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**Ad Hoc Committee on the Elaboration of a
Convention against Transnational Organized Crime**

Sixth session

Vienna, 6-17 December 1999

Agenda item 3 (a)

Consideration of the additional international legal instruments:

**draft instrument against illegal trafficking in and
transporting of migrants, with particular
emphasis on articles 7-19**

**Proposals and contributions received from Governments on
the revised draft Protocol against the Smuggling of Migrants
by Land, Air and Sea, supplementing the United Nations
Convention against Transnational Organized Crime**

**Mexico: amendment to the revised draft international legal instrument
against illegal trafficking in and transporting of migrants***

Preamble

The States Parties to this Protocol [Instrument],

(a) *Concerned* about the rapid development of the illegal trafficking in and transporting of migrants,

(b) *Stressing* the importance for Governments of countries of destination and countries of origin to adopt effective sanctions against those who illegally organize the trafficking in and transporting of migrants, in particular when such activities endanger the life of migrants or are aimed at their sexual or labour exploitation,

(c) *Alarmed* by the significant increase in the activities of transnational criminal organizations that make illicit profits from the illegal trafficking in and transporting of migrants across national boundaries, bringing great harm to the States concerned,¹

* Based on the text of the revised draft Protocol contained in document A/AC.254/4/Add.1/Rev.2.

¹ The texts of former preambular paragraphs (c) and (d) have been merged.

(d) *Recalling* the duty of Governments of countries of destination to respect the fundamental human rights of migrants while at the same time asserting their own right to control access to their territory and to adopt policies regulating immigration flows,

(e) *Convinced* that the illegal trafficking in and transporting of migrants can endanger the health, person, life, safety or liberty of migrants and entail great expense for the international community, including the costs of rescue, medical care, food, housing and transportation for their repatriation,²

(f) *Emphasizing* the importance of protecting migrants and their relatives from abuse by transnational criminal organizations and from racism, ethnocentrism and xenophobia, and of respecting their person, dignity, religious beliefs and cultural values,

(g) *Convinced* of the need for States to redouble their efforts to protect the human rights and dignity of migrants, irrespective of their status,³

(h) *Aware* that the illegal trafficking in and transporting of migrants can lead to the misuse of lawfully established procedures for immigration, including those seeking asylum or refuge,⁴

(i) *Reaffirming* the priority of States Parties to prevent, combat and eradicate the illegal trafficking in and transporting of migrants owing to the links of such activity with transnational organized crime and other criminal activities,⁵

(j) *Recalling* the desirability for States to conduct public information campaigns on migration in countries of origin and reception of migrants, with a view to combating the illegal trafficking in migrants and also racist and xenophobic attitudes in receiving countries, and to ensuring that potential migrants fully understand the consequences of their desire to migrate,

(k) *Reaffirming* respect for the sovereignty and territorial integrity of all States, including their right to control immigration flows,⁶

(l) *Convinced* that combating the unlawful trafficking in and transporting of migrants requires international cooperation and, in particular, the exchange of information and other measures of cooperation at the national, regional and global levels,⁷

(m) *Also convinced* that a global approach is necessary to counter this phenomenon,⁸

(n) *Stressing* the need for an international legal instrument to combat all aspects of the illegal trafficking in and transporting of migrants by land, air and sea,

(o) *Stressing also* the importance of full compliance by States Parties with their obligations under the 1951 Convention⁹ and the 1967 Protocol¹⁰ relating to the Status of Refugees, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 1990,¹¹ and other provisions of international law,

² This was previously preambular paragraph (f).

³ This was previously preambular paragraph (j).

⁴ This was previously preambular paragraph (e).

⁵ This was previously preambular paragraph (g).

⁶ This was previously preambular paragraph (o).

⁷ This was previously preambular paragraph (h).

⁸ This was previously preambular paragraph (i).

⁹ United Nations, *Treaty Series*, vol. 189, No. 2545.

¹⁰ *Ibid.*, vol. 606, No. 8791.

¹¹ General Assembly resolution 45/158, annex.

(p) *Recalling* the work of the International Maritime Organization concerning unsafe practices associated with the illegal trafficking in or transporting of migrants by sea, in particular the work of the Maritime Safety Committee, which approved the interim measures for combating unsafe practices associated with the trafficking in or transporting of migrants by sea,¹²

(q) [*Text on decisions of the International Civil Aviation Organization to be added*],

(r) *Bearing in mind* the United Nations Convention against Transnational Organized Crime,¹³

(s) *Declaring* that such an instrument must concentrate on crime prevention and criminal justice, in particular the activities of those who organize and facilitate the illegal trafficking in and transporting of migrants,

Have agreed as follows:

I. General provisions relating to the illegal trafficking in and transporting of migrants by land, air and sea

*Article 1*¹⁴

*Statement of objectives*¹⁵

The purpose of this Protocol [Instrument] is:

1. To promote international cooperation to prevent and combat more effectively the illegal trafficking in and transporting of migrants by land, air and sea, especially when such trafficking endangers, or may endanger, the health, person, life, safety or liberty of migrants.

2. To promote international cooperation in the interests of the protection of the victims of such trafficking and respect for their human rights.

Article 2

*Safeguard*¹⁶

1. A migrant who is the subject of illegal trafficking and transport shall not become punishable under this Protocol [Instrument].

2. The relatives of the migrant shall not become punishable for acts, committed by an organized criminal group of which the relative is not a member, whose purpose is the illegal trafficking in and transporting of that migrant.

3. The relatives of the migrant shall not become punishable by reason of the profits obtained by an organized criminal group from those relatives as a result of the illegal trafficking in and transporting of that migrant.

*Article 3*¹⁷

Scope of application

¹² MSC/Circ. 896, annex.

¹³ This was previously preambular paragraph (a).

¹⁴ Previously appeared as article 3.

¹⁵ Proposal submitted by the delegation of Mexico at the fourth session of the Ad Hoc Committee, document A/AC.254/L.61.

¹⁶ Previously appeared as paragraph 7 of article 4.

¹⁷ Previously appeared as article 5.

1. This Protocol [Instrument] applies to the illegal trafficking in and transporting of migrants when committed by a transnational organized criminal group as defined in article 4 of this Protocol [Instrument].

2. The provisions of this Protocol [Instrument] shall be without prejudice to the rights of asylum and refuge and to the obligations assumed by States Parties under the 1951 Convention⁹ and the 1967 Protocol¹⁰ relating to the Status of Refugees and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 1990.¹¹

*Article 4*¹⁸
*Definitions*¹⁹

For the purposes of this Protocol [Instrument]:

(a) “Transnational organized criminal group” shall mean a situation where three or more persons agree to organize themselves or are organized on a permanent or recurrent basis to commit acts that in themselves or when combined with others have as their objective the perpetration of a crime or crimes that are provided for in this Protocol [Instrument] and over which two or more States have established their jurisdiction;²⁰

(b) “Illegal trafficking in and transporting of migrants” shall mean any act committed by a transnational organized criminal group for the purpose of procuring the undocumented or irregular entry of a person into a State of which the person is not a national or resident;

(c) “Undocumented or irregular entry” shall mean the crossing of borders by persons without complying with the necessary requirements established by the receiving State in accordance with its domestic law;

(d) “Vehicle” shall mean any conveyance that may be used for transportation by land or air; and

(e) “Vessel” shall mean craft of every description, including non-displacement [non-propulsion] craft and seaplanes that are used or capable of being used as means of transportation on water, except warships, naval auxiliary or other vessels owned by a State or operated by it on government non-commercial service.

¹⁸ Previously appeared as article 2.

¹⁹ Proposal submitted by the delegation of Mexico at the fourth session of the Ad Hoc Committee.

²⁰ Proposal submitted by the delegation of Mexico at the second session of the Ad Hoc Committee.

*Article 5*²¹
*Criminalization*²²

1. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as a criminal offence the illegal trafficking in and transporting of migrants when committed by a transnational organized criminal group.

2. States Parties that have not yet done so shall adopt the necessary legislation or other measures to consider the following activities as aggravating factors:

(a) Illegal trafficking in and/or transporting of migrants in circumstances that endanger, or may endanger, the health, person, life, safety or liberty of the migrants;

(b) Subjection of migrants to sexual or labour exploitation, including forced labour and inhuman or degrading treatment.

3. Each State Party shall also adopt the necessary legislation or other measures to establish as criminal offences the following acts when carried out knowingly and for purposes of profit:

(a) Attempting to commit an offence set forth in paragraphs 1 and 2 of this article;

(b) Participating as an accomplice in an offence set forth in paragraphs 1 and 2 of this article;

(c) Organizing or directing others to commit an offence set forth in paragraphs 1 and 2 of this article; or

(d) In any other way contributing to the commission of an offence set forth in this article by a transnational organized criminal group; such contribution shall be intentional and shall be made with the aim of furthering the general criminal activity or purpose of the group.²³

Article 6
*Jurisdiction*²⁴

1. Each State Party shall take legislative measures to establish its jurisdiction over the offences specified in article 5 of this Protocol [Instrument] in accordance with article 9 of the Convention.

2. If more than one State intends to declare jurisdiction over an alleged offender in accordance with paragraph 1 of this article and with article 9 of the Convention, the States Parties concerned shall consult each other with a view to determining the jurisdiction applicable.

²¹ Previously appeared as article 4.

²² Proposal submitted by the delegation of Mexico at the fourth session of the Ad Hoc Committee (A/AC.254/L.61).

²³ The wording of this paragraph corresponds to the text of paragraph 3 of former article 4.

²⁴ The provisions of this article will have to be considered in the light of whatever decision is taken by the Ad Hoc Committee regarding the nature of the relationship between this draft instrument and the Convention. Pending such decision, the delegation of Mexico reserves the right to present its comments concerning the contents of those provisions.

II. Illegal trafficking in and transporting of migrants by sea

Article 7

Measures against the illegal trafficking in and transporting of migrants by sea

1. States Parties shall cooperate to the fullest extent possible to prevent, combat and eradicate the illegal trafficking in and transporting of migrants by sea, in conformity with the United Nations Convention on the Law of the Sea²⁵ and all other generally accepted relevant international instruments.

2. A State Party that has reasonable grounds to suspect that a vessel, which is flying its flag or claiming its registry, which is without nationality or which, although flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned, is engaged in the illegal trafficking in and transporting of migrants by sea may request the assistance of other States in suppressing the use of the vessel for that purpose. The Parties so requested shall render such assistance as is reasonable under the circumstances.

3. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State Party is engaged in the illegal trafficking in and transporting of migrants may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, *inter alia*:

(a) To exercise the right of visit;

(b) To inspect the vessel; and

(c) If evidence is found that the vessel is involved in the illegal trafficking in and transporting of migrants, take the necessary action with respect to the vessel, persons and cargo on board, as authorized by the flag State.

4. A State Party that has taken any action in accordance with paragraph 3 of this article shall promptly inform the flag State concerned of the results of that action.

5. A State Party shall respond expeditiously to a request made by another State Party to determine whether a vessel that is flying its flag or claiming its registry is entitled to do so and to make the request in accordance with the stipulations of paragraph 3 of this article.

6. A flag State may, consistent with paragraph 1 of this article, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary in cases of imminent danger to safeguard at sea the health, person, life, safety or liberty of the migrants and crew and also the vessel.

7. Each State Party shall designate an authority or, where necessary, authorities to receive reports of the illegal trafficking in and transporting of migrants and to respond to and deal expeditiously with requests for assistance, confirmation of registry or the right of a vessel to fly its flag and authorization to take appropriate measures.

²⁵ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

8. Where there are sufficient grounds to suspect that a vessel is involved in the illegal trafficking in and transporting of migrants by sea and it is concluded in accordance with the international law of the sea that the vessel is without nationality or has been assimilated to a vessel without nationality, States Parties shall conduct an inspection of the vessel, as necessary. If the results of the inspection indicate that a vessel is involved in the illegal trafficking in and transporting of migrants, States Parties shall take appropriate measures in accordance with relevant domestic and international law.

9. Where evidence exists that a vessel is involved in the illegal trafficking in and transporting of migrants by sea, States Parties shall:

(a) Ensure the safety and the humanitarian handling of the persons on board and ensure that any measures taken with regard to the vessel are lawful and environmentally sound; and

(b) Take appropriate measures in accordance with relevant domestic and international law.

10. If any measures are taken against a vessel suspected of being engaged in the illegal trafficking in and transporting of migrants by sea, the State Party concerned shall take due account of the need not to endanger the safety of human life at sea and the security of the vessel and the cargo or to prejudice the commercial or legal interests of the flag State or any other interested State.

11. States Parties shall take, adopt or implement such measures in conformity with international law with due regard to:

(a) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel; and

(b) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

12. Any action taken pursuant to this article shall be carried out only by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

13. Measures taken, adopted or implemented pursuant to this Protocol [Instrument] shall be in conformity with the United Nations Convention on the Law of the Sea and with all generally accepted relevant international instruments, such as the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

14. States Parties shall consider entering into bilateral or regional agreements to facilitate cooperation in applying appropriate, efficient and effective measures to prevent and suppress the illegal trafficking in and transporting of migrants by sea. States Parties shall also encourage the conclusion of operational arrangements in relation to specific cases (ad hoc arrangements).

III. Implementation, cooperation and prevention measures

Article 7 bis *Implementation measures*

1. States Parties shall ensure that their law enforcement personnel and officers act with full respect for the person and dignity of those involved in the illegal trafficking in and transporting of migrants and shall dispense to them humanitarian treatment at all times, in particular to victims at the time of seizure or detention by reason of illegal trafficking and transport.

2. States Parties shall grant migrants and their relatives access to the domestic courts and competent authorities for the purpose of instituting liability proceedings against a member or members of an organized criminal group for illegal trafficking and transport of which they are subject. Their domestic law shall provide for procedures in order that migrants and their relatives can obtain compensation for loss or damage sustained by them by reason of illegal trafficking and transport.

3. States Parties shall make available to migrants and their relatives relevant information concerning judicial and administrative procedures for instituting liability proceedings against a member or members of an organized criminal group and for obtaining compensation.

4. States Parties shall afford due assistance to migrants whose health, person, life, safety or liberty is endangered by reason of illegal trafficking and transport.

5. At the time of any seizure or detention, those involved in illegal trafficking and transport shall be informed of their right to the protection and assistance of the consular or diplomatic authorities of the State of which they are nationals.

Article 8 *Compliance with measures and arrangements*

1. States Parties shall adopt all legislative and administrative measures necessary to comply with the obligations deriving from this Protocol [Instrument], having respect for the principles of sovereignty, territorial integrity and non-interference in the internal affairs of States.

2. States Parties shall consider the conclusion of bilateral or regional agreements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent, combat and eradicate the illegal trafficking in and transporting of migrants, in accordance with this Protocol [Instrument]; or

(b) Enhancing the provisions of this Protocol [Instrument] among themselves.

Article 9²⁶ *Information*

1. Each State Party shall take the necessary measures to ensure the strengthening or implementation of information programmes to increase public awareness of the fact that the

²⁶ Previously appeared as article 10.

illegal trafficking in and transporting of migrants is a criminal activity frequently perpetrated by organized criminal groups for their own advantage and is highly perilous for those involved.

2. States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from becoming victims of transnational organized criminal groups.

3. Without prejudice to the achievement of the objectives of this Protocol [Instrument], States Parties shall exchange information among themselves on:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation suspected or known to be used by organized criminal groups involved in the illegal trafficking in and transporting of migrants;

(b) Identification and methods of organized criminal groups known or suspected to be involved in the illegal trafficking in and transporting of migrants;

(c) Authenticity and proper form of travel documents issued by a State Party, and advice in cases of theft or misuse of issued or blank travel or identity documents;

(d) Means and methods of transportation and concealment of persons, the unlawful alteration, reproduction or acquisition or misuse of travel or identity documents used in the illegal trafficking in and transporting of migrants and ways of detecting them;

(e) Legislative experiences, practices and measures to prevent, combat and eradicate the illegal trafficking in and transporting of migrants; and

(f) Transfer of relevant scientific and technological information that may be used for law enforcement, thereby enhancing their ability to prevent, detect and investigate the illegal trafficking in and transporting of migrants and to prosecute the members of organized criminal groups.

Article 10²⁷
Prevention

Each State Party shall endeavour to adopt such measures as it may consider necessary to detect and prevent the illegal trafficking in and transporting of migrants between its territory and that of other States Parties, by strengthening border controls.

Article 11²⁸
Training and skills development

1. Each State Party shall provide specialized training and skills development in order that immigration personnel and officials and those concerned with the prevention of illegal trafficking in and transporting of migrants dispense humanitarian treatment at all times, in particular to victims at the time of any seizure or detention by reason of illegal trafficking and transport.

2. States Parties shall cooperate with each other and, as appropriate, with competent international organizations to prevent, combat and eradicate the illegal trafficking in and transporting of migrants and to protect the rights of victims of such illegal trafficking and transport, thereby achieving the objectives of this Protocol [Instrument].

3. Each State Party shall, in accordance with its means, provide the necessary resources, such as vehicles, computer systems and document readers, to combat the illegal

²⁷ Previously appeared as article 11.

²⁸ Previously appeared as article 14.

trafficking in and transporting of migrants. States Parties with relevant experience shall provide technical assistance to States that are frequently used as States of origin or as transit States for the illegal trafficking in and transporting of migrants.

IV. Final provisions

Article 12²⁹
Implementation

For the purpose of examining the progress made by States Parties in achieving the implementation of the obligations undertaken in this Protocol [Instrument], States Parties shall provide periodic reports to the Conference of the Parties to the Convention.

Article 13³⁰
Signature, accession, ratification and entry into force

1. This Protocol [Instrument] shall be open for signature, by any State that has signed the Convention, at United Nations Headquarters in New York until [...]. Thereafter, it shall be open for accession by any State Party to the Convention.

2. This Protocol [Instrument] shall be subject to ratification, acceptance, approval or accession. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

3. This Protocol [Instrument] shall enter into force on the thirtieth day following the date of deposit of the sixtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. In the event that the deposit of the sixtieth instrument of ratification, acceptance, approval or accession occurs prior to the entry into force of the Convention, this Protocol [Instrument] shall not enter into force until the entry into force of the Convention.

Article 14³¹
Withdrawal

1. Any State Party may withdraw from this Protocol [Instrument] by written notification to the Secretary-General of the United Nations.

2. Withdrawal shall take effect twelve months after the date on which notification is received by the Secretary-General of the United Nations.

²⁹ Previously appeared as article 16.

³⁰ Previously appeared as article 17.

³¹ Previously appeared as article 18.

Article 15³²
Depositary

The original of this Protocol [Instrument], of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

³² Previously appeared as article 19.