

THE MIGRATION AND ASYLUM PACT:

Challenging the European Commission's narrative
from a Left perspective

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CHALLENGING THE EUROPEAN COMMISSION'S NARRATIVE

"This set of proposals will mean clear, fair and faster border procedures, so that people do not have to wait in limbo. It means enhanced cooperation with third countries for fast returns, more legal pathways and strong actions to fight human smugglers. Fundamentally it protects the right to seek asylum".

Ylva Johansson,
Commissioner for
Home Affairs

On 23rd September 2020, the EU Commission presented the Asylum and Migration Pact as a "fresh start" for migration and asylum policies in the European Union. Misleadingly, the proposals were presented through the image of a "house with three floors". It falsely promises a new start in European migration policies, but in reality, the Pact reinforces current failed policies by focusing on deterrence, containment of people fleeing in third countries, strengthening of the external borders of the EU, detention of people, and acceleration of procedures at the borders at the expenses of the right to a fair and individual procedure. It also maintains the principle of responsibility of the Member State of first entry.

Worryingly, this Pact - presented as a compromise document - includes a number of elements which are aligned with the xenophobic positions of the Visegrád Group governments. Such a 'compromise' though not only harms the general principles of our responsibility to protect, it also means frontline Member States - in the Mediterranean - will once again have to face most of the challenges head on. This represents a definitive step backwards in terms of protection of rights and concrete solutions to the current situation. This proposal, heavily focused on returns, will undoubtedly lead to more incidents of extreme violence in third countries, at the EU's external borders, and within EU's territory - in detriment of those trying to exercise their fundamental right in finding safety in Europe.

On top of xenophobic forces, it is the security companies that will be the biggest beneficiaries of the strengthening of these policies: from construction companies building fences, to the maritime and defence companies that provide ships, aircrafts, helicopters, drones, as well as the security companies which are contracted to develop biometric systems in the EU and third countries.

This document will aim to deconstruct the narrative built around the proposal by the European Commission from a Left perspective. It also puts forward a number of alternatives, with dignified reception and human rights at its core.



European Commission's narrative #1:

“This set of proposals will mean clear, fair and faster border procedures”

This proposal aims to create obligatory “integrated” asylum and return procedures, carried out on people, by pretending they are not yet on EU territory. This comprises of a mandatory pre-entry screening - a maximum of 5 days but could be extended to 10 in times of crisis - with the aim of “channelling” people to the “correct process”. In any case, when an asylum seeker uses false documents, is considered a national security threat, or belongs to a nationality with a ‘recognition rate’ (which reflects the percentage of recognised asylum holders per nationality) below 20%, the person is “channelled” to an obligatory asylum border procedure and, where appropriate, immediate return border procedure. In order to speed up the decision-making, both asylum and return border procedures have a maximum of 12 weeks with a single appeal at the very end of the procedure.

The European Commission claims these procedures will be accompanied by specific monitoring and legal safeguards to ensure a full assessment of the respect of the rights of each individual person. Their claim is that “more efficient procedures will benefit both applicants and the asylum system more generally”. The Commission also stresses that it wants “no more Morias”, and this would be based on the fact that people should have their claims processed more quickly - with the vast majority deported to countries of origin or transit.

In a “crisis” situation, exceptions would be provided to these rules, notably by enabling Member States to apply accelerated border procedures to almost all nationalities (the criteria of nationality would be extended to all those with a recognition rate of up to 75%). A Member State could also be authorised to suspend consideration of asylum applications for a year, as long as it can provide a status equivalent to subsidiary protection (depriving them the beneficiaries of rights they would have under international protection status, like the right to family reunification) in the meantime.

THE REALITY

Mandatory accelerated border asylum and return procedures, when implemented, have always come hand-in-hand with reduced fundamental rights standards and safeguards. We have systematically witnessed lawyers and interpreters being unable to cope with the increased number of applications and the extremely tight deadlines - to the detriment of the rights of the applicants. In fast-track procedures, the actual idea of the ‘human being’ also gets lost. The applicant is dehumanised and becomes just a “number”, which the system can overlook and forget about persecution back home. Possible violence and trauma are also ignored when applicants are requested to give quick evidence as to why they deserve international protection, but are often unable to do so within such strict time limits and dire conditions.

Yet, despite all these, there are no provisions for judicial review of the outcome of the screening in the EU Commission proposal. The usual rules on informing asylum applicants and registering their application would also not apply until the end of the screening. There are also fears that the “debriefing form” will have an impact on the procedures that would follow, notably the application for international protection.

This whole acceleration of the border procedures is based also on curtailing the rights of appeal (combined with the removal of the suspensive effect of the appeal under the Return recast) that are often successful. Obligatory border procedures would further undermine the applicants’ access to a fair and efficient asylum procedure by significantly expanding the temporal scope of border procedures, and thus legitimising systematic deprivation of liberty of asylum seekers at the border.

The fact is that any undocumented person found on a Member State’s territory could be brought to the screening procedure, de facto exiting the EU’s territory fictitiously. They are then suddenly thrust into the accelerated return procedure, and this will certainly lead to more undocumented migrants choosing to hide from the authorities. Fewer people will also report violence against them, or that they are being exploited at work.

The nationality-based criteria to determine whether a person will be subject to an accelerated procedure also creates a distinction between asylum seekers. Some will have more rights, time and legal assistance to prepare their applications for international protection. Others though will have to fight against a biased system that will do its utmost to prove there is no risk of persecution in their country of origin or transit in order - all in the name of increasing the total number of persons to be returned. This distinction by nationality was already at the heart of the EU-Turkey deal whereby different treatments were applied to different nationalities. Inevitably, this created tensions and misunderstanding between asylum seekers, with many unable to comprehend why individual risks of persecution in their countries of origin were not assessed equally by the authorities.

A clear example is that of Syrian nationals, who suddenly saw their claims being deemed inadmissible as Turkey was considered a “safe third country”. This led to the systematic denial of international protection for Syrians which, in the first instance, were based mostly upon copying and pasting decisions “recommended” by the European Asylum Support Office. Although it is not highlighted in the narrative around the Pact, ‘inadmissibility based on safe third country’ will remain a cornerstone of this new asylum architecture. This will make many asylum seekers enter into the category of people to be returned despite a clear risk of persecution in their countries of origin.

Another example Left MEPs encountered in many of our visits to hotspots such as Italy is that of Nigerian girls who had been trafficked for sexual exploitation, and who had been told by traffickers to say they are adults in order not to fall under the child protection scheme, and that they would be picked up by the traffickers after their identification. Under the new proposal, these girls would be automatically directed from their rescue at sea to the border procedure (due to the 10% average recognition rate).

OUR ALTERNATIVE PROPOSAL

- **The right to international protection should be effectively guaranteed across EU Member States. Instead of lowering standards, the European Commission must ensure that existing asylum EU acquis is upheld and should focus on its actual implementation.**

Except for the Dublin regulation, the current deficiencies are due to bad compliance by Member States of existing asylum law that materialise in, for example, fast-track procedures aimed mostly to provide negative decisions, disregard of vulnerabilities, bad reception conditions - including detention of asylum-seekers - lack of special procedural guarantees such as proper access to legal aid or interpretation, and poor decision-making.

- **The European Commission should therefore ensure that the right to family reunification is guaranteed across the EU**, promoting the guidelines the Commission adopted and starting infringement procedures against Member States that do not respect the Family Reunification Directive. We advocate for a more inclusive definition of family reunification that goes beyond the "nuclear family".



European Commission's narrative #2: “We will bring an end to pushbacks with the setting of a monitoring mechanism during the screening procedure”.

With mounting evidence of pushbacks at the EU's external and internal borders, as well as political pressure by the European Parliament, the European Commission came up with an interesting idea of setting up an independent monitoring mechanism.

However, the fact that this would be solely limited to the screening procedure, plus a lack of ambition with the proposal means that, as it stands in the Pact, the mechanism defeats its whole purpose. Member States will be the ones setting this up based on the guidelines of the Fundamental Rights Agency, but they are non-binding. According to the Commission, “this new mechanism should also monitor compliance with the principle of non-refoulement as well as with the national rules on detention where they are applied during the screening.”

THE REALITY

The European Commission is currently “experimenting” with such an idea under the EMAS grant that was awarded to Croatia in 2018 - renewed and increased in 2019. The requirement for Croatia to set up an independent monitoring mechanism had been presented by the European Commission as the guarantee of Croatia’s compliance with fundamental rights in its border surveillance activities, and for which the EMAS grant was providing additional funding on top of Croatia’s funding under the ISF Borders and Visa Fund.

Despite evidence provided by the European Parliament and other stakeholders that such a mechanism has never actually been set up, and that the Ombudswoman, who has the mandate to monitor fundamental rights violations at the Croatian border, is being prevented by authorities to investigate allegations of abuse, the European Commission has kept providing additional money for border surveillance activities to Croatia.

The sole mechanism that exists in Croatia is a former project that looks into existing police files of people who have managed to enter the system and be registered. All the people who have been pushed-back, as acknowledged by the same stakeholders in charge of this project, are not in the police files. One could fear that the proposal of the Commission would take the same approach, as people being pushed-back would never reach the “screening” procedure. This latest monitoring mechanism would therefore not end the practice of pushbacks which is carried out daily at EU’s external land and sea borders. These people would also not be registered anywhere.

OUR ALTERNATIVE PROPOSAL

- **Support should be given to the setting up of a truly robust and independent monitoring mechanism that would be properly funded and allowed to exercise its role. It would rely upon existing, independent national human rights institutions** (Ombudsperson institutions, NHRIs, NPMs), supported by existing international monitoring bodies (Council of Europe Commissioner for Human Rights and CPT mainly, but also ECRI), and its findings should lead to concrete follow-up, also on a European level. The FRA and FRONTEX fundamental rights officer could be invited to contribute to the design and operation of this mechanism but also remaining fully independent of them.
- **Funding to border surveillance operations where there is evidence of fundamental rights violations should not be provided, or should be recovered** if evidence is being presented after the granting of such funding.



European Commission's narrative #3:

“The New Pact recognises that no Member State should shoulder a disproportionate responsibility and that all Member States should constantly contribute to solidarity”

One of the undisputed failures of the current system has been the disproportionate responsibility the Dublin Regulation places upon Member States of first entry. With this new Pact, the European Commission has claimed that it has “put Dublin to bed” or that “Dublin is dead”.

Although it is to be welcomed that the Commission has proposed the quick relocation of asylum seekers with family links based on an enlarged definition of ‘the family’, family links were already the first in the hierarchy of criteria under the current Dublin Regulation - not that it was respected most of the time. The addition of a diploma obtained in a Member State as a new criterion to determine the Member State responsible does not hide the fact that the Commission’s proposal still places the main responsibility on the first Member State of entry. The duration of the main responsibility lasts for three years.

THE REALITY

Instead of an automatic distribution mechanism, as proposed by the European Parliament in reforming Dublin, the European Commission caved in to the proposal made by the Visegrád in 2016 on “flexible solidarity”.

In the new proposed “migration management system”, a Member State could choose to relocate asylum seekers or refugees, “sponsor” returns of persons from another EU Member State, or provide support for “capacity-building” to another EU Member State or to a third country. In a “crisis” situation (to be determined by the Commission), Member States could only choose between relocation or “sponsoring” returns. If the return “sponsors” do not manage to deport the people they aimed to deport, after 8 months in normal situations or 4 months in a crisis situation, they would have to transfer them to their own territory. The procedural steps that are put in place in case there are not enough relocation places do not foresee any effective sanctioning mechanism, and these are dependent on many levels of decisions that will complicate and delay the procedure without ensuring that, after all, enough relocations places will be available.

OUR ALTERNATIVE PROPOSAL

- **The current Dublin regulation should be replaced by a binding mechanism of distribution of asylum seekers across the EU**, ending the principle of responsibility on the first Member State of entry. This distribution mechanism should be fast, open for all, and it should apply from day one in any situation - even in the absence of a crisis.

In times of crisis, priority has to be given to the most vulnerable groups. The European Parliament position on the reform of the Dublin Regulation represents a key proposal in this regard.

- **Regional and local authorities willing to receive people should be able to do so and should not be blocked by national authorities.**
- **Relocation must be carried out immediately for the most vulnerable**, including families with children, unaccompanied minors, people with disabilities or mental health issues or in need of medical treatment.

RELOCATION MUST BE CARRIED OUT IMMEDIATELY FOR THE MOST VULNERABLE, INCLUDING FAMILIES WITH CHILDREN





European Commission's narrative #4:

No More Morias

Moria camp - with a capacity of 3,100 people but at its peak "hosted" 25,000 people - and all the other hotspots on the other Greek islands have in recent years become human repositories. This fully exposed the failure of EU's policy choice which, amongst others, imposed the containment of applicants upon the islands on the Aegean front. Following the fire at Moria, European Commissioner for home affairs Ylva Johansson made a commitment that there will be "no more Morias".

However, the fact that a new camp that is even worse than Moria is already up and running in Lesvos raises so many concerns about how true the Johansson statement is. Responding to the concerns that the new Pact will entail massive detention at our borders, the Commission replied that this will be up to each Member State to assess the need and that an individual assessment is to be carried out for each applicant.

THE REALITY

As the purpose of the newly-proposed asylum border procedure is to allow authorities to examine a claim in newly-constructed facilities or existing ones at or near the borders, but without granting entry into Member State territory before the screening is over, it is hard to see how we would break with the “hotspot approach” that had been imposed upon places like the Greek islands, or how detention would not quickly become the norm in all Member States, de facto legalising mass detention.

OUR ALTERNATIVE PROPOSAL

- **All persons, independently of their status, should be guaranteed adequate and dignified reception conditions at all stages.** They should not be kept on islands, and alternatives to camps should be proposed with, for example, supporting UNHCR’s rental-accommodation schemes which enable independent living. This would also be more respectful to the needs of local communities.
- Detention because of someone’s legal status should be prohibited, with detention centres closed.
- A **robust plan of “small-scale social inclusion projects”** shall be funded so that all Member States can elaborate and implement inclusion policies which would favour both refugees and migrants and the local communities.
- **Local initiatives aimed at welcoming and socially include people from migrants-led organisations, civil society organisations, self-organised groups and cities should be supported and not impeded.**



European Commission's narrative #5:

The Pact will build win-win relationships with third countries

The Commission stated on different occasions that the Pact would deliver mutual benefits with third countries through comprehensive, balanced and tailor-made partnerships.

THE REALITY

Such a statement ignores the reality that the EU and third countries have conflicting interests when it comes to migration and mobility. The issue at heart actually concerns which coercive approaches will oblige third countries to cooperate with the EU's main objective of preventing people from coming to the EU. The new Pact states that "any measure" could be taken against a country that "is not cooperating sufficiently on the readmission of illegally staying third-country nationals". One of the proposed new tools is the limitation of the issuance of visas or the removal of a country from the list of visa-free countries.

Whilst on mission, Left MEPs witnessed at first hand the EU's cooperation with third countries with authoritarian regimes as part of the bloc's policy to externalise migration control. Such a policy not only lends legitimacy to these regimes by cooperating on an international level, it also undermines the EU's upholding of fundamental rights. The EU's silence over rights violations at Sudan, Libya, Egypt, Turkey and Morocco are deafening.

Elsewhere in countries like Niger, the EU's push to criminalise internal mobility and migration has led to diplomatic spats with the other members of ECOWAS. This is in addition to the destruction of longstanding social and cultural practices, leading to new problems such as corruption and the destabilisation of the local economy in the Agadez Region.

Meanwhile, the EU and Italy's cooperation with the so-called Libyan coastguard has meant that Member States and Commission officials are complicit in crimes against humanity. That's because the mission for the Libyan 'coastguards' is clear: intercept all those who are trying to flee Libya, send them back into detention (where torture is endemic). Consequently, there is an ongoing case at the International Criminal Court as well as a complaint to the European Court of Auditor over such an arrangement between the EU and the Libyan coastguard.

The Commission narrative also omits armed conflicts are being carried out with the tactical support or the direct participation of EU Member States, as seen in the wars in Mali, South Sudan and Afghanistan.

OUR ALTERNATIVE PROPOSAL

- The European Commission must **open safe and legal channels to the EU**. This includes striving to achieve a significant contribution of resettlement places in the EU based on the UNHCR resettlement needs and by opening up complementary pathways such as the provision of humanitarian visas. This also should include pathways for legal labour migration. The categorisation of people as “highly skilled” and thus benefitting from more rights than “low skilled” persons has to end, as the rights should be the same for all categories of workers.
- With significant EU funding, a **massive and robust proactive multinational search and rescue operation should be set up in the Central Mediterranean to ensure disembarkation in an EU safe harbour. Search and rescue operations in the Aegean Sea should also be financed by EU funding and all EU countries must share the responsibility immediately after the disembarkation of the people who have been rescued, either in the Central Mediterranean or in the Aegean Sea.**
- Member States should **stop criminalising humanitarian assistance at sea or land** and abide by the International Law of the Sea by **providing a safe harbour in the EU** as soon as possible after a rescue operation has been carried out.
- The European Commission should **reverse the outsourcing of EU border management, search and rescue and asylum processing to third countries**, including suspending the agreement with the Libyan coastguard, shelving the Khartoum Process, and stop EU financial bilateral support to regimes responsible for human rights abuses such as Egypt, Eritrea and Sudan.
- The European Commission should **develop real development cooperation policies and reform the EU’s foreign and neighbourhood policy based on solidarity and the needs of people**. Current economic and trade policies as well as militarisation should end.
- The European Commission should **ensure transparency, ongoing monitoring and evaluation of all EU funds** related to migration and asylum, both internally and externally.



European Commission's narrative #6:

“Two-thirds of people who apply for international protection are abusing our system and need to be returned”

It is clear that the main focus of the Commission in this Pact, as acknowledged by Ylva Johansson, is returns, as she said during the unveiling: “Last year, we had 140,000 irregular arrivals and this is what we are focusing now in our proposal”.

This obsession on returns is not new for the European Commission, which had already proposed back in 2018 to amend the Return Directive which, if adopted, would, amongst others, imply systematic detention of undocumented people.

THE REALITY

The statistics of “two-thirds” of people having their applications rejected in 2019 have to be treated with extreme caution. A typical case that would fall into this category would be the people whose application for international protection are deemed inadmissible based on the ‘safe third country’ or ‘first country of asylum’ principles. In addition to this false claim of them not being “refugees”, many people - while not being granted any protection status - cannot be deported to their country of origin because of the principle of non-refoulement, or refusal of the country of origin to readmit its nationals. These people deserve to be properly treated with a solution - and with dignity - by state authorities.

OUR ALTERNATIVE PROPOSAL

- **Every asylum seeker has the right to an in substance and individual examination of their asylum application.** No application should be deemed inadmissible based on a ‘safe third country’ principle.
- **The European Commission should shift away from the obsession with returning people. Rather, it should focus on supporting Member States that are willing to regularise undocumented persons who have been living and working there for years,** with close ties to the Member States they live in. Such measures would significantly contribute to reducing the exploitation of undocumented workers and, thus, social dumping that is widespread across the EU.
- **Member States should develop measures to fight against the exploitation of migrant workers, including protecting those who are undocumented** and who are afraid to complain about violence against them or their exploitation at work in fear of deportation. Member States, which have not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the ILO 189 Convention on Domestic workers should do so.
- The European Commission should devote ample resources to working for a **long-term social inclusion of third country nationals living in the EU and protect them from discrimination.**
- The European Commission should start **working towards a legal status for people forced to flee due to climate change.**



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