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THE INFORMALIZATION OF MIGRATION POLICIES: THE PITFALLS OF SOFT LAW

ILLUSTRATION: EXTRACT FROM THE MIGREUROP VIDEO "*NO TO THE WAR ON MIGRANTS*" - PRODUCED BY BONJOUR AGENCY

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Little known to the public, soft law is a formidable weapon in the hands of States, which use this method when they want to get around the constraints and rigidity that national laws or international texts and treaties would impose on them.

It is often mobilized in the field of "migration control", without it always being easy to distinguish between the strict application of the law and its circumvention. The externalization of asylum and immigration policies is a typical example of the use of soft law: the European Union (EU) or its member states find it advantageous to negotiate a whole host of arrangements with various names, more or less informal, with their "partners" in third countries, misrepresented as being on an equal footing. The aim is to force the latter to stop immigration at source or to take back to their soil the undesirables that will be sent back to them, sometimes under the pretext of urgency (as was the case with the EU-Turkey "declaration" in March 2016, supposed to put an end to the misnamed "migratory crisis"). With soft law, certain clauses contrary to fundamental rights can remain concealed. Abuses will be imputed to these authorities outside Europe, parliamentary or judicial bodies will not be seized, internal dissensions will be less visible and, faced with possible pitfalls, it will be easier to change course.

This opens up a vast field for forms of infra-law which, beyond the diversity of operating methods, inevitably lead to the denial of the norms in force. Hence the challenge for human rights associations to understand the mechanisms of soft law and the public discourse that aims to impose its legitimacy on public opinion.

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The powerful surge of informalisation in migration policies

The problem concerning the proliferation of practices and policies derived from soft law does not reside as much in their non-binding character from a legal point of view as in their intention to short-circuit procedures that aim to guarantee full respect for international public law and European law. During the last decades, numerous bilateral and multilateral agreements have been adopted, in fields as different as trade, security, finance and military cooperation, without the legislative powers (national and EU parliaments) having been able to hold debates about their legal and constitutional compatibility. This tendency to avoid parliaments' right of scrutiny leads us to some major democratic challenges, all the more so because it causes concrete effects for individuals' rights (whether or not they are migrants).

In the field of migration, we are witnessing a strong push by states to resort to administrative arrangements, memoranda of understanding, verbal notes and other atypical agreements in order to control migration movements. Cooperation in the field of the readmission of foreigners in an "irregular" situation, or those who have been excluded from the right to asylum, is symbolic of these developments through which executive powers proclaim, with great media visibility/exposure, their will to act to control migrations. At a European level, the Partnership Framework proposed by the Commission in 2016 embodies this ascendancy of informality: it aims to promote a "mutual understanding" on migration management issues, as well as their operationalisation by means of "pacts". Of course, such pacts cannot be likened to readmission agreements. However, whether they are described as "joint declarations", "common plans" or "standard operational procedures", these arrangements are nothing other than agreements based on reciprocal commitments between their signatories. In its proposal, the Commission builds on the political declaration at the Valetta Summit (2015) whose action plan mentioned "the need for agreed mutual arrangements in the field of returns and readmission". In fact, this initiative has drawn inspiration from the operative modes that member states have resorted to well before the EU adopted them itself, crystallising them afterwards in the Pact on Migration and Asylum (2020). This shows how the informalisation process first appeared at the intergovernmental level, before being developed much later at the European level.

Setting off from the case of readmission, four characteristic features of soft law can be identified. Firstly, it reinforces the sovereign prerogatives of states (in the North as well as the South) at the core of which is security, and it shows public opinion that states are able to control their borders, regardless of whether they are or real. Secondly, its function is to make the terms of cooperation better adapted to uncertainty, even if it results in making them less transparent. Thirdly, using the pretext of responding to urgent situations, it circumvents parliaments' right of oversight. Finally, due to its secret character, its existence and actual legal reach can easily be denied by decision-makers if criticism arises from civil society or there is a change of strategy, for entirely different reasons.

These four characteristics take on a dimension that is symbolic as well as political, responding to external challenges (for example, the "fight against irregular migration flows") and to internal concerns (the tensions between sovereignty and European supranationalism). The rise of populism and Euroscepticism, in addition to activism by political parties that are hostile to immigration in the West, amount to factors that have been used to justify, as a necessary evil, resorting to modes of operation that are increasingly informal and opaque, able to discipline an electorate that longs for answers.

The escalation of the informalisation of migration policies calls for an empirical evaluation of state practices and their legal, political and moral reach as well as of the intentions formulated by the signatories of agreements and; finally, of the consequences of these acts for fundamental rights and respect for states' international obligations, if not those of the EU as a whole.

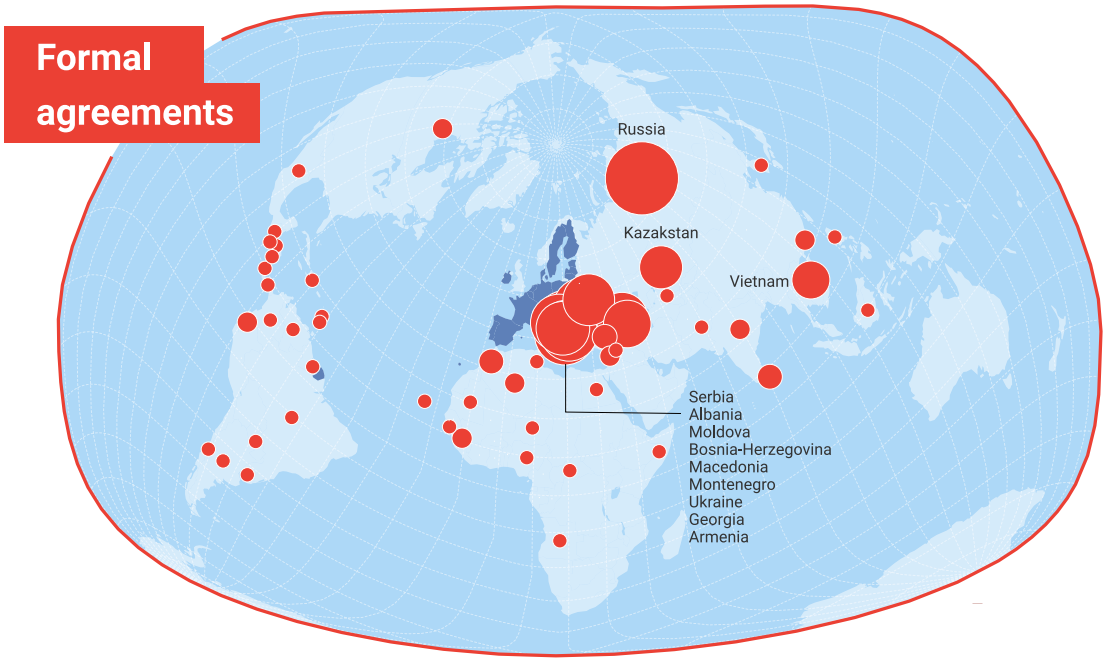
Soft law, what are we talking about?

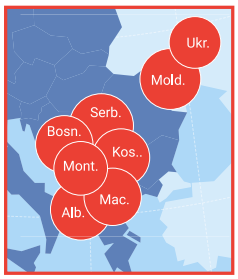
The English language expression "soft law" appeared in the 1930s to designate a heterogenous combination of atypical legal instruments that are proliferating at the international, regional and national levels. EU member states have adopted it to block the arrival of people on the move and to expel those who have reached its borders. The rules that are announced do not create rights or obligations ("droit mou", in French); they are not equipped with legal sanctions ("droit doux"). They influence the behaviour of their addressees and encourage the development of certain practices ('droit souple'); they offer a great degree of freedom to states, by leaving room for interpretation and intervention ('droit flexible').

Nonetheless, soft law instruments have legal effects. Although some people consider these instruments means that promote the effectiveness of established rights or the recognition of new rights, others stress their dangerous aspects: soft law degrades the quality of the norm by affecting the principle of legal security; it makes it possible to circumvent the democratic requirements of political and judicial control; it authorises a lowering of the standards of protection for established rights in international hard law instruments.

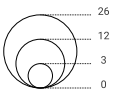
In the field of migration, the deterioration of people on the move's rights and freedoms must be raised. In Europe, there is a proliferation of texts that are adopted without a legal basis, without parliamentary oversight and without the possibility of resorting to a judge, which contribute to the integrated management of the Union's external borders: they are opinions, recommendations, guidelines, communications, codes of conduct, notes, interinstitutional agreements, conclusions, declarations, resolutions, working agreements, best practices, 'non-papers', exchanges of letters, administrative arrangements, police cooperation agreements, memoranda of understanding, standard operational procedures, etc. Regardless of their guise, these different soft law instruments threaten and violate the rights of migrants.

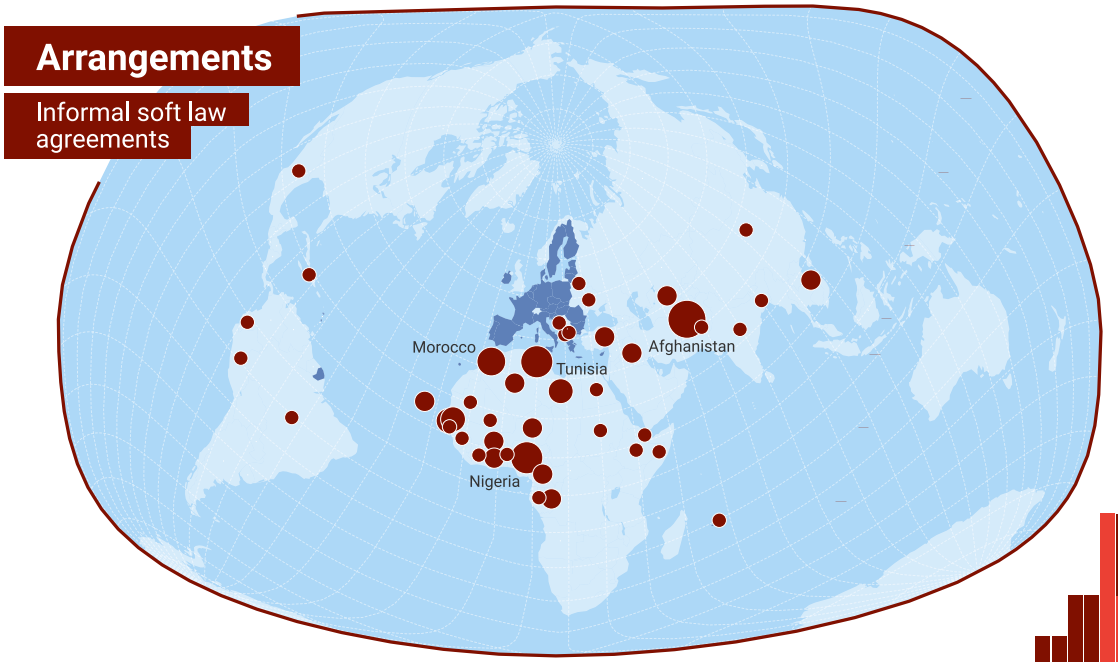
An obsession with readmission:
the drift towards informalisation





Number of bilateral readmission agreements completed by third countries with the EU's 27 member states (in March 2022)





Cartography : Nicolas Lambert for **BIC** (Cartographic Interventions Brigade), 2022
Source: data collected and elaborated by Jean-Pierre Cassarino, March 2022
https://www.jeanpierrecassarino.com/datasets/ra/

Soft law traps people on the move in the Libyan nightmare

In a report of 23 March 2022, the UN Council for Human Rights documents the abuses suffered by migrants in Libya, such as arbitrary detention, summary executions, torture, inhuman treatment, sexual violence, extortion, slavery, and forced labour, which constitute crimes against humanity according to an independent UN inquiry mission of November 2021. The images broadcast by CNN in 2017 came to mind: those of people on the move sold to bidders in slave markets. The European Union has its responsibilities for this situation: it turned Libya into a hellish trap for migrants by contributing to prevent their departure and by pushing them back towards a country where their rights are trampled.

In 2022, five years have passed since the protocol of understanding signed on 2 February 2017 by the Italian prime minister, Paolo Gentiloni, and Fayez al-Sarraj, head of the Libyan government of national unity. The EU and its member states wanted this agreement, which they have supported since 3 February. It is a soft law instrument because there has been no oversight by the Italian parliament or jurisdiction. Of course, there have been past agreements adopted in due form between Italy and Libya: on 13 December 2000 (Rome agreement), on 29 December 2007 (Tripoli agreement) and on 30 August 2008 (the Benghazi agreement referred to as 'Friendship Treaty'). However, Italy being found guilty by the European Court of Human Rights in the Hirshi Jamaa decision in 2012 led the authorities to resort to soft law. In fact, the Strasbourg court had ruled that the interception of vessels in the high sea off Lampedusa and the immediate push-back to Libya of people caught under the provisions of the 2008 Friendship Treaty violated the non-refoulement principle and the ban on collective expulsions.

Cooperation between Italy and Libya on migration has been a long-term endeavour, inscribed within European dynamics that are not too troubled about dealing with rogue actors: first, the Khadafi regime which faced an international embargo; now, some clashing factions, rival tribes, armed gangs and notorious criminals who share control of the coast guard units and detention centres.

Since the early 2000s, the EU stated the importance of cooperation with Libya to prevent migration across the central Mediterranean: the EU Council declared this in 2002; in 2003, it asked the Commission to conduct a mission in Libya; from 2004 onwards, it financed projects to strengthen the border between Libya and Niger and to assist in the deportation of immigrants; it engaged in an ad hoc dialogue with the Khadafi regime in 2005; in 2008, it gave the Commission a mandate to negotiate with Libya; in 2010, it adopted an 'agenda for cooperation in the fight against clandestine migration'; in 2015, it deployed operation EUNAVFOR MED, which aimed to destroy Libyan boats that carried migrants; in 2015, it created the EU Emergency Trust Fund for Africa (EUTF Africa) worth 5 billion euros, a part of which was assigned to Libya.

In order to reach agreements and conduct cooperation with Libya, the EU relies on the Italian government. The EU Council welcomed the measures taken by Italy, defining the fight against irregular migrations from Libya as a priority goal (2009), or by deeming cooperation with Libya a model to be followed in relations with all the countries that migrants leave from (2017).

Libya intercepts migrants who set off by sea towards European shores to pull them back to its territory. The EU and Italy, in turn, strengthen the Libyan coast guard's maritime surveillance capability by providing technical means and financial support. The overall aid that Libya receives is considerable: in 2008, Italy promised 5 billion dollars' worth of investments over a 20-year period, of which 500 million would be devoted to maritime border surveillance; the EU provided arm export licences for a value of over 1.3 billion euros between 2007 and 2016, and it dedicated 700 million euros to cooperation with Libya; in addition, there have been payments to heads of tribes, armed groups and militias.

The Maltese authorities have also been subcontracting migration management: an arrangement reached in 2019 provides that Libyan coast guards should intercept migrants before they enter Maltese territorial waters and return them to Libyan shores.

As an instrument of EU policy, soft law locks up people on the move in a Libyan nightmare: this amounts to danger and death in the Mediterranean, torture and criminalisation in Libya and, through a knock-on effect, also in neighbouring countries. The European institutions and UN agencies know it; however, they cooperate in this deadly policy.

The bibliography is available on Migreurop website: www.migreurop.org in the section *Publications / Notes*.
https://migreurop.org/article3173.html

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Migreurop is a network of associations, activists and researchers, with a presence in around twenty countries across Europe, Africa and the Middle East. The network strives to raise awareness of and to oppose policies that marginalise and exclude migrants, notably, detention in camps, various forms of displacement and the closure of borders, as well as the externalisation of migration controls by the European Union and its Member States. In this way, the network contributes to defending migrants' fundamental rights (including the right '*to leave any country, including their own*') and to promoting freedom of movement and settlement.

www.migreurop.org

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