



Analysis

EU rules on maritime rescue: Member States quibble while migrants drown

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Introduction

For many years now, the death toll of migrants who drown while attempting to reach the European Union in search of a better life has tragically been rising. Most recently, public opinion was particularly shocked when hundreds of migrants drowned when a single vessel sank off the coast of Italy. The Italian government has called for the EU to adopt an action plan to deal with the issue, and the Prime Minister of Malta, calling the Mediterranean a 'graveyard', has called on the EU to act.

Yet shockingly, these Member States, along with four others, are blocking an EU proposal on the table that contains concrete rules on the search and rescue of migrants - *precisely and solely because it contains rules on search and rescue* (along with disembarkation) of migrants. In fact, they describe their opposition to such rules as a 'red line', ie they *refuse to negotiate on their opposition to any detailed EU rules which concern saving migrants' lives.*

The following analysis examines the background to this issue and assesses these Member States' objections. It concludes that their legal objections to this proposal are clearly groundless. Furthermore, of course, from a political point of view, the hypocrisy and inhumanity of these Member States' position speaks for itself.

Background

Due to widespread concerns about the accountability and legality of the actions of the EU's border agency, known as 'Frontex', when it coordinates Member States' maritime surveillance operations, EU rules on this issue were first adopted in 2010.

These rules initially took the form of a Council Decision implementing the EU legislation on the control of external borders, which is known as the 'Schengen Borders Code'. The 2010 Council Decision included binding rules on interception at sea, and apparently non-binding rules on search and rescue and disembarkation of migrants.

A majority of those members of the European Parliament (EP) who voted on this Council Decision opposed it, and so the EP decided to sue the Council before the Court of Justice to annul the decision. The EP won its case, when the Court ruled in September 2012 that the Council Decision had to be annulled. According to the Court, this Decision should have been adopted as a legislative act, because it addressed issues that affected the human rights of the persons concerned, and regulated the coercive powers of border guards; the Court also clarified that the rules in the Decision on search and rescue and disembarkation were in fact binding. However, the Court maintained the 2010 Decision in force until its replacement by a legislative act.

In spring 2013, the Commission proposed such a replacement act, which has to be adopted by means of the 'ordinary legislative procedure', ie a qualified majority vote in the Council (Member States' ministers) and joint decision-making powers of the European Parliament. This proposal took over much of the text of the Council decision, but also added some further details as regards search and rescue and disembarkation, confirming also that these rules were binding. Like the 2010 Council decision, the proposal is limited to cases where Frontex coordinates Member States' maritime surveillance.

While the European Parliament is broadly supportive of this proposal, suggesting only modest amendments, a group of Mediterranean Member States opposes the idea of any EU measure containing any detailed binding rules on search and rescue and disembarkation - even though such provisions are the most important rules in the 2013 proposal as regards saving migrants' lives and their subsequent welfare.

The proposed search and rescue and disembarkation rules

The relevant parts of the 2013 proposal are Article 9 (search and rescue) and Article 10 (disembarkation). Article 9 contains first of all a general obligation to 'render assistance to any ship or person under distress at sea'. It defines further what is meant by a condition of 'uncertainty', 'alert' or 'distress', and provides for general rules on coordination of operations in such cases.

As for disembarkation, Article 10 contains rules to determine where migrants should be disembarked if they are intercepted or rescued. If they are intercepted in the territorial water or nearby maritime zone of a Member State participating in Frontex operations, they must be disembarked in the territory of that State. If they are intercepted in the high seas (ie waters which no State has a legal claim to, under the international law of the sea), then they should be disembarked in the State which they departed from - subject to the rules in Article 4 of the proposal, on the protection of fundamental rights. In the case of search and rescue operations, there are no specific rules on which State to disembark migrants in, but Article 4 implicitly applies here as well.

The rules in Article 4 prohibit sending a person to a State 'where there is a serious risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment or from which there is a serious risk of expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*'. This clause reflects the judgment of the European Court of Human Rights, in a case called *Hirsi v. Italy*, where Italy was condemned for 'pushing back' boats full of migrants to Colonel Khadafy's Libya.

Member States' objections

The group of Member States objecting to Articles 9 and 10 state that the EU has no competence over issues relating to search and rescue or disembarkation.

First of all, as regards disembarkation, this objection is clearly ridiculous. The admission of a migrant onto a Member State's territory, or removal to a third State's territory, is obviously an inherent part and parcel of immigration policy, and the Treaties empower the EU to develop a 'common immigration policy'. Equally, the Treaties give the power for the EU to adopt rules on border controls, and it would be absurd to adopt rules governing the interception of migrants without addressing the obvious corollary question of what to do with the migrants once the border guards catch them.

Secondly, at first sight, the objections to EU competence as regards search and rescue rules have more force. Certainly, there is nothing in the EU Treaties which gives the EU power to regulate searches and rescues generally. But the 2013 proposal would not do that: it would *only* regulate searches and rescues in the context of the EU's border controls policy, and *only* where maritime surveillance was coordinated by Frontex.

Can the EU regulate searches and rescues in such cases? The case law of the Court of Justice on public health issues should logically apply by analogy. The Court has ruled that while the EU cannot regulate public health generally, it can take account of public health concerns when it adopts legislation (for instance, on tobacco advertising, cigarette content or the packaging of cigarettes) which is principally concerned with regulating the EU's internal market. Similarly, the EU's General Court has ruled that EU legislation can take account of the life and welfare of seals, if it adopts legislation on the sale of seal products that mainly concerns the internal market.

If EU internal market law can concern itself with the long-term effects of cigarette smoking for smokers, or the immediate effect of clubbing on seals, then surely EU law on border controls can concern itself with the effect of imminent drowning upon migrants, where there is a direct connection with maritime surveillance. And there is bound to be such a connection: EU rules stepping up maritime surveillance, while they have (and legally *must* have) the principal purpose of controlling entry onto the territory of the Member States, will in some cases fall to be applied when the persons planning such entry are about to drown. It should be recalled, as explained above, that the proposal only sets out a general obligation to assist vessels in distress and to coordinate action in emergency situations.

Thirdly, it should not be forgotten that the proposed rules will apply only to operations coordinated by Frontex - an EU agency, funded entirely by money from the EU budget. Why should the EU not have the power to set conditions before its agency (spending its money) assists Member States with maritime surveillance, in the same way that it has the power to set conditions on its financial assistance to its Member States, or third countries?

Another objection of the six Member States is the compatibility of the proposed Regulation with international law. The obvious way to address this problem (if it exists) is to amend the Regulation to ensure that it is consistent with international law. Anyway, the preamble to the legislation (recital 4) states that it must be applied consistently with international law: Member States did not object to such vague references to international law in readmission treaties, or in much of the EU's legislation on irregular migration or border controls. The six objecting Member States seem to be concerned also about the proposal's mere *overlap* (as distinct from *conflict*) with international law - but the EU adopts an enormous amount of legislation (on the environment, for instance) which overlaps with international law, and aims to provide for the detailed and effective implementation of the relevant international law obligations.

More fundamentally, eviscerating the proposed rules on disembarkation would empty the protection of Article 4 of the proposal (on ensuring the safety of persons sent to third countries) of much of its practical content - but, as explained above, this part of the

proposal reflects important case law of the European Court of Human Rights. Similarly, removing or weakening the provisions on search and rescue would subtract from the proposal any added value as regards protection of the right to life – another key obligation of human rights law. One can only conclude that the six Member States in question come not to praise international law, but to bury it.

Conclusion

Member States rightly rejected specious and cynical legal arguments made throughout the last decade to justify torture, abduction and indefinite detention without trial in the name of the ‘war on terror’. Of course, control of immigration is a different issue, but the legal arguments raised by these six Member States are equally specious and cynical – and should equally be rejected. The EU bears its share of responsibility (alongside its Member States) for the deaths of hundreds of migrants – but that must also mean that the Union should be able to make some concrete contribution towards reducing this death toll in future.

Sources

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