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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**DRAFT**  
**OPINION OF THE EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)**  
**ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 2009 (2013) ON**  
**“TOWARDS A COUNCIL OF EUROPE CONVENTION TO COMBAT TRAFFICKING**  
**IN ORGANS, TISSUES AND CELLS OF HUMAN ORIGIN”**

Secretariat of  
the Directorate General of Human Rights and Rule of Law (DGI)

CDPC website: [www.coe.int/cdpc](http://www.coe.int/cdpc)  
CDPC e-mail: [dgi.cdpc@coe.int](mailto:dgi.cdpc@coe.int)

## Opinion on Parliamentary Assembly Recommendation 2009 (2013)

1. Following the adoption by the Parliamentary Assembly of Recommendation 2009(2013) “towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin”, the Committee of Ministers decided to send it to the European Committee on Crime Problems (CDPC) for information and possible comments. The CDPC examined the above recommendation and decided to contribute to the response of the Committee of Ministers by providing the following comments concerning matters within its field of competence.
2. As regards paragraph 8.1 of the Recommendation, the CDPC shares the view of the Parliamentary Assembly and recognises that the shortage of organs, which prevents many patients from receiving the benefits of transplantation, is one of the main reasons for the trafficking of human organs. While organ shortage for transplantation is a universal challenge, it is clear that the systems in place for tackling this concern differ substantially between States. The CDPC is of the view that the lack of organs may lead patients to start considering alternative solutions, while certain people and criminal groups can take advantage of their vulnerable situation. The main purpose of the draft convention is to contribute to eradicating the trafficking in human organs notably by preventing and combating this crime through the introduction of new offences supplementing the existing international legal instruments in the field. The draft convention on purpose does not intend to provide any solution to increase the supply of organs available for transplantation, as this is considered to be a purely regulatory matter. This said, the CDPC recognises that the issue of voluntary organ donation should be raised by all States as a matter of priority.
3. With regard to paragraph 8.2 of the Recommendation, the CDPC recalls that States have very different legal approaches when addressing aggravating or mitigating circumstances in their national systems. Some national legal systems in Europe do not have the notion of mitigating circumstances as such. The new convention establishes that certain circumstances may be taken into consideration as aggravating circumstances in the determination of the sanction for all offences established in the draft convention. In particular, one of these aggravating circumstances covers the situation where the offence is committed “against (...) any particular vulnerable persons” which covers the particular vulnerability of some donors and/or recipients. As regards more generally the accountability of donors and recipients and the penalties which may be applicable to these two categories of persons, the draft explanatory report clearly indicates that “the negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraphs 1 and 3, Articles 5, 6, 7 and 9 to the donor or the recipient or both. There is thus no legal obligation to apply these provisions to the donor and the recipient, whereas e.g. the surgeon carrying out the transplantation will always be covered by the criminalisation obligation. The negotiators took note that a number of States would – under any circumstances – refrain from prosecuting organ donors for committing these offences. Other States have indicated that organ donors could under their domestic law, under certain conditions, also be considered as having participated in, or even

instigated, the trafficking in human organs. As the provisions are formulated, it is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not, organ donors should be subject to prosecution.”

4. Regarding paragraph 8.3 of the Recommendation dealing with the issue of the so-called “transplant tourism” (obliging a State Party to establish extra-territorial jurisdiction for criminal acts committed by its own citizens in a third State where the conduct of “organ trafficking” is not criminalized), the CDPC has adopted a cautious position given that a majority of delegations in both the ad-hoc Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) and the CDPC were against including such a provision in the draft convention. This majority referred, in particular, to the very significant practical problems involved in proving beyond reasonable doubt that an alleged offender had breached the substantive criminal law provisions of the draft convention while permanently or temporarily residing in a State not being party to the convention. Rather than including a provision in the draft convention that would rarely, if ever, be used, the CDPC decided not to include a provision directly criminalising “organ transplant tourism”, nor to provide for an exception from the principle of double criminality in the jurisdiction provision of the draft convention. The CDPC considers that the best way of dealing with “transplant tourism” would be to raise awareness of the problem at a global level, persuading States outside Europe to become Parties to the adopted convention, or at least to adopt similar standards in their domestic legislation. Furthermore, a State Party would, of course, be free to go beyond the text of the convention and waive the dual-criminality requirement in accordance with its domestic law.
5. In relation to paragraph 8.4 of the Recommendation, the CDPC underlines that the draft convention establishes as a general rule that Parties to the convention have to establish as a criminal offence “the removal of human organs from living or deceased donors” (Article 4). This provision undoubtedly applies also to “persons deprived of their liberty” as indicated by the PACE in its Recommendation. The CDPC considers that some specific elements in this regard could be added in the explanatory report to the convention.
6. Regarding paragraph 8.5 of the Recommendation, the CDPC underlines that the draft convention provides for the establishment of a Committee of the Parties to monitor its implementation (Chapter VI). By setting-up the Committee of the Parties, this new convention adheres to the latest practice in the Council of Europe adopted in the recent conventions in the criminal law field (the Lanzarote Convention, the Medicrime Convention). As far as its composition is concerned, the Committee of the Parties “shall be composed of the representatives of the Parties to the Convention” and other representatives: the Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental or scientific committees, in which the Committee on Bioethics (DH-BIO) are included (see the draft explanatory report).
7. Regarding paragraph 8.6 of the Recommendation, the CDPC recalls that the PC-TO discussed the question of the feasibility of elaborating an additional protocol against trafficking in human tissues and cells. Most of the delegations expressed concerns about the difficulties involved and underlined the possibility to elaborate

such a protocol at some later stage in time. The majority of delegations were of the opinion that it would be premature to prepare a text on the issue of trafficking in human tissues and cells because of the need to administratively regulate this area in much the same way as has already been done for the area of transplantation of human organs before introducing criminal sanctions. Nevertheless, due to the fact that trafficking in human tissues and cells may also lead to serious violations of human rights and dignity, the CDPC recognises that it should be kept on the agenda.

## **Appendix 1:**



Parliamentary Assembly  
Assemblée parlementaire

<http://assembly.coe.int>



**Recommendation 2009 (2013)<sup>1</sup>**

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

Parliamentary Assembly

1. The Parliamentary Assembly welcomes the draft Council of Europe convention against trafficking in human organs. Closely associated with the preparation of the convention from the outset, the Assembly considers that this text represents the culmination of several years of efforts by the Council of Europe in the field of organ trafficking.
2. The Assembly notes that, at this stage, it has not been considered advisable to prepare an additional protocol against trafficking in human tissues and cells, largely due to the absence at both national and international levels of complete and harmonised regulation of the removal and use of tissues and cells. It nevertheless emphasises that, like organ trafficking, the trafficking of tissues and cells of human origin constitutes a grave threat to human rights and to public and individual health.
3. The Assembly points out that, once it has been adopted, the convention will be the first legally binding international instrument devoted solely to organ trafficking. This is why the Assembly takes the view that the convention must be as complete as possible in order to prevent and combat this worldwide phenomenon which contravenes the most basic standards in terms of human rights and human dignity.
4. With regard to the latter, the Assembly notes that questions relating to the prevention of organ trafficking, the protection of victims and national and international co-operation to combat such trafficking are not sufficiently detailed in the draft convention. It also notes that the draft leaves States complete freedom to decide whether donors and recipients may be prosecuted when they are involved in organ trafficking. Whatever position member States may take on this matter, the Assembly argues that these two categories of persons, because of the specific nature of their situation, which can sometimes be summed up as a "matter of life or death", may find themselves extremely vulnerable.
5. 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 as illicit any removal of organs without the free, informed and specific consent of the living donor. This 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 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. Assembly debate on 23 January 2013 (6th Sitting) (see Doc. 13082 and Addendum, report of the Committee on Social Affairs, Health and Sustainable Development, rapporteur: Mr Marquet). Text adopted by the Assembly on 23 January 2013 (6th Sitting).

6. The Assembly notes with concern the practice followed by certain patients who travel abroad in order to obtain organs in return for payment, a practice widely referred to as "transplant tourism". In this context, it is particularly concerned about allegations that some States which are not members of the Council of Europe trade organs removed from prisoners and from executed detainees.

7. Given that organ trafficking occurs worldwide, extending beyond the territory of the Council of Europe's member States, 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. 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.

8. Consequently, the Assembly recommends that the Committee of Ministers:

8.1. complete the provisions of the draft convention relating to measures for the prevention of organ trafficking, the protection of victims and national and international co-operation against such trafficking, paying particular attention to measures to deal with the shortage of organs which is one of the main reasons for that trafficking, in particular by encouraging the Parties to contribute, by all means at their disposal, to an increase in the supply of organs available for transplantation, in particular by seeking alternative methods and by setting up a system of presumed consent for the removal of organs from deceased persons;

8.2. include a provision in the convention on "mitigating circumstances" which includes, *inter alia*, the consideration of the particular vulnerability of organ donors and/or recipients who have committed the offences established in the convention, or refer to that particular vulnerability in the explanatory report to the convention, specifying that it should be taken into account when the penalties which may be applicable to these two categories of persons are determined;

8.3. include a provision in the convention whereby the usual dual criminality rule is not applicable, in order to combat "transplant tourism";

8.4. include a provision in the convention prohibiting the removal and use for transplantation or other purposes of organs from persons deprived of their liberty, living or deceased;

8.5. 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 of Bioethics (DH-BIO) – with a role in supervising the convention's implementation;

8.6. decide on a roadmap for the preparation of the additional protocol against trafficking in human tissues and cells;

8.7. 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.

9. The Assembly also recommends that the Committee of Ministers urge those member States which have not yet done so to sign and ratify the other two Council of Europe conventions which relate to the combating of trafficking in human organs, namely:

9.1. the Convention on Human Rights and Biomedicine and its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin (ETS No. 186);

9.2. the Convention on Action against Trafficking in Human Beings (CETS No. 197).