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Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on its fifth session, held in Vienna from 4 to 15 October 1999

Addendum

Report of the informal consultations on the draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime, and the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime

Informal consultations on the draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime

1. At the informal consultations on the draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime, held from 4 to 6 October 1999, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime discussed articles 2-4 of the revised version of the draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.1/Rev.2). The discussion of articles 5 and 6 of the draft Protocol

was postponed pending the discussion of the parts of the draft Convention relating to the subjects dealt with in those articles. The Ad Hoc Committee welcomed the non-paper submitted by Austria and Italy (A/AC.254/L.71) and suggested that the practice of submitting non-papers should be followed for future informal consultations.

2. The observations and suggestions made during the informal consultations will be reflected in a revised version of the draft Protocol.¹

Article 2: Definitions

3. The discussion of article 2, subparagraph 1 (a), focused on whether the words “illegal residence” and “profit” should be deleted or retained. If those words were deleted from the text, subparagraphs (c) and (d) of paragraph 1 would also have to be deleted.

4. With regard to subparagraph 1 (b), there were three positions concerning the words “illegal entry”. The delegation of Mexico suggested replacing the words “illegal entry” with the words “irregular or non-documented entry”. The delegation of the United States of America suggested replacing the word “illegal” with the word “irregular”, while other delegations expressed their concern that the word “irregular” did not cover all forms of “illegal” conduct. The delegation of Japan expressed its concern that the scope of criminalization would not be clear under either option.

5. The discussion of subparagraphs 1 (e) and (g) was postponed.

6. There was convergence of views regarding subparagraph 1 (f); however, some delegations expressed concern about the exact meaning of the term “vehicle”.

7. With regard to paragraph 2, several delegations proposed to discuss the paragraph later, when article 4, on criminalization, and article 6, on jurisdiction, were discussed, or to move the paragraph to those articles. The Chairman requested the delegation of Austria to propose new language for paragraph 2 of article 2 for discussion by the Ad Hoc Committee.

Article 3: Purpose

8. The discussion of article 3 focused on whether to remove the brackets from subparagraph (a). It was decided to retain the brackets and to add the following text, as proposed by the United States: “when involving an organized criminal group as defined in the Convention”.

9. Regarding subparagraph (b) of article 3, some delegations preferred to add the words “as well as to protect the victims of such smuggling, including their human rights”, while others were of the view that human rights should be covered in article 5. The delegation of the Netherlands proposed to add the phrase “while protecting their human rights” as a compromise solution.

Article 4: Criminalization

10. With regard to article 4, paragraph 1, many delegations agreed on the proposal submitted by Canada and the United States (A/AC.254/L.76), except for certain wording such as “international travel” in subparagraph (b) (i), “possessing” and “involved” in subparagraph (b) (ii) and “acting on” in subparagraph (b) (iii). In addition, there was a discussion on whether the words “organized criminal group” should be in brackets. Some

¹ To be issued subsequently as document A/AC.254/4/Add.1/Rev.3.

delegations preferred a proposal by the Russian Federation that read “States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as criminal offences the activities of organized criminal groups relating to the organization, procuring and actual effectuation of the smuggling of migrants”, while the delegation of Mexico strongly suggested retaining paragraph 1 of option 1 of article 4.

11. With regard to paragraph 3, there was a convergence of views on subparagraphs (a), (b) and (c). Many delegations were of the view that subparagraph (d) needed to be clarified.

12. There was no objection to paragraph 4.

13. With regard to paragraph 5 (and 6), most delegations preferred option 2, while the delegation of the Syrian Arab Republic strongly suggested adding the words “and smuggling of” after the word “treatment” in subparagraph 5 (b) of option 2.

14. Regarding paragraph 7, many delegations stated that migrants were victims. Although other delegations did not agree, there was consensus that migrants should not be criminalized for being smuggled. Some delegations supported the proposals submitted by France (A/AC.254/L.77), while other delegations expressed concern about the clarity of the wording and the concept of that proposal. Some delegations expressed support for the proposal submitted by Canada (A/AC.254/L.59). Many delegations were of the view that the Protocol dealt with traffickers, instead of dealing with individual smuggled migrants. According to the delegation of the Netherlands, the best way to avoid parts of the Protocol unintentionally covering smuggled migrants was not by excluding migrants from the criminalization provision, but by excluding them in a more general sense from the scope of application of the Protocol. At the request of the Chairman, the delegation of the Netherlands and some other delegations undertook to draft a proposal in that sense, to be submitted for discussion at the sixth session of the Ad Hoc Committee.

15. Some delegations supported a proposal submitted by Morocco (A/AC.254/L.60), in which new text was introduced as paragraph 8 of article 4 or a new article 4 *bis*. Others opposed the proposal.

Informal consultations on the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime

16. In informal consultations held from 6 to 8 October 1999, the Ad Hoc Committee at its fifth session discussed the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.3/Rev.3).

17. Articles 1 and 2 of the draft Protocol were discussed. It was agreed to add new article 2 *bis*, on definitions. Consensus was reached on deferring the discussion on article 3 until the discussion on articles 2 and 2 *bis* had been concluded. The majority supported recommending to the plenary the use of a proposal made by Belgium, Poland and the United States to restructure the draft Protocol (A/AC.254/5/Add.13) as a basis for further discussion of the draft Protocol.

18. The observations and suggestions made during the informal consultations will be reflected in a revised version of the draft Protocol.²

Article 1: Purpose

19. Option 1 was considered preferable as the basis for discussion, although some delegations expressed the view that the first paragraphs of the two options should be merged. Consensus was reached on inserting the word “particularly” in front of the words “for the purpose of” in order to broaden the purpose of the Protocol, so that it would be applicable to forms of exploitation other than forced labour or sexual exploitation.

20. There were several suggestions to replace the word “punish” with the word “prosecute” or “combat”, or, alternatively, to add the word “prosecute” before the word “punish”.

21. The discussion of article 1, paragraph 2, was postponed until the rest of the draft Protocol was discussed.

Article 2: Scope of application

22. Consensus was reached on using option 1 of article 2 as the basis for discussion. There was no comment on paragraph 1.

23. Regarding paragraph 2, it was agreed to replace the phrase “for the purpose of sexual exploitation or forced labour” with the phrase “with the aim of submitting them to any form of exploitation, as specified in article [...]”, which would be put in brackets. The delegation of Japan proposed to replace the phrase “for the purpose of sexual exploitation or forced labour” with the phrase “for the purpose of profit by sexual exploitation or forced labour”. However, some delegations pointed out that this phrase should be refined in order to be clearer.

24. It was agreed to replace the word “kidnapping” with the word “abduction” and to insert the word “international” in brackets before the word “trafficking”. Some delegations suggested that the term “international trafficking” should be defined. A number of delegations wished to consider further what sort of international nexus should be required in order to trigger application of the Protocol, noting that this complex question was still being addressed in connection with the draft United Nations Convention against Transnational Organized Crime.

25. Furthermore, it was agreed to add footnotes on the following:

(a) The suggestion to move the definition of “trafficking in persons” to new article 2 *bis*, on definitions;

(b) The suggestion to add the words “especially women and children” after the word “persons” every time it appeared in the text, as indicated in footnote 2 of the draft Protocol contained in document A/AC.254/4/Add.3/Rev.3;

(c) The suggestion by some delegations to insert the words “debt bondage” in the text.

26. Regarding paragraph 3 of article 2, consensus was reached on replacing the phrase “under the age of consent in the jurisdiction where the offence occurs” with the phrase “under eighteen years of age”.

² To be issued subsequently as document A/AC.254/4/Add.3/Rev.4.

27. As the majority of the delegations had expressed the view that the scope of paragraph 3 should not be limited to “sexual exploitation”, it was agreed that the words “sexual exploitation” would be placed in brackets, to be changed at a later stage. However, some delegations expressed concern that an open-ended phrase might give rise to some problems in relation to the obligation of States regarding criminalization.

Article 2 bis: Definitions

28. It was agreed to use the proposal submitted by the United States (A/AC.254/L.54) as the basis for the discussion on definitions. In addition, the Chairman requested the delegation of the Netherlands to submit its proposal to replace the phrase “sexual exploitation” and its definition with a broader definition of slavery for discussion at the sixth session of the Ad Hoc Committee.

“Sexual exploitation”

29. Regarding the definition of “sexual exploitation”, consensus was reached on replacing the word “voluntarily” with the words “with free and informed consent” in subparagraph (a).

30. Also in subparagraph (a), it was decided to place the word “forced” in brackets before the word “prostitution”, with a footnote explaining that there were opposing views on whether the word “forced” should be included.

31. Regarding subparagraph (b), it was agreed to replace the words “participation in the production of pornographic materials” with the words “use of a child in pornography”.

32. It was also agreed to insert a footnote on the suggestion to include “paedophilia” in the definition of “sexual exploitation”, making reference to the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Alternatively, the delegation suggested it could be included in a definition of “sexual servitude”.

“Forced labour”

33. Regarding the definition of “forced labour”, the majority of delegations suggested inserting the phrase “for the purpose of this Protocol” at the beginning of the sentence.

34. It was agreed to place the words “or coercion” in brackets after the words “use of force” and to add a footnote indicating that several delegations had expressed the desire to consider the wording further.

Suggestions concerning other terms

35. The majority of delegations suggested keeping the definitions general, defining the term “trafficking in persons” rather than the term “trafficking in children” or the term “trafficking in women”. It was suggested by several delegations that the more specific terms could be defined at a later stage, if necessary.

36. Several delegations suggested defining the term “child” in this article. Delegations were invited to suggest additional definitions to be included in this article.
