

“Disentangling Refugee Protection from the (European) Migration Control Web”

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Introduction

Ten years ago this week, Semira Adamu died. Or rather, Semira Adamu was killed. Semira Adamu was a 20 year old Nigerian woman, who had applied for asylum in Belgium. She claimed to have fled Nigeria to avoid a forced marriage with a 65-year old man who already had several other wives. Semira further claimed to have tried several times to seek refuge in neighboring Togo but to have been sent back to Nigeria each time. Belgium rejected her application in an accelerated procedure carried out in the detention center located at the airport, which was all she ever saw of Belgium. She suffocated when Belgian police who were escorting her on a commercial flight bound for Lagos pressed a pillow over her face to keep her from crying out.

Semira Adamu’s case illustrates the subject I want to talk about today, namely: how to deal with the tension between the right to seek and enjoy asylum from persecution, as enshrined in Article 14 of the Universal Declaration of Human Rights, and the right of states to control who enters and stays in their territory.

Politicians repeatedly re-affirm their commitment both to controlling irregular migration, and to protecting refugees. UNHCR has published a 10-point plan for protecting refugees in the context of mixed migration. But can this really be done? Is it being done?

In the European Union, it has become commonplace to speak of ‘balancing’ refugee protection and migration control. The metaphor of balance carries with it an inherent tension – in this case between individual rights and state sovereignty. Scales are rarely in balance – they tend to tip one way or the other.

Background: Tampere and the Common European Asylum System

By way of background, let me recall that it is nearly ten years since the European Union decided to establish a Common European Asylum System. In October 1999 the EU heads of state and government held a summit meeting at Tampere, Finland. The summit was devoted to the creation of an area of “freedom, security and justice” in the European Union. The heads of state and government decided that this area would include a common European asylum system, based on the parameters set out in the 1997 Treaty of Amsterdam (amending the Treaty on European Union).

The Treaty had stipulated that within a period of five years from its entry into force (i.e. by 2004), legally binding measures on asylum would be adopted, in accordance with the 1951 Refugee Convention, on temporary protection in situations of mass influx, reception of asylum-seekers, qualification for refugee status and subsidiary protection,

asylum procedures and the identification of which Member State is responsible for determining an asylum claim.

This was accomplished. We should not under-estimate this achievement; it is truly unprecedented that 27 sovereign states with different experiences with asylum and migration, different legal traditions and different geographic situations agree to harmonize their law and policy in an area as sensitive as asylum.

Even if in many cases the agreement simply represents convergence around the lowest common denominator, the legal framework for a Common European Asylum System has advanced international refugee law in some important ways. For the first time we have international (regional) law governing the rights of asylum seekers and the conduct of asylum procedures. These are subjects not addressed by the 1951 Geneva Convention (other than in its references to protection from *refoulement* and non-penalization for illegal entry). In addition, the EU Qualification Directive, which defines who is entitled to protection, builds on the Geneva Convention by stipulating clearly that persecution in the sense of the 1951 Convention remains persecution whether it is carried out by state or non-state actors, thereby resolving a long-standing European controversy.

Despite these advances, it is clear that the political focus in the EU is now not on asylum but on the control of irregular migration. Some observers allege that the emphasis has shifted from protecting refugees to protecting the EU from irregular migration. The reasons for this shift can be debated but clearly relate to the new security environment post 9/11, to the changed nature of migratory flows toward the EU since the end of the cold war, and to the failed integration policies in Europe.

Whatever the reasons, I fear that in the balancing of the rights of individuals and the sovereignty of the state, the scales seem to have tipped in the direction of the state. I propose to illustrate this from three angles which are of importance to refugee protection:

- i) the question of access to the territory of the EU;
- ii) the refugee status determination process, and
- iii) the removal of persons who do not have title to remain.

Access to territory

A common European asylum system only has meaning if persons seeking protection can have access to the territory where this system operates. At the same time as the Common European Asylum System was being built, the EU was developing the notion of “integrated border management”. The word ‘integrated’ does not refer to integration of all EU and international norms which should guide border management, including to norms of refugee protection, but to all border related “threats” as perceived by the EU.

The concept of integrated border management encompasses a whole range of measures, including those taken at the physical border and those taken outside the EU to prevent irregular crossing of the EU’s external border.

In 2006 the EU Council adopted the Schengen Borders Code, which applies to all EU (and several other) countries except those not participating in the Schengen area (namely UK and Ireland). It contains rules governing the movement of people across the EU’s external borders. It has an important saving clause, which stipulates that its provisions are without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-*refoulement*.

Articles 5 and 13 of the Code provide that entry to the EU of third country nationals who do not otherwise meet the entry criteria may be authorized on humanitarian grounds or because of international obligations --including those concerning the right to seek asylum. It is interesting to note that this safeguard was included at the insistence of the European Parliament (the Borders Code was the first instrument in the migration area to be subject to the co-decision procedure.) The Parliament also insisted that Article 13 incorporate a right to appeal against refusal of entry. According to the Code, the authorities are obliged to provide written reasons for refusal. But the right to appeal does not have suspensive effect, the exception to refusal of entry is crafted using the word “may” (not “must”) and – most importantly -- it is not clear how articles 5 and 13 are monitored and enforced.

Some individuals do manage to apply for asylum at the EU’s external borders, whether air, land or sea borders. Most enter irregularly, however, and apply for asylum thereafter. For this reason the EU focus has shifted to off-shore controls, including interception at sea and at airports in distant countries.

The creation of the European Agency for the Management of Operational Cooperation at the External Borders, or Frontex (which became operational in mid 2005) has been very important in this context. Frontex has a wide mandate to provide the Member States with expertise and support to assure a uniform, high level of control and surveillance of the external borders. Frontex enjoys very strong political (and financial) support from Member States. The most visible of its actions have involved efforts to stop irregular migration toward the EU across the Mediterranean Sea.

Like the Schengen Borders Code, Frontex’ founding Regulation (Council Reg. 2007/2004 of 26 Oct. 2004) affirms in its Preamble that it reflects the fundamental rights and observes the principles reflected in the Charter of Fundamental Rights of the EU. This includes the principle of non-*refoulement* and the right to asylum (contained in Article 18 of the Charter).

Frontex was given the power to enter into cooperative working arrangements with other organs, though the only other organ mentioned explicitly in the Frontex Regulation is Europol, the European police agency. Nonetheless, Frontex and UNHCR have concluded an exchange of letters setting a framework for cooperation, which to date has been largely confined to limited UNHCR participation in training sessions for border guards.

How to assess whether Frontex’ processes place due emphasis on the balancing of border controls with safeguards for basic rights? One measure is to see how Frontex itself defines its success. Frontex public statements on its different operations measure success solely in terms of the number of irregular migrants whose entry has been prevented. None makes any mention of persons seeking international protection, or how their rights might have been safeguarded.

This belies one of the most difficult issues with which Frontex has been confronted – namely what to do with people intercepted or rescued at sea – though some argue that there has been disproportionate emphasis on this, given that most illegal entries to the EU are by land. But the visibility of the maritime context has put a spotlight on questions of states’ responsibility for their extraterritorial actions, in particular in the context of the non-*refoulement* principle.

The EU Member States have been unable to agree on which state is responsible to disembark and subsequently deal with people who are intercepted or rescued outside any State's territorial waters. At EU level, a year-long attempt to reach agreement on this question failed to reach any conclusion.

The question is even more complicated when it involves non-EU countries, for instance North African countries where there is no guarantee that a person would have access to an asylum procedure or to a secure status upon recognition. An unknown number of people are turned back to third countries without any examination of their need for international protection. In certain cases their return to third countries results in their detention under inhumane conditions, or being left without any form of support, or being returned to other countries where they face a risk to their lives or liberty. Moreover, these countries might be the countries of origin of at least some of the persons intercepted or rescued, and sending the person back to his or her country of origin could violate the principle of *non-refoulement*.

Frontex does not publish comprehensive statistics, but recently published data for the 2008 Hera operation (targeting migrants departing from the West Coast of Africa heading for the Canary Islands) report that 4,180 "illegal migrants" were diverted back or deterred. Although the same Frontex chart indicates that experts deployed by Frontex carried out 1,111 interviews (presumably with migrants), there is no information on whether any of the persons sent back would have wished to seek protection.

This is even more of concern when one considers movements across other routes – such as from Libya toward Malta and Italy. Arrivals in those countries consist to a large extent of persons from Somalia, Eritrea, and Sudan – groups where there is a strong presumption of a protection need.

The principle of *non refoulement* contained in the 1951 Refugee Convention prohibits the return of persons "in any manner whatsoever" to the territories of states where their lives/freedom would be threatened. The question therefore arises of whether EU Member States are violating their obligations when they return persons to non EU countries without any examination of their protection needs.

Refugee Status Determination

A second area where I fear that the concern about irregular migration is having a negative impact on refugee protection is in the manner in which asylum claims are assessed. In many European asylum procedures, there seems increasingly to be a shift in focus from giving the individual a fair chance to articulate his or her need for protection to an effort to prove that the individual is not telling the truth.

As a result, interviewers often devote more attention to questions which are aimed at verifying the origin of applicants than at ascertaining his or her actual experiences. Often, the interviewers and decision-makers fail to take the profile of the applicant into account – meaning his or her age, gender, level of education etc. When applicants don't provide documents, it is stated that they could not prove their identity. When they do provide document, it is said that there is no guarantee that the documents are authentic.

An example: Asylum-seekers who claim to come from Somalia are frequently questioned in detail about clan structures (clans, subclans, lineages) and geographic and political details which it is unreasonable to expect them to know and which most Somalis

do not know. They are asked about the locations of government buildings, shops and village names, about how long it takes to walk from point A to point B, or what abbreviations like SNF (Somalia National Front), SSDF (Somali Salvation Democratic Front), SNM (Somali National Movement) correspond to. It is not reasonable to expect persons from small villages, often illiterate persons, to have this precise knowledge, yet when they cannot answer the questions, the conclusion is often that they are not from Central/South Somalia but from the North or from Ethiopia – and therefore not in need of protection.

Returns of persons without title to remain

A third area where the ‘balancing’ question arises is that of return procedures and standards pertaining to persons who are being removed from EU territory.

The removal of persons not in need of international protection and who do not receive permission to remain in the EU is considered a pillar of the EU’s migration management strategy. UNHCR and its Executive Committee have also repeatedly stated that the return of such persons is key to the integrity of asylum systems.

Here, too, there is often an unresolved tension between individual rights and the interests of the state. If individuals strongly and repeatedly resist return, is there a reason? Or are they simply acting in an abusive manner? As the case of Semira Adamu and many others shows, it may be very difficult to find the right balance.

The proposed new EU Returns Directive was an effort to achieve some balance between the individual rights of migrants who do not have permission to stay in the EU, and the prerogative of states to remove them from their territory. Indeed in its Hague Programme in 2004 the European Council had called for the establishment of “an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and will full respect for their human rights and dignity”.

Many in the advocacy community saw this as a chance to lay down safeguards for the way removals are carried out, precisely to avoid tragedies like the death of Samira Adamu. With the creation of a Community Return Fund to support removals from EU territory, it was considered essential to have community standards to regulate returns on which such a large amount of taxpayers’ money was to be spent.

Discussions on initial drafts of the Returns Directive were very difficult and took place over three years. A number of Member States were opposed to provisions seen as too focused on the rights of returnees. Some did not want any Community regulation of this area, preferring to keep a free hand. The European Parliament made a political linkage between adoption of the Directive and releasing of the “Return Fund”, which offers Member States over six hundred million Euros over the next five years to support the removal of persons without permission to remain.

In June 2008, the European Parliament gave its assent to a compromise version which is expected to be adopted by the Council without further debate. The European Commission has argued strongly that this draft improves human rights protections for persons being removed from the EU, citing in particular the fact that it requires that member states shall always grant time for voluntary departure. But the Commission’s other arguments are less persuasive. The Commission heralds the express reference in the text to the principle of the best interest of the child – but all EU states are already bound

to respect this principle, by the Convention on the Rights of the Child. The Commission argues that the principle of non-refoulement becomes applicable in all cases of return – but it already is. The Commission argues that the rules on detention will improve the situation in many member states, since nine currently have no time limit for pre-removal detention.

UNHCR articulated several concerns about the agreed text. First: the scope of the Directive. The text allows Member States to exclude from the scope of this Directive any persons apprehended for irregular crossing of an external border, and who have not subsequently obtained permission to remain, although certain limited guarantees apply to all persons.

Secondly: the risk of violation of international refugee law. Although the Directive is in principle to apply to persons not in need of international protection, it may in reality apply to persons being removed from the EU on so-called “safe third country” grounds -- in other words, persons whose asylum claims have not been heard on their merits in the EU.

Thirdly, it does little to resolve the absence of standards for administrative detention of foreigners, which is not regulated in the same way as criminal detention. It sets a limit of 18 months for the duration of pre-removal detention; this is a long period to be deprived of liberty and the grounds on which detention can be extended to 18 months are very broad.

Fourth, it includes a 5 year re-entry ban for persons removed from the EU. This ban could impede people from seeking protection subsequently, and could also impede family reunion.

Finally, the Directive requires all Member States to recognize and act on removal decisions of others – in essence, requiring mutual recognition of negative asylum decisions. Yet the EU asylum instruments adopted to date do not include any obligation of mutual recognition of positive decisions. Here, too, the scales seem to have tipped in one direction.

Conclusion

In conclusion: As a result of increased control of the European Union’s external borders, countries in the European neighborhood – those outside the EU’s eastern and southern borders – will experience more and more migratory pressure. The result of the EC’s migration control policy may be that countries outside the EU will have to bear a greater share of the responsibility for hosting people in need of protection.

This could be an opportunity to build improved refugee protection systems in those countries. But if the perception is that the EU is seeking to shift responsibility to countries outside its borders the reaction is likely to be negative and has the potential to undermine the international system of refugee protection.

