

Weekly Editorial: Disembarkation – Are We Nearly There Yet?

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Brussels: European Council on Refugees and Exiles (ECRE) has issued the following press release:

In the last few weeks, some progress has been made on the temporary arrangements for disembarkation and relocation in the Mediterranean, first at a special meeting in Valletta and at the Justice and Home Affairs Council in Luxembourg on Tuesday. ECRE offers a cautious welcome to these developments: welcome because there are more positive than negative elements but cautious because undesirable points still find their way in. The agreement now needs to be finalised and expanded.

The Coalition and the Agreement

First, it should be emphasised that this is not an agreement in any formal sense. As the French Interior Minister explained after the JHA Council, this is not an international treaty that countries sign up to. We are way into the territory of political and practical cooperation and away from legal solutions – although a wide range of international law provisions still apply as is sometimes overlooked.

In terms of what is actually in place it is best to separate two elements: the coalition of the willing and the agreement. There is a group of European countries who are working together to manage the humanitarian consequences of the situation in the Mediterranean. By ECRE's count, this now includes 17 countries. The coalition has fuzzy edges – a few countries have come in and out, such as Austria, invited to some meetings when it held the EU Presidency but even then present in person but not in spirit (an unwilling participant in the coalition of the willing and not one of the 17). In July, France referred to 14 countries in the preliminary agreement; on Tuesday they referred to 10 EU Member States who welcomed the Valletta developments.

The agreement is not the same as the coalition. Following the Malta meeting, it was announced that four countries had reached an agreement: France, Germany, Italy and Malta. This was the formal sign that Italy and Malta had joined the arrangement – their absence was a gaping hole at the July meeting but the change in the composition of the Italian government has enabled their involvement.

The agreement can be seen as encompassing these four countries which have signed up and also those who have demonstrated through their actions that they agree to the arrangements. The best indicator of being part of the agreement is involvement in relocation. To date there are 12 countries who have relocated people at some point in the last 18 months: Croatia, France, Germany, Ireland, Luxembourg, Lithuania, Netherlands, Norway, Portugal, Romania, and Spain. Then, Finland which has just started relocation following the appointment of a Green Minister

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of the Interior who changed their policy, and Belgium which has relocated people but is not currently involved as it doesn't have a government. It would be unfortunate and unlikely if its new government withdrew definitively from collective efforts to manage a European challenge.

With Italy and Malta, that makes a core group of 15 operating the informal agreement out of a coalition of up to 17. Switzerland and Sweden have been in discussions but have not relocated people, so are best described as part of the coalition but not the agreement.

What has been agreed?

The content of the agreement is slightly clearer than its membership. Following the argument above, what has been agreed is the Malta Declaration but it is also the practical arrangements that are operating, as countries that are relocating have agreed to be part of something. Thus, as well as the text of the Malta Declaration, we also assess information on the informal arrangements that are apparently working.

On the positive side, there is now an agreement on relocation including some sort of quota system for relocation of rescued people. This is already being applied and features in the Malta Declaration (point 2).

The agreement on who to relocate is also positive, with a reference to asylum-seekers (point 2). A major sticking point has been some countries' unwillingness to relocate those who – after brief nationality-based speculation – are presumed not to have protection needs. For political reasons, some may hang on to the idea that it only applies to the most manifestly founded but that is not what is stated or what is happening in practice.

The process set out tends towards the positive with a reference to Standard Operating Procedures (SOP), (point 4) which probably means the "Messina Model" developed by EASO for managing relocation. Having a SOP – and the involvement of EASO – is likely to reduce the risk of unlawful detention and denial of access to the asylum procedure which has followed some (reluctant) disembarkations. There are good references to fast relocation and to a four-week time limit.

On return, there is good and bad. Point 7 argues for return: ...of those not "eligible for international protection". This is presumably after the fast-track relocation and status determination, or for those not seeking asylum, so it may not imply changes in practice or procedure. As is de rigeur in any document on asylum and migration, there is a disproportionate emphasis on return. So long as that is not translated into new procedures, as per the hotspots, or yet more (un-spendable) resources, then it can be ignored.

Further difficulties in the agreement can be remedied either by adding or removing elements. First, it should cover all countries in the Mediterranean not just Italy. While the previous Italian government was in place, Member States supported wanted it to cover more countries so that it could not be presented as a victory for Salvini. Now, the scope seems to have narrowed again to only Italy. Partly in response, Bulgaria, Cyprus and Greece presented their own plan to the JHA Council. The actions suggested are not wholly clear nor adequate however the initiative is best seen as a call for help and a reminder that support should also apply to them, and rightly so. It follows previous proposals from Cyprus for relocation given increasing arrivals there.

Second, the declaration says that state-owned vessels should disembark in the flag state (point 1). This was not in the earlier drafts; it was presumably added as a condition for Italy and Malta to sign up. It is probably a dig at Germany. Tension has arisen in relation to major SAR NGOs registered in Germany or with prominent German staff members. Although the reference is to "state-owned" vessels, it echoes the Salvinian rhetorical approach of saying "Why don't you take the ship?" when other governments urged Italy to allow vessels to dock.

Whatever the explanation, the suggestion is idiotic and contravenes numerous aspects of international law, and not least the Law of the Sea. As ECRE has previously discussed, there are different interpretations of the rules on the port of disembarkation, and not least key differences between Italy and Malta, which is one of the underlying reasons for the crisis. However, the rules could not possibly be stretched so far as to say that disembarkation should be in the flag state. For example, if Ireland sends ships to the region as it has done in the past, are they supposed to then disembark in Dublin port?

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Other negative elements include the reference to the use of leverage on Countries of Origin in the context of return (point 7); the instructions to SAR providers to comply with commands from Regional Coordination Centers (which could include Libya) and not to “obstruct” coastguards including the Libyan Coast Guard (point 9); and a call on UNHCR/IOM to “encourage” support for disembarkation in North Africa (point 14).

These points should not be there but insofar as they call for actions from organisations and governments who are not party to the agreement they are immaterial, if unwelcome.

Beyond the outright negative elements, there are weaknesses. There is no agreement on dividing responsibility for disembarkation – i.e. where should ships dock. The draft agreement included different options, including an “automatic rotation scheme”. Apparently this could not be agreed. ECRE has argued that two pieces are essential: as well as a relocation mechanism, there needs to be an agreement to divide responsibility for disembarkation without prejudice to the existing provisions of the Law of the Sea. Discussions should continue on this.

The Declaration calls for an increase in EU aerial surveillance but there is no reference to reinstatement of maritime operations. The Declaration and any related agreement has no status in the Member State deliberations on the future mandate of Operation Sophia or of Frontex operations, which take place in their own respective structures. However, it should be read as an indication that despite the end (or break from) Salvini, there is no plan to reinstate maritime operations. This would be a major error, and not just due to the humanitarian consequences. ECRE has commented on the problems of removing Operation Sophia’s naval assets (which had rescued +45,000 people just by being present). The related crackdown on SAR NGOs is not working – they continue to operate. (And not only: the Protestant church in Germany has just bought a rescue ship to operate in the Mediterranean.) But these efforts should not have to substitute for state/EU-operated SAR in the most deadly sea area in the world. In addition, without adequate SAR efforts merchant ships have to rescue people and this causes disruption to shipping.

Welcoming, Cautiously

Overall, this is important progress, and a cautious welcome is fair. Of course, the coalition of the willing model is far from ideal, but it is better than nothing. Those who object because it apparently undermines solidarity in the EU – cue spurious reference to Article 80 TFEU – should get their priorities straight. This is a humanitarian issue not an attempt to undermine the workings of the EU.

The numbers are adding up, with the coalition discussions bringing in more countries. As well as the four who have formally joined the agreement, another 10 have demonstrated that they are part of it through their actions, and specifically involvement in relocation. The countries outspokenly opposed to the agreement – Hungary and Denmark of course – look more and more isolated. Their tired and unfounded arguments about pull factors are even being challenged by the media.

As with the relocation programme, there is a risk that well-meaning people condemn any positive measure for not being enough. It’s not enough – obviously – but that doesn’t mean it’s without value. To say so, plays into the hands of those who would rather do nothing and give up on any kind of collective and halfway decent policy. Similarly, the criticism that this tentative agreement is not a “solution” misses the point – there is no such thing. Asylum and migration are complex policy issues which need to be tackled piece by piece. The overdue emergence of an agreement to deal with one particular humanitarian mess is but one necessary measure. The long-term flaws that provoked the situation remain to be tackled, and there will be no shortage of other short-term challenges to manage.

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