



COUNCIL CONSEIL
OF EUROPE DE L'EUROPE

Strasbourg, 15 May 2013
cdpc/docs 2013/cdpc (2013) 8

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**PROPOSALS OF THE DELEGATIONS OF GERMANY AND THE UNITED KINGDOM
ON THE DRAFT EXPLANATORY REPORT TO THE DRAFT COUNCIL OF EUROPE
CONVENTION AGAINST TRAFFICKING IN HUMAN ORGANS**

GERMANY

Germany is aware of the work done by the PC-TO, the CDPC and the Bureau on the draft convention and the explanatory report. We have achieved a very good result and tried to find common solutions which should enable all delegations to accept the final texts before submitting them to the committee of ministers.

Nevertheless we think the texts still leave room for an improvement and we would like to invite all delegations to discuss the following topics:

Article 4 paragraph 2: Article 4 paragraph 2 contains the possibility of an opt-out to paragraph 1 a in cases where a free, informed and specific consent to the removal of organs could not be obtained from a living donor. We propose to delete that possibility.

Of course we are aware of the challenges in exceptional situations and we acknowledge that an opt-out is only possible if there are appropriate safeguards in place. Nevertheless we have to meet the obligations written down in Article 20 of the Oviedo Convention:

“Article 20 – Protection of persons not able to consent to organ removal

1. No organ or tissue removal may be carried out on a person who does not have the capacity to consent under Article 5.
2. (...)”

The Council of Europe should be consistent in its actions and in its conventions. The Council of Europe should not go below its own standards. We have to be aware of the highly political challenges to face if changing standards with respect to children and handicapped people.

Article 5: There are cases in which an organ had been removed legally and could not be used afterwards in the way envisioned in the moment where the consent had been given. The actual text obliges to dump the human organ – a result which is surely not in the interest of the donor or the scientific progress.

Therefore we propose to delete the words “or other purposes than implantation” from the text. If that is not acceptable we would prefer an opt-in instead of an opt-out foreseen in Article 30 paragraph 1.

If the CDPC does not intend to change the wording of the text we propose to add into the explanatory report the following text as last paragraph to no. 46:

“According to this Article 5 (use of organs for „other purposes“) does not apply in cases where an organ has been lawfully removed for medical purposes but is then used for other (e.g. teaching and research) purposes (for example because the organ turns out to be unsuitable for transplantation) although the expressed consent did not or not fully cover this use. It does also not apply in cases where an organ has been lawfully removed for other purposes (e.g. for research purposes) where consent was expressed but its scope not clearly specified, for example with regard to the type of research project. The above cases do not necessitate criminal sanctions. „

Article 7 paragraph 2 and 3: Article 7 obliges the Parties to provide for criminal consequences of specific behaviour. Germany agrees that such consequences are necessary in order to guarantee human dignity and the right to life. But such criminal consequences should be in line with the national criminal law system which is different in each state. In order to allow the Parties to adopt a coherent system in their national law we propose to avoid the words “criminal offence” in the text:

“2 Each Party shall take the necessary legislative and other measures to ensure that the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who, in any capacity, direct or work for private sector entities, with a view to having a removal or implantation of a human organ performed or facilitated, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1 or Article 5 and where appropriate Article 4, paragraph 4 or Article 6 is subject to criminal or other legal sanction, when committed intentionally.

3 Each Party shall take the necessary legislative and other measures to ensure that the request or receipt by healthcare professionals, its public officials or persons who, in any capacity, direct or work for private sector entities, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1 or Article 5 and where appropriate

Article 4, paragraph 4 or Article 6 is subject to criminal or other legal sanction, when committed intentionally.”

If a change of the wording of the Draft Convention is not accepted it might be a possibility to change the explanatory report. If Article 4 paragraph 4 and Article 6 only oblige Parties to consider to establish a behaviour as criminal offence Article 7 paragraph 2 and 3 should not be more rigid. A new paragraph could be added to no. 54 stating:

“The aim of Article 7 paragraph 2 and 3 is to ensure that the behaviour described in both paragraphs is subject to criminal or other legal sanctions when committed intentionally. The sanctions should be in line with each party’s system.”

Article 19 paragraph 1 letter a.: We suggest to point out more clearly the importance of the victim by changing the place of the words “and their role therein” in the draft text and the report.

We suggest the following wording of Article 19 paragraph 1 letter a:

“a informing them of their rights and the services at their disposal and, upon request, the follow-up given to their complaint, the charges retained, the state of the criminal proceedings and their role therein, unless in exceptional cases the proper handling of the case may be adversely affected by such notification, as well as the outcome of their cases;”

and in the Explanatory Report:

“115 First of all, Article 19 sets out the right of victims to be informed of their rights and of the services at their disposal and, upon request, the follow-up given to their complaint, the charges, the state of the criminal proceedings and their role therein (unless in exceptional cases the proper handing of the case may be adversely affected), as well as the outcome of their cases.

THE UNITED KINGDOM

Definition of Illicit

A definition of illicit - (not presently included in the draft text or Explanatory Report) would assist in clarifying the purpose and scope of the Convention and the criminal behaviour sought to be captured within the specific offences, and secondly issues in relation to specific Articles and how the references to these in the Explanatory Report may assist in overcoming these difficulties:-

THE DRAFT CONVENTION TEXT AND A DEFINITION OF ILLICIT

1. Article 2 provides no definition of illicit in order to determine the scope of the Convention. As previously discussed a non-exhaustive definition would clarify the scope and purpose of the Convention which under the present draft Article 2 is - for the Convention to apply to 'trafficking in human organs for purposes of transplantation or other purposes (and to other forms of illicit removal and of illicit implantation).'
As previously discussed "trafficking in human organs" is not defined beyond meaning, 'any illicit activity in respect of human organs as prescribed (in the offences set out) in Article 4, paragraph 1 and Articles 5,7,8 and 9 of this Convention.'
2. It is of note that the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin 2002 - at Article 22 provides that, 'organ and tissue trafficking shall be prohibited'. And yet trafficking as far as I could see is not defined in either the Protocol or the Convention itself.
3. A definition would solve the following difficulties:-
 - (i) in relation to the Convention applying to the illicit removal of organs for 'other purposes', a definition of illicit would ensure that all medical research, therapy etc in relation to removed organs, would fall outside the scope of the Convention if the removal itself was not illicit.

It is of note in this regard that Article 30 provides for a reservation so that the scope of Article 5 (use of illicitly removed organs for purposes of implantation or other purposes) and Article 7 paras 2 and 3 (offering/requesting of reward etc with a view to performing removal) is limited to the use of illicitly removed organs for the purposes of implantation only. However the reservation also provides that these offences can be limited to purposes of implantation, 'or for purposes of implantation and other purposes as specified by the Party.'

So, again, without a definition of illicit, what these other purposes are is not really limited in anyway by this reservation.

(ii) A definition of illicit would also solve difficult jurisdiction issues whereby other Member States, not applying the Article 30 reservation may seek to extradite/ prosecute on the basis of a removal without consent for example being carried out for purposes other than transplantation.

(iii) A definition would solve jurisdiction issues in relation to Member States who had not applied a reservation in relation to Article 4(1)a - (removal without consent of the donor) as they would not be able to seek jurisdiction if the removal was not deemed illicit (notwithstanding it was without the consent of the donor/person lacking capacity) as these situations would be taken outside the scope of the Convention.

(iv) A definition of illicit would assist in relation to Germany's proposal that the legal trade in medicinal products is not covered or restricted by the Convention.

The final sentence of paragraph 20 of the Explanatory Report states:-

'The legal trade with medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the Convention and shall not be restricted by it.'

As drafted, this does not read well as it could be read that the legal trade with medicinal products manufactured from illicitly removed organs is not considered or covered by this Convention.

I would therefore propose that this sentence is re-drafted to read:-

'The lawful use of medicinal products , manufactured from human organs or parts of human organs which have not been removed illicitly (such as advanced therapy medicinal products), is not covered by the Convention and shall not be restricted by it.'

(v) A final thought on this is with regard to the Explanatory Report which states at para 20:-

'The negotiators decided that the notion of trafficking in organs covers all the conducts of illicit removal provided in Article 4(1)... etc.'

So the starting point for the negotiators is that under Article 4(1) any removal without the consent of the donor is illicit. And yet by allowing for a reservation, they are recognizing that in exceptional circumstances as provided for under domestic law in relation to children/those lacking capacity, removal of an organ without consent is not illicit.

This would seem to be a fundamental inconsistency - ie by determining that any removal without consent is illicit on the one hand but at the same time recognising circumstances whereby removal of an organ without consent is not illicit.

If a definition of illicit was therefore included in the Convention, this inconsistency would be removed and would mean that removal of organs from a child/person lacking capacity is taken outside of the scope of the Convention unless the circumstances of the removal was illicit..

(vi) A definition of illicit would also make it less likely that extradition/prosecution would be sought by another Member State in circumstances where removal takes place without consent under our domestic provisions - as such removal, if not illicit, would be outside the scope of the Convention.

SPECIFIC ARTICLES IN THE CONVENTION TEXT AND THE EXPLANATORY REPORT

4. Article 4(1)b - removal of an organ for financial gain –

As drafted, this prohibits the removal of organs in circumstances where the donor or a third party has been offered or received a financial gain or comparable advantage. We have discussed the difficulties here as to whether this might capture a paired/pooled donation situation. Again a definition of illicit would assist in taking these situations outside the scope of the Convention. However, paragraph 40 of the Explanatory Report does assist here as it states:-

'The expression "financial gain or comparable advantage" does not apply to an arrangement that is authorised under domestic law such as arrangements for paired or pooled donation.'

5. Article 7 illicit solicitation/recruitment of donor/recipient for financial gain for the person soliciting or for a third party.

As presently drafted, this provision potentially captures lawful activities such as the UK's NHS Blood and Transplant Authority who receive grant in aid to run inter alia recruitment campaigns to recruit donors. A definition of illicit would assist in taking these activities outside the scope of the Convention. However, the Explanatory Report also assists here as it states at paragraph 52:-

'This measure does not prevent activities to recruit donors which are authorised under domestic law.'

7. Article 21(3) states

Each Party shall take the necessary legislative and other measures to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

Notwithstanding the inclusion of paragraph 52 referred to above so that lawful activities to recruit donors are not restricted by the Convention, a definition of illicit would assist in clarifying what advertising is being referred to here and the behaviour it is seeking to capture.

So the reference to advertising in the above Article could be expanded so that the reference is to the prohibition on the 'illicit advertising of the need for or availability of human organs with a view to offering or seeking financial gain or comparable advantage.'

Alternatively, as the Explanatory Report states at paragraph 128:-

'The prohibition to advertise the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage, is intended to target mainly the persons operating as a broker between donors and recipients'

this could be amended to read:-

'The prohibition to advertise the illicit need for or illicit availability of human organs with a view to offering or seeking financial gain etc.