# HANDBOOK FOR PARLIAMENTARIANS

## The Council of Europe Convention against Trafficking in Human Organs (CETS No. 216)

Council of Europe

French edition:

*Manuel à l'usage des parlementaires*
*La Convention du Conseil de l'Europe*
*contre le trafic d'organes humains*
*(STCE n° 216)*

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# I. The Council of Europe and the Parliamentary Assembly

The Council of Europe is the continent's oldest political organisation. Founded in 1949, it has 47 member states, representing more than 830 million Europeans, and 5 observer states (Canada, the Holy See, Japan, Mexico and the United States of America).

The main aims of the Organisation are:

- to protect human rights, parliamentary democracy and the rule of law in all member states;
- to develop continent-wide agreements to harmonise member countries' social and legal practices;
- to promote awareness of a European identity and greater unity based on shared values which cut across different cultures.

Since November 1990, the accession of 22 central and eastern European countries has given the Council of Europe a genuine pan-European dimension. Since then, its main job has been to act as political anchor and human rights watchdog for all the democracies in greater Europe, to assist them in carrying out and consolidating political, legal and constitutional reform, and to facilitate the exchange of good practice in areas such as human rights, local democracy, education, culture and environment.

The Council of Europe has its permanent headquarters in Strasbourg, France. By statute, it has two constituent organs: The Committee of Ministers, composed of the ministers for foreign affairs of the member states, and the Parliamentary Assembly (PACE), comprising delegations from the 47 national parliaments.

The 648 men and women who make up the Council of Europe Parliamentary Assembly (http://assembly.coe.int) come together four times a year to debate topical issues and common challenges, to request action from Europe's governments, and to hold those governments accountable for their acts. They speak on behalf of 830 million Europeans whom they represent on any subject they choose, and Europe's governments – represented in the Council of Europe by the Committee of Ministers – are obliged to reply to them. They are greater Europe's democratic conscience.

# II. Preface by the President of the Parliamentary Assembly

Trafficking in human organs is one of the most serious human rights violations imaginable, a ghoulish crime which evokes horror. It is also, unfortunately, one of the most lucrative. It should thus come as no surprise that it is estimated that at least 5 to 10% of all organ transplants worldwide are performed with an organ obtained on the black market.

Where do these organs come from? Often from desperately poor people in low-income countries who see no other way to survive or pay their debts. They may have been deceived, or they may even have been forcibly trafficked for this purpose. The Parliamentary Assembly has even documented cases of alleged trafficking of organs removed from executed Serbian prisoners in Kosovo* in 2011[1]. Organ sellers will generally receive much less than was promised, if anything is paid at all, and are likely to find themselves swiftly back in debt, facing declining health, and possibly death. It is a truly tragic fate.

Who buys these organs? Usually desperately ill people with means in higher-income countries whose days are numbered unless they can secure a transplant. These people may be too ill or too old to be high enough on their countries' legitimate waiting list to have a chance of ever being allocated an organ. Or their country may not even have a list, since not every country carries out transplantations. Organ buyers' relief after an illegal transplant may be short-lived: recipients of illicitly-removed organs run significantly higher risks of complications and death. They also run a much higher risk of severe infectious diseases.

Feeding on this human misery are criminal networks, including recruiters, brokers and medical professionals without scruple, who can "earn" several tens or hundreds of thousands of dollars with a single organ. The corruption can extend to others, such as hospital administrators, health authority officials,

* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

1. Resolution 1782 (2011) on Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.

police officials, customs officers, and embassy officials. The risk of detection is usually low, but there are other forms of hidden damage: trafficking may also undermine the development of the regular transplant system, public confidence in transplantation, and trust in the medical profession and the rule of law in general.

Already in 2003, the Parliamentary Assembly adopted Recommendation 1611 (2003) on Trafficking in Organs in Europe. This called on Council of Europe member states to close legislative loopholes, in particular by providing criminal sanctions for infringements of the ban on organ trafficking. In 2009, the Council of Europe and the United Nations published 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 proposed the drawing up of an international legal instrument setting out a definition of trafficking in organs, and measures to prevent and prosecute this crime as well as to protect its victims. The resulting Convention against trafficking in human organs does just that. It was adopted by the Committee of Ministers on 9 July 2014, opened for signature in Santiago de Compostela on 25 March 2015, and entered into force on 1 March 2018.

However, this Convention has only been ratified by nine member states so far. Although it is having an impact in these countries, organ trafficking is a highly dynamic crime: when it gets too "hot", the criminals simply move their operations elsewhere, where the Convention is not in force. To stop this crime in Europe and beyond, a much higher rate of ratifications is needed.

This is where we, as parliamentarians, come in. We can do many things to promote this Convention: we can change laws to close legislative loopholes, we can push for signature and ensure ratification of the Convention, and we can hold the government to account to guarantee its effective implementation. This Handbook for parliamentarians has been developed to assist you in these endeavours: it provides a clear explanation of the added value of the Convention, details its provisions, and suggests myriad ways you, as parliamentarians, can help put a stop to these ghastly crimes.

Stopping trafficking in organs is something we must do. Certain things should never be for sale: our principles, our rights – and our organs.

**Liliane Maury Pasquier**
*President of the Parliamentary Assembly*
*of the Council of Europe*

# III. Overview

## The problem of organ trafficking

Trafficking in human organs is a worldwide problem. Organ transplantation is performed in 100 countries, saving the lives of more than 150,000 patients in 2018.[2] However, it is estimated that this represents less than 10% of the global need. In this situation desperate patients may seek strategies to obtain an organ illegally. As a result, a black market in organs has emerged. According to an estimate of the World Health Organization from 2007, 5 to 10% of all transplants worldwide are performed with an organ obtained on the black market.[3] Although it is very difficult to know the true extent of organ trafficking, it is feared that the numbers are actually much higher.

Patients may try to buy an organ either by directly soliciting a potential organ seller or by relying on networks of recruiters and brokers. If an organ seller is found, these patients or criminal networks may try to have the organ removed and transplanted within regular transplant systems by deceiving the medical professionals and circumventing the screening mechanisms that protect donors from abuse. Alternatively, patients may rely on trafficking networks that include transplant surgeons and other health-care professionals who operate in clandestine facilities or accept payments to perform the illicit organ removal and transplantation in legitimate hospitals or clinics. These cases often also involve corruption of other persons, such as hospital administrators, officials in the health authority, police officials, customs officers, and/or embassy officials.

Since in many countries organ transplantation is tightly regulated, patients who want to buy an organ are inclined to travel to countries where transplantation is poorly regulated or monitored, where law enforcement has limited resources, and where corruption is widespread. This practice was first reported in the late 1980s and has proven very difficult to combat. It typically involves wealthy patients from countries with weak transplant programmes who go to transplant centres in countries where illicit transplant practices are overlooked. These

2. Global Observatory on Donation and Transplantation, 2019. Note that these are only the data of officially registered organ transplants and that some major transplant countries (e.g. China and India) did not provide data.
3. Shimazono, Y., The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information, *Bulletin of the World Health Organization*, 2007; 85(12), 955-962.

patients may bring an organ seller along or, more frequently, may make use of organ sellers who are recruited locally or are transferred from other countries.

Organ sellers are often poor and vulnerable individuals who are persuaded into selling an organ as an act of last resort to improve their precarious situation. They may be recruited in person or through advertisements, or they may approach recruiters on their own initiative or advertise their willingness to sell an organ. Although organ sellers may agree to sell an organ, the organ removal itself is frequently not performed with their free, informed, and specific consent. Potential organ sellers are often misled about the nature of the surgery and about the risks and consequences of the organ removal. Studies highlight that a huge majority of organ sellers later express serious regrets, stating that they would not have agreed if they had been properly informed and if their situation had not been so hopeless. Extreme forms of deception have also been reported, mostly involving persons who are lured abroad with a false promise of employment and are forced into organ removal before they are allowed to return home. Importantly, individuals who had initially agreed to sell an organ but later want to withdraw their consent are often intimidated and coerced into co-operating. Moreover, organ sellers will generally receive much less than what there were promised, if money is paid at all. As is clear from these examples, in many cases of organ trafficking the illicit organ removal is performed in conditions of exploitation that may also amount to trafficking in human beings.

Reports indicate an enormous discrepancy between what the patient pays to obtain the organ (between $40,000 and $200,000) and what the organ seller may eventually receive (between $1,000 and $10,000). These prices may fluctuate considerably, depending on the local availability of poor individuals who are willing to sell an organ and on the difficulties in arranging and performing the illicit removal and transplantation. However, brokers and collaborating health-care professionals invariably make huge profits, which makes organ trafficking one of the most lucrative illegal activities in the world.

Organ trafficking may also involve organs from deceased donors. There have been reports of regions where families of deceased persons were routinely paid to agree with organ removal. Other cases involve organs from deceased donors that were removed without valid consent or authorisation and were transplanted into foreigners on a commercial basis.

Organ trafficking not only is a severe violation of human rights and an affront to human dignity, it also presents a clear danger to individual and public health. Persons who have been subjected to illicit organ removal often suffer negative health consequences, depression, and social stigma. Recipients who receive

an illicitly removed organ run significantly higher risks of medical complications and death. In addition, they run a much higher risk of severe infectious diseases, which may pose a major public health threat. Organ trafficking may also undermine the development of regular transplant systems, public confidence in transplantation, and trust in the medical profession.

Organ trafficking is a global phenomenon that has proven extremely difficult to eradicate for a number of reasons. Increasing organ shortages continue to prompt some desperate patients to look for illegal means to obtain an organ. Moreover, among the world's poor a virtually endless pool of individuals can be found who can be persuaded or tricked into selling an organ. Because of the lucrative nature of the black market, organ trafficking networks that are dismantled are quickly replaced. In addition, organ trafficking is highly dynamic, with patients and trafficking networks finding their way to other parts of the world when in certain countries laws are set in place and become properly enforced. Difficulties in preventing and combating organ trafficking are further increased by the clandestine nature and often the cross-border aspect of the crime, by the reluctance to prosecute medical professionals and the unwillingness of donors and recipients to collaborate with law enforcement, and by legislative loopholes, widespread corruption, and lack of resources and willingness in some major hubs of organ trafficking.

By harmonising criminal law provisions, facilitating international collaboration, requiring the implementation of prevention measures, and guaranteeing the protection of victims, the Council of Europe Convention against Trafficking in Human Organs is an urgently needed legal instrument that will prove essential in combating this type of crime.

## Action of the Council of Europe

Since the transplantation of human organs became an established therapeutic practice in the mid-1970s, the Council of Europe has taken the lead in combating transplant activities that violate human rights and human dignity. In 1978, the Council of Europe adopted Resolution (78) 29 on Harmonisation of Legislations of Member States to Removal, Grafting and Transplantation of Human Substances. This was the first international instrument to set out general principles to protect human dignity and to guarantee respect for human rights with regard to the transplantation of human organs. As the cornerstone of legitimate organ transplantation, the Resolution put forward the requirement that:

- from a living person no organ may be removed without that person's free, informed, and explicit consent;

- from the body of a deceased person no organ may be removed unless consent or authorisation required by law has been obtained; and
- substances of the human body must not be offered for any profit.

The importance of consent and non-commercialisation for preventing misuse of transplantation was also confirmed by the final declaration of the Third Conference of European Health Ministers, which was held in Paris in 1987. These requirements were developed in the Convention on Human Rights and Biomedicine (ETS No. 164) of 1997 – commonly referred to as the "Oviedo Convention" – and its Additional Protocol concerning the Transplantation of Organs and Tissues of Human Origin (ETS No. 186) of 2002. This Convention and its Additional Protocol prohibit that the human body and its parts, as such, give rise to financial gain or comparable advantage. This principle has since become part of the legal *acquis* of the Council of Europe.[4]

In 2003, the Parliamentary Assembly adopted Recommendation 1611 (2003) on Trafficking in Organs in Europe, calling upon Council of Europe member states to close legislative loopholes, in particular by providing criminal sanctions for infringements of the prohibition of organ trafficking.[5] The Recommendation also contains a number of additional proposals to more effectively prevent and combat organ trafficking, and calls upon member states to intensify their co-operation in addressing the problem. In 2004, the Committee of Ministers responded to this initiative by adopting Recommendation Rec (2004) 7 on Organ Trafficking, which contains detailed provisions to prevent and combat organ trafficking, to improve domestic transplant systems, to bolster international co-operation, and to inform the general public about the dangers and criminal nature of organ trafficking. Although several instruments at the time referred to organ trafficking, no consensus definition of organ trafficking was available, which greatly hampered the fight against this crime.

In 2005, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) was adopted, further developing at European level the Protocol to Prevent, Suppress and Punish Trafficking in Persons, adopted by the United Nations in 2000. The Convention covers acts that involve the exploitation of living donors by using coercive, deceptive or fraudulent means,

4. Note that "the prohibition on making the human body and its parts as such a source of financial gain" is also enshrined in Article 3 of the Charter of Fundamental Rights of the European Union, adopted in 2000.
5. This Recommendation built on the findings of the hearings organised by the Parliamentary Assembly's Social, Health and Family Affairs Committee, and the results of the fact-finding visit led by Rapporteur Mrs Vermot-Mangold. Council of Europe, Parliamentary Assembly Social, Health and Family Affairs Committee, Trafficking in Organs in Europe: Report by Mrs. Ruth-Gaby Vermot-Mangold (Doc. 9822, 3 June 2003).

or by abusing their position of vulnerability.[6] The Convention also contains extensive provisions on prevention and victim protection.

The importance of upholding the principle of non-commercialisation of human organs has since been repeated on several occasions by the Committee of Ministers, by the Parliamentary Assembly, and by the Committee on Bioethics and the European Committee on Organ Transplantation.[7]

In addition, the Committee of Ministers has adopted a variety of Recommendations and Resolutions that are relevant for preventing and combating organ trafficking. These legal instruments focus on improving domestic organ transplant systems and practice, with the aim of ethically increasing organ availability, making transplantation more transparent and equitable, and promoting data collection and exchange.

## Why a Convention?

### Drafting the Convention

Following the adoption of the Council of Europe Convention on Action against Trafficking in Human Beings, the question was raised whether that Convention would also adequately cover all scenarios of organ trafficking. To answer this question, 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 was published in 2009 and concluded that it was necessary to distinguish clearly between trafficking in human beings for the purpose of the removal of organs and the trafficking in human organs *per se*. Importantly, the Joint Study contained a recommendation to elaborate an international legal instrument

6. Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings defines "trafficking in human beings" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation [through] the removal of organs".
7. Committee on Bioethics and European Committee on Organ Transplantation, Statement on the Prohibition of Any Form of Commercialisation of Human Organs, 30 May 2014; Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, Declaration on the Prohibition of Any Form of Commercialisation of Human Organs, 24 June 2014; Committee of Ministers, Statement on the Prohibition of Any Form of Commercialisation of Human Organs, 9 July 2014.

setting out a definition of trafficking in organs and measures to prevent and prosecute this crime and to protect its victims.[8]

Against this background, in 2010 the Committee of Ministers asked three Steering Committees for their opinion.[9] These Committees pointed out that, despite the existence of the criminal law instruments on trafficking in human beings, important loopholes continued to exist in the international legal framework. They concluded that these international legal instruments only address the use of various coercive or fraudulent measures to exploit a person in the context of organ removal, but do not sufficiently cover scenarios in which the donor has adequately consented or cannot be considered as a victim of trafficking in human beings (e.g. removal of an organ from a deceased person without consent or authorisation).[10] To fill these gaps, the three Steering Committees proposed that the Council of Europe elaborate a binding international criminal law Convention against Trafficking in Human Organs.

By decisions of July 2011 and February 2012, the Committee of Ministers set up a multi-disciplinary ad-hoc Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) under the authority of the European Committee on Crime Problems (CDPC), and instructed it to elaborate a criminal law Convention. The Convention against Trafficking in Human Organs was drafted during four meetings held between December 2011 and October 2012. The Committee of Experts recommended to later revisit the possibility of elaborating an additional protocol addressing trafficking in tissues and cells. The draft text was finalised by the CDPC in December 2012, and sent for an opinion by the Committee of Ministers to the Parliamentary Assembly, which had closely followed its elaboration.[11]

The Committee of Ministers examined the draft Convention in the light of the opinion of the Parliamentary Assembly and the comments by member states. The Convention was adopted by the Committee of Ministers on 9 July 2014, was

8. Council of Europe/United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*. Council of Europe/United Nations: Strasbourg, 2009, 96-97.
9. The European Committee on Crime Problems (CDPC), the Steering Committee on Bioethics (CDBI) and the European Committee on Transplantation of Organs (CD-P-TO).
10. Additional Opinion of the Steering Committee on Bioethics (CDBI), the European Committee on Crime Problems (CDPC), the European Committee on Transplantation of Organs (CD-P-TO), identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC), Strasbourg, 20 April 2011, CDPC/CDBI/CD-P-TO (2011).
11. Parliamentary Assembly of the Council of Europe Recommendation 2009 (2013) Towards a Council of Europe Convention to Combat Trafficking in Organs, Tissues and Cells of Human Origin, 23 January 2013.

opened for signature during a signing ceremony in Santiago de Compostela on 25 March 2015, and entered into force on 1 March 2018. Currently (30 August 2019), it has been signed by 24 States and ratified by 9 member States.

## Added value of the Convention

The Convention against Trafficking in Human Organs is the first international binding criminal law instrument on organ trafficking. It recognises organ trafficking both as a violation of human rights and human dignity, and as a severe health risk. The Convention provides a clear and exhaustive definition of organ trafficking that clarifies the conceptual ambiguities that existed previously. Importantly, it also provides a strong and comprehensive legal framework that covers the so-called three "P's": prosecution, prevention, and protection, which are all essential to effectively tackle organ trafficking.

The Convention sets a new standard in that it requires the criminalisation and prosecution of the whole chain of criminal acts related to organ trafficking. More specifically, the Convention targets the recruiters, brokers, and intermediaries; the surgeons and health-care professionals involved in the illicit removal, handling, and implantation of the organ; all the persons who facilitate these acts; and the hospitals involved. In addition, Parties may decide to prosecute the first and the last link in the chain – the donors and the recipients –, unless they suffered clear harm, which would make them eligible for protection as victims.

The Convention also shows clear awareness that organ trafficking can only be eradicated if its root causes are addressed. It therefore proposes a range of prevention measures to be implemented. These are mainly related to ensuring the transparency of the transplant system, fair access to transplant services, the collection and exchange of relevant information, and the prohibition of advertising the willingness to buy or sell an organ.

In addition, the Convention is particularly sensitive to the specific situation and vulnerability of the donors and the recipients involved in organ trafficking. For that reason, it provides specific protection measures for donors and recipients subjected to clear harm, who should be awarded the status of victims. These measures focus on assistance in recovery, compensation, access to information, support, legal aid, and protection.

Another major strength of the Convention is its recognition that international co-operation is essential. It obliges Parties to co-operate in investigating and prosecuting offences to the widest extent possible and provides instruments to facilitate judicial co-operation. The Convention also provides the tools to prosecute organ trafficking crimes committed abroad. This is of crucial importance since the great majority of organ trafficking cases occur outside the Council of Europe member States, often in countries that may lack the resources or the

will to initiate a criminal investigation. Moreover, to maximise international harmonisation and co-operation, the Convention is open to non-member States and encourages the participation of as many countries as possible.

Lastly, the Convention introduces a strong monitoring mechanism to facilitate its effective implementation and to ensure timely exchange of information and good practices.

The Convention is a globally recognised, ground-breaking instrument that closes the gaps that existed in international law. It does so both by consolidating, harmonising, and enforcing existing standards in the field of transplantation and by complementing the international legal framework on trafficking in human beings for the purpose of organ removal.[12]

## Objectives of the handbook

This handbook is designed to promote greater awareness and understanding among parliamentarians concerning organ trafficking. At the same time, it is an important tool to assist them in promoting the Convention against Trafficking in Human Organs, and in encouraging their national parliaments and governments to sign, ratify, and implement it.

The handbook explains the main provisions of the Convention in an accessible language. It also provides model examples (in unofficial translation) of how these provisions can be introduced into national legislation and policy. These examples of good practice mainly focus on the types of laws and measures that have been adopted in member States of the Council of Europe that have ratified the Convention (as of August 2019) or have recently amended their Criminal Codes or Transplant Laws with a view to future ratification. This selection is not intended to explicitly set aside or judge the legislation and measures that have not been taken into consideration. Neither does it intend to anticipate the possible evaluation of national legislation and measures by the Committee of the Parties.

12. Gawronska, S., A Critical Look at the Council of Europe Convention Against Trafficking in Human Organs and What It Means for the Global Fight Against Organ and Transplant-Related Crimes, *European Criminal Law Review*, 2018; 8(3), 404-439; Kalb, L. & Negri, S., The Criminal Justice Response to Organ Trafficking and Trafficking in Human Beings for Organ Removal, *Journal of Trafficking and Human Exploitation*, 2017; 1(2): 187-210; López-Fraga, M.; Domínguez-Gil, B.; Capron, A. et al., A Needed Convention against Trafficking in Human Organs, *The Lancet*, 2014; 383(9936): 2187-2189; Pondrom, S., New Treaty Aims to Curb Organ Trafficking, *American Journal of Transplantation*, 2014; 14(11): 2437-2438; Siller, N.J., The Codification of Transplant-Related Crimes in the Convention Against Trafficking in Human Organs, *Journal of Trafficking and Human Exploitation*, 2017; 1(2): 161-173.

## Role of parliamentarians

Parliamentarians have a crucial role to play in combating organ trafficking. As lawmakers and policy-makers, they can take action to:

- promote the signature and ratification of the Convention, for example by:
  - asking their governments to support the Convention;
  - asking for information from their governments with regard to the stage reached in the process of signature and ratification;
  - initiating relevant parliamentary enquiries;
  - organising debates on organ trafficking and/or the Convention within their parliaments;
  - ensuring that all relevant documents can be obtained at their parliament's documentation centre;
  - ensuring that the Convention is translated into national languages;
  - encouraging their national parliaments and administrations to adopt and implement the necessary legislative and other measures in compliance with the requirements of the Convention;
  - raising awareness of the Convention and of initiatives to implement its provisions (articles in the press, social media, etc.);
- promote the signature and ratification of other relevant international legal instruments in the field (e.g. the Council of Europe Convention on Action against Trafficking in Human Beings; the Convention on Human Rights and Biomedicine and its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin);
- address the root causes of organ trafficking, in particular by:
  - taking initiatives to decrease the domestic need for organs, by investing in public health programmes for screening, prevention, and treatment of conditions that may lead to organ failure;
  - taking initiatives to ethically increase the availability of organs by maximising donations from deceased donors and optimising living kidney donation programmes;
  - revising and strengthening national regulations to ensure transparency of the domestic transplant system, fair access to transplantation services for patients, reimbursement of costs associated with organ donation, and improved screening of living donors to guarantee voluntariness and absence of payment;
- facilitate the establishment of a national data collection system on transplant procedures and organ trafficking offences;

- support initiatives at national level to inform and train health-care professionals and relevant public officials, in co-operation with relevant health authorities and national transplant organisations;
- support initiatives at national level to ensure close co-operation between the competent authorities involved in combating organ trafficking;
- ensure that service-providers for victims of organ trafficking are allocated sufficient resources, and that victims are adequately compensated;
- support awareness-raising activities among non-governmental organisations, civil society, and the general public, for example by providing communication and campaign tools (e.g. this handbook, USB drives containing legislative texts, and campaign material), and in co-operation with the national contact person in charge of data collection on illicit transplantation activities, appointed in accordance with Resolution CM/Res(2013)55;[13]
- facilitate co-operation at international level, in particular by:
  - adopting legislation that matches that of other member states, with a view to facilitating the prosecution of cross-border organ trafficking in the light of the principle of double criminality;
  - drafting and ratifying bilateral and multilateral agreements to give mutual assistance in criminal matters, providing for co-operation in investigating criminal activities, prosecuting offenders, extradition of offenders, and seizing illicit profits;
  - setting up partnerships with professional organisations, non-governmental organisations, the United Nations, the European Union, etc.;
  - supporting initiatives to exchange information and expertise.

13. Resolution CM/Res (2013)55 on Establishing Procedures for the Collection and Dissemination of Data on Transplantation Activities Outside a Domestic Transplantation System.

# IV. The Council of Europe Convention against Trafficking in Human Organs (CETS No. 216)

## Purpose of the Convention

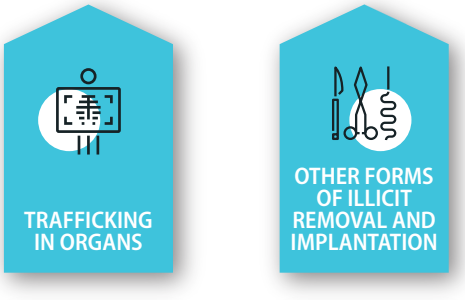
The Convention provides a comprehensive framework to take decisive action against trafficking in human organs. It has three main purposes:

- to prevent and combat trafficking in human organs;
- to protect the rights of its victims;
- to facilitate national and international co-operation against this crime.

## Scope

The Convention applies to:

- trafficking in human organs;
- other forms of illicit removal and implantation of human organs.




## Use of terms

"Trafficking in human organs" refers to a whole range of offences relating to the illicit removal of a human organ. Because these offences involve different acts and different actors, it was impossible to arrive at a compact definition. Instead, the definition of trafficking in human organs lists all the offences:

1. the illicit removal of an organ (i.e. when the organ is removed without valid consent or when somebody has been paid for the organ);
2. the implantation or other use of an illicitly removed organ;
3. the illicit solicitation and recruitment of an organ donor or recipient;
4. the offering and requesting of undue advantages to perform or facilitate the illicit organ removal or to perform or facilitate the implantation of an illicitly removed organ;
5. the preparation, preservation, storage, transportation, transfer, receipt, import, and export of an illicitly removed human organ;
6. aiding or abetting, or attempting to commit, these criminal offences.

Parties are required to criminalise all these offences.

The expression "other forms of illicit removal and implantation" refers to the situation where important other rules are violated when the organ is removed

or implanted. This will be the case when removal or implantation takes place outside of the transplant system or in violation of essential principles of the transplant law.

Parties are not required but are still encouraged to criminalise these acts.

The definition of "human organ" is the same as the one that is internationally recognised.[14]

## Non-discrimination principle

The Convention prohibits all types of discrimination in the implementation of its provisions. Discrimination means "a difference of treatment which has no objective and reasonable justification".[15] More specifically, individuals should not be discriminated against on the basis of 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. The list of grounds for discrimination is based on those mentioned in Article 14 of the European Convention on Human Rights, and its Protocol No. 12, and also includes other grounds. This list is not exhaustive, but indicative.

Non-discrimination is particularly important when implementing measures to protect victims. This is especially the case since victims may experience severe physical and mental health problems as a result of organ trafficking. In addition, non-discrimination is essential when implementing measures to prevent organ trafficking. This, for instance, requires that access to transplant services is guided by objective medical criteria.

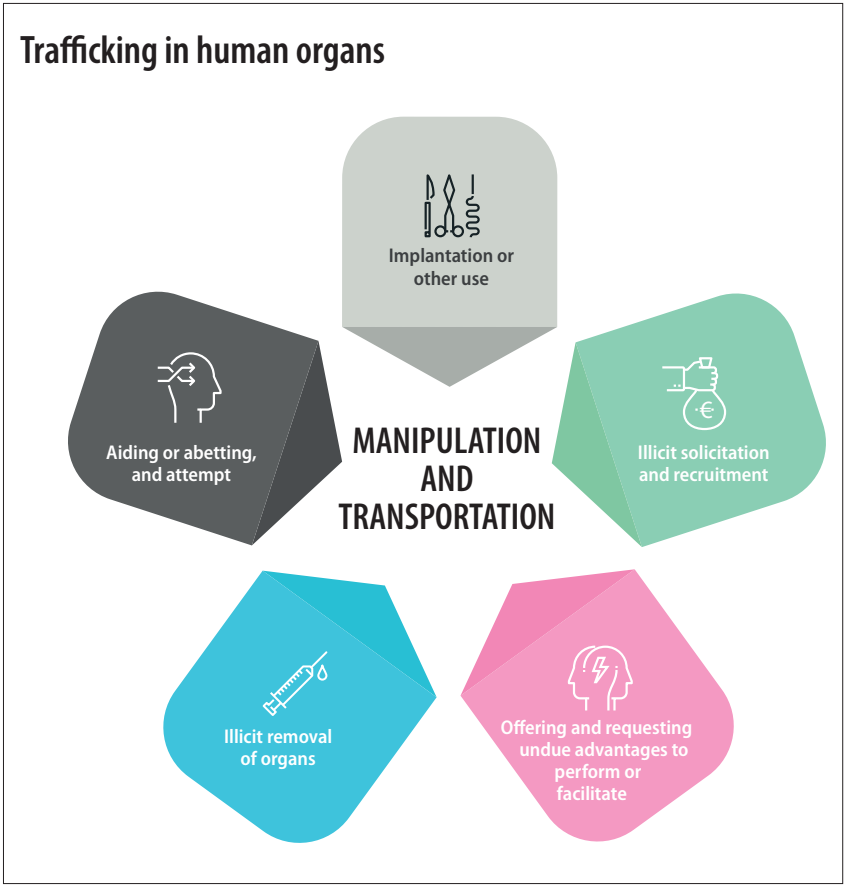
## Criminalisation of trafficking in human organs

The Convention requires Parties to criminalise "trafficking in human organs", which covers the following acts:

1. illicit removal of human organs (Article 4, paragraph 1);

14. See, for instance, 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(h): "'organ' means 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." For instance, a liver lobe is also considered an organ, but the cornea is not.
15. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A, no. 94.

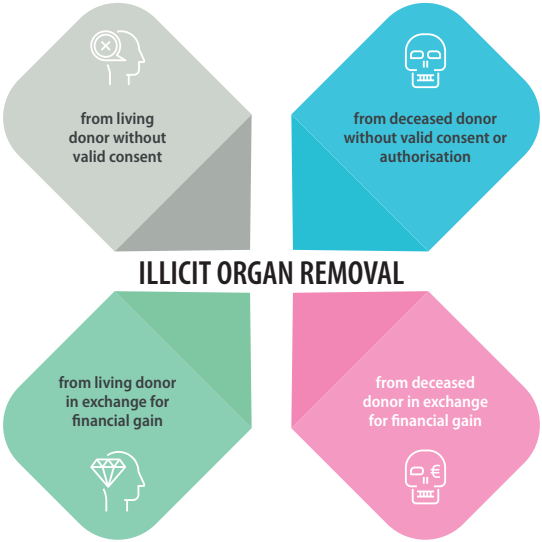
2. implantation or other use of illicitly removed organs (Article 5);
3. illicit solicitation and recruitment of an organ donor or recipient (Article 7, paragraph 1);
4. offering and requesting of undue advantages to perform or facilitate illicit organ removal or implantation of an illicitly removed organ (Article 7, paragraphs 2 and 3);
5. preparation, preservation, storage, transportation, transfer, receipt, import, and export of illicitly removed human organs (Article 8);
6. aiding or abetting, or attempting to commit, these criminal offences (Article 9).



## Illicit removal of human organs

Parties are required to criminalise the illicit removal of an organ from living or deceased donors. Four acts should be criminalised:

1. removal of an organ from a living donor without that person's free, informed, and specific consent;
2. removal of an organ from a deceased donor without that person's free, informed, and specific consent provided when alive, or without the removal being authorised under domestic law;
3. removal of an organ from a living donor, where the donor or a third party has been offered or has received a financial gain or comparable advantage in exchange for the removal;
4. removal of an organ from a deceased donor, where a third party has been offered or has received a financial gain or comparable advantage in exchange for the removal.



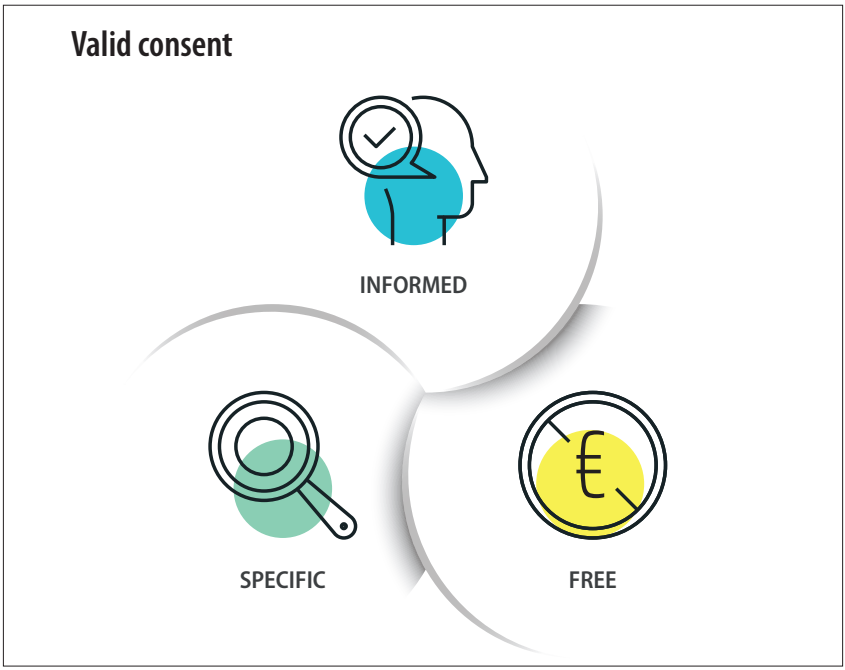

The offence of illicit organ removal therefore has two components: (1) the act of the removal of an organ; and (2) the absence of valid consent or authorisation, or (the promise of) payment to have the organ removed. No additional components are required. It is therefore not necessary that the person who removes the organ does so to obtain financial gain for him/herself. Similarly, there does not need to be a specific purpose for the organ removal. This means

that Parties have to criminalise illicit organ removal for any purpose, not only for transplantation.

By requiring the criminalisation of illicit organ removal, the Convention makes it possible to prosecute the health-care professional (or other person) who removes an organ knowing that no valid consent or authorisation was obtained or that payment was involved.

## Organ removal from a living donor without that person's valid consent

The definition of consent is identical to the one expressed in the Convention on Human Rights and Biomedicine and its Additional Protocol concerning Transplantation. This means that the living donor should have given "free, informed, and specific consent, either in written form or before an official body."[16] "Free" means the absence of undue pressure. As an additional guarantee, the donor should be assured of the possibility to refuse to donate or to withdraw consent at any time. "Informed" means that the donor should previously have




16. Convention on Human Rights and Biomedicine, Articles 5 and 19, paragraph 2; Additional Protocol concerning Transplantation, Article 13.

been given accurate and understandable information about the purpose and nature of the organ removal and about its consequences and risks. "Specific" means that consent must be given clearly, must specify that it concerns organ removal, and must precisely identify the organ that will be removed.

The Convention on Human Rights and Biomedicine and its Additional Protocol do not allow organ removal from persons who are unable to consent. Since in some member States organ removal from persons unable to consent may be allowed, the Convention provides Parties with the possibility to make a reservation, stating that they will not criminalise this form of organ removal without consent. Such a reservation must be restricted to exceptional cases for which appropriate safeguards are in place. The reservation must also contain a brief statement of the relevant domestic law.

## Organ removal from a deceased donor without valid consent or authorisation

The rules on consent or authorisation for organ removal after death are also derived from the Additional Protocol concerning Transplantation.[17] An organ may only be removed if the donor has given free, informed, and specific consent during his/her lifetime, or, where no wish has been expressed, if the requirements of authorisation are fulfilled that are defined by domestic law (e.g. consent is presumed; the decision is taken by the relatives).

## Organ removal in exchange for financial gain or comparable advantage

Even if the organ is removed with valid consent or authorisation, it will be illicitly removed if a person has been offered or has received a financial gain or comparable advantage in return. This provision builds on the principle of non-commercialisation of the human body and its parts. This principle is based on concerns for human dignity and can be found in the Convention on Human Rights and Biomedicine, its Additional Protocol, and all other international legal instruments and guidelines on organ transplantation.[18] The Organ Trafficking Convention is particularly important in that it not only prohibits violations of the principle of non-commercialisation but also requires that violations of the principle are punishable with criminal sanctions.

17. Additional Protocol concerning Transplantation, Article 17.
18. Convention on Human Rights and Biomedicine, Article 21; Additional Protocol concerning Transplantation, Article 21: "The human body and its parts shall not, as such, give rise to financial gain or comparable advantage."

It is not necessary that the financial gain or comparable advantage has actually been received. It is sufficient that it has been offered. The gain or advantage can be offered to the donor or to a third person (e.g. family member; health-care professional; association; hospital), either directly or through intermediaries. "Comparable advantage" means any advantage whatsoever that is comparable to a financial gain, such as benefits in kind (e.g. holiday; car; tuition fee), a job or promotion, or a settlement of debt or reduction in punishment. Are not considered "financial gain or comparable advantage":

1. Compensation of living donors for loss of earnings and any other justifiable expenses that are caused by the removal or by the related medical examinations. This means that it is acceptable to reimburse travel expenses and to compensate missed wages while the donor was off work.
2. Compensation of living donors for damage that they suffered as a result of the removal and which is not a normal consequence of organ removal. This situation may, for instance, occur when (during surgery) another organ was injured.
3. Arrangements that are authorised under domestic law, such as arrangements for paired or pooled donation. This type of donation is an option when potential donors cannot donate to their intended recipients, e.g. because of blood group or other incompatibilities. To make transplantation possible, a potential donor can agree to donate their organ to another compatible recipient in exchange for a compatible organ for their originally intended recipient.

In order to assist member states in deciding what is a financial gain or a comparable advantage in the context of organ removal, the Council of Europe has recently published a Guide on the Prohibition of Financial Gain.[19]

19. Council of Europe. Guide for the Implementation of the Principle of Prohibition of Financial Gain with Respect to the Human Body and its Parts from Living or Deceased Donors. Council of Europe: Strasbourg, March 2018, available at https://rm.coe.int/guide-ginancial-gain/16807bfc9a.

## Portugal

*Penal Code, amended by Law n° 182/XIII/4.ª of 21 June 2019*

**Article 144°-B Trafficking in human organs**

1. Whoever removes a human organ:

   (a) from a living donor, without his/her free, informed and specific consent, or from a deceased donor, when its unavailability for donation has been validly demonstrated; or

   (b) where, in exchange for the removal, the living donor or a third party is promised or given a financial or non-financial advantage, or has received such an advantage,

   shall be punished with imprisonment of three to ten years.

## Spain

*Penal Code, amended by the Organic Law 1/2019 of 20 February 2019*

**Article 156*bis***

1. Those who, in any way, […] carry out trafficking in human organs, shall be punished by imprisonment of six to twelve years for an organ of a living person and imprisonment of three to six years for an organ of a deceased person.

   For these purposes, trafficking in human organs shall be understood as

   a) The illicit removal or procurement of another person's organs. Such removal or procurement shall be illicit if it occurs under any of the following circumstances:

      1. it has been carried out without the free, informed and express consent of the living donor in the manner and with the requirements established by law;
      2. it has been carried out without the necessary authorisation required by law in the case of the deceased donor;
      3. that, in exchange for the removal or procurement, for one's own benefit or for the benefit of a third party, a gift or remuneration of any kind is requested or received by the donor or a third party, by himself or by an intermediary, or an offer or promise is accepted. The compensation for expenses or loss of income derived from the donation will not be understood as a gift or remuneration.

## Switzerland

The Swiss Transplant Law contains a list of elements that are not considered as financial gain or comparable advantage in the context of organ donation.

*Federal Act on the Transplantation of Organs, Tissues and Cells*

**Article 6 – Non-commercialisation of donation**

1. It is prohibited to grant or derive financial gain or any other advantage from a donation of human organs, tissues or cells.
2. The following are not regarded as financial gain or other advantage:
   a. reimbursement of loss of earnings and expenses incurred directly by the donor;
   b. compensation for damage incurred by the donor as a result of organs, tissues or cells being removed;
   c. a subsequent symbolic gesture of gratitude;
   d. a crossover living donation.

## Implantation and other use of illicitly removed organs

The Convention requires Parties to criminalise the implantation and any other use of an organ, known to have been illicitly removed. Under "any other use" of illicitly removed organs can be understood, for instance, research, removal of tissues (e.g. heart valves) or cells for therapy, exposition, education, and use in rituals. Consequently, by implementing this provision, it will become possible to prosecute a variety of persons involved, including transplant surgeons and other health-care professionals, researchers, pharmacists, biologists, artists, and even practitioners of black magie.

Parties are allowed to make a reservation, stating that they limit the criminalisation of the use of illicitly removed organs only to implantation, or to implantation and specified other uses.

## Belgium

*Penal Code, amended by the Law of 25 April 2019*

**Art. 433*novies*/3**

With imprisonment of five years to ten years and with a fine of 750€ to 75,000€ shall be punished anyone who:

1° transplants into a person an organ that is removed in violation of Article 433*novies*/2 [*i.e. illicit organ removal*] or that is removed in another State under the conditions referred to in that Article, or uses such an organ for other purposes than transplantation, and this knowingly;

## Malta

*Penal Code, amended by the Human Organs, Tissues and Cell Donation Act of 10 June 2016*

**248CA. Trafficking in human organs**

(1) […]

(2) A person who does any of the following acts shall be guilty of an offence against this article –

(a) makes use of illicitly removed organs, tissues or cells as described in sub-article (1), for purposes of implantation or other purposes than implantation;

and shall be liable on conviction to the punishment laid down in sub-article (1) [*i.e. punishment of imprisonment for a term from six to twelve years*].

## Portugal

*Penal Code, amended by Law n° 182/XIII/4.ª of 21 June 2019*

**Article 144°-B Trafficking in human organs**

1. […]

2. The same penalty [*i.e. a prison sentence of three to ten years*] shall be applied to those who, having knowledge of the acts referred to in the previous paragraph:

(a) […];

(b) use a human organ or part, tissue or cells thereof for transplantation, scientific research or other non-therapeutic purposes;

## Spain

*Penal Code, amended by the Organic Law 1/2019 of 20 February 2019*

**Article 156*bis***

1. Those who, in any way, […] carry out trafficking in human organs shall be punished by imprisonment of six to twelve years for an organ of a living person and imprisonment of three to six years for an organ of a deceased person.

For these purposes, trafficking in human organs shall be understood as

a) […];

c) The use of illicitly removed organs for the purpose of transplantation or for other purposes.

## Illicit solicitation and recruitment of organ donors and recipients

Parties are required to criminalise persons who solicit and recruit donors and recipients to obtain financial gain or a comparable advantage. The person who solicits or recruits a donor or a recipient may do so to obtain the financial gain or comparable advantage for him/herself or for somebody else.

This criminalisation targets the recruiters who approach patients who are in need of an organ or persons who may consider selling an organ. Persons who advertise that they need an organ and that they are willing to pay for it, and persons who advertise that they are willing to sell an organ, are also covered. Parties can also decide to make this type of advertising a separate offence.[20]

In addition, the criminalisation targets the brokers who bring together the donors, the patients, and the medical team to perform the illicit organ removal or the implantation of an illicitly removed organ.

The Convention is important because it introduces illicit solicitation and recruitment as a separate offence, independent from the illicit organ removal or the implantation of the illicitly removed organ. This was done because the activities of recruiters and brokers cannot always be directly linked to these offences and these persons may otherwise escape punishment.

20. It should be noted that the Convention also contains a provision in Article 21, paragraph 3, requiring Parties to prohibit this practice and to take measures to stop it when it occurs. This will be analysed in more detail below.

## Belgium

In Belgium a provision was introduced in the Penal Code which does not only criminalise solicitation and recruitment for financial gain or comparable advantage, and advertising of the need for, or the availability of, an organ for financial gain or comparable advantage, but also the making of publicity for practices involving organ trafficking.

*Penal Code, amended by the Law of 25 April 2019*

**Article 433*novies*/5**

With imprisonment of five years to ten years and with a fine of 750€ to 75,000€ shall be punished anyone who solicits or recruits a candidate organ donor or recipient for the purpose of obtaining, directly or indirectly, a financial gain or comparable advantage for him/herself or for a third party.

**Article 433*novies*/6**

With imprisonment of one year to five years and with a fine of 500€ to 50,000€ shall be punished anyone who, by any means:

1° […];

2° directly or indirectly advertises such practices [*i.e. illicit organ removal; transplantation or other use of an illicitly removed organ; preparation, transportation, import or export; and knowingly accepting an organ that is illicitly removed*], or orders, publishes, distributes or disseminates advertising of such practices;

3° makes public, directly or indirectly, the need for or the availability of organs for the purpose of offering or obtaining, directly or indirectly, a financial gain or comparable advantage for him/herself or for a third party.

## Italy

The Italian Penal Code has opted for a broader criminalisation, which is not restricted to solicitation and recruitment for financial gain, but covers any form of mediation for financial gain. In addition, the Penal Code also explicitly criminalises advertising aimed at organ trafficking and the organisation of trips aimed at organ trafficking.

*Penal Code, amended by Law no. 236 of 11 December 2016 and Legislative Decree no. 21 of 1 March 2018*

**Art. 601-*bis*. Trafficking in organs removed from a living person**

[…]

Anyone who mediates in the donation of living organs in order to gain an economic advantage is liable to imprisonment for a period of between three and eight years and a fine of between 50,000€ and 300,000€.

Unless the act constitutes a more serious offence, a term of imprisonment of between three and seven years and a fine of between 50,000€ and 300,000€ shall be imposed on anyone who organises or promotes trips or advertises or disseminates, by any means, including computerised or electronic means, announcements aimed at trafficking in the organs or parts of organs referred to in the first paragraph.

## Offering and requesting of undue advantages

The Convention requires Parties to criminalise the corruption of health-care professionals, public officials or persons who direct or work for private sector entities, if such corruption takes place in order to persuade these individuals to allow or to facilitate illicit organ removal or the implantation of an illicitly removed organ. This provision covers two scenarios:

- the brokers who promise, offer or give an undue advantage to health-care professionals, public officials or persons who direct or work for private sector entities;
- the health-care professionals, public officials or persons who direct or work for private sector entities who request an undue advantage.

This provision of the Convention is important because reports indicate that in many cases of organ trafficking, health-care professionals, hospital administrators, police and custom officers, embassy officials, and/or officials in the health authority or even in the government have been bribed.

This provision is inspired by the Criminal Law Convention on Corruption and the United Nations Convention against Corruption.[21] It was included because not all Parties to the Convention against Trafficking in Human Organs will necessarily be Parties to these Conventions.

21. Council of Europe. Criminal Law Convention on Corruption, ETS No. 173, 27 January 1999, Strasbourg; United Nations Convention against Corruption, *Treaty Series*, vol. 2349, p. 41, 31 October 2003, New York.

## Belgium

*Penal Code, amended by the Law of 25 April 2019*

**Article 433*novies*/8**

With imprisonment of one year to five years and with a fine of 500€ to 50,000€ shall be punished anyone who, directly or through intermediates, promises, offers or gives any undue advantage to a person, for that person or for a third party, with the aim of removing, transplanting or using an organ in violation of Articles 433*novies*/2 to 433*novies*/4 [*i.e. illicit organ removal; transplantation or other use of an illicitly removed organ; and preparation, transportation, import or export*], or with the aim of facilitating the commission of such an act.

With the same penalties shall be punished anyone who, directly or through intermediates, requests, accepts or receives any undue advantage, for himself or for a third party, with the aim of removing, transplanting or using an organ in violation of Articles 433*novies*/2 to 433*novies*/4, or with the aim of facilitating the commission of such an act.

## Spain

*Penal Code, amended by the Organic Law 1/2019 of 20 February 2019*

**Article 156*bis***

1. […]
2. In the same way [*i.e. by imprisonment of six to twelve years for an organ of a living person and imprisonment of three to six years for an organ of a deceased person*] shall be punished those who, for their own benefit or for the benefit of others:
   a) […];
   b) offer or deliver, by themselves or through an intermediary, a gift or compensation of any kind to medical professionals, public officials or private individuals in the exercise of their profession or their position in clinics, establishments or public or private doctor's offices, for the purpose of performing or facilitating illicit removal or procurement or the implantation of illicitly removed organs.
3. […]
5. The medical professional, public official or private individual who, in the exercise of his profession or position […] requests or receives the

gift or compensation referred to in point (b) of paragraph 2, or accepts the offer or promise to receive it, shall incur the penalty indicated above to a higher degree and, in addition, the special disqualification from public employment or office, profession or trade, to exercise any health profession or to provide services of any kind in clinics, establishments or public or private doctor's offices for the time of the sentence. […]

For the purposes of this Article, the term medical professional includes doctors, nurses, and any other person who performs an activity related to health or social care.

### Switzerland

In Switzerland the Penal Code does not provide a specific criminalisation but these acts will be punishable under the general criminal law provisions on corruption.

## Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

The Convention also requires Parties to criminalise all acts of manipulation and transportation of the organs after they have been illicitly removed. It is of crucial importance that the Convention in this way covers the entire criminal chain, from the moment when the organ is illicitly removed to the moment when it is implanted or used in another way. The main purpose of this provision is to target transplant coordinators and health-care professionals who handled the organ but did not take part in the illicit removal or implantation themselves. These acts should be criminalised even if they are not performed for profit.

More specifically, the following acts should be criminalised:

- the preparation, preservation, and storage of illicitly removed organs;[22]
- the transportation, transfer, receipt, import, and export of illicitly removed organs.

Taking into account the differences in the criminal law systems that exist in Council of Europe member states, the Parties may decide whether they

22. Definitions can be found in the European Directorate for the Quality of Medicines & HealthCare, *Guide to the Quality and Safety of Organs for Transplantation*, 7th Edition, Council of Europe, Strasbourg, 2018 and in EU Directives 2004/23/EC and 2010/45/EU. Preservation is defined as "The use of chemical agents, alterations in environmental conditions or other means during processing to prevent or inhibit biological or physical deterioration of organs between procurement and transplantation." Storage can be defined as "means maintaining the organ under appropriate controlled conditions until implantation."

establish these offences as separate offences or whether they consider them as aiding or abetting, or attempt.

As indicated, the import of an illicitly removed organ should be criminalised. However, some organs are imported within the framework of international organ exchange agreements. To avoid hindering such organ exchange agreements, import can then take place unless proof is provided that the organ has been illicitly removed.

## Belgium

*Penal Code, amended by the Law of 25 April 2019*

**Article 433*novies*/4**

With imprisonment of five years to ten years and with a fine of 750€ to 75,000€ shall be punished anyone who, knowingly:

1° prepares, preserves, stores, transports, transfers, receives, or exports an organ that is removed in violation of Article 433*novies*/2 or that is removed in another state under the conditions referred to in Article 433*novies*/2;

2° imports or allows to transit an organ removed in another State under the conditions referred to in Article 433*novies*/2.

The organs removed in Belgium or another member state of the European Union are presumed not to have been removed in violation of Article 433*novies*/2 or under the conditions referred to in that Article, until proof to the contrary, if they were allocated by a public or private non-profit organisation that conducts domestic and cross-border organ exchanges.

## Finland

*Law on the Medical Use of Human Organs, Tissues and Cells*

**§ 25 Penal provisions**

Whosoever knowingly:

1) […]

5) imports into Finland organs, tissues or cells that have been removed or obtained contrary to the conditions on donors laid down in this Act, or imports into Finland organs, tissues or cells from a state whose legislation does not meet the conditions laid down in this Act for the removal and traceability of organs, tissues or cells;

shall be punished by a fine for violation of the provisions relating to the medical use of human organs, tissues and cells, unless the law otherwise provides for more severe punishment.

### Norway

*Law on Donation and Transplantation of Organs, Cells and Tissues, amended by Law No. 54 of 16 June 2017*

**§ 23a Penalties**

The same [*fines or imprisonment of up to two years*] applies to anyone who […] prepares, preserves, stores, transports, transfers, receives, imports or exports organs that have been illicitly removed in violation of the rules in §§ 5, 6, 7, 10, 12, 13, 16 or 20.

## Aiding or abetting and attempt

According to the Convention, the following acts should also be criminalised:

- assisting or encouraging someone to carry out organ trafficking;
- attempting to commit organ trafficking.

Parties are allowed to make a reservation stating that they will not, or only in specific cases or conditions, criminalise the attempt:

- to illicitly solicit and recruit;
- to offer and request undue advantages;
- to prepare, preserve, store, transport, transfer, receive, import, and export illicitly removed human organs.

This possibility has been provided to take into account the fact that some member States limit the offences for which attempt is punished.

### Malta

*Penal Code, amended by the Human Organs, Tissues and Cell Donation Act of 10 June 2016*

**248CA. Trafficking in human organs**

**248F. Aiding and abetting**

(1) Whosoever aids, abets or instigates any offence under this sub-title shall be guilty of an offence and shall be liable on conviction to the punishment laid down for the offence aided, abetted or instigated.

## Spain

*Penal Code, amended by the Organic Law 1/2019 of 20 February 2019*

**Article 156*bis***

1. Those who, in any way, promote, encourage, facilitate, […] trafficking in human organs shall be punished by imprisonment of six to twelve years for an organ of a living person and imprisonment of three to six years for an organ of a deceased person.
2. […]
8. The instigation, the conspiracy, and the proposal to commit the crimes provided for in this Article will be punished with a penalty one to two degrees lower than that which corresponds, respectively, to the acts provided for in the previous paragraphs.

## Criminalisation of other forms of illicit removal and implantation

The Convention does not require, but still encourages, Parties to criminalise:

- the removal of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law (Article 4, paragraph 4);
- the implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law (Article 6).

These provisions are important because, when they are implemented, it will be easier to prosecute health-care professionals who are suspected of illicit organ- or transplant-related practices. If these professionals performed organ removal or implantation outside of the domestic transplant system or in breach of essential principles of the national transplant law, it will no longer be necessary to prove that no valid consent or authorisation was obtained or that financial gain or comparable advantage has been offered or received.

These provisions may cover a variety of situations, such as organ removal or implantation in a private hospital in countries where this is only allowed in accredited public hospitals, organ removal from a deceased donor without verifying consent or absence of refusal, or the implantation of an organ in violation of the rules of organ allocation.

Parties may determine whether or not to criminalise these acts. The option to leave this decision to the Parties is dictated by differences in domestic transplant systems and laws. For instance, in some countries organ removal

performed outside of the domestic transplantation system is only a regulatory or minor offence, if it does not at the same time constitute illicit organ removal as defined by the Convention.

When Parties decide to criminalise removal and/or implantation of organs outside of the domestic transplant system or in breach of essential principles of the national transplant law, they are also encouraged to apply to that offence all the other relevant provisions of the Convention (e.g. aiding and abetting and attempt; corporate liability; sanctions; aggravating circumstances; jurisdiction).

## Belgium

The Belgian Penal Code criminalises, in addition to acts constituting organ trafficking in accordance with the Convention, removal and implantation outside an authorised healthcare facility or by an authorised person.

*Penal Code, amended by the Law of 25 April 2019*

**Article 433*novies*/2**

With imprisonment of five years to ten years and with a fine of 750€ to 75,000€ shall be punished anyone who removes an organ from a person in the following cases:

3° where the removal is performed by a person who is not authorised to do so by law, or outside a healthcare facility authorised by law.

**Art. 433*novies*/3**

With imprisonment of five years to ten years and with a fine of 750€ to 75,000€ shall be punished anyone who:

2° transplants into a person an organ without being authorised to do so by law or outside a healthcare institution authorised by law.

## Norway

The Norwegian Transplant Law criminalises, in addition to acts constituting organ trafficking in accordance with the Convention, a range of other violations of essential principles of the Transplant Law.

*Law on Donation and Transplantation of Organs, Cells and Tissues, amended by Law No. 54 of 16 June 2017*

**§ 23a Penalties**

Anyone who intentionally or by gross negligence violates the provisions in §§ 5 (*consent for removal from living minors*), 6 (*consent for removal from*

*living adults)*, 7 (*legal capacity of living adult donors*), 10 (*confirmation of death of dead donors*), 12 (*consent for treatment for organ perfusion for donation after death*), 13 (*consent for donation after death*), 16 (*allocation criteria*), 17 (*maintaining anonymity*), 19 (*prohibition of xenotransplantation*) or 20 (*removal, implantation or use of organs, cells or tissues to obtain financial gain or undue advantage as well as requesting, offering, accepting or giving such gain or advantage*), or in regulations that are associated with them, is punishable by fines or imprisonment up to two years. The same applies to anyone who makes use of, purchases, prepares, preserves, stores, transports, transfers, receives, imports or exports organs that have been illicitly removed in violation of the rules in §§ 5, 6, 7, 10, 12, 13, 16 or 20.

## Portugal

The Portuguese Penal Code criminalises, in addition to acts constituting organ trafficking in accordance with the Convention, the allocation of an organ in violation of the allocation rules.

*Penal Code, amended by Law n° 182/XIII/4.ª of 21 June 2019*

**Article 144°-B Trafficking in human organs**

1. […]

3. The persons referred to in Article 150, paragraph 1, who remove, transplant or allocate a human organ to a recipient different from the one who would be eligible, in violation of the *leges artis* or contrary to the general criteria for transplantation regarding clinical urgency, immunogenic compatibility, or preference and priority, shall be punished with imprisonment of one year to five years, if a more serious penalty does not apply under another legal provision.

## Legal status of donors and recipients

The negotiators of the Convention could not find a consensus on the advisability of prosecuting organ donors and/or recipients. For that reason, the Convention does not contain a provision requiring the criminalisation of selling or buying organs (organ trade), which would make donors and recipients criminally liable. For the same reason, it is left to Parties to decide whether to apply the sanctions for organ trafficking also to the donor and/or the recipient.[23]

23. Huberts, C., Un organe à quel prix? Genèse et analyse de la Convention du Conseil de l'Europe contre le trafic d'organes humains, *Revue de Droit Pénal et de Criminologie*, 2016; 96(6), 626-627.

The choice to leave this decision to the Parties is important, because it gives them some room to adapt the implementation of the Convention to their own legal system and preferences. By not requiring Parties to criminalise or not to criminalise donors and recipients, the Convention enables as many states as possible to ratify the Convention.

During the drafting process of the Convention, a number of member states indicated that they would never prosecute organ donors for committing organ trafficking. These states emphasised that donors who sold an organ would normally have been motivated by financial problems and that they may run considerable health risks as a result of the organ removal. In the same way, some member states indicated that they would not prosecute recipients who knowingly have received an illicitly removed organ. These states emphasised that many recipients would have been motivated by severe illness to purchase an organ. The risk of prosecution could also deter donors and recipients from co-operating in exposing the organ trafficking network or from filing a complaint.

Other member states indicated that organ donors who sold an organ could under their domestic law, under certain conditions, be considered as having participated in, or even instigated, organ trafficking. In the same way, some member states wanted to provide for the opportunity of prosecuting recipients who knowingly received an illicitly removed organ. These states emphasised that the organ trafficking process is fuelled by the patients who request and pay for an organ, and that they may need to bear some responsibility for the mutilation and negative health consequences of the donor. Criminalising the donor and recipient would also have a dissuading effect which could help in reducing the supply and demand side of organ trafficking.

It should be noted that the Convention also requires that donors and recipients must under certain circumstances be considered as victims of organ trafficking who are entitled to protection.

## Switzerland

In Switzerland, the donor and recipient will be punishable for violating the prohibition of organ sale.

*Federal Act on the Transplantation of Organs, Tissues and Cells*

**Article 69 – Misdemeanours**

1. Provided that no more serious offence has been committed under the Criminal Code, a custodial sentence not exceeding three years or a monetary penalty shall be imposed on any person who wilfully:

a. grants or accepts a financial gain or other advantage for the donation of human organs, tissues or cells (Art. 6 para. 1);

## France

In France, the recipient who pays for an organ is criminalised, but the donor who sells an organ is not.

*Penal Code*

**Article 511-2**

Obtaining from a person one of their organs in exchange for payment, whatever its form, shall be punished by seven years of imprisonment and a fine of 100,000€.

## Belgium and Spain

Belgium and Spain have introduced in their Penal Code a provision that criminalises the recipient who accepts the transplantation of an organ, in the knowledge that it was illicitly removed. In Spain the provision also contains a reference to mitigating circumstances.

*Belgian Penal Code, amended by the Law of 25 April 2019*

**Article 433*novies*/7**

With imprisonment of one year to five years and with a fine of 500€ to 50,000€ shall be punished anyone who knowingly has accepted for him/herself the transplantation of an organ that is removed in violation of Article 433*novies*/2 [*i.e. illicit organ removal*] or that is removed in another State under the conditions referred to in Article 433*novies*/2.

*Spanish Penal Code, amended by the Organic Law 1/2019 of 20 February 2019*

**Article 156*bis***

3. If the recipient of the organ consents to have the transplant performed, knowing its illicit origin, he or she shall be punished with the same penalties provided for in paragraph 1 (*i.e. imprisonment of six to twelve years for an organ of a living person and imprisonment of three to six years for an organ of a deceased person*), which may be reduced by one or two degrees depending on the circumstances of the act and the guilty party.

## Corporate liability

One of the main benefits of the Convention is that it requires Parties to make it possible that health facilities, hospitals, commercial companies, and other legal entities are held accountable if they have benefitted from organ trafficking. Their liability needs to be established in two situations:

- when the organ trafficking offence is committed by an individual who has a leading position;
- when a person who is under contract was able to commit the organ trafficking offence because there was not enough supervision.

When the health facility, hospital, commercial company or other legal entity is held liable, the individual who committed the offence can still be prosecuted.

## Sanctions

Parties are required to introduce effective, proportionate, and dissuasive sanctions that correspond to the seriousness of the offence. Individuals who commit organ trafficking should be punishable by a penalty involving deprivation of liberty that may give rise to extradition. In accordance with the European Convention on Extradition, this means that the maximum penalty should be at least one year of imprisonment.[24] This gives Parties considerable freedom to determine appropriate sanctions.

In addition, Parties should ensure that:

- the profits from the offence can be confiscated;
- any establishment used to carry out the offence can be temporarily or permanently closed;
- the offender can be prohibited, temporarily or permanently, from carrying out the professional activity (e.g. medicine, nursing) in connection with which the offence was committed.

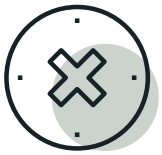
These sanctions are crucial because they will ensure that the offender does not benefit financially from organ trafficking and will no longer be in a position to engage in such a crime.

In the same way, Parties are required to introduce effective, proportionate, and dissuasive sanctions for health facilities, hospitals, commercial companies, and other legal entities that are held liable. This liability does not have to be criminal, but may be civil or administrative, as long as it includes monetary

24. European Convention on Extradition (ETS No. 24), Article 2.

## Effective, proportionate and dissuasive sanctions

Temporary or permanent closure of the establishment used



Temporary or permanent prohibition from carrying on the professional activity concerned

At least one year of imprisonment maximum penalty

Confiscation of profits

Monetary sanctions for legal entities

sanctions. In addition, it may include measures such as temporary or permanent disqualification from exercising commercial activity, placement under judicial supervision, or a judicial winding-up order.

## Aggravating circumstances

The Convention requires Parties to ensure that judges can take into account the following aggravating circumstances, punishable with tougher sanctions:

- where the offence caused the death of, or serious damage to the physical or mental health of, the victim. Given that any organ removal or implantation carries a health risk, it will be up to the courts to decide the causal link between the offence and the damage or death.
- where the offence was committed by persons abusing the confidence placed in them in their professional capacity. This provision primarily targets, but is not restricted to, health-care professionals and public officials.
- where the offence was committed in the framework of a criminal organisation. "Criminal organisation" corresponds to the definition of "organised

criminal group" in the UN Convention against Transnational Organised Crime.[25]

- where the perpetrator has previously been convicted of offences established under the Convention. This provision emphasises the need to combat recidivism, considering that organ traffickers typically only face a low risk of arrest and prosecution. The Convention also requires that judges can take into account previous convictions given by a court in another Party for offences established under the Convention. This is particularly relevant because organ trafficking is often committed transnationally and offenders may already have been convicted in another country.
- where the offence was committed against a child or any other particularly vulnerable person. "Child" is defined as "any person under 18 years of age" in accordance with the UN Convention on the Rights of the Child. "Any other particularly vulnerable person" refers to a person who because of age, mental development or familial or social dependence on the offender, is especially vulnerable to become a victim of organ trafficking.

## Czech Republic

The Czech Penal Code contains two levels of aggravating circumstances for illicit organ removal. In addition to the four aggravating circumstances listed in the Convention, the Czech Penal Code introduces several others.

*Penal Code*

**§ 164 Unauthorised removal of tissues and organs**

(1) Anyone who removes a tissue, cell or organ from another person in violation of another legislation, shall be punished by imprisonment of two to eight years.

(2) In the same way shall be punished anyone who, in violation of another legislation, for himself or for another person obtains, mediates in, offers, imports, exports or transits a tissue, cell or organ removed from the body of a living person, or otherwise disposes of a tissue, cell or organ.

(3) By imprisonment of five to twelve years or the forfeiture of property shall be punished the offender who

25. United Nations Convention against Transnational Organised Crime, Article 2(a) defines "organized 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."

a) commits an offence referred to in paragraph 1 or 2 against a child;

b) commits such an offence by the use of violence, threats of violence or threats of other severe harm;

c) commits such an offence by abusing vulnerability or dependency;

d) commits such an offence against at least two persons;

e) repeatedly commits such an offence;

f) commits such an offence as a member of an organised group;

g) causes a severe injury to health by committing such an offence; or

h) obtains through such an offence a significant benefit for himself or for another person.

(4) By imprisonment of eight to sixteen years or the forfeiture of property shall be punished the offender who

a) commits an offence referred to in paragraph 1 or 2 against a child under the age of fifteen;

b) commits such an offence in connection with an organised group operating in several countries;

c) causes death by committing such an offence; or

d) obtains through such an offence a very substantial benefit for himself or for another person.

(5) The preparation is punishable.

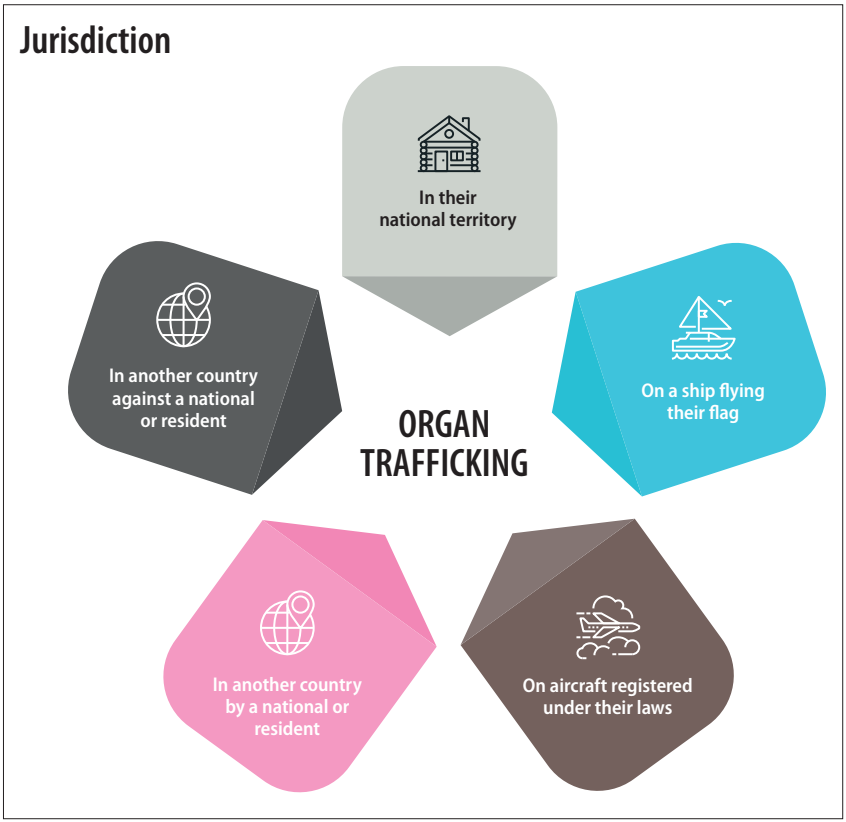
## Jurisdiction

Parties are required to prosecute organ trafficking offences that have been committed:

- on their territory;
- on a ship flying their flag or on an aircraft registered under their laws (territoriality principle);
- in another country by one of their nationals or by a person who usually lives in their territory (nationality principle). However, Parties may make a reservation on the application of this rule.

In addition, Parties are not required but are still encouraged to also try and prosecute organ trafficking offences that have been committed:

- in another country against their nationals or persons who usually live in their territory (passive personality principle).




If a Party has established jurisdiction over an organ trafficking offence committed in another country, two principles apply. First, the Convention does not contain a provision that eliminates the usual rule of dual criminality. The principle of dual criminality means that prosecution will only be possible if the act is an offence not only in the country where it is prosecuted but also in the country where it took place.

Second, Parties may not require that they will only prosecute the organ trafficking offence if the country where the offence took place first has transmitted a case file or if the victim first has filed a complaint. Taking into account that certain countries in which organ trafficking takes place may lack the resources or the will to initiate an investigation, it is considered that allowing these conditions would severely hinder prosecution. However, Parties may still make a reservation.

Parties are also required to prosecute organ trafficking offences if the suspected offender is present on their territory, but they refuse to extradite that person because he or she is one of their nationals. In such a case, prosecution should be initiated when the country that requested extradition asked to do so.

If several Parties at the same time claim jurisdiction over an organ trafficking offence, the Convention requires them to consult each other. The aim is to determine the most appropriate jurisdiction for prosecution and to avoid that several procedures would be started against the same suspected offenders.

In addition to the different bases of jurisdiction outlined above, Parties may also establish other types of criminal jurisdiction according to their domestic law. For instance, Parties may indicate that they will prosecute organ trafficking offences that have been committed in another country, even if the offences have not been committed by one of their nationals or against one of their nationals.

## Belgium

The Belgian legislation contains extensive provisions on jurisdiction over organ trafficking offences committed in another country. To enable a more efficient international fight against organ trafficking, and to give a clear warning sign to possible traffickers, the Code of Criminal Procedure was amended. As a result, any person, regardless of that person's nationality, who has committed organ trafficking in another country, may be prosecuted in Belgium, if that person is found on Belgian territory. The scope of the provision is restricted to organ removal for financial gain or comparable advantage. In the light of the different rules on consent for organ removal from a living person (e.g. organ removal from an incompetent person is not allowed in Belgium but is allowed in some other countries), the scope of the provision was not extended to organ removal without valid consent or authorisation.

*Belgian Law containing the preliminary title of the Code of Criminal Procedure*

**Article 10*ter***

Any person may be prosecuted in Belgium when he/she has committed outside the territory of the Kingdom:

1 […];

1bis one of the offences provided for in Articles 433*novies*/2 to 433*novies*/10 [*i.e. organ trafficking*], in the case of organ removal performed or contemplated in exchange for a financial gain or comparable advantage;

## Procedural law

To facilitate the prosecution of organ traffickers the Convention requires Parties to adapt their criminal procedure in the following ways:

- Parties have to ensure that the offences can be investigated or prosecuted even if the victim did not file a complaint, and that criminal proceedings that have been initiated after a complaint of a victim may continue even if the victim withdraws the complaint. This provision of the Convention is important because traffickers often pressure or threaten victims not to report the offence. The aim of the provision is to allow that the investigation and prosecution can continue even if victims have withdrawn their complaint under pressure.
- Parties also have to ensure effective investigation and prosecution of offences. Considering the seriousness of organ trafficking offences and the complexity of trafficking networks, it may be useful to allow the use of special investigation techniques such as financial investigations, covert operations, and controlled delivery (i.e. a technique that allows the transport of the organ or of the money, under the supervision of law enforcement, to the persons who have ordered the delivery).

### Portugal and Belgium

In **Portugal**, Article 1 of the Code of Criminal Procedure was amended to include organ trafficking into the category of "highly organised crime", which allows for the use of evidence-gathering procedures and the application of procedural measures reserved for the investigation of the most serious and complex crimes.

In **Belgium**, Article 90*ter*, §2, was amended to allow the investigating judge to authorise the use of wiretapping if there are serious indications that an organ trafficking offence was committed, and the other means of investigation are not sufficient to establish the truth.

## International co-operation in investigation and prosecution

The Convention requires that Parties co-operate in investigating and prosecuting offences established in accordance with the Convention. This should be done to the widest extent possible and on the basis of relevant international and national law.

Co-operation should focus on:

- investigations or proceedings of the offences, including for the purpose of carrying out seizure and confiscation;[26]
- extradition and mutual legal assistance in criminal matters that concern the offences. If no treaty of mutual assistance and extradition exists between the Parties, they are invited to use the Convention itself as the legal basis for this judicial co-operation.

Relevant international instruments include:

- the European Convention on Extradition (ETS No. 24);
- the European Union Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (for Parties member of the EU);
- 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);
- 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).

## Protection measures

One of the central aims of the Convention is to protect and assist the victims of the offences that are established in accordance with the Convention, especially taking into account that they may suffer serious consequences. The Convention introduces a non-exhaustive list of protection measures that is inspired by other Council of Europe Conventions. Victims should, for instance, be provided with:

- access to information relevant to their case;
- access to information necessary for the protection of their health and other rights involved;
- assistance in physical, psychological, and social recovery;

26. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Article 1(d), defines "confiscation" as "a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property."

- the right to compensation from perpetrators;
- access to information about their rights regarding the criminal investigation and proceedings against the traffickers, about the services at their disposal, and, upon their request, about the state of the criminal proceedings;
- the possibility to be heard, to supply evidence, and to have their views, needs, and concerns presented and considered;
- appropriate support services so as to guarantee that their rights and interests are duly taken into account;
- protection from potential intimidation and retaliation (which should also be provided for witnesses);
- access to information on relevant judicial and administrative proceedings;
- access to legal aid free of charge, when the victim is a party to the criminal proceedings;
- the possibility to make a complaint before the competent authorities of their state of residence;
- the possibility to be assisted and/or supported, during the criminal proceedings, by groups, foundations, associations or governmental or non-governmental organisations.

## Portugal

In Portugal, Articles 87 and 88 of the Code of Criminal Procedure were amended to include additional protection measures to ensure that the identify of victims of organ trafficking is not disclosed.

The Convention does not define "victim" and leaves it to the Parties to determine who would qualify as a victim of organ trafficking. The approach taken in other international legal instruments related to victim protection indicates that the status of victim will depend on harm suffered as a direct consequence of the criminal offence.[27]

Examples of donors and recipients who have suffered significant harm from organ trafficking include: victims subjected to forced organ removal; donors who had agreed to paid organ donation but did not receive any money after organ removal; paid donors who suffered severe negative health consequences

27. MEDICRIME Convention (CETS No. 211), Article 4(k); Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, Article 2, 1, (a)(i).

as a result of organ removal; and recipients who suffered severe infections or organ loss after transplantation.

Living donors can also be qualified as victims of trafficking in human beings if the elements of the Council of Europe Convention on Action against Trafficking in Human Beings are established. This would, for example, be the case when coercive, deceptive or fraudulent means have been used, or where they were in a position of vulnerability that was abused, to exploit them by organ removal. If a living donor is not only a victim of organ trafficking but also a victim of trafficking in human beings, priority should be given to the qualification which provides the higher protection to the victim.[28] The protection measures for victims of trafficking in human beings are usually more extensive and the punishment provided for offenders generally higher. In addition, victims of trafficking in human beings must not be punished for unlawful acts that they were forced to commit.[29] This means, for instance, that a donor who was recruited on the basis of lies or fraudulent statements must not be punished for selling a kidney.

## Prevention measures at national level

To prevent organ trafficking Parties should address its root causes. The Convention lists six measures that should be implemented at domestic level. These measures largely correspond to the measures proposed in the Additional Protocol concerning Transplantation and in other legal instruments and guidelines on organ transplantation, issued by the European Union, the World Health Organization, the World Medical Association, and the Transplantation Society and International Society of Nephrology.[30]

28. Gawronska, S., Organ Trafficking and Human Trafficking for the Purpose of Organ Removal: Two International Legal Frameworks Against Illicit Organ Removal, *New Journal of European Criminal Law*, published online first on 16 July 2019, 17-18.
29. Council of Europe Convention on Action against Trafficking in Human Beings, Article 26; Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, Article 8; OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking, 2013.
30. Council of Europe. Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin; Directive 2010/53/EU of 7 July 2010 on Standards of Quality and Safety of Human Organs Intended for Transplantation; World Health Organization, WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation, Resolution WHA63.22, May 2010; World Medical Association, Statement on Organ and Tissue Donation, revised October 2017; The Transplantation Society and International Society of Nephrology, Declaration of Istanbul on Organ Trafficking and Transplant Tourism, updated 2018.

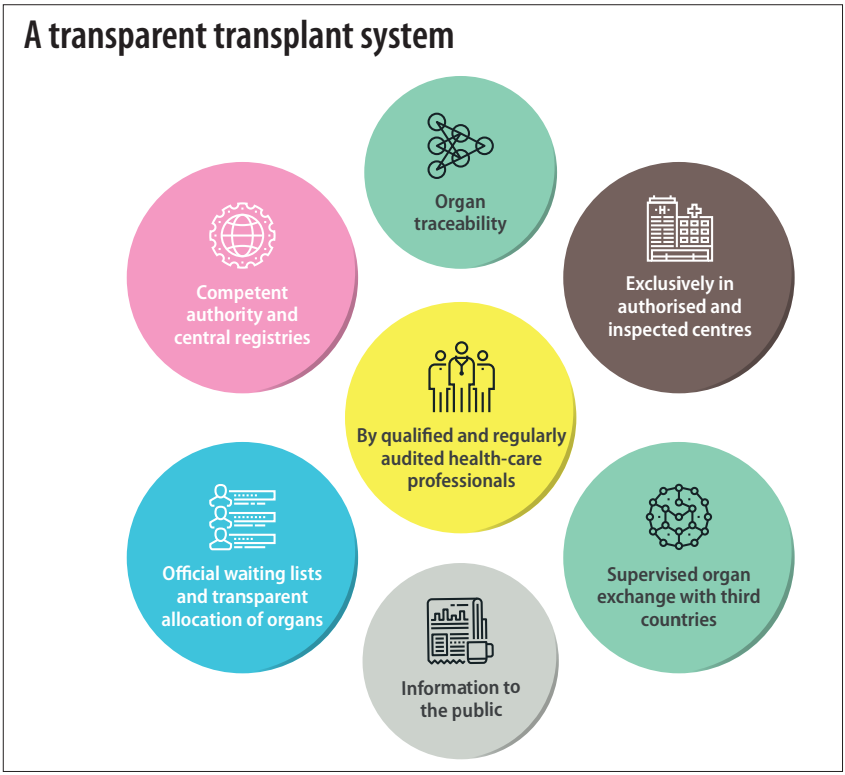
## Existence of a transparent transplant system

Parties are required to ensure the existence of a transparent domestic transplant system. The risk that illicitly removed organs would be introduced into the legitimate domestic transplant system, and, more generally, the risk that organ trafficking would happen, can be greatly reduced if the transplant system is tightly regulated and transparent.

Best practice indicates that the transparency of a transplant system may be guaranteed for example by:

1. Establishing a Health Authority responsible for the supervision of all transplant activities carried out in the country.[31]
2. Ensuring that organ removal and transplantation take place exclusively in centres that are specifically authorised for such activities and that are regularly inspected.
3. Ensuring that organ removal and transplantation are carried out by health-care professionals who are suitably qualified and who are regularly audited on their performance.
4. Establishing central registries which include information about each procedure of organ removal and transplantation.[32]
5. Implementing a centralised system for organ traceability, which ensures that all organs can be traced from donation to transplantation, allowing the identification of the donors and the recipients, and of the medical facilities and professionals involved.
6. Ensuring that organs removed from deceased persons are only allocated to patients registered on an official waiting list and that the allocation procedure is transparent.
7. Ensuring that organ exchange with third countries is supervised by a Health Authority or is delegated to an official organ exchange organisation.
8. Providing information to the public on organ donation, allocation, and transplant activities so as to allow public scrutiny and enable public trust.

31. See also Recommendation Rec(2006)15 on the Background, Functions, and Responsibilities of a National Transplant Organisation (NTO).
32. See also Resolution CM/Res (2015) 11 on Establishing Harmonised National Living Donor Registries with a View to Facilitating International Data Sharing.




## Norway

Norway has amended its Transplant Law on 16 June 2017 to make explicit that one of the main purposes of the Law and of the provisions on the domestic transplant system is to prevent organ trafficking

*Law on Donation and Transplantation of Organs, Cells and Tissues, amended by Law No. 54 of 16 June 2017*

**§ 1. Purpose**

The purpose of the law is to ensure the best possible access to organs, cells, and tissues for the treatment of other persons, respect for the will and integrity of the donor, and consideration that the relatives are taken into account.

The purpose of the law is also to prevent and combat trafficking in human organs.

## Equitable access to transplantation services for patients

Parties are also required to ensure equitable access to transplantation services for patients. This means that Parties should guarantee a "level playing field" in terms of the allocation of organs for all patients awaiting implantation. The concern is that there is no discrimination against any person who might benefit from a transplant. Considering that there is a severe shortage of most organs, the domestic transplant system will be responsible for ensuring that patients have equitable access to evaluation for transplantation and to transplant waiting lists.

How equitable access to organs should be ensured is indicated in the Additional Protocol concerning Transplantation. Transplantation of organs removed from a living donor should only take place in accordance with the conditions specified in transplant regulations. These conditions should also define the nature of the relationship required between the donor and the recipient. Organs from deceased donors should be allocated only among patients on an official waiting list, in conformity with transparent and objective rules guided by medical criteria. The persons or organisation responsible for the allocation decision should be designated within the domestic transplant system. When official international co-operation agreements between the governments of the countries exist to facilitate the exchange of organs or that patients travel for transplantation to a third country, the arrangements must ensure transparency, traceability and continuity of care and be based on the principles of solidarity and reciprocity.

## Adequate collection, analysis, and exchange of information related to offences

Parties are required to ensure adequate collection, analysis, and exchange of information related to the offences established in accordance with the Convention. Preventing and combating these offences requires evidence-based policy-making. To guide policy-making on organ trafficking and to monitor the implementation of measures, it is essential to systematically and effectively collect data. To enable timely action to prevent and combat organ trafficking, all relevant authorities involved should co-operate in the collection, analysis, and exchange of information. While the Convention does not define the type of data that will need to be collected, analysed, and exchanged, a network of Council of Europe National Focal Points on Transplant Related Crimes, in accordance with Council of Europe Resolutions CM/Res(2013)55 on establishing procedures for the collection and dissemination of data on transplantation activities outside a domestic transplantation system and CM/Res(2017)2 on

establishing procedures for the management of patients having received an organ transplant abroad upon return to their home country to receive follow-up care, regularly collects and exchanges this type of information, identifies hotspots for transplant tourism and elaborates guidelines to help professionals prevent and address illicit transplantation practices.

The collection, processing, and communication of data should comply with the domestic rules relating to professional confidentiality, and with the standards on data protection as contained in the Convention for the Protection of Individuals with Regard to the Processing of Personal Data (ETS No. 108).

## Information and training for health-care professionals and public officials

Parties are required to take measures to provide information to, or strengthen training for, health-care professionals and officials involved in preventing and combating organ trafficking. This training must cover methods of preventing organ trafficking, of protecting its victims (with attention to victims' needs, victim reception and appropriate treatment of victims), and, for the relevant authorities, also of prosecuting the offenders.[33]

### Portugal and Spain

In **Portugal** and **Spain**, national protocols to prevent and combat organ trafficking are being developed, which include:

- developing guidelines for health professionals on how to prevent, detect, and report cases of organ trafficking;
- amending the Code of Medical Deontology to allow or even require disclosure of information on organ trafficking to law enforcement agencies;
- integrating organ trafficking as a topic into the curriculum of medical students, nurses, and police officers;
- organising joint workshops with transplant professionals and law enforcement agencies;
- organising targeted training sessions for transplant professionals, nurses, judges, public prosecutors, and police officers;

33. Information and training could be provided in co-operation with the national contact person on illicit transplantation activities, appointed in accordance with Resolution CM/Res(2013)55 on Establishing Procedures for the Collection and Dissemination of Data on Transplantation Activities Outside a Domestic Transplantation System.

– promoting co-operating with national authorities responsible for preventing and combating human trafficking for the purpose of organ removal.

## Awareness-raising campaigns for the public

Parties are also required to promote awareness-raising campaigns addressed to the general public about the unlawfulness and dangers of organ trafficking. The organisation of these information campaigns will help to:

- mobilise the general public and to increase its vigilance;
- deter persons who are considering embarking on illicit activities (e.g. travelling abroad to buy an organ, helping a patient obtain an illegal transplant);
- increase awareness of the need to develop and optimise ethical and effective donation and transplantation programmes.

Considering that systematic awareness-raising campaigns are already organised to promote deceased organ donation (e.g. European Day for Organ Donation and Transplantation), information about organ trafficking can be disseminated in a similar way or can be included in these campaigns.

## Prohibition of advertising need for, or availability of organs, for financial gain

Parties are required to prohibit advertising the need for, or the availability of, organs where advertising is done with a view to offering or seeking financial gain or comparable advantage. This provision was considered necessary in the light of reports of organs that have been put up for sale in newspapers, on websites or on social media. All means of advertising for financial gain should be covered, including the printed press, placards, radio, Internet, social media, fairs, telephone calls, and face-to-face consultations.

The implementation of the provision is left to the Parties, although they are expected to take into account the case-law of the European Court of Human Rights on Article 10 of the ECHR, which guarantees the right to freedom of expression. More specifically, it is not illegal to place an advert seeking a living organ donor if there is no offer of payment or comparable advantage to the potential donor.

Under the Convention, advertising for financial gain is a form of solicitation and should therefore also be criminalised. This criminalisation is intended to target mainly persons who act as brokers between donors and recipients, but Parties can decide whether or not organ donors should also be prosecuted.

Apart from criminalising the advertisers, it is important that domestic law also allows that the legal persons involved, such as publishers, are punished and that websites where these advertisements appear can be blocked or closed.

## Moldova

The Moldovan Penal Code contains a detailed provision on advertising, which does not provide for prison sentences, and which allows to impose a fine on the legal person involved.

*Moldovan Penal Code, amended by Law no. 207 of 28 July 2016*

**Article 213[1] – Advertising for the purpose of illicitly obtaining human organs, tissues and cells or their illicit donation**

Advertising for the purpose of illicitly obtaining human organs, tissues and/or cells, as well as advertising or giving publicity to advertisements for illicit donation of human organs, tissues and/or cells, shall be punished by a fine in the amount of 500 to 750 conventional units or community service from 180 to 240 hours, and with a fine imposed on the legal person in the amount of 1300 to 1600 conventional units.

The list of prevention measures in the Convention is not exhaustive. A range of additional measures have been suggested in other instruments of the Council of Europe and other bodies.[34]

34. See also Council of Europe/United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*. Council of Europe/United Nations, Strasbourg, 2009; European Parliament Resolution of 22 April 2008 on Organ Donation and Transplantation: Policy Actions at EU Level (2007/2210 (INI)); European Parliament, *Trafficking in Human Organs* (study prepared by Michael Bos). European Union Subcommittee on Human Rights, Brussels, 2015; The Transplantation Society and International Society of Nephrology, Declaration of Istanbul on Organ Trafficking and Transplant Tourism, updated 2018; United Nations Resolution 73/189, Strengthening and Promoting Effective Measures and International Cooperation on Organ Donation and Transplantation to Prevent and Combat Trafficking in Persons for the Purpose of Organ Removal and Trafficking in Human Organs, 17 December 2018; World Health Organization, WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation, 2010; World Medical Association, Statement on Organ and Tissue Donation, October 2017. In addition, suggestions can also be found in publications addressing identification and prevention of trafficking in human beings for the purpose of organ removal. See United Nations Office on Drugs and Crime. *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal*, United Nations: Vienna, 2015; De Jong, J. & Ambagtsheer, F., Indicators to Identify Trafficking in Human Beings for the Purpose of Organ Removal, *Transplantation Direct*, 2016; 2(2): e56; Pascalev, A.; Van Assche, K.; Sándor, J. et al., Protection of Human Beings Trafficked for the Purpose of Organ Removal: Recommendations, *Transplantation Direct*, 2016; 2(2): e59.

Additional best practice examples to prevent organ trafficking include:

– initiatives to better fulfil the transplant needs of the population,[35] by:
  - decreasing the domestic need for organs, by investing in public health programs for screening, prevention, and treatment of conditions that may lead to organ failure;[36]
  - ethically increasing the availability of organs by maximising donations from deceased donors, as outlined in Council of Europe consensus document "Organ shortage: current status and strategies for improvement of organ donation";[37]
  - ethically increasing the availability of organs by optimising living kidney donation programmes;[38]
  - ensuring full coverage of the costs related to organ donation, guaranteeing that donation does not put a financial burden on donors and families;[39]
– enhancing the quality of screening of living donors, with specific attention to unrelated donors and non-resident donors, by:
  - improving the quality of ethics committee review,
  - establishing clear protocols to verify identification documents and individual declarations;
  - updating psychosocial screening guidelines for living donation;[40]

35. Participants to the Third WHO Global Consultation on Organ Donation and Transplantation, The Madrid Resolution on Organ Donation and Transplantation: National Responsibility in Meeting the Needs of Patients, Guided by the WHO Principles, 2010.
36. The Transplantation Society and International Society of Nephrology, Declaration of Istanbul on Organ Trafficking and Transplant Tourism, updated 2018.
37. European Directorate for the Quality of Medicines & HealthCare, *Organ Shortage: Current Status and Strategies for the Improvement of Organ Donation – A European Consensus Document*, 2003. See also Recommendation Rec (2006) 16 on Quality Improvement Programmes for Organ Donation; Resolution CM/Res (2015) 10 on the Role and Training of Critical Care Professionals in Deceased Donation.
38. Resolution CM/Res (2013) 56 on the Development and Optimisation of Live Kidney Donation Programmes.
39. The Transplantation Society and International Society of Nephrology, Declaration of Istanbul on Organ Trafficking and Transplant Tourism, updated 2018.
40. Resolution CM/Res (2008) 6 on Transplantation of Kidneys from Living Donors Who Are Not Genetically Related to the Recipient; Resolution CM/Res (2017) 1 on Principles for the Selection, Evaluation, Donation and Follow-Up of Non-Resident Living Organ Donors; KDIGO. Clinical Practice Guideline on the Evaluation and Care of Living Kidney Donors, *Transplantation*, 2017; 101(8S): S1-109; Massey, E.K.; Timmerman, L.; Ismail, S.Y. et al. The ELPAT Living Organ Donor Psychosocial Assessment Tool (EPAT): From 'What' to 'How' of Psychosocial Screening: A Pilot Study, *Transplant International*, 2018; 31(1): 56-70.

– requiring physicians not to take any action that would allow their patients to purchase an organ abroad, but to actively discourage them, for instance by distributing a special patient brochure;[41]

– development of an international referral system for legitimate travel for transplantation, allowing flagging and stopping of transplant attempts abroad when no details of prior registration are available;[42]

– denying national medical insurance reimbursements for illegal transplants abroad.[43]

## Prevention measures at international level

Parties are required to co-operate with each other to the widest extent possible in preventing organ trafficking. More specifically, Parties should:

- report to the monitoring body established by the Convention (the Committee of the Parties) at its request the number of organ trafficking cases within their jurisdictions;
- designate a national contact point for the exchange of information about organ trafficking.

These measures are necessary to ensure effective international co-operation and to be able to assess the impact of the Convention.

## Switzerland

The Swiss Transplant Law contains a provision stating that confidential data may be provided to foreign authorities and institutions or to international organisations if required by international agreement or if this would enable the exposure of organ trafficking.

41. Cf. Declaration of Istanbul Custodian Group. *Patient Brochure: Thinking of Buying a Kidney? Stop*, available at https://www.declarationofistanbul.org/resources/patient-brochure-thinking-about-a-kidney.
42. Martin, D.E.; Van Assche, K.; Domínguez-Gil, B. et al., Prevention of Transnational Transplant-Related Crimes: What More Can be Done?, *Transplantation*, 2016; 100(8): 1776-84.
43. Parliamentary Assembly Recommendation 1611(2003) on Trafficking in Organs in Europe; Recommendation Rec(2004)7 of the Committee of Ministers to Member States on Organ Trafficking.

*Federal Act on the Transplantation of Organs, Tissues and Cells*

**Article 60 – Exchange of data with foreign authorities and international organisations**

1. The Federal Council shall regulate responsibilities and the procedures for exchanging data with foreign authorities and institutions and with international organisations.
2. Confidential data may only be provided to foreign authorities and institutions or to international organisations if:
   a. required by agreements under international law or resolutions passed by international organisations;
   b. necessary to avert an imminent danger to life or health; or
   c. this would enable illegal trafficking or other serious offences under this Act to be exposed.

## Monitoring mechanism – Committee of the Parties

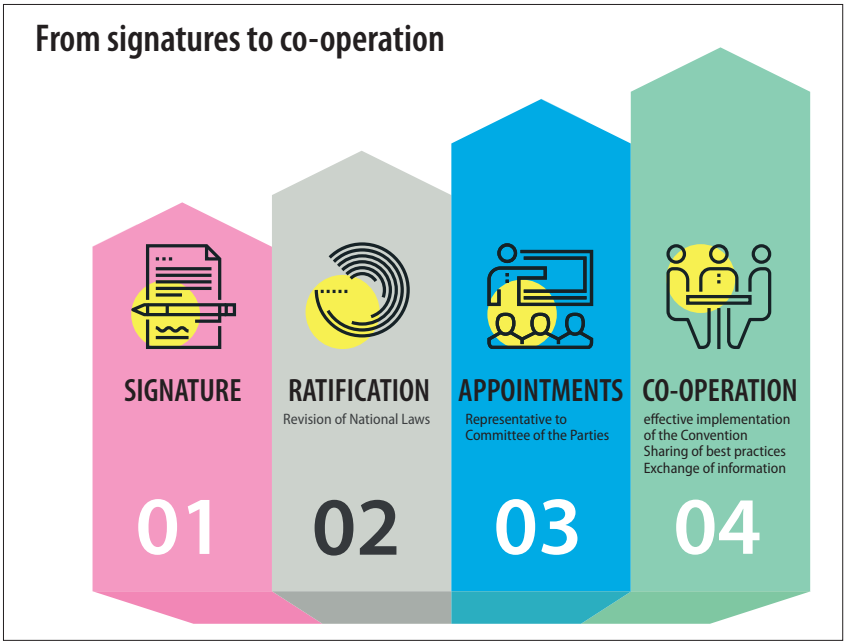
The effective implementation of the Convention is monitored by the Committee of the Parties. This is a body composed of representatives of the Parties to the Convention, and of the Parliamentary Assembly, the European Committee on Crime Problems, the Committee on Bioethics, and the European Committee on Organ Transplantation. In addition, observers from relevant international bodies, official bodies of the Parties, and civil society may be invited to that Committee. The involvement of observers from a variety of sectors and disciplines that are actively engaged in preventing and combating organ trafficking should ensure that the follow-up of the implementation of the Convention is truly effective.

The Committee will hold its first meeting within a year after the Convention enters into force in the tenth country that ratifies it (as of 30 August 2019, 9 countries have ratified the Convention). The Committee will be convened for the first time by the Secretary General of the Council of Europe and will subsequently meet whenever this is requested by at least one third of the Parties or by the Secretary General.

The Committee of the Parties has three main tasks:

- to facilitate and improve the effective implementation and use of the Convention, including by identifying any problems that may arise;
- to play an advisory role by expressing an opinion on any question about the application of the Convention and by making specific recommendations to Parties;

- to serve as a centre for the collection, analysis, and exchange of information on significant developments, experiences, and good practice, allowing Parties to improve their policies.




## Relationship with other international instruments

The Convention does not affect the rights and obligations arising from other relevant international legal instruments. The purpose of this provision is to ensure that the Convention coexists harmoniously with other international legal instruments which contain relevant provisions.

The Parties may conclude bilateral or multilateral agreements in order to supplement or strengthen the provisions of the Convention or to facilitate the application of its principles. However, Parties are not allowed to conclude any agreement that goes against the provisions of the Convention.

## Amendments to the Convention

The Parties may propose amendments to the provisions of the Convention. These proposals are communicated to the Secretary General of the Council of Europe, and forwarded to all Council of Europe member states, to the

non-member states enjoying observer status, to the European Union, and to any state invited to sign the Convention.

The European Committee on Crime Problems and other relevant Council of Europe committees will prepare opinions on the proposed amendment, which will then be submitted to the Committee of the Parties. After considering the proposed amendment and the opinions submitted by the committees, the Committee of Ministers may adopt the amendment. Before deciding whether to adopt the amendment, the Committee of Ministers shall consult all Parties and obtain their unanimous consent.

## Final clauses

The Convention is open for signature by Council of Europe member states, the European Union, and states enjoying observer status (Canada, Holy See, Japan, Mexico, and United States of America) with the Council of Europe. Non-member states are allowed to sign and ratify the Convention, subject to an invitation by the Committee of Ministers. This is aimed at encouraging the participation of as many non-member states as possible to the Convention. The Committee of Ministers may invite any non-member state to accede to the Convention after having obtained the unanimous agreement of the Parties to the Convention.

The entry into force of the Convention required five ratifications. This number was not very high in order not to delay the entry into force. The Convention entered into force on 1 March 2018.

The Parties to the Convention may specify the territory or territories to which it will apply. It would, however, be incompatible with the object and purpose of the Convention if a Party excludes parts of its main territory from the scope of the Convention.

Parties may make reservations to certain provisions of the Convention for which this is expressly allowed. This possibility aims at enabling as many states as possible to ratify the Convention, while permitting them to preserve some of their fundamental legal concepts. Reservations are possible in respect to:

- Article 4, paragraph 2 (establishing as a criminal offence the removal of human organs from a living donor without that person's free, informed, and specific consent);
- Article 9, paragraph 3 (establishing as a criminal offence the intentional attempt to commit any of the criminal offences established in accordance with Article 7 and Article 8);

- Article 10, paragraph 3 (establishing jurisdiction when the offence is committed by a national of the Party);
- Article 10, paragraph 5 (establishing jurisdiction when the offence is committed by a person who has his or her habitual residence on the territory of the Party).

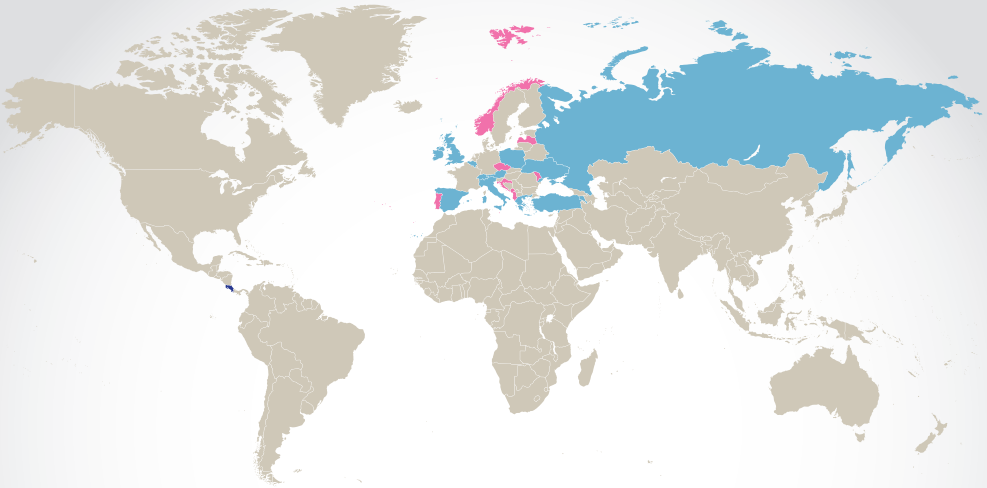
Parties can also reserve the right to apply Article 5 (establishing as a criminal offence the use of illicitly removed organs for purposes of implantation or other purposes than implantation) and Article 7, paragraphs 2 and 3 (establishing as a criminal offence the offering of undue advantages to, or requesting the same by, a healthcare professional, public official, or person who directs or works for a private sector entity to facilitate or perform illicit organ removal or implantation of an illicitly removed organ) only when the offences are committed for purposes of implantation, or for purposes of implantation and other purposes as specified by the Party.

Reservations should be made when the Convention is signed or ratified and can be withdrawn at any time by notifying the Secretary General of the Council of Europe.

If disputes arise between Parties about the application of the Convention, the Committee of the Parties, in close co-operation with the European Committee on Crime Problems and other relevant committees of the Council of Europe, will facilitate their solution.

Any Party may, at any time, denounce this Convention by notifying the Secretary General of the Council of Europe.

# Signatures and ratification



As of 30 August 2019

- Signatures of member states of the Council of Europe
- Member states of the Council of Europe which have ratified the Convention
- Signatures of non-member states of the Council of Europe

**Since the Convention was opened for signature in Santiago de Compostela on 25 March 2015, 9 states have ratified it:**

| | |
|---|---|
| Albania | 6 June 2016 |
| Croatia | 16 May 2019 |
| Czech Republic | 21 September 2017 |
| Latvia | 9 July 2019 |
| Malta | 7 November 2017 |
| Montenegro | 5 February 2019 |
| Norway | 12 September 2017 |
| Portugal | 8 November 2018 |
| Republic of Moldova | 21 June 2017 |

**15 states have signed but not yet ratified the Convention:**

| | |
|---|---|
| Armenia | 21 January 2018 |
| Austria | 25 March 2015 |
| Belgium | 25 March 2015 |
| Greece | 25 March 2015 |
| Ireland | 8 October 2015 |
| Italy | 25 March 2015 |
| Luxembourg | 25 March 2015 |
| Poland | 25 March 2015 |
| Russian Federation | 24 September 2015 |
| Spain | 25 March 2015 |
| Switzerland | 10 November 2016 |
| Turkey | 25 March 2015 |
| Ukraine | 11 September 2017 |
| United Kingdom | 25 March 2015 |
| Costa Rica | 16 April 2018 |

The text of the Convention can be found on line at https://rm.coe.int/16806dca3a or ordered at https://book.coe.int/en/council-of-europe-treaties-and-explanatory-reports/6894-council-of-europe-convention-against-trafficking-in-human-organs-and-explanatory-report.html