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Proposals and contributions received from Governments

United States of America: amendments to chapter II of the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime

1. In an effort to advance the discussion on chapter II of the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, the United States of America proposes that the following amended text of chapter II be used as the basis for discussion during the ninth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime.
2. Except where indicated otherwise, the attached draft is identical to the revised draft text of chapter II found in document A/AC.254/4/Add.1/Rev.5. All of the changes concern developments from previous sessions and thus this proposed amended text is more current than document A/AC.254/4/Add.1/Rev.5. Some of the proposed changes to the revised draft text (A/AC.254/4/Add.1/Rev.5) reflect specific comments made by delegations at previous sessions. Other proposed changes seek to make the language of the revised draft text (A/AC.254/4/Add.1/Rev.5) conform with that of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the "1988 Convention") and improvements suggested by a number of delegations at previous sessions. Finally, it is proposed to delete general references to international law, including international humanitarian law and international human rights law, because these matters will be addressed in the general saving clause of the Protocol (article 15 *bis*). This is consistent with the approach taken in the other provisions of this Protocol, as well as in the draft Convention and other draft Protocols.
3. Additions to the revised draft text (A/AC.254/4/Add.1/Rev.5) are underlined; deleted language has been scored through.

4. Each amendment to the revised draft text (A/AC.254/4/Add.1/Rev.5) is explained in the footnotes.

II. Smuggling of migrants by sea

Article 7

Cooperation and mutual assistance

1. States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in conformity with the international law of the sea.¹

~~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, though 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 smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance within the means available to them.~~²

Article 7 bis

Measures against the smuggling of migrants by sea

~~1. 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, though 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 smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance within the means available to them.~~³

2. 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~~ involved in the smuggling 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*:

¹ This paragraph has been amended to reflect the language of article 17, paragraph 1, of the 1988 Convention. A generic reference to “international law” will not be necessary in this article as long as the Protocol contains a properly formulated general saving clause. The current formulation of this saving clause (article 15 *bis*) specifies that nothing in the Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law. However, because chapter II applies only at sea, it is appropriate to refer generally to the “international law of the sea”. Accordingly, a reference to “international law of the sea” should be added to article 15 *bis*. Finally, it would also be appropriate to retain a general reference to “international law of the sea” in this chapter, although a specific reference to the United Nations Convention on the Law of the Sea, as proposed by some delegations, would be inappropriate since not all States are parties to that Convention.

² As proposed by the delegation of the Netherlands and other delegations, this paragraph has been moved to article 7 *bis* without change.

³ This paragraph was originally article 7, paragraph 2. No changes have been made to the text contained in document A/AC.254/4/Add.1/Rev.5, except that the word “engaged” has been changed to “involved.”

- (a) To board the vessel;⁴
- (b) To ~~inspect~~ search the vessel; and⁵

(c) ~~If evidence is found that the vessel is engaged of involvement in the smuggling of migrants is found, to take appropriate action with respect to the vessel, persons and cargo on board, as [expressly] authorized by the flag State [in accordance with article 7 *ter* of this Protocol].~~⁶

~~23.~~ A State Party that has taken any action in accordance with paragraph ~~1~~ 2 of this article shall promptly inform the flag State concerned of the results of that action.

~~34.~~ A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made pursuant to paragraph ~~1~~ 2 of this article.

~~45.~~ A flag State may, consistent with article 7, ~~paragraph 1,~~ of this Protocol, 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[, including the use of force].~~⁷ A State Party shall take no additional action without the express authorization of the flag State, except those necessary to relieve imminent danger ~~{to the lives or safety of persons}~~ or those which follow from relevant bilateral or multilateral agreements.⁸

~~56.~~ States Parties shall designate an authority or, where necessary, authorities:

- (a) To receive information on the smuggling of migrants mentioned in paragraph ~~3~~ 4 of this article; and

⁴ As proposed by the delegation of Mexico and other delegations, the word “*buque*” should be used in the Spanish text of the document.

⁵ Subparagraph (b) has been amended to conform to the language of article 17, paragraph 4 (b), of the 1988 Convention.

⁶ The phrase “as expressly authorized by the flag State” duplicates the chapeau, which provides that “the flag State *may authorize* the requesting State” to take certain measures, and should therefore be deleted. Additionally, the right of the flag State to place explicit conditions on the boarding State is clearly recognized in article 7 *bis*, paragraph 4 (now paragraph 5). Reference to article 7 *ter* at the end of the sentence is also superfluous and should be deleted. Subparagraph (c) has been amended to reflect the language of article 17, paragraph 4 (c), of the 1988 Convention.

⁷ The first sentence has been amended to reflect the language of article 17, paragraph 6, of the 1988 Convention. As proposed by the delegation of Mexico and other delegations, the reference to “use of force” has been deleted. However, deletion of this language should not be interpreted as precluding a flag State from imposing limitations on the use of force by the boarding State. Nor should deletion of this language be interpreted as precluding the use of force by the boarding State under appropriate circumstances (e.g. authorized by the flag State, exercise of the inherent right of self-defence or defence of migrants) in accordance with international law.

⁸ As proposed by the delegation of Germany and other delegations, deletion of the square brackets around the words “to the lives or safety of persons” clarifies the meaning of the words “imminent danger”. If delegations are unable to reach consensus on this issue, one alternative would be to delete the second sentence in its entirety, consistent with article 17, paragraph 6, of the 1988 Convention. The more general right of approach and visit, recognized by the international law of the sea, would be preserved under the general saving clause in article 15 *bis*.

(b) To receive and respond ~~as quickly as possible~~ expeditiously to requests for assistance, confirmation of registry or of the right of a vessel to fly their flags and authorization to take appropriate measures.⁹

Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.¹⁰

~~67. A State Party, which has~~ When there are reasonable grounds to suspect that a vessel is ~~engaged~~ involved in the smuggling of migrants by sea and ~~it is concluded in accordance with the law of the sea that the vessel is without nationality or has been~~ may be assimilated to a vessel without nationality, ~~States Parties shall~~ may board and ~~inspect~~ search the vessel, ~~as necessary.~~ If evidence ~~of involvement in confirming the smuggling of migrants~~ suspicion is found ~~during such inspection;~~ States Parties the inspecting State shall take appropriate ~~measures~~ action in accordance with relevant domestic and international law.¹¹

Article 7 ter
Safeguard clauses

~~1. Where there is evidence that a vessel is engaged in the smuggling of migrants and a State Party takes action in accordance with this Protocol and relevant domestic and international law, that State Party shall ensure the safety and the humane treatment of the persons on board and shall make sure that any action taken with regard to the vessel is environmentally sound.~~¹²

~~2. If any measures are taken against a vessel suspected of being engaged in the smuggling 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, the security of the vessel or its and the cargo, or to prejudice the commercial and/or legal interests of the flag State or any other interested State [ensure that the safety of human life at sea is not endangered and that the security of the vessel and its cargo and the commercial or legal interests of the flag State or any other interested State or party are not prejudiced].~~¹³

2. When there is evidence that a vessel is engaged in the smuggling of migrants, action taken by a State Party under this Protocol with regard to the vessel shall be, within the means available, environmentally sound.¹⁴

⁹ The term “expeditiously” expresses more urgency than the words “as quickly as possible”.

¹⁰ A new sentence has been added to this paragraph for consistency with article 17, paragraph 7, of the 1988 Convention.

¹¹ The changes to this paragraph are primarily editorial in nature. The reference to the law of the sea is redundant and has been deleted. In the first sentence, the word “shall” has been replaced with the word “may” to give the inspecting State the choice, in the light of all the circumstances, to board the vessel or not as it sees fit.

¹² With the exception of the requirement to ensure that action taken with regard to the vessel is environmentally sound, the rest of this paragraph duplicates the next paragraph, which addresses the safety of persons on board, and general saving clause, which addresses the applicability of international law, including international humanitarian and human rights laws. The redundant provisions should be deleted and the remaining text moved to paragraph 2, as indicated below.

¹³ The text has been modified to reflect the language found in article 17, paragraph 5, of the 1988 Convention. As suggested by the delegation of the Netherlands and other delegations, this provision is now paragraph 1.

¹⁴ This paragraph reflects the language that was retained from the original paragraph 1, as discussed in footnote 9 above.

~~2 bis. 3.~~ Where measures taken pursuant to this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.¹⁵

~~3.4.~~ 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 law of the sea.~~

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or affect:

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

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.¹⁶

~~5.4.~~ Any action taken at sea pursuant to ~~articles 7 to 7 quater of this Protocol~~ this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.¹⁷

~~5.6.~~ Measures taken, adopted or implemented pursuant to this Protocol shall be in conformity with international law.¹⁸

5. No action taken pursuant to this chapter shall be taken in the territorial sea, except with the permission of, or as otherwise agreed by, the coastal State.¹⁹

Article 7 quater Application

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 smuggling of migrants by sea. States Parties shall also

¹⁵ This provision simply repeats article 110, paragraph 3, of the United Nations Convention on the Law of the Sea and is therefore superfluous. A similar provision is not found in the 1988 Convention. Inclusion of such a provision could have the unwanted effect of discouraging the interdiction of suspect vessels at sea.

¹⁶ As proposed by the delegation of Singapore, this paragraph has been amended for greater consistency with article 17, paragraph 11, of the 1988 Convention and articles 21, 33 and 94 of the United Nations Convention on the Law of the Sea. As proposed by France and the United Kingdom of Great Britain and Northern Ireland, the words “adopted” and “implemented” have been retained in the chapeau to broaden the scope of the article. By retaining these words, regulatory and legislative measures, in addition to enforcement measures, must also be consistent with subparagraphs (a) and (b).

¹⁷ The words “this chapter” have been substituted for the words “articles 7 to 7 quater of this Protocol”.

¹⁸ This provision is redundant vis-à-vis the general saving clause article and should therefore be deleted.

¹⁹ As proposed by the delegation of Singapore, this paragraph has been added to clarify that coastal States have exclusive enforcement jurisdiction within their own territorial waters. The words “or otherwise agreed by” have been added to take into account the possibility that the coastal State may enter into ad hoc arrangements or bilateral or regional agreements to facilitate cooperation in preventing and suppressing the smuggling of migrants by sea.

encourage the conclusion of operational arrangements in relation to specific cases (ad hoc arrangements).²⁰

²⁰ In response to a request for clarification from the delegation of the Syrian Arab Republic, the term “operational arrangements” in the second sentence refers to arrangements, such as granting of authority orally or by facsimile, memoranda of understanding or memoranda of agreement, between enforcement officials (e.g. navy-to-navy or coast guard-to-coast guard) that do not rise to the level of an international agreement between States. Such ad hoc arrangements can be for a single interdiction operation against a specific vessel or may be a long-term arrangement between enforcement officials regarding how their operating forces will interact during joint interdiction operations.