

Challenges in Implementing the European Convention against Trafficking in Human Organs

ALESSANDRA PIETROBON*

Abstract

The newest convention of the Council of Europe requires states parties to criminalize all activities related to the trafficking in human organs. It is the first international agreement specifically aimed at addressing this form of criminal trade. Trafficking in human organs is mostly a transnational criminal enterprise: the article highlights how contracting states will have to face specific problems in prosecuting offences committed in foreign countries. The effectiveness of the convention depends on the parties' determination in solving such problems and in avoiding taking advantage from some reservations that – though admitted by the convention – could undermine its possible value as a means of combating transnational crime.

Key words

organ trafficking; human rights; equality and non-discrimination; criminal law conventions; treaty implementation

I. INTRODUCTORY REMARKS

The Council of Europe's *Convention against trafficking in human organs* opened for signature and ratification on 25 March 2015 in Santiago de Compostela and represents the widely anticipated outcome of delicate negotiations.¹ When in force, it will be the first international agreement specifically aimed at confronting a phenomenon of growing concern at a global level in terms of both human rights and public health protection.² It is very difficult to collect quantitative data on this subject: according to a recent study, 5–10 per cent of kidney transplants carried out annually result from commercial transactions.³ Organ exporting countries are located in poorest areas of

* Associate Professor of International Law [alessandra.pietrobon@unipd.it]. The Author acknowledges the contribution of Professor David Rossman of Boston University for critical reading and discussion of this article.

1 The Author took part in the preparatory works of the Convention, as a member of the delegation of Italy to the Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO). The opinions expressed in this article are the Author's own and do not reflect the views of the Italian Government.

2 See full text of the Santiago de Compostela Convention (hereinafter: SCC), available at www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081562. The previous *Istanbul Declaration on Organ Trafficking and Transplant Tourism* of 2008 (available at www.declarationofistanbul.org/), being the final document of an international summit of scientific and medical bodies from 150 countries, is a benchmark of the effort at the international level to both combat organ trafficking and promote free donations.

3 See M. López-Fraga et al., *A needed Convention against trafficking in human organs*, in (2014) 384 *The Lancet* 2187, available at [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)60835-7/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)60835-7/abstract). Unlawful

Asia (India, Pakistan, Indonesia) and Africa, Latin America and Eastern Europe, while recipients originate from North America, Western Europe and Israel.⁴ In China, there are reports of the use of organs that have been removed from executed prisoners, with most of these organs thought to be allocated to foreigners.⁵

Though some international law instruments already considered the problem, specific and more effective rules were needed. In fact, the *Additional Protocol concerning transplantation of organs and tissues of human origin* clearly states that ‘organ and tissue trafficking shall be prohibited’, but it is almost silent on measures to enforce this principle.⁶

Trafficking in human organs is dealt with to a limited extent in other instruments, for example in cases where it amounts to a form of trafficking in human beings.⁷ The new convention will be more far reaching, providing that even the unlawful removal of organs not related to exploitation of human beings shall be considered a criminal offence.⁸ Moreover, through the new convention even the implantation or any other use of organs illicitly removed by individuals will entail prosecution of those responsible.

The new instrument is conceived as a criminal law convention and state parties will be bound to consider as criminal offences a given list of activities that amount to forms of *trafficking in human organs*. The purpose is to criminalize every act related to the trafficking of human organs, reaching the entire chain of culpable actors in the enterprise – from the ones involved in the procurement of the organ, to the surgeons and all other medical professionals who take part in its removal, and in the subsequent implantation. Indeed, this catch-all approach is meant to extend to everyone except the first and the last link of the chain, namely the ‘donor’ and the ‘recipient’, whose conduct is not dealt with by the convention on the assumption that both such subjects are compelled by necessity. In this regard, the convention is

transplants are very difficult to detect, knowledge is often provided by the fact that some patients “disappear” from the waiting list of the official health care system and later return to get post transplantation treatment.

4 Further information in *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Joint Council of Europe/United Nations Study, 2009, at www.coe.int/t/dghl/monitoring/trafficking/Docs/News/OrganTrafficking_study (‘Joint Study’).

5 Tania Branigan, ‘Executed prisoners are main source of Chinese organ donations’, *The Guardian*, 26 August 2009, available at www.theguardian.com/world/2009/aug/26/china-organ-donation-prisoners.

6 See Art. 22 of the 2006 Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, CETS No. 186 (2002), available at www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081562 (‘AP’). The AP has operated since 1 June 2006 and has only currently been ratified by 13 States of the Council of Europe (‘CoE’). The AP simply requires the Parties to ‘provide appropriate judicial protection to prevent or to put a stop to an unlawful infringement’ of the principle (Art. 24) and to provide for appropriate sanctions (Art. 26). This Protocol is meant to complete the 1999 Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No. 164 (1997) (‘OC’). The OC entered into force on 1 December 1999 and has been ratified by 29 states.

7 So provide both the UN’s 2003 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2237 UNTS 319 (2000) in Art. 3 and the 2008 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197 (2005) (‘CoE Convention’) in Art. 4 (see note 47, *infra*).

8 For instance, when the victim agrees to the removal but the consent is not valid, or in the case of illicit removal of organs from deceased persons.

neutral: it does not require states parties to punish such highly vulnerable persons but, at the same time, it does not prevent the parties from doing so.⁹

State parties will have to either create new provisions or modify their domestic criminal law to the extent needed to assure full compliance with their international obligations as is the ordinary practice when criminal law conventions are to be implemented. The impact of the convention on domestic legislation will not be very significant in those European states which already have a strictly regulated transplantation system, aimed at protecting the same principles now endorsed by the convention. Indeed, the most serious cases of organ trafficking – those consisting in the illicit removal of organs – are presently being reported from outside Europe.¹⁰ The present study will investigate the actual possibilities for the European states that will be parties to the SCC to establish their jurisdiction to prosecute crimes related to organ trafficking that are committed outside their territories. These possibilities will be more or less effective depending on some decisions that each contracting state will have to make when ratifying the convention. This includes the decision whether or not to take advantage of some reservations provided for by the convention. Once jurisdiction is established, some conflict of law issues might arise that will have to be solved in such a way as to enhance the effectiveness of the SCC as this article will try to demonstrate.

2. THE SUBSTANTIVE CRIMINAL LAW RULES AND THE DOMESTIC TRANSPLANTATION SYSTEMS

The Convention was promoted by the UN and the Council of Europe (CoE), that – along with the conclusions of the *Joint Study*¹¹ – underlined the need for a clear, internationally agreed definition of ‘trafficking in human organs’. However, negotiators could not reach an agreement on this point and, as a result, the preparatory work avoided formulating a general notion, thus leaving the concept of ‘trafficking in human organs’ to be understood by reference to each specific substantive criminal law provision set forth by the SCC.¹²

The fundamental principles endorsed by the Convention are the freedom of consent of the donor and the gratuity of the donation. Both of them are clearly upheld by Article 4 which states that the removal of a human organ is prohibited if either of these principles is violated. So, the removal of an organ will constitute a criminal offence when it is performed without the *free, informed and specific* consent

9 See Explanatory Report to the SCC, (‘SCC-ER’), at www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.

10 Joint Study, *supra* note 4, 57.

11 *Ibid.*, 96.

12 According to Art. 2.2, trafficking in human organs ‘shall mean any illicit activity in respect of human organs’ as prescribed in Art. 4.1 and Arts. 5,7,8,9 of the SCC, *supra* note 2. According to the SCC-ER, the definition of human organ has to be taken from Art. 3 of the EU directive 2010/45 (note 15, *infra*), thus meaning ‘a differentiated part of the human body, formed by different tissues, that maintains its structure, vascularisation, and capacity to develop physiological functions with a significant level of autonomy’. Trafficking in tissues and cells (corneas, stem cells, bone marrow) is not dealt with by the SCC, as the matter has been left to a future agreement, not yet elaborated: see SCC-ER, *supra* note 9, 2.

of the donor and/or when the donor gets some financial compensation, or any other advantage (Art. 4.1). The act of removing or transplanting an organ without proper consent or by compensating the donor is criminal if committed intentionally. The purpose of the removal is immaterial so it does not matter if the organ is used for implantation in another person or for any other purpose, such as research.

When determining the sanctions, some specific aggravating circumstances must be taken into account, such as causing serious physical or mental harm to the donor, as well as the donor's minor age or vulnerable condition.¹³ Any subsequent use of an illicitly removed organ for the purpose of implantation or for any other purpose shall be considered as a separate criminal offence if committed *intentionally* (Art. 5).

The catch-all approach of the convention is quite clear in Articles 7 and 8, according to which a list of activities – connected to the illicit removal of an organ or to its exploitation – are considered as criminal offences. This applies to illicit solicitation or recruitment of an organ donor or a recipient, and to the offering or requesting of undue advantages (Art. 7) as well as to the preparation, preservation, storage, transportation, transfer, reception, import and export of illicitly removed organs (Art. 8). Aiding or abetting and attempt are dealt with by Article 9.

The impact of the convention upon the domestic law of the Parties will obviously depend on the degree of similarity of already existing criminal law provisions with the criminal provisions whose adoption and enforcement it requires. The principle of the free consent of the donor as well as the principle of gratuity of organ donation, should already be informing the domestic transplantation system, especially so in the states parties to the 2002 Strasbourg Protocol.¹⁴

As for the 28 EU member states, a directive provides for *standards of quality and safety of human organs intended for transplantation*.¹⁵ Accordingly, transplantation of organs in the EU can be legally performed only in authorized institutions and there is a set of rules that provides for the traceability of the organs in order to guarantee their quality and suitability for a totally safe transplant. Such rules are supposed to be effective in assuring that the procurement of organs is possible only through official channels and, in turn, make it quite burdensome, and thus too risky or expensive, to perform organ removals or implantations outside the official transplantation system.¹⁶ Outside the EU, domestic transplant law or rules on the traceability of

13 SCC, *supra* note 2, Art. 13: other aggravating circumstances occur when the offence is committed by a person abusing his/her position; or is committed in the framework of a criminal organization, or the perpetrator has previously been convicted of offences established in accordance with the same convention.

14 States parties to the AP shall guarantee that an efficient transplantation system is established, by national legislation, in order to 'provide equitable access to transplantation services for patients' (*supra* note 6, Art. 1). So far, only 13 states have ratified this, including Bulgaria, Croatia, Estonia, Finland, Georgia, Hungary, Iceland, Moldova, Montenegro, Slovenia, Spain, Switzerland and the former Yugoslav Republic of Macedonia.

15 Directive 2010/45/EU, of the European Parliament and of the Council of 7 July 2010, in OJ, L 207 of 6 August 2010. The directive acknowledges the exchange of organs for transplantation between member states as common practice and is meant at providing an uniform legal framework, in order to ensure faster procurement, transport and use of organs at Union level (preamble, paras. 4–6).

16 *Ibid.* According to its preamble (para. 7), the directive 'although having as its first objective the safety and quality of organs, contributes indirectly to combating organ trafficking through the establishment of competent authorities, the authorisation of transplantation centres, the establishment of condition of procurement and systems of traceability'. Member states shall ensure not only that 'all organs procured, allocated and transplanted on their territory can be traced from the donor to the recipient and vice versa' but

organs might nevertheless be lacking or less effective, making such countries a suitable location for organ trafficking.¹⁷

3. THE CONSENT OF THE DECEASED DONOR

Regarding cadaver organ donation, legislation may follow either of two different systems: (1) an *opting in rule*; or (2) an *opting out rule*. The former makes the removal of organs from a deceased person legal only when the same person, during his/her life, had positively agreed to it and then, according to many transplantation systems, agreed to be added to a list of possible donors. On the contrary, where the opting out system is used, removal from cadaver is prohibited only when the deceased person, during his/her life, had made a specific declaration to exclude *post mortem* donation.¹⁸ Both systems are considered consistent with the convention and, as such, no state party will have to amend its domestic legislation in this regard.¹⁹

In the absence of the specifically expressed will of the deceased, domestic legislation of some states allows organ removal from a deceased donor in given conditions. Since this possibility is provided for as a means of alleviating the shortage of organs for transplantation, Article 4 of the SCC is clear that removals performed under such conditions are lawful. Had it not been so, the consequences would have been that a removal legally carried out in one state could have been considered a crime in a different state, even if both such states are parties to SCC.²⁰ This kind of outcome, rather obviously, is to be avoided and the point did not raise problems during the negotiations.

4. THE CONSENT OF THE LIVING DONOR

As clearly stated by the ER, the SCC is not aimed at harmonizing domestic transplantation systems. Thus, the convention does not provide for any conditions or requirements whatsoever to be applied in ascertaining whether the consent of a living donor is 'free, informed and specific'. Therefore, these conditions and requirements will continue to be set by each domestic transplantation law.

also 'the implementation of a donor and recipient identification system that can identify each donation and each of the organs and recipients associated to it' (Art. 10).

17 Concern has emerged about organ trafficking taking place in Azerbaijan (see CEDAW, *Concluding observations on the fifth periodic report of Azerbaijan*, UN Doc No. CEDAW/C/AZE/CO/5, 2015, para. 25; on CEDAW, *infra*, note 37) and in Turkey (see note 62, *infra*).

18 See *WHO Guiding Principles of Human Cell, Tissues and Organ Transplantation*, at www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf?ua=1. Strictly speaking, the consistency of the opting out system with the principle of the free consent of the donor may be controversial. In fact, the rule supporting it relies on a *presumed* consent (for example, even a person that does not express any will on the issue will be considered as a donor) rather than requiring at least an *implicit* consent of the donor (for example, some expression of the person's will in favour of donation, though not necessarily contained in a formal statement). The present article will not deal with this and other fundamental issues related to donations by deceased donors (like the determination of the moment when death occurs).

19 The SCC will not interfere with the choice of States: see SCC-ER, *supra* note 9, 5.

20 So that, for instance, the surgeon lawfully performing a removal in the first state could be prosecuted under criminal law in the second.

A minimum level of harmonization is instead provided by different international law instruments.²¹ According to the ER to the OC, *free* consent is to be understood as given ‘in the absence of any pressure from anyone’.²² This, as a general rule, applies to every medical treatment: indeed, when it comes to organ donation the same requirement should be interpreted in the most rigorous way. In fact, while ordinary medical treatment is meant to improve the health condition of patients, the removal of an organ will certainly not be beneficial to the donor’s health in any way.²³ The AP equally states that removal from a living donor can be performed only after the person has given free, informed and specific consent. It is here that the need for further conditions is established. The consent has to be in written form or given before an official body, and it can be freely withdrawn at any time.²⁴ Only individuals who have a close personal relationship with the recipient can be living donors.²⁵ When such a relationship does not exist, the removal can be carried out only under special conditions that have to be regulated by domestic law.²⁶

As for the adequacy of information, the living donor has to be made aware not only of ‘the purpose and nature of the removal as well as on its consequences and risks’, but also of the ‘rights and safeguards prescribed by law for the protection of donor’

21 According to Art. 31 of the 1980 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), in interpreting a treaty ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account. Interpretation of the SCC by reference to the AP or to other international conventions is both necessary and possible only as long as all the states concerned ratify the same related instruments. This is still far from being the case for the mentioned CoE conventions (see *supra* note 5, 14). Nevertheless, the SCC-ER assumes that the SCC and the related conventions are to be considered as a single system of norms within which inconsistencies are to be avoided. This applies, in particular, to the issue of consent. ‘[A]s a general principle’, the concept of consent included in the SCC ‘should be identical’ to the one expressed in the OC and in the AP (SCC-ER, *supra* note 9, 5).

22 See Art. 5 of the OC, *supra* note 6. The European Court of Human Rights (‘ECHR’) considered the issue, in a case concerning sterilization of a Roma woman performed while she was giving birth to her second child by Caesarean section. The patient’s consent had been formally required and she had signed a form, but the Court considers that ‘it does not appear from the documents submitted that the applicant was fully informed about her health status, the proposed procedure and the alternatives to it. Furthermore, asking the applicant to consent to such an intervention while she was in labour and shortly before performing a Caesarean section clearly did not permit her to take a decision of her own free will, after consideration of all the relevant issues and, as she may have wished, after having reflected on the implications and discussed the matter with her partner’: *V.C. v. Slovakia*, ECHR, Judgment of 8 November 2011, para. 112.

23 Kidney donation is the most frequent procedure, but also part of a lung, the liver (which regenerates), the pancreas and a portion of the intestines can be removed from a living donor. Even the heart can be donated by a living person that – needing not a new heart, but a lung transplant – for medical reasons gets a joint lung-heart transplantation, so that his/her heart can be donated to another patient: more at www.organdonor.gov/about/livedonation.html.

24 AP, *supra* note 6, Art. 13.

25 In several countries donation is restricted to benefit close relatives: to mention only a few, see *The Transplantation of Human Organs and Tissues Act*, of Punjab, of 18 March 2010, Art. 3, at www.punjablaws.gov.pk/index1.html; in India Art. 3 of the *Transplantation of Human Organs Act* of 1994 admits donation from a living person to a recipient, not being a near relative, ‘by reason of affection or attachment towards the recipient or for any other special reasons’ but ‘such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee’, see full text at www.indiankanon.org/doc/1666741/. A few cases of organ trafficking have already come to courts in India, showing how this requirement is often violated by donors representing themselves as relatives of the recipient: see note 43, *infra*. In Israel, donation to a non-relative recipient is admitted following authorization by a Central Board, and the same rule applies to donations to non-residents of Israel: see *Organ Transplant Act*, 2008, at www.declarationofistanbul.org/resources/legislation/267-israel-transplant-law-organ-transplant-act-2008.

26 AP, *supra* note 6, Art. 10: each state party to the AP shall provide for a definition of the ‘close relationship’ and of the conditions to be met in the absence of such a relationship.

and, in particular, of the right to have access to *independent* advice about the risks ‘by a health professional having appropriate experience and who is not involved in the organ or tissue removal or subsequent transplantation procedures’.²⁷

In any case, even *after* a consent was given, the removal shall not be carried out if there is a serious risk to the life and the health of the donor. To this end, the AP prescribes that health professionals shall carry out all appropriate investigations in order to evaluate and reduce all potential physical and psychological risks to the donor.²⁸

For states that are members of the EU, more rules are provided by Directive 2010/43, which requires that the medical team carry out an interview with the potential donor.²⁹

It can be assumed in states which are members of the EU as well as in other European states adopting the AP that domestic legislation would be already consistent with this principle. Therefore, should the allegedly illicit removal of an organ be performed in the territory of such states, the application of the criminal provisions set by Article 4 of the SCC will probably raise no issue. Domestic law will already refer to similar, if not the same, substantial rules in order to establish whether or not the consent of the donor was free, informed and specific.

5. DONATION OF ORGANS BY NON-COMPETENT LIVING DONORS

The consent to the removal of an organ will be valid only if duly issued by competent living donors. Thus, this excludes minors and other subjects without full legal capacity, for example because of mental illness. The SCC includes among aggravating circumstances the fact that the offence ‘was committed against a child or any other vulnerable person’. A child in the European conventions is someone below the age of 18. This, however, does not imply that removal of organs from a minor will *always* amount to a criminal offence according to the SCC.

Some states do provide for the possibility of removing organs from a living donor under the age of consent, or from subjects with mental disabilities, with the permission of a special authority.³⁰ In Europe a common understanding on this issue is so far unpredictable as was made evident by the radically different positions taken by states during the negotiations. On the one hand, several states, for ethical reasons which to them are self-evident, radically opposed the idea of removing organs from a minor or an incompetent donor. On the other hand, other states suggested that donation by incompetent donors can be acceptable under special

²⁷ *Ibid.*, Art. 12.

²⁸ *Ibid.*, Art. 11.

²⁹ See preamble of the Directive, para. 7.3 and 12.

³⁰ To mention only a couple of examples: The *Human Transplantation (Wales) Act, 2013*, states as a general rule that the child, if competent, can validly express consent to the removal of an organ. If the child is not competent or is competent to deal with the issue but fails to do so, the consent may be issued by a ‘person who has parental responsibility for the child’ (Art. 6). In Switzerland, Art. 13 of the *Transplantation Act* provides for donations from minors or persons ‘incapable of judgement’. See also the *Swedish Transplant Act of 1975*. For an overview, see L. Lopp, *Regulations Regarding Living Organ Donation in Europe* (2012).

circumstances strictly regulated by law. This applies, for instance, to organ donation among siblings in cases where no organ would otherwise be available.³¹

Likewise, there is a difference in the legislation of state parties to the SCC in dealing with organs removed from a non-competent living donor without his/her consent. A removal that is completely lawful in one country could be prosecuted as organ trafficking by another state party to the same SCC. To avoid the problem, the simplest solution would have been to draft Article 4 so as to also give living donors the same possibility that is now explicitly stated only with regard to the deceased donor of the removal being 'authorized by law'.³² Nevertheless, the issue proved to be so extremely delicate that the negotiators could not reach any agreement on this point at the technical committee level. Eventually, it was for the Committee of Ministers to choose the remaining possible solution. They ultimately decided to provide for a reservation through which each state party can declare that it reserves the right not to apply Article 4.1a 'to the removal of human organs from living donors, in exceptional cases and in accordance with appropriate safeguards or consent provisions under its domestic law'.³³

6. ASSESSING THE VALIDITY OF CONSENT TO ORGAN REMOVAL, PERFORMED IN A FOREIGN COUNTRY: A CONUNDRUM

Prosecution of the offence consisting of the *use* of illicitly removed organs, as per Article 5 of the SCC, will play a crucial role in enabling the extraterritorial effectiveness of the SCC convention, in cases where all or part of the conduct is performed *outside* the territory of the states parties. This will happen when just the *use of illicitly* removed organs takes place in one of the state parties to the convention, while its *removal* was performed in a third country, such that any consent provided by the donor was given there.

Assessing whether or not the consent of the victim of an alleged crime was *free, informed and specific* is generally a matter of fact. Indeed, when the donation of an organ is concerned, it will be also a matter of law since, in most countries, transplantation law is supposed to provide for conditions and formal requirements to be met in order to demonstrate the validity of a living donor's consent. So, the issue raises a conflict of law problem which is quite unusual before a criminal court. This conflict is not addressed exhaustively either in the convention or the explanatory report. As a result, the question of which domestic law is to be considered in order to assess whether the consent of the donor was valid remains.³⁴ Shall the court consider

31 SCC-ER, *supra* note 9, 6.

32 This could have been done by omitting the words 'in the case of the deceased donor', which relates to the possibility of the removal *being authorized by law*.

33 It was perceived that national Parliaments in those States would reject ratification the SCC if the possibility of lawful organ removal from non-competent donors been established by it as a rule, rather than as an exception. As normally required for a reservation of this kind, it shall contain 'a brief statement of the relevant domestic law'.

34 By quoting the ER of the OC, the SCC-ER, *supra* note 9, states that 'it is for domestic law to determine whether or not a person has the capacity to consent' (para. 37).

and, if so, to what extent, the law of the state where the removal was performed, or shall it rather refer to the law of the country where the proceedings takes place (*lex fori*)?

A proper solution will have to assure the full implementation of the SCC which must be consistent at the same time with obligations set by general international law and the relevant conventions on the protection of human rights.

It would not be wise for the court to refer only to its domestic law because this would probably lead national courts to consider almost any removal of an organ performed abroad as illicit, according to rules at variance with those provided by the *lex fori*. This reasoning, which might be inferred by a superficial reading of Article 4,³⁵ hinders the possibility of using organs removed in a foreign country without committing a criminal offence and might eventually affect even the lawfulness of removals performed in other State parties to the SCC. This 'domestic law-oriented' approach could eventually bring about detrimental effects on the effort to face the shortage of organs for transplantation where the lawfulness of a removal can be challenged for not meeting some formal condition.

The alternative solution would be to refer to the law of the place where the removal was performed. A clear suggestion in this sense is provided by Directive 2010/45EU, stating that the verification of the donor's consent will be done 'in accordance the national rules that apply where donation and procurement take place'.³⁶

Without the co-operation of the courts in the donor state, it will be practically impossible for criminal courts in a state party to the SCC to get the evidence needed to prosecute. The judge, however, could obtain and take into consideration formal documents issued by foreign health authorities, probably certifying that the consent of the donor was duly ascertained and that the removal took place in full compliance with local rules. Following this reasoning, subsequent use of the organ would not be prosecuted if some documented evidence is provided that local law was observed in the country where the removal was carried out.

Nevertheless, that local law might be less attentive to the protection of the donor when compared to European standards. As a matter of fact, while several foreign countries can be considered to be 'safe' with regards to living donors' protection, for other states a similar assumption might be improper. In such cases, alleged compliance with local rules should not in itself satisfy the court that no abuse was committed. The final assessment would be left to judicial discretion. However, the issue might be dealt with in different ways, thus leading to different conclusions even among judges in the same country. The consequent lack of consistency and uniformity in the judicial application of the convention would hinder its effectiveness against the skilled criminals who organize transnational organ trade.

35 The norm requires every state party to criminalize removals performed in violation of 'its domestic law'. This assumes that the crime occurs *within* its jurisdiction, while the issue of transnational offences is considered in SCC, *supra* note 2, Art. 5.

36 Art. 4.2, *b*.

7. EQUALITY AND NON-DISCRIMINATION AS LEADING PRINCIPLES IN THE IMPLEMENTATION OF THE CONVENTION

Some leading principles should be found to help reach a uniform application of the SCC and let it play its role to the best. International law should be looked at as the source of such principles since the prosecution of the crimes provided for by the convention does not simply proceed from a domestic legislator's will, but is also required as a measure of compliance with international obligations.

Indeed, the SCC will not operate as an isolated international law instrument with its own purposes and effects in the criminal law field. Rather, it will interact with general international law norms and with other treaties already in force for the same states. In particular, the SCC will have to be implemented while also taking into account the need to comply with the existing conventions on human rights and the conventions against the trafficking of human beings. From this perspective, not only should the measures taken to implement the SCC be consistent with each of those conventions, but they could be seen as a positive means of simultaneously ensuring compliance with other international law rules related to the protection of victims, even beyond what the SCC explicitly requires.

As made clear by the preamble, the SCC is meant to combat a *global problem*, whose victims are among the weakest people in the world. Being entrusted with such a task, courts should pay particular attention when dealing with cases of the removal of organs performed in countries where local law, traditional rules or social customs are still inconsistent with the non-discrimination principle and the alleged 'donor' is a vulnerable subject whose capacity is impaired for whatever reason.³⁷

In such cases, a certificate issued by local health authorities stating that the removal was lawful should be irrelevant to the inquiry into whether there was a criminal offence set out by Article 5 of the convention – the Court's assessment will have to be totally autonomous. The outcome might well be that of the organ's removal being illicit due to the lack of adequate consent, even in cases where it was legal according to the law of the place where it was performed.³⁸

37 The meaning of the non-discrimination principle as recalled by Art. 3 of the SCC, *supra* note 2, is 'identical to that given to it under Art. 14 of the European Convention on human rights' (SCC-ER, *supra* note 9, at 6). States parties to the ECHR shall secure equality in the enjoyment of the rights *set forth by the same ECHR* to everyone *within their jurisdiction*. Illicit organ removal, as inhuman treatment, violates Art. 3 of the ECHR. However, had the crime been perpetrated in a foreign country, the victim would hardly come within the jurisdiction of a state party to the ECHR and SCC (and would probably not even benefit from the prosecution of the crime). In any case, even assuming that the non-discrimination principle *as set by the ECHR* would not come into consideration, the courts shall nonetheless grant the broadest application to that principle in every possible way to properly comply with other international law norms that require it. First of all, the 1981 *Convention on elimination of all forms of discrimination against women* 1249 UNTS 13 (1979) ('CEDAW'), to which all member states of the CoE are parties, requires states 'to do *everything that is necessary*' to achieve the full realization of the rights of women: see A. Byrnes, 'Art. 24', in M.A. Freeman, C. Chinkin and B. Rudolf (eds.), *CEDAW Commentary* (2012), 541 (emphasis added). As for the ECHR, Protocol no. 12 (presently in force only among 19 states) aims at broadening protection of the non-discrimination principle. While Art. 14 of the ECHR prohibits discrimination only with regard to the 'enjoyment of the rights and freedoms' *set forth by the same convention*, the Protocol states that the enjoyment of *any right set forth by law*, including international law, shall be secured without discrimination (Art. 1).

38 As no obligation exists in general international law compelling states to recognize legislative or administrative acts of foreign states, denying authoritative effect of such documents would not entail any international

The issue can be highly sensitive when the alleged donor is a woman. In many places in the world, women are still subject to some kind of legal or *de facto* guardianship by their husbands or by male relatives. Even if local law does formally grant equal capacity to men and women, a different discriminatory tradition might still be in effect and social or religious pressure might still be compelling women to follow their husbands' or male relatives' will.³⁹ In such cases, a women donor would probably not even be left alone with the medical team when required to express her consent.

Though organ trafficking is explicitly mentioned as an issue of concern only in a few cases, trafficking in human beings and slavery are reported in several countries.⁴⁰ Where such crimes occur on a large scale, the relevant area should also be considered at risk in relation to organ trafficking. The same conclusion should be reached in any other case in which the donor's capacity to give free consent is impaired for whatever reason. Donations from illiterate people, for instance, could hardly be considered valid for lack of capacity of the donor to fully understand the possible impact that the removal can have on his/her own health and life quality.

From this perspective, elements to start an inquiry can be found in the reports of the UN Committee on discrimination against woman, concerning the region where the 'donation' occurred.⁴¹ Countries that are reported to have yet to eradicate substantial forms of discrimination should be considered as unsafe areas for the purpose of sound organ donation. This conclusion should be reached, in particular, where discrimination is coupled with life conditions below the poverty line, with poor education and/or domestic violence. The level of education of the donor is not likely to be attested to by any certificate, but the same UN reports mentioned above should be considered to at least identify areas where illiteracy is endemic. The report of CEDAW concerning the condition of women in some areas of India, for instance, is of the utmost concern but the situation is even more frightening when considering that the vast majority of living donors in that country are women.⁴²

There shall be no freedom of consent when the consent was obtained by duress or fraud, from subjects in a condition of severe debt or suffering from deprivation

wrongful act: see M. Ruffert, *Recognition of Foreign Legislative and Administrative Act*, in MPEPIL (May 2011, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1087).

39 See Art. 5, in *CEDAW Commentary*, *supra* note 37, 141. Special protection is needed by women in rural areas: see Art. 14, *ivi*, 357.

40 Victims are mainly women and children, see CEDAW, *Consideration of reports submitted by Pakistan*, UN Doc No. CEDAW/C/PAK/4 2011, 59 at <http://www2.ohchr.org/english/bodies/cedaw/docs/54/CEDAW-C-PAK-4.pdf>. CEDAW, *Consideration of reports submitted by Indonesia*, UN Doc No. CEDAW-C/IDN/4-5, 2005, 21, *ivi*. Domestic violence is equally reported as a major problem.

41 The Committee is established by Art. 17 of the CEDAW, *supra* note 37, to which all states of the CoE are parties. The same relevance could be attributed to the reports of the UN Committee established by Art. 8 of the 1969 *Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195 (1965), or by Art. 43 of the 1990 *Convention on the Rights of the Child* 1577 UNTS 3 (1989).

42 See CEDAW, *Concluding observations on the combined fourth and fifth periodic reports of India* (CEDAW/C/IND/CO/4-5; 2014) available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5. See also *Trafficking in organs*, Joint Study, *supra* note 4, 59. As for Turkey, 'even after legislative reforms have removed the legal authorisation for discriminatory treatment, attitudes that pressure women to conform to certain codes of behaviour restrict women's life choices': see *Opuz v. Turkey*, ECHR, Judgment of 9 June 2009, Application no. 33401/02, para. 100; selling of kidneys is reported in the country: see note 62, *infra*.

of liberty.⁴³ Consent given by detainees should be considered to be not free in order to criminalize any use of organs removed from such persons in a State party to the SCC.

8. THE BURDEN OF PROOF OF THE CIRCUMSTANCES OF THE REMOVAL, AS PART OF THE CRIMINAL INTENT: THE DIFFICULT TASK OF THE CRIMINAL COURT

When the removal was performed in a country where violations of fundamental human rights occur on a large scale, the court will actually play a substantial role in granting effectiveness not only to the SCC but also to other international law norms.

Prosecution of the use of illicitly removed organs could be enhanced by considering as *intentional* the conduct of the accused who, being aware of the general situation of the area where the removal occurred, nevertheless used the organ, thus ‘accepting the risk’ that it had been illicitly removed (*dolus eventualis*). The prosecutor would bear the burden of proof regarding both the general situation of the country where the removal took place and the knowledge that the accused had of it. On the latter point, the personal and professional experience of the accused would be taken into account.

As for the general situation of the country, means of obtaining reliable data might well be found in official reports issued by UN bodies operating in the field of human rights that are established by an international agreement. In some cases before the ECHR, not only reports of this kind but also similar documents provided by NGOs were conclusive in assessing the lawfulness of a state’s behaviour.⁴⁴ Nevertheless, their relevance as means of evidence in criminal proceedings might be controversial.

Indeed, while reports and data provided by NGOs lack official status, reports issued by the UN committees established by means of an international agreement for monitoring contracting states’ compliance should be considered material to the enquiry even in criminal cases. Although they do not include any legally binding conclusions, such reports represent the outcome of enquiries conducted by the committee in co-operation with the state concerned, following the rules set by the same convention by whom the committee is created.

43 In the Indian State of Orissa, the High Court dealt with a case in which a woman had accepted to donate a kidney after being persuaded by a friend that it was the only means to save the life of a close relative of hers. The removal of the kidney was actually done to the benefit of a patient totally unknown to the donor. Upon denunciation by the husband of the victim, the director of the hospital was arrested. The Court investigated the events in order to decide on a writ of *habeas corpus*, see *Ratnakumary v. State of Orissa*, Orissa High Court, Cuttack, order of 24 July 2014. The Court held that the deceiver had changed the victim’s identity documents to project her as a relative of the recipient and her signature ‘was taken on several written papers and blank papers against her will and she was not aware about the contents and meaning of those papers’. The transplantation had been performed with the approval of the clinic’s director. A State Court of Gujarat acquitted eight people accused of organ trafficking, as the evidence provided did not reveal that any monetary transaction had taken place in respect of a number of donations of kidneys: see *State of Gujarat v. Rajendrasinh*, 22 March 2013. Actually, it had been proved that the donors had posed as relatives of the recipients, being induced to do so by middlemen.

44 Reports by Amnesty International and Human Rights Watch, for instance, were material to the conclusion that Italy had violated the principle of *non-refoulement*, in *Hirsi Jamaa & Others v. Italy*, Judgment of 23 February 2012, Application No. 27765/09.

For this reason, it can be argued that a state party to a convention appointing one of such committees would not be free to deny the relevance of the UN official reports as statements of facts. Evidence of a different situation might well be provided, but international law norms requiring good faith in the interpretation and execution of treaties, as well as the rule on *estoppel*, would prevent contracting states from *a priori* disregarding pertinent reports and a sound motivation for so doing should be provided.⁴⁵

It seems problematic to further enhance the role of the prosecution, in collecting evidence of the criminal intent, without incurring a violation of the presumption of innocence and the principles of due process. In particular, a court will rarely, if ever, be allowed to presume that the consent of the donor was not valid. In certain cases of particularly vulnerable donors, however, specific norms of international law can support the task of the prosecutor as they definitely exclude the validity of organ donation, leaving no possibility for admitting evidence that informed consent was given. According to humanitarian law, donation of organs by war prisoners is totally void and therefore, for the purposes of the SCC, even the use of organs removed from those prisoners shall always be considered a criminal offence.⁴⁶ The same conclusion applies to the removal or to the use of organs removed from subjects who are victims of trafficking in human beings – their consent would be totally irrelevant as expressly stated by the conventions against the trafficking in human beings.⁴⁷

It will be for the legislature to ensure that the convention's goals will not be hindered by the difficulty of collecting direct evidence in Europe of the circumstances in which the removal of an organ was performed in third countries. The SCC-ER already indicates the easiest way – recalling that states parties are bound to consider as criminal offences only acts committed intentionally it then underlines that 'this does not mean that parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts'.⁴⁸ State parties

45 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 141; M. Kotzur, *Good Faith (Bona Fide)*, MPEPIL (January 2009), available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?prd=EPIL.

46 According to Art. 12 of the 1978 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 1125 UNTS 3 (1978) only consent to donation of blood for transplantation or skin for grafting could be lawful by these subjects, if 'given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient'. See G. Novak, *Wounded, Sick and Shipwrecked*, in MPEPIL (December 2013, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e448). See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), at 124.

47 CoE Convention, *supra* note 7. According to the CoE Convention, trafficking in human beings 'shall mean the recruitment, transportation, transfer harbouring or receipt of persons, by means of the threat of the 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 the giving or receiving of payments or benefits to obtain the consent of a person having control over another person'. The crime is characterized by the purpose of exploitation, that 'shall include, at the minimum, the exploitation of prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' and 'the consent of a victim of trafficking in human beings ... shall be irrelevant where any of the means indicated have been used' (Art. 4, emphasis added).

48 See SCC-ER, *supra* note 9, 4. This also underlines that 'the interpretation of the word intentionally is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence'.

should carefully consider the option of providing for the prosecution of reckless or negligent conduct when the offender *could have known* that proper consent to the removal of an organ was lacking. In this regard, the same elements of evidence described above would be necessary in relation to dealing with the general situation of the country and the knowledge that the accused had of it. However, in these circumstances it would be easier to assess whether the defendant was reckless or negligent in not knowing that the donor's consent was not voluntary.

To enhance the effective prosecution of crimes committed abroad, state parties could adopt a list of "safe" countries that would be made public and known to health professionals. This would permit the courts to conclude, *prima facie*, that the use of organs removed in states *not* included in the list amounts to a criminal offence, avoiding the burden of providing direct evidence that the perpetrator was aware of the specific situation. The use of organs illicitly removed in those countries thus could be considered as committed intentionally and be adequately sanctioned.⁴⁹ This option should be carefully considered by each contracting state – or, even better, by all of them acting together – since reference to such a list would help in ensuring the uniform application of the convention; the SCC actually encourages its parties to conclude bilateral or multilateral agreements 'for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it'.⁵⁰

9. THE PRINCIPLE OF GRATUITY OF ORGAN DONATION

Notwithstanding valid consent provided by the donor, the removal shall still be a crime when, in exchange for it, the donor gets a 'financial gain or other comparable advantage'. The same applies when the advantage is due not to the donor himself but to a third party linked to him/her. As a consequence, the removal of an organ will be illicit, for instance, when new employment or an improvement in some working position is promised to a donor's relative in exchange for the organ. However, the living donor can legitimately receive compensation for 'loss of earnings and any other justifiable expenses caused by the removal of an organ or the related medical examinations, or compensation in case of damage which is not inherent to the removal of organs'.⁵¹

In this regard the SCC has staked out a position in favour of the principle of gratuity of donation that is not without controversy. Indeed, the opinion that it would be wise to allow compensation for the donor, especially for a living donor, has become more widespread.⁵² According to this opinion, paid donation could

49 Through making this list officially available to the public, it would become easier to admit that the criminal intent took the shape of *dolus eventualis*. Compared to a non-intentional offence, more effective and dissuasive sanctions could apply as required by Art. 12 of the SCC, *supra* note 2. Deprivation of liberty shall be provided for offences committed intentionally by natural persons under Art. 12.

50 SCC, *supra* note 2, Art. 26.2.

51 SCC-ER, *supra* note 9, 6.

52 The issue has been under discussion in the US for many years. See, for example, G. Crespi, 'Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs' (2994) 55 *Ohio State Law Journal* 2. Other forms of state policies aimed at encouraging organ donation are reported to have little to no effect:

bring several advantages: on the one hand it would contribute to alleviating the severe shortage of organs, saving many lives, and on the other hand, it would help prevent illicit trade.⁵³ As this perspective does not yet appear to garner significant support in Europe, the negotiators did not take it into account and the SCC admits no exceptions to the principle of gratuity of organ donation. Should the opinion supporting paid donation gain momentum in Europe, it might prevent states who favour that option from ratifying the SCC.⁵⁴

10. THE ISSUE OF TRANSPLANT TOURISM AND THE RULES ON JURISDICTION

For patients fearing for their lives, suffering from end-stage organ disease but placed on a long waiting list, the beckoning alternative to uncertainty might be to move to a country where organ procurement can be faster.⁵⁵ Rooted in desperation, this so-called transplant tourism is managed by criminal organizations as close co-operation by a chain of subjects is required: starting from people who inform patients of the possibility of being treated abroad, to those who organize travel to the selected country and, once there, those who provide for accommodation of the patient, for the procurement of the organ and, eventually, for the transplant and the related medical care.⁵⁶

Regardless of the role they play, all subjects participating in the trafficking of organs are subject to prosecution according to Articles 4 and 5 of the SCC. However, the actual possibility of so doing for courts of a state party to the convention will depend on the rules establishing jurisdiction. According to Article 10 of the same SCC, state parties shall prosecute every criminal act performed in their territory (or on vessels and aircrafts flying their flag) as well as any alleged offender present on their territory if they do not 'extradite him or her to another State, solely on the basis of nationality'.

As state parties would normally lack jurisdiction to prosecute crimes committed in foreign countries, to properly implement the SCC they should extend their jurisdiction beyond the territorial principle – at least to enable the prosecution of their nationals or habitual residents who take part in the criminal activities no matter where carried out. By so doing, state parties will be ready to prosecute national

P. Chatterjee et al., *The Effect of State Policies on Organ Donation and Transplantation in the United States* (2015) at *JAMA Intern Med.* doi:10.1001/jamainternmed.2015.2194. On the possibility of offering some form of incentive to families of deceased donors, see S. Nagral and J. Amalorpavanathan, 'Deceased organ donation in India: Where do we go from here?' (2014) 11 *Indian Journal of Medical Ethics* 162.

53 See A. Farrell, 'Adding Value? EU Governance of Organ Donation and Transplantation' (2010) *European Journal of Health Law* 51 and J. Robertson, 'Paid Organ Donations and the Constitutionality of the National Organ Transplant Act' (2013) 40(2) *Hastings Constitutional Law Quarterly* 221. Selling a kidney is legal in Iran: see F. Alesi and L. Muzi, 'Kidneys for sale: Iran's trade in organs', *The Guardian*, 10 May 2015 (available at www.theguardian.com/society/2015/may/10/kidneys-for-sale-organ-donation-iran).

54 Should a paid donation occur in a state where it is permitted by law and should the organ, then, be used in a state party to the SCC, a conflict of law issue would arise, quite similar to the one considered above, para. 6.

55 Several implications and risks are involved for both the donor (or vendor) and the recipient: see T. Mone, 'Transplant Tourism: The Ethical Implications' (2011) XI(1) *Journal of Humanitarian Medicine*.

56 Even embassy officials are reported to facilitate the business: see Joint Study, *supra* note 4, 58.

medical professionals who usher some ‘precious patient’ to a third country, in order to perform the surgery or just to advise or assist the local colleagues. However, a reservation is possible on this point but, for states that are really determined to grant the convention its highest possible degree of effectiveness, it is hoped that they will avoid benefitting from such a reservation.

Prosecution of crimes on the basis of the passive personality principle is, surprisingly, left optional. State parties are just required to ‘endeavour to take’ the necessary legislative measures to establish jurisdiction ‘where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory’.⁵⁷

The SCC requires state parties to avoid making criminal proceedings conditional on the presentation of a complaint by the victim or a report by the state where the offence was committed. However, even on this point a reservation is permitted, though this is clearly inconsistent with the goal of making the SCC really effective.⁵⁸

1.1. A TENTATIVE ASSESSMENT OF THE EFFECTIVENESS OF THE CONVENTION AT A GLOBAL LEVEL

During the negotiations, the original text of the convention was watered down to some degree due to the strong opposition of some states to certain rules that eventually were made just optional. The joint UN-EU study, that had motivated the drafting of the convention, had included in the notion of trafficking in human organs even removals or transplant of organs performed *in violation of domestic transplantation law*. By means of such a broader definition, even minor cases of non-compliance with such domestic legislation, or fraudulent circumvention of it would be considered as criminal offences. Indeed, this would be needed to prevent unlawful behaviour by health professionals that undermines the sound allocation of organs among waiting patients.

Although Western Europe can be hopefully assumed to be a safe area in relation to clandestine transplant surgery, other violations of national transplantation systems are reported, including the intentional misrepresentation of clinical data of some patients needing transplantation in order to advance their position in the waiting list.⁵⁹ Criminal prosecutions of these kinds of less visible offences should be considered strategic as firm trust in the transplantation system is an essential condition for people to become donors.⁶⁰ However, since several negotiating states could not accept such a broad definition of ‘trafficking in human organs’, the final text of the SCC only requires parties to *consider* the issue, so they are free to choose whether to criminalize violations of their domestic transplantation rules or to treat them just as regulatory offences.

57 SCC, *supra* note 2, Art. 10.2; in the convention ‘there are no provisions providing for the elimination of the usual rule of dual criminality’: SCC-ER, *supra* note 9, 9.

58 SCC, *supra* note 2, Art. 15; SCC-ER, *supra* note 9, 13.

59 See K. Connolly, ‘Mass donor organ fraud shakes Germany’, *The Guardian*, 9 January 2013 (available at www.theguardian.com/world/2013/jan/09/mass-donor-organ-fraud-germany). The case involved several important clinics.

60 News concerning organ trafficking and even rumours ‘may damage the image of donation and transplantation to such an extent that they undermine public trust in the system’: see Joint Study, *supra* note 4, 64.

As is usual for CoE conventions, the SCC is open for ratification not only by the states which are members of the CoE, but by any other state sharing its purposes upon invitation by the CoE. In any event, the SCC will hardly come to be accepted and duly implemented in non-European states where trafficking in human organs is presently commonplace. Thus, the effectiveness of the convention in facing the problem at the global level is highly dependent on the determination of states parties to fully comply with it, particularly those provisions whose firm enforcement can demonstrate to third states and potential criminal perpetrators that conduct related to trafficking in human organs will in no way be exempt from criminal prosecution by the states parties of the SCC. From this perspective, as seen above, it will be important for states aggressively to prosecute the use of organs illicitly removed in third countries by exercising jurisdiction beyond the limits set by the territorial principle and the passive personality principle. States should not take advantage of the reservation provided by Article 30 in order to deter and punish criminal acts committed abroad by their nationals and residents.

Similarly, states should avoid recourse to the reservation that would allow a state to *not* consider as a criminal offence the use of illicitly removed organs for purposes *other than transplantation*. Such a reservation was not included in the original text of the convention, but some contracting states insisted on its inclusion, not to hamper the possible exploitation of human organs for research purposes or for the making of medical drugs.⁶¹ Indeed, as protection of victims is the major goal pursued, no difference which depends on the use of the organ should be admitted.

To conclude this tentative assessment of the possible effectiveness of the SCC, a final remark dealing with territorial efficacy is due. If the SCC proves successful, it will be applicable almost everywhere in Europe. Nevertheless, Kosovo will be excluded despite being the region where the most serious cases of organ trafficking have been reported so far.⁶² Kosovo is not yet a member of the CoE because of its uncertain political status. As is widely known, several state members of the CoE refuse to recognize Kosovo as an independent state, considering it as a region still belonging to Serbia. It is highly unlikely that an invitation might be addressed to the Kosovar authorities to join the SCC because this would imply Kosovo's recognition as a state.

To make the SCC applicable, a possible solution would be to admit the region to participate by means of an act of approval (ratification or acceptance) issued by the provisional UN authority that is presently invested with the major essential powers

61 The reservation refers to Art. 5 (use of illicitly removed organs) as well as to Art. 7 (illicit solicitation, recruitment, offering and requesting of undue advantages). States are free to totally exclude criminalizing such conduct when not aimed at transplantation, or to specify which 'other purposes' they will consider as legitimate – SCC, *supra* note 2.

62 The case was tried by an EU-led court, see BBC News, 'Medicus: Five guilty in Kosovo human organ trade case', *BBC News*, 29 April 2013 (available at www.bbc.com/news/world-europe-22343589). Seven people have been recently charged in Israel with having organized or performed transplants in Kosovo as well as in Azerbaijan, Sri Lanka, and Turkey, using paid local donors for Israeli recipients, see more at *The Straits Times*, 'Israel Charges Seven with International Organ Trafficking', *The Straits Times*, 14 May 2015 (available at www.straitstimes.com/news/world/middle-east/story/israel-charges-seven-international-organ-trafficking-20150514#sthash.ZOfCX4C3.dpuf).

for the interim government. This solution, as far as it does not imply considering Kosovo as an independent entity, might perhaps be acceptable even to Serbia, but it would be at variance with the wording of Article 28 of the SCC, which provides only for the participation of *states*. To allow non-state entities to be a party to the SCC, a special agreement would be needed, concluded with the unanimous consent of all the members of the CoE. As diplomatically complicated as it may prove, the goal seems to deserve consideration by the CoE.