

How the Frontex Sea Borders Regulation avoids the hot potatoes

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Abstract

This contribution focuses on the externalization of maritime border controls coordinated by the EU borders agency Frontex. This externalization occurs in two ways. First, by geographically relocating controls away from coastal border crossing points to the various maritime zones. Secondly, by involving non-EU countries in border controls. The recently adopted Frontex Sea Border Regulation aims to clarify the legal regime applicable to such controls in the sphere of fundamental rights, powers of interdiction and search and rescue obligations. The contribution argues that the Regulation is fundamentally flawed as it avoids hard choices, thereby failing to harmonize divergent Member State practice. Further, it provides substandard human rights protection, by creating a parallel legal regime for boat migrants which fundamentally differs from ordinary provisions of EU asylum and immigration law.

1. Introduction

On 25 November 2014, Pope Francis addressed the European Parliament. Arguably more provocative than his call to not “allow the Mediterranean to become a vast cemetery”, was his depiction of Europe having become “a grandmother, no longer fertile and vibrant”.¹ The Pope did not refer to the EU’s enlargement fatigue, but to the perception that “the great ideas which once inspired Europe seem to have lost their attraction, only to be replaced by the bureaucratic technicalities of its institutions”. Specifically in the context of immigration, the Pope lamented that courageous policies ensuring mutual support within the EU and assisting countries of origin were missing, and that the EU was focusing instead on policies motivated by self-interest, which address only the effects and not the root causes of migration.

When it comes to the EU’s policies on the plight of migrants undertaking the journey across the Mediterranean, it cannot be said that vision or inspiration is totally absent. It is obvious that the growing number of migrants attempting to enter the European Union by sea in the last two decades poses all sorts of challenges in the sphere of controlling the external border, protecting refugees, combatting human smuggling and saving lives at sea. In all key policy documents, the three EU legislative institutions – the European Parliament, the European Commission and the Council of Ministers – stress that EU action should meet the goals of preserving life at sea, global responsibility-sharing, combatting human smuggling and trafficking and respecting refugee rights.² The issue seems not to be that the requisite aims and values are lacking, but that they are so difficult to translate into one coherent whole. In its attempts to formulate concrete proposals for action or legislation, the EU tends to become mired in the potentially contradictory nature of the multitude of policy aims, but also in the controversy of how to distribute burdens and responsibilities amongst the EU, its Member States and third countries.

¹ Address of Pope Francis to the European Parliament, Strasbourg, 25 November 2014.

² See eg Commission documents COM(2011) 743 final (The Global Approach to Migration and Mobility) and COM(2008) 69 final.

That the EU strategies in respect of boat migrants are becoming embroiled in what Pope Francis termed ‘bureaucratic technicalities’ is very much epitomized by the most recent effort to ensure common action in this area: the Frontex Sea Borders Regulation (Regulation 656/2014), adopted in May 2014. This contribution zooms into that Regulation and argues that it consolidates and even bolsters the controversies inherent in the EU’s external sea borders policies, rather than solving them. The Regulation lays down binding rules for Member States and the EU external border agency Frontex on joint operations of maritime border control, with the aim of establishing ‘clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law as well as increased operational cooperation between Frontex and countries of origin and of transit’.³ But the Regulation fails to deliver concrete answers on essential issues such as the place of disembarkation of rescued or intercepted migrants, the exact scope of duties to engage in search and rescue activities and the guaranteeing of refugee rights. Moreover, the Regulation disregards a number of international law obligations on the treatment of migrants found at sea. Although it formulates a number of useful procedural standards and upgrades human rights standards in comparison to the Council Decision it replaces, the Regulation may well be branded an instrument which first and foremost masquerades unresolved tensions between Member States. It must, therefore, not be expected to bring about a fundamental paradigm shift in Europe’s approach to the thousands of migrants who risk their lives each year in search for a better future.

After explaining the Regulation’s coming into being (section 2), the contribution critically engages with the manner in which the Regulation addresses the potential tension between immigration deterrence and safeguarding refugee rights (section 3) and between immigration deterrence and the saving of lives at sea (section 4). It concludes by formulating three main reasons why this most recent EU attempt to bring about clarity and consistency in the EU’s approach to boat migrants is fundamentally flawed.

2. Background

The Frontex Sea Borders Regulation is the result of a rather laborious series of negotiations and institutional conflict within the EU. It replaces Council Decision 2010/252/EU which was annulled by the Court of Justice in September 2012, on the grounds of the Council having exceeded the scope of its implementing powers.⁴

When Frontex was established in 2004, the core of its mandate was described rather broadly as rendering ‘more effective the application of existing and future Community measures relating to the management of external borders’.⁵ Frontex was founded in lieu of a supranational European corps of border guards (for which political support was lacking) and leaves primary responsibility for border control with the Member States. It assists national border guard services by providing technical assistance and by facilitating cooperation among national border guards. It is mainly known for coordinating joint maritime controls in the Mediterranean and the Atlantic. Frontex is also tasked

³ Reg. 656/2014, recital 1. Also see Stockholm programme [2010] OJ C115/01, par 5.1.

⁴ CJEU 5 September 2012, Case C-355/10 (*Parliament v Council*).

⁵ Reg. 2007/2004, Art. 1(2).

with maintaining and coordinating the Eurosur framework which was set up in 2013 and which went 'live' in December of that year.⁶ Eurosur links intelligence systems of Member States for the purpose of increasing reaction capability at the external borders.

The original Frontex regulation did not refer to other EU instruments on migration, such as the EU asylum directives, and only contained a general affirmation in the recital that the Regulation respects fundamental rights.⁷ The lack of a concrete human rights framework on how to deal with refugees or migrants who are in distress at sea contributed to a perception that Frontex was preoccupied with border security considerations.⁸ These concerns were in part addressed in the revision of the Fontex Regulation of October 2011, which introduced a reference to the 1951 Refugee Convention and the prohibition of *refoulement*, and an obligation for Frontex to draw up a fundamental rights strategy.⁹ Likewise, the Eurosur Regulation mentions that, in addition to preventing unauthorized border crossings and to counter cross-border criminality, the shared intelligence has the purpose of 'contributing to ensuring the protection and saving the lives of migrants'.¹⁰ However, these instruments do not as such resolve such contested issues as the manner in which screening for refugees should occur, where persons claiming asylum should be disembarked or how to respond to situations of distress. These were issues that, together with a description of powers of migrant interdiction, were developed in Council Decision 2010/252/EU, which was replaced by the Frontex Sea Borders regulation.

Council Decision 2010/252/EU came about after lengthy negotiations. After the Commission had published a study on the international law instruments in relation to illegal immigration by sea in May 2007¹¹, it commissioned an informal working group consisting of representatives of member states, Frontex, the UN High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) to produce guidelines for Frontex' maritime operations. The group failed to agree however on the implications of refugee law, the role of Frontex and the question of where to disembark intercepted migrants. The Commission then decided to prepare a draft decision on the basis of Article 12(5) of the Schengen Borders Code¹², which allows for the adoption of additional, implementing, rules governing surveillance in accordance with the regulatory procedure with scrutiny (in which Parliament does not have co-legislative but only veto power). The Commission's proposal aimed to make explicit the duties to respect fundamental rights and the rights of refugees in Frontex operations, created a legal basis in EU law in accordance with international maritime law for searching and intercepting vessels, and provided modalities for disembarking intercepted or rescued persons.

The draft failed, however, to acquire the requisite support in the Schengen Borders Code Committee, but was nevertheless forwarded to Parliament and the Council in November 2009.¹³ Although Parliament voted in majority against the draft decision, it did not muster the absolute

⁶ Reg. 1052/2013, Art. 6

⁷ Reg. 2007/2004, Recital 22.

⁸ See eg S Carrera, 'The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document No. 261/March 2007.

⁹ Reg. 1168/2011, new Articles 1(2) and 26a.

¹⁰ Reg. 1052/2013, Art. 1.

¹¹ SEC(2007) 691.

¹² Reg. 562/2006.

¹³ COM(2009) 658 final.

majority required for vetoing it.¹⁴ The Council, as the body charged with implementing the Schengen Border Code, subsequently adopted the proposal in April 2010 with some amendments. The most pertinent one was that it divided the decision into binding rules on interception and non-binding guidelines on search and rescue situations and disembarkation.

Upon unanimous request of Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), however, the President of Parliament decided to bring an action for annulment of the decision before the Court of Justice. The Court annulled the decision, because it contained decisions affecting fundamental rights in an essential manner which go beyond the scope of 'additional measures', and only the EU legislature is entitled to adopt such a decision.¹⁵

The Court's ruling initiated renewed negotiations, this time under the ordinary legislative procedure with the full involvement of the European Parliament. The adopted text lays down detailed rules on the detection of vessels carrying irregular migrants, interception in the territorial sea, interception on the high seas, interception in the contiguous zone, search and rescue situations and disembarkation. The Regulation addresses a number of gaps that were present in the annulled Council Decision in the sphere of human rights, saving lives at sea and ensuring accountability. It makes duties of participating member States in search and rescue situations binding, it contains a detailed provision on ensuring refugee rights and observing the principle of non-refoulement, and it circumscribes obligations in the sphere of incident reporting and the manner in which Frontex draws up operational plans together with the Member State hosting the operation. It further lays down a solidarity mechanism in case a Member State faces a situation of 'urgent and exceptional pressure at its external border'. Compared to the annulled Council Decision, the Regulation is certainly more balanced and encompassing. This can be attributed, firstly, to the co-legislative role of the European Parliament, which strived especially to make some human rights guarantees explicit; secondly, to the *Hirsi* judgment of the European Court of Human Rights of 23 February 2012¹⁶, which clarified the human rights framework applicable to interceptions of migrants at sea; and thirdly, to the Lampedusa migrant shipwreck of October 2013¹⁷, which stirred widespread outcry and calls for deeper EU involvement and enhanced solidarity between Member States. Yet, it is also evident from its text as well as from the negotiations both in the Council and between the Council and the European Parliament, that the Regulation avoids the political hot potatoes as much as possible.

3. Refugee rights and immigration deterrence

One such hot potato is the reconciliation of the aims of respecting refugee rights and immigration deterrence. How does one deter the entrance of irregular migrants whilst guaranteeing that refugees are not returned to a country where their life or freedom is threatened? Should one allow an intercepted (or rescued) migrant access to a refugee status determination procedure? Can one

¹⁴ Motion for a resolution on the Draft Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational coordination coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, B7-0227/2010, 17 March 2010. See further procedural file 2009/2755(RPS).

¹⁵ CJEU 5 September 2012, Case C-355/10 (*Parliament v Council*).

¹⁶ ECtHR [Grand Chamber] 23 Feb. 2012, *Hirsi Jamaa a.o. v Italy*, no. 27765/09.

¹⁷ See eg Statement by President Barroso following the European Council meeting of 25 October 2013 and European Council Conclusions of 24/25 October 2013, Council doc. ST 169 2013 INIT.

make an agreement with a third country which allows for the summary return of intercepted or rescued migrants?

The Regulation establishes a somewhat uneasy compromise between fundamental rights and the liberty of States to treat boat migrants outside ordinarily applicable statutory guarantees. This resembles strategies in Australia and the U.S. of creating parallel legal frameworks for migrants arriving by boat. Before discussing the Regulation itself, this section first makes some comparative observations on U.S., Australian and European practices concerning boat immigration.

It has been observed that one reason why externalized maritime border controls, i.e. controls away from ports or coastal areas (which may extend so far as the territorial waters of another country) are a popular instrument of immigration deterrence, is that they would allow for circumventing ordinarily applicable obligations in the sphere of protecting refugees.¹⁸ Under the United States “Wet foot, Dry foot” policy, for example, a Cuban caught on the seas between the two countries is liable to being sent summarily home, while Cubans who make it to shore can invoke the provisions of the U.S. Immigration and Nationality Act and are hence subject to the ordinary immigration procedures.¹⁹ The U.S. Supreme Court confirmed, in the well-known *Sale/Haitian Centers Council* case, that neither the Immigration and Nationality Act nor the 1951 Refugee Convention entertains obligations on the part of the U.S. authorities outside U.S. territory.²⁰ This legal construction allows for stripping migrants of fundamental rights. In Presidential Order 12807 of 24 May 1992, which was adopted in response to the exodus of Haitians after the coup that ousted President Aristide, the special position of refugees was noted, but only to the extent that “the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.”²¹

Disconnecting the ordinary immigration regime from the one applying at sea also underpins and legitimizes the programme of offshore deterrence of present-day Australia. That programme is meant to live up to the current government’s election promise to turn back every boat that enters Australian waters illegally and which consists of either diverting any boat on its way to Australia to Indonesia or picking up the migrants and bringing them to offshore processing centers in Papua New Guinea and Nauru, with which agreements to that effect have been concluded. The interdictions are accompanied by the government broadcasting videos telling would-be immigrants that if they try to make the trip by boat illegally, “there is no way you will ever make Australia home”.²² Legally, the turnbacks are possible due to a series of amendments to Australia’s Migration Act which marked the beginning of Australia’s ‘Pacific Solution’ in 2001.²³ The amendments purported to excise certain places and installations along migration routes, such as Christmas Island and Cocos Islands, from the Australian migration zone with the effect of making it impossible for “offshore entry persons” to make valid visa applications (which is required for making a formal asylum application) in these locations. To rule out the eventuality that asylum seekers would reach Australia’s mainland by boat,

¹⁸ T. Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, CUP 2011, p. 41 (referring in this connection to states playing ‘sovereignty games’).

¹⁹ R.E. Wasem, ‘Cuban Migration to the United States: Policy and Trends’, U.S. Congressional Research Service, 2009.

²⁰ U.S. Supreme Court 21 June 1993, *Sale v Haitian Centers Council*, [1993] 509 US 155.

²¹ Executive Order 12807, ‘Interdiction of Illegal Aliens’, 24 May 1992.

²² Youtube video ‘No Way. You will not make Australia home’, published 15 April 2014, <<https://www.youtube.com/watch?v=rT12WH4a92w>>.

²³ Migration Amendment (Excision from Migration Zone) Act 2001; Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.

the Australian Parliament passed a law in May 2013 to excise the mainland itself from the migration zone.²⁴ The new policies of the Abbott government resulted in a sharp fall of the number of boat arrivals – less than 200 arrivals in 2014 compared to more than 20.000 in 2013.²⁵ This resembles the decrease in boat arrivals after the first version of Australia’s Pacific Solution was installed in response to the Tampa incident in 2001, also involving offshore processing in Nauru. Back then, 43 boats with a total number of 5.516 migrants arrived in the year 2001, and only one boat carrying one migrant in 2002.²⁶ The numbers had started rising again when the newly elected Labor government fulfilled its government promise to close the center at Nauru in 2008.

The most clear European example of an interdiction programme involving summary returns of the kind employed in Australia and the U.S. are the Italian push-backs of 2009. These were made possible after the Italian government had concluded an agreement with the Khadafi regime in which the latter pledged to immediately accept all migrants found at sea who had embarked in Libya.²⁷ The push-backs, which were ill-received by civil society and a number of intergovernmental bodies, contributed to a decline of migrants intercepted in the Central Mediterranean route from almost 40.000 in 2008 to 4.500 in 2010.²⁸ The official position of the Italian government at the time was that migrants still at sea could not rely on Italian, EU or international law to effectuate an entry.²⁹ Civil unrest erupting in Libya (and Tunisia) made the continued implementation of the Italian-Lybian agreement impossible and caused a massive spike of migrants along this route in 2011.

It is not difficult to grasp the common logic behind the United States’, Australian and Italian policies: if the goal is to minimize the number of irregular entries, one should i) make an agreement with another country to the effect of making summary returns to that country possible (Cuba, Libya, Papua New Guinea, Nauru); ii) ensure that intercepted migrants cannot invoke statutory guarantees on access to an asylum procedure or to courts; and iii) proceed with actually intercepting and summarily returning migrants at sea.

This logic is however challenged by fundamental rights. The judgment in *Sale* has been heavily criticized and in the European legal order at least, a different human rights paradigm in respect of boat migrants has come to prevail.³⁰ In the 2012 *Hirsi* judgment, in a case brought by 24 migrants who were part of a larger group of migrants who had had been intercepted in May 2009 in one of the first Italian push-back operations and were returned to the port of Tripoli, the European Court of Human Rights found violations of the prohibition of inhuman treatment, the right to an effective remedy and the prohibition of collective expulsion.³¹

The judgment made it clear that any interdiction policy which does not allow migrants the opportunity to claim asylum or to mount a legal challenge against return before the return is enforced, will violate the European Convention on Human Rights. The ECtHR formulated a set of rather clear conditions which must be met if a state wishes to return migrants found at sea. These

²⁴ *ABC News* 16 May 2013, ‘Parliament excises mainland from migration zone’.

²⁵ *Financial Times* 6 Nov. 2014, ‘Australia’s ‘stop the boats’ asylum policy divides opinion’.

²⁶ J. Philips, ‘Boat arrivals in Australia: a quick guide to the statistics’, Parliament of Australia Research Paper Series 2013-14.

²⁷ See extensively A. di Pascale, ‘Migration Control at Sea: The Italian Case’, in: B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), 281-309.

²⁸ Frontex Risk Analysis Quarterly, Issue 1, Jan-March 2011.

²⁹ See *Hirsi Jamaa a.o. v Italy*, par. 64-66.

³⁰ For criticism see eg HH Koh, ‘The “Haiti Paradigm” in United States Human Rights Policy’, 103 *Yale Law Journal* (1994) at 2417; JC Hathaway, *The Rights of Refugees under International Law*, CUP 2005, at 318.

³¹ *Supra* note 16.

can be summarized as follows: i) the returning country must verify, even if no individual asylum claim is made, whether the country of return fulfils its international obligations in relation to the protection of refugees, ii) the migrants must have access to a procedure to identify them and to assess their personal circumstances, iii) the personnel conducting the interviews must be trained to do so and the migrants must be assisted by interpreters or legal advisers, iv) the migrants must be informed about their destination and be able to challenge their transfer before an independent tribunal, before the transfer is enforced.

It is obvious that these conditions rule out any policy of summarily returning migrants, even to countries which can generally be considered safe. Although the ECtHR did not say that refugee screening cannot be done on board ships or in some offshore facility, the Court stresses that proper procedures ought to be in place and that migrants should always be granted the possibility to bring legal challenges with suspensive effect. In the current European context, this can only imply that all intercepted migrants are brought to European shores for processing.

This may indeed be a hard pill for some European states to swallow. Although no European country has since the 2009 Italian push backs been officially engaged in a policy of summarily returning migrants, there are strong indications that such practices continue to occur. NGOs have reported large numbers of push back cases involving Bulgaria and Greece along the land and sea border with Turkey.³² There are also reports – and even videos – of the Spanish border guard immediately returning migrants to Morocco who managed to climb the fences around the Spanish enclaves Ceuta and Melilla in Morocco.³³ In a move that resembles Australia’s excision of certain territories from its migration zone, the Spanish government proposed an amendment to its immigration law in October 2014 which would allow rejecting migrants who present themselves at the border of Ceuta and Melilla and returning them to Morocco, presumably legalizing a practice that is already ongoing – but hard to reconcile with the standards developed in the *Hirsi* judgment.³⁴ The *Hirsi* standards were confirmed by the ECtHR in its later judgment in *Sharifi*, a case concerning a group of migrants from Afghanistan, Sudan and Eritrea, who had travelled by boat from the Greek town of Patras to Bari, Italy in 2008 and 2009, where the Italian border police intercepted them and immediately deported them back to Greece.³⁵

The reluctance on the part of at least some European states to allow migrants entry into a proper refugee status determination procedure or return procedure, makes it easier to understand why the Frontex Sea Borders Regulation, which was adopted two years after the *Hirsi* judgment, only

³² Human Rights Watch 29 April 2014, ‘Containment Plan: Bulgaria’s Pushbacks and Detention of Syrian and other Asylum Seekers and Migrants’; Amnesty International 31 March 2014, ‘Bulgaria: suspension of returns of asylum-seekers to Bulgaria must continue’; ProAsyl 7 November 2013, ‘Pushed Back: Systematic human rights violations against refugees in the Aegean Sea and at the Greek Turkish land border’; Amnesty International 29 April 2014, ‘Greece: Frontier of hope and fear migrants and refugees pushed back at Europe’s border’; Amnesty International 9 July 2013, ‘Greece: Frontier Europe: Human rights abuses on Greece’s border with Turkey’

³³ Eldiario 16 October 2014, Vídeos: La Guardia Civil deja inconsciente a palos a un inmigrante y lo devuelve atado de pies y manos, <http://www.eldiario.es/desalambre/VIDEOS-Guardia-Civil-ilegalmente-inmigrante_0_314268729.html>. For a compilation of accounts see UNHCR, ‘Syrian Refugees in Europe. What Europe Can Do to Ensure Protection and Solidarity’, July 2014.

³⁴ Additional Provision 10 to the Organic Law 4/2000, of 11 January, Regarding the Rights and Freedoms of Foreign Nationals Living in Spain and Their Social Integration (Spanish Alien Law), adopted by Spanish Congress on 11 December 2014. Amnesty International Press Release 31 October 2014, ‘Spain: Immigration Law Amendment Will Violate Rights’.

³⁵ ECtHR 21 October 2014, *Sharifi a.o. v Italy and Greece*, no. 16643/09.

half-heartedly seeks to incorporate the standards of that judgment. In proposing the Regulation, the European Commission expressly sought to take account of the *Hirsi* standards.³⁶ Instead of merely alluding to the prohibition of returning asylum seekers to an unsafe country (non-refoulement) without setting forth how that prohibition should be guaranteed in practice, as was done in Decision 2010/252/EU, the Regulation sets forth a number of substantive and procedural guarantees. Thus, it is stipulated that ‘when considering the possibility of disembarkation in a third country’, the participating Member States ‘shall take into account the general situation in that country’.³⁷ Furthermore, it is laid down that ‘all means are used to identify the intercepted or rescued persons’ before being returned to a third country.³⁸

But a closer reading of the Regulation text reveals that in three areas relating to procedural standards, the drafters have left room for ambiguity. The Regulation provides as basic rule that disembarkation shall occur in the coastal Member State in the case of interception in the territorial sea or the contiguous zone, and holds that in the case of interception on the high seas, disembarkation may take place in a third country. If that is not possible, disembarkation shall take place in the host Member State.³⁹

The rule of disembarkation in the coastal Member State in the situation of interception in the territorial waters is in line with the clarification in the recast Asylum Procedures Directive that asylum applications made in the territorial waters fall within the directive’s scope and are therefore to be examined by the coastal Member State.⁴⁰ The Regulation does not, however, address the possibility of asylum claims made by migrants intercepted in the territorial waters entirely satisfactory. First, by way of exception, Art. 6(2)(b) of the Frontex Sea Borders Regulation allows participating units to order a vessel found in the territorial sea ‘to alter its course towards a destination other than the territorial sea or the contiguous zone’. This compromises the guarantees of the Asylum Procedures Directive and is difficult to reconcile with the *Hirsi* ruling. Second, the Regulation does not address the situation where a coastal Member State experiences systemic flaws in the asylum procedure and in the reception conditions for asylum seekers. Both the ECtHR and the CJEU have declared that in such situations, Member States may not transfer asylum applicants to the Member State in question pursuant to the Dublin Regulation.⁴¹ This is especially relevant in the context of Frontex operations, as Greece and Italy, two likely candidate countries to host Frontex missions, have been declared unsafe for (particular categories of) asylum seekers.⁴² Although this case law specifically deals with Dublin transfers, it would not be unreasonable to extend its implications to interceptions at sea where one Member State wishes to transfer intercepted migrants who may wish to claim asylum to the coastal Member State. The Frontex Sea Borders Regulation avoids the issue, and hence fails to clarify for participating Member States how to address the issue of disembarkation in a Member State where the asylum system is flawed.

Also problematic are the Regulation’s standards on disembarkation of intercepted or rescued persons in a third country. First, the Regulation does not require that the identification is

³⁶ COM(2013) 197 final.

³⁷ Reg. 656/2014, Art. 4(2).

³⁸ *Ibid*, Art. 4(3).

³⁹ *Ibid*, Art. 10(1)(a) and 10(1)(b).

⁴⁰ Directive 2013/32/EU, Art. 3(1).

⁴¹ ECtHR 21 January 2011 [Grand Chamber], *M.S.S. v Belgium and Greece*, no. 30696/09, CJEU 21 December 2011, Case C-355/10 (*N.S. and M.E.*); ECtHR 4 November 2014 [Grand Chamber], *Tarakhel v Switzerland*, no. 29217/12.

⁴² See *M.S.S. v Belgium and Greece* and *Tarakhel v Switzerland*.

done by trained personnel, and neither requires the presence of interpreters and legal advisors on board participating units, but merely holds that such ‘details’ are to be contained in the operational plans to be drafted for each Frontex mission, and only ‘when necessary’.⁴³ The operational plans, however, are secret. It is highly questionable whether they are appropriate instruments for guaranteeing fundamental rights. The adjective ‘when necessary’ further begs the question when proper communication and legal advice is not deemed essential for refugee status determination.

Second, the Regulation says that migrants have to be informed of their destination ‘in a way’, instead of a language, ‘that those persons understand or may reasonably be presumed to understand’. One MEP involved in the negotiations with the Council explained that this seemingly minor detail may have profound consequences:

When insisting on informing persons on board of the place of disembarkation in a way rather than in a language they understand, the Council indicated that this would allow Member States to point just on a map to show people where they would be disembarked. Fine so far. However, if a common language does not exist, how could refugees then "express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement" in a way Frontex would understand? They could wave or shout. But probably every person on board would wave or shout no matter if he or she is in need of protection or rather looking for a better live in Europe. And how, if everybody waves or shouts, can they make clear that an interpreter would be needed in their case? As mentioned above, interpreters will be provided only if necessary, possibly via a radio interpreters help line.⁴⁴

This reminds of the so-called ‘shout test’, which was employed by the US coast guard intercepting Haitian migrants in 2004. The test purportedly allowed a person to be interviewed for pre-establishing his refugee status, but only if he, in the words of one U.S. Coast Guard Commander, aggressively insists he fears for his life.⁴⁵ A commentator observed that “only those who wave their hands, jump up and down, and shout the loudest – and are recognized as having done such – are even afforded, in theory, a shipboard refugee pre-screening interview.”⁴⁶ It was reported that only nine of 1.850 interdicted Haitians were transferred to the migrant reception center on Guantánamo Bay for status determination on the basis of this form of pre-screening and that only one of those was found to be a refugee.⁴⁷

Third, and arguably most problematic in view of the *Hirsi* judgment, is that the Regulation does not say anything about legal remedies with suspensive effect. There is no mention of a right of appeal against return to a third country. Given that a right of appeal and making that right effective by providing information and access to legal assistance is well-nigh impossible to reconcile with a desire to disembark intercepted or rescued migrants in a third country, the omission of such guarantees in the Regulation suggests rather clearly that some Member States simply insisted during the negotiations to maintain that possibility.

⁴³ Reg. 656/2014, Art. 4(3)

⁴⁴ S. Keller (MEP, Greens), ‘LIBE Special April 2014: New rules on Frontex operations at sea’, 16 April 2014, <<http://www.ska-keller.de/en/topics/migration/borders/libe-special-april-2014-new-rules-on-frontex-operations-at-sea>>.

⁴⁵ *Duluth News Tribune* 23 Jan. 2006, “Coast Guard told not to encourage asylum claims by Haitian migrants’.

⁴⁶ B. Frelick, “‘Abundantly Clear’: Refoulement’, 19 *Geo. Immigr. L.J.* (2004-2005), 245 at 246

⁴⁷ R.E. Wasem, Congressional Research Service, ‘U.S. Immigration Policy on Haitian Migrants’, CRS Report for Congress, 2010, p. 5.

Overall, the Regulation establishes a very specific regime for dealing with migrants who may claim asylum who are found at sea, outside the ordinary framework of EU asylum law. The EU directives on asylum, which regulate such matters as the reception conditions, the standards of the asylum procedure and the eligibility criteria for asylum, are, according to the definitions on the scope of the directives, applicable 'to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State'. Applications made at the high seas or beyond are hence excluded from their scope.⁴⁸ If the latter applications are made in the context of a Frontex mission, they are governed by the Regulation, which provides a set of substandard guarantees, omitting such key elements as the right of access to an asylum procedure, the right to legal assistance, the right that a decision is given in writing, the right of appeal, etcetera. Further, the Regulation has its own standards on returns and apprehension, which are not at all aligned with the norms set out in the Returns Directive (2008/115/EC) setting out the common procedures to be applied in Member States for returning illegally staying third-country nationals. The conclusion is accordingly that very much akin to the United States and Australian precedents, the Regulation excludes boat arrivals from ordinary statutory guarantees.

A further omission is that the Regulation is remarkably silent on interceptions in the territorial sea of third countries. In earlier policy documents, the wish was expressed to clarify the scope of Member State powers also in respect of operations in the territorial sea of third countries.⁴⁹ The issue is topical, as for example Spain has concluded detailed arrangements with a range of countries in Northwest Africa, including Morocco, Senegal, Mauritania and the Cape Verde, which foresee in joint sea patrols of the Spanish *Guardia Civil* and the border authorities of the partner countries, and which aim to prevent migrant vessels from exiting the territorial sea of the latter countries.⁵⁰ These patrols have been highly instrumental in closing the Atlantic migration route to the Canary Islands and continental Spain. Frontex has been involved in these operations, as it coordinated the various HERA operations in the seas adjacent to Mauritania, Senegal and Cape Verde. Spain's bilateral arrangements have raised questions about their implications for the migrants' fundamental right to leave a country, the safeguards applicable during interception and the division of responsibilities between the various states involved.⁵¹

4. Saving lives at sea and immigration deterrence

Another hot potato concerns the question of how to execute border surveillance 'while contributing to saving lives'.⁵² Compared to 'ordinary' situations of distress at sea, the combination of 'irregular migrants' and 'distress' tends to generate questionable dynamics of burden avoidance and burden shifting.

⁴⁸ See Directive 2013/33/EU, Art. 3; and Directive 2013/32/EU, Art. 3(1).

⁴⁹ COM(2006), 733 final, par. 34.

⁵⁰ The agreements themselves are confidential. See for an extensive analysis P. Garcia Andrade, 'Extraterritorial Strategies to tackle Irregular Immigration by Sea: A Spanish Perspective', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), 311-346.

⁵¹ *Ibid.*

⁵² Reg. 656/2014, recital 1.

Obviously, if a state elects to render assistance to a migrant vessel at sea it makes itself the most plausible candidate for having to carry the migrant burden – i.e. to bring the migrants to shore and thus allowing them to effectuate entry. Private shipmasters may for similar reasons be discouraged to engage in rescue operations. For them, there are not only potential delays and commercial losses involved, they may also be simply refused entry into any nearby port.⁵³ And if allowed entry into port, they must seriously take into account the possibility of being investigated or even charged for involvement in migrant smuggling.⁵⁴

This gives rise to all sorts of avoidance behavior which is regularly reported on by the press and NGOs in various European countries. Recall, for example, the incident of May 2007, when the shipmaster of a tuna pen flying the Maltese flag had rendered assistance to a group of 28 irregular migrants whose ship had sunk and who, for both financial and security reasons, refused to allow the migrants on board. And because Malta, Italy nor Libya were under a clear obligation to allow the migrants to disembark in one of their ports, the migrants were compelled to desperately cling to the buoys of a tuna fishing net for three days before finally being brought to Lampedusa.⁵⁵ In another incident in July 2006, the Maltese government had refused to allow the disembarkation of fifty-one migrants rescued by the Spanish fishing trawler *Francisco y Catalina* by affirming that it had been Libya's responsibility to rescue them and, given that a Spanish vessel ended up doing so, the migrants had become Spain's responsibility. After a standoff lasting eight days, it was agreed that Malta, Libya, Italy, Spain and Andorra would all take in a share of the migrants.⁵⁶ A further peculiar example of how shipmasters are not all too keen on rendering assistance is an incident in August 2014, when the Rescue centre in Rome called on 76 ships which were in the area of rescue of a vessel in distress, but where within one minute there were only six ships left on the radar screen. All the others had switched off their radar signal.⁵⁷ Well-documented as well, is the fate of the so-called left-to-die boat, of whom all but 11 of the 72 passengers died, and which gave rise to an investigation of the Parliamentary Assembly of the Council of Europe. The report revealed, amongst other things, how a military helicopter had dropped water and biscuits in the adrift vessel but never returned, and how a large military vessel allegedly ignored the boat's distress calls after half of the passengers had already died.⁵⁸

Avoidance behavior lies at the heart of disagreements between EU Member States, in especially Malta and Italy, on the interpretation of relevant international law standards on search and rescue at sea. One such dispute concerns the definition of rescue in the International Convention on Maritime Search and Rescue (SAR Convention) and in particular the duty to deliver rescued persons to a 'place of safety'.⁵⁹ Malta maintains that disembarkation should always occur at the nearest safe port to the site of the rescue, which is often a port in Italy. Italy, on the other hand, is of the opinion that rescued migrants should be brought to a port of the country in whose Search

⁵³ For examples see M. den Heijer, *Europe and Extraterritorial Asylum*, Oxford: Hart Publishing (2012), at 231.

⁵⁴ *Statewatch News* 7 Sep. 2007, 'Italy/Tunisia: Fishermen on trial for rescuing migrants'.

⁵⁵ The incident has been widely reported. For a summary: Migration Policy Group, *Migration News Sheet*, Brussels, July 2007, p. 11.

⁵⁶ Migration Policy Group, *Migration News Sheet*, Brussels, August 2006, pp. 16-18.

⁵⁷ BBC News 12 November 2014, 'Mediterranean migrants: EU rescue policy criticized'.

⁵⁸ Parliamentary Assembly of the Council of Europe, 'Lives lost in the Mediterranean Sea: who is responsible?', 5 April 2012, doc. 12895.

⁵⁹ International Convention on Maritime Search and Rescue 1979, Annex par. 1.3.2.

and Rescue (SAR) region the rescue took place.⁶⁰ Malta, strategically located in the middle of the Mediterranean, has a large SAR zone relative to its size (which encloses the Italian island of Lampedusa) and has for that reason rejected amendments to the SAR Convention of 2004 which bestow 'primary responsibility' for ensuring that survivors are disembarked from the assisting ship and brought to a place of safety on the government responsible for the SAR region.⁶¹ A majority of other Contracting States, including Italy, did accept the amendments. Malta feared that the new arrangement would be an open invitation to migrant smuggling, since vessels carrying migrants would simply have to enter the closest neighboring SAR area, launch a distress call and the government of that SAR zone would effectively be obliged to come to their assistance and guarantee a place of safety.

Malta and Italy also disagree when a vessel is in distress, which under the Law of the Sea triggers duties of search and rescue. Klepp describes how the Armed Forces of Malta adhere to the definition that distress is the imminent danger of loss of lives. In that perspective: if a ship is sinking it's distress. If the boat is not sinking, it's not in distress. The Italian navy, on the other hand, would rescue every heavily overloaded boat.⁶²

Avoidance behavior is also discernible on the part of the smugglers and migrants themselves. There are quite a few incident reports where migrants aim to be rescued by one Member State in particular – often Italy. Thus, after a group of 220 Syrian migrants had been taken on board a Maersk cargo ship some 285 nautical miles southeast of Malta in October 2014, they refused to be transferred on Maltese patrol boats.⁶³ After having exhausted further attempts to transfer the migrants onto a boat to Malta, the Armed Forces of Malta made contact with the Italian government which agreed to take charge of the group. In a similar incident one month earlier, some 300 mostly Syrian migrants who had been rescued by the cruise liner *Salamis Filexonia*, refused to disembark in Cyprus, insisting that they be taken to Italy instead.⁶⁴ After a stand-off that lasted a day, Cypriot police negotiators coaxed the migrants off the ship. The Armed Forces of Malta have sometimes been accused of providing migrants in distress with water, food or fuel and driving them to Italian waters, but have themselves always denied such allegations, saying instead that it often happens that migrants refuse to be transferred onto Maltese patrol vessels, in which case they remain in close vicinity in order to render assistance should the need arise.⁶⁵

The Frontex Sea Borders Regulation is much more explicit on search and rescue situations than Council Decision 2010/252/EU. It provides binding rules on search and rescue (as opposed to guidelines in the Council Decision) in the form of quite detailed instructions for participating units in case they are confronted with distress situations. These rules were adopted despite opposition of six

⁶⁰ S. Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea', 23 *International Journal of Refugee Law* (2011), 539 at 548-551; P. Mallia, 'The Challenges of Irregular Maritime Migration', Jean Monnet Occasional Paper No. 4/2013, at 11.

⁶¹ Mallia, n. above, p. 11. See also *Times of Malta* 26 April 2009, 'Shrinking Malta's search and rescue area is 'not an option''.

⁶² Klepp, *supra* note 60, at 554.

⁶³ *Times of Malta* 26 October 2014, 'Rescued migrants refused to come to Malta'.

⁶⁴ *International Business Times* 26 September 2014, 'Nearly 300 Migrants, Mostly Syrians, Refuse To Disembark In Cyprus After Rescue'.

⁶⁵ Human Rights Watch Sept. 2009, 'Pushed Back, Pushed Around. Italy's Forced return of Boat Migrants and Asylum-Seekers'; *Malta Today* 19 August 2014, 'AFM denies Italian media report claiming it pushed migrants away'.

Mediterranean countries (Italy, Cyprus, France, Greece, Malta and Spain).⁶⁶ These countries called the proposed provisions on search and rescue “unacceptable for practical and legal reasons” and argued that international maritime law already dealt ‘amply’ with such situations.

These countries do have a point, as international law already circumscribes search and rescue obligations extensively. Art. 98 of the United Nations Convention on the Law of the Sea (UNCLOS) contains the primordial duties on the part of every shipmaster ‘to render assistance to any person found at sea in danger of being lost’ and ‘to proceed with all possible speed to the rescue of persons in distress’. It further obliges coastal states to ‘maintain adequate and effective search and rescue services’. These general duties are worked out in detail in the SAR Convention. The Frontex Sea Borders Regulation confirms that it does not affect these obligations and for the most part reiterates them.⁶⁷ From the outset, it appeared that the key added value of the Regulation would lie in harmonizing divergent interpretations of Member States on such issues as what distress amounts to and what a place of safety means. But this turned out to be a bridge too far.

The Regulation ‘solves’ the issue of what distress exactly is by inventing a sliding scale of three phases of urgency, namely a ‘phase of uncertainty’, a ‘phase of alert’ and a ‘phase of distress’.⁶⁸ All three phases are defined in an open manner – by merely mentioning examples of situations belonging to each phase. Especially remarkable is that the Regulation does not differentiate between the type of action to be undertaken in each of the phases of urgency. It merely holds that in all three phases, participating units are obliged to transmit all relevant information to the Rescue Coordination Centre and to place themselves at the disposal of that Rescue Coordination Centre.⁶⁹ And, ‘while awaiting instructions from the Rescue Coordination Centre’, they must ‘take all appropriate measures to ensure the safety of the persons concerned’. Although this may guarantee that participating units remain alert also in situations not requiring immediate action, the Regulation fails to specify when rescue operations must be initiated. It assigns primary responsibility for such a decision to the Rescue Coordination Centre, and puts participating units under the vaguely formulated residual obligation to take appropriate measures to ensure safety. Hence, the Regulation leaves it to each Rescue Coordination Centre and participating unit to decide whether it is appropriate to remove every overloaded and unseaworthy vessel from the sea as soon as it leaves port, or to come into action only when a boat is actually sinking.

Neither does the Regulation provide clarity on what ‘a place of safety’ is. It holds that the Member State hosting the Frontex mission and the other participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify a place of safety after a rescue operation.⁷⁰ The Rescue Coordination Centre shall then designate a place of safety. Importantly, however, in case a place of safety cannot be agreed on ‘as soon as reasonably practicable’, the Regulation provides as residual rule that disembarkation should occur in the host Member State.⁷¹ That rule goes some way in addressing the frequent controversies between Member States over allowing rescued migrants entry into a port. However, Malta has always firmly

⁶⁶ ANSA 15 October 2013, ‘Immigration: EU Council divided over FRONTEX guidelines’. See also Council docs. 10349/13 of 14 June 2013 and 14612/13 of 10 Oct. 2013.

⁶⁷ Reg. 656/2014, recital 14 and 15.

⁶⁸ *Ibid.*, Art. 9.

⁶⁹ *Ibid.*, Art. 9(2)(a).

⁷⁰ *Ibid.*, Art. 10 (1)(c).

⁷¹ *Ibid.*

resisted such a rule (which already existed in the previous non-binding guidelines) and for that reason refuses to host any Frontex mission since 2010.⁷²

The freedom of Malta to simply ignore the common EU rules in this manner lays bare the more fundamental issue of how to ensure common action and Member State solidarity in the area of external border control. Frontex pool of assets and border guards is made up of voluntary contributions of Member States. The voluntary character of Member State participation has obvious consequences for Frontex' effectiveness. According to Frontex' former director, the dependence of Frontex on voluntary contributions of Member States compromises its ability to fulfil its mandate.⁷³ Moreover, it fails to guarantee that a Member State facing particular pressure at its external borders is appropriately assisted. Apart from Malta's refusal to host Frontex missions, the United Kingdom has now also announced that it would no longer participate in search and rescue operations in the Mediterranean.⁷⁴ The United Kingdom, despite being outside Schengen, did participate in most Frontex operations, but is principally opposed to Operation Triton, the EU's successor to Mare Nostrum Operation which is said to have saved the lives of around 150.000 migrants.⁷⁵ It is precisely the success of Mare Nostrum in terms of lives saved which explains the United Kingdom's reluctance to participate. Just as Malta, the UK government is concerned that search and rescue operations in the Mediterranean act as a pull factor for illegal migration, only encouraging more people to make the dangerous crossing in the expectation of being rescued. The discussion on Mare Nostrum and Triton shows that there is not only hardly a common vision on how to approach the very issue of boat migration, but also that any Member State with a different view can simply choose to withdraw itself from any common action.

5. Conclusion

No one should have expected the Frontex Sea Borders Regulation to be the panacea for all the tragedies in the Mediterranean and the difficulties in finding a common European answer. The Regulation is in fact a stronger instrument than the Council Decision it replaces, both in terms of fundamental rights and search and rescue obligations. Yet, the Regulation is inherently flawed for three main reasons. First, because it avoids hard choices on difficult issues of how to share the migrant burden and how to cooperate with third countries, it tends to legitimize questionable unilateral practices of Member States. This is most evident from its substandard guarantees against removals to third countries, but also transpires from some of the compromises in the sphere of search and rescue. It is important to recall, therefore, the duty under EU law to implement secondary EU legislation in conformity with the EU Charter on Fundamental Rights. But it would have been better if these guarantees were respected fully in the text itself.

Second, similar to its predecessor, the Regulation proceeds from the questionable presumption that boat migrants may be treated in a fundamentally different manner than migrants who present themselves in or at the border of a state. The Regulation does not refer in any way to the guarantees for persons subjected to 'ordinary' border controls laid down in the Schengen

⁷² *Times of Malta* 2 July 2011, 'Army can honour 'all international obligations', AFM commander insists'. Briefing European Parliamentary Research Service 13/12/2013, 'Irregular immigration in the EU Some national perspectives on arrival of immigrants'.

⁷³ I. Laitinen (Frontex director), 'An Inside View', EIPASCOPE 2008/3.

⁷⁴ *BBC News* 28 October 2014, 'UK opposes future migrant rescues in Mediterranean'.

⁷⁵ UNHCR 17 October 2014, 'UNHCR concerned over ending rescue operation in the Mediterranean'.

Borders Code, and refers neither to guarantees for asylum seekers laid down in EU asylum law. It thus creates a parallel regime for migrants found at sea, opening up procedural possibilities for expedient and summary returns, but also for apprehending migrants and the taking of other coercive measures, outside a comprehensive human rights framework. There are notable parallels here with the manner in which Australia has created a special immigration regime for ‘unauthorized boat arrivals’ and the United States policy of legally separating migrants based on whether their feet are dry or wet.

Third – and one might be tempted to welcome this in view of the two preceding points – the Frontex Sea Borders regulation provides only a limited set of answers to a limited set of situations. It only enters into play if it is decided that a Frontex mission should be started and only applies to Member States who on a voluntary basis decide to participate in a Frontex mission. It does not apply to unilateral maritime controls of Member States, which are still far more common than those undertaken under the aegis of Frontex. It follows that there are no common EU rules on individual Member State maritime controls. Given the prevailing disputes between Member State arising from such operations and the fact that all external border controls are in the scope of Union law, the choice of the EU legislator to adopt rules solely for Frontex operations, which it justifies on the basis of the principles of subsidiarity and proportionality, can be seriously questioned.⁷⁶ The result is that, although the EU has fully harmonized the manner in which border controls ‘at’ the external border must be conducted by virtue of the Schengen Borders Code, it allows for altogether divergent control practices of Member States at sea. This challenges the very integrity and coherence of the EU’s external border controls regime.

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⁷⁶ COM(2013) 197 final, Paragraph 5