



Analysis

New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?

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Introduction

When the EU Charter of Fundamental Rights was first adopted, in its initial non-binding form, in 2000, many asked what certain of the rights contained in the Charter had to do with the EU at all. Most notably, why mention the right to life, when the EU did not carry out its own death penalty, or have coercive forces which killed anyone?

Of course, it would seem odd to have a human rights charter without including the right to life, and the EU had already developed a detailed foreign policy strategy opposing the death penalty worldwide. Subsequently the right to life also became relevant to the development of the Common European Asylum System. But more strikingly, the significant death toll of migrants in the Mediterranean has widely been blamed on EU policies – whether those policies are carried out by the Member States' authorities alone, or by those authorities as coordinated by the EU's borders agency, Frontex, which began operations in 2005. Moreover, the national authorities and Frontex have often been blamed for 'push-backs': the forced return of migrants' vessels to unsafe countries, which were condemned by the European Court of Human Rights in its 2012 judgment in *Hirsi v Italy*.

The response to these criticisms was the adoption of rules governing maritime surveillance operations coordinated by Frontex, first of all in the form of a Council measure implementing the Schengen Borders Code. A majority in the European Parliament (EP) voted against this measure, but they did not constitute a majority of the Members of the EP (MEPs), some MEPs being absent. So the EP instead sued to annul the Council's measure before the Court of Justice of the European Union (CJEU), and won its case, on the grounds that a measure concerning human rights and coercive measures had to be adopted by means of the EU's legislative process.

That meant that the European Commission had to propose a legislative measure, which it did in April 2013. At first, a hard-line group of Member States opposed most of the provisions in this proposal concerning search and rescue and disembarkation (ie the rules on the destination of migrants who were intercepted and rescued), even after the particularly tragic loss of 300 migrants' lives in autumn 2013. However, these Member States relented, and the European Parliament also pressed to retain and improve upon the Commission's proposal.

The result was that the EP and the Council (made up of Member States' ministers) both agreed on their respective positions on the proposal in December 2013, and then both agreed on a joint deal on the legislation by February 2014. The legislation will therefore be formally adopted in March or April this year, before the EP elections in May. The crucial question is therefore whether the EU will then be doing enough to address the loss of life and push-backs in the Mediterranean.

The new Regulation

The previous Decision contained binding rules on interception, and non-binding rules on search and rescue and disembarkation. However, the CJEU said that even the latter category of rules was binding. As noted above, a group of Member States wanted to water down (as it were) most of these rules in the new Regulation, but was ultimately unsuccessful.

There are new rules on search and rescue, which retain (at the EP's behest) the Commission's detailed proposal on this issue, including particularly the definition of whether vessels can be considered in a state of alert, uncertainty or distress. Provided that sinking vessels are detected in time and that these rules are properly applied, the Regulation should therefore ensure that migrants are rescued from drowning wherever possible.

On the other hand, the situation is more complex as regards the rules on protection of those migrants who are potentially at risk of persecution, torture or other forms of ill-treatment in their country of origin (or another country). The focus of this analysis is therefore upon those rules – followed by an assessment of the issue of the accountability of Frontex.

Protection and disembarkation rules

The core of the new Regulation is Article 4 – the protection against non-refoulement (removal to an unsafe country) and protection of fundamental rights. Article 4(1) states that no-one can be 'disembarked in, forced to enter, conducted to or otherwise handed over to' an unsafe country as further defined in the Regulation. Compared to the 2010 Decision, the Commission proposal, and the Council position, the EP successfully insisted on adding the words 'forced to enter' and 'conducted to', which clearly covers push-backs.

What is an unsafe country? Article 4(1) goes on to define two situations: (a) a serious risk of subjection of the migrant to the death penalty, torture, persecution or other inhuman or degrading treatment; and (b) the migrant's life or freedom would be

threatened on the grounds set out in the Geneva Convention on Refugees (race, religion, nationality, political opinion or membership of a social group), as well as sexual orientation. Also, a 'chain refoulement' is banned: a migrant cannot be handed over to a country which is safe in itself, but which would hand the migrant over to an unsafe country.

Compared to the criteria in EU asylum law (the 'Qualification Directive'), the first category includes two of the grounds concerning the grant of 'subsidiary protection' (ie protection for those who do not qualify as refugees under the Geneva Convention): the death penalty and torture or other inhuman or degrading treatment. It does not include the third category, concerning ill-treatment in the event of armed conflict; however, it does include 'persecution', without further definition. The second category is identical to Article 33(1) of the Geneva Convention, except that it does not include the exception in Article 33(2) of that Convention for persons posing security threats et al., and it adds the grounds of 'sexual orientation' to those referred to in the Convention. However, the CJEU has confirmed that homosexuals can form a 'particular social group' under the EU's Qualification Directive (Cases C-199/12 to 201/12 X, Y and Z, judgment of 7 November 2013).

The 2010 Decision referred simply to 'non-refoulement' without any further explanation in the main text, while the 2013 proposal (and the Council's position) referred only to the first category of grounds, without the general reference to 'persecution'. So the EP clearly succeeded in strengthening this provision.

Next, how must an unsafe country be determined? Article 4(2) states that when considering disembarking migrants in a third country, the host Member State (the Member State from which an operation takes place or from which it is launched: Article 2(3)) must 'take into account the general situation in that third country', and cannot disembark or otherwise force to enter, conduct to or hand over if the host Member State or other participating Member States 'are aware or ought to be aware' that such a State presents such a risk. The EP insisted on adding the references to forcing to enter, conducting to or handing over.

The EP also obtained an amendment further clarifying the sources of information to take into account – a 'broad range', including other Member States, EU bodies, agencies and offices and international bodies. The Member States 'may' take into account existing agreements and projects carried out using EU funds.

What are the migrants' procedural rights? Article 4(3) of the agreed Regulation specifies that (in accordance with the *Hirsi* judgment) before disembarking or otherwise conducting, etc the migrants to a third State, taking into account the general situation in that State, the Member States' units shall 'use all means' to identify the migrants, assess their circumstances, inform them of their destination and give them an opportunity to object on grounds of the non-refoulement rule. These obligations are subject to an override in the interests of the safety of all the persons involved (see Article 3).

The operational plan must 'where necessary' provide for medical staff, interpreters, legal advisers and other relevant experts on shore. Also, the annual reports which Frontex must provide on the application of the Regulation must include 'further

details' on cases of disembarkation in third States, as regards the application of the relevant criteria. These provisions were insisted upon by the EP, in particular the reference to 'legal advisers', but the Council Presidency points out the 'wiggle room' granted by the words 'where necessary' and 'use all means'.

There are also limits on the exchange of personal data with third countries, an obligation to respect human dignity, and rules on training of staff.

The protection rules cannot be separated from the rules on disembarkation of migrants. According to Article 10, there are three scenarios. First, if migrants are intercepted in the territorial sea or contiguous zone (the waters adjacent to the territorial sea, according to international law: see the definition in Article 2(13)) of a Member State, then they must be disembarked in the coastal Member State, ie the Member State in whose territorial waters or contiguous zone the operation takes place (definition in Article 2(14)). But this is subject to a crucial exception: it is possible under the Regulation that a vessel that has made it this close to a Member State could still be ordered to alter course towards another destination.

Secondly, if migrants are intercepted in the high seas, they may be disembarked in the country from which they are assumed to have departed, subject to the non-refoulement rules in the Regulation. If that is not possible, then disembarkation 'shall' take place in the host Member State.

Thirdly, in the event of a search and rescue, the migrants shall be disembarked in a place of safety. If that is not possible, then they shall be disembarked in the host Member State.

These provisions raise many important questions. First of all, it is curious that there is a reference to the non-refoulement rules of Article 4 only as regards the second category of persons (those intercepted in the high seas), not the other two categories. Since Article 4 clearly is intended to apply to all removals of any kind to third States under the Regulation, perhaps this is a drafting error that can be corrected before the legislation is finally adopted. In any event, the clear wording of Article 4 must mean that the non-refoulement rule takes priority, but it would obviously be better if there is no scope for misunderstanding.

Secondly, as correctly noted in the preamble to the Regulation, the EU's asylum legislation applies to anyone in the territorial waters of the EU. This means that, in accordance with that legislation, once an asylum application is made in the territorial waters, the asylum applicant cannot be removed to a third State before there is a decision on the asylum application in accordance with that legislation, save for some limited exceptions not relevant here. The obvious corollary of this is that asylum-seekers who make their application in the territorial waters must be disembarked on the territory of the Member State concerned, since it is unlikely that it will be practical to keep them on board a ship for the entire duration of a full asylum procedure. However, the main text of the Regulation does not reflect the wording of this legislation, since it provides for the possibility of persons intercepted or rescued in the territorial waters to be removed to third countries.

Thirdly, when migrants are disembarked on the territory of a Member State, an awkward question could arise: is that Member State safe? While the specific non-refoulement rules in Article 4(2) and (3) refer to the safety of *third* countries, the general rule in Article 4(1) refers to countries in general. The European Court of Human Rights and the EU's Court of Justice have already both concluded that Greece in effect fails the standard set out in Article 4, and litigation in some Member States is also challenging the safety of Italy. So there could be a clash between the non-refoulement rule and the obligation to disembark in a Member State which is the host State, coastal State or place of safety, or in the territorial waters of which the applications were made.

Fourthly, as for those intercepted or rescued in the high seas or the contiguous zone (the Regulation does not contemplate the scenario of migrants being intercepted in the territorial waters of third States), the bulk of the EU's asylum legislation does not apply. However, the EU's qualification Directive does – since there is nothing in the text of that Directive to limit its territorial scope. But the wording of the Regulation is confusing in this regard, since it does not refer to the detailed text of that Directive but rather to general standards on non-refoulement, which are different from that Directive in some respects, as noted above (the omission of persons fleeing conflict, for instance).

Having said that, EU rules on asylum procedures and reception conditions do not apply to asylum-seekers who are intercepted or rescued in the high seas or the contiguous zone, and in that case the rules in the Regulation would apply. In effect, the rules summarised above provide for a highly simplified process – which might be dubbed the 'maritime asylum procedure' – for such cases. As noted above, though, the Council believes that the words 'where necessary' and 'use all means' give Member States considerable flexibility not to apply these rules fully, and these rules are (understandably) subject to the requirement to give priority to the safety of all persons. This should mean that in the event of a risk to the safety of persons, if the application of the non-refoulement rule has not yet been assessed, the migrants must be taken to a (safe) Member State to avoid prejudicing the outcome of that assessment. Once the migrants enter a Member State's territorial waters, EU asylum law will apply fully (arguably it applies even if the application was made *before* the vessel entered those waters; if not, then there is nothing to stop the asylum-seeker making a renewed application for asylum once the vessel is in those waters).

Finally, at the EP's behest, the preamble to the Regulation clarifies (recital 7) that a shipmaster and crew should not face criminal sanctions for rescuing migrants and bringing them to a place of safety. This provision is welcome, but it would be better if the EU legislation on criminal sanctions for facilitating irregular migration were amended to confirm that there is no criminal liability in such cases.

Accountability of Frontex (and national authorities)

Article 10c of the Regulation, which was inserted at the EP's insistence, states that Frontex must make annual reports on the application of the Regulation, including on Frontex's own procedures and information on the application of the Regulation in practice, including 'detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place'.

Presumably this means that these reports will have to include full information on where migrants were disembarked and the assessments that were made of the safety of any third countries (and Member States) in each particular case. It would have been better to clarify the extent of these obligations expressly, although any provision on accountability is better than none. The EP also insisted on recital 2a in the preamble, which repeats text already in the Frontex Regulation regarding Frontex cooperation with third countries.

When the Frontex Regulation was last amended in 2011, the EP insisted on many new provisions ensuring that Frontex would be compliant with human rights standards, and the application of these new rules has since been examined by the European Ombudsman. Frontex is still refusing to establish an individual complaints procedure for migrants who believe that it has violated the rules binding upon it, on the grounds that it only coordinates Member States' authorities' actions, so cannot be held directly responsible for those actions.

While it would be preferable to ensure that individuals could raise complaints that Frontex had not complied with its obligations as regards human rights, it is also true to say that Frontex only coordinates Member States' authorities' actions. In any event, those authorities take actions that are not coordinated by Frontex. Given that (as the new Regulation itself implicitly accepts) any control of the EU's external border, including by means of patrols outside a Member State's territorial waters, is linked to the application of the EU's own rules on external border controls, the EU Charter of Rights is applicable to Member States' control of those borders. And there have been allegations that Member States' authorities have on some occasions been responsible for push-backs and ill-treatment of migrants at the external borders.

In this context, it is possible that Frontex has been serving for too long as a 'lightning rod' for critics of the EU's external borders control policy, whereas attention should have focussed more on Member States' authorities, whether they are being coordinated by Frontex or not. The 'right to life' in the European Convention of Human Rights entails, according to the European Court of Human Rights, an obligation to hold an independent investigation into losses of life that have arguably resulted from actions of the authorities. So arguably the EU is under an obligation pursuant to the EU Charter of Fundamental Rights to ensure that its Member States conduct such investigations into losses of life which are linked to the implementation of EU policies, in this case the EU external borders rules. Those authorities should also be held accountable for any alleged push-backs or other ill-treatment of migrants at the external borders.

To that end, the EU should agree upon a general framework for independent investigations into such alleged abuses, with the results of these investigations reported and assessed by the Commission as part of its twice-yearly report on the Schengen system. Furthermore, it is long past time for the Commission to stiffen its backbone and to bring infringement proceedings against Member States where there is sufficient evidence that their authorities are responsible for push-backs or other ill-treatment.

Conclusions

The existence of this Regulation is welcome, as its rules on search and rescue are valuable and its provisions on protection, disembarkation and accountability of Frontex are better than nothing at all. But the complex interplay of the provisions of this Regulation with EU asylum law has led to something of a 'dog's dinner' of rules governing the asylum applications of people rescued or intercepted in the Mediterranean, and the rules on the accountability of Frontex are something of a 'red herring' in light of the allegations of serious misconduct in some cases by national authorities. Finally, the Commission's continued unwillingness to bring infringement proceedings in this area (and in the face of its own documented breaches of other EU immigration and asylum law) is undermining the letter and spirit of the Charter by allowing Member States' authorities to think that they can violate the Charter with impunity.

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