

PROTECTION OF, OR PROTECTION FROM, REFUGEES? REFLECTIONS ON BORDER CONTROLS AND MOVEMENT OF PERSONS AT THE EUROPEAN BORDERS

*Eduard Nazarski**

Introduction

There is one photograph that captures the current approach towards people from poor countries trying to reach European borders better than any description or figures. That photograph shows 27 persons clinging to a tuna pen dragged by a Maltese fishing boat in the Mediterranean Sea in 2007. The Italian Navy rescued these people after three days. Later on it turned out that the captain of the boat did not want to alter the course to let the migrants disembark because he did not want to lose his catch of fish. This episode was not the last of its kind.

Economic reasons are not the only ones creating such appalling situations. Those who rescue people in distress at sea could be indicted for crimes related to illegal immigration, as has happened in Italy. This considerably threatens lives at risk.

Even if it has been repeatedly stated that irregular entries by sea are far less important in terms of numbers than those through land borders and that therefore there is no reason to focus exclusively on sea border controls, the amount of people trying to enter Europe by sea is considerable (between 100,000 and 120,000 per year in the Mediterranean only)¹ as is the death toll (including more than 10,000 of those who tried to reach the Italian coast in the last decade)².

On the other hand, control operations at land borders give rise to concern as well, especially between Greece and Turkey. Also the developments in Eastern Europe (Ukraine, Moldova) are worrying. Refugees are seldom conferred formal asylum. The facilities for asylum-seekers are below acceptable levels.

I. Dilemma

** Eduard Nazarski (55) studied anthropology and has a MBA from the Business School Nederland. He worked with the Dutch Council for Refugees for 15 years, in various functions, including as Director from 2000 until 2006. Since March 2006 he has been the Director of Amnesty International, Dutch Section. He has been a member of the board of the European Council on Refugees (ECRE) since 1997, acting as Chair from 2005 until September 2008. The opinions expressed in this paper are those of the author and do not necessarily reflect the views of Amnesty International or the Dutch Council for Refugees.*

¹ International Centre for Migration Policy Development, *Irregular Transit Migration in the Mediterranean – Some facts, figures and insights*, Vienna, 2004.

² Giovanni Maria Bellu, 'Quel cimitero nel canale di Sicilia, « Diecimila annegati in 10 anni »', *La Repubblica*, 17 June 2008.

We are faced with a very difficult dilemma. Irregular migration is both a security issue and a humanitarian one. On the one hand, as also the European Court of Human Rights rules in its settled case-law, “Contracting States have the right, as a matter of well-established international law and subject to their Treaty obligations including the Convention, to control the entry, residence and expulsion of aliens”.³ On the other hand, States must comply with other international provisions with regard to the safety of those falling under their jurisdiction, in particular with regard to article 2 (right to life), article 3 (prohibition of torture and other inhuman or degrading treatments or penalties) and article 4 of Protocol 4 (prohibition of collective expulsions) of the European Convention on Human Rights and article 33 of the 1951 Refugee Convention. Is it possible to cope with security issues (border controls) while respecting the human rights of those arriving? Research shows that “the main effect of these border and immigration control efforts in the Mediterranean thus far seems to have been a diversion of the migratory flows towards longer and thus also more dangerous routes across the Mediterranean, thus directly contributing to increasing the risks for the undocumented immigrants seeking to reach the EU by boat”.⁴ It is evident, in my opinion, that the right to control one's own borders in time of peace should not be realised to the detriment of human lives.

II. No comprehensive EU migration and asylum policy yet

When the Schengen Agreements were concluded in 1985 and 1990, it seemed clear that the free movement of persons within the States concerned would have consequences for those arriving from third countries. In 1990 the Dublin Convention was adopted (even if it entered into force only in 1997) containing about the same provisions of the Dublin Regulation adopted in 2003.

In the late 1980s it was planned to have a harmonised European asylum policy as soon as 01-01-1993. This proved to be far too optimistic. After the Maastricht (1992) and Amsterdam (1997) Treaties, the path for a new, harmonised, European Asylum policy was clearly set out.

In 1999 the European Council reaffirmed in the Finnish town Tampere, that the EU and its member States were committed to ensure the absolute respect for the right to seek asylum by the full application of the Refugee Convention of the UN (1951). The idea of a Common European Asylum System (CEAS) was elaborated. A first phase of harmonisation of the different national policies started with the adoption of binding legislation. However, the level of harmonization reached is very poor and allows the States to maintain or adopt a very low standard of protection for refugees in

³ See, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2264, § 42.

⁴ Derek Lutterbeck, *Coping with Europe's Boat People. Trends and Policy Dilemmas in Controlling the EU's Mediterranean Borders*, ISPI Policy Brief, no. 76, February 2008.

the EU. In 2004 The Hague Programme moved on towards the second phase of the CEAS and expressed the aim to reach a uniform asylum procedure within the EU by 2010. It is not realistic to believe that the deadline will be met.

A CEAS that fully respects the Refugee Convention cannot be realised without respecting human rights at the borders.

As of the 1st of July 2008 France took over the presidency of the European Union and immediately presented an asylum and immigration pact, which was informally approved by the EU governments. A few weeks earlier, the European Commission adopted a communication on a common immigration policy for Europe and a policy plan on asylum. It is interesting to note that both the Presidency and the Commission reintroduced old proposals which ended up in deadlocks or were almost forgotten by the media for the last few years. Among these were the externalisation of asylum procedures, protection in the region of origin and the use of joint charter flights for expulsions.

Both European and national institutions agree on common plans or actions on asylum and migration when the aim is to limit or exclude the entry of foreigners, or to expel them. But when the aim is to reach a global and comprehensive approach to the whole issue, from the root causes of movement of people onwards, consensus seems far away and States draw out the principle of sovereignty, which allows them to decide what is best for their own country. Is it not an exhausting exercise to focus on interception and expulsion of those trying to enter without coping with the fact that they will try to enter time and again because they are persecuted or live in very harsh conditions?

In 2005 Joanne van Selm concluded that there is no European refugee policy. Rather, she perceives that “most European States have an asylum policy - which can at best be said only to be a quite small part of a full approach to refugee issues”.⁵ We can argue that Europe has no migration policy either and what is even more alarming is that States tend to treat refugees as if they were irregular migrants and thus undesirable. Of course, it is difficult to make an objective distinction between refugees and migrants when every day hundreds of people disembark from small boats after appalling journeys at sea. States, however, committed themselves to protect refugees. Therefore they must have a fair and efficient asylum procedure in order to determine if a person is a refugee or not. If it appears that he or she is not a refugee, States must take further decisions with regard to expulsion and possibly detention in full compliance with international human rights standards.

III. Starting at the end

⁴ Joanne van Selm, ‘European Refugee Policy: is there such a thing?’, *New issues in refugee research*, Working Paper No. 115, UNHCR, May 2005.

Europe's approaches to the migration/refugee issue start at the end of the process, instead of considering it as the result of a complex situation in which Europe itself plays a relevant role. Take for example the so-called "Dublin Regulation". According to this binding EU law, there is only one member State responsible for examining an asylum claim within the EU. In practice it is very often the country the asylum-seeker entered. This policy aims to impede asylum shopping in several countries. Many NGOs and scholars have criticised this regulation, because it came into force when no harmonisation of asylum systems had yet been reached (and has not yet at present). Such a regulation is inherently unfair, because it allows that a person who would get international protection in one State does not get it in the State where by chance he/she was obliged to apply for protection. First other harmonising measures should have been taken, like those on procedures and reception of asylum-seekers. Only when a balanced and stable system is in place can one talk about sharing responsibilities and possibly burdens.

The same seems to happen with the Return Directive, which was adopted last June and allows member States to detain foreigners staying irregularly in their territory for up to 18 months and imposes an entry ban for a maximum of 5 years for those who have been forcibly returned. Expulsion can take place on joint charter flights, but states have not yet agreed on common grounds for allowing migrants to legally stay in their territory. Harsh penalties for transgressors have been introduced while the rules of the game are not always clear and are not the same for everybody.

It is interesting to note that the language used by media and politicians referring to migrants who try to reach Europe has taken a military connotation in recent years, as if it there is an invasion justifying the building of a fortress as well as the adoption of a border agency (FRONTEX) and within this framework the implementation of Rapid Border Intervention Teams (RABIT).

FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States) is an example of how the control of the external borders has been given more and more significance in tackling illegal immigration. Not long ago, the northern States of Western Europe that were not touched by the continuous arrival of migrants at their borders, argued that border controls were the responsibility of the single State concerned and did not want to cooperate (financially or otherwise) with southern member States. Since then, it has become evident that immigration concerns all EU countries and not only the ones at the external borders of Europe, as people can move freely within the Schengen territory. Now also Switzerland, which is not even party to the EU, and the Netherlands are interested in participating in the FRONTEX operations and are ready to put naval or other means available to secure the frontiers.

What do the border operations consist of? Principally they seem to consist of turning back people who are not in possession of legitimate identification and travel papers. This can be on land or at sea. Until now there have been three main operations, called Hera (off the Canary Islands) and Nautilus and Poseidon in the Mediterranean. The budget of the agency has been recently increased considerably in order to guarantee permanent operations. These activities are carried out by the (para)military forces of the participant States under the coordination of the European Agency. It is unclear, however, which State is responsible for the people who are intercepted, rejected or rescued. Sometimes there is disagreement among the States on which one of them should be held responsible: the flag State or the State in whose territorial waters the operation took place? And what about those persons intercepted in international waters that are returned to the country they escaped from? Against the authorities of which State can people file a claim if their rights have been violated? And how many are they? Where do they come from?

IV. Old new proposals

The ideas of reception (or protection) in the region and that of processing asylum claims outside the borders are old ideas that currently are being suggested again. It is argued that not all the people who have to flee can come to Europe. Therefore, they should receive protection as close to their home as possible. Why should they come to Europe when their claim of protection can be assessed in Northern Africa or in Turkey or in Ukraine?

Reception in the region is already a standing practice as only a small percentage (about 15%) of refugees reach Europe. The vast majority of them remain in the neighboring countries and many of those who flee their homes are IDPs (Internally Displaced Persons), thus do not cross the border of their country. Besides, the consideration as to whether it is fair to worsen the already dramatic situation in some regions with more burdens, it is only to be hoped that North African countries or Turkey or Ukraine provide international protection. The point is that at the moment they seem not to be able or willing to provide it by means of a fair and efficient asylum procedure and the full respect of human rights. The truth is that these proposals mean: “we do not want these people in our homes and they should look for the solution of their problems somewhere else”. But Morocco has abandoned foreigners in the desert at the border with Algeria, where they were left without food or water. Egypt has returned hundreds of Eritreans to their country of origin, where they were at risk of persecution. The same has been done by Libya, which signed a secret agreement with Italy to combat irregular migration. It seems that reception centres for aliens have been built there (and also in Tunisia) with Italian financial support. Nobody is able to trace these centres and monitor the situation in which people live there, but it is well known that these countries do not respect the human rights of migrant and refugees. According to a recent report of Amnesty International,

thousands of migrants, accused of setting out from Mauritania with the intention of irregularly entering the Canary Islands (Spain), have been arrested and forcibly returned to Mali or Senegal.⁶ The desperate situation of refugees and asylum-seekers in the Ukraine seems to be in striking contrast with plans to deport asylum-seekers to Ukraine. The admission agreements will be in force between EU and Ukraine from January 2010. The central question here is: Does Europe have the intention and will to protect refugees, or is it organizing things in order to protect itself from refugees?

Final remarks

There are in my opinion two relevant principles that form the basis of any sensible discussion on migration/refugees issues. These are *the appropriate use of the language related to aliens* by the media and politicians and the *full transparency of the decisions and measures* regarding them.

Last month the Italian Association of Journalists, on proposal of the UNCHR, issued a code of conduct with regard to asylum seekers, refugees, victims of trafficking and migrants. This paper provides a glossary of the terms commonly used and calls on the journalists to exercise the utmost diligence when they report about these people, especially by using the appropriate terms; by avoiding to report superficially, which can raise unjustified alarms; by protecting the identity and the image of those involved and by consulting experts and organisations specialised in the issue which can provide correct information on certain situations, taking into account also their causes. This attempt to adjust the use of the language is very important. The media have a great impact when presenting stories of those arriving or staying. Therefore, I think it is important, for instance, not to speak about “illegals”. The fact that some people do not have the proper documents to stay or travel in a certain country does not mean that they do not have rights.

Another aspect that should be addressed is the absolute need for transparency when dealing with migration and refugee issues. It is unacceptable that there is no information about the specific activities of FRONTEX. FRONTEX' mandate should contain an explicit reference to the respect of the *non-refoulement* principle and State clearly that the rights of those rescued or intercepted must definitely be respected. Transparency should also govern both synallagmatic and multilateral agreements among States and between the EU, member States and third countries. They should never be kept secret or implemented solely to safeguard States' own interests (often economical). Only if we start from these premises can we have a discussion on migration/refugees issues conducive to finding real and sustainable solutions to these problems.

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⁵ Amnesty International, 'Mauritania: « Nobody wants to have anything to do with us ». Arrests and collective expulsions of migrants denied entry into Europe, AI Index: AFR 28/001/2008.