



**Doc. 13082 Add.**  
22 January 2013

## **Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin**

### **Addendum to the report<sup>1</sup>**

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Mr Bernard MARQUET, Monaco, Alliance of Liberals and Democrats for Europe

### **1. Proposed amendments to the draft recommendation**

#### *Amendment A*

In the draft recommendation, paragraph 1, replace the words “preliminary draft Council of Europe convention” with the words “draft Council of Europe convention”.

#### *Amendment B*

In the draft recommendation, paragraph 4, replace the words “preliminary draft convention” with the words “draft convention”.

#### *Amendment C*

In the draft recommendation, replace paragraph 5 with the following text:

*“The Assembly underlines the utmost importance of protecting vulnerable persons, in particular persons deprived of their liberty and persons who are unable to give full and valid consent to an intervention for reasons either of their age (in the case of minors) or their mental incapacity. In this connection, it welcomes the provision in the draft convention defining any removal of organs without the free, informed and specific consent of the living donor as illicit. This is in line with the provisions of the Convention on Human Rights and Biomedicine (Oviedo Convention), which prohibit any organ removal from persons who do not have the capacity to consent, thereby affording special protection to that group of persons. The Assembly notes that, while it is possible for States to reserve the right not to apply this article, such a reservation would be accepted only in exceptional cases and in accordance with appropriate safeguards or consent provisions under their domestic law. The possibility of making a reservation is intended to facilitate access to the convention for States whose legislation is less restrictive than the principles set out in the Oviedo Convention in relation to consent, while respecting the fundamental rights of the persons concerned.”*

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1. Addendum approved by the committee on 22 January 2013.



#### Amendment D

In the draft recommendation, paragraph 7, replace the words “, the Assembly calls for the future convention to have the broadest possible geographical scope” with the following words:

*“; the Assembly welcomes the provision made in the draft convention for its opening to signature by States that are not members of the Council of Europe, even prior to its entry into force, which will foster the broadest possible geographical scope.”*

#### Amendment E

In the draft recommendation, paragraph 8.1, replace the words “preliminary draft convention” with the words “draft convention”.

#### Amendment F

In the draft recommendation, paragraph 8.4, replace the words “for transplantation purposes” with the words “for transplantation or other purposes”.

#### Amendment G

Delete paragraph 8.5 of the draft recommendation.

#### Amendment H

Delete paragraph 8.6 of the draft recommendation.

#### Amendment I

In the draft recommendation, replace paragraph 8.7 with the following text:

*“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; while entrusting the competent committees – the European Committee on Crime Problems (CDPC) and the Committee on Bioethics (DH-BIO) – with a role in supervising the convention’s implementation.”*

#### Amendment J

In the draft recommendation, after paragraph 8.8, add the following sub-paragraph:

*“call on those member States wishing to reserve the right not to apply the provision defining as illicit any removal of organs without the free, informed and specific consent of the living donor to instead revise their legislation in order to bring it into line with this provision and the Oviedo Convention.”*

## 2. Explanatory memorandum by Mr Marquet, rapporteur

1. On 19 November 2012, the Committee on Social Affairs, Health and Sustainable Development adopted the report entitled “Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin”. The report and the draft recommendation it contained were drawn up on the basis of the preliminary draft convention against trafficking in human organs, finalised on 19 October 2012 by the Committee of Experts tasked with this activity (PC-TO).<sup>2</sup>

2. The preliminary draft convention was then examined by the European Committee on Crime Problems (CDPC) at its plenary meeting on 4-7 December 2012. The CDPC examined the preliminary draft article by article and the delegations sought to reach agreement on its provisions where a consensus had not been found at the level of the PC-TO. On 7 December 2012, the CDPC approved the final text of the draft convention against trafficking in human organs in the form that will be submitted to the Committee of Ministers<sup>3</sup>.

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2. The Committee of Experts on Trafficking in Human Organs, Tissues and Cells.

3. Owing to a lack of time, the CDPC decided to postpone its examination of the draft explanatory report. It is planned to finalise that document in spring 2013 and to submit the draft convention together with its explanatory report to the Committee of Ministers by around July 2013.

3. The present addendum and the proposed amendments it contains stem from the need to align the draft recommendation adopted by our committee with the final draft convention text as approved by the CDPC.
4. Firstly, in the draft recommendation, since the references made to the preliminary draft convention are now obsolete, it is proposed that they be replaced by references to the “draft convention” (Amendments A, B and E).
5. Given that organ trafficking occurs worldwide, extending beyond the territory of the Council of Europe's member States, the committee had called for the broadest possible geographical scope for the future convention. Accordingly, of the two proposals of the preliminary draft convention as finalised by the PC-TO, the committee had proposed recommending that the Committee of Ministers opt for the one making provision for its opening to signature by States that are not members of the Council of Europe, even prior to its entry into force.<sup>4</sup> Since the CDPC has already opted for this solution in the draft convention, the recommendation to the Committee of Ministers is no longer relevant, hence my proposed Amendments D and H.
6. In view of the issues associated with the consent of persons deprived of their liberty (notably prisoners), the committee had thought it necessary that the convention include a provision prohibiting the removal and use for transplantation purposes of organs from these persons, whether living or deceased.<sup>5</sup> However, while organ trafficking is carried out mainly for transplantation purposes, there is nothing to prevent organs being trafficked for other purposes, such as research. Indeed, article 2.1 of the draft convention stipulates that it applies to trafficking in human organs for purposes of transplantation or other purposes. Consequently, I think it important to supplement the recommendation in order to prohibit all removal and subsequent use of organs from persons deprived of their liberty (Amendment F).
7. When adopting the draft recommendation, the committee had asked its chair to inform the CDPC that it favoured the variant of the preliminary draft convention that included article 4.1.a, defining as illicit any removal of organs without the free, informed and specific consent of the living donor or, in the case of a deceased donor, without the removal being authorised under domestic law. In the form approved by the CDPC, article 4 of the draft convention reads as follows:
- “1. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:*
- 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 ...*
- 2. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1.a of this article to the removal of human organs from living donors, in exceptional cases and in accordance with appropriate safeguards or consent provisions under its domestic law.”*
8. Our committee's wish has been granted, therefore, in respect of article 4.1.a. This provision is in line with the provisions of the Convention on Human Rights and Biomedicine (ETS No. 164, “Oviedo Convention”) which prohibit any organ removal from persons who are unable to give full and valid consent to an intervention for reasons either of their age (in the case of minors) or their mental incapacity, thereby affording special protection to that group of persons.
9. Concerning the new article 4.2, which allows States to make a reservation in respect of article 4.1.a in the case of living donors, it should be emphasised that such a reservation is acceptable only in exceptional cases and in accordance with appropriate safeguards or consent provisions under the domestic law of the State concerned. In the area of consent, the legislation of certain Council of Europe member States is less restrictive than the principles set out in the Oviedo Convention, permitting, in exceptional cases, the removal of organs from minors and persons without the necessary mental capacity, while respecting the fundamental rights of those persons. Such legislation is in direct conflict with article 4.1.a and, were they unable to make a reservation in respect of this article, it would quite simply be impossible for the States concerned to accede to the convention. For that reason, the drafters have opted for a compromise solution aimed at facilitating access

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4. Explanatory memorandum of the report (Doc. 13082), paragraphs 23 and 24.

5. Ibid., paragraphs 17 and 18.

to the convention for as many States as possible, which the Assembly should encourage, while urging member States to revise their legislation in line with article 4.1.a and the Oviedo Convention (Amendments C, G and J).

10. Independently of the amendments made to the draft convention text by the CDPC, I also propose, on the grounds I put forward in the report<sup>6</sup>, that the recommendation be reworded where implementation of the convention is concerned, so that it better conveys the committee's message set out in paragraph 7<sup>7</sup> (Amendment I).

11. Finally, I think it important to point out that the explanatory memorandum of our committee's report must be read in the light of the amendments proposed above and bearing in mind that the draft explanatory report to the convention is still in preparation.

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6. *Ibid.*, paragraphs 19-22.

7. Paragraph 7 of the recommendation: "... It also emphasises the importance of stringent and effective implementation of the convention, so that it can bring the desired added value to the work of the Council of Europe."