

# The NGOs Facing Cain's Dictate: The Debate on the Fight against Death in the Mediterranean

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The current state of the Mediterranean, which has been called the most dangerous border in the world, is a very serious fissure in democratic legitimacy. Faced with the large numbers of people who reach the northern shore every day by crossing the waters from the southern shore and endangering their lives, European governments avoid the legal duty to provide them with assistance and only some social movements and NGOs are involved in refugee rescue tasks. Paradoxically, in some cases, these NGOs have seen their work hindered and have been accused of crimes. Faced with this breach of legal duty, which is also an international political obligation, it is necessary to define a clear and coherent model of action throughout the Mediterranean area to ensure respect for human rights.

## An Issue of Democratic Legitimacy

What has happened in the Mediterranean for years and, in particular, the lack of an effective reaction to the repeated scenario of loss of human lives, is, in my view, the greatest challenge for civil society, not only as an agent involved in the public space but also in its most radically political condition; in other words, in that of the whole of society as subject of the *demos*: as sovereign. Put another way, we are faced with one of the most serious fissures in democratic political legitimacy.

If I dare venture this opinion it is because this Mediterranean, this sea whose transformation is so often discussed and was the origin of our cultures and even of the incipient concept of Europe (in a dialectical sense that with great difficulty we strive to make dialogical), has become an enormous cemetery, the result of the attempt to make it an impenetrable border. In fact, as the UNHCR has acknowledged, it is the most dangerous border on the planet.<sup>1</sup>

This reality has led to the awareness of the limit of “necropolitics”<sup>2</sup> in order to continue

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1. See <https://eacnur.org/es/actualidad/noticias/emergencias/el-mediterraneo-mas-mortal-que-nunca>. From 1988 to 2017, over 28,000 people might have lost their lives according to the database of Migrants Files (<https://www.detective.io/detective/the-migrants-files/>), a consortium of European journalists providing data on the migration issue in the EU. According to the International Organization for Migration (IOM), we are speaking of 75% of all the deaths recorded at the world borders. Among the databases available on this, I recommend the website Human Cost of Border Control, which conducts a specific study on the Mediterranean: Deaths at the Borders of Southern Europe (<http://www.borderdeaths.org/>)

2. In different articles I have aimed to argue how this category (defined by the philosopher Achille Mbembé based on Foucault's biopolitics) can be applied. Cf. “Negar la política, negar sus sujetos y derechos (Las políticas migratorias y de asilo como emblemas de la necropolítica)”, *Cuadernos Electrónicos de Filosofía del Derecho*, 36, 2017.

to be able to speak of democratic legitimacy, of the politics of a decent society, in the words of Péguy or Margalit. I do not intend with this to add to criticism of migration and asylum policy models that seem to be gaining ground, notwithstanding our policy-makers who seem to have given up on the undoubtedly ambitious and difficult objective of a global, coordinated and legitimate response to the challenge posed by the new characteristics of the manifestations of human mobility in this century. This failure to offer assistance has been guilty<sup>3</sup> and, faced with it, some civil society agents and NGOs have taken on the elementary duty of assistance. I will discuss this later. But what I want to highlight, as we are talking about “civil society challenges in the Mediterranean”, is that here we are coming up against several major contradictions in terms of legitimacy that affect each one of the member states and the European project itself, insofar as they seem to go beyond the rate of exclusion that a society that wants to continue to call itself democratic can allow.

In the first place, internal contradictions of civil society: contradictions between what the civil society votes for (which mainly supports political programmes that include migration

and asylum policies that do not respect basic rights) and what a part of this civil society, through the NGOs<sup>4</sup> and citizen movements that have even been officially adopted by different European city councils,<sup>5</sup> demands from their European governments. That is, other policies that prioritise saving lives while being committed to fighting for the rights of migrants and refugees. Contradictions, in the second place, also external, because they are clear contradictions between the condemnations and demands of these civil society representatives and their states; or perhaps it would be better to say and their governments and representative institutions, including two key EU institutions, the Commission and the Council.

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While public opinion only seems to react to mass shipwrecks, like those that took place near Lampedusa or in the Sicily Channel in 2013, or the most serious in terms of victims, when 700 people drowned off the Libyan

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3. One only need mention the debate or rather the resistance over the very tentative attempt to provide recommendations (not binding legal instruments) such as the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees, promoted by the UN since 2016, agreed in Marrakech in December 2018 and endorsed by the UN General Assembly on 18 and 19 December that same year. These poorly named “compacts” – not in a technical sense – bring together useful initiatives and proposals but with little innovation beyond some recommendations on the need to avoid bad practices such as the primary resort to detention centres, while are nevertheless the cornerstone of European migration policy (the “Centros de Internamiento de Extranjeros”, in Spanish terminology).

4. These NGOs include Save the Children, MSF, Salvamento Marítimo Humanitario, ProEmaid, SOS Méditerranée, Proactiva Open Arms, Sea Watch “MOAS” and Jugend Rettet.

5. The critical stance of Giusi Nicolini, the Mayoress of Lampedusa in October 2013, continues to be symbolic, when EU representatives attended the funerals of the 300 people who died at sea following two shipwrecks. “Come here and count the deaths with me... How big should the cemetery of my island be?” In May 2016, Irina Bokova, Director General of UNESCO; Mariana V. Vardinoyannis, UNESCO Good Will Ambassador; and Benedetto Zacchiroli, President of the European Coalition of Cities against Racism (ECCAR), which brings together cities such as Graz, Malmö, Upsala, Erlangen, Karlsruhe, Metz, Rotterdam, Barcelona, Ghent, Bologna and Esch-sur-Alzette, launched the initiative “Welcoming Cities for Refugees: Promoting Inclusion and Protecting Rights”. Barcelona, Valencia, Madrid, Zaragoza, Bologna, Catania, Naples, Palermo, Latina and joined this initiative. Their mayors have been received on several occasions by Pope Francis (the most recent, in February 2019). It is worth recalling that Mimmo Lucano, Mayor of the Italian city of Riace, pioneer in programmes to host and integrate migrants and refugees and dismissed by Minister Salvini, has been proposed for the Nobel Peace Prize.

coasts in 2015, or those with major media coverage – such as Aylan Kurdi’s photo on 2 September 2016 –, the truth is that some social movements and NGOs have involved themselves in rescuing shipwrecked people in the Mediterranean (first on the Aegean Sea, on islands such as Lesbos, a few nautical miles from the most Western coast of the Anatolia peninsula and, later, above all, in the Sicily Channel, between the coasts of Libya and the islands of Malta, Lampedusa and Sicily). What is paradoxical is that, again, these altruistic and socially-spirited tasks of assisting those in danger of death are often regarded as criminal acts, according to the well-known stigmatising mechanism created by the oxymoron of “crimes of solidarity”, making criminals (accomplices or even responsible for trafficking crimes or exploitation of human beings) out of those that respond to the call of duty to render assistance.

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In terms of how we should respond to avoid deaths at sea, what should be emphasised, I repeat, is that the aim is not to perform an altruistic act, with a moral obligation. We speak of demandable legal rights whose infringement is punishable. These duties are not, by the way, the main purpose of the operations deployed by the EU, with the support of NATO, in the Aegean and Central Mediterranean. We should not forget that the EuNavFor MED operation (later renamed Operation Sophia) deployed in that area is, first and foremost, an operation of control and deterrence, a barrier against the mafias, but rescue has never been its main purpose, although, of course, like any

other ship, these are obliged by international law of the sea to provide assistance to any ship they sight in danger or as many shipwreck survivors as they find. But not to welcome them in Europe but to return them to a “safe port”. To date, the European authorities, against all evidence, continue to insist that the ports of Libya (that failed state that today is again in a de facto situation of civil war) are safe, when we know that those travelling in those ships of death fear, above all, being captured by Libyan coastguards and returned to the inferno they are fleeing.

### **What Actions Are We Talking About? The Aquarius Is Not a Rule but an Exception**

Many NGOs have seen their tasks hindered or have been accused of offences and their ships confiscated. I will briefly recall the most emblematic and extreme case: Italy. On 10 June 2018, Matteo Salvini confirmed the closure of the ports of Italy to the arrival of the 629 people rescued by Médecins Sans Frontières and that were at sea on board the ship Aquarius of the NGO SOS Méditerranée and Médecins Sans Frontières. At that time, the boat was 43 miles from Malta, which had stated that it was not competent to authorise the disembarkation arguing that the shipwreck had happened in the Libyan rescue area and was coordinated by Rome, and therefore it was not competent to take in that ship. On Monday 11 June, several Italian and Spanish mayors offered their cities and ports, given Salvini’s refusal to accept the people rescued. In Spain the regional presidents of Valencia, the Basque Country, Extremadura and the Balearic Islands, among others, offered to take some of the people rescued. Finally, the recently appointed President of the Government of Spain Pedro Sánchez offered the city of Valencia to the UN as a safe port for the

disembarkation.<sup>6</sup> According to the Ministry of the Interior, 608 people applied for asylum and, of these, 365 were moved to state facilities, while another 52 remained in the charge of the Valencian government, which took care of the 73 unaccompanied minors. In early February 2019, the government reported that 73 of the 630 people rescued who reached the port of Valencia had left the asylum system and that over 500 people accepted by Spain were divided among the 30 provinces among the organisations specialised in asylum issues, with Valencia taking the highest number of people, 158. Today, the international protection and asylum requests are still unresolved.

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But what we have seen since the episode of the Aquarius is an agonising haggling over the ships that have rescued victims and have spent many days on the high seas, while the closest European countries pass responsibility for disembarking them between each other, with the additional problem that the Italian government, led by Salvini, keeps its ports closed. Since the Aquarius, the Spanish government has not had the support of its initial partners in Europe, France and Germany, and also has not been able to get stable and mutually supportive

criteria established between European member states on the disembarkation and distribution of the people rescued.

### **Facing Cain's Legacy: The Obligation to Protect and Preserve the Right to Life**

In his first public speech, given (in a significant gesture) in Lampedusa, in July 2013, Pope Francis asked: "Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: 'It isn't me; I don't have anything to do with it; it must be someone else, but certainly not me.' ... Today no one in our world feels responsible; we have lost a sense of responsibility for our brothers and sisters. We have fallen... the hypocrisy." It is the Cain complex, illustrated in another way in the parable of the Good Samaritan, with which Jesus responds to the question "And who is my neighbour?" from an expert in law (Luke 10, 29-37).

This moral obligation to help the helpless, the consequence of the unity of the human species (in the religious version, of the condition that brings together human beings as "children of God"), is the foundation of a universally time-honoured legal precept: the obligation to offer succour, complemented by the crime of failing to provide assistance. These are *erga omnes* obligations set out in the Montego Bay Convention, in Article 98: "Every State shall require the master of a ship flying its flag, in so far as he can do so [...] to render assistance to any person found at sea in danger of be-

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6. After a four day journey, around 700 nautical miles, in bad weather, which forced it to seek shelter in Sardinia, on 17 June 630 people from 31 countries reached the port of Valencia on board the Aquarius and two other ships made available by Italy (the Danilo and the Orione). Most were Africans from Sudan, Algeria, Eritrea and Nigeria, although a minority came from Afghanistan, Pakistan or Bangladesh. At first, people spoke of over 100 unaccompanied minors although, after the disembarkation, the figure dropped to 72, and most of them were transferred to the city of Alicante. A group of 2,300 people provided assistance to them, comprising specialists and volunteers from different fields, coordinated by the Government of the Valencia Region and with the presence of specialists of the Red Cross and the Comisión Española de Ayuda al Refugiado, among others. The French government offered international protection to 80 people out of 286 who, at first, had requested to go to France.

ing lost.” We refer to a basic legal instrument of international law of the sea, of which all European states form part.<sup>7</sup> We should add to this that, in terms of those people rescued who could invoke the condition of refugees, the principle of *non refoulement* imposed by article 33 of the UN-Convention relating to the Status of Refugees is absolutely obligatory: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”

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The thesis is very simple: we are dealing with the non-compliance – albeit by omission (and I will recall that there is a criminal definition: the offence of failure to render assistance) – with a legal obligation and, also, an international political obligation. The paradox is that these NGOs and citizen movements have taken on the unavoidable compliance with both, given the subterfuges used by European governments to avoid them, if not, simply – Salvini *dixit* – to oppose them and commit gross violations of them, almost always with the argument that “we cannot be responsible for resolving all the suffering in the world.”

Another thing is, of course, what obligation the rescue ships have, that is, if it is enough to disembark them in the nearest port to consider them safe. All EU member states have the

obligation to guarantee the rights of everyone under their jurisdiction, even irregular immigrants, including health assistance *and legal mechanisms*. *But first, those rescued must “set foot on” European soil*. Ultimately, that is the reason that Malta and Italy vetoed the arrival of the Aquarius: to avoid accepting this responsibility.

In the case of the EU member states, the application of Regulation 656/2014 of the European Union is invoked. It recommends ensuring “the safety of the persons intercepted or rescued, the safety of the participating units or that of third parties.” But if we look at the obligations of the rescue ships in terms of disembarking people, although article 9 of the Regulation establishes that “Member States shall observe their obligation to render assistance to any vessel or person in distress,” article 10 indicates that “the modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation.” Spain was able to offer to take in refugees by invoking the clause that stipulates, as an exception, that “those modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone.”

## Some Consequences and Proposals

Cases such as the Aquarius have had the virtue of highlighting some of the contradictions of the supposed European model of migration

7. On this, see the monograph by professor Félix Vacas, *El Derecho migratorio, internacional y europeo, como límite desde los Derechos Humanos a la discrecionalidad de los Estados en materia migratoria*, Valencia, Tirant lo Blanch, 2018, with a foreword by myself. See also my article “El respeto al Derecho, barrera entre la civilización y la barbarie”, [https://www.infolibre.es/noticias/luces\\_rojas/2018/06/12/respeto\\_derecho\\_linea\\_roja\\_entre\\_civilizacion\\_barbarie\\_proposito\\_del\\_caso\\_aquarius\\_83843\\_1121.html](https://www.infolibre.es/noticias/luces_rojas/2018/06/12/respeto_derecho_linea_roja_entre_civilizacion_barbarie_proposito_del_caso_aquarius_83843_1121.html)

and asylum policies and, in addition, spotlighting the unfortunate consequences of what an undisputed expert like Sami Nair has called the “renationalisation” process that many European governments have embraced since 2015. This process makes the unviable essential: a minimum shared policy on the three pillars of all migration policies, the international, border control and the management of *those settled in national territory*. But what first prevails is the realisation that no state can cite the old notion of sovereignty and endeavour to resolve from this the whole of the migration phenomenon that, as professor Joan Romero likes to repeat, is a fact of geopolitical transcendence of the first order that demands international treatment. Only a real European policy, coordinated and supportive, can provide the right resources for the challenge of managing the manifestations of forced human mobility. In this context, compliance with the duty to save lives is not an option, a whim of do-gooders that try to confront the *malheur* of conscience.

*Let us leave behind the sanctimonious paternalism that understands refugees as poor wretches to be rewarded with crumbs of charity and endeavours to use immigrants as pieces in the prosperous*

A clear and coherent model must be defined, which avoids the fallacious alternative between, on the one hand, irresponsible moralist do-gooding and, on the other, raw pragmatism that, for the sake of internal and European political difficulties and the risks of populism and the supposed incomprehension of most of the population of a pedagogy of the complexity, overlooks the priority of compliance with legal obligations as a condition sine

qua non of legitimacy and even of efficacy. No, it is not true that, as they tell us in the abundant universe of simplistic political scientists armed with an elementary – meagre – reading of Weber, one must choose between the morality of responsibility, that of the politician, and the morality of conviction, that of the moralist, the NGOs or the academics enclosed in their ivory towers and far removed from the real harsh limitations. Neither is it true that there is a “third way”, that of compassionate pragmatism that, in the image of that fraud of compassionate capitalism preached by Reagan and rehashed by Sarkozy (with which Macron, his enlightened version today, so often seems to align), made us regress to the do-gooding paternalism portrayed by Dickens and stigmatised by Brel in his unforgettable *Les dames patronnesses*. No. None of the narcotising morality of the herd that Nietzsche rightly condemned. Let us leave behind the sanctimonious paternalism that understands refugees as poor wretches to be rewarded with crumbs of charity and endeavours to use immigrants as pieces in the prosperous “industry of human waste disposal industry”, in Bauman’s harsh but accurate formula. Let us abandon once and for all that contradiction that means living obsessed by compliance with the dogma of decimal points, while we casually violate, over and over, basic legal obligations enshrined in our own agreements and laws, such as the Convention on the Law of the Sea of Montego Bay, the SOLAS Convention, the Convention on the Rights of the Child, or the Spanish Child Protection Law. NGOs, even in the case of managing to implement a coordinated, supportive and obligatory system of disembarkation and distribution of those rescued at sea, still have a role to play.<sup>8</sup>

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8. Cf. the recent working paper published by ECRE (May 2019), *Refugee-Led Organisations (RLOs) in Europe: Policy Contributions, Opportunities and Challenges*. Available at: [www.ecre.org/ecre-working-paper-refugee-led-organisations-rlos-in-europe-policy-contributions-opportunities-and-challenges/](http://www.ecre.org/ecre-working-paper-refugee-led-organisations-rlos-in-europe-policy-contributions-opportunities-and-challenges/)

Complying with the primary legal duties, which oblige us to respect and guarantee human rights, is not an option. It is what allows us to feel part of a civilisation or to swell the ranks of the barbarism that we do not wish to see in the mirror. For this the political will is needed to create legal and safe channels of access, something that is still far from the decisions of Brussels, but also the European foreign ministries. We only need to examine the gulf between those policies and the fifteen proposals recently announced by the Comisión Española de Ayuda al Refugiado (Spanish Commission for Refugees, CEAR), before the European elections, such as those that envisage, for example,

putting an end to the border externalisation policies and the signing of agreements with third countries that do not respect human rights; advancing in the construction of a common European asylum system that does not mean a cut in rights; ensuring that the principle of not returning refugees to unsafe countries is not violated; promoting a European mechanism of safe disembarkation and a later relocation between member states; or avoiding further suffering of people taking refuge inside their borders, as happens now in the Greek islands. And, obviously, facilitating the work of the rescue organisations and teams that endeavour to save lives at sea.<sup>9</sup>

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9. Cf. <https://www.cear.es/wp-content/uploads/2019/03/Propuestas-Elecciones-Europeas.pdf>. With a wider perspective scope, [https://www.cear.es/elecciones\\_propuestas\\_para\\_la\\_mejora\\_de\\_la\\_proteccion\\_de\\_las\\_personas\\_refugiadas/](https://www.cear.es/elecciones_propuestas_para_la_mejora_de_la_proteccion_de_las_personas_refugiadas/)