

# Parliamentary Assembly Assemblée parlementaire

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COUNCIL OF EUROPE    CONSEIL DE L'EUROPE

## Trafficking in organs in Europe

**Doc. 9845**

24 June 2003

**Opinion** [\[1\]](#)

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Dirk Dees, Netherlands, Liberal, Democratic and Reformer's Group

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### **I. Conclusions of the Committee**

1. The Committee on Legal Affairs and Human Rights fully supports the draft recommendation tabled by the Social, Health and Family Affairs Committee, but would like to table some amendments aimed mainly at reinforcing the proposed legal measures.

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

#### ***Amendment A:***

Add, in the draft Recommendation, paragraph 14 (v) a.in fine:

“and to consider, in the framework of the drafting of the future Convention on Trafficking of Human Beings, the inclusion of an additional protocol covering the trafficking of organs and tissues of human origin.”

### ***Amendment B:***

1. Replace, in the draft recommendation, paragraph 14 (iii) f.: “With the legal assistance of the Council of Europe, to amend the Criminal Code to include specific provisions on organ trafficking;” by “With legal support from the competent services of the Council of Europe, to amend, where necessary, their criminal codes, in order to ensure that all participants in organ trafficking may be adequately punished, including sanctions for medical staff involved in transplanting organs obtained through illegal trafficking.”
2. Place the newly formulated phrase under (i), as new item e.

### ***Amendment C:***

Delete paragraph 14 (iii) g, last part-sentence.

### ***Amendment D:***

Delete paragraph 14 (iv.) b.

### ***Amendment E:***

At the end of paragraph 14. (iv) d, add “except where such a refusal would endanger the life or health of the patient unable to cover the cost of vital treatment himself.”

### ***Amendment F:***

In paragraph 14 (iv), add as new paragraph f: “to take appropriate measures to increase the availability to individuals of statements of “consent” regarding the removal of organs after their death, in order to stimulate the availability of organs and tissues obtained post mortem procurement.”

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## **III. Explanatory memorandum**

by Mr Dees, Rapporteur

### **A. General philosophy of this Opinion**

1. I would like to congratulate Mrs Vermot-Mangold on her very detailed and exhaustive report. Her views and recommendations generally deserve the full support of our Committee. It is simply unacceptable that human body-parts become objects of commerce and profit, and Mrs Vermot-Mangold’s report gives some striking evidence of where the “slippery slope” is leading that we step onto when we begin tolerating the commercialisation of the human body. The appalling reports on the background of numerous disappearances and murders of

indigent persons in the vicinity of Ciudad Juarez (Northern Mexico), which appears to be organised organ smuggling, and the recent arrest by the Italian police of a ring of human traffickers involving women forced into prostitution and their babies sold upon birth, are an illustration of what might become the final stage if we allow a market in human organs to establish itself. Where there is a market at all, the development of a black market is practically inevitable.

2. At the same time, the widely-publicised scandalous practices found over many years in certain UK hospitals show that even where no commercial motives are involved, it is important to respect the dignity of the human being, even after death, in order to safeguard and improve the public acceptance of legitimate organ donations. The qualitative and quantitative development of legitimate donation is after all the best means to reduce the demand-pressures leading to the development of illicit or even criminal practices.

3. Politicians and lawyers are often called upon to balance competing interests – it is the essence of their job, of our job. The legitimate, vital interests of persons in desperate need of an organ transplant are well-known, and, once again, aptly presented by Mrs Vermot-Mangold. She provided us with all the relevant statistics, and these numbers are indeed troubling. But it would be a serious misunderstanding to conclude that these interests require any “balancing” with the interests protected by the prohibition of commerce in human organs – the bottom of the “slippery slope” is simply too appalling. Lawmakers must find ways and means to encourage the development of legitimate, voluntary organ donations so that the pressing demand can be satisfied without recourse to commercial practices. This is key in order to avoid a likely downward spiral: public scandals about criminal practices in the field are likely to affect negatively the reputation of the entire transplant sector and thereby reduce the public’s readiness for voluntary donations, thus further increasing demand pressures. There is therefore simply no room for “balancing” of interests in the sense of entering into any compromises with commercialism in this field.

4. Consequently, the philosophy of this Opinion is to strengthen Mrs Vermot-Mangold’s proposals with a view to making them even more operational and effective from a legal perspective, and to avoid any possible misunderstandings that could make the realisation of her proposals more difficult.

## **B. Reasons for the individual amendments proposed**

### ***Amendment A:***

The Council of Europe is currently drafting a Convention on Human Trafficking. The trafficking of human organs raises similar issues to those raised by the trafficking of whole human beings, such as devising appropriate sanctions and organising international cooperation to prevent and repress illegal practices. While it appears that a widening of the scope of the draft convention on human trafficking might complicate and excessively delay the process of the preparation of the Convention, the technique of using an additional protocol would avoid these problems. Such an additional protocol would allow for specific provisions organising pan-European cooperation in this field, and thus to complement the additional protocol concerning Transplantation to the Convention on Human Rights and Biomedicine. This existing additional protocol, whose ratification the

Report of Health and Social Affairs Committee rightly recommends, includes a general condemnation of commercialisation and trafficking in the field of organ transplantation, but it does not provide any more detailed guidelines on European cooperation in preventing and repressing violations.

### **Amendment B:**

The original formulation may be misunderstood in the sense that “provisions on organ trafficking” would be a new “one-size fits-all” crime definition, to cover all possible contributions to such actions and setting a common “tariff” of punishment. In fact, criminal law provisions must distinguish carefully between the culpability of different contributions made by different persons involved in the trafficking. It goes without saying that any killings aimed at providing cadaver organs must be punished as murder, i.e. premeditated for-profit taking of life. Other acts may also be adequately covered by existing definitions of common crimes such as the prohibition of causing grievous bodily harm involving the use of dangerous instruments, which in many countries covers medical practitioners operating without full and informed consent, and all those who aid and abet such acts. Many of the practices presented in Mrs Vermot-Mangold’s report are characterised by a clear lack of informed consent: either the victim was lured into consenting by false information regarding the safety of the operation and his or her future health outlook; or, if the victim consented after being given realistic information, the consent would still be considered as invalid as it would be in breach of public policy – although clear definition of this public policy against commercial organ donations may in some countries need an intervention by the legislator. Furthermore, these general criminal provisions leave certain gaps that make effective prosecution difficult in practice. These are linked to the fact that in the case of grievous bodily harm, the stage of (punishable) attempt is only reached rather late, in general only when the patient is readied on the operating table and the doctor takes the knife to begin cutting. Mere preparations for criminal acts, before they reach the stage of punishable attempt, are only penalised in exceptional cases (for example, in Germany, in the case of genocide and nuclear sabotage). It may be appropriate in some countries to extend the penalisation of the stage of preparation to include certain acts linked to trafficking of organs which may be easier to prove in practice, and leave more room for preventive action by the law enforcement organs. Examples for this could be acts involving the recruitment of victims, their transport over national borders or the like.

The last part-sentence of the reworded text picks up the purpose of para. 14 (iv) b. whose deletion is recommended in Amendment D.

These are relatively technical issues, for which the involvement of legal experts from the competent departments of the Council of Europe would indeed be useful, as it would enable those responsible for legal reforms on the national level to compare their notes with practices and experiences in other countries faced with the same problem. To help organise such cooperation is one of the strengths of the Council of Europe, though the term “assistance” should be avoided, as proposed in the new wording, since it may be mistaken as paternalistic.

Finally, the reworded recommendation should be included in paragraph (i)

addressed to all member states, as the need to ensure proper penalisation of illicit trafficking in human organs concerns all countries. There is no country, not even in Europe, where there are no socially marginalized groups members of which may at least potentially fall victim to organised criminal activity in this field.

***Amendment C:***

Specific measures against organ trafficking are proposed in other sections of the recommendation (on occasion reworded with a view to making them even more precise); this would appear to make the general invitation “to undertake effective measures to combat [...] trafficking in organs in particular” redundant.

***Amendment D:***

This provision, if interpreted narrowly, is redundant. The reworded recommendation in section (iii) f - addressed, as proposed, to all member states - ensures that all participants in illicit organ trafficking operations, including medical practitioners, shall be adequately punished.

If interpreted widely - as intended to criminally punish also doctors treating a recipient of a (albeit illicit) transplant who subsequently falls sick or simply needs regular follow-up treatment - section (iv) b. would go too far. It is generally accepted, for humanitarian reasons, that doctors must not be prosecuted for treating persons in need, even if their injury is the result of an illicit act (for example, a shoot-out with the police). Indeed doctors are generally in many countries under a legal and ethical obligation to intervene on the strict basis of need.

***Amendment E:***

Flatly to deny any public health coverage of post-transplant follow-up could, in those countries where patients are only treated when they are either covered by insurance or can afford to pay for the treatment out of their own pockets, lead to untenable situations. The well-off would still get away with their illicit action, whereas those on more modest incomes, who simply cannot afford the high cost of anti-rejection medication, would, in practical terms, be condemned to death. Any legislation to implement our recommendation should therefore include a “hardship clause” excluding from the denial of health insurance coverage those cases where such a refusal would put into danger the life or health of the patient unable to cover the cost of vital treatment himself or herself.

***Amendment F:***

The availability of statements of consent regarding organ donation after death may be increased, for instance by recording the statements in a national registry (Netherlands) or by including a consent form in the drivers licences (United Kingdom, Canada). Such measures are designed to increase the number of legitimate organ donations, thereby reducing the demand pressures which lead to an increase of illegal practices of organ trafficking.

*Reporting committee:* Social, Health and Family Affairs Committee

*Committee for opinion:* Committee on Legal Affairs and Human Rights

*Reference to committee:* [Doc. 8966](#) and Reference No. 2579 of 13 March 2003

*Opinion approved by the committee on* 24 June 2003

*Secretaries to the committee:* Ms Coin, Mr Schirmer, Mr Cupina, Mr Milner

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[\[1\]](#) See Doc. [9822](#) tabled by the Social, Health and Family Affairs Committee.