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Draft convention on the protection of children against sexual exploitation and sexual abuse¹

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Jean-Charles GARDETTO, Monaco, Group of the European People's Party

Summary

The Committee on Legal Affairs and Human Rights welcomes the draft convention, which constitutes a major step along the path leading to the full protection of children, for which the Assembly calls. The amendments recommended by the Committee pursue four main objectives: to strengthen the text by the deletion of “escape clauses” that may in some situations weaken the protection afforded by the convention; to stress the importance of the role of the family in protecting children against sexual exploitation and sexual abuse; to strengthen the follow-up provisions foreseen in the draft convention, and to avoid the creation of new dividing lines in Europe by opposing the “disconnection clause” in relation to the European Union.

¹ See Doc. 11209 rev.

A. Draft opinion

1. The Assembly welcomes the speedy preparation of the draft convention on the protection of children against sexual exploitation and sexual abuse. It considers this draft to be a major step forward in the protection of children against this particularly repugnant kind of abuse. It also takes the view that the name of the Council of Europe should appear in the title of the convention.

2. The future convention chimes perfectly with a long-established priority of the Parliamentary Assembly and of the Council of Europe as a whole: building a Europe for and with children. It constitutes a necessary, albeit insufficient, contribution to the fight to eradicate all forms of violence, exploitation and abuse suffered by children. Indeed, in Recommendation 1778 (2007), the Assembly urged the Committee of Ministers "working closely with the Parliamentary Assembly, to instruct its competent governmental committees [...] to produce a draft convention aimed at affording children comprehensive, effective protection against all forms of violence, exploitation or abuse [...]". As the sexual exploitation and abuse of children are amongst the most despicable forms of child exploitation and abuse, this draft convention constitutes a major step along the path leading to that full protection of children for which the Assembly calls.

3. The Assembly welcomes the provision made by the draft convention for a monitoring mechanism, for which it invites the Committee of Ministers to make appropriate resources available, taking account of the scope and importance of the remit of the Committee of the Parties under Article 41.

4. Regarding Articles 20, 21, 24 and 25 of the draft convention, allowing reservations which might well, in certain cases, weaken the criminal protection of children at risk of sexual exploitation and abuse, the Assembly regrets that it was necessary, in order to attain sufficiently broad agreement among government representatives, to include such "escape clauses" in the draft. It recommends the Committee of Ministers to strike out these clauses. Failing that, it recommends to all member states to accede to this convention without making any reservations, and it calls on national parliaments to be vigilant in this respect.

5. The Assembly also advocates certain textual amendments, particularly regarding better recognition of the important role of victims' parents and families, and therefore recommends that the Committee of Ministers amend the draft convention as follows:

5.1 in the title of the convention, add the name "Council of Europe" before the word "Convention";

5.2 in Article 9, paragraph 2 at the end: either delete the words "or co-regulation", or make its meaning more explicit;

5.3 in Article 13, after the words "to provide advice to callers", insert the words "or allow them to denounce abuses";

5.4 in Article 14, reword the second sentence in paragraph 1 as follows: "Measures taken pursuant to this paragraph shall take due account of the views, needs and concerns of the child and of his or her parents, except when the parents have themselves been involved in the practice of sexual abuse or sexual exploitation";

5.5 in Article 14, add the following sentence at the end of paragraph 3: "Each Party shall ensure that, in all cases in which the measures to which this article refers have been taken, the allegations made against a parent or other person who has care of the child shall be determined as soon as possible.";

5.6 in Article 15, paragraph 2, after the words "judicial authorities", insert "while respecting their independence" ;

5.7 in Article 15 paragraph 3 [*concerns only the French version*];

5.8 in Article 16, add at the end of paragraph 3 the words "and protecting their potential victims";

- 5.9. in Article 20, insert at the end of paragraph 1, after the words " when committed without right" the words "(outside of legitimate activities aimed at prevention or repression of such criminal acts)";
- 5.10. in Article 20, delete paragraph 4;
- 5.11. in Article 21, delete paragraph 2;
- 5.12. in Article 22, insert at the end the words "except in the cases covered by Article 18 paragraph 3";
- 5.13. in Article 24, delete paragraph 3;
- 5.14. in Article 25, delete paragraph 3;
- 5.15. in Article 25 paragraph 6 at the end, delete the words "and it does not extradite him or her to another Party, solely on the basis of his or her nationality";
- 5.16. in Article 26 paragraph 2, replace the terms "lack of supervision or control" by "lack or insufficiency of absence or control";
- 5.17. in Article 27 paragraph 2.a., insert after "public benefits or aid" the words "or from public calls for tenders";
- 5.18. in Article 27 paragraph 2.b., insert after "commercial", the words "or other";
- 5.19. in Article 30, add at the end of paragraph 3 the words "particularly in cases in which one of the measures for which Article 14, paragraph 3 provides (removal of the alleged perpetrator and removal of the victim from his or her family environment) has been taken";
- 5.20. in Article 33 at the end, insert the words "and which is commensurate with the gravity of the crime in question.";
- 5.21. in Article 36 paragraph 2.b., delete the word "communication";
- 5.22. in Article 41, after paragraph 2, insert the following new paragraph: "The Committee of the Parties shall prepare at regular intervals a report on the implementation and the effects of the convention, which it shall transmit to the Committee of Ministers and to the Parliamentary Assembly.";
- 5.23. in Article 41 paragraph 3.a., after "any problems and", add the word "interpret";
- 5.24. in Article 43, delete paragraph 3 ("disconnection clause"); failing this, insert into the explanatory report on the convention a passage equivalent to the one on this subject included in the explanatory report on the Council of Europe Convention on Action against Trafficking in Human Beings.

B. Explanatory memorandum by Mr Jean-Charles Gardetto, Rapporteur

I. Procedure

1. At their 989th meeting, on 14 March 2007, the Ministers' Deputies decided to request the opinion of the Parliamentary Assembly on the draft convention on the protection of children against sexual exploitation and sexual abuse, drawn up by the Committee of Experts on the Protection of Children against Sexual Exploitation and Sexual Abuse (PC-ES)². The draft convention underwent some amendments at the meeting of the PC-ES which took place from 26 to 30 March 2007, and these were communicated to the Assembly on 2 April 2007.

2. At its meeting of 12 March 2007, the Committee on Legal Affairs and Human Rights appointed Jean-Charles Gardetto (Monaco, EPP/CD) as rapporteur, in anticipation of the expected referral to the Committee.

3. On 16 March 2007, the Assembly referred the request for an opinion made by the Committee of Ministers to the Committee on Legal Affairs and Human Rights for report and to the Social, Health and Family Affairs Committee for opinion. On 16 April 2007 the Assembly decided to hold a debate on this matter under urgent procedure during the April 2007 part-session.

II. Substantive comments

i. General appraisal of the draft convention

4. The Assembly already in its Resolution 1530 (2007) welcomed "the fact that work on a draft Council of Europe convention on the protection of children against sexual exploitation and abuse has recently been commenced"³. It now congratulates the Committee of Experts on managing to prepare this draft so speedily.

5. The future convention chimes perfectly with a long-established priority of the Parliamentary Assembly and of the Council of Europe as a whole: building a Europe for and with children⁴. It constitutes a necessary, albeit insufficient, contribution to the fight to eradicate all forms of violence, exploitation and abuse suffered by children. Indeed, in Recommendation 1778 (2007), the Assembly urged the Committee of Ministers, "working closely with the Parliamentary Assembly, to instruct its competent governmental committees [...] to produce a draft convention aimed at affording children comprehensive, effective protection against all forms of violence, exploitation or abuse [...]"⁵. As the sexual exploitation and abuse of children are amongst the most despicable forms of child exploitation and abuse, this draft convention constitutes a major step along the path leading to that full protection of children for which the Assembly calls.

6. The Assembly can but welcome the general thrust of the draft convention, which is a comprehensive text systematically covering not only preventive and social aspects of the problem, but also law enforcement aspects, including the thorny questions of extraterritorial application of criminal law and international co-operation in this field - always in a palpable effort to optimise the protection of children, by their very nature amongst the most vulnerable members of our societies - in all Council of Europe member states. In its broad lines, the draft convention also respects the balance between the wish to afford child victims of sexual abuse maximum protection and the preservation of the presumption of innocence and the certainty of the law. Amongst its particularly positive and innovative provisions are Articles 25 (Jurisdiction, including extraterritorial), 31 (General measures of protection), 32 (Initiation of proceedings *ex officio*) and 37 (Recording and storing of national data and exchanges of information among the Parties).

7. Certain textual amendments will nevertheless be proposed below, regarding both better recognition of the role of victims' parents and families and certain "escape clauses" which might well weaken the criminal protection of children at risk of sexual exploitation and abuse.

² Cf document CM (2007) 24 of 14 February 2007.

³ Resolution 1530 (2007), § 9; cf the report by Jean-Charles Gardetto (Monaco, EPP/CD) on "Child victims: stamping out all forms of violence, exploitation and abuse", Doc 11118 of 21 December 2006.

⁴ http://www.coe.int/t/transversalprojects/children/default_EN.asp

⁵ Recommendation 1778 (2007), § 3.

8. This text being a major draft convention drawn up within the Council of Europe, it would be logical for the organisation's name also to appear in the title of the convention, which could be "Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse". It would be a shame for the Council of Europe not to seize this opportunity to raise its profile in the field of human rights.

ii. Comments on specific articles in the draft convention

Article 9 – Participation of children, the private sector, the media and civil society

9. As the meaning of the term "co-regulation" is not clear, in particular as opposed to "self-regulation", it would be preferable either to delete this term, or to express its meaning more clearly.

Article 13 – Helplines

10. The information services to be set up (telephone or internet helplines) should not only provide advice to callers, but also give them the opportunity to signal cases of abuse.

Article 14 - Assistance to victims

11. This article is of crucial importance, given that children, as particularly vulnerable victims, need speedy assistance capable of warding off damage that can still be avoided.

12. Parents are required to play a leading role in protecting their children and ensuring their physical and psychosocial well-being. This also applies in any case in which the child has fallen victim to sexual abuse, unless, obviously, the parents themselves are involved in the abuse of their own child. A reminder should be given of this simple fact in Article 14, at the end of the second sentence in paragraph 1, reworded as follows:

"Measures taken pursuant to this paragraph shall take due account of the views, needs and concerns of the child and of his or her parents, except when the parents have themselves been involved in the practice of sexual abuse or sexual exploitation."

13. Where paragraph 3 of Article 14 is concerned, which encourages the possibility of the removal of the alleged perpetrator and the removal of the victim from his or her family environment when his or her parents are involved in the abuse, a warning should be added. In practice, in a crisis situation for a couple or in a context of difficult relations between neighbours, it is possible for an innocent parent to be accused of sexual abuse of a child. In such cases, it is in the interests of both the parent concerned and the child him or herself for the facts to be clarified as soon as possible, in order to avoid the irreparable trauma that prolonged removal causes to the parent-child relationship. Otherwise, the cumulative effect of too much intervention by social services and the too slow workings of the criminal courts may well cause the complete break-up of wrongly accused families.

14. The following sentence should therefore be added to paragraph 3 of Article 14:

"Each Party shall ensure that, in all cases in which the measures to which this article refers have been taken, the allegations made against a parent or other person who has care of the child shall be determined as soon as possible."

Article 15 - General principles (for intervention programmes or measures)

15. A detail should be added to paragraph 2 of Article 15: although all forms of co-operation are necessary between the various authorities responsible (healthcare services, social services, judicial authorities, etc), this co-operation must respect the specific role of the judicial system in a state governed by the rule of law, and particularly its independence. This is why it is proposed that "while respecting their independence" be added after "judicial authorities".

16. Paragraph 3 requires clarification, firstly as regards its formulation [concerns French version only], secondly as regards the content of the "appropriate programmes or measures", which could be clarified in the convention's explanatory report.

Article 16 - Recipients of intervention programmes and measures

17. Where measures to meet the developmental needs of children who commit offences of a sexual nature (Article 16, paragraph 3) are concerned, the indication of the aim of such measures should be supplemented by a reference to the protection of potential victims. The words "and protecting their potential victims" should therefore be added at the end of Article 16, paragraph 3.

Article 20 – Offences concerning child pornography

18. The parenthesis suggested for insertion behind the words "when they are committed without right", which spells out the rare cases in which some of the activities described in this Article may be legitimate, would contribute to avoiding any misunderstanding that child pornography as such could be justified in certain cases.

Articles 20, 21 and 24 ("Escape clauses")

19. Paragraph 4 of Article 20, on child pornography, allows Parties to reserve the right not to apply, in whole or in part, paragraph 1.f of the same article. Paragraph 1.f provides for it to be a criminal offence knowingly to obtain access, through information and communication technologies, to child pornography.

20. Similarly, Article 21, paragraph 2 (Offences concerning the participation of a child in pornographic performances) allows Parties to reserve the right not to apply, in whole or in part, paragraph 1.c. Paragraph 1.c provides for it to be a criminal offence knowingly to attend pornographic performances involving the participation of children.

21. Article 24, paragraph 3 (Aiding or abetting and attempt) allows Parties not to establish as criminal offences a number of the offences referred to in Articles 20 to 23.

22. The jurisdiction rules laid down in Article 25 are intended to facilitate the prosecution of offences committed outside national territory, and in particular to combat "sex tourism". As this is a praiseworthy objective, the Assembly regrets that Article 25, paragraph 3 again opens the way to reservations concerning the rules on jurisdiction set out in paragraph 1.e (offence committed by a person who has his or her habitual residence in a Party's territory). It is unclear why a Party would wish to be able to prosecute a "sex tourist" who commits offences against juveniles abroad only if the "tourist" is a national of that state, and not when he is habitually resident on the territory of the said state but does not hold its nationality.

23. The Assembly regrets that it was necessary, in order to attain sufficiently broad agreement among the government representatives in the PC-ES, to include such "escape clauses", which might well considerably reduce the scope of the criminal protection afforded to children against sexual exploitation and abuse.

24. The Assembly therefore recommends in the first place to delete these clauses. Failing that, it invites all Council of Europe member states to accede to this convention without making any reservations.

25. It also calls on the parliaments of the states concerned to be vigilant in respect of the reservations which their governments might well attach to their signature, ratification, acceptance or approval of this draft convention.

Article 22 – Corruption of children

26. A reference to Article 18 paragraph 3 should be added in order to avoid a contradiction with this provision aimed at avoiding the criminalisation of consensual sexual activities between minors.

Article 25 – Jurisdiction

27. It is desirable that every Party shall be in a position to prosecute the perpetrator of offences under this convention whenever the perpetrator is present on its territory. The part-sentence of paragraph 6 recommended for deletion (“and it does not extradite him or her to another Party, solely on the basis of his or her nationality”) adds an extra condition and thus constitutes an unwelcome obstacle in the path of such prosecutions.

Article 26 – Corporate liability

28. In order to be operational, the legislative measures recommended must not only sanction the (complete) lack of supervision or control, but also its insufficiency.

Article 27 – Sanctions and measures

29. As regards paragraph 2.a., the legal persons held liable for such offences should not only be excluded from entitlement to public benefits or aid, but also from public calls for tenders.

30. As regards paragraph 2.b., measures of disqualification from pursuing activities should not only be possible regarding commercial activities, but also include other activities, such as those of non-profit associations.

Article 30 – Principles (Investigation, prosecution and procedural law)

31. In Article 30, paragraph 3 (“Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay”), the words “especially in cases in which one of the measures for which Article 14, paragraph 3 provides (removal of the alleged perpetrator and removal of the victim from his or her family environment) has been taken” should be added. As explained above, the aim is to minimise, in the interests of both the child and the parent suspected of abuse, the detrimental consequences of a prolonged severing of the family relationship.

Article 33 – Statute of limitation

32. It is regrettable that Article 33 does not foresee a minimum length of the prescription period (beginning with the date at which the victim reaches the age of majority). It would be useful to send at least a signal to the Parties in the sense that in fixing the length of the prescription period, due consideration should be given to the gravity of the offence in question.

Article 36 – Criminal court proceedings

33. It is indeed very important that the victim can be heard by the court without being present in the courtroom, by the use of appropriate “technologies”. The qualifying term “communication” could give rise to an unwelcome interpretation tending to exclude the technique of time-lagged hearings (taped ahead of time).

Articles 39 to 41 – Monitoring mechanism

34. The Assembly welcomes the provision made in the draft convention for a monitoring mechanism, the Committee of the Parties, with instructions to monitor the implementation of the convention, facilitating the collection, analysis and exchange of information, experience and good practice between states.

35. It should, however, be remembered that the effectiveness of the monitoring will very much depend on the means at the disposal of the Committee of the Parties, which, according to Article 41, paragraph 4, “shall be assisted by the Secretariat of the Council of Europe”. The Assembly therefore invites the Committee of Ministers to make available to the Committee of the Parties resources appropriate to the scope and importance of its remit under Article 41.

36. To complete the scope of the follow-up operated by the Committee of the Parties, the latter should be invited to prepare at regular intervals, to be determined by the Committee itself, a report on the implementation and the effects of the convention, which should be submitted to the Committee of Ministers and the Parliamentary Assembly.

Article 43 – Relation to other international instruments

37. Article 43, paragraph 3⁶ contains the "disconnection clause" according to which, in short, European Union member states are to apply in their mutual relations Community rules, in so far as such rules exist.

38. The Assembly opposes such a clause, which has the potential to give rise to new divisions in Europe between the parties which are members of the European Union and those which are not. The problems which concern all Council of Europe member states must continue to be dealt with by means of conventions drawn up within the Council of Europe - with equal participation by all member countries - which set up non-discriminatory regulations common to all the countries which make up "Greater Europe".

39. Unfortunately, such a "disconnection clause" has already been included, in the same terms, in the Council of Europe Convention on Action against Trafficking in Human Beings⁷. However, the explanatory report to that convention⁸ reproduces a declaration made by the European Community and its member states when the convention was adopted, recognising that "the Community and the European Union Member States will be bound by the convention and will apply it like any party to the convention, if necessary, through Community/Union legislation", and guaranteeing "the full respect of the convention's provisions vis-à-vis non-European Union parties". The explanatory report specifies that, "As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the 'context' of this convention".

40. As the draft explanatory report to the present draft convention, dated 2 April 2007⁹, contains no declaration equivalent to that in the explanatory report on the Convention on Action against Trafficking in Human Beings, the Assembly urges that such a text be included in the final version of the explanatory report.

⁶ Still in square brackets in the version of 13 April 2007.

⁷ CETS 197 (16 May 2005), Article 40 § 3.

⁸ See paragraph 375.

⁹ PC-ES (2007) 22 FIN E.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Request for an opinion by the Committee of Ministers, Reference No. 3319 of 16 March 2007

Draft opinion adopted unanimously by the Committee on 17 April 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György **Frunđa**, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya Atanasova, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Erol Aslan Cebeci, Mrs Pia Christmas-Møller, Mrs Ingrida **Circene**, Mrs Lydie Err, Mr Valeriy **Fedorov**, Mr Aniello Formisano (alternate: Mr Andrea **Manzella**), Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mr Holger Haibach, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Serhiy Holovaty, Mr Michel Hunault, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Želiko Ivanji, Mr Sergei Ivanov, Mrs Kateřina Jacques, Mr Antti Kaikkonen, Mr Karol Karski, Mr Hans Kaufmann, Mr András Kelemen, Mrs Kateřina Konečná, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mr Eduard Kukan, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony **Lloyd**, Mr Humfrey **Malins**, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh, Mr Murat Mercan, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr João Bosco Mota Amaral, Mr Philippe Nachbar, Mrs Nino **Nakashidzé**, Mr Tomislav Nikolić, Mrs Carina Ohlsson, Ms Ann Ormonde (alternate: Mr Paschal **Mooney**), Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen Rustamyan, Mr Christoph Strässer, Mr Mihai Tudose (alternate: Mrs Florentina **Toma**), Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis (alternate: Mrs Elsa **Papadimitriou**), Mrs Renate Wohlwend, Mr Marco **Zacchera**, Mr Krzysztof Zaremba, Mr Vladimir Zhirinovskiy (alternate: Mr Alexey **Aleksandrov**), Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann