an international coalition of state delegates drafted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol).<sup>1</sup> The Palermo Protocol entered into force in 2003. One of this instrument's primary aims is to 'combat trafficking in persons' by way of domestic criminalization of this practice.<sup>2</sup> The substantive criminal law scope of the Palermo Protocol's definition of 'trafficking in persons' is contained in its Article 3. Specifically, 'trafficking in persons' is defined 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;<sup>3</sup>

The Palermo Protocol's definition of 'trafficking in persons' is universally recognized.<sup>4</sup> To date, this instrument has 117 signatories and 173 parties which includes every state within the Council of Europe (CoE).<sup>5</sup> In this respect the Palermo Protocol can be hailed as having unprecedented success worldwide.

Five years after the Palermo Protocol, the CoE Convention on Action against Trafficking in Human Beings was opened for signature and ratification. It copied the statutory construction of the Palermo Protocol's Article 3 verbatim

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<sup>1</sup> 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319 (hereinafter the Palermo Protocol).

<sup>2</sup> Article 2, Palermo Protocol.

<sup>3</sup> Article 3, Palermo Protocol.

<sup>4</sup> J. Allain, *Slavery in international law: of human exploitation and trafficking* (Leiden: Martinus Nijhoff Publishers, 2013), 325.

<sup>5</sup> United Nation Treaty Collection, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en), 10 January 2018.

within its instrument.<sup>6</sup> This is not an isolated occurrence. The Palermo Protocol's legislative influence can be considered far reaching considering its definition of trafficking in persons has been the source of inspiration for countless regional and domestic codifications all over the globe.<sup>7</sup>

Article 3 of the Palermo Protocol recognizes the many forms trafficking can take, including trafficking in persons for the purpose of organ removal. The traffic of persons for the purpose of organ removal is however distinguishable from organ trafficking. Considering the Palermo Protocol's drafting process and the wording of Article 3, it seems apparent that the crime of 'trafficking in persons' fails to cover many activities related to trafficking in human organs.

In 2002, the CoE introduced an additional protocol to the 1997 Convention on Human Rights and Biomedicine concerning the Transplantation of Organs and Tissues of Human Origin.<sup>8</sup> This instrument very briefly addressed the organ trafficking. Article 22 states: 'Organ and tissue trafficking shall be prohibited.'

In order to confront the organ trafficking phenomenon with a more comprehensive criminal justice response, the CoE drafted the Convention against Trafficking in Human Organs (CTHO) which opened for signature and ratification on 25 March 2015.<sup>9</sup> It will enter into force after five ratifications, three of which must come from Member States. As of January 2018, there are 5 ratifications (Albania, Czech Republic, Malta, Norway, and Republic of Moldova) and 20 signatures to this instrument.<sup>10</sup>

The CTHO is particularly important because it requires States Parties to criminalize a number of transplant-related offenses that have never before been considered in international legal instruments.<sup>11</sup> While the Palermo Protocol

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<sup>6</sup> Article 4(a), Palermo Protocol.

<sup>7</sup> J. Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol', *Albany Government Law Review* 14 (2014): 1. See also, UNODC, Abuse of a Position Of Vulnerability And Other 'Means' Within The Definition Of Trafficking In Persons, 2013; Article 28J, Protocol on the Statute of the African Court of Justice and Human Rights (as Amended by the Malabo Protocol), Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII) (Malabo Protocol). Note that the Amended Statute was annexed to the Malabo Protocol.

<sup>8</sup> Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin ETS No 186. Strasbourg, 24.I.2002; COE Convention for the Protection of Human Rights and Dignity of the Human Being with regards to the Applications of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS 164, 1997, Oviedo, 4 IV.

<sup>9</sup> Council of Europe, Convention against Trafficking in Human Organs, CETS N. 216, Santiago de Compostela, 25 March 2015. I (hereinafter CTHO).

<sup>10</sup> CoE Treaty Office, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p\\_auth=5CPY1KzC](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=5CPY1KzC), 10 January 2018.

<sup>11</sup> See also, S. Negri, 'Transplant Ethics and the International Crime of Organ Trafficking', *International Criminal Law Review* 16 (2016):287, 299-300; A.M. Capron & F. Delmonico, 'Preventing Trafficking in Organs for Transplantation: An Important Facet of the Fight Against Human Trafficking', *Journal of Human Trafficking* 1 (2015):56.

includes a singular definition for the offense of ‘trafficking in persons’, no such agreement could be made when fashioning the CTHO.<sup>12</sup> Consequently, the concept of ‘trafficking in human organs’ is understood by reference to the various offenses outlined in Articles 4-8 of the Convention.

Both the Palermo Protocol and the CTHO are considered to be criminal law conventions. A key attribute of the effectiveness of criminal laws is an accurate understanding of their substance which can be consistently understood by those affected. Primarily, these persons include the citizenry, those responsible for investigating crime, prosecuting offenders, defending the accused, adjudicating in criminal proceedings and providing services to victims, offenders and their family members.

One of the principal criticisms of the Palermo Protocol is that its definition of ‘trafficking in persons’ is not commonly or consistently understood.<sup>13</sup> The definition itself is a rather long list of terms which have remained largely undefined for almost two decades. This purported lack of understanding of the material elements of trafficking in persons is one of the main reasons given for poor conviction rates of human traffickers.<sup>14</sup>

In order to provide greater legal clarity from the perspective of substantive criminal law, this article will identify and outline the offenses codified within the CTHO. First, this article will discuss the Palermo Protocol’s codification of ‘trafficking in persons’ (for the purpose of organ removal) and distinguish it from ‘trafficking in human organs’. Second, this article will briefly discuss the material elements of the crimes codified in Articles 4-8 of the CTHO. It is the aim of this mini-contribution to compliment the other articles to this special issue of the *Journal of Trafficking and Human Exploitation* by providing an outline of substantive criminal offenses created in light of the CTHO.

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<sup>12</sup> A. Pietrobon, ‘Challenges in Implementing the European Convention against Trafficking in Human Organs’ *Leiden Journal of International Law* 29 (2016): 485, 487.

<sup>13</sup> N. Siller, “‘Modern Slavery’: Does International Law Distinguish between Slavery, Enslavement and Trafficking?’, *Journal of International Criminal Justice* 14 (2016): 405.

<sup>14</sup> N. Siller, “‘Modern Slavery’: Does International Law Distinguish between Slavery, Enslavement and Trafficking?’, *Journal of International Criminal Justice* 14 (2016): 405. See also, V. Roth (ed.), *Defining human trafficking and identifying its victims: a study on the impact and future challenges of international, European and Finnish legal responses to prostitution-related trafficking in human beings* (Leiden: Martinus Nijhoff, 2012).

## 2. From Trafficking in Persons (for the Purpose of Organ Removal) to Transplant-Related Crimes

International laws addressing human trafficking have existed for more than 100 years.<sup>15</sup> Nevertheless, it is the Palermo Protocol that is attributed with providing the first international definition of this crime. As discussed in the Commentary on the United Nations Convention and its Protocols, the most controversial aspect of negotiating the Palermo Protocol was the codification of an unequivocal definition of 'trafficking in persons'.<sup>16</sup> Ten months of negotiation at eleven separate sessions in which over 100 state representatives participated,<sup>17</sup> culminated in creating this instrument and solidifying an explicit definition which, as reproduced in the introduction, is contained in Article 3 of the Palermo Protocol.<sup>18</sup>

Defining the crime of trafficking was believed to be of utmost importance in order to internationally standardize the concept and provide for the harmonization of substantive and procedural issues in law as it relates to human trafficking. In the context of substantive criminal law, the international definition of 'trafficking in persons' can be understood as consisting of two *actus reus* elements: an act (recruitment, transportation, transfer, harbouring or receipt of persons) and a means (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); both of which must

<sup>15</sup> International Agreement for the Suppression of the 'White Slave Traffic,' (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910, entered into force 8 August 1912) 3 LNTS 278. These two instruments were amended by protocol (30 UNTS 23) and approved by the UNGA on 4 May 1949. International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415; International Convention for the Suppression of the Traffic in Women on Full Age (adopted 11 October 1933, entered into force 24 August 1934) 150 LNTS 431. These two instruments were amended by protocol (53 UNTS 13) and approved UNGA on 12 November 1947. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271. See also, N.J. Siller, 'Human Trafficking in International Law before the Palermo Protocol', *Netherlands International Law Review* 64 (2017): 407.

<sup>16</sup> D. McClean, *Transnational Organized Crime: A Commentary on the UN Conventions on its Protocols* (Oxford: OUP, 2007) 20, 315. See also, A.T. Gallagher, 'Human Rights and Human Trafficking: Quagmire of Firm Ground? A Response to James Hathaway', *Virginia Journal of International Law* 49 (2009): 789, 790.

<sup>17</sup> J. Allain, *Slavery in international law: of human exploitation and trafficking* (Leiden: Martinus Nijhoff Publishers, 2013), 355. See also, S. Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford: OUP, 2008) 59; D.B. Jannson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Leiden: Brill 2014) 73-77.

<sup>18</sup> For more on the drafting history, see: M. Ditmore and M. Wijers, 'The negotiations on the UN Protocol on Trafficking in Persons', 4 *NEMESIS* 4 (2003) 79.

be committed for the third (*mens rea*) element: a purpose. The ‘purpose’ of trafficking must always be exploitation.

While exploitation was left undefined, the Palermo Protocol lists several examples of types of exploitation already classified by the drafters as falling within the substantive scope of the third element of this offense. These practices include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or *the removal of organs*.<sup>19</sup> It must be stressed that while the purpose of trafficking must be exploitation, the *exaction* of exploitation is not required to satisfy the material elements of the offense. It is merely the *intent* to exploit that substantiates this element.

The final type of exploitation listed in Article 3(a) of the Palermo Protocol is the ‘removal of organs’. The exploitative purpose of ‘organ removal’ was a late addition to the Palermo Protocol’s third element of this crime and caused contention during the drafting sessions.<sup>20</sup> The inclusion of terms in addition to ‘organ’ within the trafficking framework was also attempted without success. The extent of this debate is illustrated in the notes of the Palermo Protocol’s preparatory works and is worth reproducing:

At the ninth session of the Ad Hoc Committee, several of the delegations that supported listing forms of ‘exploitation’ requested that such a list should include the removal of or trafficking in human organs, tissues or body parts and it was decided to include such a reference for purposes of further discussion. The wording was proposed by the Chairperson. Also proposed were the words ‘illicit removal of organs’, ‘transfer of organs of persons for profit’ and ‘trafficking in organs’ and expanding the wording to include ‘other body parts’. One delegation noted that, while trafficking in persons for the purpose of removing organs was within the mandate of the Ad Hoc Committee, any subsequent trafficking in such organs or tissues might not be. Another delegation noted that dealing with organ trafficking as such might make it necessary to develop additional measures, since the other provisions of the draft protocol dealt with trafficking in persons and not organs.<sup>21</sup>

Only including the exploitative purpose of ‘organ removal’ demonstrates the drafters’ focus of trafficking as an offense to remain on the person as op-

<sup>19</sup> Article 3, Palermo Protocol. Emphasis added.

<sup>20</sup> UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, NY: United Nations, 2006) 344, note 28. See also, A.T. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) 39.

<sup>21</sup> UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, NY: United Nations, 2006) 344, note 28.

posed to a person's parts.<sup>22</sup> It should be mentioned however that even though these additional terms were decidedly left out of the Palermo Protocol's definition, Article 3's non-exhaustive nature of exploitative purposes may still conceivably enable a trafficking case involving tissues, cells, or 'other body parts'.

Other than the above referenced discussion, the Palermo Protocol's *travaux préparatoires* are rather silent on this form of human exploitation. The preparatory works do clarify that '[t]he removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.'<sup>23</sup>

Other sources of interpretational guidance on the Palermo Protocol primarily come from the United Nations Office on Drugs and Crime (UNODC). The UNODC has labeled itself, 'the guardian' of the Palermo Protocol, claiming that it has a 'a vital role to play in assisting States in translating their commitments into action, in mainstreaming related criminal justice and security mandates into the UN system, and in raising global awareness of this problem.'<sup>24</sup> Accordingly, the UNODC has issued an overabundance of publications on issues of statutory interpretation concerning the Palermo Protocol.<sup>25</sup> Nevertheless, these documents all refrain from explicitly defining this exploitative purpose from a substantive criminal law perspective.

One of the UNODC's most topical publications for purposes of this study is a 2015 Issue Paper on 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol.'<sup>26</sup> The UNODC articulates that 'organ removal' as an end purpose of trafficking can occur for reasons of culture and religious ritual, as

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<sup>22</sup> UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, NY: United Nations, 2006) 344, note 28. See also, UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol*, 2015 (Vienna, Austria, 2015) 36.

<sup>23</sup> UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, NY: United Nations, 2006) 347. See also, UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol*, 2015 (Vienna, Austria, 2015) 36-37: '[t]his raises several questions, not least of which is whether the same rule would apply to adults (subject of course to their valid consent) and if not, why not.'

<sup>24</sup> UNODC, 'UN Convention against Transnational Organized Crime celebrates 10 years', <https://www.unodc.org/lpo-brazil/en/frontpage/2013/10/16-un-convention-against-organized-crime-celebrates-10-years.html>, 10 January 2018.

<sup>25</sup> The manifestation of such research emerges via the creation of various UNODC materials including: training materials (such as legislative guides, manuals and so-called toolkits), reports and assessments, technical papers, inter-agency papers, brochures, leaflets and multimedia. See UNODC, 'Catalogue of Materials: Global Programme against Trafficking in Persons & Global Program against Smuggling of Migrants', [https://www.unodc.org/documents/human-trafficking/2015/UNODC\\_Catalogue\\_of\\_Materials.pdf](https://www.unodc.org/documents/human-trafficking/2015/UNODC_Catalogue_of_Materials.pdf), 10 January 2018.

<sup>26</sup> UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol*, 2015 (Vienna, Austria, 2015).

well as for the commercial trade in organs for transplantation.<sup>27</sup> As opposed to the other enumerated forms of exploitation in the Palermo Protocol, the Exploitation Issue Paper notes,

it is only ‘removal of organs’ that does not necessarily constitute an inherent wrong – or indeed a crime in its own right in national law. In other words, unlike sexual exploitation, forced labor or services, slavery, practices similar to slavery and servitude, which are ‘wrong’ irrespective of whether or not they take place in the context of trafficking, the removal of organs may be lawful or unlawful depending on the purpose and circumstances of that removal.<sup>28</sup>

In 2008 and 2009, a joint CoE and United Nations Study was published on trafficking in organs, tissues, cells (trafficking in OTC) and trafficking in human beings for the purpose of organ removal (Joint Study). One of the major findings of this study included ‘the existence of widespread confusion in the legal and scientific community between ‘trafficking in OTC’ and ‘trafficking in human beings for the purpose of the removal of organs.’<sup>29</sup> One of the joint study’s main aims was to distinguish these crimes from one another. The joint study explained this delineation as follows:

it could be said that trafficking in organs, tissues and cells differs from trafficking in human beings for organ removal in one of the constituent elements of the crime—the object of the criminal offense. In the former case, the object of the crime is the organs, tissues and cells, while in the latter case it is the trafficked person.<sup>30</sup>

Thus, where the Palermo Protocol is relevant in this space is when the person, as opposed to one or more of their parts is trafficked for the purpose of the removal of their organs.

The Joint Study incorporated a recommendation: the international community should ‘elaborate an international legal instrument setting out a definition of trafficking in organs, tissues and cells (OTC) and the measures to prevent such trafficking and protect the victims, as well as the criminal law measures to punish the crime.’<sup>31</sup> Criminal law measures were realized in the creation of the CTHO. The purpose of this article to understand the criminal law confines

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<sup>27</sup> Ibid 37-38.

<sup>28</sup> Ibid 37.

<sup>29</sup> United Nations and CoE, ‘Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs’, 2009 (France, 2009), 7.

<sup>30</sup> Ibid 93.

<sup>31</sup> Ibid 8. See also, CoE, Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs, <https://rm.coe.int/16800d3840>, para. 7 (Explanatory Report).

of the organ trafficking offenses, not the human trafficking for the purpose of organ removal offense. The latter concepts have been codified in the CTHO and will be discussed in the following section.

### 3. Crimes Identified in the CTHO

A legislative outcome of the Joint Study's recommendation is the CTHO. The CTHO's purpose is three-fold, the first of which is: 'to prevent and combat the trafficking in human organs by providing for the criminalisation of certain acts'.<sup>32</sup> In spite of the identified need for a definition of trafficking in OTC, no such agreement could be reached. In the Explanatory Report to the CTHO, it states:

Given the complexity of the criminal actions comprising 'trafficking in human organs', involving different actors and different criminal acts, the negotiators of the Convention considered it less useful to attempt to formulate an all-encompassing definition of the crime to serve as the basis for specifying the description of the offenses in Chapter II of the Convention. Instead, the mandatory provisions contained in Chapter II of the Convention on 'Substantive Criminal Law' (Article 4 paragraph 1 and Articles 5, 7, 8 and 9) enumerate the criminal acts which, whether committed on their own or in conjunction with one another, all constitute trafficking in human organs.<sup>33</sup>

As such, the CTHO has identified 5 offenses which fall under the umbrella of trafficking in OTC:

- The illicit removal of human organs (Article 4);
- The use of illicitly removed organs for purposes of implantation or other purposes than implantation (Article 5);
- The implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law (Article 6);
- The illicit solicitation, recruitment, offering and requesting of undue advantages (Article 7); and,
- The preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs (Article 8).

Additionally, the CTHO also requires States Parties to criminalize the attempt

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<sup>32</sup> Article 1(a), CTHO.

<sup>33</sup> Explanatory Report, para. 23.



of these offenses as well as to extend criminal liability to those who aid or abet the commission of any of these enumerated offenses.<sup>34</sup>

The below subsections will go through the CTHO offenses and identify the elements of each offense. These offenses attempt to both cover and criminalize practices at various stages of the organ trafficking process from recruitment of the necessary parties to the removal itself. Additionally, these provisions also enable the attachment of criminal liability to various persons who participate in the organ trafficking process.

### 3.1. Offenses Concerning the Illicit Removal of Human Organs

Article 4 requires States Parties to take ‘take the necessary legislative and other measures to establish as a criminal offense under its domestic law’ pertaining to the illicit removal of organs.

This offense is not concerned with the traffic in, and of organs, but rather, with the removal of them. Another significant difference between this codified offense from the Palermo Protocol’s conceptualization of trafficking is that the CTHO contemplates and includes the removal of organs from living as well as deceased persons. This issue (trafficking the dead) was not discussed in the Palermo Protocol’s drafting sessions.

To understand the elements of offenses proscribed under Article 4, one must determine two things. First, whether the case involves a living or deceased donor. Second, whether the removal was performed in exchange for a financial gain or comparable advantage. Article 4(3) explains that a ‘financial gain or comparable advantage’ does ‘not include compensation for loss of earnings and any other justifiable expenses caused by the removal or by the related medical examinations, or compensation in case of damage which is not inherent to the removal of organs.’

It seems then that the ‘financial gain or comparable advantage’ envisaged incurring criminal liability would include payment to a donor, or to a person on behalf of the donor for the organ, as well as to a person who procured the individual from whom the organ was removed. This type of payment could be considered similarly to a finder’s fee.

As it concerns organ removal, the CoE expressed its opinion on the issue of financial gain when it established the Convention on Action against Trafficking in Human Beings, ‘[t]he principle that it is not permissible for the human body or its parts as such to give rise to financial gain is established Council of Europe legal acquis.’<sup>35</sup> These sentiments were reconfirmed in the Explanatory

<sup>34</sup> Article 9, CTHO.

<sup>35</sup> Explanatory Report, para. 96. The Explanatory Report goes on to identify several instances where this principle has been formally memorialized which includes: Committee of Ministers Resolution (78) 29; the final declaration of the 3rd Conference of European Health Ministers (Paris, 1987); Article 21 of the Convention on Human Rights and Biomedicine (ETS No. 164); the additional protocol to that convention concerning transplantation of organs and tissues of

Report to the CTHO.<sup>36</sup> Moreover, this concept is intended by the drafters of the CTHO to be ‘understood in a broad context’ including but not limited to an understanding that the advantage or gain ‘can be offered to the donor or third person, directly or through intermediaries.’<sup>37</sup>

If the incident concerns a living donor and no form of financial advantage was received, then the offense is comprised of two *actus reus* elements and one *mens rea* element. The elements can be understood as including the: 1) the removal of one or more human organs; 2) without the consent of the living donor; and, 3) that the removal is performed intentionally.

Valid consent is described under Article 4(a) as requiring it to be free, informed and specific. Negotiators of the CTHO considered that the concept of consent ‘should be identical as the one expressed in the Convention on Human Rights and Biomedicine, and its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin.’<sup>38</sup> The same terminology (free, informed and specific) is used in those instruments as well. However, Article 13 of the Additional Protocol notes that consent of living donors must be given in either ‘written form or before an official body.’<sup>39</sup> It is important to note that consent can be withdrawn at any time.<sup>40</sup> The term ‘specific’ was clarified in the CTHO’s Explanatory Report to mean, ‘that the consent must be clearly given and with regard to the removal of a ‘specific’ organ that is precisely identified.’<sup>41</sup>

Article 14 of the Additional Protocol governs consent as it concerns persons unable to consent. As a general rule, no removal can be made from a person who lacks capacity to consent.<sup>42</sup> As it concerns consent and deceased donors, the Additional Protocol states that removal shall not take place ‘unless consent

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human origin (ETS No. 186); the Parliamentary Assembly of the Council of Europe adopted a report on ‘Trafficking in organs in Europe’ (Doc. 9822, 3 June 2003, Social, Health and Family Affairs Committee, Rapporteur: Mrs Ruth-Gaby Vermot-Mangold, Switzerland, SOC); and, Recommendation 1611 (2003) on trafficking in organs in Europe.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid para. 40.

<sup>38</sup> Ibid para. 32.

<sup>39</sup> This point is reiterated in the Explanatory Report at para. 33.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid para. 35.

<sup>42</sup> Article 14(1), ETS 186 – Human Rights and Biomedicine (Additional Protocol), 24.I.2002. The exceptions to this rule are contained in Article 14(2), which states: Exceptionally, and under the protective conditions prescribed by law, the removal of regenerative tissue from a person who does not have the capacity to consent may be authorized provided the following conditions are met: i) there is no compatible donor available who has the capacity to consent; ii) the recipient is a brother or sister of the donor; iii) the donation has the potential to be life-saving for the recipient; iv) the authorization of his or her representative or an authority or a person or body provided for by law has been given specifically and in writing and with the approval of the competent body; v) the potential donor concerned does not object. See also, Explanatory Report para. 37.

or authorisation required by law has been obtained. The removal shall not be carried out if the deceased person had objected to it.<sup>43</sup>

If the incident concerns a deceased donor and no form of financial advantage, then the elements of the offense include: 1) the removal of one or more human organs; 2) the removal was not authorized under domestic law; and, 3) that the removal is performed intentionally. A lack of legal authorization will most often be the removal of an organ occurring apart from a domestic system's sanctioned organ donation system.<sup>44</sup>

If the incident concerns a living or a deceased donor and some form of financial advantage, it is irrelevant who receives the advantage in question. It can be the donor or a third party. Under these circumstances, the elements can be understood as including the: 1) the removal of one or more human organs; 2) removal in exchange for a financial gain or comparable advantage; and, 3) that the removal is performed intentionally.

### 3.2. Offenses Concerning Illicitly Removing Organs for Purposes of Implantation and More

Article 5 calls on States Parties to the CTHO to criminalize the 'use of illicitly removed organs, as described in Article 4, paragraph 1, for purposes of implantation or other purposes than implantation.' The inclusion of this provision is so that states will criminalize the subsequent use of the organ once it is removed.<sup>45</sup> The elements of this criminal offense include: 1) use of illicitly removed organs for purpose of implantation or otherwise; and 2) accused acted intentionally with regards to that use.

Article 6 obliges State Parties to *consider* criminalizing outright, as opposed to criminalize the implantation of organs when it occurs outside of the domestic transplantation system, or in breach of essential principles of national transplantation law. This change in duty to criminalize was a consequence of differing domestic systems and perspectives on the matter.<sup>46</sup>

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<sup>43</sup> Article 17, Additional Protocol.

<sup>44</sup> As discussed in the Explanatory Report paras 41-45, this issue is a controversial one. Note also that, '[t]he wording "removal being authorised under its domestic law"... covers different concepts as provided for under domestic law which are based on implicit consent of the deceased person or according to which the relatives of the deceased person are entitled to take the decision.' (Explanatory Report, para. 36)

<sup>45</sup> Explanatory Report, para. 47.

<sup>46</sup> Ibid paras 49-51.

### 3.3. Offenses Concerning the Procurement of Persons to Effectuate Organ Removals etc.

Article 7 calls on States Parties to criminalize the illicit solicitation, recruitment, offering and requesting of undue advantages of an organ donor or recipient. This crime most closely resembles the offense of trafficking in persons for the purpose of organ removal. Article 7 covers instances of donor/recipient procurement, as well as the procurement of individuals (e.g., healthcare or government officials, etc.) to aid in completing the removal.

The procurement of organ donors and recipients is covered in Article 7(1). This offense has 3 elements which include: 1) the solicitation and recruitment of an organ donor or a recipient; 2) carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party; and, 3) committed intentionally. As discussed in the Explanatory Report, Article 7(1) aims to criminalize ‘the activities of persons operating as an interface between and bringing together donors, recipients and medical staff’. The Explanatory Report notes that ‘these activities constitute an essential element of the trafficking in human organs.’<sup>47</sup>

Paragraphs (2) and (3) of this article target what the drafters of this Convention call ‘active and passive corruption.’<sup>48</sup> Individuals who incite others with any undue advantage to assist in the organ removal, implantation or facilitation process can be held criminally responsible. The elements of this offense are as follows: 1) the promising, offering or giving by any person, directly or indirectly, of any undue advantage to or by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity; 2) for the purpose of assisting with the removal process, implantation process or facilitation of a human organ (under the circumstances where appropriate as described in Articles 4(1), (4), (6) and Articles 5); and 3) committed intentionally. Article 7(2) encompasses actions from procurers to others whereas Article 7(3) focuses on requests made by persons (e.g., healthcare professionals or officials) to others for an unfair advantage in exchange for assistance.

### 3.4. Offenses Concerning the Preparation, Preservation, Storage, Transportation, Transfer, Receipt, Import and Export of Illicitly Removed Human Organs

Article 8 covers the various in between stages of the organ trafficking process. Specifically, Article 8(a) calls on States Parties to criminalize the following conduct: ‘the preparation, preservation, and storage of illicitly re-

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<sup>47</sup> Ibid para. 52.

<sup>48</sup> Ibid para. 54.

moved human organs as described in Article 4, paragraph 1, and where appropriate Article 4, paragraph 4.’ Any one of those identified forms of conduct will constitute the *actus reus* element of the offense. The *mens rea* component requires such conduct be committed intentionally.

The *actus reus* element of Article 8(b) includes: ‘the transportation, transfer, receipt, import and export of illicitly removed human organs as described in Article 4, paragraph 1, and where appropriate Article 4, paragraph 4.’ Any one from that list will substantiate the first element. Likewise, the *mens rea* component requires that the above conduct be committed intentionally. As it concerns Article 8 the Explanatory Report explains that the codification of this conduct could be a stand-alone offense, or it could be considered within the realm of aiding or abetting or attempt which is discussed in Article 9.<sup>49</sup>

#### 4. Conclusion

In order to provide some insight as to what offenses the CTHO legislated, this article identified and outlined each offense and its constituent elements. Since the Palermo Protocol’s entry into force, legislative efforts in Europe by way of the CoE have endeavored to broaden criminal liability to those who not only traffic persons for the purpose of organ removal, but to persons who engage in the business of organs at different stages. From donor and recipient acquisition to the removal process and every stage in between, the CTHO appears to have identified criminal liability and now calls on states within the CoE to sign and ratify this instrument. The CTHO has prompted domestic focus on these particular forms of conduct. As far as substantive criminal law is concern, the real work still lies ahead: domestic law making and national criminal justice.

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<sup>49</sup> Ibid para. 57.