Interrogating Europe's Borders: Reflections from an Academic Career

FAREWELL SPEECH BY PROF. ELSPETH GUILD

change perspective

Radboud Universiteit

Radboud Universiteit

INTERROGATING EUROPE'S BORDERS: REFLECTIONS FROM AN ACADEMIC CAREER

Interrogating Europe's Borders: Reflections from an Academic Career

Farewell speech delivered by Prof. Elspeth Guild, Professor of European Migration Law at Radboud University's Faculty of Law, on Friday 6 September 2019

INTRODUCTION

It is both a pleasure and an honour to address you here today to celebrate my career at the Radboud University over the past 22 years. For me it is of course a bittersweet occasion - I will miss so many of the colleagues, the students and the wonderful environment - but sweet as my successor has been named and I am delighted with the choice.

I will divide this lecture into four parts and a conclusion - first I would like to thank the university for the opportunities which it has given me. Secondly, I would like to reflect on the importance of my students in the development of my academic work and my understanding of the importance of knowledge creation and dissemination. Thirdly, I will return to my inaugural lecture of May 2001 and examine the blueprint which I laid out there for my academic career - what is important now from the theoretical framing of state sovereignty and border control which I began to develop then. Fourthly, I will assess how the intervening 18 years have confirmed or confounded my expectations regarding the borders of Europe and their controls and why. Finally I will conclude looking towards the future and what may be the challenges for the forthcoming 20 years in this field.

THE UNIVERSITY

When I came to the Radboud University in 1997 at the invitation of Professors Groenendijk and Fernhout, I never anticipated that my career would be changed forever. I was a full-time practicing solicitor in London who had been astonished by the effect that EU law was having on the lives of third country nationals in the UK. The duty of good faith in EU law meant that British officials were required to grant residence cards to Turkish workers in the UK and third country national family members of EU nationals who had moved to the UK with only very limited conditions and minimal fees. In 1991 the Court of Justice had found that Turkish workers were entitled to the protection of the subsidiary legislation under the EC Turkey Agreement (a Dutch reference to the Court), in 1992 it found that British citizens returning to the UK after living in another EU state were entitled to be accompanied or joined by their third country national family members on EU terms (not the more restrictive and expensive national rules). The adoption of the association agreements with the Central and Eastern European States from 1992 onwards were providing fertile new sources of rights and leading towards enlargement in 2004. I first came to the Radboud University to investigate this transformation, as I saw it, of the nature of rights in Europe where individuals were entitled to rely on EU generated rights to defeat national restrictive rules and national officials accepted this obligation. This led to my PHD. This investigation led, in time, to my inaugural lecture - Moving the Borders of Europe - a reflection on the relationship of state sovereignty to borders and their control. I will return to this shortly.

In 2001 a CPO Wisselleerstoel was opened for European Migration Law and I was appointed. This led to the opening of a chair in European Immigration Law the following year where as a result of the death of Hanneke Steenbergen, a colleague and academic for whom I have the highest regard, I was appointed to the post. I would like to express a particularly thanks to those colleagues who have had such confidence in my work and have made my stay at the Radboud University such a pleasure. Of course Professor Kees Groenendijk must be the first to whom I must express my thanks. His supervision of my work when I was a student, and his wise counsel ever afterwards has been of great importance to me and to the development of my work. In the process, Kees and Fifi have become good friends. Roel Fernhout has been an exceptional colleague, always willing to provide advice and assist with my work. Over the last ten years my closest collaborators have been Professor Paul Minderhoud and Dr Sandra Mantu with whom we have managed the European Journal of Migration and Law, an academic network for the European Commission on implementation of free movement of workers and three Jean Monnet projects of the Centre of Excellence. With Dr Anita Bocker we have written together a book on free movement rights and supervised a PHD student with great success.

Becoming a university professor is a great privilege and an honour. I am very aware of the confidence which the university invested in me by appointing me to the post of professor. Professors are nominated to lead the academic community and to create new knowledge which will have a positive impact of society. We are given an authority by the university community to speak and to have our voices heard. In politically difficult and sensitive fields like migration, borders and asylum in Europe, a particularly heavy duty is apparent. Our field is mired in inaccuracies, fears, prejudices and vulnerable to instrumentalisation by those who speak the language of ultra-patriotism. Our duty to examine carefully the field and to exercise the utmost integrity in the creation of new knowledge is profound. My academic position has been informed both by international human rights commitments of European states as well as humanitarianism. Being a professor, my voice has been heard in places where without this qualification it is not evident that this would have been the case. Because of the honour which the university conferred on me, my voice has been heard in many policy venues such as the Council of Europe, the European Parliament, the European Commission, UNHCR, OHCHR and elsewhere where as a simple British solicitor the value of my research would have had much less impact. There are many types of courage which the academic community expects from professors these include: speaking unwelcome truths to society and policy makers; dispelling myths which are capable of harming people's lives; and perhaps most importantly teaching students to be rigorous and critical in their research and their thinking.

Professors are also given the duty and the honour of teaching new generations of young people and supervising their research. It is to this aspect of my work that I will now turn.

THE STUDENTS

Already in 1998 I began teaching students at the Radboud University. In the context of a cooperation agreement with the Ministry, I commenced teaching European Immigration Law originally aimed at civil servants in the Ministry to provide them with the legal knowledge they needed to carry out their jobs correctly. The course continued after the end of the cooperation project and eventually became a compulsory course on the Human Rights LLM. Although I taught this course (with increasing numbers of colleagues participating in it) for almost 20 years, the content change dramatically. When I started, the course was exclusively about the right of free movement of workers, the self-employed, service providers and recipients and their family members within the EU. But in 1999 the Amsterdam Treaty came into force giving competence to the EU over migration, borders and asylum and the contents of the course had to adjust to the adoption of EU legislation in these fields as well. Indeed, with time these fields relating to third country nationals almost began to dominate the course. But the enlargements of the EU in 2004, 2007 and 2013 and the transitional arrangements limiting the right of free movement of workers for nationals of the acceding states meant that the original content of the course remained highly relevant.

Enlargement also changed the nature of my student body as young people from across Central and Eastern Europe came to the Radboud University eager to understand the new rights which they were in the course of acquiring. It is with great fondness that I pass responsibility for this course now to others. I will remember my students over all these years, so eager to learn and so ready to understand the importance of free movement of persons in the EU and the fair treatment of third country nationals. It has been my privilege to supervise the PHD theses of a number of outstanding scholars, so many of whom have gone on to stellar careers both nationally and internationally. I have learned so much from them and enjoyed the pleasure of the intellectual investigation – unearthing the material, struggling with the analysis and creating new knowledge in our field.

REVISITING MOVING THE BORDERS OF EUROPE

In my inaugural lecture on 30 May 2001 I posited the question - where are the borders of Europe? My Europe for these purposes is the European Union and at the time, a Union of 15 Member States. I positioned my inquiry between Max Weber's definition of the state - a territory with a bureaucracy which is successfully upholding a claim to a monopoly of the legitimate use of physical force in the enforcement of its order and the

Westphalian order which champions the principle of state sovereignty as a state entitlement to control internal affairs (including borders) without hindrance. The investment of state sovereignty in border controls fits comfortably both in Weber's definition of the state as the equivalent of a tin of beans for people where the internal order is established by the bureaucracy subject to a careful delineation of territory and the essential distinction of people between those who belong to the state and those who do not. The political heavy lifting of borders, as Torpey points out, is as the place where the politics of belonging is made visible. The Weberian states needs a definition of the people for whom the claimed monopoly over violence is exercised. The long and careful construction of the citizen, through the documentation his or her birth and belonging (parents, grandparents) to determine his or her entitlement to citizenship documented by a passport is performed finally (and decisively) at the border. The citizen is entitled to enter but the foreigner (some other country's citizen) is not. The other person can go back to his or her country of belonging but does not need to be admitted to any other country. The Westphalian order supports the investment of state sovereignty in border controls on persons. It is the performance of sovereignty at the border which demonstrates the reality of the inter-state order and played out on the identities of people. It is a very powerful story of bureaucratic entitlement which props up the illusion of power, control and sovereignty. In Europe today it is a shared state sovereignty though no longer the sovereignty of a specific state which performs violence around external border controls as a political spectacle of claimed control. I will return to this shortly.

In 2001, I examined the claims to state control of borders from the perspective of the EU. I tried to unpick where the border controls of the EU are and where they are encountered. I started from the simple reality for most people that borders and their controls are places and practices of bureaucracy which are unsettled and diffuse. At the time, I used the example of a Moroccan national who first encounters the EU border within her own country at the consulate of the state to which she wishes to travel. Today she encounters the border at the offices of an external service provider, a private business with which consulates contract to assist in the processing of visa applications. Whether or not she will be able to make a visa application or not will depend on the service provider whose job it is to ensure that only 'complete' applications are forwarded to the consulate for approval. But once her complete application is sent to the consulate and validated (as all but 9% of applications for short stay visas are) she will be able to enter the EU through the border crossing point of any of the 26 Schengen participating states. But before she will arrive at a physical border she will encounter the border control carried out by the transport company – airline officials checking her passport and visa or agencies which carry out this control for airlines. All these actors will be private sector ones as well engaged in border controls because destination states

threaten them with fines for failure to do so. Next, she will encounter the border on entering the EU territory, but the state authority carrying out the border control may be entirely different from the one which issued her a visa. At least this time the control will be carried out by a state authority rather than the private sector. But increasingly the control may be carried out by a machine. However, she can relax, the chances that she will be refused admission at the external border of the EU are 0.0005% (according to the EU external border agency Frontex). Further she is unlikely to spend much time at the border control place as Frontex tells us that the border guard has 12 seconds to make a decision on her entry and will almost always make a positive decision.

In my inaugural lecture I examined four issues: (1) the export of the border into the territory of other states as part of the completion of the abolition of intra-Schengen borders; (2) the engagement of the private sectors as the gatekeeper of enforcement of border controls through sanctions on carriers bringing unauthorized people to the EU border; (3) the consequences of these two developments for refugees and persons seeking international protection squeezed out of access to the authorized travel industry and (4) the possible emergence of the private sector as the licensing authority for migration management.

At the time, I was particularly concerned about the position of refugees and persons in search of international protection, how would they be able to claim their rights in international law to protection when those rights only come into existence when the border has been crossed. I was also exercised by the consequences for asylum seekers within the Union where the Dublin system means they have only one chance to make an asylum application – to a state which the EU determines is responsible. But refugee recognition rates varied widely, nationals from the same countries (suffering civil war or totalitarian persecution) depending on the Member State considering the application. This meant that asylum seekers in very similar positions and with very similar claims would have very different outcomes depending on where they were required to make their asylum applications. In one EU state they would get protection while in another they would be rejected. This problem has not gone away. Indeed it has only intensified as a result of the arrival of substantially more refugees in Europe in 2015-16 than some state anticipated. The highly criticized aspect of the Dublin system, the threat of forced displacement of asylum seekers from one Member State to another based on the EU Member States responsibility rules, in the end turned out to be a paper dragon. Only 3% of asylum seekers are ever actually sent form one state to another. But the Dublin system encourages irresponsibility among Member States as regards the provision of reception conditions. Administrations are reluctant to provide reception conditions to asylum seekers who 'ought' according to the Dublin rules to be the responsibility of another Member State (this notwithstanding judgments of the CJEU to the contrary).

The engagement of the private sector in border controls has intensified with the incorporation of external providers into the centre of visa processing. My interest in a possible new role for the private sector as licensers for migrant workers sub-contracted by the state to resolve labour shortage issues with only a light hand control by the state has turned out to be misplaced. In the end EU states have been unwilling to lift their bureaucratic hand from labour migration, instead there has been an intensification in some states of the requirements on employers, the fees exacted. Indeed, in some Member States employers have been coerced into carrying out very extensive immigration control measures to satisfy national authorities that their employees are not 'illegal'. So instead of a possible liberalization we have seen greater control and regulation in many Member States.

Yet, perhaps the most spectacular of the developments over the 18 years since my inaugural lecture has been the export of the border abroad. In the next section I will look at how EU law and policy has responded to the reframing of the Weberian state for the purposes of border controls as a group of 26 rather heterogeneous states, not even consistent with EU membership and the Westphalian order as a collective exercise of state sovereignty at and beyond the border eventually interfering in other countries (and regions) state sovereignty claims.

interrogating europe's borders in 2019

An inaugural lecture about borders and their control given on 30 May 2001 could not have taken into account what would happen a few months later on 11 September of that year in the USA. The attacks in the US through the use of planes as weapons astonished the world. The reaction of the US administration was to declare a War on Terror (finally ended in 2013) which included: the invasion of Afghanistan (US forces are still present there) and Iraq, the creation of a US detention centre for suspected terrorists on the island of Cuba (in Guantanamo Bay – still open and holding men from 2001 without trial), the operation of a US extraordinary rendition programme (with complicity from a number of EU states – now ended but in favour with the current US President) where people were kidnapped from one country and taken to another for interrogation which included torture and enhanced border control. All of these measures had profound effects on border controls and their place within systems of rule of law. The invasion of two states constitutes a challenge to the Westphalian order of state sovereignty. The US extraterritorial detention centre for foreigners in Guantanamo Bay was chosen because it was not on US soil and the US legal order would not protect those detained there. The border of law and the border of involuntary movement of people converged. The extraordinary rendition programme also depended on subverting the borders of law and the movement of persons – people were moved involuntarily from their home state to other states around the world where the CIA had negotia-

ted use of bases where their operatives could torture them. According to the Council of Europe's Marty report on European state complicity, it seems that when CIA chartered flights carrying detainees arrived at some European airports, the US staff were subject to border controls but the detainees were classified as 'packages' and no border control was carried out. All these actions are profoundly problematic for the Weberian state where people are supposed to stay where they belong, not be packaged up and shipped around the world for inhuman and degrading treatment and torture at the whim of a foreign state. The US focus on borders and how they could be used to achieve greater security for the USA (and its citizens) was a siren call to the world. The temptation to enhance border controls in light of the heightened terrorism threat as propounded by the USA was substantial. But in the EU it ran straight into another policy development – enlargement. By 2001 it was clear that at least a number of the former Soviet block states would be joining the EU soon. In the end the Baltic states, Slovenia and the two Mediterranean islands were also included in the big bang enlargement which took place on 1 May 2004.

It was not possible for the EU in 2001 to reframe its vision of itself as moving its borders outwards and embracing its neighbours into the internal market to one of hard borders designed to keep out threat and danger. The neighbours were about to join the EU and in due course Schengen and thus could not be presented as the source of threat and danger but rather the venue of peace and hope (including free movement of persons and the abolition of border controls). The President of the European Commission at the time, Romano Prodi announced the Neighborhood Policy – planning to extend the EU's internal market (but not the institutions) far beyond the sphere of states which were joining the EU. This policy would work fairly well towards the East but not at all towards the South, across the Mediterranean.

The unsettling of the borders of Europe which I described in 2001, continued with the 2004 enlargement, the 2007 - enlargement to Bulgaria and Romania and in 2013 the addition of Croatia. While none of the post 2004 states have been admitted to the Schengen border-control free area yet, the pressure is there and rising. This flexibility of borders and where their controls take place confounds both a Weberian understanding of the state and a Westphalian order where the performance of border controls is a statement of state sovereignty. But the adjustment of EU states to the new regime was surprisingly smooth. While interior ministries fumed at the loss of a critical tool of crime prevent and protection of the state – border controls, the EU political consensus ignored them. Indeed, Eurostat began producing statistics on (police recorded) crime which show a continuous drop in crime from 1995 onwards irrespective of the abolition of border controls or how many states were included.

But this unsettling of where border controls take place facilitated the development of policies to move border controls even farther from the EU's external border into the territory of other countries. The relaxation of the link between borders and their controls with the existence of the state and state sovereignty in a Weberian or Westphalian way made their displacement ever easier. The purpose of the border controls however also need to be re-defined. While crime and terrorism are always favorites for advocates of stronger border controls, neither are particular helpful in an EU context. Eurostat tells us that crime is dropping irrespective of border controls and Europol (TE-SAT) tells us that terrorism in the EU is largely an ethno-nationalist/separatist affair with only tangential links to cross border movement, almost all of them intra-EU. Instead, as the EU exercised ever more of its 1999 competences, with the creation of an EU Border Agency Frontex in 2005, a Border Code in 2006, in 2008 a Return Directive, and in 2009 a Visa Code, border control became increasing merged with migration management. The policy documents of the EU presented a picture that better border control would result in more effective migration management, in particular from a coercive perspective: keeping out unwanted foreigners and expelling them if they did get in. One problem with this approach is the convergence of two very different policy areas. Border control and migration management are only loosely connected. Border control is about organizing the orderly movement of people arriving in a state through a rapid check of their documents.

As Frontex has explained, a border guard has only 12 seconds to make a decision on the admission of a person at the external border. This is insufficient time to make any calculation of the impact on migration management that the entry of one individual might have on the EU particularly one with no internal border controls. It is unrealistic and futile to expect that border control will enhance migration management – it is simply not possible unless a state or region is willing to block the entry of virtually all foreigners such as is done in North Korea. But the fantasy that border control can be used as a migration management tool has been very popular among some interior ministries in the EU. It also fuels a policy development that border controls better carried out in countries far away (on the so-called migration routes) can enhance migration management in the EU. The idea is that if people cannot cross borders far away from the EU then they are less likely to get to the EU and become a migration management problem.

But the first question which must be asked is whether the EU actually has a border control and/or migration management problem. According to Frontex, out of over 300 million entries at the external border in 2018, 3/4 were third country nationals.[1] A total of 190,930 persons were refused entry at external borders of the EU. This constitutes approximately 0.0006% of total entries at external borders. Yet this very low percen-

tage of people refused entry at the EU external border does not transform into substantial pressure for irregular border crossing. Again according to Frontex, there were a total of 150,114 illegal border crossings into the EU of which 114,276 were by sea. The constitutes approximately 0.0005% of the entries at external borders. One argument sometimes put forward is that few people are refused entry at the external border because the unsuitable ones are 'weeded out' at the visa stage. Yet, the Commission tells us that of the approximately 16 million Schengen visas applied for in 2018, only 9.6% were not issued.[2]

Further, Frontex states that 361,636 persons were treated as irregularly staying in the EU in 2018. Of these, however it tells us that only 75,241 third country nationals were subject to forced returns (expulsion) in the same year. This constitutes approximately 0.21% of those originally counted as irregularly present. The top five nationalities of persons forcible expelled from the EU were Albania, Moroccan, Algeria, Tunisian and Ukrainian (nationals of neighbouring states).[3] Further, Eurostat tells us that in 2017 (the most recent year for which statistics are available) 3.1 million first residence permits were issued to third country nationals (the top five nationalities were Ukrainians, Syrians, Chinese, Indians and US nationals).[4] The EU political problem with these statistics is that they do not reveal a crisis in terms of pressure on the EU external borders nor a migration management problem. The pressure at the external borders as regards irregular entry is miniscule (and dropping according to Frontex). Any policy which is designed to address as a 'serious' problem a statistical non-compliance issue of less than 0.0005% lacks credibility.

Yet, the EU and its Member States have pursued extraterritorial border control operations with deadly consequences for a small number of people. According to IOM 3,139 persons were missing in the Mediterranean in 2017, 2,299 in 2018 and so far in 2019, 859. In general missing migrants in the Mediterranean crossing have exceeded 2,000 since 2014. The Mediterranean has become something of a testing ground for the EU in these extra-territorial adventures. As Hein de Haas has explained, before the consolidation of the Schengen list of countries whose nationals must obtain visas to come to the EU with the inclusion of most African states on the mandatory visa list in the 1990s, people rarely drowned trying to cross the Mediterranean. However, once the extraterritorial step of consolidated mandatory visa obligations came into place anyone who could not get a visa but who wanted to travel had to resort to more dangerous means. This has given rise to much friction with the private shipping and fishing sector where a strong international obligation to rescue people at risk of drowning has come into conflict with an increasingly strong reluctance of some Mediterranean countries to permit disembarkation. Commercial ships do not want to rescue people if they cannot drop them off quickly and easily somewhere where they will be safe. From October 2013

to October 2014 the Italian navy took over responsibility operating a very expensive programme called Mare Nostrum to save the lives of migrants at sea who had endeavoured to cross the Mediterranean under poor conditions. The cost of the trips by smugglers is not cheap – often recorded at around $1,000. A trip on a safe (unionised) ferry from Morocco to Spain costs about € 35 if booked in advance. The cost of the Mare Nostrum operation per month was € 9 million.

I will come back to the end of the More Nostrum operation shortly, but before that, the challenge which the flight of around 2 million mainly Syrians from Turkey to Greece then across the Balkans to northern Europe in 2015 – 2016 must be factored in. The numbers arriving in Europe, while small in comparison with the Syrian refugee populations in Turkey, Lebanon and Jordan, caused a political crisis which resulted in a small number of interior ministries re-introducing intra-Schengen border controls on persons (Germany, Austria, Denmark, Sweden and Norway) to avoid responsibility for asylum seekers arriving at their borders. The intra-Schengen border controls rules were modified a number of times, and the recalcitrant states were not disciplined by the EU institutions. But the robustness of the intra-Schengen system meant that the controls had to be limited to a small number of places. An official of a Permanent Representation in Brussels told me that on the Austrian-German autobahn, the traffic radio station advises drivers when and where a border control is set up so that drivers can avoid the affected junction and the related delay. But the extraterritorialing of border controls was also presented as the way to prevent asylum seekers arriving from Turkey. The EU Turkey Statement 18 March 2016 transferred responsibility to Turkey to prevent unwanted crossings in return for the promise of visa liberalisation for Turkish nationals coming to the EU for short stays by the end of June 2016 and 3 billion euros under the Facility for Refugees in Turkey. The Statement has been controversial as it does not comply with EU legislative requirements and so was found by the CJEU not to be an EU agreement, thus not justiciable by the CJEU. While the Turkish authorities consider that they have fulfilled their obligations under the Statement, the EU has most visibly and spectacularly not as regards visa liberalization.

At the end of the Mare Nostrum operation, two alternatives emerged. First, a number of non-governmental organisations such as MSF, Sea Watch and SOS Mediterranee, started operating boats along key stretches of the Mediterranean with the sole objective of saving lives at risk. In September 2015 the EU commenced Operation Sophia, a naval operation with the vocation to save lives, identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers and to disrupt the business model of human smuggling and trafficking. Operation Sophia was launched after the head of the EU External Action Service convinced the UN Security Council to give approval for it. But when in 2019 the Italian authorities refused

disembarkation, the German authorities withdrew their ship from the Operation and it's life-saving vocation has stalled. The mandate of the Operation was extended in 2016 to include training the Libyan coast guard and navy. However, this activity has not been uncontroversial.

A communication was made to the prosecutor of the International Criminal Court alleging EU and Member State responsibility for death by drowning in the Mediterranean, lodged on 3 June 2019. The core of the communication, (244 pages long) calls for the prosecution of senior EU and Member State officials on the grounds that:

> "1001. The evidence provided to the Prosecutor is diverse and includes an expert opinion on the situation of migrants in Libya; a victim statement confirming, for the first time to the best of our knowledge, the involvement of the Libyan Coast Guard ('LYCG') in smuggling, trafficking and detention of migrants; internal documents of high-level EU organs, framing the commission of multiple Crimes Against Humanity within the context of a predefined plan executed pursuant to a policy aimed at stemming migration flows of Africans; statements by policymakers, made before, during and after the commission of the crimes, that establish their awareness of the lethal consequences of their decisions and implicate them in the alleged crimes; and reports by civil society organizations on the "dire and unacceptable" human rights situation in Libya."

The information contained in the communication is indeed troubling. But in the meantime, the Italian authorities began refusing disembarkation in Italy of people saved by NGO boats. By December 2018, MSF stopped its humanitarian rescue operation when its ship, the Aquarius was the subject of sustained harassment by the authorities of a number of states, including the withdrawal of its licence by the French authorities. By June 2019, the Italian authorities were confiscating ships and arresting captains of any rescue ship bringing rescued persons to Italy. Currently, the best known of the captains is Carole Rackete who was arrested and detained (until release on a judge's order recently). She still awaits trial for helping illegal immigrants enter Italy. Her situation is not unique.

Also in pursuit of the extraterritorial border control policy, in 2017 the French government announced action to free migrants held in slave-like conditions in Libya.[5] This resulted in some UN agencies becoming engaged in evacuating migrants from Libya to Niger at the behest of the EU and some of its Member States.[6] The outcomes have been fairly chequered with some resettlement to European states but some migrants abandoned in Niger.[7] But why Niger? How did these states find one another? According to a researcher, the EU's engagement with Niger began in the 1980s when it began funding non-government organisations engaged in local rule of law issues.

However, following the military Coup d' Etat in Niger in 2010[8] the EU remained present but began funding state activities, in accordance with the new dictatorship's demands. When the need arose to find a state in which to 'park' migrants from Libya, the EU and its Member States planned to engage with three states – Niger, Mauritania and Mali. The latter two states desisted quickly but the military leaders in Niger acquiesced to the requests in return for further financial contributions. Effectively, the EU and its Member States have been funding a dictatorship in pursuit of their border/migration concern.[9]

The Libya-Niger route is not the only EU and Member State external policy. The most recent object of the EU and its Member States in its border/migration policies for expulsion of third countries nationals of various nationalities is the Gambia where a failed coup attempt in 2014 has resulted in repression and economic decline.[10] As the European Stability Initiative Newsletter 29 July 2019 states "the European Commission was trying to get the Gambian government to allow more than 1,000 returns of its citizens in a year, for many years to come. In return it offered to send a consultant to help the Gambian government "effectively communicate with its citizens", as well as "to monitor developments in the (social) media." These EU coercive border/migration related activities which target weak and totalitarian regimes with financial support in return for accepting expelled persons from the EU or related (ie Libya) states does not reflect well on the human rights commitments of the EU let alone promote responsible international relations.

Yet, the moving of Europe's borders does not have to result in death, friction in international relations and peculiar forays into distant lands. The Mediterranean is a terrible example of the consequences of pursuit of policies of extra-territorialisation of border controls to achieve ephemeral if not illusory migration management objectives. Another example is also available from the EU which is much less bloody. In 2014 the Russian Federation annexed Crimea. Eastern Ukraine was destabilised and armed hostilities are still continuing. One of the consequences of this has been an out-pouring of Ukrainians seeking protection from hostilities and an economy in crisis. According to Eurostat, Poland has issued more than ½ million first work and residence permits to Ukrainians per year since 2014. But under 10,000 Ukrainians have applied for asylum in the EU in 2017 and 2018. On 11 June 2017, the EU lifted the mandatory visa requirement on Ukrainians (with biometric passports) so that they could arrive at the EU border without having to pass through the 'border abroad'. Instead of extending the extraterritoriality of the EU border, in this case the EU diminished it. Ukrainians can now come to the EU without a visa and without entering the EU irregularly. They can transition easily to work and residence permits in Poland. And still, only between 25,000 – 38,000 Ukrainians were expelled from the EU in 2017 and 2018. Clearly the

states surrounding the EU's eastern border have a different appreciation of the relationship of border controls and migration management than their colleagues in the South. Neither border control nor migration management is permitted to become a contentious issue either among states on the Eastern side of the EU or with the neighbouring states. There is nothing natural about hostility towards foreigners.

Since my inaugural lecture, three lessons need to be learned about the EU and its fluctuating borders. First, border control and migration management must never be conflated. Border control is a regulatory procedure to ensure the orderly movement of people across borders. It does not contribute to migration management. Migration management should take place within states. The attempts to export it to the territory of other countries creates unnecessary friction and achieves little in the way of results. Secondly, the extraterritorialisation of EU border controls is causing death in the Mediterranean. This is unacceptable, arbitrarily visited on a small number of people and shameful. The EU should not be seeking to pay other countries to prevent people from moving – effectively inciting other states to breach the international human right to leave a country, any country. Thirdly, the EU is fully able to adjust its border control and migration management systems to meet legitimate demand for mobility. The EU response to Ukraine is an example of a well considered and human rights oriented approach to borders and migration. The key is to acknowledge that migration and movement of people is a political question where the preferences of ultra-patriotic leaders should not be tolerated.

REFERENCES

1   Frontex Annal Risk Analysis 2019.

2   https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en visited 5 August 2019.

3   Statistics on voluntary return are less reliable as many state rely on third country nationals 'self expelling' a term which is too vague to be meaningful as it can include for instance visitors leaving at the end of their stays

4   https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=410577 visited 5 August 2019.

5   https://www.telegraph.co.uk/news/2017/11/29/europe-promises-44bn-marshall-plan-africa-migrant-slavery-libya/ visited 5 August 2019.

6   https://www.reuters.com/article/us-europe-migrants-libya-idUSKBN1DC11C visited 5 August 2019.

7   https://www.aljazeera.com/indepth/features/world-refugee-day-unhcr-head-flies-niger-abused-migrants-180620004405582.html visited 5 August 2019.

8   https://www.theguardian.com/world/2010/feb/19/niger-military-junta-coup visited 5 August 2019.

9   L C Petteng, 'How security turmoil in the Sahel is helping Niger renegotiate its influence in global affairs', International Studies Association Conference Accra 2 August 2019.

10   http://www.lejournalinternational.info/en/gambie-coup-detat-manque-et-repression-sanguinaire/ visited 5 August 2019.