

Policy Making in an Era of Alternative Facts

The EU Pact on Migration and Asylum

By Chowra Makaremi

As the European Commission is working on a reform of the European Union migration policy, the European border control agency is being criticized for its violent methods. In this interview, the legal scholar Elspeth Guild explores the relation between decision making and the reality of migrations.

Elspeth Guild is a Jean Monnet Professor ad personam of law at Queen Mary University of London and Emeritus Professor at Radboud University, Nijmegen, Netherlands. She is also a partner at the London law firm Kingsley Napley. She regularly advises EU institutions on migration and asylum in particular the European Parliament. She also advises the Council of Europe. In 2017 she co-edited with Stefanie Grant and Kees Groenendijk *The Human Rights of Migrants in the 21st Century directed at the UN Global Compact for Safe, Orderly and Regular Migration*. As a legal scholar, she studied for more than two decades the common European asylum system and migration laws in Europe. She is the co-author of a report written in 2015

for the European Parliament (LIBE commission) on "Enhancing the common European asylum system and alternatives to Dublin".¹

In September 2020, the European Commission presented a blueprint for a reform of the EU migration policy, calling for "a fresh start on migration" against the "current system (that) no longer works".² Legislative acts based on this "New pact on Asylum and Migration" were announced for the end of 2020; but reaching political agreement amongst member States over the propositions of the European Commission is more difficult than planned, and the legal outcome of this Pact is delayed for now.³ In the meantime, the EU border control agency, Frontex, is being attacked by European Parliamentarians for its lack of accountability, harassing management methods and, above all, violation of human rights at the borders, while its irregular relations with arms lobbyists are exposed by the press and its offices under investigation of the EU anti-fraud agency.⁴ This crisis happens as Frontex is expanding considerably in scale and responsibility, into what is programmed to be the first European uniformed corps of border guards.⁵ These flaws, which appear at different levels of the governing of migrations — politics, laws and tasks forces on the ground — invite us to reflect back on the way EU approaches migrations.

The New pact on Asylum and Migration proposed by the EU commission on 23 September 2020:

- aims to be a solution to the inequalities in terms of reception of asylum seekers between EU States within the Schengen area. It uses the word "solidarity" to refer to a fairer redistribution of asylum claims between "front-line" countries at the external borders and other EU member States

¹ See Guild, Elspeth and Costello, Cathryn and Garlick, Madeline and Moreno-Lax, Violeta and Carrera, Sergio, Enhancing the Common European Asylum System and Alternatives to Dublin (July 15, 2015). Study for the European Parliament, LIBE Committee, 2015

² European Commission, "A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity", Press release, 23/09/2021

³ "Trio Presidency meeting of the Ministers for Home Affairs addressed the outstanding issues under the new Pact on Migration and Asylum", Government of the Republic of Slovenia, 21/01/2021

⁴ "Missteps and Mismanagement at Frontex Scandals Plunge Europe's Border Agency into Turmoil", *Der Spiegel*, 05/02/2021; "L'agence européenne Frontex fragilisée par les accusations d'expulsions illégales", *Le Monde*, 29/01/2021; "EU immigration: Frontex faces scrutiny over its growing role", *The Financial Times*, 20 January 2021; "Frontex, l'Agence européenne de garde-frontières, à nouveau mise en cause pour ses liens avec des lobbyistes", *Le Monde*, 05/02/2021

⁵ "EU border force gears up for big expansion", *Politico*, 18/12/2020

- asks for the abolition of the Dublin III Regulation and notably proposes a “Screening Regulation” instead, which would support “fast asylum procedures” at the borders
- proposes new rules on the border procedure, and especially “non-admission” at the borders (based on the legal fiction that people who arrive at the border have not yet entered the territory), which in practice enables refoulement
- focuses on the increase and effectiveness of returns and expulsion
- builds the “solidarity” between EU States through the relocation of asylum seekers or through the new principle of ‘return sponsorship’ (that consists in sponsoring financially the return of refused asylum applicants)
- proposes new instruments for relations, collaborations and agreements with third-country States, and what is known as the “externalization” of border control
- outlines some general legal pathways for economic migration.

Books & Ideas: Elspeth Guild, what are your thoughts on the new pact on migration and asylum presented by the European Commission in Autumn 2020? The content of the pact has been discussed in many legal and political analyses (including by yourself).⁶ Here I would like to know your thoughts about the political orientation and decisions that lay behind it.

Elspeth Guild: The Pact illustrates a persistent and very serious problem at the European Commission, which is the relation between decision making and the reality of migrations. For instance, the European Border and Coast Guard Agency, also known as Frontex,⁷ in its “Annual risk analyses”, tells us that there are more than 300 million people who enter the EU through the external borders per year. Of those, more than one-third are known as EU citizens and the rest are third-country nationals or unspecified. So we have between 100 and 200 million third-country nationals who enter the EU every year. Again, according to Frontex, 165 000 people

⁶ See the academic Odysseus Network for legal studies on immigration and asylum in Europe [Special Collection on the ‘New’ Migration and Asylum Pact](#), edited by Daniel Thym, and Elspeth Guild’s contribution in this collection: [“Negotiating with Third Countries under the New Pact: Carrots and Sticks?”](#) See also Charles Heller and Bernd Kasperek [“The EU’s pact against migration, Part One”](#) and [“Towards a European pact with migrants, Part Two”](#), Open Democracy, 5 and 6 October 2020.

⁷ Frontex was established in 2004 as an agency of the European Union responsible for coordinating border control in the Schengen Area, in collaboration with the border and coast guards of the member states. In response to the crisis of European migration policies in 2015-16, the European Commission proposed to transform Frontex into a European Border and Coast Guard Agency, launched in 2016 at the Bulgarian-Turkish border. Its budget have gradually increased from €143 million in 2015 up to €322 million in 2020.

arrive in the EU irregularly every year, and the number of refusals of entry is about 130 000 a year.⁸ We can criticize the figures; we can discuss the statistics.⁹ But let us assume that the European institutions are providing the best knowledge they are capable of producing, and most importantly, that decision-makers within these institutions consider this knowledge to be a truthful assessment of the situation. If you take these figures together, what you have in the European Union is effectively open borders with third country nationals, because statistically, the chances that someone will be refused at the border or will enter irregularly are about 0,2 %! Legally speaking, this is the equivalent of open borders.

One could reply “Yes, but people don't get visas to the EU”.¹⁰ However, if you look at the European Commission’s statistics on Visas, an average of 10% of all visa applications are rejected¹¹. It is a much higher rate than at the borders, but it still means that 90% of visa applications *are* issued. As for residency, according to Eurostat (the EU's statistical agency), the EU is perfectly happy to give more than 3 million first residence permits to third-country nationals per year¹²—which by the way is a drop in the bucket compared to the 450 millions inhabitants in Europe. But when it comes to the asylum seekers, there is a pervasive discourse about how something is terribly wrong about all of them. If you go back to the Eurostat statistics on the recognition of people in need of international protection who have applied for

⁸ Frontex, *Risk Analysis for 2019*, p. 50 and *Risk Analysis for 2020*, pp. 59-60

⁹ Nando Sigona, lecturer at the University of Birmingham, showed in 2015 that Frontex data were inflated by double counting some entries, which was confirmed by the agency in an addendum to its press release: “Frontex provides monthly data on the number of people detected at the external borders of the European Union. Irregular border crossings may be attempted by the same person several times in different locations at the external border. This means that a large number of the people who were counted when they arrived in Greece were again counted when entering the EU for the second time through Hungary or Croatia.” See: [N. Sigona, “Seeing double? How the EU miscounts migrants arriving at its borders”, *The Conversation*, 16/10/2015.](#)

¹⁰ Elspeth Guild and Didier Bigo’s research on the Schengen visas show the crucial rule of visa attributions in the EU migration and border policies: see Guild et Bigo 2003b; 2003a

¹¹ “The percentage of visa applications that were refused continued to increase in 2019 but varied widely between countries, ranging from less than 2.5% in Belarus, Botswana, Indonesia and Russia, to more than 40% in Algeria, Comoros, Ghana, Guinea, Nigeria and Senegal. Worldwide, 9.9% of all visa applications were refused, 0.3 percentage points more than in 2018. 8.9 million or 59% of the 15 million visas issued in 2019 allow for multiple entries into the Schengen area, a share that has been stable for several years.” EU Commission Migrations and Home Affairs, [Visa statistics: Schengen States issue 15 million visas for short stays in 2019](#)

¹² “In 2018, 2.6 million non-EU citizens obtained the right to both reside and work in the EU through the single permit administrative procedure” and “ In 2019, some 3.0 million first residence permits were issued across the EU to people from non-member countries.” Eurostats, [Residence permits - statistics on first permits issued during the year](#) and [Residence permits – statistics on authorisations to reside and work](#)

asylum over the last few years, acceptance rate has been about 60% in 2015, to down to 38% percent this year. So out of the 600 thousands applicants, between 60% in Spain and under 10% in Hungary were accepted as needing international protection. We are actually talking about 350,000 people who will not be granted international protection.¹³ What will happen to them? Let us go back to the Frontex statistics on how many people have been subjected to a forced expulsion: in 2019, 80,000 people were expelled forcibly from the EU, fewer than in 2018. With the Brexit and the UK (which does a lot of expulsions) out of the statistics, these numbers are probably going to drop down to about 60,000 people per year.

Let us be clear: the EU regime is in fact very liberal and open for the very large majority of third-country nationals, while incredibly violent and coercive towards a very small proportion. If we ask: “Can you get across the European border?” it seems that yes, almost everybody can, except for a small proportion of people. Yet, the irregular entries have been made into a huge problem by some media and by the extreme right. There is a terrible problem of scale here. When their own statistics show that the EU likes having foreigners come, encourages them to come and issues an overwhelming number of visas and first residence permits, how is it possible that the European Commission produces a Pact—a blueprint for EU migration policy—that presents the arrival of foreigners in the EU as a problem which needs to be addressed, resolved and diminished? There is only one section in the pact on legal pathways to migration and it doesn’t say much.

We asked the question to a senior European Commission official during a two-days conference organized by the Academy of Law and Migration (ADiM) at the Università degli Studi della Tuscia,¹⁴ and the answer was “Well, we cannot just deal with facts and reality; we have to deal with perceptions.” I think this is irresponsible policy making. Yes, public officials and state authorities do have to deal with perceptions, which are constructed through discourse. But the only responsible way of dealing with perceptions is by insisting on the facts, and not by entering into an escalation of incorrect perceptions of invasion, based on profoundly false promises and lies, which are terribly damaging. One thing we have seen in politics, both in Europe and in the United States particularly, is that, if you let go of your knowledge base in the making of public policy, you end up with a completely insane public policy, which is driven by prejudice, xenophobia and unsubstantiated fears, rumors,

¹³ Eurostats, *Asylum statistics*

¹⁴ The panel was recorded and is available [here](#).

etc. You do not end up with a public policy that meets the requirements of reality, of the situation and the requirements of the States.

Books & Ideas: In her recent talks, Ylva Johansson, the European Commissioner for Home Affairs, seemed to advocate in favor of a shift toward normalization and contextualization of migration, but these words have not translated whatsoever in political orientations in the Pacte, which remains firmly focused on border control and unwanted arrivals.¹⁵ Shouldn't the European Commission, as a supranational institution, be more independent from electoral incentives and anti-immigrant bids? Why isn't it listening to facts?

Elsbeth Guild: One of the developments that I have watched closely over my career is the transfer of competence in immigration and asylum from the member states to the European commission in 1999. This is the development between the Amsterdam Treaty of 1999¹⁶ and where we are now. As long as the European Commission did not have competence over migration and asylum, it retained an independent position—in particular from 1992 to 1999, when it was responsible for free movement of persons, but not for immigration and asylum. One of the consequences of the transfer of competences from the Member States to the European Union from 1999 onwards, was that it brought with it the voice of the ministries in the Member States, which previously were competent. The Interior Ministries, because of the transfer of competence, put a lot of energy into transforming the politics of what became Directorate-General Migration and Home Affairs (known as DG HOME)¹⁷ into one that reflected their rather restrictive—I would even say paranoid—perspectives on migration. Within each Interior ministry, each immigration and asylum department,

¹⁵ This paradox was analysed by Daniel Thym in *“European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ‘New’ Pact on Migration and Asylum”*, *EU Immigration and Asylum Law and Policy*, 28 September 2020

¹⁶ Under the Treaty of Amsterdam, entered into force on 1 May 1999 in amendment to the Maastricht Treaty of 1992, member states agreed to transfer certain powers from national governments to the European Parliament notably across legislating on immigration, adopting civil and criminal laws, enacting foreign policy, and implementing institutional changes as new member nations join the EU.

¹⁷ DG HOME is a Directorate-General, i.e. the equivalent of a ministry at the level of EU government, in charge of “building a common EU migration and asylum policy”, “ensuring EU security”, and “promot(ing) dialogue and cooperation with non-EU countries” (DG HOME, “about us”, January 2021). It was created in 2010 when the DG Justice, Freedom and Security was split into DG HOME and the Directorate-General for Justice.

you have people handling the three million first residence permits, and those who are trying to expel what will turn out to be 80,000 people. The latter seem to have got the upper hand by leaving the debate at the national level and moving to the EU level. They occupied the places on the various Committees, which advise the European Commission.

From 1999 until now, we have seen the gradual colonisation of DG HOME by bureaucrats with extreme anti-immigrant views, which are not necessarily reflected in the practices of their own ministries. The transfer of competence in immigration and asylum to the European Commission has not worked so far, because the Member States are divided and can hardly get any measures through the institutions. It is a pretty sad tale; but the Commission does not seem to realize this and keeps going down the route of coercion, exclusion and expulsion—against all evidence and facts—because this is what they hear from Member States officials, who don't actually represent the whole of their Interior ministries, let alone the whole of their governments. So there seems to be a consensus at the European level within the institutions such as DG HOME or the comitology committees,¹⁸ even if it does not reflect a consensus at the national level. The outcome has been a reverse operation, where these groups are succeeding in pushing DG HOME in the European Commission to propose and apply laws which are much more xenophobic in their framework than what is actually happening within the member states. This is not true in every country—it is not true for Hungary.... But if you look at Poland for instance: there is a pretty harsh public discourse about foreigners, and yet, Poland is one of the great issuers of first residence permits to third-country nationals, and even pushed for lifting the visa restrictions on Ukrainians, for geopolitical reasons. Because indeed, migration is becoming an integral part of foreign relations, as “the partnership with third countries” shows in the current Pact.

Books & Ideas: The Pact is presented as a “fresh new start” for a common European asylum policy. But in fact the core of the Dublin system¹⁹ remains

¹⁸ Committees chaired by the European Commission, in charge of adjusting and modifying EU law. The lack of transparency in the membership, debates and modes of procedure of these committees, while they produce important binding legislation, is a question of concern. See for instance: Rhinard, Mark,, “The democratic legitimacy of the European Union committee system”, *Governance*, 15 (2), April 2002, 185–210.

¹⁹ The Dublin System consists of the Dublin Regulation (came into force in 1997) and the EURODAC Regulation. The Dublin Regulation determines which EU Member State is responsible for the examination of an asylum claim and provides for the transfer of the asylum seeker to that State, based

untouched, with all the shortages and paradoxes that you have raised in your report on alternatives to Dublin. Does this mean that the Commission is willing to “solve” these problems by screening and expelling the refused asylum seekers at the borders?

Elsbeth Guild: Yes, and there are many ways in which this is happening. On asylum, the pact is dismantling the common European asylum system by pushing everyone out of the normal procedure, which at least requires an individual interview. The idea of “hotspots” introduced by the Commission in 2016 has turned into a nightmare, and ended up in the humanitarian, political, legal disaster of Moria. Since it is not possible to push further the idea of hotspots, they have decided to treat most asylum seekers as if they were border cases, in the hope that they will not get past the border, will be rejected and sent back rapidly. But among other issues, such as that of asylum screening procedures respectful of basic human rights, this focus on border control poses the problem of refoulement and pushbacks, which is well known by the authors of the Pact. The European Commission has been convinced by international organisations and NGO evidence that Frontex was involved in pushing back boats to Turkey from the Greek border, at least in so far as to seek further clarification from Frontex. Late October, the Commission called the executive board of Frontex to a high level meeting to discuss whether or not Frontex was indeed participating in illegal pushbacks.²⁰ So the pressure and the intention of the Pact—illustrated by what Frontex is doing—are countered within the Commission itself by the argument that these pushbacks at sea are illegal, according to the European Convention of Human Rights as interpreted by the European Court of Human Rights. Although expulsion is a key objective of the Pact, the institution that is supposed to carry this out, Frontex, is being already taken to task over the implementation of these procedures.

The other idea in the Pact is the one of relocation, by which member States will relocate asylum seekers from “frontline States”. We are heading towards an official

on the fingerprint they left in the EURODAC Europe-wide fingerprinting database for unauthorised entrants to the EU.

²⁰ Since then, the European Anti-Fraud Office of the European Commission, OLAF “has opened an investigation into Frontex, the bloc’s border agency, over allegations of harassment, misconduct and migrant pushbacks, according to four EU officials.” See Jacopo Barigazzi, “EU watchdog opens investigation into border agency Frontex. Organization faces allegations of harassment, misconduct and migrant pushbacks”, Politico, 11 January 2021.

relocation process with distribution keys by population, GDP, etc. (very difficult to implement by the way!). If states don't want to relocate "their" share of asylum seekers, they can choose instead to have a "return sponsorship" and become responsible for expelling these asylum seekers. For instance, if Hungary doesn't want to relocate asylum seekers from Greece, it can pay for their detention in Greek facilities until they are sent to Hungary, which will proceed to their expulsion. I know it sounds like an insane idea to be dragging people around Europe against their will, to eventually push them back to somewhere they are afraid to go... But it is the plain result of a specific logic in which the Commission has got stuck, which is relocation and the complete, utter rejection of the idea of self-relocation: the idea that somehow, people should be entitled to choose their destinies.

Books & Ideas: These developments raise two problems. You just pointed out the first one: the refusal of self-relocation, which anchors in the "outrage at asylum seekers' perceived agency and choice of destination encoded in the notion of 'asylum shopping'".²¹ The refusal of "asylum shopping" was the reason why the first Dublin Regulation was adopted. Since it was coined in 1998-1999, the notion was proved to be inadequate, as dozens of empirical researches show,²² but it continues to prevail, and has surfaced in the Pact as "incentivised unauthorised movement". The basic agency of asylum seekers seems to crystallize anxieties, and the institutions have worked hard for decades to create rules and management against it—although migration scholars argue that this postulate is unrealistic (precarious subjects deprived of any agency do not exist in real life, even people fleeing for their survival do make choices). This misconception may be a reason why the Dublin system produces such an administrative mess, and is always in need of being fixed. However—and this is the second problem—the solutions offered to fix a system that has been facing deadlocks since its creation are extremely technical: calculating distribution keys for relocation/sponsorship, or organizing asylum-screening procedures at the border. Beyond their constant

²¹ Moore K. 'Asylum shopping' in the neoliberal social imaginary, *Media, Culture & Society*, 2013, 35(3), 348-365.

²² See for instance: Guild E. & Harlow C. (eds.) *Implementing Amsterdam*. Hart Publishing; Mitsilegas, V. Solidarity and Trust in the Common European Asylum System. *Comparative Migration Studies* 2, 181-202 (2014); Mouzourakis, Minos. 'Wrong number?' *The Use and Misuse of Asylum Data in the European Union*. CEPS Centre for European Policy Studies, 2014; Odorige, Catherine. "The Shoppers; Venue Shopping, Asylum Shopping: A Resolution in EURODAC?" *Central and Eastern European eDem and eGov Days*. 2018.

infringement of human rights principles, these technicalities are almost impossible to implement, yet the commission wants to fix the situation by creating more of them. You mentioned Frontex pushback operations, but we can also think of the failure of relocation in 2015, and the fact that only 3% of all asylum seekers are actually sent back from one EU country to the other in application of the Dublin Convention.²³ So the ideology of coercion is translated into politics through a technical rationale that is also problematic, because it has proved to be inefficient, very costly and at times illegal. Where is the place of expert knowledge in all this? How can investigation, scholarship and basic knowledge on asylum experience and management permeate spheres of decision-making? It is obviously not the case now.²⁴

Elsbeth Guild: We should not underestimate the importance of an expert knowledge, or the importance of public leadership. One of the things that the EU has been extraordinarily and surprisingly successful in doing is, from one day to another, transforming its whole discourse, in order to change what Europe is. In 1985, the decision was taken to abolish internal border controls—a decision taken on economic grounds by the Delors Commission.²⁵ On March 25, 1995, internal border controls were abolished in all the Schengen states. There were, of course, reintroductions of border controls from time to time on exceptional bases amongst the member states, as it was the case even before the current sanitary situation, when France declared its “Etat d’urgence in 2015 for instance during the COP21 conference. However, the institution of border controls in the member states is no longer there. Of course, with Covid 19, a number of member states said they were introducing strict border controls with one another. But in fact, what you see at the borders between France and Belgium for instance are these orange plastic cones, because there is no structure and no infrastructure anymore: it is all gone. If you put border guards on a border between France and Spain, they need offices, toilets, cafes, Internet connexion—many things. How many people do you have to put there and what kind of infrastructure do you have to put into place? And how much are you going to spend,

²³ See Guild, Elspeth and Costello, Cathryn and Garlick, Madeline and Moreno-Lax, Violeta and Carrera, Sergio, Enhancing the Common European Asylum System and Alternatives to Dublin (July 15, 2015). Study for the European Parliament, LIBE Committee, 2015

²⁴ See Virginie Guiraudon, Camille Schmoll, H el ene Thiollet. “Repenser les politiques migratoires : pour un « GIEC » des migrations et de l’asile”, Site de Sciences Po, December 10, 2018.

²⁵ The European Commissions led by Jacques Delors are regarded by some as the most successful in the European Union's history at advancing integration.

as a state, for something that is temporary? It may be done, in very specific cases, such as in Manton/Vintimille since 2015—and really we should have a look at the huge cost of such enterprises in comparison to their expected outcome in terms of control. But these are—rather spectacularly ineffective—exceptions.

Let us not forget that the capacity to rethink is enormous. We saw this again in 2004 and the association agreements with the Central and Eastern European states, which gave a right of establishment to nationals of both sides, to carry out self-employed activities. I remember talking to a colleague in 1994 about these agreements projects, and saying “I cannot imagine Poland being a member State of the EU”. He replied this was because I was too young to know about the time, before 1945, when many middle class Central Europeans had their vacation houses in Poland... And the agreements did happen and turned what was perceived as “unwanted immigrants” from the East into fellow EU citizens with entitlements. The EU can have an astonishing ability to transform. It is not showing that kind of leadership at the moment in respect of the common European asylum system, towards which it has made no attempts, as did the Canadian Prime minister, for instance, when he created the sponsorship programme for refugees in Canada. That programme what was very effective in providing protection: it was a way of getting the population to fight for refugee protection. The private sponsors, the universities, the churches and mosques, the sporting clubs, the sponsor families all have a responsibility to take care of the newcomers for a year, to find jobs for them, to get them into school, to make sure that the children don't get involved in criminality, and make sure they get a good health treatment. You have a community, which is positive about, or at least accepts the idea of refugee protection. So it is a mechanism that could be very useful if used in Europe to try and change, and turn around from the bottom-up the discourse that we have at the moment.

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