

PROPOSED MULTILATERAL CONVENTION TO COMBAT ILLEGAL
MIGRATION BY SEA

The States Parties to this Convention,

HAVING IN MIND the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,

RECOGNIZING in particular that everyone has the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,

DEEPLY CONCERNED about the escalation of illegal migration flows arriving by sea which not only undermine the legal order in the countries concerned, but also endanger the lives of those attempting illegally to leave their own countries,

CONSIDERING that illegal migration flows seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation,

CONSIDERING further that these flows are a matter of grave concern to the international community as a whole,

CONVINCED of the urgent need to develop international co-operation between States in devising and adopting

SEMDOC

Statewatch European Documentation &
Monitoring Centre on justice and home
affairs in the European Union

PO Box 1516, London N16 0EW, UK
tel: 0181 802 1882 (00 44 181 802 1882)
fax: 0181 880 1727 (00 44 181 880 1727)

effective and practical measures for the preemption and prevention of illegal migration flows arriving by sea,

RECALLING that Resolution 51/62 of the General Assembly of the United Nations on "Measures to Prevent Illegal Immigration" mandated the United Nations Committee on Crime Prevention of Crime and Control to devise instruments to encourage international co-operation against this offence,

HAVING IN MIND resolution A. 584(14) of 20 November 1985, of the Assembly of the International Maritime Organisation, which called for development of Measures to Prevent Unlawful Acts which Threaten the Safety of Ships and the Security of their Passengers and Crews,

CONVINCED that illegal migration by sea and the aiding and abetting of this practice are serious transnational crimes which damage the International Community as a whole and that it is therefore necessary to draw up a specific collective Convention establishing the forms of international co-operation requiring the contracting States to exercise criminal jurisdiction to prevent and punish these crimes or to extradite those committing them at the lawful request of any other contracting State wishing to exercise its criminal jurisdiction against those responsible,

AFFIRMING that any matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

RECOGNIZING the need for all States, in combating illegal migration flows arriving by sea, strictly to comply with the rules and principles of general international law,

HAVE AGREED as follows:

Article I

For the purposes of this Convention, 'illegal migrants' means persons who are travelling illegally by sea bound for a country other than the one of which they are nationals. 'Ship' means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft.

Article II

1. This Convention does not apply to:

- (a) a warship; or
- (b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
- (c) a ship which has been withdrawn from navigation or laid up.

2. Nothing in this Convention affects the immunities of warships and other Government ships operated for non-commercial purposes.

Article III

1. The Parties shall co-operate to pre-empt and prevent illegal migration by sea in accordance with international maritime law.
2. The Parties shall adopt every legislative and administrative measure needed in order to comply with the obligations deriving from this Convention, in respect for the principles of sovereignty, territorial integrity and non-interference in internal affairs.

Article IV

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.

Article V

1. Each State Party which has reasonable grounds to believe that a ship flying its flag or flying no flag, or which is not registered in any country, is involved in the transport of illegal migrants may request the assistance of other States Parties to prevent this

traffic. The Parties involved shall offer all the assistance required in order to achieve this objective.

2. Each State Party which has reasonable grounds to believe that a ship flying the flag of or registered with another State Party, navigating freely in accordance with international law, is involved in the transport of illegal migrants may notify the State whose flag it flies and request a search of the shipping register, and, after receiving confirmation, may request authorization to adopt the necessary measures to guarantee the control and containment of the illegal transport of individuals bound for its territory, which may include verifying the ship's right to fly its flag, stopping the ship, boarding it and diverting it.
3. Activities related to verifying the ship's right to fly its flag, stopping, boarding and diverting the ship shall be performed in the following manner:
 - a) verifying the ship's right to fly its flag consisting in requesting information on the ship concerned, its nationality and the nationality of its crew, its port of departure and its destination. This request shall be made using appropriate VHF radio systems. In the absence of a radio link, the request shall be made by loud-hailers, appropriately drawing alongside the ship being investigated;

- b) stopping the ship: the ship may be ordered to stop or reduce speed appropriately, following the procedures mentioned in a) above, so that a team of inspectors may board the vessel using a dinghy or motorboat, under the orders of an officer, to ascertain the truth of the information communicated and to ascertain whether any illegal migrants are on board, taking account of any information supplied by the Harbour Master's Offices of the State of origin;
- c) on-board visit: when the ship is stopped or has changed course as ordered and at the speed ordered, the aforementioned inspection team shall board the ship to carry out the necessary documentary searches and inspections in order to ascertain whether it is involved in the transport of illegal migrants;
- d) diversion: if the ship refuses to permit an on-board visit or if the on-board inspection reveals that unlawful activities are being committed, the ship shall be ordered to return to a port in the State of origin. If the ship fails to comply with this order, it shall be escorted to the limits of the territorial waters of the State of destination and delivered into the hands of the competent police authorities so that the necessary statutory measures may be taken against it, and hence so that it can be seized, arrested and/or repatriated.

4. No activity undertaken within the scope of this article may in any way jeopardize the safety of the ship or the commercial interests of the State whose flag it flies or any other State, or interfere with the exercise of the rights of jurisdiction of any other coastal State.
5. The flag State may, in relation to the obligations referred to in paragraphs 1 and 2 of this article, issue its authorization subject to a reciprocity agreement.
6. Any State Party which has undertaken any action under the terms of this article shall promptly notify the flag State of the final outcome of the proceedings.
7. Each State Party shall appoint the competent authority, or competent authorities where necessary, for receiving and responding to the requests referred to in paragraphs 1 and 2 of this article. The appointment shall be communicated to the Secretary-General of the International Maritime Organization (hereafter referred to as the "Secretary-General") and to all the other Parties within one month of being appointed.

Article VI

1. This Convention applies if the ship is navigating or, according to its routing chart, is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the

lateral limits of its territorial sea with adjacent States.

2. Where there are clear grounds for believing that the offence is being committed, each State Party may enter and operate in the territorial waters of the State of origin of the illegal migrants within the area lying between the three-mile and the external limits, using its own naval ships or naval aircraft, and within the three-mile limit, including the internal waters, using motor boats and aircraft belonging to its own Harbour Masters Offices, in order to pre-empt and contain illegal migration flows.

Article VII

1. The State of destination of the illegal migration flow shall draw up the special Hydrolant on behalf of their State of origin to inform all the merchant marine authorities of third countries of the authority vested in it to take all the necessary measures to guarantee the containment and control of the illegal migration flows towards its coasts, by verifying the ship's right to fly its flag, stopping, visiting and diverting the ship.
2. The provisions of this Convention in no way jeopardize any rights acquired by third States (in good faith.)

Article VIII

Each State Party shall:

- (a) designate as soon as possible the ports to which any merchantman or naval ship caught red-handed transporting illegal migrants can be diverted;
- (b) take control of the ships referred to in paragraph (a) above which are diverted to its ports in order to prevent the commission of further illegal actions;
- (c) authorize the naval ships of the State of destination to put in at the ports designated for the purpose for technical purposes, even for extended periods of time;
- (d) provide berthing facilities and water supplies free of charge for the port visits referred to in paragraph (c) above.

Article IX

1. Any person commits an offence if that person unlawfully uses a ship to transport illegal migrants:
2. Any person also commits an offence if that person:
 - (a) attempts to commit the offence set forth in paragraph 1; or
 - (b) instigates another person to commit the offence set forth in paragraph 1; or
 - (c) abets the commission of the offence set forth in paragraph 1 perpetrated by any person or is otherwise

an accomplice of a person who commits such an offence;
or

(d) threatens to commit the offence set forth in paragraph 1.

Article X

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article IX when the offence is committed:

(a) on board a ship flying the flag of the State at the time the offence is committed; or

(b) by a national of that State.

2. A State Party may also exercise its jurisdiction over any such offence when:

(a) it is committed by a stateless person whose habitual residence is in that State; or

(b) during its commission a national of that State is seized, threatened, injured or killed; or

(c) it is committed in an attempt to compel that State to do or abstain from doing any act.

3. This Convention does not exclude any criminal jurisdiction established in accordance with national law.

Article XI

The flag State shall inflict appropriate punishments for the offences established in article XI taking into consideration the serious nature of the offences committed, such as custodial sentences or other forms of detention, fines and the confiscation of the ship used for the transport of illegal migrants.

Article XII

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceeding to be instituted.
2. Such State shall immediately make a preliminary enquiry into the facts, in accordance with its own legislation.
3. Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:
 - (a) communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

- (b) be visited by a representative of that State.
4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 1 are intended.
 5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article X, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article XIII

Each State Party shall refrain from instituting criminal proceedings for illegal migration against any illegal migrants who return home.

Article XIV

1. The offences set forth in article IX shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties to this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article IX. Extradition shall be subject to the other conditions provided by the law of the requested State Party.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article IX as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
4. If necessary, the offences set forth in article IX shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred by also in

a place within the jurisdiction of the State Party requesting extradition.

5. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article XII and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.
6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in article XII, paragraph 3, can be effected in the requesting State.
7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

Article XV

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set

forth in article IX, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties on mutual judicial assistance that may exist between them. In the absence of such treaties, States Parties shall afford each other assistance in accordance with their national law.

Article XVI

The States Parties shall co-operate, also preemptively, by making every possible effort to inspect any ship thought to be involved in the transport of illegal migrants. To this end, the States Parties shall exchange information in accordance with their national legislation and coordinate any other administrative measures adopted.

Article XVII

1. Each State Party shall, in accordance with its national law, provide to the Secretary-General as promptly as possible, any relevant information in its possession concerning:
 - (a) the circumstances of the offence;
 - (b) the action taken pursuant to the article XVI;

(c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

2. The information transmitted in accordance with paragraphs 1 above shall be communicated by the Secretary-General to all States Parties, to members of the International Maritime Organization to the other States concerned, and to the appropriate international inter-governmental organizations.

Article XVIII

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by any or all of the provisions of

paragraph 1. The other States Parties shall not be bound by those provisions with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General.

Article XIX

1. This Convention shall be open for signature on at the Headquarters of the Organization by all States and shall thereafter remain open for accession.
2. States may express their consent to be bound by this Convention by:
 - (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
 - (c) accession.
3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

Article XX

1. This Convention shall enter into force ninety days following the date on which States have either

signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession in respect thereof.

2. For a State which deposits an instrument of ratification, acceptance, approval or accession in respect of this Convention after the conditions for entry into force thereof have been met, the ratification, acceptance, approval or accession shall take effect ninety days after the date of such deposit.

Article XXI

1. This Convention may be denounced by any State Party at any time after the expiry of one year from the date on which this Convention enters into force for that State.
2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the Secretary-General.

Article XXII

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.

2. The Secretary-General shall convene a conference of the States Parties to this Convention for revising or amending the Convention, at the request of one third of the States Parties, which shall not be fewer than
3. Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

Article XXIII

1. This Convention shall be deposited with the Secretary-General.
2. The Secretary-General shall:
 - (a) inform all States which have signed this Convention or acceded thereto, and all Members of the Organization, of:
 - each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;
 - the date of the entry into force of this Convention;
 - the deposit of any instrument of denunciation of this Convention together with the date on which it is received and the date on which the denunciation takes effect;
 - the receipt of any declaration or notification made under this Convention;

(b) transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.

3. As soon as this Convention enters into force, a certified true copy thereof shall be transmitted by the Depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article XXIV

1. This Convention is established in a single original in the languages, each text being equally authentic.

PRESENTATION

This presentation provides you with information, with a view to gaining a consensus in principle on the initiative contained in the text circulated to you, i. e. the Proposed Multilateral Convention to Combat Illegal Migration by Sea (which, as is known, is the form of migration giving rise to most problems).

The following elements lie at the basis of the proposal:

- a) the considerable increase in illegal migration, with all its social, human and economic repercussions, not only in the country of destination, but also in the neighbouring countries, and hence in broad sectors of the international community;
- b) since 1990 Italy - the promoter of the initiative - was, as is known, particularly hit by this phenomenon which led to the implementation of a whole range of measures which, however, could prove to be not entirely effective, if they are not supported by an appropriate international understanding;
- c) on the other hand, it is appropriate to recall that even the United Nations were repeatedly concerned with international cooperation to combat illegal migration, in the framework of the work carried out by the Commission for the Prevention of Crime and Penal Justice. In this regard, reference can be made to the Sixth Session of the UN General Assembly, as well as to the efforts deployed up to now to create a preliminary approach to this problem by the Commission;
- d) in the light of the points raised above and considering the ever increasing awareness and availability of the international community towards the adoption of rapid and effective measures, maybe the times has come to develop, approve and implement an adequate international instrument capable

of classifying reception, transportation and landing of illegal migrants as an international offence, identifying at the same time the exercise of the relevant jurisdiction and the extradition of people charged with that offence.

This being said, the text of the Italian proposal, that the delegations of this group are kindly asked to consider, with a view to expressing their comments, contains some specific principles, and in particular:

- A) generally speaking, the codification of the notion of international offence for the illicit traffic and exploitation of illegal migration;
- B) the existence of this offence when transport by sea takes place intentionally in an illegal manner;
- C) the existence of an offence also in case of attempt, abetment or simply instigation or threat to commit it, in order to prevent the reoccurrence of criminal acts of this kind;
- D) the adoption by the legislations of the States Parties to the Convention of appropriate provisions, to adjust them to the spirit and the letter of the Convention and to make the offence of illicit traffic and exploitation of illegal migration punishable;
- E) the implementation of the required forms of international cooperation for a reciprocal judiciary and police assistance;
- F) by virtue and on the basis of the Convention, establishment of the legal bases for the extradition of people found guilty of the offence of illicit traffic and illegal migration;

G) non-institution of criminal proceedings for all illegal migrants who, having landed in the territory of a State Party to the Convention, return definitively in the territory of their State of origin.

Italy is aware that the adoption of such a Convention can lead to take a series of measures at the domestic and international levels; in any case, we believe that the initiative should be the object of a first and important favourable opinion by the working group on the law of the sea. Subsequently, it will be possible to involve other fora, among which - besides the Third Pillar - the IMO, which could guarantee a more rapid implementation than that which can be expected in the framework of the broader consensus of the United Nations.

The synthesis of the above indications would not be complete, were it not accompanied by the analysis - carried out by grouping together all similar provisions or by subject - of the different Articles of the proposed Convention, through which Italy tried to envisage and outline important initiatives on a subject having always sensitive and complex characteristics, and sometimes dramatic repercussions.

The points considered in the preamble provide a global framework of the reasons why the Convention seems to be necessary: the second last paragraph is particularly important, in that it summarises the gist of the understanding to be adopted, when envisaging also the obligation to institute criminal proceedings vis-à-vis those responsible or to refer them to the State requiring their extradition.

Articles I to V practically describe situations which occurred in the past or are likely to occur, whereas Article VI has an innovative nature, in that it envisages the possibility for any State Party to the Convention to enter and operate - in the presence of clear evidence - in the territorial waters of the State of origin of illegal migrants.

Article IX is equally important, in that it describes the characteristics of the criminal offence to be prevented and punished, on the basis of five examples: if the offence is really committed, or if there is an attempt, instigation or abetment or even threat to commit it. In this connection, we would also like to mention Article XIII, envisaging the possibility not to institute criminal proceedings for people returning to their country of origin, thus establishing a sort of drawing line between the

organisations and the subjects taking part in an illegal migration initiative they have subsequently disavowed voluntarily returning home.

In this connection, it seems appropriate to wonder whether the two above-mentioned Articles - IX and XIII - should be considered in a more immediate perspective, with a view to working out a provision specifying the difference between those morally responsible for the offence and the legal consequences entailed by it (organisers, accomplices, habitual criminals, etc.), and those only responsible for having believed and yielded to the mirage of illusion.

We would also like to submit to your attention the leading role of Articles XIV, dealing with extradition measures, and XVI, on cooperation among States, as a major action element to prevent the occurrence of the subject phenomenon. Equally important is also Article XVIII, envisaging the recourse to arbitration, should a dispute arise on the interpretation or application of the Convention. As to Articles XIX to XXIV, they were drawn up according to the usual practice in multilateral Conventions.

In conclusion, the text of the proposed Convention - which can be further improved - outlines some hopefully effective operational strategies aimed at stopping, reducing and possibly eliminating a phenomenon that, in the last few years, attracted the critical attention of the different Governments of the Union and brought about a series of domestic disorders, due to both its scope and its seriousness.

Finally, it seems appropriate to recall that, in developing the text of the proposed Convention, due account was taken of the Multilateral Understanding to Combat the Illegal Traffic of Drugs and Psychotropic Substances adopted by the United Nations in Vienna on December 20, 1988, and in particular of Articles 6 (extradition), 10 (international cooperation) and 17 (illegal traffic by sea).

It is evident that, irrespective of the text proposed, it will be necessary to adopt and implement a mechanism capable of managing the different operations required, also in order to provide clear and precise signs of absolute rejection of any form of illegal migration.