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COUNCIL OF EUROPE
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Opinion 253 (2005)[1]

Draft Council of Europe Convention on action against trafficking in human beings

Parliamentary Assembly

1. In third place worldwide after drugs and arms, trafficking in human beings is a scourge which threatens fundamental human rights and which must be eradicated. Despite the mobilisation of the authorities in all countries and of non-governmental organisations, the problem is still on the increase.

2. Every year, thousands of human beings, primarily women and children, are the victims of trafficking carried out with the aim of sexual exploitation, slavery, forced labour, forced marriage or other purposes, both within and outside the borders of their countries. Trafficking in human beings has now reached such an unprecedented scale that it can be described as a new form of slavery. This is why measures are desperately needed to combat such trafficking, while at the same time paying constant attention to protecting its victims.

3. The Parliamentary Assembly recalls that in 1997, in Recommendation 1325 on traffic in women and forced prostitution in Council of Europe member states, it asked the Committee of Ministers to draw up a European convention on trafficking in women, open to non-member states. It explicitly repeated this request in its Recommendation 1545 (2002) on a campaign against trafficking in women.

4. It welcomes the decision of the Committee of Ministers to draw up a European convention on action against trafficking in human beings.

5. It notes with satisfaction that the preamble to the draft convention explicitly refers to trafficking in human beings as a violation of human rights and as an offence to the dignity and the integrity of the human being.

6. It wholeheartedly welcomes the extremely broad scope of the convention, which covers all forms of trafficking, both national and transnational, and linked or not to organised crime.

7. The Assembly is very pleased that the terms of reference given to the committee of experts responsible for drafting the text (the Ad hoc Committee on Action against Trafficking in Human Beings – Cahteh) put particular emphasis on protection and assistance for victims, indicating that the goal pursued is the same as that proposed in its aforementioned recommendation.

8. It nevertheless regrets the fact that the current wording of the draft is far from guaranteeing effective and sufficient protection of victims, contrary to the objective pursued. The Assembly has the impression that the Council of Europe member states are not willing to make the distinction between illegal migration and trafficking in human beings. The measures for the protection of victims, which should be at the heart of the convention, have become weaker in the course of the negotiations. The current draft convention gives the impression of reflecting the member states' desire to protect themselves from illegal migration rather than of accepting that trafficking in human beings is a crime and that its victims must be protected. In its current form, the convention thus loses much of its force and ends up not being very convincing.

1. Assembly debate on 26 January 2005 (5th Sitting) (see Doc. 10397, report of the Committee on Equal Opportunities for Women and Men, rapporteur : Ms Vermot-Mangold ; and Doc. 10433, opinion of the Committee on Legal Affairs and Human Rights, rapporteur : Mr McNamara). Text adopted by the Assembly on 26 January 2005 (5th Sitting).

9. This comment applies in particular to the recovery and reflection period for victims (Article 13 of the draft convention). The Assembly considers it necessary to provide for a minimum period during which victims can recover and decide, under optimum conditions, whether or not to co-operate with the judicial authorities. The criticism also applies to the excessively vague wording of Article 14 regarding the issuing of a residence permit. The same again holds for the provision on non-punishment of victims, where the vague wording raises doubts as to the genuineness of the will to protect victims who have been forced to commit offences.

10. The Assembly regrets the fact that civil society was not sufficiently closely involved in formulating the text and that the increased powers and recent enlargement of the European Union hampered any genuine negotiation process within the Cahteh.

11. The Assembly has long been warning against the pernicious consequences of "à la carte conventions", under which signatory states can declare themselves to be bound by some provisions but not by others. It therefore asks that the only reservation foreseen in Article 45 of the current draft of the convention be deleted.

12. The Assembly also regrets that the text has been drafted in such a way as to leave states a wide margin of discretion. It would be better for the convention to leave less leeway in defining the concepts to each state's domestic legal system and to Community law. Furthermore, the Assembly deplores the fact that some provisions in the draft are not binding, which weakens the scope of the commitments entered into by states. In view of the gravity of the issue addressed, it considers that all the provisions of such a convention must be binding (cf. Articles 6, 7, 14 and 19 in particular).

13. The Assembly welcomes the establishment of a monitoring mechanism by the text. It considers a group of independent experts to be the right kind of body to effectively ensure the implementation of the convention. The Assembly approves the option chosen – the creation of the Group of Experts on Action against Trafficking in Human Beings (the Greta) – concerning the application of the same monitoring mechanism to all parties. However, the Assembly considers that – the convention being a Council of Europe convention even if non-member states or the European Union may agree to be bound by it – the Greta should report to the Council of Europe Committee of Ministers. The Committee of Ministers should also retain the right to address recommendations to the parties and the right to decide on amendments to the convention.

14. Consequently, the Assembly advises the Committee of Ministers to make the following amendments, which it considers essential, to the draft convention :

i. in Article 6 :

a. replace "such as" with "including" ;

b. reword sub-paragraph d as follows: "preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being" ;

c. add the following new sub-paragraph : "e. provisions criminalising and punishing the intentional use of the services of victims of trafficking" ;

ii. in Article 7 :

a. in paragraph 1, after "free movement of persons", add "and to the right of asylum" ;

b. delete paragraphs 3 and 4 ;

c. in paragraph 6, replace "shall consider strengthening" by "shall strengthen" ;

iii. in Article 8 :

a. delete "within available means" ;

b. add a new sub-paragraph, worded as follows: "c. to deliver personal documents to every travelling child" ;

iv. in Article 10 :

a. in paragraph 1, after the words "trafficking in human beings", add the words "and in identifying and assisting victims including children" ;

b. in paragraph 1, after "with a view to enabling an identification of victims", add "in a procedure duly taking into account the special situation of female and child victims" ;

c. in paragraph 2, delete “of an offence provided for in Article 18 of this Convention” and “by the competent authorities” ;

d. add the following sentence to the end of paragraph 2: “The persons concerned shall be granted the right to appeal to an independent and impartial body against such decisions.” ;

e. in paragraph 4, delete “and is unaccompanied” ;

f. in paragraph 4, add a new sub-paragraph: “d. appoint a relevantly-experienced lawyer to represent the child” ;

v. in Article 12 :

a. in paragraph 1, after the word “victims”, add the words “and members of their families if necessary” ;

b. in paragraph 1. b replace “emergency” by “necessary” ;

c. in paragraph 1, after sub-paragraph e, insert a new sub-paragraph : “f. access to education for children” ;

d. reword paragraph 2 as follows: “Each Party shall satisfy the safety and protection needs of victims, and, if necessary, of their family members.” ;

e. in paragraph 3, delete “lawfully resident within the territory of the Party concerned” ;

f. in paragraph 4, delete “lawfully resident within the territory of the Party concerned” ;

g. in paragraph 4, replace “shall adopt the rules under which victims … shall be authorised” with “shall authorise victims” ;

h. in paragraph 6, replace “to a child victim” with “to a victim”, and delete “child’s” ;

i. in paragraph 6, delete the second and third sentences ;

j. add the following paragraph 7: “For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, with due account being taken of the age and sex of the victim and specific needs of children in terms of housing, education and appropriate health care.”

vi. in Article 13 :

a. in paragraph 1, after the words “a recovery and reflection period”, add “of at least thirty days” ;

b. add the following sentence to the end of paragraph 1: “The authorities shall issue the persons concerned with a residence permit covering this period.” ;

c. add the following to the end of paragraph 2 : “and children shall be granted access to education” ;

vii. in Article 14 :

a. reword the first three paragraphs as follows :

“1. Each Party shall provide victims with a renewable residence permit of at least six-month’ length :

a. either so that they can take part in judicial or criminal proceedings concerning them, inter alia with a view to obtaining compensation ;

b. or where their stay is necessary owing to their personal situation, particularly in cases where they have suffered or are liable to suffer serious abuse such as physical or sexual violence, or renewed trafficking.

Residence permits for child victims shall in all cases be issued in accordance with the best interests of the child. If a child victim participates in judicial proceedings, the Party concerned shall ensure that the procedure is appropriate to the age and maturity of the child.

2. The residence permit shall be renewed on expiry of the six-month period provided that the conditions set out in paragraph 1 are still fulfilled. Residence permits for child victims shall be renewed until such time as a lasting solution has been found.

3. Parties shall envisage issuing a permanent or long-term residence permit where the victim is in a particularly vulnerable personal situation.” ;

b. add a new paragraph 6 worded as follows: “Each Party facilitates family reunion throughout the period of legal residence of victims, in particular for unaccompanied children.” ;

viii. in Article 15 :

a. add the following to the end of paragraph 1 : “, in a language which they can understand. They shall also have access to the justice system in order to obtain reparation.” ;

b. at the end of paragraph 2, replace “and for the conditions under which the victim may benefit from free legal aid” with “and the right to free legal aid, inter alia during court proceedings, if necessitated by the victim’s situation” ;

ix. in Article 16 :

a. in paragraph 2, after the words “dignity of that person” add the phrase “, following a risk and security assessment,” ;

b. at the end of paragraph 2, add the following sentence: “If the return concerns a child victim, such return shall be undertaken in a child-sensitive manner, in accordance with the age and vulnerability of the child.” ;

x. in Article 18, delete “when committed intentionally” ;

xi. in Article 19, replace “consider adopting” by “adopt” ;

xii. in Article 20.a, in the English version, replace “producing a fraudulent” by “forging a” ;

xiii. in Article 23, paragraph 4, after “trafficking in human beings”, add “and/or in which its victims were exploited” ;

xiv. in Article 24 a, delete the adjective “gross” ;

xv. in Article 26, replace the provision with the following: “Victims of trafficking shall not be detained, charged, prosecuted or submitted to any sanction on the grounds that they have unlawfully entered or are illegally resident in countries of transit and destination, or for their involvement in unlawful activities of any kind to the extent that such involvement is a direct consequence of their situation as victims of trafficking.” ;

xvi. in Article 27, paragraph 3 :

a. at the end of the sentence, replace “to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention” with “the possibility of initiating or commissioning investigations or prosecutions concerning the offence established in accordance with Article 18 of this Convention and the possibility of assisting and/or supporting the victim with his or her consent during the criminal proceedings relating to the said offence” ;

b. add the following sentence: “Each Party shall ensure that the said groups, foundations, associations or non-governmental organisations have the right to participate as a party in criminal proceedings concerning the said offence.” ;

xvii. in Article 28 :

a. add a new sub-paragraph to paragraph 1 : “e. if necessary, members of the groups, foundations, associations or non-governmental organisations, which carry out any of the activities set out in Article 27, paragraph 3” ;

b. in paragraph 2, after “relocation”, add “asylum, resettlement in a third country,” ;

xviii. in Article 29, paragraph 1, last sentence: replace “should” with “shall” ;

xix. in Article 31.a, after “territory”, add “or within its jurisdiction” ;

xx. in Article 31, add a new sub-paragraph as follows: “f. by anyone placed under its authority or effective control, situated in a territory over which it exercises authority or effective control” ;

xxi. delete paragraph 2 from Article 31 ;

xxii. in Article 33, paragraph 2, after the words: “in the search for missing people”, insert the words “, particularly for missing children” ;

xxiii. in Article 38, after paragraph 4, insert the following :

"The Contracting Parties to this Convention recognise the right of the international non-governmental organisations which have consultative status with the Council of Europe and the representative national non-governmental organisations within the jurisdiction of the Contracting Party against which they have lodged a complaint to submit complaints alleging unsatisfactory application of the Convention. The Greta shall be competent to examine collective complaints" ;

xxiv. in Article 38, paragraphs 6 and 7, replace "Committee of the Parties" with "Council of Europe Committee of Ministers" ;

xxv. in Article 45, delete ", with the exception of the reservation of Article 31, paragraph 2".

15. Furthermore, the Assembly recommends, in the interests of terminological clarity, replacing the words "also taking gender equality aspects into consideration" in Article 1 sub-paragraph a and in Chapter III with "guaranteeing gender equality", and deleting the word "aspects" from the heading of Article 17, which would thus read "Gender equality".

16. Lastly, in connection with the reservations expressed by the European Community as represented by the European Commission, the Assembly would stress that it is giving its opinion on the draft as submitted to it and that in any case it would consider any proposal from the Commission at this stage in the preparation of the convention as having been submitted out of time. The Assembly insists that the member states of the European Community should in any case be subject to the same monitoring mechanism as all other states parties to the convention.

17. The Assembly emphasises that it is not certain that it will be able to maintain its support for the convention if the most important amendments proposed, namely those which concern the protection of victims of trafficking and those which insist on the binding nature of the convention's provisions, are not adopted by the Committee of Ministers;

18. The Assembly urges the Committee of Ministers to reconvene the Cahteh before the next session of the Committee of Ministers in March 2005, in order to consider the Assembly's recommendations as well as those made by non-governmental organisations (NGOs). Given the lack of consultation to date on the draft convention in most states and the NGOs' key role in assisting victims, representatives of the Assembly's committees concerned as well as relevant NGOs should be invited to attend and participate in the debates.