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Draft Council of Europe Convention against Trafficking in Human Organs

Request for an opinion
Committee of Ministers

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Letter from the Chair of the Ministers' Deputies to the President of the Parliamentary Assembly of 18 July 2013

At their 1176th meeting (10 July 2013), the Ministers' Deputies decided to transmit to the Parliamentary Assembly, for opinion, the draft Council of Europe Convention against Trafficking in Human Organs.

I have pleasure to send you herewith the draft Convention and, for information, its explanatory report.

I look forward to receiving the Assembly's opinion as soon as possible.

[signed]

Mr Armen Papikyan

Chairman of the Ministers' Deputies

Draft Council of Europe Convention against Trafficking in Human Organs

Preamble

The member States of the Council of Europe and the other signatories to this Convention;

Bearing in mind the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948, and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5);

Bearing in mind the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997, ETS No. 164) and the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (2002, ETS No. 186);

Bearing in mind the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS No. 197);

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that the trafficking in human organs violates human dignity and the right to life and constitutes a serious threat to public health;

Determined to contribute in a significant manner to the eradication of the trafficking in human organs through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking in human beings for the purpose of the removal of organs;

Considering that the purpose of this Convention is to prevent and combat trafficking in human organs, and that the implementation of the provisions of the Convention concerning substantive criminal law should be carried out taking into account its purpose and the principle of proportionality;

Recognising that, to efficiently combat the global threat posed by the trafficking in human organs, close international co-operation between Council of Europe member States and non-member States alike should be encouraged,

Have agreed as follows:

Chapter I – Purposes, scope and use of terms

Article 1 – Purposes

1. The purposes of this Convention are:

a. to prevent and combat the trafficking in human organs by providing for the criminalisation of certain acts;

b. to protect the rights of victims of the offences established in accordance with this Convention;

c. to facilitate co-operation at national and international levels on action against the trafficking in human organs.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific follow-up mechanism.

Article 2 – Scope and use of terms

3. This Convention applies to the trafficking in human organs for purposes of transplantation or other purposes, and to other forms of illicit removal and of illicit implantation.

4. For the purposes of this Convention, the term:

– “trafficking in human organs” shall mean any illicit activity in respect of human organs as prescribed in Article 4, paragraph 1 and Articles 5, 7, 8 and 9 of this Convention;

– "human organ" shall mean 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. A part of an organ is also considered to be an organ if its function is to be used for the same purpose as the entire organ in the human body, maintaining the requirements of structure and vascularisation.

Article 3 – Principle of non-discrimination

5. The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

Chapter II – Substantive Criminal Law

Article 4 – Illicit removal of human organs

6. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:

a. where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;

b. where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage;

c. where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage.

7. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1. a of this article 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. Any reservation made under this paragraph shall contain a brief statement of the relevant domestic law.

8. The expression "financial gain or comparable advantage" shall, for the purpose of paragraph 1, b and c, 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.

9. Each Party shall consider taking the necessary legislative or other measures to establish as a criminal offence under its domestic law the removal of human organs from living or deceased donors where the removal is performed outside of the framework of its domestic transplantation system, or where the removal is performed in breach of essential principles of national transplantation laws or rules. If a Party establishes criminal offences in accordance with this provision, it shall endeavour to apply also Articles 9 to 22 to such offences.

Article 5 – Use of illicitly removed organs for purposes of implantation or other purposes than implantation

10. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the use of illicitly removed organs, as described in Article 4, paragraph 1, for purposes of implantation or other purposes than implantation.

Article 6 – Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law

11. Each Party shall consider taking the necessary legislative or other measures to establish as a criminal offence under its domestic law, when committed intentionally, the implantation of human organs from living or deceased donors where the implantation is performed outside of the framework of its domestic transplantation

system, or where the implantation is performed in breach of essential principles of national transplantation laws or rules. If a Party establishes criminal offences in accordance with this provision, it shall endeavour to apply also Articles 9 to 22 to such offences.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

12. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party.

13. Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, with a view to having a removal or implantation of a human organ performed or facilitated, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4 or Article 6.

14. Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the request or receipt by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1 or Article 5 and where appropriate Article 4, paragraph 4 or Article 6.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

15. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally:

a. the preparation, preservation, and storage of illicitly removed human organs as described in Article 4, paragraph 1, and where appropriate Article 4, paragraph 4;

b. 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.

Article 9 – Aiding or abetting and attempt

16. Each Party shall take the necessary legislative and other measures to establish as criminal offences, when committed intentionally, aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.

17. Each Party shall take the necessary legislative and other measures to establish as a criminal offence the intentional attempt to commit any of the criminal offences established in accordance with this Convention.

18. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 2 to offences established in accordance with Article 7 and Article 8.

Article 10 – Jurisdiction

19. Each Party shall take such legislative or other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

a. in its territory; or

b. on board a ship flying the flag of that Party; or

c. on board an aircraft registered under the laws of that Party; or

d. by one of its nationals; or

e. by a person who has his or her habitual residence in its territory.

20. Each Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

21. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraph 1. d and e of this article.

22. For the prosecution of the offences established in accordance with this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1. d and e of this article is not subordinated to the condition that the prosecution can only be initiated following a report from the victim or the laying of information by the State of the place where the offence was committed.

23. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases paragraph 4 of this article.

24. Each Party shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged offender is present on its territory and it does not extradite him or her to another State, solely on the basis of his or her nationality.

25. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

26. Without prejudice to the general rules of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its internal law.

Article 11 – Corporate liability

27. Each Party shall take the necessary legislative and other measures to ensure that legal persons can be held liable for offences established in accordance with this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it based on:

a. a power of representation of the legal person;

b. an authority to take decisions on behalf of the legal person;

c. an authority to exercise control within the legal person.

28. Apart from the cases provided for in paragraph 1 of this article, each Party shall take the necessary legislative and other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

29. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

30. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 12 – Sanctions and measures

31. Each Party shall take the necessary legislative and other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for offences established in accordance with Article 4, paragraph 1 and, where appropriate, Article 5 and Articles 7 to 9, when committed by natural persons, penalties involving deprivation of liberty that may give rise to extradition.

32. Each Party shall take the necessary legislative and other measures to ensure that legal persons held liable in accordance with Article 11 are subject to effective, proportionate and dissuasive sanctions, including criminal or non-criminal monetary sanctions, and may include other measures, such as:

a. temporary or permanent disqualification from exercising commercial activity;

b. placing under judicial supervision;

c. a judicial winding-up order.

33. Each Party shall take the necessary legislative and other measures to:

a. permit seizure and confiscation of proceeds of the criminal offences established in accordance with this Convention, or property whose value corresponds to such proceeds;

b. enable the temporary or permanent closure of any establishment used to carry out any of the criminal offences established in accordance with this Convention, without prejudice to the rights of *bona fide* third parties, or deny the perpetrator, temporarily or permanently, in conformity with the relevant provisions of domestic law, the exercise of a professional activity relevant to the commission of any of the offences established in accordance with this Convention.

Article 13 – Aggravating circumstances

Each Party shall take the necessary legislative and other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of domestic law, be taken into consideration as aggravating circumstances in determining the sanctions in relation to the offences established in accordance with this Convention:

a. the offence caused the death of, or serious damage to the physical or mental health of, the victim;

b. the offence was committed by a person abusing his or her position;

c. the offence was committed in the framework of a criminal organisation;

d. the perpetrator has previously been convicted of offences established in accordance with this Convention;

e. the offence was committed against a child or any other particularly vulnerable person.

Article 14 – Previous convictions

34. Each Party shall take the necessary legislative and other measures to provide for the possibility to take into account final sentences passed by another Party in relation to the offences established in accordance with this Convention when determining the sanctions.

Chapter III – Criminal Procedural Law

Article 15 – Initiation and continuation of proceedings

35. Each Party shall take the necessary legislative and other measures to ensure that investigations or prosecution of offences established in accordance with this Convention should not be subordinate to a complaint and that the proceedings may continue even if the complaint is withdrawn.

Article 16 – Criminal investigations

36. Each Party shall take the necessary legislative and other measures, in conformity with the principles of its domestic law, to ensure effective criminal investigation and prosecution of offences established in accordance with this Convention.

Article 17 – International co-operation

37. The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in pursuance of relevant applicable international and regional instruments and arrangements agreed on the basis of uniform or reciprocal legislation and their domestic law, to the widest extent possible, for the purpose of investigations or proceedings concerning the offences established in accordance with this Convention, including seizure and confiscation.

38. The Parties shall co-operate to the widest extent possible in pursuance of the relevant applicable international, regional and bilateral treaties on extradition and mutual legal assistance in criminal matters concerning the offences established in accordance with this Convention.

39. If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such a treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by the domestic law of the requested Party, consider this Convention as the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences established in accordance with this Convention.

Chapter IV – Protection measures

Article 18 – Protection of victims

40. Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims of offences established in accordance with this Convention, in particular by:

a. ensuring that victims have access to information relevant to their case and which is necessary for the protection of their health and other rights involved;

b. assisting victims in their physical, psychological and social recovery;

c. providing, in its domestic law, for the right of victims to compensation from the perpetrators.

Article 19 – Standing of victims in criminal proceedings

41. Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims at all stages of criminal investigations and proceedings, in particular by:

a. informing them of their rights and the services at their disposal and, upon request, the follow-up given to their complaint, the charges retained, the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification, and their role therein as well as the outcome of their cases;

b. enabling them, in a manner consistent with the procedural rules of domestic law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

c. providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

d. providing effective measures for their safety, as well as that of their families, from intimidation and retaliation.

42. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

43. Each Party shall ensure that victims have access to legal aid, in accordance with domestic law and provided free of charge where warranted, when it is possible for them to have the status of parties to criminal proceedings.

44. Each Party shall take the necessary legislative and other measures to ensure that victims of an offence established in accordance with this Convention committed in the territory of a Party other than the one where they reside can make a complaint before the competent authorities of their State of residence.

45. Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its domestic law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

Article 20 – Protection of witnesses

46. Each Party shall, within its means and in accordance with the conditions provided for by its domestic law, provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings, who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

47. Paragraph 1 of this article shall also apply to victims insofar as they are witnesses.

Chapter V – Prevention measures

Article 21 – Measures at domestic level

48. Each Party shall take the necessary legislative and other measures to ensure:

a. the existence of a transparent domestic system for the transplantation of human organs;

b. equitable access to transplantation services for patients;

c. adequate collection, analysis and exchange of information related to the offences covered by this Convention in co-operation between all relevant authorities.

49. With the aim of preventing and combatting trafficking in human organs, each Party shall take measures, as appropriate:

a. to provide information or strengthen training for healthcare professionals and relevant officials in the prevention of and combat against trafficking in human organs;

b. to promote awareness-raising campaigns addressed to the general public about the unlawfulness and dangers of trafficking in human organs.

50. Each Party shall take the necessary legislative and other measures to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

Article 22 – Measures at international level

51. The Parties shall, to the widest extent possible, co-operate with each other in order to prevent trafficking in human organs. In particular, the Parties shall:

a. report to the Committee of the Parties at its request on the number of cases of trafficking in human organs within their respective jurisdictions;

b. designate a national contact point for the exchange of information pertaining to trafficking in human organs.

Chapter VI – Follow-up mechanism

Article 23 – Committee of the Parties

52. The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

53. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

54. The Committee of the Parties shall adopt its own rules of procedure.

55. The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

56. A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Committee of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 24 – Other representatives

57. The Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental or scientific committees, shall each appoint a representative to the Committee of the Parties in order to contribute to a multisectoral and multidisciplinary approach.

58. The Committee of Ministers may invite other Council of Europe bodies to appoint a representative to the Committee of the Parties after consulting the latter.

59. Representatives of relevant international bodies may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

60. Representatives of relevant official bodies of the Parties may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

61. Representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

62. In the appointment of representatives under paragraphs 2 to 5 of this article, a balanced representation of the different sectors and disciplines shall be ensured.

63. Representatives appointed under paragraphs 1 to 5 above shall participate in meetings of the Committee of the Parties without the right to vote.

Article 25 – Functions of the Committee of the Parties

64. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention, using a multisectoral and multidisciplinary approach.

65. The Committee of the Parties shall also facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat trafficking in human organs. The Committee may avail itself of the expertise of other relevant Council of Europe committees and bodies.

66. Furthermore, the Committee of the Parties shall, where appropriate:

a. facilitate the effective use and implementation of this Convention, including the identification of any problems that may arise and the effects of any declaration or reservation made under this Convention;

b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments;

c. make specific recommendations to Parties concerning the implementation of this Convention.

67. The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the activities mentioned in paragraphs 1, 2 and 3 of this article.

Chapter VII – Relationship with other international instruments

Article 26 – Relationship with other international instruments

68. This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

69. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

Chapter VIII – Amendments to the Convention

Article 27 – Amendments

70. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, the non-member States enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention.

71. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, which shall submit to the Committee of the Parties their opinions on that proposed amendment.

72. The Committee of Ministers of the Council of Europe shall consider the proposed amendment and the opinion submitted by the Committee of Parties and, after having consulted the Parties to this Convention that are not members of the Council of Europe, may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe.

73. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

74. Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

Chapter IX – Final clauses

Article 28 – Signature and entry into force

75. This Convention shall be open for signature by the member States of the Council of Europe, the European Union and the non-member States which enjoy observer status with the Council of Europe. It shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers. This decision shall be taken after having obtained the unanimous agreement of the other States/European Union having expressed their consent to be bound by this Convention.

76. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

77. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

78. In respect of any State or the European Union, which subsequently expresses its consent to be bound by the Convention, it shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 29 – Territorial application

79. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

80. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

81. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 30 – Reservations

82. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it avails itself of one or more of the reservations provided for in Articles 4, paragraph 2; 9, paragraph 3; 10, paragraphs 3 and 5.

83. Any State or the European Union may also, at the time of signature or when deposing its instrument of ratification, acceptance or approval, declare that it reserves the right to apply the Article 5 and Article 7, paragraphs 2 and 3, only when the offences are committed for purposes of implantation, or for purposes of implantation and other purposes as specified by the Party.

84. No other reservation may be made.

85. Each Party which has made a reservation may, at any time, withdraw it entirely or partially by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect from the date of the receipt of such notification by the Secretary General."

Article 31 – Dispute settlement

86. The Committee of the Parties will follow in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees the application of this Convention and facilitate, when necessary, the friendly settlement of all difficulties related to its application.

Article 32 – Denunciation

87. Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

88. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 33 – Notification

89. The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention in accordance with the provisions of Article 28, of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Convention in accordance with Article 28;

d. any amendment adopted in accordance with Article 27 and the date on which such an amendment enters into force;

e. any reservation and withdrawal of reservation made in pursuance of Article 30;

f. any denunciation made in pursuance of the provisions of Article 32;

g. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done in [.....], this [..] day of [.....], in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which enjoy observer status with the Council of Europe, to the European Union and to any State invited to sign this Convention.

Draft Explanatory Report to the draft Council of Europe Convention against Trafficking in Human Organs

1. The Committee of Ministers of the Council of Europe took note of this Explanatory Report at a meeting held at its Deputies' level, on…

2. The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

Introduction

3. The existence of a world-wide illicit trade in human organs for the purposes of transplantation is a well-established fact, and various means have been adopted, both at national and international levels, to counter this criminal activity, which presents a clear danger to both individual and public health and is in breach of human rights and fundamental freedoms and an affront to the very notion of human dignity and personal liberty.

4. Hence, both the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) of 16 May 2005 contain provisions criminalising the trafficking in human beings for the purpose of the removal of organs.

5. Furthermore, the 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 (ETS No.164) of 4 April 1997 prohibits, in its Article 21, that the human body and its parts, as such, give rise to financial gain. This prohibition is developed in the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Transplantation of Organs and Tissues of Human Origin (ETS No. 186) of 24 January 2002 which explicitly prohibits organ trafficking in its Article 22. In accordance with Article 26 of the aforesaid Additional Protocol, Parties should provide for appropriate sanctions to be applied in the event of infringement of the prohibition.

6. In 2008, the Council of Europe and the United Nations agreed to prepare a “Joint Study on trafficking in organs, tissues and cells (OTC) and trafficking in human beings for the purpose of the removal of organs”. This Joint Study, which was published in 2009, identified a number of issues related to the trafficking in human organs, tissues and cells which deserved further consideration, in particular the need to distinguish clearly between trafficking in human beings for the purpose of the removal of organs and the trafficking in human organs *per se*; the need to uphold the principle of prohibition of making financial gains with the human body or its parts; the need to promote organ donation; the need to collect reliable data on trafficking in organs, tissues and cells, as well as the need for an internationally agreed definition of trafficking in organs, tissues and cells.

7. Most importantly, the Joint Study contained a recommendation to 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.

8. Against this background, the Committee of Ministers on 16 November 2010 decided to invite the European Committee on Crime Problems (CDPC), the Steering Committee on Bioethics (CDBI) and the European Committee on Transplantation of Organs (CD-P-TO) to identify the main elements that could form part of an international binding legal instrument and report back to the Committee of Ministers by April 2011.

9. In their report of 20 April 2011, the three aforesaid Steering Committees underlined that “trafficking in human organs, tissues and cells is a problem of global proportions that violates basic human rights and fundamental freedoms and constitutes a direct threat to individual and public health”. The above mentioned three Committees further pointed out that “despite the existence of two international legal binding instruments [namely the aforesaid UN Trafficking Protocol and the Council of Europe Trafficking Convention], important loopholes, that are not sufficiently addressed by these instruments, continue to exist in the international legal framework”.

10. In particular, the three Steering Committees came to the conclusion that existing international legal instruments “only address the scenario where recourse is had to various coercive or fraudulent measures to exploit a person in the context of the removal of organs, but do not sufficiently cover scenarios, in which the donor has – adequately – consented to the removal of organs or – for other reasons – is not considered to be a victim of trafficking in terms of the [….] conventions”.

11. The three Steering Committees therefore proposed for the Council of Europe to elaborate a binding international criminal law convention against trafficking in human organs, possibly also covering tissues and cells, to fill the gaps in existing international law.

12. By decisions of 6 July 2011 and 22-23 February 2012, respectively, the Committee of Ministers established the ad-hoc Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) and tasked it with the elaboration of a draft criminal law convention against trafficking in human organs, and, if appropriate, a draft additional protocol to the aforesaid draft criminal law convention against trafficking in human tissues and cells.

13. The PC-TO held a total of four meetings in Strasbourg, on 13-16 December 2011, on 6-9 March, on 26-29 June, and on 15-19 October 2012, and elaborated a preliminary draft Convention against Trafficking in Human Organs. It did not elaborate an additional protocol on tissues and cells and recommended to revisit this possibility in the future.

14. The draft text of the Convention was finalised by the European Committee on Crime Problems (CDPC), which approved it at its plenary meeting on 4-7 December 2012.

Preamble

Commentary to the preamble:

15. The preamble describes the purpose of the Convention, namely to contribute in a significant manner to the eradication of trafficking in human organs by preventing and combating this crime, in particular through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking of human beings for the purpose of the removal of organs.

16. The preamble underlines that in the application of the provisions of the Convention covering substantive criminal law, due consideration should be given to the purpose of the Convention and to the principle of proportionality.

17. Specific reference is made in the preamble to the following legal acts of the United Nations and the Council of Europe:

– The Universal Declaration of Human Rights (1948);

– The Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5);

– The 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;

– The Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin;

– The Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000);

– The Council of Europe Convention on Action against Trafficking in Human Beings.

Chapter I – Purposes, scope and use of terms

Article 1 – Purposes

18. Paragraph 1 sets out the purposes of the Convention, which are to prevent and combat the trafficking in human organs, to protect the rights of victims and to facilitate co-operation at both national and international levels on action against trafficking in human organs.

19. Paragraph 2 provides for the establishment of a specific follow-up mechanism (Articles 23–25) in order to ensure an effective implementation of the Convention.

Article 2 – Scope and use of terms

20. Article 2, paragraph 1, defines the scope of the Convention as applying to trafficking in human organs for purposes of transplantation or other purposes and to other forms of illicit removal and of illicit implantation. The negotiators decided that the notion of trafficking in organs covers all the conducts of illicit removal provided in Article 4, paragraph 1, of implantation/use of illicitly removed organs provided in Article 5, and the

other conducts provided in Articles 7, 8 and 9. For further explanation on the concept of trafficking in human organs, see paragraph 23. The expression “other forms of illicit removal and of illicit implantation” refers only to actions covered by Article 4, paragraph 4 and Article 6. The legal trade with medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the Convention and shall not be restricted by it.

21. The term “other purposes” is intended to refer to any purpose other than transplantation, for which organs illicitly removed from a donor could now, or in the future, be used. Concerning what constitutes the term “other purposes”, the negotiators identified, in particular, scientific research and the use of organs to collect tissue and cells, such as the use of heart valves from a heart illicitly removed, or the use of cells from a organ illicitly removed organ for cell therapy. But taking into account, *inter alia*, the progress of scientific research and the future developments in the use of organs for purposes other than implantation, the negotiators decided to leave this open. Consequently, this list of examples is not exhaustive. However, while this Convention applies to the removal of human organs for purposes other than transplantation, the trafficking of tissues and cells falls outside the scope of the Convention.

22. Article 2, paragraph 2, provides two definitions which are applicable throughout the Convention.

23. Definition of “trafficking in human organs”. 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 a basis for specifying the description of the offences 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. Nevertheless, the negotiators considered it necessary to refer to “trafficking in human organs” as a comprehensive phenomenon in other parts of the Convention. Accordingly, Article 2, paragraph 2, contains such a definition of “trafficking in human organs”, which consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting “trafficking in human organs”.

24. Definition of “human organ”. As regards the definition of “human organ”, the negotiators decided to take over the internationally recognised definition used by the European Union in Article 3, letter (h), of its “Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation”.

Article 3 – Principle of non-discrimination

25. This article prohibits discrimination in Parties’ implementation of the Convention and in particular in enjoyment of measures to protect and promote victims’ rights. The meaning of discrimination in Article 3 is identical to that given to it under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

26. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case law concerning Article 14 ECHR. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* of 28 May 1985 judgment, “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised”.

27. The list of non-discrimination grounds in Article 3 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. “State of health” includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to “or other status” could refer, for example, to members of refugee or immigrant populations.

Chapter II – Substantive Criminal Law

28. Chapter II contains the substantive criminal law provisions of the Convention. It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in the mandatory provisions, if they are committed intentionally. 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. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

29. The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraph 1, Articles 5, 7 and 9 to the donor or the recipient. There is thus no legal obligation for the States to apply these provisions to the donor and the recipient, whereas e.g. the surgeon carrying out the removal or implantation will always be covered by the criminalisation obligation. The negotiators took note that a number of States would – under any circumstances – refrain from prosecuting organ donors for committing these offences. Other States have indicated that organ donors could under their domestic law, under certain conditions, also be considered as having participated in, or even instigated, the trafficking in human organs.

30. As a general principle, the negotiators wished to stress that the obligations contained in this Convention do not require Parties to take measures that run counter to constitutional rules or fundamental principles relating to the freedom of the press and the freedom of expression in other media.

Article 4 – Illicit removal of human organs

31. Article 4, paragraph 1, letters a – c, obliges Parties to the Convention to establish as a criminal offence the removal of human organs from living or deceased donors in the following cases: lack of a free, informed and specific consent by the donor or of authorisation by the domestic law of the Party in question (letter a); a financial gain or comparable advantage has been offered or received in exchange for the removal of organs from a living donor (letter b), or a deceased donor (letter c). Though the illicit removal of human organs may in practice involve elements of all the acts described in letters a – c, it is enough that one of the three conditions are fulfilled to establish that the crime described in Article 4, paragraph 1, has been committed. The negotiators have chosen not to include the purpose of implantation or other purposes as an element of the offence, to avoid the proof of the purpose of the removal.

32. The negotiators considered that, as a general principle, the concept of consent included in the present Convention 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.

33. As regards living donors, Article 13 of the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin draws on the substance of Article 5 of the Convention on Human Rights and Biomedicine regarding consent to an intervention in the health field, complemented by its Article 19, paragraph 2 regarding consent to organ removal from living donors. Article 13 of the Additional Protocol provides in its first paragraph that "an organ or tissue may be removed from a living donor only after the person concerned has given free, informed and specific consent to it either in written form or before an official body." Its second paragraph specifies that "The person concerned may freely withdraw consent at any time." The fact that consent has to be "specific and given either in written form or before an official body" strengthens the requirements compared to the general rules regarding consent to an intervention in the health field. The Explanatory Report to the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin specifies the ways of obtaining and withdrawing consent: "the donor's consent must also be specific and given in written form or before an official body, a court, a judge or an official notary for example. The responsibility of this body is to ensure that consent is adequate and informed. The second paragraph provides the freedom to withdraw consent to the removal at any time. There is no requirement for withdrawal of consent to be in writing or to follow any particular form. The donor need simply say no to the removal at any time […]. However, professional standards and obligations […] may require that the team continue with the procedure if not to do so would seriously endanger the health of the donor." It appears clear that Article 4 of the Convention applies also to any person deprived of his/her liberty, living or deceased, which was at the time of the negotiation of the Convention a major concern expressed by the Parliamentary Assembly of the Council of Europe and shared by many delegations.

34. As regards deceased donors, Article 17 of the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin provides that "Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained. The removal shall not be carried out if the deceased person had objected to it." According to the Explanatory Report to this Protocol, "Without anticipating the system to be introduced, the Article accordingly provides that if the deceased

person's wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure. In some States the law permits that if there is no explicit or implicit objection to donation, removal can be carried out. In that case, the law provides means of expressing intention, such as drawing up a register of objections. In other countries, the law does not prejudge the wishes of those concerned and prescribes enquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation."

35. For the purposes of this Convention, in the case of a living donor, the term "specific" means that the consent must be clearly given and with regard to the removal of a "specific" organ that is precisely identified. In the case of a deceased donor, the latter may have given his/her consent during his/her lifetime to the removal of an organ to be carried out after his/her death; such consent may be given with regard to a specific organ or in more general terms. Any removal of organ carried out after the death of the person concerned shall respect the terms of this consent. If the donor has not expressed any wish during his/her lifetime, the removal may only be carried out if the requirements, as defined by domestic law, regarding authorisation for the removal of organs are met.

36. The wording "removal being authorised under its domestic law" set out in Article 4, paragraph 1, letter a. 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.

37. Article 20 of the Convention for the Protection of Human Rights and Biomedicine and Article 14 of its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin prohibit organ removal from persons not able to consent. The provision of paragraph 1 letter a of Article 4 of the Convention against Trafficking in Human Organs corresponds to this principle. As stated in the Explanatory Report to the Convention on Human Rights and Biomedicine regarding Article 6 on the protection of persons not able to consent, the incapacity to consent must be understood in the context of a given intervention and are defined by domestic law. It is for domestic law to determine whether or not a person has the capacity to consent.

38. However, given the specific purpose of the Convention against Trafficking in Human Organs, which is a criminal law convention, Article 4, paragraph 2, provides for the possibility of a reservation to the general rule of establishing as a criminal offence conducts referred to in paragraph 1 letter a. The reservation is restrictive, limited to living donors and only to exceptional cases. Certain delegations requested to introduce such a reservation to cover exceptional cases in which the person from whom the organ is removed is not capable of providing consent, as established in paragraph 1 letter a, and where there are thus no other possible solutions than obtaining consent from a competent institution or an authorised person as provided for in domestic law. This is the case for example for children, people with mental disabilities, or any other person under a tutorship. These states wanted to foresee that in such exceptional cases, consent may be given by other authorised persons or even, by other competent institutions (e.g. courts of law), for the person concerned, in accordance with the safeguards and provisions of internal law. The last sentence obliges any State making use of this reservation option to provide a brief statement of the relevant domestic law, as appears, for example, in the European Convention on Human Rights (Article 57, paragraph 2) and the Convention on Human Rights and Biomedicine (Article 36, paragraph 2).

39. Article 4, paragraph 3, specifies that the expression of "financial gain or comparable advantage" as used in paragraphs 1, b and c does not include 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 or organs. The negotiators considered it necessary to include this wording, which is taken from the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin, in order to clearly distinguish the lawful compensation to organ donors in certain cases from the prohibited practice of making financial gains with the human body or its parts.

40. The financial gain or comparable advantage should be understood in a broad context. The gain can be offered to the donor or third person, directly or through intermediaries. The expression "financial gain or comparable advantage" does not apply to an arrangement that is authorised under domestic law such as arrangements for paired or pooled donation.

41. Paragraph 4, obliges Parties to the Convention to consider establishing as a criminal offence the removal of human organs from living or deceased donors, where the removal is performed outside the framework of its domestic transplantation system, or in breach of essential principles of domestic transplantation laws or rules.

42. The last sentence of paragraph 4 clarifies that while it is left to each Party to decide whether or not - and if so in which respect - it will establish criminal offences covering the conduct described in this paragraph, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party is called upon to endeavour to do so.

43. The negotiators were not in agreement over the question whether or not it would be appropriate to require Parties to sanction organ removal or implantation, if it is performed "outside of the framework of the domestic transplantation systems", i.e. outside of the system for procurement and transplantation of organs authorised by the competent authorities of the Party in question, and/or in breach of its domestic transplantation rules or laws. Some States considered that normally any organ removal or transplantation that may be considered to be performed outside of the system (or in breach of transplantation law) would also constitute one of the criminal offences under paragraph 1 of Article 4. Other states did not share this position. Negotiators agreed that it would be appropriate to specifically address these situations in paragraph 4 of Article 4 of the Convention, while recognising that States currently have very different domestic transplantation systems in place, and that the aim of the present Convention is not to harmonise domestic transplantation systems.

44. Similarly, the negotiators recognised that in some States, removal of organs performed outside of the framework of the domestic transplantation system would *per se* not necessarily be considered as more than a regulatory or minor offence, i.e. if the same act does not also fall under paragraph 1 of Article 4.

45. Because of the aforesaid differences in the various domestic transplantation systems and domestic legal systems of States, the negotiators decided to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the removal of organs from living or deceased donors under the conditions described in Article 4, paragraph 4.

Article 5 – Use of illicitly removed organs for purposes of implantation or other purposes than implantation

46. Article 5 obliges the Parties to the Convention to establish as a criminal offence under its domestic law the use of illicitly removed organs – either for implantation or for any other purpose. The reference to Article 4, paragraph 1 indicates that Article 5 shall apply to any case where an organ has been removed under any of the circumstances described in Article 4, paragraph 1.

47. As in the case of implantation, the obligation for Parties to criminalise the subsequent use of the illicitly removed organ is limited to those situations where the perpetrator acts intentionally.

48. In accordance with Article 30, paragraph 2, of the Convention, a Party may decide to limit the application of Article 5 to use for implantation only, or for other uses as specified by that Party.

Article 6 – Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law

49. Article 6 obliges Parties to consider establishing as a criminal offence the implantation of organs performed outside of the framework of their domestic transplantation systems, or where the implantation is performed in breach of essential principles of domestic transplantation laws or rules.

50. As in the case of Article 4, paragraph 4, and for the same reasons, the negotiators preferred to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the implantation of organs from living or deceased donors under the conditions described in Article 6.

51. The last sentence of Article 6 clarifies that while it is left to each Party to decide whether or not - and if so in which respect - it will establish criminal offences covering the conduct described in this article, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party is called upon to endeavour to do so.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

52. Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a third party. The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff. These activities constitute an essential element of the trafficking in human organs. The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3 an explicit obligation for States Parties to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage. However, this measure does not prevent activities to recruit donors which are authorised under domestic law.

53. It is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not organ donors should be subject to prosecution under this Article (cf. paragraph 29). As the purchase of an organ does not give rise to financial gain or comparable advantage on the part of the buyer, this provision is not applicable to acts performed by a potential organ receiver. The same holds true for somebody acting on behalf of the potential organ receiver, e.g. a family member, in so far as this does not give rise to any financial gain or comparable advantage on his or her part.

54. Article 7, paragraphs 2 and 3, obliges Parties to criminalise active and passive corruption, respectively, of healthcare professionals, public officials or persons working for private sector entities with a view to having a removal or implantation of a human organ performed under the circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4 or Article 6. In this context, it should be noted that Articles 4, paragraph 4 and Article 6 leave Parties a margin to decide on whether to establish the offences described therein as criminal offences. Hence, the use of the wording “where appropriate” means that when considering establishing the offences contained in Article 4, paragraph 4 and Article 6 as criminal offences, a Party should also consider including them in Article 7, paragraphs 2 and 3.

55. The wording of Article 7, paragraphs 2 and 3 is inspired by Articles 2 and 7 of the Criminal Law Convention on Corruption (ETS No. 173). The negotiators considered it useful to include these provisions in the present Convention, as not all Parties to the Convention will necessarily be Parties to the Criminal Law Convention on Corruption.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

56. Article 8 obliges Parties to establish the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Article 4, paragraph 1 and, where appropriate, in Article 4, paragraph 4, when committed intentionally, as a criminal offence. In this context, it should be noted that Article 4, paragraph 4 leaves Parties a margin to decide on whether to establish the offence described therein as criminal offences. Hence, the use of the wording “where appropriate” means that when considering establishing the offence contained in Article 4, paragraph 4 as criminal offences, a Party should also consider including it in Article 8.

57. Due to differences in the legal systems of member States, some Parties may, when transposing the Convention into their domestic law, choose to establish offences under the Convention, in particular those enumerated in Article 8, as a separate criminal offence, or consider them as aiding or abetting or attempt under Article 9.

58. In so far as a Party makes use of the reservation possibility in Article 30, paragraph 2, with regard to Article 5, it will affect the extent to which that Party is obliged to criminalise the conduct described in Article 8.

Article 9 – Aiding or abetting and attempt

59. Paragraph 1 requires Parties to establish as offences aiding or abetting the commission of the offences established in accordance with this Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

60. Paragraph 2 provides for the criminalisation of an attempt to commit the offences established in accordance with this Convention.

61. The interpretation of the word “attempt” is left to domestic law. The principle of proportionality, as referred to in the Preamble of the Convention, should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

62. Paragraph 3 allows for the Parties to make reservations with regard to the application of paragraph 2 (attempt) to offences established in accordance with Articles 7 and 8, due to differences in the criminal law systems of member States of the Council of Europe.

63. As with all the offences established under the Convention, it requires the criminalisation of aiding or abetting and attempt only if committed intentionally.

Article 10 – Jurisdiction

64. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

65. Paragraph, 1 letter a. is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

66. Paragraph 1, letters b. and c. are based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1, letter a. would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

67. Paragraph 1, letter d. is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The negotiators considered that this was a particularly important provision in the context of combating trafficking in human organs. Indeed, certain States in which trafficking in human organs takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework.

68. Paragraph 1, letter e. applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment trafficking in human organs.

69. Paragraph 2 is linked to the nationality or residence status of the victim. It is based on the premise that the particular interests of national victims overlap with the general interest of the state to prosecute crimes committed against its nationals or residents. Hence, if a national or person having habitual residence is a victim of an offence abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour". In the present Convention there are no provisions providing for the elimination of the usual rule of dual criminality.

70. Paragraph 3 provides for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1, d and e.

71. Paragraph 4 prohibits the subordination of the initiation of proceedings, which is based on the jurisdiction provided for in paragraphs 1 d. and 1 e. to the conditions of a complaint of the victim or the laying of information from the authorities of the State in which the offence took place. Indeed, certain States in which trafficking in human organs take place do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of the laying of information by the State or of a complaint of the victim often constitutes an impediment to the prosecution. This paragraph applies to all the offences defined in Chapter II (Substantive Criminal Law).

72. In paragraph 5, the negotiators wished to introduce the possibility for Parties to limit the application of paragraph 4 by entering a reservation. Parties making use of this possibility may thus subordinate the initiation of prosecution of alleged trafficking in human organs to cases where a report has been filed by a victim, or the State Party has received a denunciation from the State of the place where the offence was committed.

73. Paragraph 6 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 6 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

74. In certain cases of trafficking in human organs, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, an organ donor may be recruited in one country and have the organ in question removed in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under paragraph 7. Finally, the obligation to consult is not absolute; consultation is

to take place “where appropriate”. Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

75. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 8 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law.

Article 11 – Corporate liability

76. Article 11 is consistent with the current legal trend towards recognising corporate liability. The negotiators were of the opinion that due to the gravity of offences related to trafficking in human organs, it is appropriate to include corporate liability in the Convention. The intention is to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 11 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention for the benefit of the entity.

77. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity’s benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term “person who has a leading position” refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

78. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity (“legal person”) where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity’s authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity’s benefit; and 3) commission of the offence was made possible by the leading person’s failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

79. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 12, paragraph 2 are met, namely that the sanction or measure be “effective, proportionate and dissuasive” and include monetary sanctions.

80. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity’s organs, liability of the legal entity as a whole and individual liability in connection with one or other.

Article 12 – Sanctions and measures

81. This article is closely linked to Articles 4 to 9, which define the various offences that should be made punishable under domestic law. In accordance with the obligations imposed by those articles, Article 12 requires Parties to match their action to the seriousness of the offences and lay down sanctions which are “effective, proportionate and dissuasive”. In the case of an individual committing an offence established under Article 4, paragraph 1, and, where appropriate,Article 5, Articles 7, 8 and 9. Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

82. Legal entities whose liability is to be established under Article 11 are also to be liable to sanctions that are “effective, proportionate and dissuasive”, which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

83. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

84. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of the proceeds derived from criminal offences can be taken. This paragraph has to be read in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As most of the criminal offences related to the trafficking in human organs are undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

85. Paragraph 3 letter a, provides for the seizure and confiscation of proceeds of the offences, or property whose value corresponds to such proceeds may be seized or confiscated.

86. The Convention does not contain definitions of the terms “confiscation”, “proceeds” and “property”. However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides definitions for these terms which may be used for the purposes of this Convention. By “confiscation” is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Proceeds” means any economic advantage or financial saving from a criminal offence. It may consist of any “property” (see the interpretation of that term below). The wording of letter a of paragraph 3 takes into account that there may be differences of domestic law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

87. Paragraph 3 letter b of Article 12 provides for the closure of any establishment used to carry out any of the criminal offences established under the Convention. This measure is almost identical to Article 23, paragraph 4 of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and Article 27, paragraph 3, letter b of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). Alternatively, the Parties may foresee provisions allowing the perpetrator to be banned, temporarily or permanently, in conformity with the relevant provisions of domestic law, from carrying on the professional activity in connection with which the criminal offence was committed. The negotiators considered it necessary to make a reference to the domestic law of Parties, since differences exist with regard to the exact measures to be applied and procedures to be followed when banning a person from exercising a professional activity. Moreover differences exist as to whether or not certain professions require the issuing of a license or other type of authorisation by public authorities.

Article 13 – Aggravating circumstances

88. Article 13 requires Parties to ensure that certain circumstances (mentioned in letters a. to e.) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences established in this Convention. This obligation does not apply to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party.

89. By the use of the phrase “may be taken into consideration”, the negotiators highlighted that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to “in conformity with the relevant provisions of domestic law” is intended to reflect the fact that the various legal systems in Europe have different approaches to address those aggravating circumstances and permits Parties to retain their fundamental legal concepts.

90. The first aggravating circumstance (a), is where the offence caused the death of, or serious damage to the physical or mental health of, the victim. Given the fact that any transplantation carries a significant element of danger for the physical health of both the donor and the recipient, it should be up to the national courts of the Parties to assess the causal link between the conducts criminalised under the Convention and any death or injury sustained as a result thereof.

91. The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their professional capacity. This category of persons is in the first line obviously health professionals, but also public officials (when acting in their official capacity) would be covered. However, the application of the aggravating circumstance is not restricted to health professionals and public officials.

92. The third aggravating circumstance (c) is where the offence was committed in the framework of a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational Organised Crime defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised crime group" and "criminal organisation".

93. The fourth aggravating circumstance (d) is where the perpetrator has previously been convicted of offences established under the Convention. By including this, the negotiators wanted to signal the need to make a concerted effort to combat recidivism in the low risk – high financial gain area of trafficking in human organs.

94. The fifth aggravating circumstance (e) is where the offence was committed against a child or any other particularly vulnerable person. The negotiators were of the opinion that most persons who would qualify as victims of trafficking in human organs are by definition vulnerable, e. g. because they are financially severely disadvantaged, which is the case for many persons who agree to have an organ removed against financial gain or comparable advantage, or because they are suffering from severe or even terminal diseases with little chances of survival, which is the case for many recipients of organs. Likewise, children are always particularly vulnerable to crime. Hence the negotiators would reserve the aggravating circumstance set out in letter e. to situations where the victim is a child or otherwise "particularly vulnerable" because of his/her age, mental development or familial or social dependence on the perpetrator(s). The term "child" is not explicitly defined in the Convention, but should be understood as the same as in the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), namely "any person under 18 years of age". This definition is ultimately derived from the UN Convention on the Rights of the Child (1989), where it is found in Article 1.

Article 14 – Previous convictions

95. Trafficking in human organs is more often than not perpetrated transnationally by criminal organisations or by individual persons, some of whom may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of domestic law, and because of a degree of suspicion of decisions by foreign courts.

96. Such arguments have less force today in that internationalisation of criminal law standards – as a pendent to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

97. The principle of international recidivism is established in a number of international legal instruments. Under Article 36, paragraph 2 (iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions shall be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional limitations, legal system and domestic law. Another example: under Article 1 of the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.

98. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU member) State.

99. Therefore, Article 14 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts may, to the same extent as previous convictions by domestic courts would do so, result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

100. Under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between member States are regulated in two legal acts, namely Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member States.However, Article 14 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts.

Chapter III – Criminal procedural Law

Article 15 – Initiation and continuation of proceedings

101. Article 15 is designed to enable the public authorities to prosecute offences established in accordance with the Convention ex officio, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

Article 16 – Criminal investigations

102. Article 16 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. The notion of "principles of domestic law" should be understood as also encompassing basic human rights, including those provided under Article 6 of the ECHR. The negotiators noted that conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as financial investigations, covert operations, and controlled delivery, taking into account the principle of proportionality.

Article 17 – International co-operation

103. The article sets out the general principles that should govern international co-operation in criminal matters.

104. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes established under the Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference should be made to the European Convention on Extradition (ETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on the Transfer of Sentenced Persons (ETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198).

105. In the same way as for paragraph 1, paragraph 2 obliges Parties to co-operate, to the widest extent possible and on the basis of relevant international, regional and bilateral legal instruments, on extradition and mutual legal assistance in criminal matters concerning the offences established by the Convention.

106. Paragraph 3 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision is of interest because of the possibility provided to third States to sign the Convention (cf. Article 28). The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. Any action taken shall be in full compliance with its obligations under international law, including obligations under international human rights instruments.

Chapter IV – Protection measures

107. The protection of, and assistance to, victims of crime has long been a priority in the work of the Council of Europe.

108. The horizontal legal instrument in this field is the European Convention on the Compensation of Victims of Violent Crime (ETS No. 116) from 1983, which has since been supplemented by a series of recommendations, notably Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation and Recommendation Rec(2006)8 on assistance to crime victims.

109. Furthermore, the situation of victims has also been addressed in a number of specialised conventions, including the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), both from 2005, and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) from 2007.

110. Taking into account the potential grave consequences for victims of trafficking in human organs, the negotiators found that it was justified to provide specifically for the protection of such victims, and also to ensure that victims of the crimes established under this Convention have access to information relevant to their case and the protection of their health and other rights from the competent national authorities and that – subject to the domestic law of the Parties – they are being given the possibility to be heard and to supply evidence.

111. It is recalled that, the term “victim” is not defined in the Convention, as the negotiators felt that the determination of who could qualify as victims of trafficking in human organs was better left to the Parties to decide in accordance with their domestic law.

Article 18 – Protection of victims

112. Article 18 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their health and other rights involved; that victims are assisted in their physical, psychological and social recovery, and that victims are provided with the right to compensation from the perpetrators under the domestic law of the Parties. As regards the right to compensation, the negotiators also noted that in a number of member States of the Council of Europe, national victim funds are already in existence. However, this provision does not oblige Parties to establish such funds.

113. Article 18, letter c, establishes a right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). For the purposes of this article, victims’ right to compensation consists in a claim against the perpetrators of the trafficking – it is the traffickers who bear the burden of compensating the victims. If, in the criminal proceedings, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

Article 19 – Standing of victims in criminal proceedings

114. This article contains a non-exhaustive list of procedures designed to victims of crimes established under this Convention during investigations and proceedings. These general measures of protection apply at all stages of the criminal proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during criminal trial proceedings.

115. First of all, Article 19 sets out the right of victims to be informed of their rights and of the services at their disposal and, upon request, the follow-up given to their complaint, the charges, the state of the criminal proceedings (unless in exceptional cases the proper handing of the case may be adversely affected), their role therein as well as the outcome of their cases.

116. Article 19 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, (in a manner consistent with the procedural rules of the domestic law of a Party), of being heard, of supplying evidence, of having their views, needs and concerns presented and considered, directly or through an intermediary, and anyway the right of being protected against any risk of intimidation and retaliation.

117. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

118. Paragraph 3 provides for access, in accordance with domestic law and free of charge, where warranted, to legal aid for victims of trafficking in human organs. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

119. In addition to Article 19, dealing with the status of victims as parties to criminal proceedings, the States Parties must take account of Article 6 of the ECHR. Even though Article 6, paragraph 3.c. of the ECHR provides for the free assistance of an officially assigned defence counsel only in the case of persons charged with criminal offences, the case law of the European Court of Human Rights (Airey v. Ireland judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (*Golder v. United Kingdom judgment*, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

120. Paragraph 4 is based on Article 17, paragraph 2, of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence. A similar provision is also found in Article 38, paragraph 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) of 25 October 2007 and in Article 20, paragraph 4, of the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (CETS No. 211) of 28 October 2011.

121. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the Parties to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their domestic systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

Article 20 – Protection of witnesses

122. Article 20 is inspired by Article 24, paragraph 1, of the United Nations Convention against Transnational Organized Crime (Palermo Convention) from 2000. Paragraph 1 obliges Parties to provide effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings concerning

trafficking in human organs. As appropriate the protection should be extended to relatives and other persons close to the witnesses. Paragraph 2 of Article 20 provides for the protection of victims in so far as they are witnesses, in the same manner as set out in paragraph 1.

123. It should be noted that the extent of this obligation for Parties to protect witnesses is limited by the wording “within its means and in accordance with the conditions provided for by its domestic law”.

Chapter V – Prevention measures

124. It is standard for recent criminal law conventions of the Council of Europe to contain provisions aiming at the prevention of criminal activity. The present Convention is no exception, and the negotiators found that such preventive measures should be implemented at both domestic and international levels in order to have effect.

Article 21 – Measures at domestic level

125. The purpose of Article 21 is to prevent trafficking in human organs by obliging Parties to address some of its root causes. Hence Parties shall in accordance with paragraph 1 ensure the existence of a transparent domestic system for the transplantation organs; equitable access to transplantation services for patients, and finally, adequate collection, analysis and exchange of relevant information pertaining to trafficking in human organs between all relevant domestic authorities. Parties may wish to consider the provisions of Articles 3 – 8 of the Additional protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, when reviewing their current transplantation systems in the light of this Article.

126. The issue of “transparency” is important, because it reduces the risk of illicitly removed organs being introduced into the legitimate domestic transplantation system. “Equitable access to transplantation services” means that Parties should ensure a “level playing field” in terms of the allocation of organs for all patients awaiting implantation. Ensuring a strong co-operation between the many different competent authorities involved in combatting trafficking in human organs is a prerequisite for achieving any measure of success. In this respect, the negotiators decided to put special emphasis on the collection, analysis and exchange of information between these authorities, thus enabling them to take timely action to prevent the crimes set out in the Convention.

127. Paragraph 2, letter a, obliges Parties to take measures, as appropriate, with regard to providing information and strengthening training, e. g. on how to detect indications of trafficking in human organs, for healthcare professionals and relevant officials. According to letter b, Parties are furthermore obliged to promote, as appropriate, awareness-raising campaigns addressed to the general public on the unlawfulness and dangers of trafficking in human organs.

128. Finally, paragraph 3 obliges Parties to prohibit the advertising of the need for, or availability of, human organs “with a view to offering or seeking financial gain or comparable advantage”. The negotiators considered this provision necessary, taking into account the existence of e.g. websites on the internet where human organs are put up for sale. The implementation of this provision is left to Parties, but they must obviously ensure that it is carried out while respecting their human rights obligations, especially as set forth in the ECHR, the International Covenant on Civil and Political Rights, and any other obligations under international law. The Parties concerned are in particular expected to take into account the case-law of the European Court of Human Rights which, based on Article 10 of the ECHR, guarantees the right to freedom of expression, the exercise of which may be subject to certain formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, or for the protection of health or morals. Cf. also paragraph 30. The prohibition to advertise the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage, is intended to target mainly the persons operating as a broker between donors and recipients.

Article 22 – Measures at international level

129. Article 22 obliges Parties to co-operate, to the widest extent possible, with the aim of preventing trafficking in human organs by: (i.) reporting to the Committee of the Parties, on its request, on the number of cases of trafficking in human organs d within their respective jurisdictions; (ii.) designate a national contact point for the exchange of information of a general nature between Parties pertaining to trafficking in human organs.

130. These measures were deemed necessary by the negotiators in order to be able to assess the impact of the Convention and to ensure effective international co-operation.

Chapter VI – Follow-up mechanism

131. Chapter VI of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The follow-up system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

Article 23 – Committee of the Parties

132. Article 23 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

133. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

134. It should be stressed that the negotiators intended to allow the Convention to come into force quickly while deferring the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility.

135. The setting-up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention follow-up procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

136. The Committee of the Parties must adopt rules of procedure establishing the way in which the follow-up system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

137. The Committee of Ministers shall decide on the way in which those Parties which are not member States of the Council of Europe are to contribute to the financing of these activities. The Committee of Ministers shall seek the opinion of those Parties which are not member States of the Council of Europe before deciding on the budgetary appropriations to be allocated to the Committee of the Parties.

Article 24 – Other representatives

138. Article 24 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention follow-up mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and, secondly, more unspecified, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the follow-up of the work on the Convention. These committees are the Committee on Bioethics (DH-BIO) and the European Committee on Transplantation of Organs (CD-P-TO).

139. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, as well as representatives of civil society, in the work of the Committee of the Parties is undoubtedly one of the main strengths of the follow-up system provided for by the negotiators. The wording “relevant international bodies” in paragraph 3, is to be understood as inter-governmental bodies active in the field covered by the Convention. The wording “relevant official bodies” in paragraph 4, refers to officially recognised national or international bodies of experts working in an advisory capacity for Parties to the Convention in the field covered by the Convention, in particular as regards bioethics and transplantation of human organs.

140. The possibility of admitting representatives of inter-governmental, governmental and non-governmental organisations and other bodies actively involved in preventing and combating trafficking in human organs as observers was considered to be an important issue, if the follow-up of the application of the Convention was to be truly effective.

141. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of non-governmental organisations), a balanced representation of the different sectors and disciplines involved (the law enforcement authorities, the judiciary, the health authorities, as well as civil society interest groups) shall be ensured.

Article 25 – Functions of the Committee of the Parties

142. When drafting this provision, the negotiators wanted to base itself on the similar provision of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. No. 201), creating as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating the trafficking in human organs. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

143. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:

– plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations or reservations made under the Convention;

– plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect. This activity does not entail mutual evaluation or similar intrusive follow-up;

– serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of relevant committees and other bodies of the Council of Europe.

144. Paragraph 4 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 25.

Chapter VII – Relationship with other international instruments

Article 26 – Relationship with other international instruments

145. Article 26 deals with the relationship between the Convention and other international instruments.

146. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 26 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 26, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

147. Article 26, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

148. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007, the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

Chapter VIII – Amendments to the Convention

Article 27 – Amendments

149. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to the non-member States enjoying observer status with the Council of Europe, to the European Union and to any State invited to sign the Convention.

150. The CDPC and other relevant Council of Europe intergovernmental or scientific committees will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

Chapter IX – Final clauses

151. With some exceptions, Articles 28 to 33 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

Article 28 – Signature and entry into force

152. The Convention is open for signature by Council of Europe member States, the European Union, and States enjoying observer status with the Council of Europe. In addition, with a view to encouraging the participation of the largest possible non-member States to the Convention, this article provides them with the possibility, subject to an invitation by the Committee of Ministers, to sign and ratify the Convention even before its entry into force. By doing so, this Convention departs from previous Council of Europe treaty practice according to which non-member States which have not participated in the elaboration of a Council of Europe Convention usually accede to it after its entry into force. However, a precedent to such a provision may be found in the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211).

153. Article 28, paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention’s entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention, but reflects nevertheless the belief that a minimum group of Parties is needed to successfully set about addressing the major challenge of combating trafficking in human organs. Of the five Parties which will make the Convention enter into force, at least three must be Council of Europe members.

Article 29 – Territorial application

154. This provision is only concerned with territories having a special status, such as overseas territories, the Faroe Islands or Greenland in the case of Denmark, or Gibraltar, the Isle of Man, Jersey or Guernsey in the case of the United Kingdom.

155. It is well understood, however, that it would be contrary to the object and purpose of this Convention for any contracting Party to exclude parts of its main territory from the Convention’s scope and that it was unnecessary to make this point explicit in the Convention.

Article 30 – Reservations

156. The reservations listed in paragraph 1 of this article have been introduced in the Convention with regard to Articles for which unanimous agreement was not reached among the negotiators, despite the efforts achieved in favour of compromise. These reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts.

157. In addition, Article 30, paragraph 2 allows States and European Union to enter a reservation limiting the scope of application Articles 5 and 7 paragraphs 2 and 3, only when the offences are committed for the purpose of implementation and other purposes as specified by them in their reservation.

158. Paragraph 3 specifies that no reservation may be made in relation to any provision of this Convention, with the exceptions provided for in paragraphs 1 and 2 of this article.

159. Paragraph 4, by making it possible to withdraw reservations at any time, aims at reducing in the future divergences between legislations which have incorporated the provisions of this Convention.

Article 31 – Dispute settlement

160. Article 31 provides that the Committee of the Parties, in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, shall follow the application of the Convention and facilitate the solution of all disputes related thereto between the Parties. Coordination with the CDPC will normally be ensured through the participation of a representative of the CDPC in the Committee of the Parties.

Article 32 – Denunciation

161. Article 32 allows any Party to denounce the Convention.

Article 33 – Notification

162. Article 33 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Union).