

Council of Europe Convention Against Trafficking of Human Organs



Article

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The trafficking of human organs (THO) has gone from being an urban legend for many countries to becoming a dark reality that can end in a custodial sentence. Understood as an international problem that demands a response from governments, legislative institutions, and international organizations, it mainly emerges in the context of the inability of countries to cope with the transplantation needs of their patients. The shortage of organs, disparities accentuated by the economic crisis, the vast differences between health systems, and the voracity of unscrupulous traffickers have, in recent years, led to an increase in transplant tourism and the development of an international organ trade where potential recipients travel abroad to obtain organs from impoverished people through commercial transactions. There are many direct consequences of the current shortage of organs such as long waiting lists for transplantations and the high cost of alternatives to transplantation (i.e., dialysis), etc.

As a problem of global proportions, THO violates basic fundamental freedoms, human rights, and human dignity. It also constitutes a direct threat to public health, integrity, freedom and often the life of individuals, and therefore there is a real need to put in place measures to protect the most vulnerable individuals. Frequently linked to the activities of transnational organized criminal groups, who profit from the vulnerable situation of donors from poverty-stricken and deprived areas and the desperation of recipients, this crime erodes the public's confidence in existing transplantation systems, therefore perpetuating its root cause: organ shortage. Although it is difficult to precisely quantify the scale of this criminal activity because it is hidden, the proliferation of cases of THO is a significant problem. Despite numerous responses to THO from many countries, the necessity for a solid legal framework, especially at the international level, is more acute than ever, as the absence of an international legal instrument establishing this activity as a criminal offense has facilitated the cross-border cooperation of criminals (organized networks) and allowed terrorists to work with total impunity. THO becomes part of a wider circle of violence and threats to human rights, democracy, and the rule of law, values on which the Council of Europe (CoE) is founded. Thus, this worldwide problem can only be addressed through concerted efforts at a global level.

The CoE Convention against Trafficking in Human Organs represents a historical milestone in the fight against THO from an efficiency standpoint. This report aims at introducing the Convention and its most relevant features in order to assess to what extent this new legal instrument represents a significant advancement towards the establishment of a "zero tolerance zone" against THO.

I. International Legal Framework

It should be recalled that the subject of THO is not new, and certain international organizations have carried out significant work to combat THO either from the bioethics perspective, in the field of organ transplantation, or from the criminal law perspective, concentrating on trafficking in human beings (THB).

From a bioethics perspective, the international legal framework implemented by the Council of Europe (CoE), the European Union (EU), and the World Health Organization (WHO) should be acknowledged:

- a) Art. 21 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine: The Convention on Human Rights and Biomedicine¹ (hereafter, the Oviedo Convention) prohibits any action that gives rise to financial gain from the human body and its parts. This idea is included in Art. 21 of its Additional Protocol² and developed in Art. 22 of the same Protocol, which prohibits organ and tissue trafficking. In this regard, Art. 26 of the aforesaid Protocol urges that that parties should provide for appropriate sanctions to be applied in the event of infringement of the prohibition.

In addition to the Oviedo Convention, there is a range of other legal instruments³ from the Committee of Ministers of the CoE that deal with organizational and technical issues. They highlight that organ removals from living donors may be achieved, provided that safeguards are implemented in order to guarantee the freedom and safety of the donor and a successful transplant. In this regard, particular attention should be paid to Recommendation Rec(2004)7 on organ trafficking, which clearly states that organ trafficking is illegal⁴ and that countries should ensure that legal instruments prohibiting the trafficking of organs⁵ are in place.

b) At the EU level, while its first objective may be the safety and quality of organs, the EU Directive on standards of quality and safety of human organs intended for transplantation (Directive 2010/45/EU)⁶ contributes indirectly to combating organ trafficking through the establishment of competent authorities, the authorization of transplantation centers, and the establishment of conditions of procurement and systems of traceability.⁷

c) In the UN, the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation are intended to provide a framework for the acquisition and transplantation of human cells, tissues, and organs for therapeutic purposes.⁸

In addition to this legal framework, the work carried out by other international actors should also be mentioned. Although the 2008 Istanbul Declaration defined “organ trafficking” and “transplant tourism” and highlighted their prohibition, this definition is, however, just a step in the right direction from a summit convened by the Transplantation Society and International Society of Nephrology and does not represent the opinion of the international community/states. Important efforts to raise awareness of organ trafficking among health professionals and transplant organizations should be attributed to the Istanbul Custodian Group, established in 2010 to promote the principles of the Declaration of Istanbul and to encourage and assist in their implementation.

From the criminal law perspective, the following legal instruments contain criminal law provisions against THB for the purpose of organ removal:

a) The Additional Protocol to the UN Convention against Transnational Organised Crime (Palermo Convention) and the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography, both adopted in 2000 by the United Nations;

b) The Convention on Action against Trafficking in Human Beings,⁹ adopted in 2005 by the CoE, and the EU directive 2011/36/EU on prevention and combating trafficking in human beings and protecting its victims contain a definition which also covers trafficking in human beings for the purpose of the removal of organs.

Unfortunately, these legal instruments do not cover THO or other cases in which the donor has consented to the removal of organs. The loopholes for perpetrators in the international legal framework prompted the CoE to consider the necessity of drafting a legal instrument. Prior to this, the CoE and UN had drafted a “Joint study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs,”¹⁰ which issued the following recommendations:

- To clearly distinguish two different phenomena, THO *per se* on the one hand, and “Trafficking in human beings for the purpose of the removal of organs” (HTOR), on the other;
- To support the principle of the prohibition of making financial gains with the human body;
- The need for an internationally agreed definition of THO;
- To elaborate an international legal instrument setting out measures to prevent such trafficking as well as to protect and assist the victims and containing criminal law measures to punish the crime.

Following these recommendations, the Committee of Ministers of the CoE mandated a committee of experts on Trafficking in Human Organs, Tissues and Cells,¹¹ under the authority of the European Committee on Crime Problems (CDPC), to draft a criminal law convention against THO and, if appropriate, an additional protocol to it.¹² In less than one year, the members of this Committee produced a draft convention that was finalised and approved by the CDPC in 2012¹³ and adopted by the Committee of Ministers on 9 July 2014. The Convention was opened for signature on 25 March 2015 in Santiago de Compostela, Spain, the city which gives name to the Convention.

II. The Convention

1. General Ideas

Given the importance of the legal rights involved, the first binding international legal instrument against THO, the Santiago de Compostela Convention, contains legal provisions of a criminal law nature. It also sets out the offenses committed intentionally that states should introduce into their national legislation. This means that states will be held responsible if they do not respond adequately to any illicit activity in respect of human organs. Following the principle of legality applied in criminal matters, states parties are required to specify in their domestic law all the offenses provided for in the Convention.

Similar to the THB Convention, the Santiago de Compostela Convention follows the “4 Ps” principle:

- Prevents;
- Prosecutes THO;
- Protects the human rights of the victims;
- Promotes international cooperation on both the national and international levels.

One of the major achievements of this Convention is the definition of THO, as requested by the Joint Study CoE/UN. Without being a *strictu sensu* definition of the crime, it consists of an enumeration of the substantive criminal law provisions setting out the different criminal acts constituting THO¹⁴ (i.e., Art. 4 paragraph 1 and Arts, 5, 7, 8, and 9). The scope of the Santiago de Compostela Convention covers four different areas:

- Trafficking in human organs for purposes of transplantation;
- Trafficking in human organs for other purposes;
- Other forms of illicit removal;
- Other forms of illicit implantation.¹⁵

It should be recalled that the legal trade in medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the Convention and shall not be restricted by it.

2. Punishable acts under the Convention

State parties to the Convention will establish as a criminal offense the following acts:

a) The illegal removal of human organs (Art. 4.1)

The situations criminalized under this article cover the removal of human organs:

- Without the **free, informed, and specific consent**¹⁶ of the living or deceased donor (Art. 4.1 a),
- Without **authorization by the domestic law** in the case of the deceased donor (Art. 4.1.a),
- Where a **financial gain or comparable advantage** has been received or offered:
 - To the living donor or a third party in exchange for the removal of organs (Art. 4.1.b);
 - To a third party in exchange for the removal of organs from a deceased donor (Art. 4.1.c).

This means that the removal of any organ from a living or deceased person is illicit when valid consent is absent and/or when financial gain has been offered or received in exchange for the organ removal. It should be mentioned that the idea of consent to an intervention in the health field comes from Art. 5 of the Oviedo Convention, which should be read in relation with Art. 19.2 of the same Convention, whereby consent must be specific and given in written form or before an official body. This has been further developed in Art. 13 of the Additional Protocol to the Oviedo Convention.

Two groups deserve particular attention:

1. ***Persons not able to consent***: According to this Convention, organ removal from persons unable to give consent is prohibited, as already stated in Art. 20 of the Oviedo convention and Art. 14 of its Additional Protocol.
2. ***Persons deprived of their liberty***: Art. 4 also applies to these persons regardless of whether they are living or deceased.

The expression “financial gain or comparable advantage” does not include compensation for loss of earnings and any other justifiable expenses caused by the removal of an organ or the related medical examinations. It also does not include compensation in case of damage that is not inherent to the removal of organs. It does not apply to any arrangement authorized under domestic law (such as arrangements for paired or pooled donation). This wording is taken from the Additional Protocol to the Oviedo Convention to clearly distinguish the lawful compensation of organ donors in certain cases from the prohibited practice of making financial gains with the human body or its parts. According to the Convention, any removal of organs from living or deceased donors performed outside the domestic transplant system, or violating the essential principles of national transplant legislation, is considered a criminal offense.

b) The use of illicitly removed organs (Art. 5)

Art. 5 shall apply to any case concerning an organ that has been removed under any of the circumstances described in Art. 4.1 (see above) for purposes of implantation or other purposes (e.g. research).

c) Solicitation, recruitment, and undue advantages (Art. 7)

With the aim of criminalizing the activities of those persons operating as an interface between/bringing together donors, recipients, and medical staff, the illicit solicitation and recruitment of organ donors and recipients for financial gain (or comparable advantage), either for the person soliciting or recruiting or for a third party, has been criminalized under the Santiago de Compostela Convention. Although advertising is indeed a form of solicitation, the Santiago de Compostela Convention introduces as a preventive measure an explicit obligation for state parties to prohibit the advertising of the need for/availability of human organs,

with a view to offering or seeking financial gain or comparable advantage (Art. 21.3). This measure does not, however, prevent activities to recruit donors authorized under domestic law. In addition, the active and passive corruption of healthcare professionals, public officials, or persons working for private sector entities in the illicit removal¹⁷ or implantation¹⁸ of human organs has also been criminalized.¹⁹

d) Acts committed following the illicit removal of human organs (Art. 8)

Under this article, the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Art. 4.1 and, where appropriate, in Art. 4.4, when committed intentionally, should be understood as criminal offenses. It should be noted that the wording "where appropriate" means that, if a state party considers establishing the offense contained in Art. 4.4 to be a criminal offense, then it should also be included in Art. 8.

e) Aiding or abetting and attempt (Art. 9)

According to the Santiago de Compostela Convention, all acts aiding or abetting the commission of any of the above criminal offenses as well as any attempt to commit them will be established as offenses.

3. Additional elements

The Santiago de Compostela Convention also introduces additional important elements, such as:

a) Corporate liability (Art. 11)

Applied to both individuals and corporations, legal persons are, in addition to natural persons, among the perpetrators of these offenses. This being so, commercial companies, associations, and similar legal entities are liable for criminal actions performed on their behalf. Moreover, liability is also possible when someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offenses established in the Convention for the benefit of the entity. Some measures have been foreseen, e.g., the closure of any establishment, the seizure and confiscation of the proceeds derived from criminal offenses, etc.

b) Aggravating circumstances and previous convictions (Arts. 13, 14)

Certain circumstances may be taken into consideration in the determination of the sanction, e.g.:

- The death of, or serious damage to the physical or mental health of, the victim;
- The abuse of power;
- An offense committed within the framework of a criminal organization;
- Previous convictions of the perpetrator;
- The victim being a child or any other vulnerable person.

The internalization of crimes and, in particular, the transnational nature of criminal organizations or individual persons when perpetrating THO means that convictions may take place in more than one country. With a view to tackling these offenses, it is important that final sentences passed by one party be taken into account by another. As such, the Convention provides that parties may introduce into their domestic law that previous convictions by foreign courts may be taken into account. This possibility should also include the

principle that the offender should not be treated more favourably than he/she would have been treated if the previous conviction had been a national conviction.

c) Criminal procedure (Arts. 15-17)

With a view to facilitating prosecution, it is not necessary that a victim file a complaint because public authorities can prosecute offenses *ex officio* (Art. 15). The Santiago de Compostela Convention can be considered the legal basis for judicial cooperation in those cases in which a party to the Convention does not have a treaty with a country requesting extradition to that country (Art. 17). The interest in this provision is high, given that it is possible for third countries to join this Convention.

d) Protection measures

The protection of, and assistance to, victims of THO is conceived as a priority for the Santiago de Compostela Convention. Thus, it provides for them to be assisted in their physical, psychological, and social recovery. The term "victim" is not defined in the Convention. The question of whether the organ donor or recipient should be prosecuted is left open. Whereas, in some states these persons could be prosecuted for having participated in, or even instigated, the THO, in other states they would not be prosecuted because they could be considered "victims." The right of victims to compensation from the perpetrators and to effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings are also measures foreseen in the Convention.

e) Prevention measures

Measures for preventing THO at both national and international levels are set out in the Convention, e.g., ensuring a transparent domestic system for transplantation; adequate collection, analysis and exchange of information relating to the offenses; capacity building and awareness-raising activities for legal and health professionals; appointing a national contact point for the exchange of information pertaining to trafficking in human organs; etc.

4. Conclusions and the Way Forward

In addition to giving a definition of THO and bringing legal clarity with regard to acts that constitute THO, there are two other issues that can be seen as the added-value elements of this Convention: the situation of victims and international cooperation. As mentioned before, the victims must be protected and granted reparation. A major shortcoming of the current state of international cooperation in law enforcement is its geographical fragmentation: A more coordinated and multi-state approach is needed. Without a proper legal framework, international cooperation is hampered or even impossible from the onset. The more states that become party to CoE instruments, the more the network of legally binding connections expands and increases the possibilities for cooperation.

This Convention is a first step that is opening the way towards a concerted approach at the international level, which is needed to fight this scourge.

In addition to CoE Member States and observer states, this Convention is open for signature to EU and non-Member States upon invitation by the Committee of Ministers. To date, 16 countries have signed the Convention. In doing so, the international community can work together towards a common goal: to win the fight against transnational criminal groups.

* The views expressed in this article are purely those of the author and may not under any circumstances be regarded as stating an official position of the Council of Europe.

1. CETS No.: 164¹
2. Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, CETS No.: 186²
3. Resolution (78) 29 on harmonisation of legislations of Member States relating to removal, grafting and transplantation of human substances, Recommendation Rec(2004)7 on organ trafficking, Resolution CM/Res(2008)4 on adult-to-adult living donor liver transplantation, Resolution CM/Res(2008)6 on transplantation of kidneys from living donors who are not genetically related to the recipient.³
4. Recommendation Rec(2004)7 on organ trafficking, Art. 1⁴
5. Ibid. Art.4⁵
6. Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010. Vid. Directive 2010/53/UE Rectificatif à la directive 2010/45/UE du Parlement européen et du Conseil du 7 juillet 2010 relative aux normes de qualité et de sécurité des organes humains destinés à la transplantation.⁶
7. Ibid. Directive 2010/45/UE, recital §7.⁷
8. WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22, § 4.⁸
9. CETS No.: 197⁹
10. Joint Council of Europe/United Nations study, Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs, Directorate General of Human Rights and Legal Affairs, Council of Europe, 2009.¹⁰
11. Following the Terms of Reference of this Committee, every Member States was invited to designate one or more representatives with specific expertise in the relevant fields of criminal law, bioethics, and transplantation of organs, tissues, and cells. Moreover, the Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), the Committee on Bioethics (DH-BIO), the European Committee on Transplantation of Organs (CD-P-TO), the European Union, states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, USA), United Nations Office for Drugs and Crime (UNODC), International Criminal Police Organization (INTERPOL), and the World Health Organization (WHO) could send representatives to the four meetings held (13-16 December 2011, 6-9 March 2012, 26-29 June 2012, 15-19 October 2012).¹¹
12. The Committee experts decided not to elaborate an additional protocol on tissues and cells and recommended reviewing this possibility in the future.¹²
13. At its 63rd plenary session on 4-7 December 2012.¹³
14. Art. 2, paragraph 2¹⁴
15. The expression "other forms of illicit removal and of illicit implantation" refers only to actions covered by Art. 4, paragraph 4 and Art. 6.¹⁵
16. "Specific" means that the consent must be clearly provided and pertain to the removal of a "specific" organ that is precisely identified.¹⁶
17. Offenses under Art. 4.1 and Art. 5 and, where appropriate, Art. 4.4 (removal performed outside of the framework of the domestic transplantation system or in breach of essential principles of national transplantation laws/rules) of the Santiago de Compostela Convention.¹⁷
18. Offenses under Art. 6 of the Santiago de Compostela Convention (i.e., implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law).¹⁸
19. Arts. 4.4 and 6 leave parties a margin to decide on whether to establish the offenses described therein as criminal offenses or not.¹⁹

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