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Draft Council of Europe Convention against Trafficking in Human Organs

Report[1]
Committee on Social Affairs, Health and Sustainable Development
Rapporteur: Ms Liliane MAURY PASQUIER, Switzerland, Socialist Group

Summary

The Council of Europe has been working to combat organ trafficking for many years. In particular, the Parliamentary Assembly was closely involved in the process which lead to the elaboration of the draft convention, which inspired the adoption of its Recommendation 2009 (2013) "Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin".

The Committee on Social Affairs, Health and Sustainable Development warmly welcomes the draft Council of Europe convention against trafficking in human organs, which is the first legally binding international instrument in this field. Given that organ trafficking is a worldwide phenomenon, the committee welcomes the fact that the future convention will be open to the signature and ratification of non-member States of the Council of Europe.

While supporting the draft convention, the committee regrets that it is chiefly oriented towards criminal law and comprises many "opt-out" clauses. Hence, it wishes to propose amendments with a view to strengthening its scope and effectiveness, in particular with regard to the prevention of organ trafficking and of "transplant tourism", as well as to the follow-up mechanism.

1. Reference to committee: Doc. 13289, Reference 3988 of 30 September 2013.

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A. Draft opinion[2]

1. The Parliamentary Assembly welcomes the draft Council of Europe Convention against trafficking in human organs. It recalls that it has been closely involved in the drawing up of this draft convention and, in this connection, refers to its Recommendation 2009 (2013) "Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin", unanimously adopted on 23 January 2013.

2. Given the international dimension of organ trafficking, the Assembly is pleased to see that the future convention reaches beyond the frontiers of the Council of Europe, allowing States that are not members of the Organisation to become Parties. It is convinced that this approach will further help to heighten the relevance and visibility of the Council of Europe in the sphere of human rights.

3. However, the Assembly regrets that the draft convention focuses on the criminal aspects of organ trafficking without adequate consideration of matters such as prevention and co-operation. More specifically, it deplores the fact that Article 21.1 – the only article in the draft convention mentioning national prevention measures outside the criminal law context – makes no reference to the issue of organ shortage, even though this is one of the reasons why organ trafficking exists.

4. The Assembly notes that the draft convention gives the Parties a free hand in deciding whether or not to punish the donors and recipients involved in organ trafficking. It believes that, in view of the vulnerability of these two categories of people, the future convention should at least guarantee that the penalties that may be applicable to them are fair and proportionate. The Assembly also notes that the draft convention does not contain a provision providing for the elimination of the usual dual criminality rule, which encourages "transplant tourism".

5. The Assembly welcomes the fact that the draft convention provides for a follow-up mechanism but regrets that at the same time there are no reporting requirements for the Parties. In these circumstances, the smooth running of the follow-up mechanism will depend on the goodwill of the States and, in all events, the resources allocated to it.

6. The Assembly notes that the current draft convention text is a compromise seeking to strike a balance between the positions of the different parties involved. Nevertheless, it regrets that, in order to strike a sufficiently broad consensus, it has been necessary to include the "opt-out clauses" provided for in Articles 9.3, 10.3, 10.5 and 30.2 of the draft convention, permitting reservations that risk weakening the scope of the future convention.

7. In the light of the aforegoing, the Assembly recommends that the Committee of Ministers:

7.1. add a sub-paragraph *d* to Article 21.1, worded as follows:

"that efforts are made to remedy as far as possible the shortage of organs, which is one of the main reasons why human organs are trafficked.";

7.2. add, after the second sentence of paragraph 81 of the draft explanatory report concerning Article 12 relating to sanctions and measures, a new sentence, worded as follows:

"The term 'proportionate' used in this article implies, where applicable, that any vulnerability of organ donors and recipients, as described in paragraph 94 of this explanatory report, should be taken into consideration when deciding on the penalties that may be applied to them.";

7.3. add a new paragraph to Article 10, after paragraph 3, worded as follows:

"For the prosecution of the offences established in accordance with Articles 4 to 8 of the present Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the acts are criminalised at the place where they were performed";

7.4. provide for an independent, strong and effective Committee of the Parties assigned a clear function of co-ordination and monitoring on the basis, *inter alia,* of reporting requirements for the Parties;

7.5. in the French version only, replace the word *"application"* appearing in Article 25.1 with the term *"mise en œuvre"*, in order to harmonise the terminology used in this article;

2. Draft opinion adopted unanimously by the committee on 2 October 2013.

7.6. remove the possibilities of making reservations provided for in Articles 9.3, 10.3, 10.5 and 30.2. If this recommendation is not followed, the Assembly invites all the States to accede to this convention without making reservations, and calls on the parliaments of the States concerned to be vigilant as regards any reservations their governments may attach to the signature or ratification, acceptance or approval of the future convention.

8. For the reasons set out in paragraphs 2 and 5 of Recommendation 2009 (2013), the Assembly recommends that the Committee of Ministers:

8.1. urge the member States, which, pursuant to Article 4.2, may reserve the right not to apply the provision defining any removal of organs carried out without the free, informed and specific consent of the living donor as illicit, to opt instead to revise their legislation in order to bring it into line with this provision and with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (ETS No. 164);

8.2. decide on a road map for the preparation of the additional protocol against trafficking in human tissues and cells.

B. Explanatory memorandum, by Ms Maury Pasquier, rapporteur

1. Introduction

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

2. At its meeting on 9 September 2013, the Committee on Social Affairs, Health and Sustainable Development appointed me as rapporteur in anticipation of the expected reference to the committee. On 30 September 2013, the Assembly referred the request for an opinion from the Committee of Ministers to our committee for report and to the Committee on Legal Affairs and Human Rights for opinion.

3. It should be noted that the Assembly has been closely involved in the drawing up of the draft convention which has just been forwarded to it for opinion. Mr Bernard Marquet, a former, highly dedicated member of our committee, monitored discussion on the draft convention at the levels of both the Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO), tasked with drawing up a preliminary draft,[3] and the European Committee on Crime Problems (CDPC), which completed the work of the PC-TO by approving the draft convention on 7 December 2012. Mr Marquet's report on the draft convention was debated in the Assembly's plenary session on 23 January 2013, and this resulted in Recommendation 2009 (2013) "Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin", which was adopted unanimously.

4. I note that, apart from minor changes of a technical and linguistic nature with no impact on the substance of the issues dealt with, the draft convention submitted to the Assembly today is identical to the one on which it took position on 23 January this year. Accordingly, in this report, I will limit myself to reiterating the Assembly's stance on the draft convention as a whole and briefly reviewing its specific recommendations, reformulating them as I think necessary. It goes without saying that my report must be read in conjunction with Recommendation 2009 (2013) and the explanatory memorandum thereto.[4]

2. Overall assessment of the draft convention

5. In its Recommendation 2009 (2013), the Assembly welcomed the draft Council of Europe Convention against trafficking in human organs, which represents the culmination of several years of efforts by the Council of Europe in the field of organ trafficking. Notable achievements in this area include the incorporation of the principle of the non-commercialisation of the human body in the relevant legal instruments drawn up by the Council of Europe[5] and the joint study carried out with the United Nations[6] which concluded that it was necessary to prepare an international legal instrument in the field of organ trafficking. That conclusion was endorsed by the Assembly in its Resolution 1782 (2011) on the investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo*.[7]

6. The draft convention submitted to us today is the Council of Europe's latest contribution to the fight against organ trafficking and a response to the pressing need for an international instrument devoted exclusively to this issue. In this context, given that organ trafficking is a worldwide phenomenon extending beyond the territory of the Council of Europe's member States, it is particularly pleasing to note that the future convention will be open to signature and ratification by non-member States as soon as it is adopted by the Committee of Ministers, that is to say even before it enters into force. I am convinced that this approach will further help to heighten the relevance and visibility of the Council of Europe in the sphere of human rights. I would like to point out in this connection that the "Medicrime" Convention,[8] which took the same approach, now has three States which are not Council of Europe members among its signatories.[9]

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3. In June 2012, the Committee on Social Affairs, Health and Sustainable Development had the opportunity to hold an exchange of views with Dr Hans-Holger Herrnfeld, Chair of the PC-TO.
4. Doc. 13082 and addendum.
5. These being the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (ETS No. 164) and its Additional Protocol concerning transplantation of organs and tissues of human origin (ETS No. 186) which, on the basis of the said principle, prohibits the trafficking of organs.
6. Joint study on Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs.
7. *All reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.
8. Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211).

7. However, in its Recommendation 2009 (2013), the Assembly criticised the draft convention for being chiefly oriented towards criminal law. This is most regrettable for a convention that will be the first and very likely the only legally binding international instrument in the field of organ trafficking. In terms of prevention of trafficking, victim protection and co-operation outside the criminal law sphere, I believe that this is a missed opportunity, since these questions are quite simply not sufficiently developed in the draft convention.[10] I will return to one specific aspect of prevention later in this document (see point 3.2 below).

3. Comments on specific questions covered by chapters II, V and VI of the draft convention

3.1. Chapter II – Substantive Criminal Law

3.1.1. The situation of donors and recipients involved in organ trafficking

8. Given the complexity of criminal actions comprising organ trafficking, which involves various players and various criminal acts, the convention's negotiators have eschewed an all-encompassing definition, preferring instead to enumerate all criminal acts which constitute trafficking in human organs in "Chapter II – Substantive Criminal Law". Those acts are defined in Articles 4.1, 5, 7, 8 and 9.

9. While donors and recipients of an organ feature among the aforementioned players involved in organ trafficking, the draft convention does not say whether or not they must be punished for their involvement. On the other hand, paragraph 94 of the draft explanatory report indicates that they could be considered as victims owing to their vulnerability.[11] The possibility of punishing the donor and/or the recipient is left, therefore, to the discretion of the Parties.

10. In this respect, based on the same arguments as those set out in paragraph 94 of the draft explanatory report, the Assembly recommended that a provision be added to the draft convention, recommending that the vulnerability of the donor and/or recipient of an organ be taken into consideration when deciding on possible sanctions against them. It suggested the alternative of including a sentence in the explanatory report along similar lines.

11. In a situation where the States would have a free hand in deciding what should happen to donors and recipients (namely to punish or not to punish), the future convention should at least guarantee that the sanctions that may be applied to them are fair and proportionate. In this respect, the Assembly should insist on its alternative proposal, in the knowledge that this could easily be implemented in the context of Article 12.1 which focuses on the criteria governing sanctions. Article 12.1 reads as follows:

> *"Each Party shall take the necessary legislative and other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions …"*

12. In the light of the aforegoing, I propose that the following sentence be added after the second sentence in paragraph 81 of the draft explanatory report concerning Article 12.1:

> *"The term 'proportionate' used in this article implies, where applicable, that any vulnerability of organ donors and recipients, as described in paragraph 94 of this explanatory report, should be taken into consideration when deciding on the penalties that may be applied to them."*

3.1.2. "Transplant tourism"

13. "Transplant tourism" is a practice whereby some patients travel abroad to procure organs in exchange for payment. This phenomenon is booming, partly because the less restrictive regulations of certain countries allow such "transactions" or do not expressly prohibit them.

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9. Namely Guinea, Israel and Morocco.

10. For further details, see paragraphs 3, 4 and 8.1 of Recommendation 2009 (2013) and paragraphs 6 to 9 of the explanatory memorandum thereto.

11. Paragraph 94 of the draft explanatory report reads as follows: "The negotiators were of the opinion that most persons who would qualify as victims of trafficking in human organs are by definition vulnerable, e.g. because they are financially severely disadvantaged, which is the case for many persons who agree to have an organ removed against financial gain or comparable advantage, or because they are suffering from severe or even terminal diseases with little chances of survival, which is the case for many recipients of organs."

14. Article 10 of the draft convention sets out the criteria according to which the Parties must establish their jurisdiction over the offences targeted by the convention. In this connection, the draft explanatory report states, in paragraph 69, that there are no provisions in the convention providing for the elimination of the usual rule of dual criminality whereby the criminal act is considered as an offence both in the country prosecuting the crime and in the country where it was committed. In other words, it is possible for a country to not prosecute a national or person having habitual residence on its territory[12] implicated in an offence falling within the scope of organ trafficking, simply because the offence was committed in a country where it is not considered as such. I believe that having such a possibility encourages "transplant tourism" and must therefore be removed.

15. In the light of the aforegoing, the Assembly should reiterate its proposal that a provision be included in the draft convention whereby the usual dual criminality rule is not applicable, in the knowledge that such a possibility was initially foreseen in the preliminary draft convention. It is proposed, therefore, that a new paragraph be added to Article 10 after paragraph 3, worded as follows:

> *"For the prosecution of the offences established in accordance with Articles 4 to 8 of the present Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the acts are criminalised at the place where they were performed."*

3.2. Chapter V – Prevention measures

16. As was emphasised above, the questions of prevention of organ trafficking, victim protection and international co-operation outside the criminal law sphere are not sufficiently developed in the draft convention. In this respect, Chapter V on prevention measures is notably succinct, not to say lacking – as is the relevant part of the explanatory report. A total of two articles are devoted to this area: Articles 21 and 22 on national and international measures respectively. Article 21 calls on the States to take the necessary measures to ensure *inter alia* the existence of a transparent transplantation system and equitable access to its services.

17. As a result, the sole article of the draft convention referring to national prevention measures outside the context of criminal law makes no mention of measures in response to the shortage of organs, despite this being precisely one of the prime reasons why organ trafficking exists.[13] I find this quite simply incomprehensible. Consequently, I propose that a sub-paragraph *d* be added to Article 21.1, worded as follows:

> *"that efforts are made to remedy as far as possible the shortage of organs, which is one of the main reasons why human organs are trafficked."*

18. In connection with this new sub-paragraph, the explanatory report might suggest, among other things, that the States consider the expediency of setting up a system of presumed consent for the removal of organs from deceased persons or an official and compulsory system for registering wishes (whether or not to donate one's organs), or otherwise of developing research into alternative methods. It could also suggest organising campaigns to raise public awareness of organ donation in order to increase the number of donors.

3.3. Chapter VI – Follow-up mechanism

19. Chapter VI contains provisions regarding the implementation of the convention. The follow-up mechanism provided for in the convention hinges chiefly on a Committee of the Parties, made up of representatives of the Parties to the convention. The task of this committee is *inter alia* to monitor the implementation of the convention and, where appropriate, facilitate its effective use and implementation, express an opinion on any question concerning its application and make specific recommendations to Parties concerning its implementation.

20. In its Recommendation 2009 (2013), the Assembly recommended that the Committee of Ministers strengthen the provisions relating to the Committee of the Parties to provide for an independent, strong and effective committee assigned a clear function of co-ordination and monitoring on the basis, *inter alia,* of

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12. Article 10.1.*d* and *e* of the draft convention

13. In this connection, I am pleased to note that the sentence in the draft explanatory report stating that equitable access to transplantation services also means that the Parties should endeavour to ensure that there is sufficient access to organs, has been removed. The previous version reduced the crucial issue of organ shortages to one of access, which was not appropriate.

reporting requirements for the Parties, while entrusting the competent committees – CDPC and the Committee on Bioethics (DH-BIO) – with a role in supervising the convention's implementation. The Assembly's chief concern here was to ensure that the functioning of the Committee of the Parties was not dependent on the goodwill of the States.

21. I would be inclined to reiterate this recommendation while removing the part referring to the competent committees, as I believe that the committees concerned already have a role, albeit a limited one, in monitoring implementation. In fact, the CDPC and the DH-BIO are among the committees which may send a representative to the Committee of the Parties, without the right to vote. Furthermore, Article 25.4 stipulates that the CDPC shall be kept periodically informed of the activities of the Committee of the Parties.

22. In the interests of consistency of the terminology used in Article 25 concerning the functions of the Committee of the Parties, I also propose that, in the French version, the word "application" appearing in paragraph 1 of that article be replaced with the term "mise en œuvre", which is also more in keeping with the language used at the Council of Europe [not applicable to the English version, which uses the term "implementation" in both cases].

23. Finally, even if the Committee of Ministers were to adopt this chapter as it stands, I remain optimistic as regards the smooth running of the future Committee of the Parties, as long as adequate resources are allocated to it. The experience of the Lanzarote Committee,[14] which operates in a framework that is identical to the one provided for in the draft convention, suggests that the States are capable of assuming their commitments even in the absence of reporting requirements. It remains to be seen whether this follow-up mechanism will be effective in the long term.

4. Concluding remarks

24. In its Recommendation 2009 (2013), the Assembly also advocated prohibiting the removal and use for transplantation or other purposes of organs from persons deprived of their liberty. Taken together, the sentence added to paragraph 33 of the draft explanatory report expressly pointing out that Article 4.1 applies to those persons and paragraph 17 of the explanatory memorandum to Recommendation 2009 (2013) are sufficient grounds, in my opinion, to consider that persons deprived of their liberty are adequately protected by the future convention. Accordingly, I will not reiterate this proposal.

25. I would also like to comment on Article 30, which lists the articles of the convention in which States may make reservations. The Assembly has already stated its view regarding the possibility of making reservations in respect of Article 4.1 of the draft convention defining the illicit removal of human organs and, accordingly, I will simply refer the reader to paragraphs 5 and 8.7 of Recommendation 2009 (2013).[15]

26. However, I would question the other reservation possibilities, particularly as regards intentional attempts (Article 9.3) and the provisions relating to jurisdiction (Articles 10.3 and 10.5). While I understand the concern to ensure the largest possible ratification of the convention conveyed by the drafters,[16] I believe that these "opt-out clauses" risk weakening the scope of the future convention. The Assembly should therefore recommend firstly that these clauses be deleted and, failing that, invite all the States to accede to the convention without making reservations. It should also call on the parliaments of the States concerned to be vigilant as regards any reservations their governments may attach to the signature or ratification, acceptance or approval of the future convention.

27. In conclusion, I would like to highlight the fact that, at this stage, it has not been deemed expedient to draft an additional protocol against trafficking in human tissues and cells. However, as Recommendation 2009 (2013) emphasises, trafficking in human tissues and cells, like organ trafficking, constitutes a serious threat to human rights and individual and public health. Accordingly, I think it justified to reiterate the recommendation urging the Committee of Ministers to decide on a road map for the preparation of the additional protocol against trafficking in human tissues and cells.

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14. The Committee of the Parties to the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

15. It is to be noted that a new sentence has been added at the end of Article 4.2: "Any reservation made under this paragraph shall contain a brief statement of the relevant domestic law." The intention is very clearly to make States justify any reservations they make.

16. Paragraph 156 of the draft explanatory report.