Migrants: *like an arrow in the bow of humankind*[*]

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1. Migrations: a critical challenge for Europe *and* democracy

Protecting the democratic values of the rule of law and fundamental human rights is among MEDEL's (*Magistrats Européens pour la Démocratie et les Libertés*) objectives. Since its foundation, which dates back to when Europe was still divided by the Berlin Wall, MEDEL looked forward to the promotion of a European integration based on those common values, and included «the proclamation and the defence of the rights of minorities and of differences, and in particular the rights of immigrants and the most deprived, in a perspective of social emancipation of the weakest» among the goals set in its charter.

Back then, immigration already stood out as the testing ground for the project of a Europe united not only by the market, but also by those universal and indivisible values recalled in the preamble of its Charter of Fundamental Rights: «*an ever closer union*», in which «*the peoples of Europe are resolved to share a peaceful future based on common values*»; a Union that, «*conscious of its spiritual and moral heritage», is founded «on the indivisible, universal values of human dignity, freedom, equality and solidarity* [*and*] *the principles of democracy and the rule of law*»; a Union that «*places the individual at the heart of its activities*», committed to ensuring the enjoyment of fundamental rights and assuming «*responsibilities and duties with regard to other persons, to the human community and to future generations*».

2. What remains of our promises today?

The *Missing migrants project* section of the International Organization for Migration, which has been collecting information about dead and missing migrants since 2014, states that, taking into account the latest accident of April 29 – to which must be added the tragic shipwrecks recently occurred off the coasts of Roccella Ionica and Lampedusa[1] –,

[*] This text expands the speech made at the international conference "Immigration in Europe and Fundamental Rights. Which perspectives for the next European Legislature?" organised on April 12, 2024 at Roma Tre University by MEDEL, Magistratura Democratica, Fondazione Basso and Movimento europeo.

[1] www.rainews.it/articoli/2024/06/almeno-50-migranti-dispersi-a-100-miglia-dalla-costa-della-calabria-1a9dd3c6-4188-49bc-96aa-85e14932c294.html.

734 victims and missing migrants were registered since the beginning of 2024 across the central Mediterranean route alone (they were 3105 last year). The world's deadliest migration route is precisely the central Mediterranean one: since 2014, 29.588 people have died or have gone missing.

Such figures highlight the weight of our legacy on Europe's future and democracy: the very survival of the European Union project, as a community that places the individual and its values at its core, is connected to the ability to understand and deal with migrations. As Luigi Ferrajoli wrote, migrations – as a request for and a vehicle of equality – are capable of shaping a new world order, destined to transform human relations. Therefore, they also require a radical change in the narrative of what they represent: not a menace, but an opportunity.

3. The policies of "Fortress Europe"

Today we stand at the dangerous crossroads where national and European policies unable to meet this challenge have taken us through the years.

With those policies, we betrayed the promises written in the Charters, and reinforced the plans to break Europe apart through rediscovering and calling for inviolable national borders and identity, in whose name ghosts and demons from the past are brought back to life alongside their symbols: walls and barbed wire.

These control and damage limitation policies propose to distinguish the status and rights of refugees from those of the so-called "economic migrants", on the assumption that while the first are forced, "pushed" and "compelled" to leave their Countries, the latter do so by their own will and are therefore free to choose ("pulled"). As mentioned, aiming at limiting our reception-related obligations, such classification patterns have shown their utter inadequacy and arbitrariness *vis-à-vis* the complexities and reality of the actual situation.

The experience of our Country is an instance of the "Fortress Europe" approach, which has always dealt with immigration in terms of security and public order, by making extensive use of "legal criminalisation" techniques which introduced specific crimes connected to "illegal entering" or "stay". This "emergency approach" produced and is still producing a "special" immigration law, which punishes individuals for what they *are* and not for what they *do*. This law introduced administrative detention as an immigration governance tool, which brought along enormous problems relating to respect for human rights and compliance with our strict and mandatory safeguards envisaged for lawful deprivation of liberty.

Today, when it comes to regulating immigration, we are facing what has been defined as an emerging model of decline of well-established liberal-democratic constitutional orders in their commitment towards human rights. By defying the human rights protection system based on the European Convention of Human Rights and ECtHR decisions, the British government creates by law a "safe third Country", by means of the *Safety of Rwanda Bill*. Despite court decisions certifying the violation of the domestic law on refugees and the interim measures adopted by the Strasbourg Court, the Belgian government persists in the systematic non-execution of judgments that recognise the

right to reception to asylum seekers[2]. In France, a new law on immigration was recently approved, which has been defined the most retrogressive one since 1945.

We stand at the crossroads where choices marking what has been defined as Europe's "moral and ethical retrogression" in border management have taken us: the end of *Operation "*Mare Nostrum*"*; the 2016 deal with Turkey, through which Europe sold its «soul» – as *The Financial Times* wrote – by relying on Turkey's President and entrusting him the task of controlling the Balkans Route while pretending to consider Turkey a "safe third country".

4. A new shift of paradigm: "legal" violence

Recent and long-standing events across Europe have shown that today we are facing a further shift of paradigm; that yet another threshold has been crossed through resorting to violence for EU internal and external border surveillance purposes.

Suffice it to mention the statement made in February 2022 by the UN High Commissioner for Refugees, who reported increased violations of human rights at the EU borders; the information collected through UNHCR interviews to thousands of refouled individuals who confirmed violences, abuses, pushbacks, many of which resulted in tragic losses of human lives; the incidents suffered and reported at multiple land and sea border entry points, outside and inside the European Union. With few exceptions, said the High Commissioner, European states have not investigated these reports, despite mounting and credible evidence. «Instead, walls and fences are being erected at various frontiers[3]».

5. Externalisation of border management policies

By supporting third Countries to ensure border control and the re-admission of migrants, Europe redefined its aid policies based on the geographical location of third Countries and their capacity to stop the outflow of migrants, rather than on the paramount objective of international development cooperation and humanitarian aid («the reduction and, in the long term, the eradication of poverty», as envisaged in art. 208 of the Treaty on the Functioning of the European Union). As shown in the report *EU external migration policy and the protection of human rights*, requested in 2020 by the EU Parliament Subcommittee on Human Rights (DROI)[4], the analysis of EU and Member States external migration policy reveals a lack of appreciation for the full reach and importance of the fundamental rights *acquis*, especially when engaging in extra-territorial activity, and when formally or informally cooperating with third Countries. EU

[2] The refusal by Belgian authorities to execute orders issued by [their national courts] revealed «a systemic failure [...] to enforce final judicial decisions concerning the reception of applicants for international protection". "While the Court was aware of the difficult situation the Belgian State was facing, it could not accept that the time taken by the Belgian authorities in the present case to enforce a court order aimed at protecting human dignity had been reasonable» (ECtHR, *Camara v. Belgium*, 49255/22, 18.07.2023).

[3] www.unhcr.org/news/press/2022/2/62137a284/news-comment-unhcr-warns-increasing-violence-human-rights-violations-european.html.

[4] www.europarl.europa.eu/cmsdata/226387/EU_External_Migration_Policy_and_the_Protection_of_Human_Rights.pdf.

primary law requires the observance of fundamental rights, including those of TCNs (*third Country nationals*), in all EU internal and external actions (Articles 2, 6 and 21 TEU) by all EU institutions, bodies and agencies as well as by the Member States when implementing EU law (Article 51 CFR). In turn, the current policy has produced memoranda of understanding and agreements with Countries where democracy, the rule of law, minimum human rights protection standards are non-existent.

Speaking of Italy, this policy produced the *Memorandum* with Sudan's President al-Bashir, sentenced by the International Criminal Court and subject to an arrest warrant for genocide, war crimes and crimes against humanity. It also produced agreements with Libya, where migrants are deprived of their liberty and subject to torture in detention camps managed by human traffickers. Today we have agreements with Tunisia and an MoU between Italy and Albania, which, as mentioned by the CoE Commissioner for Human Rights, poses various concerns regarding respect for human rights of refugees, migrants and asylum seekers and adds to a troublesome European trend towards the externalisation of asylum-related responsibilities, thus increasing the risk of exposing migrants to human rights violations[5].

As stated by the above-mentioned 2020 DROI report, making relations with third Countries informal, through *Frontex Working Arrangement*, *Statements*, *Good Practices documents*, *bilateral Memoranda of Understanding*, *or multilateral Protocols*, all supported financially by the EU, has downgraded the democratic accountability by violating the rules on the role of the EU Parliament in EU external relations as set by EU treaties (e.g., art. 218 TFEU). Such soft law instruments and non-binding norms also escape the CJEU jurisdiction and, subsequently, the judicial oversight and control it generally performs over EU legislation.

6. Criminalisation of migrant support and humanitarian aid: *a global phenomenon*

The criminalisation of migrant support and humanitarian (or other forms of) aid can be considered a "global phenomenon". This is deeply-rooted across the EU[6] and Member

[5] www.coe.int/be/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures – «The MoU raises a range of important questions on the impact that its implementation would have for the human rights of refugees, asylum seekers and migrants. These relate, among others, to timely disembarkation, impact on search and rescue operations, fairness of asylum procedures, identification of vulnerable persons, the possibility of automatic detention without an adequate judicial review, detention conditions, access to legal aid, and effective remedies. The MoU creates an ad hoc extra-territorial asylum regime characterised by many legal ambiguities. In practice, the lack of legal certainty will likely undermine crucial human rights safeguards and accountability for violations, resulting in differential treatment between those whose asylum applications will be examined in Albania and those for whom this will happen in Italy. The MoU is indicative of a wider drive by Council of Europe member states to pursue various models of externalising asylum as a potential 'quick fix' to the complex challenges posed by the arrival of refugees, asylum seekers and migrants. However, externalisation measures significantly increase the risk of exposing refugees, asylum seekers and migrants to human rights violations. The shifting of responsibility across borders by some states also incentivises others to do the same, which risks creating a domino effect that could undermine the European and global system of international protection. Ensuring that asylum can be claimed and assessed on member states' own territories remains a cornerstone of a well-functioning, human rights compliant system that provides protection to those who need it».

[6] www.icj.org/wp-content/uploads/2022/04/Criminalization-paper-22-04-2022.pdf.

States are among its key actors. Rather than recognising to NGOs the role of pivotal partners, Member States have retained their hostile approach and continued criminalising those who save lives at sea[7].

With the so-called "security decrees" of 2018-2019, Italy started its "closed ports policy", supported with an aggressive media campaign aimed at criminalising NGOs. Such policy is not only in conflict with international covenants and fundamental rights, but also against basic humanitarian principles.

Following the entry into force of the new code for sea rescues in 2023, NGOs and independent voices in the public debated highlighted the patent violations of international covenants and reported how the new rules entail the risk of hampering humanitarian organisations from operating at sea to save migrants from the grave perils they face.

This warning was – again - upheld by the Council of Europe, with specific reference to the obstacles posed to sea rescue operations and their implications on the protection of the rights of particularly vulnerable subjects. The CoE explicitly invited the Italian government to consider withdrawing the decree-law in question, or to adopt all necessary amendments to ensure its full compliance with Italy's obligations on human rights and international law[8]. Such red flag is even more relevant as it may pave the way to potential consequences on the right of civil society to operate to protect fundamental rights and on the right to freedom of association guaranteed by art. 11 ECHR[9].

7. The role of the judiciary

Entrusted with the task of ensuring the protection of the fundamental rights of migrants, and applying primary norms and mandatory principles of charters, conventions, EU law and constitutions, judges are called to operate in the difficult context outlined above. In the past months, with political attacks and media campaigns against international protection judges, we could test in our Country the deep mistrust in the safeguard role of jurisdiction and in the function that national judges perform as *European* judges. All across Europe, we can see the risks for the stability of the supranational protection system based on the ECHR and the Strasbourg Court (with yet again the most open challenge to the system coming from the stance adopted by the British government on its new migration policies).

This is the competition field where a new era of the difficult, long-standing season of populist attacks against jurisdiction and judges has begun, targeting decisions that are not considered in line with the government's and the *voters'* choices. On this field, the new aggression campaign aims at pointing at judges as the ones accountable before the public opinion for the failure of the government's migration strategies. Again, on this field, the right to freedom of speech of the judiciary and judicial associations is

[7] CoE Commissioner for Human Rights follow-up report of 2021, *A distress call for human rights – The widening gap in migrant protection in the Mediterranean* (https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protectio/1680a1abcd).

[8] Letter of CoE Commissioner for Human Rights to the Italian Minister of Internal Affairs Piantedosi, 26.01.23 (www.coe.int/en/web/commissioner/-/the-italian-government-should-consider-withdrawing-decree-law-which-could-hamper-ngo-search-and-rescue-operations-at-sea).

[9] Opinion of the Expert Council of the CoE Conference of INGOs, 30.01.23 (https://rm.coe.int/expert-council-conf-exp-2023-opinion-italy-30-jan-2023-en/1680a9fe26).

questioned: it is no coincidence that in France as in Italy, the legitimacy of judicial decisions and the right of judges to participate in the public debate are questioned upon the accusation of partiality with regards to the positions on migrants.

8. The new European Pact on Migration and Asylum

The regulatory framework underwent radical innovation following the recent approval of the new EU Pact on Migration and Asylum. The Pact – it was noted – is particularly complex, but almost exclusively focused on the European Asylum System. Its aim is not so much to improve the system and ensure that everyone is granted the status appropriate to their situation, as provided for in Article 78 TFEU, but rather to make return measures more effective for those who enter irregularly or are denied the right to international protection[10].

In the past months, which saw a speed-up in the Pact's formal approval finalised right before the European elections, voices rose from the academia, from jurists, civil society and institutions, red-flagging some of the key retrogressive measures adopted with regards to fundamental rights:

- the legal fiction of "non-entry", considering individuals "not authorised to enter the national territory" of an EU Member State regardless of their physical presence, and the attempt to deny the physical presence of migrants and asylum seekers in the territory of the EU Member States. This entails the risk of contrasts between EU and international human rights and refugee law, as Member States cannot set aside their obligations towards those who are under their jurisdiction, such as fair trial, non-refoulement, the protection of the best interest of the child, and the protection against arbitrary deprivation of liberty;
- the pre-entry screening procedure and automatic detention of all migrants and asylum seekers, including minors in some instances, that shall not enter the territory of Member States and shall be detained in specific places located at the external border or closed to it, or in transit zones;
- the lack of adequate remedies against court orders in immigration-related matters, such as the automatic suspensive effect of appeals, which entails that applicants can be expelled before the final decision on their appeal;
- return procedures without adequate procedural guarantees[11].

The EU Pact also incorporates the new "instrumentalisation of migrants" paradigm, i.e., their instrumental use by *hostile* third Countries or non-State actors with the aim of destabilising the EU, a new, vaguely grounded concept which should allow Member States to waive standard asylum procedures.

It was noticed that exactly when Belarus invoked the risk of the so-called migrants "instrumentalisation" practices, Poland, Latvia, and Lithuania adopted wide-ranging,

[10] C. Favilli, *'Editoriale'*, *Diritto, immigrazione e cittadinanza*, No. 1 (2024) (www.dirittoimmigrazionecittadinanza.it/186-fascicolo-n-1-2024/editoriale/362-editoriale).

[11] We hereby refer to the letter addressed on 15 December 2023 to the European institutions by independent experts-special rapporteurs on human rights, appointed and commissioned by the UN Human Rights Council.

long-term domestic legislation to (forcedly) return migrants to a third Country without safe repatriation procedures and without any individual evaluation of their asylum applications[12].

The new EU Pact raises many questions and problems vis-à-vis the protection system set in the ECHR, in other relevant international instruments as well as in national constitutions. Jurists and judges will have to deal with these questions through legal instruments.

This is happening while challenges lay ahead for European politics about instituting a reception system capable of absorbing the emergencies created by tragic war scenarios, implementing global plans of cooperation with African Countries, strengthening the connection between integration and the right to work for all, and fostering mechanisms that favour employment-related and employment-search-related entry.

If we are not able to respond to migrants' demands for equality and fundamental rights, a future of global regression, inequality, and fear will lie ahead for Europe and for us all.

As Emiliana Baldoni and Gianpiero Dalla Zuanna wrote, «*migration is not a disaster, it is an arrow in the bow of humankind. And in today's out-of-balance world, it can be the solution rather than the problem*»[13].

[12] A. Ancite-Jepifánova, *'Migrant Instrumentalisation: Facts and Fictions'*, *Verfassungsblog*, September 21, 2023 (https://verfassungsblog.de/migrant-instrumentalisation-facts-and-fictions/).

[13] *'Le migrazioni moderne, fra pregiudizi e demografia'*, in U. Curi (ed. by), *'Vergogna ed esclusione. L'Europa di fronte alla sfida dell'emigrazione'*, Castelvecchi, Rome, 2017.