Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 13354
08 November 2013

Draft Council of Europe Convention against Trafficking in Human Organs

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Valeriu GHILETCHI, Republic of Moldova, Group of the European People's Party

A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights commends the Committee on Social Affairs, Health and Sustainable Development and its Rapporteur, Ms Liliane Maury Pasquier, on its draft Opinion. The committee largely subscribes to the draft opinion's conclusions and recommendations.

2. In order to further strengthen the political message of general support and constructive criticism that the Assembly needs to send, the committee proposes three amendments.

B. Proposed amendments

Amendment A

In paragraph 7.1 of the draft opinion, in the text proposed as an additional sub-paragraph *d* to Article 21.1, after the words "efforts are made to remedy as far as possible", insert the words ", without putting into question the legal and ethical principles underlying the present convention and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine and its Additional Protocol,".

Amendment B

In paragraph 7.6 of the draft opinion, after the words "remove the possibilities of making reservations provided for in Articles", insert "4.2,".

Amendment C

In paragraph 8.1 of the draft opinion, after the words "pursuant to Article 4.2", insert the words ", if it is not removed, as recommended by the Assembly,".

1. Reference to committee: Doc. 13289, Reference 3988 of 30 September 2013. Reporting committee: Committee on Social Affairs, Health and Sustainable Development. See Doc. 13338. Opinion approved by the committee on 6 November 2013.

C. Explanatory memorandum by Mr Valeriu Ghiletchi, rapporteur for opinion

1. At their 1176th meeting on 10 July 2013, the Ministers' Deputies decided to seize the Parliamentary Assembly for an opinion on the draft Council of Europe Convention against trafficking in human organs.[2] On 30 September 2013, the Assembly referred the Committee of Minister's request to the Committee on Social Affairs, Health and Sustainable Development for report, and to the Committee on Legal Affairs and Human Rights for opinion. On 1 October 2013, the Legal Affairs Committee appointed me as its rapporteur for opinion. The Social Affairs Committee adopted its opinion, prepared by Ms Liliane Maury Pasquier (Switzerland, SOC), on 2 October 2013.

2. In Resolution 1782 (2011) "Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo", based on a report of the Committee on Legal Affairs and Human Rights, the Assembly agreed "that it is necessary to draft an international legal instrument which lays down definitions of human organ, tissue and cell trafficking and stipulates the action to be taken in order to prevent such trafficking and to protect its victims, as well as criminal law measures to prosecute the perpetrators".[3] This investigative report, focusing on a particularly egregious example, has drawn the attention of the general public and of policy makers to the fact that human organ trafficking has become a profitable business of organised criminal groups and that urgent action by the international community is indeed necessary.

3. Subsequently, substantial progress was made in negotiating a Council of Europe convention against organ trafficking, and on 23 January 2013, the Assembly adopted Recommendation 2009 (2013) "Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin" on the basis of a report by the Committee on Social Affairs, Health and Sustainable Development.[4]

4. In this recommendation, prepared at an earlier stage of the intergovernmental negotiation process leading to the present draft convention, the Assembly drew the Committee of Ministers' attention to a number of issues that it expected to be covered in the final draft. The most important points have indeed been taken into account in the draft convention submitted to the Assembly. The generally positive tone of the draft opinion is therefore justified.

5. However, the draft opinion has highlighted the points where the draft convention does not yet correspond to the Assembly's wishes.

6. The amendments I propose to the draft opinion are all motivated by the need to avoid any contradiction between the new convention and the existing 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, "Oviedo Convention") and its Additional Protocol (ETS No. 186).

7. Article 20.1 of the Oviedo Convention states unequivocally: "No organ or tissue removal may be carried out on a person who does not have the capacity to consent under Article 5." The narrowly drawn exceptions in Article 20.2 concern only the removal of regenerative tissue, not of an organ (such as, for example, a single kidney). Article 14 of the additional protocol includes the same language.

8. To uphold such a principled approach also in the draft of the new convention would assure greater coherence both among the Council of Europe's own instruments and between the Council of Europe's standards and those enshrined in the Charter of Fundamental Rights of the European Union, in particular its Article 3.[5] In order to achieve the greatest possible impact, all conventions of the Council of Europe in a given field of activity should constitute a cohesive whole, without contradictions. The Oviedo Convention and its Additional Protocol are also referred to in the 2010 European Union Directive on organ transplantation,[6] in particular as regards the requirement of informed consent of living donors.[7]

---

2. See document CM(2013)79 dated 12 June 2013.
3. Resolution 1782 (2011), paragraph 20; see also Doc. 12462 (Rapporteur: Mr Dick Marty, Switzerland, ALDE).
4. See Doc. 13082 and Add endum (Rapporteur: Mr Bernard Marquet, Monaco, ALDE).
5. Extract from the Charter of Fundamental Rights:
   "Article 3
   Right to the integrity of the person
   1. Everyone has the right to respect for his or her physical and mental integrity.
   2. In the fields of medicine and biology, the following must be respected in particular:
   (a) the free and informed consent of the person concerned, according to the procedures laid down by law; …".
6. Directive 2010/45/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 (Official Journal of the European Union, L 207/14 of 6 August 2010).

9. The Oviedo Convention and Article 3 of the Charter of Fundamental Rights and are in fact expressions of the same fundamental principle that human dignity is violated when a human being is used as a mere means to an end.[8]

10. In Recommendation 2027 (2013), adopted by the Assembly on 3 October 2013 following the urgent debate on "European Union and Council of Europe human rights agendas: synergies not duplication!", the Assembly stresses that "the Europe-wide common standards and the level of protection set by the Council of Europe's legal instruments must not be undercut or undermined by member States of the Council of Europe or by the European Union". It would surely be regrettable if the Council of Europe itself, through a new convention, were to undercut the common standard enshrined in the earlier convention and additional protocol and recognised by the relevant European Union Directive, following which the principle of free, informed and specific consent for organ transplants must apply without exceptions.

11. The "opt-out clause" of Article 4.2 of the draft convention should therefore be deleted, just like the other such clauses in Articles 9.3, 10.3, 10.5 and 30.2 of the draft convention whose deletion the draft opinion, in its Article 7.6, rightly recommends to the Committee of Ministers. This is the purpose of Amendment B.

12. In case the Committee of Ministers does not follow the Assembly's call to delete Article 4.2, the recommendation to the Committee of Ministers in paragraph 8.1 of the draft opinion to urge member States not to use the opt-out but instead to opt to revise their legislation in order to bring it into line with the Oviedo Convention, remains valid. In order to avoid the appearance of a contradiction between paragraphs 7.6. and 8.1, the Assembly should clarify in paragraph 8.1 that this recommendation only applies if the Assembly's prior recommendation to delete Article 4.2 is not implemented. This is the purpose of Amendment C.

13. Amendment A is self-explanatory: its purpose is merely to spell out expressly that the need to "remedy as far as possible the shortage of organs" cannot put into question the legal and ethical principles underlying the Oviedo Convention and its Additional Protocol and the draft of the new convention.

---

7. See paragraph (23) of the considerations (in fine): "It should also be noted that some Member States are signatories to the Convention on Human Rights and Biomedicine of the Council of Europe, and its Additional Protocol on Transplantation of Organs and Tissues of Human Origin."

8. See Immanuel Kant: Die Metaphysik der Sitten. Zweiter Teil: Metaphysische Anfangsgründe der Tugendlehre, 1797, paragraph 38: "Die Menschheit selbst ist eine Würde; denn der Mensch kann von keinem Menschen … bloß als Mittel, sondern muss jederzeit zugleich als Zweck gebraucht werden und darin besteht seine Würde." The German Federal Constitutional Court has famously adopted the "object formula" based on Kant in numerous judgments setting limits based on human dignity (enshrined in Article 1 of the Grundgesetz) for the State's utilitarian pursuits (e.g. BVerfGE 27, 1 at page 6, on a census law; 28, 386 at page 391 on sentencing; and 45, 187 at page 228 on life imprisonment). Kant's concept of human dignity is widely seen as one of the foundations of Western thought in this field; see, for example, Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics, Washington, D.C., March 2008, Part 4: The Source and Meaning of Dignity, Chapter 13: Kant's Concept of Human Dignity as a Resource for Bioethics (by Susan M. Shell).