IMO

International Maritime Law Institute

Established under the auspices of the International Maritime Organization

A specialized agency of the United Nations

DRAFTING PROJECT

IMPLEMENTATION OF THE 2000 UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND SUPPLEMENTARY PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR INTO THE LEGAL SYSTEM OF THE REPUBLIC OF ITALY

A DRAFTING PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) AT THE IMO INTERNATIONAL MARITIME LAW INSTITUTE (MALTA)

2004/2005

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a. Introduction

The 2000 United Nations Convention against transnational organized crime seems *prima facie* to be exclusively addressing issues of penal law rather than dealing with aspects related to the maritime field. The reality is that the system meant to be created by the Convention and its related Protocols comprises various elements of a large spectrum covering, *inter alia*, the activity of maritime law enforcement as well as some developments on the concept of freedom of navigation on the high seas and on the other maritime zones subject to the jurisdiction of the coastal State.

In addition to that, the issue of illegal immigration via sea has become, in recent years, one of the issues of major concern of the Italian Government, which played a fundamental role in setting up the United Nations Conference, held in Palermo in the year 2000.

The Republic of Italy strongly wanted and eventually obtained the opportunity to organize the relevant event and to act as the promoting State of the initiative, due to the fact that both the transnational organized crime and the trafficking of illegal migrants by sea represented one of the most problematic emergencies that our Government had to face.

Nowadays the scenario is even more complicated by at least two relevant factors: the overwhelming threat posed by international terrorism, which affects in a very serious way the realisation of a system of maritime security and the expansion of the European Union and its maritime boundaries.

Especially the second aspect raises a series of questions that require a prompt answer by Member States, in terms of an effective exercise of jurisdiction, accompanied by a certain degree of uniformity in the application of rules governing the same subject-matter.

The area of illicit entry into the boundaries of Member States of the European Union and the related control of the immigration flows is technically a subject-matter that still entirely falls under the responsibility of each single State and therefore with no direct incidence on the EU legislation (for a deeper examination of this subject, complete of an exhaustive list of references, see the Technical-Legal Analysis in the part dealing with the impact on EU legislation).

Having said that, it is obvious that Italy, a maritime country with a strategic position in the Mediterranean, needs to avail itself of those legal instruments that are necessary for the pursuance and defence of the national interests. In this context, it is clear that the Convention and its Protocols are of a paramount importance in enabling States to cooperate and adopt such measures, in order to

successfully prevent the spread of this phenomenon and to establish the necessary conditions for the achievement of the international legal order on the seas.

The Convention, adopted by United Nations Resolution A/RES/55/25 on 15 November 2000, finally entered into force on 29 September 2003, on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, according to the proviso stated in article 39 of the Convention itself. Currently the status on ratification sees 147 signatories and 94 parties to it.

Regarding the supplementary Protocols (the first two ones were adopted by virtue of the aforementioned Resolution, while the third one was adopted lately, on 31 May 2001, by a different Resolution), we have the following situation:

a) Protocol against the smuggling of migrants by land, sea and air (entered into force on 28 January 2004, in accordance with article 22 of the Protocol itself and currently seeing 112 signatories and 64 parties to it). The need for such an international instrument originated from the United Nations Resolution A/RES/53/11 on 9 December 1999, by which the General Assembly tasked the *ad hoc* Committee to prepare a specific document devoted to the trafficking of migrants by sea (then followed by the extension also to the land and air scenarios).
b) Protocol to prevent, suppress and punish trafficking in persons, especially women and children (entered into force on 25 December 2003, in accordance with article 17 of the Protocol itself and currently seeing 117 signatories and 76 parties to it).
c) Protocol against the illicit manufacturing of and trafficking of firearms, their parts and components and ammunition (not yet entered into force and currently seeing 52 signatories and 30 States which ratified it).

Surprisingly, neither the Convention and therefore nor the other related legal instruments have been ratified by Italy and currently there is quite a determined movement (inspired by lobbies, mass media and public opinion) aimed to induce the Government to adhere to them, as a result of an increased demand for an enhanced maritime security and for the integrity of the national boundaries.

In this framework, the main objective is to provide the enforcement Agencies with a useful starting point for the future development of the legislation on this matter, focusing particularly on the aspects of maritime law enforcement related to the contrast and control of the trafficking of illegal migrants by sea.

This is an aim that can be successfully pursued by adhering to the Convention and to the supplementary Protocol as referred in letter a) listed above, but which also requires a further effort in establishing more specific norms, to be contained in the executive regulations to the law on the ratification.

This process seems to be necessary in order to harmonise the existing legislation on the matter with the principles and rules established on the international plane and, even more importantly, to tailor the new legal mechanisms to the very peculiar circumstances that characterise the involved Institutions on the domestic level.

b. Main contents and aims of the legislative intervention

The Convention is quite an exhaustive document and it contains a series of provisions that embrace various aspects, but fundamentally is aimed to determine a stricter legal regime in regard to those activities, for example international trade and transportation of goods and passengers, that might be capturing the interest of the criminal organizations.

The provisions contained herein are, in most cases, of a typical criminal law nature and according to article 3 (scope of application) the aim is to prevent, investigate and prosecute those offences that are established in the Convention itself.

The most important thing to clarify from the very beginning, however, is the fact that the crimes dealt with are to be transnational and involving an organized criminal group and therefore the Convention and the Protocol operate only if these two requirements are met.

A considerable high degree of autonomy is given to State Parties in establishing the way to carry out the treaty obligations, focusing on the adoption of those legislative instruments and other measures as meant to be necessary. Another fundamental element is represented by the international cooperation and mutual legal assistance to be rendered by State Parties, especially in the field of judicial proceedings related to confiscation and to the relevant issue of extradition.

Definitely very important, for the scope of the present drafting project, are also the provisions related to the law enforcement and to the measures adopted in this regard, aimed to enhance the cooperation between the States and their respective law enforcement agencies.

As a matter of fact, the Italian Navy very much relies on the possibility to be given a further legal basis in order to be able to operate at sea and tackle the illicit activity in a more definite framework, safeguarding itself from the very high risk that now characterises the operations against illegal immigration.

This is mainly due to the fact that the current legal scenario does not consent to proceed beyond a very basic enforcement, there being many so-called grey areas where the criminal organizations can easily subtract themselves from the proper exercise of jurisdiction both by coastal States and naval assets of any Nation that are operating on the high seas.

Especially this last point is worthy of a deeper analysis, due to the considerations that can be made with regard to the practical difficulties encountered by the enforcement authorities when dealing with the very few and limited exceptions to the general principle of freedom of the high seas, as stated in Part VII of the 1982 United Nations Convention on the Law of the Sea, as well as to the corollary of the exclusive jurisdiction of the flag State over the vessels flying its flag.

But the provisions that are of more direct interest for the fulfilment of the drafting project are contained in the supplementary Protocol against smuggling of migrants by land, sea and air, which will be the main object of the development of the present assignment.

However, it must be emphasized that if a State party intends to become party to the Protocol, it has to be party to the Convention as well and, in any case, the implementation and interpretation of the Protocol has to be seen under the light of the scope of the Convention.

c. The legal system of the Republic of Italy

Italy can be considered mainly as a monist country with regard to the process of ratification and implementation of International treaties into the domestic legal system, this happening by the direct and automatic incorporation of the treaty. Nevertheless, the enactment procedure might be utilised in some cases, when the necessity to have a prompt piece of legislation working on the domestic level is so evident that it is easier to reproduce the norms and apply them as they were originated internally.

The main reference in this regard has to be found in the norms of the Constitution, which establish the way the Italian legal system introduces international provisions on the internal plane and also how they should be interpreted when competing with the other sources of law.

Having premised that, it is then necessary to briefly familiarize with the procedure adopted in my country, which normally sees a very basic drafting for what regards the law of ratification itself, solely recalling the text of the international treaty (inserted as an annex at the end of the main articles of the law), which text is given the authority of internal law (basically an incorporation of the legal instrument into the body of the domestic legislation).

However if we go a step back we should notice that, according to the Constitution, the authority to negotiate and conclude treaties is given to the Government and therefore it is normal procedure to have the Executive Power submitting a draft Law on the ratification to the Parliament, for the subsequent formal approval. It is then clear that the activity concerning the actual set up of the legislative drafting and related technical activities, have to be carried out by the Government, within which there is usually a Ministry tasked to co-ordinate and follow up all the necessary steps and requirements in order to elaborate all documents and accomplish the formalities for the presentation of the Law project to the Chambers.

It is then a precise responsibility of the Presidency of the Council of the Ministers to issue the rules and the procedures for the emanation of the normative acts that fall under the competence of the Government (see for consultation the exhaustive list of references and guidelines on the last paragraph of this drafting project).

In this framework, the actual drafting of the Law provisions has to be accompanied by the following explanatory documents, which are to be considered as forming part of the whole drafting process:

a) *Introductory document for the Parliament*

   It consists in a brief explanation of the motives that have brought the Government to negotiate and conclude an International treaty and it is aimed to inform the Parliament on the opportunity to proceed on the ratification and implementation on the domestic level of the obligations assumed on the International plane.

b) *General report*

   This document has the function to give a general description of the contents of the instrument subject to the ratification and therefore basically it is a list of the articles with a brief explanation of them. The aim is mainly to provide the Members of the Parliament for a useful guidance in the comprehension and assimilation of the principles and provisions established in the treaty and, as a logical consequence, the language used is more generally descriptive rather than technical in strict sense.

c) *Technical-legal analysis*

   Differently from the General report, this document is based on an analysis of the most relevant provisions, having particular emphasis on the drafting technique and on the legal meaning. The document explains and motivates the necessity of the legislative intervention, by taking into proper account the insertion of the new piece of legislation within the consolidated legal

framework. The analysis also covers the basic structure to be given to the norms, especially with reference to the form they have to assume and to the position to be granted in the hierarchy of the legal sources.

A brief reminder has to be outlined, at this point in time, regarding the mandatory specification required for every single legislative act related to the financial burdens that may be consequent to its entry into force. In fact, article 81 of the Constitution establishes a very stringent caveat to the adoption of any Law that imposes new or additional costs for the State budget and therefore it is required to specify in the draft the existence of these financial obligations and the public accountability norms from where the necessary funds may be achieved.

d) *Analysis on the impact on pre-existing legislation*

Normally divided into two main parts (analysis of the intervention on one side and objectives and expected results on the other), this document is of a fundamental importance for the success of the drafting exercise. As a matter of fact, when introducing a new Law, the major concern is always related to the interactions and balance between the new legislation and the pre-existing norms governing the same subject-matter. The problematic issue of consistency with norms previously emanated is such a delicate one that it deserves the greatest interest of legal drafters, who are more often than not deeply involved in the research and citation of all necessary legislative references rather than in the pursuance of the appropriate wording.

However, it is definitely by the analysis on the impact that the proposed legislation can ultimately pass the test of adoptability.

d. The adopted method

First of all, the chosen matter is a very comprehensive one and therefore it would be overwhelming to elaborate a complete draft of all the provisions contained in the Convention and its Protocols. The preliminary step is to circumscribe the legal intervention and reduce the charge of work that otherwise would be beyond the scope of the drafting project. The idea is to adopt of course the Convention, which constitutes a *condicio sine qua non* for the adoption of the Protocols, but then followed by adhering only to the Protocol against the smuggling of migrants by land, sea and air, avoiding instead the implementation of the other Protocols, which do not contain any provisions related to the maritime field.

In the analysis and comment on the contents it will be obvious to limit the effort to the specific provisions which are related to maritime law and enforcement measures, that fall under the responsibility of the naval forces and of the other Agencies that operate at sea.

The further step is to follow the process of ratification of International treaties normally in use in the domestic legal system, as described in the previous sub-paragraph and therefore by elaborating all the relevant complimentary documents to the actual drafting of the provisions, and at the same time bearing in mind the considerations made on the necessity to essentially focus on the aspects of interest.

However when, as in our case, the International treaty itself is not exactly self-executing, due to the fact that some norms are deemed to be necessary in order to have the provisions effectively working on the internal level, the law of ratification refers to the issue of executive regulations to be emanated by the government as an exercise of the so-called delegated legislation.

The executive regulations are to be considered as a subsidiary source and they cannot govern and rule beyond the limits established by the law, but still they are of a fundamental importance because it is by them that the international provisions (which are normally generic and stated in accordance with principles valid for all States, but very often not directly applicable in a context that is affected by different rules and views) are effectively brought into action.

Moreover, it is in the executive regulations that the legal draft has to produce the most of its efforts and, consequently, is also where the results of the legislative intervention clearly show if they have been successful or not in pursuing the proposed aims.

According to the drafting procedure set up in my country, the same stages and related documents that are required for an ordinary law are mandatorily requested also for the executive regulations. However, due to the necessity to avoid repetition, that will add nothing useful to the exercise of drafting technique, this legislative project is characterized by a very important feature: only the actual text of the executive regulations is drafted, the same considerations and reasons for adopting the law of ratification itself being deemed to apply, *mutatis mutandis*, to the regulations.

In conclusion, it is fair to say that the most difficult part in the process of ratification of the two international legal instruments is to harmonize their provisions with the existing internal legislation and to provide the operating Institutions with an effective tool in contrasting the phenomenon of illicit trafficking of migrants by sea.

2. INTRODUCTORY DOCUMENT FOR THE PARLIAMENT

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Honourable Members of the Parliament,

Considering that the phenomenon of illegal immigration has become more and more relevant for our Country, especially with respect to the numerous cases of illicit entry of individuals into the sovereign territory, the Government emphasises the importance of adopting all the necessary measures in order to contrast and solve this problematic issue.

In this context, our legal system has already seen a recent intervention on this matter, namely the amendment of the Legislative Decree 25 July 1998 n. 286, which is the organic Statute concerning the discipline of immigration and status and conditions of the foreigners.

This amendment has been done by the Law 30 July 2002, n. 189, the so-called "Bossi-Fini" by the names of the two proposing Ministers and at the point in time of its emanation it provoked a series of discussions and political debates that involved also the media and the public opinion.

As we all know, this matter is such a delicate and sensitive one that requires that all possible efforts be made by the Institutions in order to achieve a certain degree of satisfaction and development.

The phenomenon comprises various elements to be taken into consideration and all of them are of a very significant importance but, from a Government's perspective, it is paramount to focus on the aspects related to the fight against transnational organized crime (and its connections with the increasing threat posed by international terrorism) on one side and to the safety of human life at sea on the other. The balance between these two aspects is the cornerstone of the proposed legislative intervention which is aimed to provide the national authorities with a flexible operational tool and, even more relevant, to enhance the uniformity and standardization of rules and procedures adopted on an international plane.

Illegal immigration and transnational crime are the concern of the international community as a whole and the only possible answer has to be found in the adoption of those instruments upon which all States may agree. The 2000 United Nations Convention against transnational organized crime and the supplementary Protocol against the smuggling of migrants by land, sea and air constitute a legal basis for both the current law enforcement activity and the future development of new measures to tackle this relevant issue.

This is even more true if we just consider the new dimension of this problematic issue, that is now affecting the policy of the whole European Union; and it is in this perspective that this legislative intervention has to be seen, especially when evaluating the peculiar circumstances, like for example the geographic position of Italy as the barycentre of the Mediterranean and the morphology of its

coasts, that render our Country the object of the daily flows of illicit immigration, which more often than not convey also an element that can jeopardize the political and social stability of the European Union as well as posing an incumbent threat on the security of its maritime boundaries.

It is also to be noted that it is in the interest of our Nation to promptly proceed to the emanation of this law of ratification, by taking into account that Italy has hosted the International Conference, held in Palermo in the year 2000, following which the Convention and the Protocol were adopted and also considering the relevant role played in that arena by our delegates who promoted the adoption of the two mentioned instruments.

As a final consideration, the Government wishes to highlight that the proposed Law project does not impose any new or additional financial obligations for the State budget, because the due activities are already carried out by the Institutions, which are involved in the vigilance of the maritime boundaries and prevention of illegal immigration.

3. GENERAL REPORT

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For the purposes of this drafting project, in the General Report there will be only the elaboration of those parts that are strictly connected with the issue of the Executive Regulations that, in other words, are the actual provisions of interest for the definition of a legal framework enabling the national Law enforcement Agencies (with particular regard to the role played by the Italian Navy in the context of the vigilance and operations taking place on the high seas) to adopt such measures as may deem be necessary in order to prevent and contrast the illicit trafficking of migrants by sea.
In any case, after having listed the provisions contained in the Law on the ratification, it is useful to distinguish between norms contained in the Convention and the provisions set out in the Protocol, considering that both instruments are entirely embodied in the Law as Annexes to it.

a) Law on the ratification

- Article 1 empowers the President of the Republic to proceed with the ratification of the Convention.
- Article 2 incorporates the Convention into the legal system by conferring full and integral execution to it.
- Article 3 authorizes the President of the Republic to ratify the Protocol, subsequently to the prior ratification of the Convention.
- Article 4 incorporates the Protocol into the legal system by conferring full and integral execution to it.
- Article 5 refers to the original text, translated into the Italian language, of both the Convention and the Protocol that are embodied in the Law as its Annexes.
- Article 6 establishes the necessity of the issue, by the Government, of Executive Regulations in order to implement the provisions of the Law.
- Article 7 deals with the modalities for the entry into force of the Law.

b) Convention

- Article 1 states the purpose of the Convention which is the promotion of the cooperation between States for the effective prevention of and the fight against transnational organized crime.
- Article 3 refers to the scope of application, by defining typologies of offences and crimes that must have also a transnational nature and involve an organized criminal group.

- Article 5 relies on States Parties for the adoption of such legislative and other measures as may be necessary to determine the nature of and the establishment as criminal offences of those activities listed in the Convention.
- Article 12 and Article 13 deal with the issue of confiscation and seizure of properties as a consequence of their use in the illicit activity.
- Article 15 covers the relevant subject of the exercise of jurisdiction by States Parties over the offences established in accordance with the Convention.
- Article 16 establishes the principle of the possible extension of the request of extradition for offences as defined according to the Convention.
- Article 18 defines a very relevant set of rules governing the mutual legal assistance between States Parties, which is of a fundamental importance for the further establishment of common legal procedures, regulating the prevention and enforcement activities taking place at sea. Such measures include, *inter alia*, investigations, prosecutions and judicial proceedings, exchange and sharing of relevant information, grant of judicial and administrative authorizations and derogations for the purpose of the Convention.
- Article 27 contains those provisions that, in accordance with article 18, are aimed to establish the cooperation among the Law enforcement agencies of the States Parties in order to combat the offences covered by the Convention. These norms are extremely relevant for the establishment of the standard procedures by which the maritime law enforcement agencies are called to operate on the high seas, where the legal ground for the exercise of jurisdiction over vessels flying a foreign flag are limited to the cases prescribed by the existing International Law.
- Article 37 defines the relations between the Convention and its supplementary Protocols. According to this article, if the Republic of Italy wishes to become a Party to the Protocol against the smuggling of migrants by land, sea and air, it must also be a Party to the Convention and, in addition to that, the Protocol has to be interpreted together with the Convention.

c) Protocol

- Article 2 states the purpose of the Protocol, which is to prevent and combat the smuggling of migrants, as well as to promote the cooperation among States Parties to that end. It also emphasizes that the aim of the Protocol is to fight transnational organized crime while protecting the rights of the smuggled migrants.

- Article 4 determines the scope of application, which refers to the prevention, investigation and prosecution of the offences and crimes established in the Protocol and that must have also a transnational nature and involve an organized criminal group.
- Article 5 sanctions the absolute freedom of the smuggled migrants from the criminal responsibility established in the Protocol.
- Article 6 relies on States Parties for the adoption of such legislative and other measures as may be necessary to determine the nature of and the establishment as criminal offences of the smuggling of migrants and other related cases.
- Part II (Smuggling of migrants by sea) constitutes the core provisions of this legal drafting project. The Protocol dedicates three articles specifically to maritime trafficking, due to its peculiarities and special legal regime, while no similar provisions are deemed to be as necessary for the trafficking that takes place on land and on air.
    - Article 7 (Cooperation) deals with the issue of enhanced cooperation among States to the maximum extent in order to prevent and suppress the phenomenon of illicit trafficking of migrants by sea. However, due to the transnational character that distinguishes the maritime scenario from the correspondent situations that happen on land and on air, the Protocol refers to the legal framework as governed by international maritime law. In this context, it is therefore necessary to tailor the juridical basis for the implementation of the provisions of the Protocol to the numerous norms that are set out by international law, especially with regard to those superior protected values and interests, such as for example the safety of navigation and of human lives at sea, that would presumably prevail, in case of conflict, over the pursuance of the aims of the Protocol.
    - Article 8 (Measures against the smuggling of migrants by sea) actually constitutes the most relevant set of rules with regard to the actions that take place at sea and therefore is worthy of a more detailed consideration, to be done by examining each single paragraph:

      - Paragraph 1 refers impliedly to the provisions contained in article 110 of the 1982 United Nations Convention on the law of the sea (UNCLOS), concerning the right of visit, but at the same time introduces also the possibility of the request of assistance to be addressed to the flag State in such cases where this is also a State Party to the Protocol.

      - Paragraph 2 is basically the development of what is stated in the previous paragraph and confers to the warships of any State Party an extension to the cases contemplated in the Protocol empowering the exercise of the right of visit. In fact, when a State Party has reasonable grounds to suspect that a vessel on the high seas, which is flying the flag of

another State Party, is involved in the illicit smuggling of migrants, then it is possible to request from the flag State an authorisation to undertake the measures that may be necessary for the contrast of this activity. These measures may include, but are not limited to, the boarding and the search of the vessel and, when deemed necessary, also other appropriate measures with respect to the vessel and persons and cargo on board (e.g. diversion, seizure, arrest).

- Paragraph 3 simply restates the necessity of keeping the flag State informed of any measure adopted in accordance with paragraph 2

- Paragraph 4 imposes an obligation on the requested flag State (being also a State Party) to promptly respond regarding the grant of the authorization. It does not contain, however, the so-called "48 hours rule" which is a usage among many States and also officially recognized in several bilateral agreements. According to this rule if a response is not given within 48 hours from the relevant request, then the requesting State may proceed by impliedly considering the consent of the flag State.

- Paragraph 5 reaffirms the principle of exclusive jurisdiction of the flag State over vessels flying its flag on the high seas and therefore confirms the absolute voluntary nature of any concession by the flag State on this regard.

- Paragraph 6 provides for another strategic concept in the pursuance of the aims of the Protocol: the designation, by each State Party, of an authority responsible for receiving and responding to the requests for assistance, exchange of information and also for the authorization to take appropriate measures as pointed out in Paragraph 2.

- Paragraph 7 refers instead to the case of vessels without nationality (or those assimilated to such vessels), which is however already regulated by the relevant domestic and international Law, in the sense of allowing any State to exercise jurisdiction over such vessels (see article 110 of the UNCLOS).

- Article 9 (Safeguard clauses) the rules established by this article are definitely relevant and somehow potentially limiting the effectiveness of the actual measures undertaken by the enforcement Agencies. However, it is pointed out at the very outset that nothing in this Protocol should prejudice the safety and the humane treatment of the persons on board, as well as the security of the vessel or its cargo. Mention is made also of the need not to prejudice the commercial or legal interests of the flag State or any other interested State. Similarly to what is stated in the above-mentioned article 110 of the UNCLOS, the system provides also for compensation for any loss or damage suffered by the vessel or by the other subjects involved in the enforced measures.

- Part III (Prevention, cooperation and other measures) consists of articles 10 to 18 and provides for more specific norms regulating the judicial, administrative and operational cooperation among States Parties, with particular relevance assigned to the standardization of the procedures and also for the possible conclusion of bilateral or regional agreements or operational arrangements and understandings, aimed to enhance the effectiveness of the measures taken for the fulfilment of the purposes of the Protocol.

4. TECHNICAL-LEGAL ANALYSIS

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1. Technical aspects in strict sense

a) Necessity of the legislative intervention: analysis of the legal framework

The legislative intervention finds its *raison d'etre* in the necessity to ratify the Convention and its supplementary Protocol and implement them into the legal system of the Republic of Italy.

If our Country does not proceed to the ratification of the afore-mentioned international instruments and to the issue of the related subsidiary Regulations, the already serious problem of illegal immigration would be tackled only by virtue of the recently emanated legislation on this specific matter, which is deemed to be lacking in many aspects.

Furthermore, one must also highlight the opportunity to move towards an area governed by common rules and, in this regard, the provisions stated in the Protocol appear to be particularly addressed in this direction, in the sense of providing for a shared legal ground in the application of the law at sea and also for its enforcement.

b) Legal impact

The main effect of the proposed legislation is to fill in the existing gap between international law and domestic law with regard to the actual rules governing the exercise of jurisdiction by the coastal State on those maritime spaces which are mainly subject to the general principle of freedom of navigation and exclusive jurisdiction of the flag State over those vessels that are flying its flag. By enlarging the sphere of application of the principle of protection of the interests of the coastal State, as well as of the measures aimed to enhance the maritime security on the high seas, the system introduced by the ratification of the afore-mentioned international legal instruments determines a positive result for the stability and certainty of our national legal system.

Nevertheless, the enforcement measures that may be carried out in pursuance of the introducing legislation should in most cases yield to the prevailing norms of such a different nature that in most cases, while defending very valuable principles, are at the same time bearing in the opposite direction for what regards the prevention and suppression of the criminal phenomena. These are the norms related to the safeguard of human lives at sea and

to the safety of navigation, and which are deemed to be of paramount importance in the context of any situation that occurs on the seas.

c) *Incidence of the proposed provisions over the existing laws and regulations*

The Law on the ratification is expressly consistent with all relevant legislation on the domestic level and compliant with the existing international law.

d) *Impact on EU legislation*

The sphere of competences of the European Union is truly widespread and even more and more expanding according to the text of the European Constitution, but on the other hand the subject-matter which is the object of this legislative intervention mainly falls under the competence of the single Member States and the incidence on the EU legislation is peripheral in most aspects. However, the issue of illegal immigration can be perceived in its European dimension, especially when considering the system created by the Schengen Agreement and in the perspective of a common EU policy in respect of the maritime security. The proposed legislative intervention presents all the necessary characteristics to be deemed to be potentially in harmony with any prospective EU legislation in this regard. In fact, considering the Union competences as stated in Title III of the European Constitution (signed in Rome on 29 October 2004 and which will enter into force on 1 November 2006), one should notice that the area regulated by this legislative intervention does not fall under the exclusive competence of the EU (see article I-13) and it cannot even be regarded as being a direct expression of the shared competence as described in article I-14. With regard to this last aspect, it is correct to say that there would be potentially room for the development of a prospective legislation in the area of freedom, security and justice, also in the framework of a future common foreign and security policy, as stated in article I-16 and in articles I-40 to I-43. However, even the impact on this prospective EU legislation is quite limited, especially when considering the provisions stated in articles III-265 to III-268 (policy on border checks, asylum and immigration), which refer to the pursuance of a common policy in the framework of the existing international law (and the ratification of the Convention and Protocol goes clearly in this direction), without prejudice to the competence of Member States concerning the geographical demarcation of their borders.

A final remark has to be made with reference to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Union (Dublin Convention, signed on 15 June 1990 and entered into force on 1

September 1997, which has been ratified by Italy with Law 23 December 1992, n. 523). The Dublin Convention has to be seen in the light of its coexistence with the Schengen Agreement (in this regard, Italy has ratified the Bonn Protocol of 26 April 1995 with Law 16 June 1997, n. 178, but the implementation process is still at an early stage), focusing on the Member States' responsibility for the control of the entry of individuals into the territory of the Union and, at the same time, giving effect to the provisions addressing the issue of asylum. The impact of the legislative intervention in this regard is very peripheral and, in any case, the authority responsible for all the matters that we are considering (boundaries control, illegal immigration and examination of asylum requests) is, according to domestic legislation, the Ministry of Interior.

e) Impact on domestic regional legislation

According to article 117 of the Constitution, the subject-matter covered by the proposed legislation is covered by an exclusive reservation in favour of the Parliament and therefore the impact on domestic regional legislation is excluded.

f) Consistency with laws establishing delegated legislation

The Law on the ratification itself requires an exercise of delegated legislation (precisely by virtue of article 6), conferring to the Government the power to issue Executive Regulations under article 17, paragraph 1, letter b) of the Law 23 August 1988, n. 400.

2. Drafting elements and legal terminology

a) The legal definitions that have been introduced by the Law on the ratification and by the Executive Regulations are consistent with all terminology so far adopted in the legislation.

b) The legislative references and cross-references contained in the acts are correctly done.

c) The only modification and integration of existing provisions is contained in article 13 of the Executive Regulations. The intervention is allowed due to the fact that the modified legislation is ranked lower than the Executive Regulations in the hierarchy of sources.

3. Further elements

a) There are no pending judicial proceedings in front of the Constitutional Court for questions related to the same subject-matter.

b) There are no simultaneous projects of Law in front of the Parliament covering the same subject-matter.

c) Article 5 of the Law indicates that both international instruments are embodied in the Law, by adding them as Annexes. The incorporated version is an official translation into the Italian language, which has to be applied as an integral part of the Law after the entry into force thereof. In case of any dispute arising from the interpretation of the Convention and of its supplementary Protocol, the translated version shall apply on a domestic level. In case of any dispute involving State responsibility, the provisions of the 1969 Vienna Convention on the law of treaties shall apply and in particular the provisions contained in article 33.
However, in the absence of any specific provisions dealing with the choice of the adopted language, it has to be said that the normal procedure followed by Italy is to refer either to the French or to the English version.

5. ANALYSIS ON THE IMPACT ON PRE-EXISTING LEGISLATION

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A) Analysis of the intervention

The intervention has to be seen in the framework of a consolidated legal regime of the maritime spaces, due to the fact that Italy has already ratified and implemented the most relevant international conventions governing this subject-matter.

The aim is to integrate the legal basis in those areas that are not sufficiently allowing the coastal State to exercise proper jurisdiction in respect of the defence of maritime boundaries and the enforcement of the related laws and regulations.

The structure of the provisions related to maritime law enforcement derives from article 17 of the 1988 Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances, ratified by the Law 5 November 1999, n. 328. However, neither the Law on the ratification nor the Executive Regulations contain any substantial difference from the model of the above-mentioned Convention, especially having regard to the exercise of the recognized freedoms on the high seas and to the powers of the coastal State.

Finally, the adoption and implementation of the proposed legislation does not impose any financial obligation on the State budget.

B) Objectives and expected results

The ratification and implementation of the Convention and supplementary Protocol:

a) introduces a further legal basis in favour of the enforcement Authorities that operate at sea for the fight against illicit smuggling of migrants;

b) complements and restructures the already established organization for the prevention and suppression of illicit activities occurring at sea.

6. LAW ON THE RATIFICATION

6. LAW ON THE RATIFICATION

Law 1 January 2005, n. 1

Ratification and execution of the United Nations Convention against transnational organized crime and supplementary Protocol against the smuggling of migrants by land, sea and air, done in Palermo and adopted on 15 November 2000, with Annexes 1 and 2.

1. The President of the Republic is hereby authorised to ratify the United Nations Convention against transnational organized crime, done in Palermo and adopted on 15 November 2000.
2. Full and integral execution is given to the Convention as referred to in article 1 of this Law, from the date of entry into force of this Law as referred to in article 7 of this Law, according to the provisions stated in article 38 of the Convention.
3. In accordance with the provisions stated in articles 1 and 2 of this Law and with the provisions stated in article 37 of the Convention, the President of the Republic is hereby authorised to ratify the Protocol against the smuggling of migrants by land, sea and air, supplementing the Convention, done in Palermo and adopted on 15 November 2000.
4. Full and integral execution is given to the Protocol as referred to in article 3 of this Law, from the date of entry into force of this Law as referred to in article 7 of this Law, according to the provisions stated in article 38 of the Convention and in article 22 of the Protocol.
5. The original text of the Convention as referred to in article 1 of this Law and the original text of the Protocol as referred to in article 3 of this Law, constitute an integral part of this Law and are reported, in their official translation into the Italian language, respectively in Annexes 1 and 2.
6. Within three months from the date of entry into force of this Law, the Government shall emanate executive Regulations for the implementation of this Law, in the form of a Decree of the President of the Republic, by virtue of the provisions stated in article 17, paragraph 1, letter b) of the Law 23 August 1988, n. 400.
7. This Law shall enter into force on the day immediately following its publication in the Official Gazette of the Republic of Italy.

7. EXECUTIVE REGULATIONS

7. EXECUTIVE REGULATIONS

According to article17, paragraph 1, letter b) of the Law 23 August 1988, n. 400, the Government has the power to issue Executive Regulations to be eventually emanated as a Decree of the President of the Republic.

The Law on the ratification of the Convention and its supplementary Protocol are not self-executing and therefore the provisions need a further specification, especially in order to harmonize them with the already existing discipline on the matter of illicit immigration occurring at sea.

These Executive Regulations have also the function to repeal the Inter-ministerial Decree 19 June issued by the Minister of the Interior, in conjunction with the Ministers of Defence, Economy and Finances, Infrastructures and Transport; containing executive provisions to article 11 of the Law 30 July 2002, n. 189.

The other relevant aspect to be taken into consideration is the implied hierarchy of the legal interests that are covered by the norms in question. The norms aimed to suppress the phenomenon of illegal immigration necessarily yield, in case of concurrent application, to the superior values of preserving human lives at sea and ensure at any time the respect for the dignity of persons, as the migrants, whose behaviour can never be criminalized or assimilated to the illegal activities of the organized crime. In this perspective it is clear that any enforcement measure taken for the purpose of the contrast of illegal immigration has to be conducted in accordance with the relevant applicable provisions established by the International Conventions (namely UNCLOS, SOLAS and SAR) to which Italy is party, as well as in compliance with the norms of general international law.

In the draft there are references to the guidelines and recommendations of the International Maritime Organization, which issued the “Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea”.

Reference is also made to the analogous legislative measures undertaken by other Countries, in the framework of a comparative Law analysis. The clearest example in this regard is the case of France, which has ratified the Convention and the supplementary Protocol on July 2002. The Law on ratification was also aimed to harmonize the new provisions with those established by Law 15 July 1994, n. 589, regarding the modalities for the exercise of policing of the high seas by the French enforcement agencies.

The matter of the exercise of policing of the high seas by the coastal State agencies is quite relevant for Italy, due to the fact that the involved Institutions are very often conducting concurrent activities but, at the same time, having a different functional and hierarchical dependency.

Therefore one of the main objectives of these Executive Regulations is to create a system for the exercise of enforcement activities at sea in the framework of well-established rules and competences, by determining for each Institution the sphere of responsibilities and the required procedures for carrying out the tasks.

Finally, a mention of a technical nature has to be done for the problematic issue of the contiguous zone which has not been proclaimed by Italy and the outer limits whereof have never been defined.

The legislator has however introduced this concept in article 11 of the Law 30 July 2002, n. 189 and therefore it is necessary to deal with it in such a manner as to avoid possible misunderstandings.

The solution found in the drafting is to refer to a maritime space internationally known as contiguous zone and so referring to the relevant provisions established by the 1982 United Nations Convention on the Law of the Sea.

DECREE OF THE PRESIDENT OF THE REPUBLIC

(Executive Regulations of the Law 1 January 2005, n. 1)

The President of the Republic

Seen article 87 of the Constitution;

Seen article 6 of the Law 1 January 2005, n. 1 on the ratification and execution of the United Nations Convention against Transnational Organized Crime and supplementary Protocol against the Smuggling of Migrants by Land, Sea and Air, done in Palermo and adopted on 15 November 2000;

Seen the Law 2 December 1994, n. 689 on the ratification and execution of the United Nations Convention on the Law of the Sea, done in Montego Bay and adopted on 10 December 1982;

Seen the Law 5 November 1999, n. 328 on the ratification and execution of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done in Vienna and adopted on 20 December 1988;

Seen the Law 23 May 1980, n. 313 on the ratification and execution of the International Convention for the Safety of Life at Sea, done in London and adopted on 1 November 1974, according to the subsequent modifications;

Seen the Decree of the President of the Republic 8 November 1991, n. 435 containing the Executive Regulations of the Law as referred to in the previous paragraph;

Seen the Law 28 December 1989, n. 422 on the ratification and execution of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done in Rome and adopted on 10 March 1988;

Seen the Law 3 April 1989, n. 147 on the ratification and execution of the International Convention on Maritime Search and Rescue, done in Hamburg and adopted on 27 April 1979;

Seen the Decree of the President of the Republic 28 September 1994, n. 662 containing the Executive Regulations of the Law as referred to in the previous paragraph;

Seen the organic Statute concerning the discipline of Immigration and Status and Conditions of the Foreigners, adopted with Legislative Decree 25 July 1998 n. 286;

Seen the modifications to the organic Statute as referred to in the previous paragraph, introduced by Law 30 July 2002, n. 189;

Seen the Inter-ministerial Decree 19 June issued by the Minister of the Interior, in conjunction with the Ministers of Defence, Economy and Finances, Infrastructures and Transport; containing executive provisions to article 11 of the Law 30 July 2002, n. 189;

Seen the organic Law 18 February 1997, n. 25, containing the attributions of the Minister of Defence and the organization of the Ministry of Defence and of the Armed Forces;

Seen the Decree of the President of the Republic 25 October 1999, n. 556, containing the Executive Regulations of the Law as referred to in the previous paragraph and seen in particular article 15 which attributes to the Commander in Chief of the Navy the responsibility for the defence of the national maritime boundaries and the authority of the law enforcement on the maritime and economic activities taking place in the areas outside the outer limits of the territorial sea;

Seen article17, paragraph 1, letter b) of the Law 23 August 1988, n. 400;

Acquired the advise of the State Council;

Seen the deliberations of the Council of the Ministers;

Considered the proposal of the Minister of Justice, in conjunction with the Ministers of Interior, Defence, Economy and Finances, Infrastructure and Transport, Foreign Affairs;

EMANATES

1. (Use of terms)

   For the purposes of these Regulations:

   a) "Protocol" shall mean the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, ratified by Law 1 January 2005, n. 1.

   b) "Assets" shall mean the aero naval forces made available by the Navy, Police Forces and Coast Guard.

   c) "Police Forces" shall mean the Guardia di Finanza, the Carabinieri, the State Police and all other governmental bodies engaged in the police service.

   d) "Surveillance" shall mean any activity carried out by the Navy, the Police Forces and the Coast Guard for the gathering of relevant information on the illicit trafficking of migrants and the control of the maritime sea lines of communication that fall under the State jurisdiction.

   e) "Relief intervention" shall mean any action aimed to guarantee the safety of navigation and the safety of human life at sea.

   f) "Police intervention" shall mean any action aimed to guarantee the respect of the Law and to the repression of administrative violations and criminal offences.

   g) "Operations Coordination Centre" shall mean the designated authority responsible for the coordination at sea of the operations carried out in accordance with these Regulations.

2. (Scope of application)

   1. These Regulations, emanated by virtue of article 6 of the Law 1 January 2005, n. 1, govern the modalities and the terms for the definition of the competences and responsibilities of the national Institutions in the execution and implementation of the provisions established by the aforementioned Law.

   2. The aim of these Regulations is to provide for effective measures in order to prevent and combat the smuggling of migrants by sea, as well as to establish procedures between the national Institutions and the corresponding foreign Authorities.

   3. These Regulations govern vigilance and law enforcement activities carried out by the national Institutions against any vessel and person suspected to be involved in the illicit trafficking of migrants by sea.

4. These Regulations do not apply to foreign warships and to foreign governmental ships operated for non-commercial purposes.

3. (Designation of the National Authority)

   In accordance with the provisions of article 8, paragraph 6 of the Protocol, the designated National Authority is the Central Division of Immigration and Boundaries Police of the Public Security Department – Ministry of the Interior, from hereinafter known as the "Central Division".

4. (Duties and Responsibilities of the Central Division)

   1. The Central Division is responsible for coordinating all activities carried out by the Navy, Police Forces and Coast Guard with regard to the prevention and repression of the illicit smuggling of migrants by sea.
   2. The Central Division immediately examines the interventions to be taken against foreign vessels suspected to be involved in the illicit trafficking of migrants, also in accordance with the re-admission agreements with the flag State of the vessel or with the State from whose port the vessel has proceeded. The Central Division is also responsible for the examination of interventions against vessels without nationality and against vessels having an unknown port of origin.
   3. In the exercise of their functions for the purposes of these Regulations, the Commanding Officers in charge of the assets shall report, through the respective chain of command, to the Central Division any relevant information related to the surveillance, police intervention and relief intervention.
   4. The Central Division shall elaborate the information as referred to in the previous paragraph and may initiate the procedure for the request to other States Parties as stated in article 6 of these Regulations.
   5. The Central Division is responsible to receive requests from other States Parties and to initiate the procedure as stated in article 7 of these Regulations.
   6. For the fulfilment of its tasks, the Central Division may require the assistance at its headquarters of qualified representatives of the Navy and of the Police Forces, and may send its own qualified representatives at the respective headquarters.

5. (Lines of action)

   The activity of prevention and contrast of the illicit trafficking of migrants takes place in the following phases:

   a) in the Countries of origin of the immigration flows or directly affected by the transit, through diplomatic relations aimed to stop the phenomenon at its source;
   b) in international waters, through the assets of the Navy and Police Forces, by monitoring and surveillance of the maritime traffic;
   c) in territorial waters, through the assets of the Police Forces and, on a concorsual basis, through the assets of the Navy.

6. (Operations Coordination Centre)

   The Joint Chiefs of Staff - Ministry of Defence is the designated authority responsible for the establishment of the Operations Coordination Centre, whose main duty is to interface between the Commanding Officers in charge of the assets and the Central Division.

7. (Procedure for the request to other States Parties)

   The Central Division may request, through the Ministry of Foreign Affairs, to other States Parties for assistance in the execution of measures against foreign vessels that are reasonably suspected of illicit smuggling of migrants. When making a request to the flag State for authorization for the execution of measures against vessels flying its flag, the Central Division shall give notice to the Office of the Prime Minister for approval before the issue of any such request is made.

8. (Procedure for the consent to requesting States Parties)

   The Central Division, once a request for assistance from other State Parties is received, shall inform the Ministry of Foreign Affairs and consequently coordinate the actions to be undertaken in this regard. When the request is for an authorization for the execution of measures against vessels flying the national flag, a prior notice has to be given to the Office of the Prime Minister for approval.

9. (Operations on the high seas)

   1. The Navy is the authority responsible for the coordination of the operations at sea of the assets engaged on the high seas.

2. The enforcement activities shall be conducted in accordance with the relevant provisions of international law. The boarding of foreign vessels may be conducted only in the cases provided for or in the case of official consent given by the flag State.

10. (Operations on territorial sea and on the contiguous zone)
    1. The Guardia di Finanza is the authority responsible for the coordination of the operations at sea of the assets engaged on the territorial sea and on the maritime zone internationally known as the "contiguous zone".
    2. The enforcement activities shall be conducted in accordance with the relevant provisions of both international law and domestic legislation.

11. (Operations for relief intervention)
    1. The Coast Guard is the authority responsible for the coordination of the assets engaged in any relief intervention that may occur at sea.
    2. The police intervention and the relief intervention may be conducted simultaneously.
    3. In any case that a relief intervention occurs at sea, the coordination of all the operations is transferred to the Coast Guard, which may require all engaged assets to render proper assistance. At the end of the relief intervention, the coordination of all operations returns to the competent authorities.

12. (Safeguards and norms of behaviour)
    1. The assets of the Navy may be rendered available for the purposes of the present Regulations save in the case of the prevalent tasks and competences concerning the national defence and security.
    2. In performing the tasks related to the fight and contrast of illegal immigration, the maximum priority shall be given, at any time, to the proper conduct of the activities and enforcement operations, taking into account the superior values of human life and dignity of the persons.
    3. The right of visit onboard of a foreign vessel shall be exercised within a framework of maximum safety for the sake of both the boarding team and the migrants.
    4. When the use of force is deemed to be necessary for the conduct of the intervention, the intensity and duration of the response shall be proportional to the intensity of the offence perpetrated and to the immediacy and reality of the threat.

13. (Renvoi)

For all the subjects not expressly covered by these Regulations, reference is made to the norms of the Criminal Code, Maritime Code and related executive Regulations and also to the special legislation governing the same subject-matter, if compatible with the activities regulated by these Regulations.

14. (Financial obligations)

The execution of the provisions of these Regulations cannot, in any case, impose new or additional expenses for the State budget.

15. (Final provisions and abrogation)

The Inter-ministerial Decree 19 June issued by the Minister of the Interior, in conjunction with the Ministers of Defence, Economy and Finances, Infrastructure and Transport; containing executive provisions to article 11 of the Law 30 July 2002, n. 189, is abrogated and replaced by these Regulations.

The present Decree, printed with the official stamp of the State, will be inserted in the Official Collection of the legislative acts of the Republic of Italy. It is obligatory for all to observe it and make it observed.

8. PRE-EXISTING LEGISLATION ON THE MATTER AND OTHER RELEVANT DOCUMENTS

NOTE

The documents reported in annex to this drafting project constitute the relevant domestic legislation governing the matter of the ratification and implementation of the international instruments into the legal system of the Republic of Italy. In accordance with the Supervisor who has agreed upon, the texts are reported in the Italian language, considering that the translation into English would have been beyond the scope of the assignment and, in any case, they can be deemed to be as a useful reference for the comprehension of the adopted method in the elaboration of the draft.

a) Constitutional provisions.
b) Article17, paragraph 1, letter b) of the Law 23 August 1988, n. 400, regarding the delegated legislation and the power of the Government to issue Executive Regulations.
c) Directive of the President of the Council of the Ministers dated 14 January 2003, regarding the activity of concertation of the drafting project on the ratification of international acts.
d) Circular of the President of the Council of the Ministers dated 2 May 2001, n.1, regarding guidelines for the drafting of legislative acts.
e) Directive of the President of the Council of the Ministers dated 27 March 2000, regarding the technical-legal analysis and the analysis on the impact on pre-existing legislation.
f) Circular of the President of the Council of the Ministers dated 20 April 2001, n.1.1.26, regarding rules and reccomendations for the drafting of legislative acts.
g) Circular of the President of the Senate dated 10 January 1997, regarding the preparatory legislative report within the Commissions.

a. Constitutional provisions

b. Article 17, paragraph 1, letter b) of the Law 23 August 1988, n. 400

c. Directive of the President of the Council of the Ministers dated 14 January 2003

d. Circular of the President of the Council of the Ministers dated 2 May 2001, n. 1

e. Directive of the President of the Council of the Ministers dated 27 March 2000

f. Circular of the President of the Council of the Ministers dated 20 April 2001, n.1.1.26

g. Circular of the President of the Senate dated 10 January 1997

A) Annex 1 to the Law on the Ratification (Original Text of the Convention)

B) Annex 2 to the Law on the Ratification (Original Text of the Supplementary Protocol)

C) UN Resolution A/RES/55/25 dated 15 November 2000

D) IMO MSC/Circ.896/Rev.1

dated 12 June 2001

E) French Draft for the Modification of Law 15 July 1994, n. 589

F) Law 30 July 2002, n. 189

G) Inter-ministerial Decree 19 June 2003

H) Relevant Legislation on Legal Drafting Rules and Procedure