



RIGHTS AND FREEDOMS OF REFUGEES IN THE EUROPEAN UNION

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VALUES AND PRINCIPLES ARE THE BASIS OF RESPECT FOR THE RIGHTS AND FREEDOMS OF REFUGEES IN THE EUROPEAN UNION IN 2018

“Wherever the names of Moses and St. Paul, wherever the names of Aristotle, Plato and Euclid were significant and concurrent authority, there Europe is” (Paul Valery).*

** Today, I would add to the words of the great French poet Paul Valery, **“that where the values and principles of coexistence, and human rights are respected and guaranteed to all human beings, without distinction of race, colour, gender, nationality or religion, Europe is also there.”***

INDEX

- I. Abstract.
- II. Introduction.
- III. Refugee crisis in Europe (2015-2018): questions to be answered by the EU, its member states and its citizens.
- IV. Values, principles, fundamental rights and public freedoms in the EU.
 - a. Respect and guarantee of EU values and principles.
 - b. Necessary consistency between values, general principles and material rules in the EU.
 - c. The inconsistency of the EU and its states in the management and treatment of refugees and asylum seekers.
- V. European society's feelings on the crisis of asylum seekers and refugees.
- VI. Conclusions.
- VII. Authorship declaration.

I. ABSTRACT

The EU is based, in 2018, on the rule of law and on a legal system: Original Treaties and Derivative Law. In the management of migration and refugee flows arriving in the EU over the last 3 years (2015-2018), have the principles, fundamental rights and values that are the pillars of the EU been respected? The community mismanagement of problems and situations of the EU and its member states reflects a change in the EU's objectives. Are we going back to the "Europe of the traders" or to 1957's initial Common Market?

Key Words: Refugees, EU Principles, Values, Right to Asylum, Human rights.

II. INTRODUCTION

The EU is an International Organization subject to Public International Law, which is structured on the basis of its own legal system, different from that of its Member States.

One of the distinguishing features of the EU is that it has its own continuously changing dynamics. The EU is in constant metamorphosis. The EU is regulated and progresses through "**Derivative Law**", the sources of which are the EU institutions, even when the guidelines or paths to follow are the principles, values and objectives contained in "**Primary Law**". The body of Primary Law is formed both by the Constitutive Treaties and their successive amendments, and the Accession Treaties of the Member States. Let us remember that the number of Member States has increased over the last 60 years from 6 to 28.

This characteristic is envied and is a model to be followed by any type of International Organization, be it Universal, General, Regional or Sectorial. All this, in spite of its serious dysfunctions, tensions and contradictions observed throughout its history. But with a long period of peace to which Europe was not accustomed.

The EU is an unfinished work in permanent construction and its crises are the driving force behind its progress and adaptation to the vicissitudes of European history, from the second half of the 20th century to the present day. We know its beginnings, objectives and the reason why the three European Economic Communities were created: ECSC, EEC and EURATOM after the Second World War. But no one can anticipate, in the short or medium term, what its future or its composition will be, nor even if, at the end of the 2018-2019 biennium, its current objectives will be maintained; or even the number of current Member States after the Brexit.

For the purposes of this paper, it should be stressed that the EU is today above all a democratic area of freedom, justice and security based - as we have already indicated - on a consolidated legal system, and that it is undoubtedly a model of success when compared with other organizations in the context of the turbulent international community. The globalized world society is characterized by being unstructured, volatile, changing and with numerous actors on the stage that change from being simple extras to playing a starring role overnight. It is clear that in the heterogeneous composition of the international community, values, democratic principles, respect for human rights and public freedoms are not its most characteristic or outstanding features.

III. REFUGEE CRISIS IN EUROPE (2015-2018): QUESTIONS TO BE ANSWERED BY THE EU, ITS MEMBER STATES AND ITS CITIZENS

Today, more than ever, EU law and the policies of its institutions, as well as those of its Member States, must take into account the values, democratic principles and defence of the fundamental human rights of every human being: Rights of **EU citizens** (legal and political status of nationals of the 28 Member States) and also of **citizens in the EU** (geographical location of an individual), i.e. of those who are in EU territory at any given time but do not have the nationality of any of the Member States.

In this paper we will attempt to raise and answer the following questions:

The first question: In the management of migration flows and the treatment of refugees arriving in the EU over the last 3 years (2015-2018), have the principles, fundamental rights and values that are the pillars of the EU legal system been respected?

The second question: After a brief analysis of the dramatic facts and policies applied to date in the EU in the crisis of the thousands of asylum seekers and refugees, has the EU's management and that of its member states led to a radical change in the paradigms of the objectives and aims that characterized the EU as a supranational international organization since its beginnings?

The third question: We are almost ashamed to ask the question, since the answer is completely negative: Has the EU, in its current treatment of refugees from Syria, failed to uphold the human rights that are mandatory under the EU Treaty (TEU) and the Treaty on the Functioning of the EU (TFEU)?

And the fourth question – findings: After analysing the policy pursued by the EU, are we returning to the initial objectives of the 1957 Treaty of Rome (EEC, ECSC, EURATOM), derogatorily described by many as “**the Europe of the traders**”?

IV. VALUES, PRINCIPLES, FUNDAMENTAL RIGHTS AND PUBLIC FREEDOMS IN THE EUROPEAN UNION

A) RESPECT AND GUARANTEE OF EU VALUES AND PRINCIPLES.

The respect and guarantee of the fundamental rights of every person, of their individual and collective freedoms are the basis and binding objective pursued by all EU law. Its implementation is mandatory not only for the institutions but for all Member States. In fashionable terms we would say that they are part of its 'DNA' as an International Organization. They are the foundations on which the EU is built. Respect for them will condition any treaty, agreement, regulatory act and any internal or international policy based on EU law.

It was in the last update of the Primary Law in 2009 (Treaty of Lisbon) where the rights, values and freedoms which were already contained in the initial articles of the EU Treaty (particularly Article 6 TEU) have been reinforced, typified and guaranteed through the inclusion of the EU Charter of Fundamental Rights (CFREU) into "*Primary Law*".

Article 6 (TEU)

1. The EU recognizes the rights, freedoms and principles set out in the *Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which has the same legal value as the Treaties.*

The provisions of the Charter shall in no way extend the competences of the Union as defined in the Treaties.

The rights, freedoms and principles set forth in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter by which its interpretation and application is regulated and with due regard to the explanations referred to in the Charter, which indicate the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. The fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and those resulting from the constitutional traditions common to the Member States shall form part of Union law as general principles.

There is no doubt that the fundamental rights and public freedoms declared and guaranteed by the Charter (CFREU) as part of Primary Law are the filter through which the positive rules that make up the entire EU legal system as well as all its activities, inside and outside the EU, must be interpreted. Respect for the dignity of the person is fundamental and is clearly expressed in Article 1 of the Charter of Fundamental Rights.¹

The EU Treaty also takes as general principles the fundamental rights guaranteed by the European Convention on Human Rights, and adds to all of them the constitutional traditions of the Member States.

We are obliged to do this not only by the literal interpretation of the “*common provisions and democratic principles*” contained in Title I and Title II of the TEU, but also by Articles 51 and 52 of the Charter of Fundamental Rights of the EU (CFREU), which imperatively establishes the “*Scope and interpretation of rights and principles*”².

For a proper analysis of the articles that make up Titles I and II of the EU Treaty (TEU), we should clarify the similarity, difference or misuse of concepts such as the general principles and values that, interspersed in the text of the Treaties, may seem synonymous but in reality are not. From a regulatory and positive law perspective, they have a different scope but can be considered to varying degrees General Principles of Law, a specific source of Community law, shaping the range of values underpinning the EU.

¹ Article 1 of the Charter of Fundamental Rights: Human dignity is inviolable. It shall be respected and protected.

²Article 51

Scope

1. *The provisions of this Charter are addressed to the institutions and bodies of the Union, with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union Law. They shall therefore respect the rights, observe the principles and promote their implementation, in accordance with their respective competences.*

2. *This Charter does not create any new powers or tasks for the Community or the Union and does not alter the powers and tasks defined by the Treaties.*

Article 52

Scope of guaranteed rights

1. *Any limitation on the exercise of the rights and freedoms recognized by this Charter shall be established by law and shall respect the essential content of those rights and freedoms. Limitations may be introduced, in compliance with the principle of proportionality, only if they are necessary and effectively meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.*

2. *Rights recognized by this Charter that are based on the Community Treaties or on the European Union Treaty shall be exercised under the conditions and within the limits defined by those Treaties.*

3. *To the extent that this Charter contains rights that correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be the same as those conferred on them by that Convention. This provision does not prevent Union Law from granting more extensive protection.*

B) NECESSARY CONSISTENCY BETWEEN VALUES, GENERAL PRINCIPLES AND MATERIAL RULES IN THE EU.

Starting from an a priori criterion based on the postulate that should govern the analysis of any legal system (national, international or community) and of any democratic political system, we defend the **necessary consistency between principles and values and rules**; a consistency that also extends to the policies to be developed. This consistency must be the result of the organized set of principles and values that inform the positive legal standards of daily application, and that arise from the material and formal sources of a legal system, at a specific moment in history.

Legal rules give the institutions the mandate in political decisions taken on behalf of the EU. Rules, values and principles are what define the red lines that neither the EU nor its Member States may cross when developing the respective competences they have to carry out and implement EU policies. They will be of particular relevance when action is being taken, either directly or indirectly through its Member States, in the fields or matters relating to immigration, asylum and refugee status.

I like to emphasise, as the backbone of the values and General Principles of Law, those which I personally call "***principles or values of coexistence***". These coexistence values are the principles that inform any legal-political system at any given time in history and in any particular geographical location. They are therefore not immutable but change. Among them we can highlight values, life, family, property, freedom, democracy, dignity, etc. All of them are integrated and subdivided in positive rules and in the General Principles of Law provided for in a regulatory system either as a primary or subsidiary source of positive law³. I am referring to what are already rules of national, community and international law. These are the so-called General Principles of Law, General Principles of Community Law and the Fundamental Rights and Freedoms that make up the International Law of human rights.

The General Principles of Community Law, except that of "non-contractual liability" (art. 340 TFEU), have been developed by the Case-Law of the CJEU, with particular emphasis on those of i) *the primacy of Community Law* and ii) *the principle of effectiveness*. Both were assumed as a result of the progressive development of Community law and are specific to this system or to the particular international law that the EU implies.

³ In Public International Law, the General Principles of Law are a source of the same hierarchical rank as the Treaties and the International Custom (vid Statute of the ICJ).

If there is no clear consistency between values, principles of coexistence and general principles of law and all of them in turn with the rules of positive law to be applied by EU actors and Member States, it would lead – as is unfortunately the case - to terrible dysfunctions in asylum and refugee policies. It also confronts us with situations which are contrary to the Community spirit and the model to be followed which had been agreed upon and reached by the citizens of the EU and had been accepted by all the subjects of International Public Law, i.e. the 28 States and the EU itself.

Principles generate rules of positive Law but rules never generate principles or values.

C) THE INCONSISTENCY OF THE EU AND ITS STATES IN THE MANAGEMENT AND TREATMENT OF REFUGEES AND ASYLUM SEEKERS.

Today it can be stated, with no mitigating factor, to those who arrive in Europe, that regarding asylum and refuge, the dysfunction and contradiction with the principles and rules are both evident and appalling. We just need to consider the policies carried out both in the past and the present by the EU and by **ALL its Member States since 2015**. The contradiction is evident simply by reading Article 18 of the CFREU, which guarantees the right to asylum and then taking a look at daily reality.

"The right to asylum is guaranteed in compliance with the rules of the Geneva Convention of 28 July 1951 and the New York Protocol of 31 January 1967 relating to the Status of Refugees and in accordance with the Treaty establishing the European Community".

An indisputable example of the dysfunction and inconsistency is the failure of Member States to comply with the relocation and settlement agreements to which ALL states had committed themselves by 2015. All the more serious and shameful is the way in which, in a context outside the EU's territorial limits, the principles, values and standards of asylum and the human rights of refugees have been violated by the Agreement of 18 April 2016 between the Member States meeting, allegedly⁴ as the European Council, with Turkey.

Respect for structural principles and values is absolutely obligatory, and no excuses or delays can be made, even in cases of "Law and Order" force majeure. Humane treatment and respect for the right to asylum are the **lowest common denominator of the Community legal system**. In particular, the right to asylum and respect for refugee status are part of the general principles of EU law, which are binding on all Member States, which are also signatories to the 1951 Geneva Convention on Refugees and the 1967 New York Protocol⁵.

⁴ We use the term "allegedly" since the CJEU has denied that it was an agreement or treaty within the Council and Turkey in the March 2017 Order, alleged lack of competence.

⁵ Turkey has not so far ratified the entire territorial or chronological extension of the NY Protocol, even though it is a party to the 1951 Geneva Protocol and a party to the 1951 NY Protocol. It filed a Reservation when ratifying it.

V. EUROPEAN SOCIETY'S FEELINGS ON THE CRISIS OF ASYLUM SEEKERS AND REFUGEES

In confronting the crisis of refugees from Asia and North Africa, the policies of the EU and its Member States are erratic, undefined and are encouraged and accompanied by feelings that have been deeply felt by the population. These feelings or lack of criticism are clearly seen in the racist and xenophobic positions of host societies. In the same way, the political parties that defend anti-migration or anti-refugee policies have won many votes in the recent elections in most of the Member States, and some parties, such as in Germany, have re-entered Parliament.

A) **"Compasión Fatigue"**: Since the massive arrival by sea of hundreds of thousands of refugees in the Greek islands, Lampedusa in Italy and in Spain, I have noticed that there has been a kind of **"Compasión Fatigue"** in European societies. This **"Compasión Fatigue"** can be seen just by reading the electoral programmes of the political parties and by following the media and especially the television channels. The **"Compasión Fatigue"** is accompanied by a very dangerous trend towards xenophobia and racism especially when refugees, apart from being of another race, practice another religion.

B) **Numerus clausus of inhabitants in Europe**: European societies and many of their political leaders believe that there is no room for more refugees in Europe and that all measures to prevent their entry are therefore good and should be adopted. Those who defend this position forget the fact that many of those who enter Europe are not refugees or asylum seekers but mere economic immigrants. Public authorities confuse asylum policies with policies to control economic immigration. At the same time they apply "law and order" measures in immigration control through the application of the right to asylum. It is important to point out and remind our politicians and governments that the right to asylum is based on **"International humanitarian law"** and that it is different from the control of migratory flows.

C) **Citizens' fear of losing the European Welfare Fund**: EU citizens, as well as citizens with residence permits in the EU and their reunited families, are afraid of losing the **"Welfare state"** they currently enjoy.

The massive influx of people from the wars in Syria, Iraq, Afghanistan, Eritrea, and the sub-Saharan countries is a cause of concern to European citizens who enjoy public health care, social assistance, pensions, etc., which the newcomers did not have and perhaps never will have. Xenophobia and racism are largely based on the fact that aid and subsidies will have to be distributed among a larger number of people. EU citizens and those who legally reside in the EU are not prepared to give up their privileged position.

D) **International terrorism:** An important factor to highlight at present is the worry about political immigration, asylum and the reception of refugees for fear of the infiltration of terrorists among asylum seekers. This fear has been heightened by the attacks in the main European cities of Paris, London, Brussels, Berlin and Barcelona.

E) **Failure of Relocation and Resettlement policies:** The most noteworthy feature since this issue was addressed on the agenda of the EU Council of Ministers on 23 April 2015 is a repetitive story of failure upon failure. The decision was shamefully postponed to the July summit and then to the September summit. In the latter, the quotas to be met by each Member State were allocated and quantified. Minimal and unrealistic quotas, as the number of new refugees arriving in Greece in the summer of 2015 doubled or tripled during that period.

This is not the place to list the dramatic statistics that have thwarted those policies. By early 2018, not even 15 per cent of the quotas allocated, which amounted to 160,000 in 2015, had been met. What more can be said? The situation is outrageous, it surpasses fiction and has no place within the principles, values and standards mentioned above. The conclusion we come to and the proof of the inconsistency should shame us all.

Let us remember that in September 2015 Greece and Italy were financed to accept the refugees who had previously arrived in their respective countries and retain them within their borders.

F) **EU-Turkey Agreement / Declaration of 18 March 2016:** We consider that this Agreement - Declaration is contrary to EU law and also to that of its Member States, and that it refers to agreements on readmission, expulsion and deportation from Greece and from EU territory to Turkey. It is a flagrant violation of international human rights law, the Geneva Convention on refugees, the EU Charter of Fundamental Rights and the EU Treaty itself.

It concerns the right to asylum and two basic principles of '**non-refoulement**' occurring in the mass expulsions (wrongly and unacceptably referred to as '**deportations**') of asylum seekers, now illegally referred to as 'illegal immigrants' from Greece to Turkey. Turkey has not ratified, in its entirety, the 1967 New York Protocol and therefore cannot be considered as a "safe country" for certain persons because of their nationality or ethnic origin, for the purposes of the Geneva Convention on Refugees.

The declaration of 18 March, has served to bring into force an international agreement between the EU and Turkey, contained in the Council Decision of 14 April 2014 (DUE 7.5.2014 L 134/1) one year in advance but which does not concern refugees but is an agreement between the EU and Turkey '**on the readmission of illegal residents**'. This change in terminology conceals a very clear violation of the treaties that bind the EU.

Unfortunately, the Order of 28 February 2017⁶ (declaring that *'the Court has no jurisdiction to rule on it'*) did not get down to the nitty-gritty of the complaints about this Declaration and the last Judgement of the CJEU of 7 February 2018⁷ states that the EU is not obliged to publish the documents that served as the basis for approving this declaration. It is stated that they are secret and may endanger the security of the EU or its Member States.

We are very concerned about the case law criteria of the CJEU because they call into question, for reasons of form or public interest or security, the application of the values and principles that the EU has adopted and established in the positive law on asylum and refuge.

⁶ ORDER of CJEU 28.02.2017 T 852/16, EU – Turkey Declaration of 18 March 2016.

⁷ Judgment of the General Court (First Chamber). Case No. T-192.2016. 7 February 2018.

VI. CONCLUSIONS

Pessimistic view of the EU refugee policy

First: The EU is structured around a legal system which is binding on all EU Member States, institutions and citizens.

Second: The general principles of law are the main or auxiliary source of the entire Community legal system. These General Principles common to the Member States are also binding alongside the specific conventional, or jurisprudential, principles of the EU itself.

Third: The acts and policies of the EU and all its Member States must be consistent with the values, principles and objectives set out in the founding treaties, the EU Charter of Fundamental Rights and international human rights law.

Fourth: The refugee crisis in the EU (2015-2018) has shown that there is neither a common immigration policy nor a uniform policy for the treatment of refugees and asylum seekers. It is clear that 29 different policies currently coexist in Europe: those of the 28 Member States and that of the EU institutions themselves.

Fifth: The 2015-2016-2017 Council of Ministers' agreements on relocation and resettlement have been breached by all Member States, and the EU has not so far been held responsible for such negligent and passive behaviour. The agreement with Turkey of 18 March 2016 is, in our view, illegal and contrary to the TEU, the Charter of Fundamental Rights, the right to asylum and the general principles of humanitarian law.

Sixth: The EU must seriously reconsider the fact that the failure to comply with the Principles, Values and Objectives currently in force following the Treaty of Lisbon in the treatment of asylum seekers and refugees is such a step backwards that it is perhaps true that the EU has returned to its origins in the E.E.C. and that in 2018 there is an involution towards: **the Europe of Traders.**

VII. AUTHORSHIP DECLARATION

Eduard Sagarra Trias is the author of this Report. Asociación Salud y Familia and the Asociación para las Naciones Unidas are responsables for its orientation and contents.

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