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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

QUESTIONS TO CDPC DELEGATIONS ON CERTAIN ISSUES IN RESPECT OF THE PRELIMINARY DRAFT CONVENTION ON TRAFFICKING IN ORGANS

Document prepared by the CDPC Secretariat
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Questions to CDPC delegations on certain issues in respect of the

Preliminary draft Convention on Trafficking in Organs

Name of delegation/country
RUSSIAN FEDERATION

Please provide your preference in answers to the questions below by marking the appropriate box

Section 1

Use of the term „offences established in accordance with this Convention“

Several provisions of the draft convention make reference to “offences established in accordance with this Convention”. This applies in particular to Art. 9 to 22 (to be noted: Art. 21 and 22 instead actually use the term “covered by this Convention”). Delegations in the PC-TO were divided over the question to what extent this reference would be applicable in respect of Art. 4(3) and Art. 6. Both of these provisions foresee sanctioning of organ removal (Art. 4(3) and organ implantation (Art. 6) “performed outside of its domestic transplantation system” or “in breach of essential principles of national transplantation laws or rules”. The corresponding original draft articles had been subject of considerable debate in the PC-TO. Several delegations had insisted that the convention should also include such offences (in addition to the conduct of organ removal or implantation in case of a financial gain or lack of consent of the donor). Other delegations were concerned that an obligation to criminalize every possible conduct that may be seen as being performed “outside of its domestic transplantation system” or “in breach of essential principles of national transplantation laws or rules” would go too far.

The present draft text in Art. 4(3) and Art. 6 was acceptable for all delegations but one. It would require Parties to the Convention to (merely) “consider” establishing any such conduct as a criminal offence. It would thus allow the legislator to be more specific (and selective) as to the acts to be criminalized. It would also allow – even if not specifically so – to apply other than criminal sanctions to certain such offences. The draft text in this respect is inspired by that of Art. 19 of the THB Convention (Warsaw Convention).

Against this background, delegations in the PC-TO agreed that if a Party to the Convention would, exercising its discretion in Art. 4(3) and Art. 6, decide not to prescribe in its domestic law for certain conduct a criminal offence but a regulatory offence/sanction, this would fall outside of the scope of "offence established in accordance with this convention" and thus there would be no obligation to foresee provisions e.g. on aiding or abetting and attempt (Art. 9), aggravating circumstances (Art. 12) and jurisdiction (Art. 14).

Delegations did, however, not agree on whether or not this would also be true in case a Party to the Convention does decide to prescribe certain criminal law provisions in respect of conduct that could be seen as falling in the scope of Art. 4(3) and Art. 6. Some delegations insisted that this would not be the case as Art. 4(3) and Art. 6 leave discretion to the State Parties and this would also apply to whether or not they want to apply any of the provisions that refer to "offences established in accordance with this Convention" to such criminal offences.

A related issue concerned the question of whether Article 9 to 14 (and onwards) should use the term "offences established in accordance with this Convention" or "criminal offences established….". Several delegations have insisted that the Convention should for sake of consistency at least always use the same expression. Some delegations were of the view that the text should always use "criminal offence" while others felt that the term "offence" would be appropriate.

Such a way of referring in the auxiliary provisions to the criminal, law provisions of the convention is standard practice in CoE conventions. Some conventions use in such provisions the term "criminal offences" (e.g. THB-Convention) while others use the term "offences" (e.g. Medicrime and the Lanzarote Convention). The use of the term "offence" may correspond with the use of that term also in the substantive law provisions (Medicrime); but the Lanzarote Convention is an example where the term "offence" refers to substantive law provisions that specifically require the criminalization of certain conduct.

As the draft Convention does not differentiate between provisions requiring the criminalization and provisions that specifically foresee or allow non-criminal sanctions, it could be argued that it would not make any difference – in legal terms – whether to use "offence" or "criminal offence" in Art. 9 to 22. However, it would seem prudent to ensure that there is clarity over the question whether or not – and if so to what extent – such references to "[criminal] offences established in accordance with this convention" also include reference to any [criminal] offences a Party decides to establish (or already has established) in the scope of Art. 4(3) and Art. 6.

It should be noted that the Warsaw Convention, which in its Article 19 also foresees an obligation merely to "consider…. to establish as a criminal offence" consequently differentiates in further provisions whether reference is made also to Art. 19 or only to the (legally binding) provisions that require to establish certain conduct as a criminal offence (c.f. Art. 21 on the one hand, Art. 23 on the other).

Delegations are invited to indicate their preference

Clarify in the text of Art. 9 to 22 whether they refer to all [criminal] offences established in accordance with the Convention or to all except for offences established in accordance with Art. 4(3) and Art. 6	
Refer in Art. 9 to 22 to "offences established in accordance with this Convention" on the understanding that this does not include reference to Art. 4(3) and Art. 6 (and this to be clarified in the Explanatory Report)	
Refer in Art. 9 to 22 to "criminal offences established in accordance with this Convention" on the understanding that this does not include reference to Art. 4(3) and Art. 6 (and this to be clarified in the Explanatory Report)	
Refer in Art. 9 to 22 to "criminal offences established in accordance with this Convention" on the understanding that this includes reference also to Art. 4(3) and Art. 6, but only when a Party criminalizes certain conduct in the scope of Art. 4(3) and Art. 6 (and this to be clarified in the Explanatory Report)	**RF**
Refer in Art. 9 to 22 to "offences established in accordance with this Convention" on the understanding that this includes reference also to Art. 4(3) and Art. 6, but only when a Party criminalizes certain conduct in the scope of Art. 4(3) and Art. 6 (and this to be clarified in the Explanatory Report)	
Other proposal: **RF Observation: While supporting the observations made by France, it is important to note that the Russian delegation preferred the reference to "offences" in the general articles (aiding and abetting, sanctions and measures etc.) in order to enable full coverage by those articles of all acts recognised as offences under the specific part of the Convention, whether or not these acts were explicitly identified as "criminal offences".** **If all offences are clearly identified as "criminal", this problem does not arise.**	

Section 2

A similar issue arose over the interpretation of the wording "where appropriate" used in Art. 7(2) and (3) as well as Art. 8. The reference here to Art. 4(3) and Art. 6 (or only to Art. 4(3) in case of Art. 8) had been included in the draft text at the recent (last) meeting of the PC-TO on the proposal of one delegation. When discussing the draft Explanatory Report it turned out that this delegation interprets the meaning of "where appropriate" to require any Party that is prescribing in its domestic law any criminal offence that could be seen to fall into the scope of Art. 4(3) or Art. 6 to then also include these criminal offences in the scope of Art. 7(2) and (3) and Art. 8. Other delegations, who had agreed to inserting the reference to these Art. 4(3) and Art. 6 under the notion of "where appropriate" interpret this to mean that a Party when exercising its discretion in respect of Art. 4(3) or Art. 6 also has discretion on whether or not Art. 7(2) and (3) and Art. 8 would apply to such offences.

Delegations are invited to indicate their preference

Clarify in the text of Art. 7(2) and (3) and Art. 8 to what extent the wording "where appropriate" entails any obligation in respect of criminal offences established in accordance with Art. 4(3) and Art. 6	
Use the present wording ("where appropriate" and leave the interpretation to the discretion of the individual delegations/Parties	
Delete in Art. 7(2) and (3) and Art. 8 the text referring to Art. 4(3) and Art. 6	
Other proposals: **RF Observation:** **The idea behind using "where appropriate" in this context, which was put forward by the Russian delegation, was to ensure that in all cases when a State Party decides to criminalise under Art.4(3) and Art.6, Articles 7 and 8 would fully apply, in the same manner as they apply normally to other offences which are criminalised in accordance with the Convention.** **However, in light of interpretations given by some delegations, it is obvious that clarification is necessary, as the wording "where appropriate" may be construed in a sense incompatible with its original meaning.** **RF Proposal:** **Replace "and where appropriate" with "and, if the State Party has established them as criminal offences, in the circumstances described in" [Article 2, paragraph 3 and Article 6].**	

Section 3 – individual articles

Article 2

Delegations have not agreed on a definition of the term „trafficking in human organs". While the definition of this term has been an issue for the negotiators from the very beginning of the work of the PC-TO, it is to be noted, that the draft convention does not rely on this term. In particular, the agreed wording for the main substantive criminal law articles (Art. 4 to 8) don't use this term. They rather each foresee very specific types of offences. The term is actually used in the draft convention only in its preamble as well as in Art. 1(1), 2(1), 21(2), 22, 25 and 30. It could be considered to avoid the term here as well.

However, as a considerable number of delegations wanted the convention to include a definition of the term, the present text was proposed to the delegations for consideration. The draft text defines the term by referring to the criminal law provisions to be prescribed by the convention. The current draft refers, however, only to those articles/paragraphs that contain a (binding) obligation to criminalize certain offences, thus not to Art. 4(3) and 6 (c.f. in this context also sections 1 and 2 above).

Depending on the final solution of this question, also Art.2(1) may need to be reconsidered. While delegations had all agreed to this text, the current wording refers to "illicit removal" and "trafficking" as two distinct elements of the scope of the convention. The present wording of

the definition of "trafficking" in Art. 2(2), however, also includes reference to Art. 4(1) and thus offences in respect of "illicit removal" of human organs.

Delegations are invited to indicate their preference

Keep the definition as currently in Art. 2(2) of the draft convention	
Keep the definition as currently drafted, but referring also to Art. 4(3) and Art. 6	**RF**
Delete the current definition and refrain from inserting any definition of "trafficking"	
Other proposal: **<u>RF Observation</u>:** **The definition of organ trafficking should encompass all criminal offences included in the convention, as they all constitute elements of the trafficking chain.** **A certain amount of leeway in terms of criminalisation, which may be introduced occasionally in the Convention via softer language or possibilities for reservations, should not obscure the fact that these offences still constitute parts of trafficking.** **Furthermore, excluding some of the offences from this definition would automatically exclude them from being covered by any other articles of the Convention which depend on this definition (such as Art. 21, 22, 25, 30).**	

Article 4(1)

This provision requires criminalization of cases where an organ is removed from a living or a deceased donor without "free, informed and specific consent". All delegations agreed that in case of a <u>deceased donor</u> organ removal is also allowed – and should thus not be criminalized – if instead of such personal consent the removal is "authorized under its domestic law". Some delegations required that the text of Art. 4(1) should also allow for certain exceptions to be applied in case of a living donor, who, under the law of that State, is not legally able to personally consent (such as minors). In this context, one delegation pointed out that the purpose of the Convention is to criminalize organ trafficking but not to regulate/harmonize the conditions under which the (regulatory) law of a Party to the Convention may consider that an appropriate consent/approval for the transplantation of an organ has been given. Other delegations were clearly opposed to allowing for such flexibility of the text and pointed out that in their view such exceptions would not be in compliance with the Oviedo Convention and the protocol thereto.

The present text of Art. 4(1)(a) of the draft Convention in this respect is:

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

Thus exceptions to the personal consent would only be allowed in case of a deceased donor whereas in the case of a living donor, every organ removal without the "free, informed and specific consent" of the living donor would have to be criminalized (even if currently allowed under the transplantation legislation of a State Party).

As an alternative, it has been suggested to use the language of the present draft, without, however, limiting the exception to deceased donors. This proposal did not find consensus.

As a further alternative, it had been proposed to specify the conditions under which a Party may allow for transplantations in the absence of a formal consent by a donor, who is legally not able to give such consent and – consequently – refrain from criminalization. This proposal, however, also did not meet approval of the delegations.

The Secretariat of the Council of Europe finally suggested as a further alternative the following wording:

> "a. where the removal is performed without the free, informed and specific consent of the donor, or authorisation substituting such consent, under the relevant provisions of its domestic law."

This proposal, however, also met opposition amongst delegations.

Delegations are invited to indicate their preference

Keep the text as currently in Art. 4(1)(a) of the draft convention	**RF**
Use the text as currently in Art. 4(1)(a) of the draft convention, but deleting the phrase ", in the case of the deceased donor"	
Specify the conditions under which a State Party, in accordance with its domestic law, may allow– and thus may refrain from criminalizing – organ removal from a person who is not able to give legally binding consent	
Use the text proposed by the Secretariat ("or authorisation substituting such consent, under the relevant provisions of its domestic law"	
Other proposal: **<u>RF Observation</u>:** **The language of existing Council of Europe documents, such as the Oviedo Convention and protocols thereto, needs to be followed in order not to create fragmentation in the Council of Europe treaty law.** **More generally speaking, the removal of organs without the consent of the living donor, even if – and especially if – this donor cannot give such concept due to physical or mental disability or young age, does not appear to be something that should explicitly be allowed in a Council of Europe convention. Perhaps this is the case when the Council of Europe has an opportunity to stimulate progressive development of national legislation.**	

Article 9

The provision on aiding, abetting and attempt is in principle standard language in all CoE criminal law conventions. When negotiating paragraphs (1) and (2) delegations were of different views on the question of whether the obligation to criminalize aiding or abetting (par (1) and attempt (par (2) should apply to all [criminal] offences established in accordance with the Convention or if this (i.e. such an obligation) should be limited to specific offences. The subject matter is thus related to the more horizontal question of whether or not the notion of "offences established in accordance with the Convention) does also refer to Art. 4(3) and Art. 6 (c.f. section 1 above).

Delegations that were in favor of a certain "flexibility" in respect of which offences they would want to commit having Art. 9 apply to, could accept a text in par (1) and (2) that foresees no such limitations, provided that par (3) would allow them to make a declaration (c.f. the wording of the present proposal for par (3). However, delegations could not agree on whether such reservations should be possible to all criminal law provisions of the Convention or only to specific Articles.

Delegations are invited to indicate in respect of which articles/paragraphs they would require that either par (1) or (2) – or both – are limited in scope or that they are allowed under par (3) to reserve their right of non applying Art. 9(1) and/or (2) to certain offences by way of a declaration. To be noted that the eventual solution in respect of Art. 4(3) and Art. (6) may depend on the outcome of discussions on the horizontal question outlined in section 1.

Please indicate as follows:

Reference to	Exclude from Art 9(1)	Exclude from Art. 9(2)	Allow for reservation In respect of Art. 9(1)	Allow for reservation in respect of Art. 9(2)
Art. 4(1)				
Art 4(3)				
Art. 5				
Art. 6				
Art. 7(1)				
Art. 7(2)				
Art. 7(3)				
Art. 8(a)				
Art. 8(b)				

RF Observation:

As is the usual practice in Council of Europe criminal law conventions, all offences criminalized under the Convention should fall under the scope of Art.9. This includes cases when a State Party has decided to introduce criminalisation in accordance with Art.4(3) and Art.6.

Article 11(1)

In respect of the second sentence of Art. 11(1), providing for "penalities involving deprivation of liberty that may give rise to extradition" an issue was discussed which – again – is related also to the horizontal question of which Articles the Convention should refer to whenever its uses the term "offences established in accordance with the Convention" (c.f. section 1 above).

The current wording in the preliminary draft Convention makes reference not to all articles in Chapter II (on criminal law), but only to Art. 4(1), Art. 5 and Art. 7 to 9.

One delegation had proposed to replace this wording by the following text:

> "These sanctions shall include, where appropriate, penalties involving deprivation of liberty that may give rise to extradition".

The intention was to give State Parties a certain degree of discretion "where appropriate".

Another delegation proposed instead:

> "These sanctions shall include, for offences established in accordance with Articles 4, paragraph 1 and Article 5 and, where appropriate, Article 4, paragraph 3 and Articles 6 to 9."

This would allow for discretion only in respect of Art. 4(3) and Art. 6 to 9, thereby, however, including reference also to Art. 4(3) and Art.6, which the current draft exempts from Art. 11(1).

Finally, other delegations proposed:

> "These sanctions shall include, for offences established in accordance with Articles 4, paragraph 1 and Article 5 and, where appropriate, Articles 7 to 9".

Contrary to the second alternative proposed, this would give discretion in respect of Art. 7 to 9 while leaving Art. 4(3) and Art. 6 from the scope of this provision.

Delegations are invited to indicate their preference

Keep the text as currently in Art. 11 (1) of the draft convention	
Use the first alternative proposed ("where appropriate" in respect of all offences)	
Use the second alternative proposed (include all offences, "where appropriate" only in respect of Art. 4(3) and Art. 6-9	
Use the third alternative proposed (leave Art. 4(3) and Art. 6 outside of the scope of Art. 11(1) and refer to Art. 7 to 9 only in terms of "where appropriate"	

Include reference to all offences, but foresee a possibility for reservations	
Other proposal: **<u>RF Proposal</u>:** **Add the following text in Art.11(1) after the words "Articles 7 to 9":** ***"(as well as Article 4, paragraph 3 and Article 6, if the State Party has established them as criminal offences)".*** **<u>RF Observation</u>:** **The original text excludes Art.4(3) and Art.6 from the scope, which disregards the possible decisions of States Parties to introduce criminalisation in line with those articles. As to the three proposed alternatives, they all severely weaken the sanction regime of the Convention.**	

Article 11(3)

Delegations have been divided over the question whether the proper term to use is "and" or "or". Several delegations have requested to use the term "or" as this is the term used also in other CoE conventions in corresponding provisions (e.g. Art. 27(3)(b) Lanzarote). Other delegations requested that the text present draft convention should use the term "and" as this would clarify that Member States, when implementing the Convention would be obliged to implement (where this is not foreseen in their domestic law already) both alternatives a) and b) of that subparagraph. One delegation pointed out that the use of the term "or" would obviously be intended to give Member States a choice whether or not they want to implement the provisions of subparagraph a) or b) – or both. Other delegations indicated that this is the interpretation their delegation gave to use of the term "or" in the case of other conventions.

The Treaty Office of the Secretariat of the CoE has given the advice that delegations, when agreeing on the present draft convention should clarify whether the text is intended to require Member States to implement both subparagraphs a) and b). In this case the text should use the term "and".

Delegations are invited to indicate their preference

Use in Art. 11(3)(b) the term "and"	**RF**
Use in Art. 11(3)(b) the term "or"	
Other proposal: **<u>RF Observation</u>:** **Art.11(3) lists the measures that should be available to judicial authorities in respect of establishments used to carry out organ trafficking. It does not oblige the authorities to necessarily take one**	

or all of these specific measures, but merely ensures that, should the authorities so require, these measures are available to them. **The measures envisaged are substantially different and not interchangeable: one pertains to the establishment itself (closure), and the other to the person of the perpetrator (denial of exercise of professional activity).** **Therefore, the use of the word "and" is correct, as it requires States Parties to enable the judiciary to use both measures at their discretion. Usage of the word "or", on the other hand, would allow States Parties to limit the palette of available measures to *either* closure of the establishment *or* denial of professional activity, which would go against the purpose of the paragraph.**	