Reconciling Border Control with the Human Aspects of Unauthorized Migration

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Understanding the human aspects of migration is essential to the design of ethically sound and effective control policies. Reconciling effectiveness and ethics in migration control requires an awareness of how migrants react to surveillance strategies, as well as of how these strategies may affect migrants' rights and integrity.

One long-term objective of migration management is to reduce immigration pressure, especially with respect to unauthorized entries. Promoting development in regions of origin is often hailed as a solution to unauthorized immigration. Aside from deserving to be a goal in its own right, development has a complex relationship to migration aspirations and is therefore unlikely to reduce the demand for unauthorized immigration in the short or medium terms. Instead, practices that seek to reduce the appeal of unauthorized migration are likely to have more immediate results.

Strategies to discourage unauthorized migration can be of a deterrent or a dissuasive nature. Thwarting attempts at unauthorized migration through effective control measures might make aspiring migrants see this option as unlikely to succeed and thus *deter* them from it. Alternatively, aspiring migrants may be *dissuaded* through measures that, for example, promote awareness of the dangers of unauthorized migration or offer alternatives to it, without relying on blocking unauthorized migration attempts.

The use of certain restrictive control mechanisms to deter unauthorized migration is difficult to legitimize when these mechanisms (a) curtail the rights of migrants and asylum-seekers; (b) have the unintended effect of driving migrants to take greater risks; and (c) have a limited effect on discouraging unauthorized migration. The use of pre-border patrolling to stop and deter unauthorized

migration from West Africa to the Canary Islands is a case in point. A more ethically sound and effective deterrent strategy would involve ensuring that all unauthorized immigrants are intercepted upon arrival and, when not in need of protection, duly repatriated.

Current EU migration control strategies

European states have a legitimate concern with controlling unauthorized crossings over their borders. Doing so is considered crucial to preserving the security of the internal Schengen area. Consensus on the need to design comprehensive approaches, addressing the 'root causes' of irregular migration, date back to the European Council in Tampere in 1999.

Current migration management efforts nevertheless remain dominated by traditional control strategies, which all member-states are willing to support. Frontex, the 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', is the largest common investment on securing the EU's external borders. Its budget has grown rapidly from €6.2m in 2005 to €70m in 2008. The Agency's tasks include coordinating joint patrols along the common external borders and assisting with return operations. Frontex will have a central role in the coordination of EUROSUR, the future European Border Surveillance System, once it is established.

Though traditional control strategies persist, there is an evolving tendency towards framing them within rubrics of cooperation and humanitarianism. Enhancing cooperation with third countries in order to improve migration control has become a priority for the EU, which calls for 'co-development' and creating a 'synergy between mi-

gration and development'. Origin and transit countries are therefore requested to assist with control activities and to readmit illegal immigrants, including their own citizens and others who transited through their territory on their way to the EU. The growing share of responsibility placed on third countries represents an externalization of European migration control activities.

Control activities are also often justified on a humanitarian basis, because they can contribute to reducing migrant deaths at sea: diverting vessels back to the coast soon after departure keeps migrants from undergoing dangerous journeys. Early detection systems make it possible to anticipate the arrival of migrants' vessels and to assist them in case of distress.

Pre-border patrols do not stop migrants

The two major strategies employed by EU countries to curb unauthorized immigration from Africa *by sea* are pre-border patrols and repatriation.

At sea, controlling the border itself is an unfeasible task. As a result, patrolling is increasingly done *before* the border, often in the waters of third countries, so that migrant vessels can be diverted back to the African coast before they can reach EU territory. Maritime and aerial patrols of the route to the Canary Islands are jointly operated by local and European border officials, often under Frontex coordination. Patrolling the seas is not an infallible task, and many migrants complete the journey undetected until reaching their destination. If readmission agreements are in place, the receiving country can return migrants to their place of origin or departure.

Patrols and repatriation seek to curtail unauthorized migration on two levels: directly by frustrating actual unauthorized migration attempts, and indirectly by deterring future ones. The more efficient a control measure, the more it is likely to deter future migrants.

Currently, the number of migrants diverted by patrols before reaching the Canary Islands is less than half of the total flow. While this contributes to reducing the number of arrivals to the archipelago, the fact that more migrants arrive than are diverted illustrates the fallibility of border controls at sea. The deterrent effect of patrols is therefore likely to be moderate, as many migrants see them as relatively easy to avoid and are willing to try again after being turned back.

Just as patrolling at sea is not infallible, repatriations from the Canary Islands are numerous but irregular, even though virtually all immigrants who arrive aboard small vessels are detected. Not all expulsions are effectuated within the maximum detention period, after which a migrant must be released even if he or she cannot be granted official permission to remain in the country. As a result, many migrants think of repatriation as a question of luck and are not discouraged by it.

Generally, however, repatriation is likely to have a stronger deterrent effect than diversions. This is because repatriation has a greater psychological impact on aspiring migrants and, as a consequence, on their decisions: the frustration felt at being repatriated is much greater than that felt at being returned to shore soon after departure. Returnees feel a great sense of defeat and disillusionment at being forcibly returned after having successfully completed an arduous and expensive journey. Many of the first Senegalese migrants repatriated from the Canary Islands staged protests to express their discontent. Patrols did not provoke a similar reaction. When repatriation is a likely outcome, many aspiring migrants no longer consider it worthwhile to risk their lives attempting unauthorized migration.[i]

Increased border surveillance can make migrants more vulnerable as they resort to dangerous strategies to avoid detection

While it does not stop unauthorized immigration flows, increased border surveillance has the effect of fostering a diversification in the strategies employed by migrants and smugglers to circumvent controls. As surveillance becomes increasingly exhaustive, migrants take greater risks to avoid detection. This in turn bolsters the initial security justifications for strengthening border controls, creating a self-perpetuating cycle of border build-up.

In order to avoid controls, migrants resort to alternative routes, often longer and more dangerous than the more controlled direct itineraries. For example, as patrols were set up along the coasts of Mauritania and Senegal to block the flow to the Canary Islands, migrants sought more remote departure points, some as far as Guinea-Bissau. Dangerous journeys may involve risks such as complicated geography (e.g. extensive open-ocean journeys), tense socio-political environments (e.g. mined territories), harsh weather conditions (e.g. desert crossings) or abusive border officials. Throughout these journeys, many migrants fall ill, are injured or die. By following remote routes, migrants move away

not only from controls but also from the rescue infrastructure usually found along established migration routes.[ii,iii]

While migrants' use of more dangerous routes is not an intended outcome of the expansion of border control activities, European authorities have the responsibility to ensure that tighter migration control does not – whether directly or indirectly – make unauthorized migrants more vulnerable. They must do so out of humanitarian concern, but also to ensure that EU border surveillance activities remain consistent with their aims: if reducing the loss of migrant lives is part of their rationale, then the effects of control operations should not undermine this aim. This is especially important given that as surveillance methods become increasingly sophisticated, migrants continue to seek new smuggling strategies to circumvent them, even if this implies a higher risk threshold and heavier human cost.

Why migrants take great risks to migrate: staying in Africa is no safe alternative

Increasing numbers of African youths are unable to forge an adult life because they cannot provide for themselves and their families. At the same time, their expectations are increasingly influenced by the high standards of living in rich countries. Many of those who have lost hope in making a decent living at home attempt to migrate to Europe for work. The restrictive nature of European immigration regimes means that opportunities for legal migration are scarce. Trying to migrate through irregular channels, using forged documents, arranging bogus marriages or overstaying a legally obtained visa is usually very expensive. Unauthorized migration is often a cheaper but potentially dangerous alternative.

Attempting unauthorized migration does not necessarily reflect a lack of awareness about the risks involved. Instead, many migrants explain that they prefer to take the necessary risks to migrate rather than stay at home. Staying is not risk-free: it often means continued life insecurity, characterized by unemployment, dependency, lack of social recognition and few chances of personal advancement.

Some aspiring migrants are unaware of the dangers of unauthorized migration, and awareness campaigns may serve to discourage them from risking their lives. Unfortunately, many are suspicious of this migration management tool, because they see the messages of awareness campaigns as biased propaganda solely aimed at making them stay home.

Extra-territorial control activities can seriously undermine migrants' rights

Besides having a limited effect in halting unauthorized migration flows, extraterritorial border control raises a number of legal and ethical concerns. First, the legality of extraterritorial controls coordinated by Frontex is unclear. As a Community body, the Borders Agency lacks the jurisdiction to operate beyond EU territory, where the Schengen Borders Code does not apply. Any activities undertaken by Frontex outside EU territory should be explicitly regulated by international law.[iv]

Second, by moving border control functions away from the Schengen border, extraterritorial patrols leave migrants devoid of the right to appeal a rejection of entry. This right is provided for by the Schengen Borders Code but is only applicable to rejections at Schengen border posts. In this context, legal experts warn that categorically diverting entire groups of migrants *before* the Schengen border could effectively entail a circumvention of Community regulations pertaining to the treatment of unauthorized migrants apprehended along the common external borders.[v]

Third, patrols in the waters of third countries may be breaching the principle of *non-refoulement*. This principle establishes that no person in need of protection should be returned, including through rejection at the border, to a country where that person's life or freedom may be endangered. Diverting legitimate asylum-seekers without giving them access to an asylum process may constitute a breach of this principle. As the *modi operandi* of Frontex operations is not publicly accessible, it is unclear whether potential asylum-seekers are consistently informed of their rights and given access to asylum procedures following interception and diversion. Frontex should make publicly available relevant data on the profiles of diverted migrants, the locations where they are intercepted and diverted to, and the kinds of procedures to which they have access following diversion.

Fourth, diverting migrants to third countries may put them at risk of abuse. There have been instances of arbitrary arrests, abusive detention conditions and collective expulsions of (suspected) irregular migrants on the part of some transit country authorities. The lack of homogenous disembarkation rules applicable to all Frontex-coordinated operations implies that the suitability of third countries to receive migrants is assessed on an ad hoc basis, offering limited guarantees that migrants will receive proper treatment. This con-

cern also applies to migrants who are expulsed to transit countries on the basis of readmission agreements.

Recommendations: seeking deterrence through repatriation in the short term

In the long term, effective migration management must address both the developmental grievances and the image of Europe that motivate African youths to migrate at great risks. In the short term, the more effective way to tackle unauthorized migration may be to discourage it. For this to be done in a manner that is both effective and respectful of migrants' rights, it is essential to take into consideration migrants' motivations and their reactions to different control measures. It is problematic to legitimize control strategies that have limited success in deterring migrants and at the same time jeopardize their rights and integrity.

Extraterritorial control of sea routes is unlikely to contribute to reducing unauthorized immigration in the long term, even if it contributes to reducing unauthorized arrivals in the short term. This is because the inherent fallibility of maritime patrols will continue to feed migrants' optimism over the possibility of completing their journeys undetected. Such optimism is likely to be reinforced by inconsistencies in returning unauthorized entrants who are not in need of protection. Further, considering the ethical and legal problems associated with pre-border patrolling activities, it would seem problematic to reinforce or maintain such measures.

Where the use of restrictive control measures is deemed necessary to deter migrants from unauthorized migration, it seems preferable to channel efforts into increasing the effectiveness of repatriations. Making repatriation more effective requires improving logistical capabilities for detection, apprehension and identification of migrants upon unauthorized entry, along with return of those who are not in need of protection. Improving effectiveness, however, must not be done in ways that jeopardize migrants' rights. Repatriation should not be sought at the cost of extending maximum detention periods or expulsing migrants to transit countries where there is reason to suspect that they may be mistreated.

The relative benefits of reinforcing repatriation rather than pre-border patrols are multiple. First, this could resolve some of the legal challenges related to extraterritorial controls preventing migrants from reaching European borders. Second, repatriation could contribute to reducing unauthorized migration attempts, as a high certainty of return would decrease the appeal of this option. Lastly, reduced unauthorized migration is likely to result in fewer migrant deaths at the borderlands.

Note

i Carling, J. & M. Hernández-Carretero, 2008. 'Kamikaze Migrants? Understanding and Tackling High-Risk Migration from Africa', paper presented at the workshop 'Narratives of Migration Management and Cooperation with Countries of Origin and Transit', Sussex Centre for Migration Research, University of Sussex, 18–19 September.

ii Carling, J., 2007. 'Migration Control and Migrant Fatalities at the Spanish–African Borders', *International Migration Review* 41: 316–343.

iii Carling, J., 2007. 'Unauthorized Migration from Africa to Spain', *International Migration* 45: 3–37.

iv House of Lords, 2008. 'FRONTEX: The EU External Borders Agency', 9th Report of Session 2007–08, Report with Evidence, 5 March. London: House of Lords, European Union Committee.

v Standing Committee, 2008. 'Views on the Commission Report on the Evaluation and Future Development of the FRONTEX Agency (COM(2008) 67 final)', Letter to the European Parliament, 4 April. Utrecht: Standing Committee of Experts on International Immigration, Refugees and Criminal Law.