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Democratic Transition and Human Rights Support Center



DAAM 's
periodical **N°04**

IRREGULAR MIGRATION



Contents

N°04

(DAAM)'s Editorial	3	Irregular migration
Shedding light on the concept of irregular migration	10	Dr. Kareema El-taher Amshiri
Egypt: In-between Hell and Heavens region for migrants	16	Ashraf Milad
The relationship between the crime of smuggling migrants and the offenses set forth in Rome Statute	28	Khaled Zew
Research paper on Tunisian legislation and Judicial systems' restraints in confronting Irregular Migration	38	Sondos Bishnawi
Irregular migration officer at The Tunisian Forum for Economic and Social Rights	54	interview with: Ramdan Ben Omar
Libyan legislation and the judicial systems' limits and restraints In fighting irregular migration	60	Dr. Amheidi Mohammed Amheidi
Head of Biladi Human Rights Organization in Libya	74	interview with: Tarek El Lamloum
Migrant platforms between European pressures and North African countries' rejection	78	Massoud Al- Ramadani

Irregular migration



credit: worldatlas.com

(DAAM)'s Editorial:

The Migration issue holds a place of paramount importance with regard to the relationship between developed and developing countries due to its non-separative connection to all political, economic and social aspects since the collapse of political and economic conditions is what drives migration from developing to developed countries.

Irregular migration is considered to be one of the most important social issues that remains a grave concern to the international community, it is a problem of high sensitivity with effects that extends to all segments of society, not only youth or young men but also women and children.

Migration in itself is not illegal or a negative act, it is a human nature that is practiced congenitally, a legitimate phenomenon and a fundamental principle of human rights, as article 13 of the Universal Declaration of Human Rights stipulates that everyone has the right to freedom of movement and the right to leave any country, including his/her own, and to return to his/her country. But in light of the rise

of state sovereignty concept around the globe, national legislation has intervened to put many obstacles and set harsh conditions to people's movement from one border to another, and then criminalize such a transition if those harsh conditions were not met.

There is no doubt that the widening economic inequality gap between the countries of the North and the South of the Mediterranean, as well as the increase of armed conflicts in Africa and the Middle East, and the events of the uprisings so-called «Arab Spring» launched in 2010 has produced many developments in the migration issue, and increased immigrants from the Arab region, especially from Syria, Yemen and countries that is witnessing violence or violent armed turning points.

The characteristics of immigrants has changed and are no longer limited to the unemployed and poor classes only, The presence of middle class high school graduates, women as well as families who did not exist before among immigrants is noticed, The security vacuum resulting from these conflicts has also produced and intensified the smuggling of migrants phenomenon in origin and transit countries, such as Tunisia, Libya and Egypt.

As for the North Mediterranean countries in Europe, the rise of the conservative right-wing political current, which is inherently anti-immigrant and the spread of terror operations of radical Islamic groups in Europe, as well as successive economic crises have all gathered together to make Europeans prioritize security options through maximizing their borders scope to include the southern Mediterranean countries' shores where they establish camps for admission and screening of refugees and migrants, or by developing and activating security aspects and theories that reduce the space of working and operating for humanitarian aid organizations in the Mediterranean, which led some of them to withdraw from this line of work and exposed their employees to security harassments and prosecutions, especially in Italy, as well as working with governments of countries of the Southern countries to aggravate domestic penalties for movement or smuggling.

Eventually, migration and mobility are inherent human rights and whatever legislators or politicians do Migration will not stop,

so treating this issue should be with a comprehensive approach (human, legal, political, economic, cultural, social), as treating this issue on legal and security basis only will never be sufficient.

The Democratic transition & human rights support center (DAAM) attempted to study this phenomenon. On 8 and 9 December 2018, DAAM Center organized, together with the Defender Center and Tanarot organization an international forum on «Problems of irregular migration on Judicial and human rights basis» with the participation of human rights organizations from 10 countries and region experts who enriched it with their valuable experience.

Their point of views did not differ from the aforementioned opinions, and those were the suggestions they came up with arranged in accordance to the forum's highlights:

1. First panel: Definition of irregular migration and human rights mechanisms at both the international and national level:

- Non-criminalization of migration and working toward promoting the concept of safe migration.
- More emphasis had to be placed on distinction carried out by many countries between refugees and migrants in order to evade international obligations towards refugees.
- To provide the necessary guarantees needed to promote the concept of safe migration by placing obligations on countries through a set of appropriate mechanisms, procedures and policies.
- To increase knowledge on migration issues at the conceptual, legal and human rights levels.
- Revise legislation to make the judiciary the sole source of deportation decisions, but not to forcibly return the migrant to his or her home country.
- Urging the signatory countries to the agreements relating to migration to ratify and activate its terms as well as the non-signatory states to sign and ratify these agreements.

- Aggravating penalties for migrant smugglers in various national legislation.
- Activation of domestic judiciary mechanisms to deal with human trafficking phenomenon.
- Ensuring that immigration laws and regulations are in compliance with national legislation to make them enforceable, feasible and compatible with recognized international mechanisms.
- To make detention centers and shelters subject to judicial supervision.
- To ensure that migrants are transferred from detention centers and shelters as soon as the investigators' procedures related to immigration applications are completed

2. Second panel: International Policies for Irregular Migration:

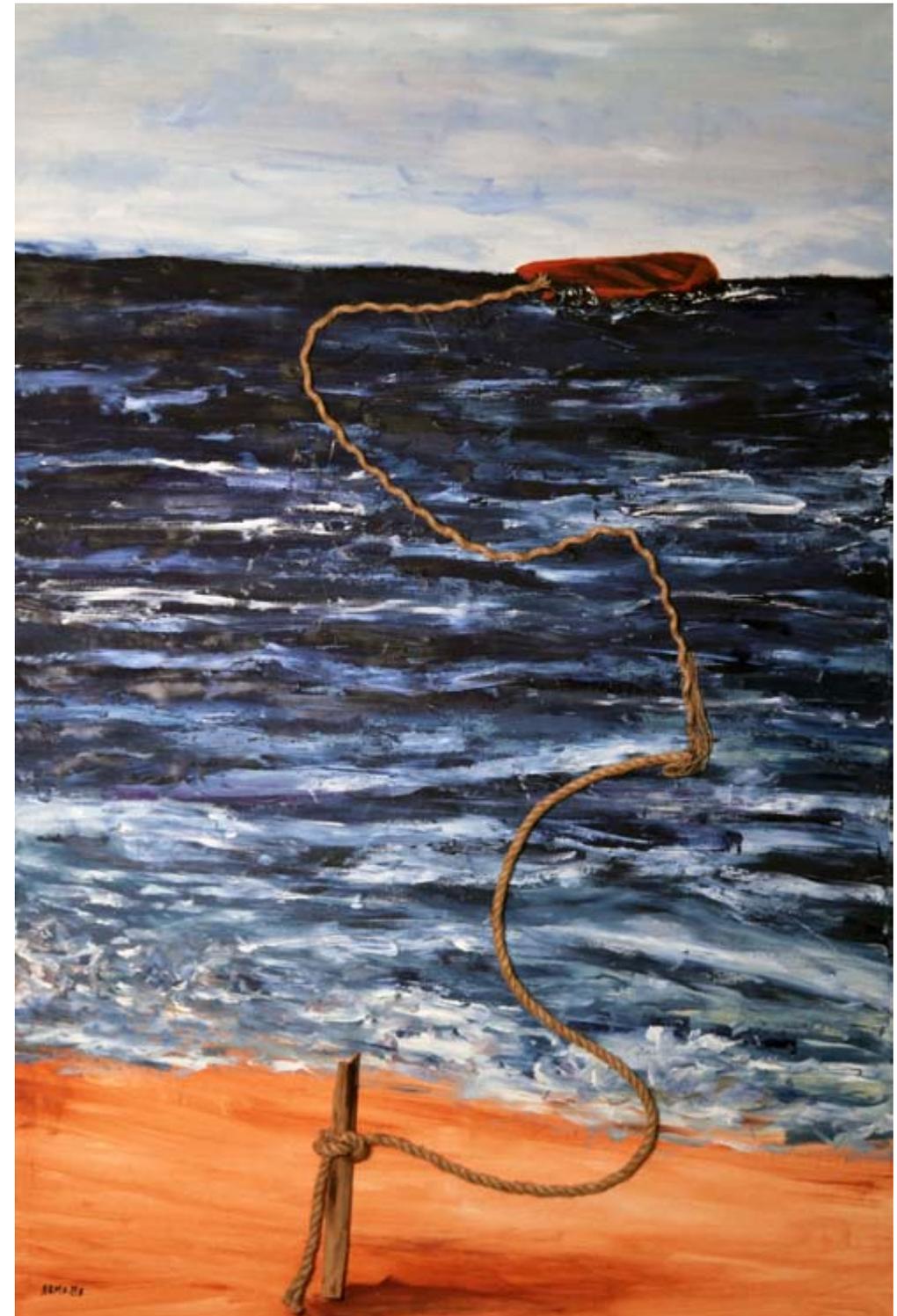
- The international community should provide assistance to migration transit states, especially states that are highly exposed to armed conflicts.
- We call upon the countries of the world to adopt Marrakech global compact for « Safe, Orderly and Regular migration» and to respect its articles.
- To attempt to provide food security for migrants.
- To ensure that migrants are not forcibly returned to their countries.
- To raise the efficiency of individuals and institutions investigating Migration applications through the necessary needed training on an ongoing basis.
- To work on and call the international community to support, the return of rescue boats that were suspended to its work with more vessels for rescue operations. And to condemn actions taken by some European countries «Italy», which obstructed international rescue operations in the middle of the Mediterranean and caused it to stop.
- To stop operations taking place at high seas that aim to return refugees and migrants to countries from which they fled, and to

ensure that migrants do not stay in or go to unsafe countries.

- Encouraging media to adopt a human rights' speech on the issue of migration and migrants, and to ensure that they promote rejection of racism, discrimination and hate speech.
- To promote the right of accessing information for migrants.
- To establish a network or alliance of associations and organizations that participates in international support forum, it is also important to strengthen relationships with human rights, humanitarian organizations, European and international powers and governments that support refugees and migrants' rights, and adopt humanitarian policies towards them.
- To further highlight the work of local organizations working in the field of migration.
- To promote literature and arts that present migration and migrants issues and to highlight the human suffering that causes this phenomenon.

Finally, We wish to successfully, through this edition, be able to contribute important information and constructive ideas to help interested researchers and decision-makers to find appropriate means to cope with migration fairly and comprehensively.

We would also like to thank our partners Defender Center and Tanarot organization for their support of this forum and this edition, and for their help and ideas which they have provided in all preparation and execution phases. We also pay special thanks to artist Asmaa Bashasha, who gave us her wonderful paintings to be an ever-present testimony of what was written within the pages of this edition.



Shedding light on the concept of irregular migration



Dr. Kareema El-taher Amshiri
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1. Concept:

Migration as a term in itself does not have a negative meaning or significance, on the contrary it is a term that stands for ideas of exchange and mobility in the world, but today it is linked to crime, fear and insecurity.

“Migration” linguistically means “to Leave”, As a legal term it means leaving the state in which one belongs to, to settle in another state permanently or temporarily, the act itself reflects movement of individuals and groups, It may be widespread and including masses, which is called a migration flow.

Migration, which means the movement of individuals to a country other than their own, might be legal, when it is in confor-

mity with the law in force, and might be in stealth, illegal, or irregular, when committed in violation of the law that governs entry and residence of foreigners in the receiving State.

2. Scope:

International law scholars define migration as “ an individual leaving his/her territory permanently to the territory of another country.” From this definition we find that international law jurisprudence has recognized the migrant’s intent, therefore if a migrant left a territory and his intention is to return to it later after any period of time whether long or short, this shouldn’t be considered, from this point of view, migration.

Even if it was referred to by various terms , its implicitly refers to State’s right to protect itself from the arrival of large numbers of migrants, In fact, it is the State’s sovereignty that determines the scope of stealth or irregular migration. The scope of illegality also can easily be determined through rules of law, restrictions on entry and residence, and legal conditions set for entering labor market. If the world was without restrictions on entry and residence, normally irregular migration will not exist.

It is a term that came to life only after the idea of the state and its political boundaries existed, “Stealth migration” is only one of the effects resulted by the restrictions imposed by states on peoples’ movement.

3. Illegal or illegitimate migration?

Since we have already pointed out that migration is an old and natural phenomenon, so it is legitimate and does not violate supreme principles, but it has become illegal by legislation or legislators. “Legitimacy” refers to whatever in accordance with natural law, especially absolute justice, whereas “Legality” refers to whatever in accordance with the imposed law , therefore, Legitimacy is a higher and more supreme principle , not every legal act is necessarily legitimate, , but law may promote injustice or unfairness, this is clearly

1 - Magdi al-Gharsali, The crime of illegal immigration, unpublished master’s thesis, Al-Manar University, Tunisia, Faculty of Law, 2009, p.16

evident in some Statutory laws that protect authoritarian regimes, in contrary not every legitimate act is necessarily legal, a clear example of that is migration, It is a legitimate phenomenon, but some legislation have made it illegal, so we prefer to use the term illegal migration as migration could be violating law in the receiving countries, but these law in itself could be illegitimate.

We also prefer the term "stealth" or "secret, since non-registration in the expatriate system or records of foreign residents is not a result of an act of omission or negligence, but with a clear will and intent to conceal it. And these terms also refer to migrants' situation as they hide their presence within the country either when they cross the border or later on.

In any case, stealth or illegal, it is considered to be a breach or violation of regulations and administrative rules that regulate the flow of migrants by entering through places other than the ones specified for entry or not during the scheduled hours, or without the necessary needed documents, these are cases of deliberate breach of national legal restrictions on entry and residence for foreigners.

Everyone agrees that irregular migration is not a recent phenomenon, but high professionalism, careful organization of border crossing and infiltration is what wasn't previously known. migration policy strictness and closure of the borders recently pushed migrants to resort to smugglers as the best offered option

4. Irregular migration and smuggling of irregular migrants:

If the concept of "irregular migration" is a concept that refers to international movement of individuals across borders in violation of laws of the transit State or receiving State, it is appropriate to distinguish between secret migrants according to the means of entry into the country: there is an independent secret migrant who crosses borders individually or within a small group of migrants that depend on their own members abilities, the second type is more dangerous and sophisticated, they are groups of migrants who cross borders through smugglers and criminal gangs supervision and aid, that act fall within organized crime on an international scale.

The first type of migration can be described as "simple irregular migration" in which an independent migrant or a small group of migrants. But when a migrant uses another person or a group for money in return that is called "smuggling migrants", We believe that smuggling migrants should not be seen as synonymous with irregular migration, but as a part of more broad phenomenon. Both terms refer to border crossing in violation of administrative rules governing entry and residence for foreigners, illegal transit or movement, but only when money is involved that is what can be called smuggling migrants.

Consequently, irregular migration is not synonymous with the smuggling migrants, but the latter is only a part of it. irregular migration is broader and more comprehensive. Both terms refer to border crossing in violation of the administrative rules governing entry and residence for foreigners, but assistance for crossing for the purpose of profit constitutes a crime of smuggling.

5. Causes of smuggling migrants:

Everyone agrees that irregular migration is not a recent phenomenon, but high professionalism, careful organization of border crossing and infiltration is what wasn't previously known. migration policy strictness and closure of the borders recently pushed migrants to resort to smugglers as the best offered option, the equation is as follows:

Increase in demand for migration to Europe, Canada, America

+ Tightening conditions for entry and residence = irregular migration + smuggling migrants.

This equation leads us to the following conclusion:

closure of borders does not stop irregular migration but increases the value of migrants as smuggled goods.

6. How valid is criminal confrontation of the phenomenon:

If the criminalization of a conduct in principle is legitimate as long as it works in favor of defending society, it may become an extreme act if it exceeds its basic objective or if the idea of defending society takes a political dimension that is incompatible with legal philosophy [...] as the idea of defending society should not overwhelm other human values, such as preserving human dignity.²

The valid criterion that makes an act a crime is refusal and non-acceptance, a crime is always rejected and socially unacceptable as an act whenever and wherever it is criminalized,³ This fact guides us in our analysis of legislators' practice in various countries of the world to criminalize illegal entry and residence. Is this behavior ejected by society or by the majority, and what values does it affect or contradict with?

In light of the aforementioned and its relation to the subject of this research that analyze issue of criminalizing illegal entry, we find that an important fact about this act, although Illegal entry is a violation of laws, but it does not provoke a violent social reaction or rejection in most societies now , which leads us to say that the legislators' criminalization of this act, even if he has absolute freedom to do so, is unnecessary.

In imposing criminal penalties on irregular migrants and considering him/her a threat to society interests, that a community must protect itself from his/her danger, we see only a reflection of a social defense perspective, which believes that social defense aims primarily to protect the society regardless of any other consideration, Its

2 - Dr. Al Raziqi Muhammad, Criminology and Criminal Policy, Dar Anis, Misurata, Libya, 1995, p. 152.

3 - Dr. Al Raziqi i Mohammed, Criminology and Criminal Policy, p. 32.



credit: international policy digest : Antonio mastiello

philosophy is based on the elimination of danger, even by arbitrary means, if necessary, in order to preserve the state and society.

Criminal policy according to this jurisprudence requires the removal of criminal threat, relying on a variety of defensive measures that is called "safety measures" which are a set of procedures that aim to mainly ensure the protection of a society.

This form of criminalization is only an application of Criminal law of the enemy theory, an abandoned theory, which came to life again by criminalizing illegal migrants conducts, who represents an enemy threatening society's interests and security.

However, security and interest of a society lies in the political, social, economic values or other values which society is eager to protect and defend. This is the only criterion that can be relied upon to determine the validity of a confrontation of a conduct. If defending those values against a real threat does not exist then any confrontation would be invalid. This leads us to say that migrants are considered enemies against their own will. This confrontation against them is declared by developed countries that use the criminal law and its penalties of detention and forcible deportation as a weapon instead of using bombs and missiles.

Egypt: In-between Hell and Heavens region for migrants

(Migrant's "al-Araf")



Ashraf Milad – Lawyer, Researcher,
Refugee field lecturer
and a Former UN official

Egypt was - and still is - a destination for refugees and migrants from Africa and the Middle East. At one time there were many migrants who had been displaced from some European countries that sought protection in Egypt even before there was a definition for asylum in international law. Many Greeks came to Egypt to flee the scourges of World War I¹, and many Armenians followed them later, some of whom fled the Ottoman massacres in the same period of time and settled in Egypt and still their descendants still live in Egypt now.²

1- BBC Arabic report, When the Greeks were turning to camps in the Middle East, Nidal Abu Murad, June 20, 2016, <http://tiny.cc/jhw48>

2- Veto gate website, Armenian diaries in Alexandria. They had their own schools, a church and four clubs. They were keen to learn their language in order to preserve their identity. Emigrated with the start of Turks massacres against them in 1914. They raised the slogan «No to politics», Khalid al-Amir, July 19, 2018, <https://www.vetogate.com/3242031>

And perhaps because of the political changes in the region and also because of the deterioration of economic conditions in Egypt for several decades, migration happens from the south to Egypt, whether economic migration or asylum in the legal sense which means staying in Egypt for a short period of time and then migrate to another destination (whether regular and irregular migration) to Europe and The United States of America. Egypt has become a transit country (a passage) since the end of the nineties (coinciding with the start of the economic crisis in Egypt). For migrants, there are no plans or intention to stay in Egypt for a long period of time or settle in and there is no doubt that the majority of those who seek refuge to Egypt come escaping persecution at the hands of their regimes or by militias or tribes .. etc,

Even if protection is their basic demand, the dream of living in a European country that seduces them is what these migrants plan to achieve, as Egypt is a country that does not provide much financial aid to refugees on its territory, and the International Organization for Migration (IOM) gives small amount of this aid.

When we talk about officially registered migrants who come to Egypt, we are talking about nationals from 38 countries around the world, according to UNHCR statistics, most of them do not come to Egypt seeking luxury or even resettlement in the United States, Australia or Canada they come to Egypt escaping death or detention in their country, of course there among them economic migrants, but they are not the vast majority, the vast majority come to Egypt escaping discrimination.

The number of refugees under the United nations refugee agency in Cairo is two hundred and twenty eight thousand and nine hundred forty one (228,941) person according to report issued by the United nations refugee agency in Cairo office of the refugees in June 2018, including about 130 thousand Syrians, and more than 37 thousand Sudanese.

There are also fewer numbers of Ethiopians, Eritreans, Somalis, Iraqis, and Yemenis.³ All of them Egypt is committed to protect. 3- United Nations, Report of the United Nations High Commissioner for Refugees, General Assembly, Official Records of the Sixty-first session, Supplement No. 12 (A / 61/12) <http://tiny.cc/cww48y>



228,941

Refugees under the United Nations
refugee agency in Cairo in June 2018



37,000

Sudanese



130,000

Syrians

United Nations, Report of the United Nations High Commissioner for Refugees,
General Assembly, Official Records of the Sixty-first session

(According to A bilateral commitment between UNHCR and the Egyptian government in accordance with a memorandum of understanding signed between the two sides in February 1954). Unfortunately, however, this protection might be affected political changes and the extent of Egypt's relationship with their origin countries, that was evident in dealing with refugees from Sudan.

It is worth to be said that there is no legislation in Egypt that regulates status of refugees except for the broad article of the 2014 Constitution which allows - and does not require - accepting refugees and this article does not refer to any international treaties signed by Egypt.

Who are the Sudanese refugees?

In light of 2011 events, many Syrian children came to Egypt as refugees, representing the vast majority of the refugees registered to UNHCR (about 130,000 of the 230,000 refugees registered to UNHCR in Egypt). Despite that, in fact the vast majority of refugees are Sudanese, , there are more than two million Sudanese in Egypt according to unofficial statistics, including those who did not apply for asylum or missed all the available opportunities to be accepted as a refugee.

There are several waves of Sudanese asylum to Egypt,⁴ the highest wave was after the coup d'état of the late 1980s, Egypt was a transit country (passage) for the thousands of Sudanese who had been displaced from the four districts of Sudan (Nubian problems in the north due to the Kajbar dam, the civil war with the south, the problems of the Beja tribes in the east, and the Darfur crisis in the west In 2003).

80% of asylum seekers in Egypt were able to benefit from resettlement opportunities in one of the three countries (USA, Australia, Canada). By 2004, the Office of the United Nations High Commissioner for Refugees (UNHCR) implemented certain procedures that included the 1969 organization of African unity (OAU) Convention, which expanded the interpretation of asylum cases , This has led to a high rate of accepted refugees in Egypt and reduced the chances of resettlement.

When the first reconciliation agreement was made between North and South Sudan, refugee status determination interviews were suspended for the Sudanese, in addition to that, the rapprochement between the Egyptian and Sudanese regimes which was followed by severe security cooperation and harassment of Sudanese nationals and activists in Egypt, resulted in infiltrations to Israeli border and emergence of some tribe gangs formed of Sudanese and Sinai Bedouins,⁵ and eventually the situation developed from smuggling to kidnapping and asking for ransom or human's organs trade.

For the Sudanese refugees , Egypt is an easy close destination (international law requires the resort to the nearest safe country for refugees unless there were conditions that prevented that) as movement across the vast border between the two countries is easy, some of which are difficult to control by border security guards.

Article 31 of the 1951 Convention relating to the status of refugees stipulates that States shall not impose penalties on refugees on account of their illegal entry or presence , and the United Nations high commission in Cairo is in contact with the Egyptian Department of

4 - Sudan Today, the memory of great national holidays, Salah Idris, 14 May 2017 <http://tiny.cc/b2w48y>

5 - Deutsche Welle, gangs smuggling African migrants, "land of torture", Ahmed Abu Dara, August 15, 2013, <https://p.dw.com/p/19Omj>

Immigration, Passports and Citizenship to legalize the residence of infiltrators who crossed the border.⁶

The Sudanese refugees belong to various Sudanese tribes and regions. There are many refugees that are part of northern and southern opposition groups (the Dinka, the Chaluk, Zandi, Bari and the Banda tribes, as well as the Nuba Mountains) who fled to Egypt during the 1983 civil war, as well as Eastern Sudanese who belong to Beja tribe (members political party on behalf Beja people called "Beja Congress"). As of March 2003, thousands of people from the Darfur region have been displaced to Egypt too as result of the mass killings and systematic looting done by government forces and Janjawid militias.

Until 1995, the displacement of Sudanese to Egypt, Didn't require to go to UNHCR as procedure, where Sudanese citizens were exempted from this requirement to obtain a residence.

However, When the assassination attempt on President Mubarak happened in Addis Ababa 1995, this exemption was cancelled and tight restrictions were imposed on Sudanese residence in Egypt, which pushed them to apply for asylum fearing that they would be deported forcibly by the Egyptian authorities to whoever don't hold a residency visa.

With the exception of "Abdin" region, in which lies in Downtown in Cairo, the Sudanese generally gather on the outskirts of the city. "Abdin" area is historically a preferred area for Nubians from Sudan and Egypt. Many of them worked at the famous Abdin Palace during the days of monarchy when Egypt and Sudan followed the Egyptian royal crown until Sudan gained its independence in 1956.

Many Sudanese also gather in "Ezbet El Haggana area" where many Sudanese have worked in the Egyptian army (the Haganah battalion, the camel riders).⁷ The region is sometimes described

6 - United Nations High Commissioner for Refugees, 1951 Convention relating to the Status of Refugees <https://www.unhcr.org/ar/4f44a8f16.html>

7 - Solidarity Initiative website, Ezbet El Haggana report, July 13, 2015, http://www.tadamun.co/?post_type=city&p=6163#.XRSNp-gzblU



credit: ASHRAF SHAZLY/AFP/Getty Images

incorrectly as "Sudanese refugee camps in Egypt" due to the high intensity of Sudanese gathering in this area" (It was also called that by Media during Angelina Jolie's visit to the region!).

Refugees in general, and Sudanese in particular, face many challenges. They cannot rely on aid that the UNHCR's executive partners in Cairo provide because of lack of resources. Also the country's severe economic crisis, security arbitrariness, bureaucracy, and political balances prevent providing basic needed services to refugees and asylum seekers in Egypt. Some police officers do not even recognize the residence card, in one incident, It has happened that the police officer ripped it apart and demanded the refugee's passport. This is a difficult situation, but there are ones more difficult as to ask from the refugee to bring a letter from his country's embassy to issue marriage permits. In other respects, such as health, a poor refugee cannot afford 50 percent of the cost of his treatment, as

UNHCR partners take care of the rest. In employment, the refugee does not receive any privileges but is treated as a foreigner who he tries to obtain work permit.⁸

Irregular migration

Irregular migration from southern Mediterranean shores to Europe has increased, most notably those of Egypt and Libya, The latter is the largest base for irregular migration vessels.

After 2011, militias are getting money to allow ships carrying migrants to sail north to the shores of Italy.⁹ This encouraged many migrants to infiltrate from Egypt to Libya via land border (Salloum city) and then travel to Europe at a low risk, because Egyptian authorities and its Coast Guard are more stringent in preventing these operations in Egypt. In Egypt, the waves of irregular migration have been increasing since the summer of 2013, from ports of Port Said, Kafr El Sheikh, Damietta, Alexandria, Marsa Matruh and Beheira.

There were several incidents of migration sinking ships, as those ships are not equipped to carry large numbers, the most prominent incident is the sinking of the famous "Rasheed" boat in September 2016, where 204 of the 500 migrants died aboard the ship, causing the Egyptian authorities to issue the "illegal migration law" Which was unanimously approved by the Egyptian parliament.

Egyptian authorities and international organizations working in Egypt have begun monitoring the steady growth of numbers of people trying to leave the country by sea irregularly.

In August 2013, the Egyptian authorities arrested a crew and passengers who were leaving a port in Alexandria, and after that

8 - The researcher knew this information through dealing with refugees cases over two decades.

9- Middle East, the smuggling of migrants in Libya .. Journey of torment, forced labor and death gang conflict «no man's money» on «Business» Human trafficking, Jamal Jouhar, August 22, 2018 Issue number [14512] <http://tiny.cc/rly48y>

between August 2013 and October 2014, the Egyptian authorities detained more than 6,800 irregular migrants across Egyptian ports, originating from Syria, Gaza, Sudan, Iraq, Somalia, Eritrea and few Egyptians

incident several arrests for migrants were made. The fragile state of security and chaos at that time has been an opportunity for smugglers, not to mention the attempts of many to escape from Egypt in those circumstances, especially among Syrian refugees who realized the seriousness of the situation in the country and offered large amounts of money to smugglers to get them out of Egypt by sea to Europe.

According to international reports by the UN High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), between August 2013 and October 2014, the Egyptian authorities detained more than 6,800 irregular migrants across Egyptian ports, originating from Syria, Gaza, Sudan, Iraq, Somalia, Eritrea and few Egyptians.¹⁰ The latter are released from prosecution immediately when they are brought before it, but the situation is different for those who hold other nationalities, they are detained for periods that may last for several months according to Egyptian procedures and brought before national security service and the Egyptian Department of passports, and the whole process may end up in deporting the arrested person, and sometimes even deporting people who have applied for asylum to Egypt. In these cases, the UNHCR will address the Egyptian authorities for the release of detainees pursuant to the 1951 Convention, which prohibits the extradition of refugees or asylum seekers to their countries of origin.¹¹

According to international law, after completing

10 - Al Safir Alaraby, Egypt: The Question of Immigration and Asylum from a Legal Perspective, Ashraf Milad, August 23, 2018, <http://tiny.cc/rly48y>

11 - United Nations High Commissioner for Refugees, 1951 Convention relating to the Status of Refugees, <https://www.unhcr.org/ar/4f44a8f16.html>

rescue operations, the European authorities provide temporary shelter for these migrants until legal proceedings are taken with them as interrogation or placement interviews, which are intended to determine whether they are actually asylum seekers or economic migrants.

The European authorities, to the extent possible, avoid the arrival of these migrants to their shores so as not to find themselves in a de facto situation that forces them to meet their international and humanitarian obligations.

One of those who were arrested on one of these ships, says that when the captain arrives at the territorial waters of Italy, he sends a distress signal and usually The captain of the boat is arrested because he does not enjoy the legal protection that migrants may enjoy, and he is certainly not an asylum seeker.

European countries have begun to conclude agreements with countries of southern Mediterranean, such as Egypt, to receive migrants who are returned to them after being rejected as refugee, As well as supporting Egypt to aggravate and impose sanctions on smugglers. The law adopted in 2016 expands the definition of irregular migration and sanctions amount to fines of tens of thousands of dollars and long prison terms, with the possibility of the ship's confiscation.

It is noteworthy that the cases of returning migrants to Egypt have not yet been carried out, and it is believed that only cases of unknown nationality will be returned. Many irregular migrants will tear up their passports so that the authorities in the country of destination do not recognize their nationality and force them to return to their country if asylum condition don't apply to them, this task is entrusted by the EU to an EU agency called the European Border and Coast Guard Agency (Frontex), which checks and investigate rejected migrants to identify their country to return them to it.¹²

12 - Frontex: Migration flows through Mediterranean route are down by 80%, Italian news agency (AKI) February 20, 2019 <https://www.adnki.net/AKI/?p=41978%E2%80%8E>



Sinking of the famous "Rasheed" boat in September 2016 : crédit: internet

pressures to receive returning migrants

While the phenomenon of irregular migration continued to grow during the new millennium, until it became a nightmare threatening the governments of Europe, some governments were forced to protect their interests through co-operating with Gaddafi regime in Libya, in order to help the Libyan fleet control its coasts to prevent migration flows from coming through Libyan ports.

Italy agreed with Gaddafi's regime in 2008 to pay \$ 5 billion in compensation to Libya for the period of its occupation in exchange for Gaddafi's pledge to protect Italy's shores from irregular migrants.¹³ When Gaddafi's regime collapsed in 2011, Libya has become a launching platform for irregular migration. According to the UN refugee agency, more than 80% of irregular migration comes from Libya. Until 2016, Egypt was another platform for these flows, which prompted European countries to seek a solution even if it was a radical one whether with Libya or Egypt, Egypt's proposal was to support a national unified government in Libya and extend its control over Libyan shores

13 - BBC Arabic, Italy pays \$ 5 billion to Libya, 30 August 2008 <http://tiny.cc/m6y48y>

and thus limit irregular migrant flows, Egypt has also suggested that projects should be established in northern Egypt to absorb labor, such as fish canning factories, etc.

Unfortunately, European countries did not find this solution to be successful. They started to put pressure on Egypt through negotiations to establish platforms for receiving migrants returning from Europe.¹⁴

The European countries succeeded in controlling entry through Eastern Europe by concluding an agreement with Turkey to establish a platform to receive rejected refugees in 2016. The plan was to replicate this model in Egypt and Morocco to control the routes of smugglers to Europe, but the offer was rejected by Egypt, despite the carrot and stick policy adopted by the European countries in their negotiations.

Egypt refused and continues to refuse to establish camps for refugees or migrants on its territory for security and economic reasons, as well as Morocco. Instead, after the Rasheed boat accident in 2016, Egypt issued "the illegal migration law", aggravating sanctions in its articles and using it as a bargaining chip with Europeans. Egypt has always stated that no boat has illegally got out of Egyptian shores since 2016.

Although it is difficult to prove that boats leaving for Europe did not come from Egypt, reality confirms that the Egyptian state's control over its coasts is powerful and that's what they rely on in their refusal to set up a platform for returnees in negotiations.

The visit of the United Nations High Commissioner for Refugees, Filippo Grandi, to Egypt in January 2019, was an attempt to find a solution to the awful situation of refugees stuck in Egypt. The visit resulted in recommendations that was not highly publicized, but it was clearly in a security context since the discussion was with Egyptian President Abd Sissy. A month later, UNHCR issued a report that 80 percent of refugees in Egypt live in extreme

14 - Deutsche Welle, Merkel and Sisi .. Does the immigration obsession overcome human rights ?, Siham Ashto, March 2, 2017, <https://p.dw.com/p/2YYnf>

poverty. This coincides, of course, with the increasing services provided by European governments to refugees in Egypt through direct and indirect funding for agencies providing services to refugees (health, education and legal) In an attempt to improve their situation in Egypt, hoping that this will reduce their attempts to migrate irregularly to Europe.¹⁵

refugees and migrants situation in Egypt is still in need of improvement at all levels, and this is sufficient for most of them to consider migrating. For migrants, conditions in Egypt are better than their origin countries on the security level, but they lack basic necessities for a decent life they aspire to achieve. No matter how much the situation is improving in Egypt, some people who have migrated illegally send or publish their photos through social media in front of their homes given to them by governments in Europe. This, in turn, and while migrant's conditions are miserable in Egypt, seduce them to migrate and get out of Egypt that represents for them "al-Araf" region between the hell of their countries torn apart by war and conflict and the heavens of a good life in Europe.



15 - UNICEF, Arab Report on Multidimensional Poverty, <https://www.unicef.org/mena/media/891/file/MENA-PovertyReport-Ar.pdf.pdf>

The relationship between the crime of smuggling migrants and the offenses set forth in Rome Statute



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Introduction

Before talking about the relationship between the crime of smuggling migrants with those crimes stipulated in Rome Statute, it is fine to recall some basic definitions related to the concept of migration first and to the crime of smuggling migrants.

First: Definition of migrant:

There is no universally accepted definition of the term "migrant", but this term covers all cases in which an individual decides to migrate freely without the intervention of an external coercive factor. ⁽¹⁾

The International Organization for Migration (IOM) adopts the

definition that defines migration as the movement of a person or a group of people between countries or within the same country between two places on its territory. ⁽²⁾

Second: Definition of smuggling migrants:

Smuggling migrants may be defined as the arrangement of an illegal entry of a person into a State Party of which that person is not a national or a permanent resident, in order to obtain, directly or indirectly, a financial or other material benefit. ⁽³⁾

The role of the judiciary in coping the phenomenon of smuggling migrants:

Countries, especially receiving countries, are making great efforts to counter the flows of migrants. However, this phenomenon is continuing to grow and increase. Failure to face the phenomenon may be due to the challenges that are facing the States. ⁽⁴⁾ Those challenges that can be hastily summed up as the most important here:

1. Lack of mutual trust between states and excessive adherence to the concept of sovereignty.
2. Diversity of legal systems.
3. Lack or weakness of channels of direct communication between competent bodies in different countries.
4. Different priorities for countries.
5. Cultural and linguistic challenges.

In addition to these challenges, there are others that are facing international cooperation to confront the phenomenon of smuggling migrants, this struggle still lacks the most important tool which is judiciary. It is difficult to say that there is an effective judicial control against migrant smuggling gangs.

This judicial deficit appears both in terms of national and international jurisdiction:

As for the national judiciary:

National judiciary in origin states and in transit or passage states appear to deficit and ineffective. This deficit has been aggravated by the transboundary nature of smuggling migrants crime and the rejection of judicial systems to cooperate with each other for various reasons, for example adherence to an old classical concept of sovereignty, Apart from, the Non-activation of real training systems for judges. So the result to all of this was this deficit in fighting this crime.

As for the international judiciary:

International criminal law defines two types of courts (special courts and permanent courts)

In the case of special courts, 5 courts are established on the occasion of a certain specific crime that has occurred and ended. Consequently, this type of courts is not related to recurring or repeated crimes, such as the crime of smuggling migrants, which necessitates the exclusion of this type of court from our research.⁽⁵⁾

The permanent criminal courts has only one example which is the International Criminal Court, whose jurisdiction and function was regulated by the Rome Statute. This Court 's narrow substantive jurisdiction prevents it adjudicating many crimes that falls outside the scope of the four trial forms enshrined in its Statute, namely article 5 : The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole and the Court shall have jurisdiction under this Statute to consider the following offenses:

- a. Genocide.
- B. Crimes against humanity.
- C. War Crimes.
- D. Crime of aggression.

Elements of smuggling migrants crime:

The physical component of the crime of smuggling migrants is the criminal behavior taking three forms, smuggling of migrants or facilitating the smuggling of migrants, or allowing a person to remain in a country unlawfully

The crime of smuggling migrants, like any other crime, has two grounds physical and moral.

The physical component of this crime is the criminal behavior taking three forms, smuggling of migrants or facilitating the smuggling of migrants, or allowing a person to remain in a country unlawfully.⁽⁶⁾

The moral element is the criminal intent, since the crime of smuggling of migrants is a deliberate crime that does not occur by fault or error.⁽⁸⁾

Noting that according to Article 6 of the Protocol against the Smuggling of Migrants, the crime of smuggling migrants requires a specific criminal intent and not merely general criminal intent. The specific intent is the offender's will to obtain financial or other material benefit.⁽⁷⁾

Does the International Criminal Court have jurisdiction over the offense of smuggling migrants:

As we have noted, Rome Statute has defined four exclusive crimes, namely, war crimes, crimes against humanity, genocide and the crime of aggression.

Thus, the competence of this court in considering the offense of smuggling migrants is subject to the inclusion of this crime as one of the four crimes mentioned above.

The closest models among the four to the crime of smuggling migrants are the crimes against humanity , so we will focus in our research on following the elements, conditions and details of these crimes compared to the crime of smuggling migrants to show the compatibility and dif-

scan and read the Rome Statute of the International criminal Court



QR code

ference between the two models.

Jurisprudence defines crimes against humanity as crimes committed by individuals of a state against other members of their state or non-state systematically and within a plan of discrimination in order to deliberately harm the other party. However, Rome Statute itself adopted a clear definition of the crime against humanity, According to article 7 of Rome Statute, the conduct that constitutes a crime against humanity if it contains one of the acts enumerated in that article (as a first condition) and the act is committed in the context of a widespread or systematic attack directed against any civilian population and being aware of the attack (as a second condition).

In accordance with article 7, paragraph 1 (k), one of the forms of conduct of a crime against humanity is "other inhumane acts of a similar nature intentionally causing severe suffering or serious injury to body or to mental or physical health".

By analyzing this text, it can be noted that it allows for introducing many acts within its scope, including smuggling migrants.

However, what may make it difficult is the second requirement in article , that the act is committed as part of a widespread or an organizational systematic attack directed against a civilian population or in furtherance of a State

that should include being aware of the attack.

There is no doubt that the linguistic definition of the word "attack" prevents introducing the crime of smuggling migrants as one of the crimes meant in this text, because in reality, migrants are the ones who go to smugglers and ask to be accepted and even pay in return for that, which raises the right to ask where is the attack in such a crime?

This problem, however, seems to be only linguistic because Rome statute itself defines "attack" more broadly and in a way that a smuggling operation of migrants can be considered as an attack in a legal sense – which is what important to us here – even if is not linguistically accurate.

To prove what I just said, paragraph 2 (a) defined the attack as a behavioral approach involving the repeated commission of acts referred to in paragraph (1) against any civilian population pursuant to in furtherance of a of a State or organizational policy to commit such an attack.

To illustrate what I want to say, smuggling migrants is

- 1) Involves multiple commission
- 2) an inhuman act that intentionally causes severe suffering or injury to physical or mental health and ,
- 3) is based on and in application of a specialized smuggling organization policy, so we shall, in this case, have a clear situation where all terms and conditions apply, that enable the ICC to intervene in these cases mentioned according to article 7 of the Rome Statute.

Does referral to the International Criminal Court allow the Security Council to have jurisdiction over the offense of smuggling migrants regardless of whether requirements of article 7 apply or not?

In the preceding lines, we attempted to examine the compatibility of the offense of smuggling migrants with that of Rome Sta-

tute. Here we shall try to find another way of examining the extent of the International Criminal Court's jurisdiction in considering the offense of smuggling migrants

Here we have an essential question: What if the Security Council refers to the International Criminal Court a case that does not fall within its jurisdiction?

First, article 13 of Rome Statute states that " The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

The previous text provides that referral to the ICC is either at the request of the Member State or the Prosecutor of the International Criminal Court or by the Security Council. Based on Chapter 7 of the Charter of the United Nations.

Let's return to our question,

Undoubtedly, if the Prosecutor of the Court refers or a State Party requests from the Court to consider an incident that is not within its jurisdiction, the Court shall decide not to exercise its jurisdiction, on the basis of its substantive competence, which is restricted in accordance with the above article 7.

If the referral was made by the Security Council and the Court was informed that the assignment referred to it by the Council was not within its jurisdiction, the most likely would happen that the Court would decide not to exercise its jurisdiction.



The International Criminal Court. credit : internet

However, some jurisprudence here goes to adopt another doctrine. In that point of view, if the referral was from the Security Council, the Court would not have authority to decide its jurisdiction. They argued that when the Security Council referred the matter to the Court, it did not act on the basis of Rome Statute but on the basis of the Charter of the United Nations. Since the Charter gave the Security Council the highest authority in maintaining international peace and security, it is no longer possible to rely on a convention to impede such powers the Council have. According to Article 103 of the Charter of the United Nations, In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail

Therefore, the International Criminal Court cannot decide its jurisdiction according to Rome statute if it conflicts with the charter of the United Nations.⁽⁹⁾

Conclusion:

Facing the crime of smuggling migrants cannot be effectively carried out by national judiciary alone, and that international judicial mechanisms can be more effective in confronting it.

Also, international legal philosophy can adopt an explicit obligation for international judicial institutions to clearly adopt International criminal jurisdiction to consider and adjudicate this crime, it is necessary to reinterpret texts so as to allow the international judiciary to take up the task of coping with this phenomenon as much as possible. And of course without prejudice to proper legal interpretation of texts, especially in accordance with the doctrine of potential will of legislator.

Margins

1 / Abu Ghanem, Mohammed Mahmoud Musaed, the organized crime of smuggling illegal migrates. With an applied study on the Republic of Yemen, p 14

2 / Abu Ghanem, op. Cit., P. 13

3 / paragraph 3 (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

4 / Abu Ghanem, op. Cit.

5 / for example the tribunal for the assassination of former Lebanese Prime Minister Rafik Hariri.

6 / Abdel-Azim, Amr Mossad, Criminal and security guidance for illegal immigration crimes, p.151-156

7 / Abdel-Azim, Amr Mossad, p.159-160

8 / Almadhagy Wael, Types of referral to the International Criminal Court, p. 109

For more details on the relationship between the Security Council and the International Criminal Court, see Yubi Abdullah, "The Relationship between the Security Council and the International Criminal Court."

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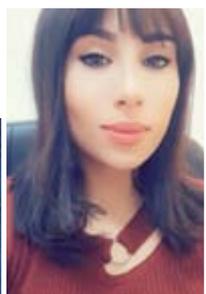
Second: Documents:

1. The Charter of the United Nations

2. Rome Statute

3. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Research paper on Tunisian legislation and Judicial systems' restraints in confronting Irregular Migration



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Judge

Migration is an old phenomenon in human history, It is affected by changes in economic , social ,and legal systems due to its direct connection to various political, social , and economic aspects.

The development of Human societies and its political and legal systems which draw the line for freedom of movement and set conditions for new-comers had its clear impact on the development of this phenomenon which is closely connected with notion of sovereignty, It went from a means of earning a living and achieving development to one of the most critical social phenomena that occupies a significant position within the challenges facing the international community.

It is no longer a phenomenon limited to certain states or societies it has become a global phenomenon that all countries suffer

from, whether developed countries or developing countries.

Although the phenomenon of irregular migration is an international phenomenon, it has been confronted by different methods that varies from one country to another. the countries I refer to here to are states of reception, which represent the destination of the migrant and the transit countries through which the migrants arrive.

it is extremely important to address national and international approaches used in confronting irregular migration as it became one of the most important issues that faces countries which consider irregular migrants as risk and crisis factors and one of the main reasons of causing instability and insecurity and spreading organized crime, drug trafficking and religious and ethnic extremism, the fact that helped justifying the use of harsh countermeasures to confront this phenomenon without giving enough attention or care to Migrants' rights which eventually weakened their legal status.

The international community has made sincere efforts to combat irregular migration through adopting series international conventions including the United Nations Convention against Transnational Organized Crime and its Protocol against the "Crime of the Smuggling of Migrants by Land, Sea and Air" which paved the way for regional and bilateral agreements made between transit and receiving countries and also between origin and receiving countries that aim to promote international cooperation to eliminate the phenomenon, this cooperation can be easily noticed in the creation of the United Nations Commission on Human Rights to the mandate of the Special Rapporteur on the Human Rights of Migrants, the commission which urged to find ways to protect the rights of migrants, but it worth to be said that achieving both protecting human rights on one hand and the host States' security seems a difficult task.

The excessive increase in migrants number as a result of successive political crises experienced by some countries led many to call for putting the irregular migrants situation into a clear legal frame through adopting international conventions that

created two types of mechanisms: on one hand mechanisms to confront the phenomenon of migration that focuses on states' security and on the other mechanisms that creates a balance between state's security and Human rights.

Nevertheless, these agreements remain of limited importance. A clear example of that is the International Convention on the Protection of the Rights of All Migrant Workers, which was concluded in 1999 and entered into force in 2003, while many countries of origin ratified it, receiving countries did not sign, although receiving countries in Europe, North America and other countries such as Japan, Australia and the Gulf States normally attracts the majority of migrant workers which made the problem of settling their situation and putting into a legal frame continuous, complicated and intricate.

Definition of irregular migration according to international perspective:

Before addressing proper means that should be used to confront irregular migration, we should determine its definition according to international statutes, the European Commission defined irregular migration as "any entry by land, sea or air into the territory of a Member State illegally by forged documents or with the assistance of organized crime networks, or by entering the European Space Area in a legal manner through the consent of the authorities to obtain Visa and then stay after the expiration of the specified period or to change the purpose of the visit and residence without the consent of the authorities"

The Global Commission on International Migration (GCIM) defined it as "passing through a country without the consent of its authorities and without having legal conditions needed to cross the border as a result for not having the necessary legal documentation"

Article 5 of the International Convention on the Protection of the Rights of All Migrant Workers defined irregular migrants as those who are non-documented or in an irregular situation which leads us to adopt the term irregular migration.

International conventions generally determine four categories of migrants

1

persons who migrate illegally without their status being settled

2

persons who migrate legally and whose term of residence is due

3

persons who are not permitted by their visas to get paid work and end up working illegally

4

persons rejected asylum-seekers who do not comply with the Geneva Convention relating to the status of refugees

The impact of migration From an international perspective led to divide it into two types of migration irregular and legitimate or legal migration in other words regular law-abiding migration, which is the type of migration that happens according to internationally substantive and procedural rules and each country's legislation requirements, the most important of which are that the migrant should hold a valid legal travel document, not to be legally barred from leaving the country for any reason, to obtain a legitimate authorization of entry to the country he wishes to migrate to, and to reside or terminate his/her stay at this country in accordance with its laws and regulations.

Based on the aforementioned, we conclude that it is the state's of origin knowledge of the citizen's movement and his destination and the approval of the receiving country what provides legitimacy to his/her migration.

• Types of migration:

In addition to regular migration, which we determined its terms,

It should be mentioned that irregular migration also has its terms and types, it is divided into two types, the first type happens when a migrant does carry legal travel documents and does not have the legal permission to enter the country of destination or the permission to departure from the State of origin and yet still enters to a state by an unauthorized way, the second type is to travel illegally according to the means previously mentioned but settle the legal status later with the authorities in accordance with the laws of the receiving State.

• Categories of migrants:

By reviewing international conventions that mentioned the legal status of migrants, we clearly don't find a unified legal system or a comprehensive preventive mechanism that aims to protect migrants, we can only find set of procedures that aim to confront the phenomena and deter who is responsible for it without establishing legal norms that is compatible with different categories of migrants, or unified standards that would help in understanding the phenomenon, and enable national legislation and judicial systems to follow them in order to figure out mechanisms to counter irregular migration.

International conventions generally determine four categories of migrants, persons who migrate illegally without their status being settled, persons who migrate legally and whose term of residence is due, persons who are not permitted by their visas to get paid work and end up working illegally, and finally rejected asylum-seekers who do not comply with the Geneva Convention relating to the status of refugees.

1- International approaches to irregular migration:

The international community sought to put the phenomenon of irregular migration into Legal Framework through recognizing migrants' human rights and through concluding international conventions, the most significant conventions of which are conventions concluded by the International Labor Organization that sought to protect migrants' rights, most notably the International Convention No. 97 of 1949, the Convention No. 143 of

1975, the Convention No. 189 concerning Decent Work for Domestic Workers.

The ILO has generally sought to protect migrants' rights as they are considered to be one of the most vulnerable categories that can be exploited, particularly through adopting the Protocol against the Smuggling of Migrants by Land, Sea and Air, which was endorsed by the United Nations General Assembly resolution 55/25 of 2000, this protecting approach was reinforced through issuing the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime to protect migrants and prevent smuggling them. The protocol considered smuggling migrants an international crime in an attempt to develop a set of guidelines similar to the ones imposed in preventing smuggling operation for organized crime groups, and also to guarantee that migrants will be treated humanely and that states would take the necessary measures and legislation to criminalize the smuggling of migrants.

While these international conventions have granted rights to migrants, they remain unable to fully guarantee their rights, as real and effective mechanisms to remedy and receiving States refuse to guarantee their basic rights.

Today, the Convention on the Protection of All Migrant Workers and Their Families is the most capable of keeping up with irregular migration's developments, on one hand it promotes the protection of their rights, and on the other hand, it determines the international standards that gives the guarantees needed for irregular migrants, it also differentiate between two main categories, migrants who hold legal documentation that allows them for a limited time residence and those who don't carry any legal documents at all.

In addition, this Convention promotes cooperation and commitment between origin, transit, and receiving states, pays the respect needed for the migrants' cultural identity and ensures migrants' human rights to eliminate any exploitation of migrants that might occur, regardless of whether their residence legal or not in the receiving countries.

In theory, it seems that international conventions have called for framing the phenomenon of irregular migration and controlling through a set of guidelines.

However, paying respect by states parties to these conventions to the guidelines doesn't always occur due to various reasons that concern the receiving states and their attempts to protect their sovereignty, stability and security, a clear example of that is the migration law issued by Italy in 1998 which is the first of its kind to set a legal system for migrants, it recognizes the procedure of refoulement and organizes detention and accommodation centers for irregular migrants.

This law also determined the duration of detention for migrants which decides their fate. However, this law was not sufficient to deter migrants. One incident occurred in October 2013 concerning the sinking of a ship carrying 300 migrants who could have been assisted by fishing vessels but they didn't as they were afraid to be punished by Italian law which criminalizes assisting irregular migrants by any means.

Despite the importance of International agreements in confronting irregular migration, they remain merely efforts that do not achieve the objective of effectively confronting this phenomenon and all its aspects or make a balance between human rights needed guarantees and confronting migration, this happens due to the absence of comprehensive strategies and long-term policies by receiving countries and origin countries as international efforts to cope with the phenomenon of migration are only reactions made to certain situations that lacks inclusiveness and to put a legal frame work for irregular migration, clear guidelines for proper means to confront this phenomenon should be established and the rights of migrants should be clearly determined and punitive rules should be appropriate and in accord with the characteristics of the case or the situation we are facing.

The basic principles needed for a comprehensive international framework have been addressed in numerous separate international conventions such as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members

of Their Families which has not been ratified by many receiving countries, and the United Nations Convention against Transnational Organized Crime 2000 and its two protocols on the prevention of human trafficking and the fight against the smuggling of migrants by land, sea and air which also has been ratified by a few countries.¹

Addressing the issue of irregular migration has taken different forms and approaches that varied according to issues and problems raised, but the main forms in which it has been addressed is as a phenomenon that is troubling the international community, as a source of dangers that may threaten the receiving countries and as a situation that deserves further attention and protection when it comes from a fundamentally human rights perspective, that last form is the main reason that not long time ago addressing the issue of migration was mainly linked to the rights of migrant workers and their families and any discrimination that might be experienced by migrant workers in reception countries, the very countries that after the world attracted migrants as Labor force, or in other words, it forced them to leave their origin countries to participate in reconstruction. This approach or point of view which was adopted by many countries in a certain historical era in order to protect migrants' rights was not pursued later as official policies have changed as the receiving countries now cope with migrants and develop complicated laws and regulations to curb migration, as migration, to them, became illegitimate and applied only on selective basis where the receiving countries seek to attract skillful talented individuals and set limits and obstacles to other large groups that they once before considered them to be a useful mean for business and development, but became later a risk and crime factor that pose a threat to their stability and security.

1 - The United Nations Convention against Transnational Organized Crime (UNTOC) is a 2000 United Nations-sponsored multilateral treaty against transnational organized crime, and its two protocols the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime is considered to be one of the most important conventions that was concerned with crime and migration, it was adopted by a resolution of the United Nations General Assembly on 2000 and have been opened for signature by December 2002.

In this sense, irregular migration has become a concern for receiving countries, which seek to establish security policies of a discriminatory nature but the international community has adopted a different perspective through concluding several international and regional conventions that aims to curb this phenomenon instead of imposing the needed guarantees to protect migrants, and despite their effort in applying that perspective they have been unable to control this phenomenon, which has been stated as a crime in the penal law of many receiving, transit and origin states.

Due to pressures imposed by receiving countries, especially European countries as they are the main destination for irregular African migrants and migrants' tragic situation, African countries were forced to take necessary measures to counter irregular migration and conclude several bilateral conventions that included several deterrent and punitive measures that excludes human rights protection, it can be said that these are purely security measures that relates to border detention and the removal of irregular migrants from the territory of the receiving states.

The United Nations has defined irregular migration as "the unformalized entry of an individual from one State to another by land, air or sea ... This entry does not carry any form of permanent or temporary residence permits, nor does it respect the necessary requirements to cross the borders of the State"

From this perspective, there is a clear difference between human trafficking and smuggling as the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime, defines the smuggling of migrants according to the following elements: arranging illegitimate entry of a person into a State Party of which that person is not a national or permanent resident.

Smuggling of migrants and human trafficking are both international criminal offenses, therefore, it is necessary to distinguish between both of them to determine and clarify all aspects related to them, while the act of smuggling involves the transfer of individuals from one State to another for profit, human trafficking is criminalized including two additional elements that go beyond

the scope of smuggling, it must involve crooked means such as coercion or abduction for the purpose of exploitation regardless of whether or not exploitation has taken place or occurred, it is crucial to differentiate between means used to commit both crimes, in human trafficking cases the means used are usually threats of force, use of force, any form of coercion, abduction, fraud, abuse of power, social abuse or abuse of a vulnerable situation, or through paying an amount of money. As for irregular migration it happens according to the person's consent where he/she contacts smugglers to help him achieve his objective, In addition to that , the two offenses differ in purpose, human trafficking usually includes sexual exploitation, slavery or sale of organs and similar practices, on the contrary, irregular migration is the crime in which smugglers seek personal benefit that may be financial, of a materialistic nature or otherwise, and any exploitation ends as soon as the migrants reach their destination where they become free.

The two offenses differ in terms of requiring the consent of the victim. In human trafficking, the victim consent is not required, even if they gave their consent at first under any circumstances, such consent is meaningless when we analyze traffickers' acts that are usually coercive or deceptive, on the other hand, migrants are fully aware of all the circumstances that surrounds smuggling them, which are generally considered offensive and dangerous, yet they agree to being smuggled with their free will.

In this context, the United Nations Office on Drugs and Crime (UNODC), which plays an important role in addressing irregular migration and its consequences, has produced its model Law against the Smuggling of Migrants in response to the request by the General Assembly to promote and assist the efforts of Member States² to become party to and implement the United Nations Convention against Transnational Organized Crime and the Protocols thereto, for achieving that article one identified the purposes of this Law which are to prevent and combat the smuggling of migrants; to promote and facilitate national and international cooperation in order to meet these objectives; and

² - Legislative guides for the implementation of the United Nations convention against transnational crime and the protocol there to, 2004

to protect the rights of smuggled migrants.

In order to confront irregular migration and its tragic effects, International Organization for Migration (IOM) adopted several mechanisms that aims to improve migrants' conditions and supporting strategies and policies against the smuggling of migrants as it has negative effects on many countries around the world, through regional and international coordination and cooperation between all relevant authorities and agencies Border security, in order to control border management systems.³

2 - Tunisian legislation Approach for irregular migration:

National legislation on irregular migration differ from one country to another depending on objectives, policies adopted, political, social and economic situation of these countries.

In this sense, the main purpose of irregular migration law-making for North Africa Maghreb countries was to confront it, criminalize it and penalize who ever commits it or associates in committing it, a clear example of that is Tunisian legislation, specifically Act No. 2004-6 of 3 February 2004 that amends and supplements Law No. 75-40 of 14 May 1975 concerning passports and travel documents, this act stated many penalties that relates to migration and range from a 3-year prison sentence to a 20-year prison sentence without paying adequate attention to the rights or protection of migrants and excluding approaches that adopts theories of "the victim migrant" and adopting instead approaches that are mainly based on deterrence and punishment which are the legal mechanisms that are in line with procedures taken by some European countries, specially, Italy which is one of the countries of reception for Tunisian migrants as the and the most affected European country by this phenomenon, where its southern coasts have become a destination for huge numbers of illegal migrants, all that led Italy to issue a migration law in 1998, which introduced for the first time a legal system for irregular migration that controls entry procedures for the Italian territory and manages renewal of residence permits

3 - See also: Collenthouez, Migration and Human-Security, Paper Submitted to the international Migration Berlin Programme for the Consolutions International Migration, Berlin, 12-22 October, 2002.

procedures for foreigners. The law adopted four mechanisms: re-programming migration policies, foreigners' entry to Italy and the means of residence therein, reorganizing procedures for granting residence, the activation of t forcible refoulement for irregular migrants and establishing detention and accommodation centers for migrants. The law determines the legal limit for detention of migrants by 30 days, after which their fate is determined in several ways, either to work in Italy or to be deported to their countries of origin, or to be tried if they have committed acts punishable by law while they were in Italy.

Despite the negative nature of these measures, they were insufficient to deter this dangerous phenomenon that threatens Italy, especially after the great increase of migrants numbers over time, that paved the way for issuing another migration law in 2002 known as "Law No. 189 or the law of Bossi Fini," this law included procedures that penalize with imprisonment and expulsion , for example article 13 stated that "a foreigner who was ordered to be expelled but remains on the territory of the state shall be arrested, tried and imprisoned from one to four years".

Not only did this law included penal sanctions but also regulated procedures for expelling irregular migrants and escorting them to borders as a way of helping migrants, they should also assist him when needed through helping him obtain travel documents and carrying out investigations, and in case of absence of any appropriate means of transport to escort him/her to his country of origin's borders, authorities shall detain him at temporary accommodation centers from 30 days to 60 days, and at the end of this extended period stated in chapter 14 of the law and if the deportation decision can not be carried out another final decision that states penal consequences for violating it shall be issued to deport the migrant within five days, In addition, Italian law stated a new penalty for migrant who reside without a residence permit regardless of whether their entry was legal or not, as the law considers them to be in an illegal situation to be subject to deportation.

Tunisian legislation was not free from fears related to irregular migration, but the issue was considered to be one of the most

significant national challenges that needs to be confronted specially through criminalization and imposing various penal sanctions that varies according to the nature of the crime committed, in fact, it is not different from legislation adopted in several other countries, the most important of which is Egypt, where it adopted the same legislative process and relatively different penal sanctions and stipulated 21 penalties for crimes related to irregular migration. The law included in the second chapter "Crimes and Penalties" It included clear definitions for crimes and determined punishments, as article 5 of this Act, states that " The penalty of imprisonment shall befall each person establishing, organizing, or managing an organized criminal group for the purposes of smuggling migrants, or assuming any leading role in such groups, or being a member of such groups or associated thereto" in addition it the law also stated that " The penalty of imprisonment and a fine of no less than fifty thousand pounds and no more two hundred thousand pounds, or a fine equivalent to the achieved profits, whichever is greater, shall befall each person who commits, attempts or mediates in the crime of smuggling migrants. The penalty of aggravated imprisonment and a fine between two hundred thousand pounds and five hundred thousand pounds or a fine equal to the value of the achieved profit, whichever is greater, shall apply in the following cases, If the criminal established, organized, or managed an organized criminal group for the purposes of smuggling migrants, or assumed command therein, or was a member thereof or joined it, If the offence had a transnational character, If the offence was committed by several criminals or by a person carrying a weapon, If the criminal was a public official or assigned to a public service and committed the offence by abusing his position or the public service, If the offence might threaten the life of the smuggled migrants or compromise their well-being or is considered inhumane or degrading treatment, If the smuggled migrant was a woman, a child, an incompetent person or a person with a disability, If a forged travel or identity document was used to commit the offence, or if a travel or identity document was used by someone other than its legal holder, If a vessel was used to commit the offence in violation of its proper purpose or its defined routes"

Unlike the Egyptian legislator, the Tunisian legislator was more

the Law on Passports and Travel Documents of 2004 stated in Chapter 38 that **"whoever plots, facilitates, assists, mediates or arranges by any means, even if it is free of charge, the entry of a person to Tunisian territory or his departure by stealth whether by land, sea or air, through crossing points shall be imprisoned three years and fined 8,000 dinars and even conspiracy and attempts are due to punishments "**

in favor of using harsh punitive penalties for irregular migrants, ranging from 4 to 20 years as the Law on Passports and Travel Documents of 2004 stated in Chapter 38 that "whoever plots, facilitates, assists, mediates or arranges by any means, even if it is free of charge, the entry of a person to Tunisian territory or his departure by stealth whether by land, sea or air, through crossing points shall be imprisoned three years and fined 8,000 dinars and even conspiracy and attempts are due to punishments" penalties also included those who host migrants as the law stated that "whoever hosts migrants that enter to or depart from Tunisian territory by stealth or hosts perpetrators who committed crimes that was previously stated in that chapter, prepare a place as a shelter for them, hide them or work to ensure their escape, lack of detection or non-punishment shall be imprisoned four years and fined 10,000 dinars and whoever provides any means of transport of any kind for the purpose of committing the crimes set forth in this section or to assist in committing them, shall be punished with the same punishment "

It should be said also, that the Tunisian legislator treated smugglers of migrants who assist any person to enter Tunisian territory equally to those who assist in their departure outside Tunisia as both are punished by five years imprisonment and a fine of 12,000 dinars for their deliberate transfer of a person or persons inside or outside Tunisian territory by stealth whatever was the means they used to achieve that .

Not only did the Tunisian legislator penalize migrants and those who are responsible for hosting and sheltering them, but also penalized those who "participated in an agreement or established an organization that aims to prepare,

manage, cooperate with or assist in any way whether it is inside or outside the country, and agreements and organizing are obtained between two or more persons through consent and intending to commit the aforementioned actions previous chapters” . The legislator also emphasized penalties for a certain category provided for in the Chapter 43 of the Passports and Travel Documents Act where the punishment shall be by imprisonment for a period of twelve years and a fine of forty thousand dinars if the aforementioned crimes are committed: “By those who have been entrusted with guarding or controlling borders or crossing points or ports, directly or indirectly, or who monitor them, and Internal Security Forces or members of the military forces or agents who have taken advantage of power given to them of his or her job or work against a child or abusing him/her.

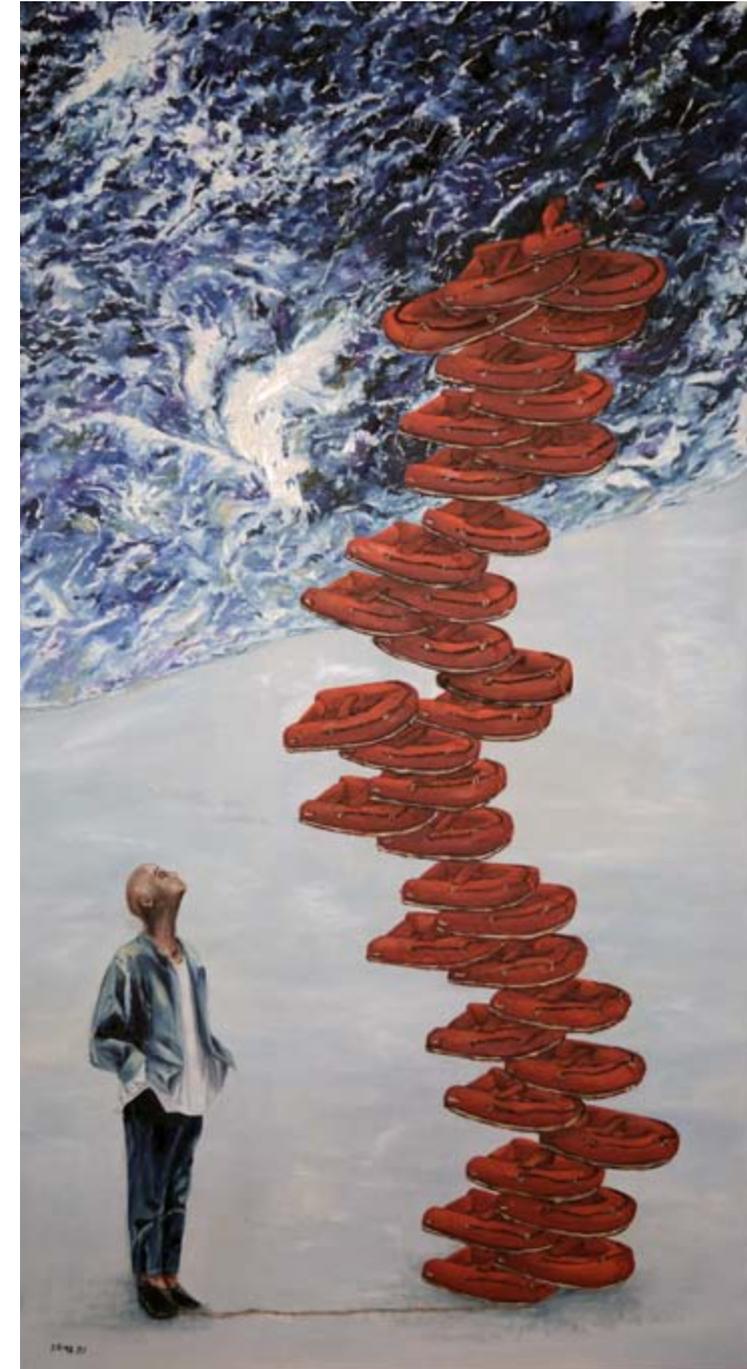
Despite the importance of these sanctions in deterring migrants from migrating illegal to escape the social, political or economic conditions in which their countries live, they do not fully deter migrants and are ineffective and unable to confront this phenomenon due to penal sanctions adopted by the countries of origin and security policies adopted by the host countries which only aggravate the situation. The current situation has shown the need to establish long-term international strategies to confront migration and to provide the necessary guarantees for the rights of migrants, who are often considered victims of a particular political or social situation.

Finally, we must note that international organizations, despite their numerous attempts to find ways of framing the phenomenon, have been unable to give a clear unified definition for migration, or to give accurate statistics on the number of migrants or a clear criteria to determine the effectiveness of measures taken by receiving countries in facing irregular migration and the absence of ways to reduce this phenomenon.

Confronting irregular migration and achieving efficiency in dealing with its effects requires continuous cooperation between the receiving countries, which are mostly the countries of the North, and the countries of the South that export irregular migration.

This cooperation should address the causes and motives rela-

ted to the phenomenon of irregular migration objectively, the most important of which are economic motives and political crises which most Arab countries are experiencing today.





interview with

Ramdan Ben Omar

Irregular migration officer
at The Tunisian Forum for
Economic and Social Rights

Has the irregular migration phenomenon aggravated following the changes in the Arab region?

Irregular migration is not a new phenomenon, in other words it existed before the developments that had taken place in the region between 2010 – 2011, the latent motives behind it already existed before the revolution, but the post-revolution period may have provided objective circumstances and security conditions that paved the way for large waves of migration in the region.

As for Tunisia, these waves have already existed since 2000, But the ruling political system was naturally used to obscure information, especially that at this time the system was bragging about its economic successes, but these successes were impugned by the social crisis which is one of its reflections is irregular migration, therefore, the motives for this phenomenon existed before the revolution but it was further deepened by the security, economic and social conditions resulting from the

situation after the Arab uprisings, as the economic trajectories didn't significantly change and the revolution has produced new economic and social pressures.

After 2011, the speech in Tunisia focused on the young generation and their problems, but the youth were fully aware that the economic change will be delayed, which led to a big migration wave between 2011 and 2012 where more than 35,000 Tunisians arrived to the Italian coast. The Ministry of Foreign Affairs recognizes only 22,000, but we estimate that the real number is much higher, as official numbers are usually based on migrants who arrive to Italian coasts through official Italian or international authorities, but we know that many Tunisians succeed in reaching Italy without passing through these official gates.

We made a study in 2016 about the desire of young Tunisians to emigrate, and the ratio of young Tunisians that wanted to migrate was around 35% before the revolution, During the revolution between 2011 and 2012 the number was reduced to 31%, This period was characterized by freedom especially freedom of expression, the right to assemble and freedom of association, and the political speech focused on responding to the youth's demands, all that was considered an opportunity for better future, but in contrast there is another part of the youth was seeing that the transition will be delayed.

What are the most important characteristics of social categories that resort to irregular migration?

The irregular migrant characteristics has gradually developed. Today, we find among irregular immigrants those who are unemployed and have high degrees or those who are in a vulnerable employment position. There is also a small percentage of women, that wasn't the case before, but it changed after the revolution, this percentage is between 3 and 5%, and it is possible to have families as irregular migration became a family project.

There is a social class that has maintained its existence among migrants, It is the category of unemployed and marginalized folks and there is a new category that joined them lately those

who are highly educated. In some situations, we find families as well as some who has a vulnerable employment position and work but their job does not achieve their aspirations.

This is what represents a change in irregular migrants' characteristics

These social protests and the change in the factors driving migration after the revolution have an indirect relationship to irregular migration, There were very pressing social demands, which led to the intensification of the protests in Tunisia. Since 2014 and Tunisia witnesses many protests, according to the Tunisian Forum for Economic and Social Rights, between 4900 to 10,000 social protest in 2010 occurred, These protests have an indirect relationship to the issue of irregular migration as successive governments did not handle or respond positively to the demands of protesters after the revolution and it establish any channels of dialogue or communicate with them, despite the fact that the right to work was not the only requirement there were many others, Such as the right to health, the right to education, the right to local and regional development and the right to water and sanitation but the role of the State had a setback in several aspects leading to give a greater motivation for those who want to migrate.

The state dealt with social protests as a matter of security. Protesters were subjected to repression, prosecutions and referral to courts, especially in interior affairs, which led to irregular migration.

There is another phenomenon became widely spread after the revolution, the phenomenon of school dropout, No body was talking about it until official reports were issued in 2013 there were 100,00 drop outs annually, no body know what is their fate.

The Tunisian Forum examined the phenomenon of school dropout in 2014, according to the study, more than half of the dropouts are attracted by networks of irregular migration in addition to similar trade networks, smuggling and even radical groups.

Each year, there are around 100,000 are added to numbers of unemployed, Ministry of Vocational Training and Employment employs about 27,000 people, this is its full capacity and it can't take on any more , so around 70,000 are left for these phenomena. One of the important factors also is the general political climate and the state of frustration in the country, as the political speech is limiting the concept of democratic transition to elections only and marginalized economic and social aspects despite their importance, we have been participating since the end of 2015 in a path that got along with the International Monetary Fund and forced the government to take several measures especially freezing hiring in public office for youth and other actions that contributed to further gestation and persistence of the crises., There has also been a loss of confidence among young people in civil and political activities. We have conducted a study showing that only between 2 and 3% of young people have civil or political activity, and even those who engage in civil and political activities are marginalized as they only play logistic and tactical roles, therefore, it appears to be a process of systematic exclusion of young people from civil and political life.

The role of the state in social services has also a major setback as there are problems in basic sectors in Tunisia in health, education and transport, in everything related to Tunisians' life, in addition to the security concern associated with violence and crime not only terrorism but even in working-class neighborhoods, In addition to all that, the image of the state has not changed it still represents the repressive system and there are still clashes between youth and security officers at police stations and security centers in these areas, the repressive image of the state still exists.

The revolution was based upon socio-economic disparities between a lucky part of the nation and an unlucky part , and these differences have their reflections even within the regions that we consider fortunate, as the working-class neighborhoods and poverty belts surrounding large cities and coastal cities complain of the same marginalization and disparities that the interior regions complain about.

Economic and social policies have not changed for 8 years, and the official ratios of poverty and unemployment rates and the re-

gional development index show that public services have fallen. Therefore, those who work in small jobs are considered to be vulnerable and in a situation of insecurity and instability and their small jobs usually become a source of funding for irregular migration in an attempt to change their reality. This is also what we see in organized migration, we see thousands of doctors, lawyers, academics and engineers choosing to migrate despite the possibility of living with their salary. It is not only about material and economic matters, but about insecurity and mistrust in the future.

Has the tightening of migration policies in Europe contributed to the growing phenomenon of irregular migration?

After the rise of anti-immigrant political speech and the rise of US President Donald Trump to power in the United States, right-wing anti-immigrant policies have become more aggressive, these policies have reached its peak stages, that was clear in dealing with the crisis of migrants in Greece and Turkey, especially policies related to Syrian migrants. In the Mediterranean, These policies was applied by harassing humanitarian rescue vessels which plays an important role in rescuing migrants and giving them humanitarian aid as well as changing the image known about the Mediterranean Sea as the largest graveyard in the world.

Harassments to organizations working in the Mediterranean was made so they would give up and withdraw, they even criminalize activists' acts to curtail their work, There are numerous on-going prosecutions against many of them, especially in Italy. The result is that these organizations withdrew from humanitarian work.

These policies coincided with other Libyan policies as the European governments made a series of agreements with Libyan militias to close the migration route through Libya.

These militias used to consider irregular migration to be their source of funding until another party have come and have given them greater funding with other undeclared agreements in order to close that route. Restrictions on migration by sea have increased after the withdrawal of humanitarian organizations five

times according to the International Organization for Migration.

The European option is clear and it has not changed, and it is the closure of the borders, but the European consider that their borders start from the coast of Tunisia and the Libyan coasts.

The European Union did not succeed in imposing landing platforms in North Africa, but they tried to develop this idea so they made a receipt and accommodation center in Libya, and forced Tunisia to cooperate in border control, Four-wheel drive vehicles were given by Italy to monitor the border. They seek to leave all the problems for transit or host States to bear alone.

The EU also calls on Tunisia to cooperate on the issue of the deporting migrants. In 2017 there are 2,000 Tunisians deported from Italy and forcibly returned to Tunisia without guaranteeing their human rights. Without any social, psychological or economic care, those folks would be an easy target for any group.

What are the possible measures that should regulate the phenomenon of migration, which is considered a humanitarian phenomenon?

Migration won't stop, it is represents a human right which is the right to freedom of movement, but irregular migration cannot be viewed as a humanitarian crisis only. It is a political crisis, a crisis of international policy and national policy that accomplices with it, therefore, any approach to remedy the situation and combat irregular migration should be comprehensive.

Although the humanitarian and human rights approach is Important but it is not sufficient to deal with irregular migration, it must coincide with a political and developmental approach.

Libyan legislation and the judicial systems' limits and restraints In fighting irregular migration



Dr. Amheidi Mohammed Amheidi
Chief judge of Ajdabiya's Primary Court

Introduction

Irregular migration is one of the most serious phenomena experienced by both developed and developing countries, because they are linked to many political, economic and social aspects. Bad political and economic conditions push individuals to migrate from developing to developed countries, many countries find a threat in these migrations to their economic, social, political and security interests.¹

Because of the southern Mediterranean countries geographical proximity to Europe, they are targeted by secret immigration networks either through the migration of citizens of sub-Saharan countries or helping citizens to migrate to other countries, so they

1 - «Combating the Crime of Smuggling of Migrants in Algerian Penal Code», Journal of Jurisdiction, the Effect of Jurisdiction on Legislation Movements periodical in Faculty of Law and Political Science, Mohammed Khudair University, Biskra, Algeria, p. 8, p. 86.

became a passage and a destination for many irregular migrants.²

Libya, like other southern Mediterranean countries, has experienced unprecedented growth in irregular migration during the last two decades. The number of migrants who arrived in Italy via Libyan shores during the period from 1 January 2016 to 22 October 2016 is (168,542), it is known that (4,164) died at sea.³ Libya's vast borders and fragile authority have made it both a transit and a destination country, threatening stability and social peace at the national and regional levels.

As a response the Libyan legislator has taken several legal measures through criminalization and punishing who ever commits a related crime, he issued Law No. (6) of 1987 on regulation of entry and residence for foreigners in Libya and their departure from them, and Law No. (19) of 2010 on combating illegal migration.

The issue that this paper discusses is how the Libyan legislator dealt with the phenomenon of irregular migration, and what means and measures he adopted to limit, block and punish the perpetrators? What are the limits of and restraints the judicial system to combat this phenomenon?

We will try to answer this problem through three paragraphs. First, I will examine the legislative mechanisms to combat irregular migration, the second is the executive mechanisms to combat irregular migration, while the third is the limits and restraints of judicial systems to combat this phenomenon.

First paragraph

Legislative mechanisms to combat irregular migration

Since the Penal Code does not contain provisions dealing with the phenomenon of irregular migration, and in view of the growing nature of this phenomenon, the legislator had to intervene to over-

2 - Bakhoyadris, «Ways to Combat Illegal Immigration in Algeria», The Academic Journal of Legal Research, Specialized Jurisdiction Journal issued by Faculty of Law and Political Science, University of Abderrahmane Meira, 6, vol. 11, p. 1/2015, p. 159 et seq.

3 - See: Report of the United Nations Support Mission in Libya on Human Rights Violations against Migrants in Libya, December 13, 2016, entitled «deprived of their humanity», p. 2

come these shortcomings in order to confront this serious phenomenon. Law No. 6 of 1987 regulating the entry, residence and departure for foreigners in Libya, which replaced Law No. (17) for the year 1962 (first), followed by Law No. (19) of 2010 on Combating Illegal migration.

First: Law No. (6) of 1987 regarding the regulation of entry, residence and departure for foreigners in Libya:

This law determined the required conditions for entry, residence and movement of foreigners in Libya as the law regulated their entry and residence if they have a passport, travel document and valid entry, transit or residence permit.

On the other hand, this law criminalizes entering and staying in Libya irregularly, however, this law does not distinguish between migrants, refugees, asylum seekers, victims of human trafficking, vulnerable categories of migrants, child migrants, or others migrants who are in need of international protection of their human rights.⁴

Law No. (6) for the year 1987 was amended by Law No. 2 of 2004 to tighten conditions for granting of entry visas. The amendment stipulated that all persons who are not citizens except for some Arab countries must obtain a valid visa to enter the country. It also aggravated sentences and for the first time, the term smuggling of migrants was introduced and the offense of smuggling of migrants was punishable by a minimum of one year's imprisonment and a fine of not less than 1,000 dinars.⁵ Law No. 6 also regulates the deportation of non-citizens to their countries.

This law criminalized entry and exit from Libyan lands from places other than the designated ⁶without a passport or a travel

4 - In 2013, the Ministry of Justice prepared a draft law on human trafficking providing for the protection of victims of human trafficking. However, this law has not yet been issued.

5 - According to article 19 paragraph (a) of Law No. (6) for the year 1987 on the regulation of the entry and residence of foreigners in Libya and amended by Law No. (2) for the year 2004 mentioned above.

6 - Article (1) of the General People's Committee Decision No. (247) for the year 1989 concerning the Executive Regulation of Law No. (6) of 1987 regulating entry, residence



Irregular migration in Libya : credit: New York Times

document, and decided to punish them by detaining them for a period not exceeding three months and paying a fine that does not exceed one hundred dinars or one of these penalties.

Second: Law No. (19) of 2010 on Combating Illegal migration ⁽⁷⁾:

It should be noted that Law No. (6) of 1987 regulating entry, and departure for foreigners in Libya, as amended by the General People's Committee Decision No. 89 of 1997 concerning entering and exiting Libya, «entry into or exit from Arab Libyan territory shall be from the following ports:

A - Land ports: Ras al-Jadir - Amsad - Ghadames - Isin - Ghat - Waiyg - Qattaroun - Alawainat - Kufra - Waazn - Abu Mazidbawadi Mardi - Al Sara in the province of Sanayeh (Sabta).

B - Civil Aviation Airports: Tripoli International Airport - Penina International Airport - Sabha International Airport.

C - Maritime Ports: Tripoli Maritime Port - Benghazi Maritime Port - Qasr Ahmed Port in Misratah - Tabruk Maritime Port - Darna Maritime Port - Zouara Marine Port - Al Khamis Maritime Port.

D - Oil Ports: Ras Lanuf oil port - Oil Zaytina port - Porta oil port - Port of the oil vessel - Sidra oil port.

residence and departure for foreigners in Libya is a supplement to Law No. (19) of 2010 on combating illegal migration in case there is no contradiction between both.

The Libyan legislator issued Law No. (19) of 2010 on Combating Illegal migration to criminalize and combat irregular migration, it was the first independent legislative action to deal with this dangerous phenomenon.

The legislator cited several provisions to criminalize irregular migration and related acts as well as the penalties prescribed in cases of such offenses, as follows:

1. The crime of entering Libyan territory, residing there without permission, or a permit from the competent authorities for the purpose of settling there, or crossing borders to another country: Article 1 of this law provides the status of illegal migrants to anyone who enters Libya, without permission, or a declaration from the competent authorities to settle in, or to transit to another State. And the penalty for that crime is imprisonment, or a fine not exceeding one thousand dinars (m 1 and 6).
2. The crime of introducing, removing, transporting, facilitating the transfer, harboring or hiding illegal migrants into the country, concealing any information about them, preparing, providing or possessing false travel documents to them: The Libyan legislator tried to tighten the penalties for those acts with imprisonment for a period not exceeding one year and a fine of not less than five thousand dinars and not more than ten thousand dinars (4/1).
3. The crime of belonging to an organization for smuggling migrants: its penalty is imprisonment for a term not less than five years and a fine not less than fifteen thousand dinars and not more than thirty thousand dinars.
4. The crime of employing illegal migrants: Article (3) of the law punishes anyone who employs an illegal migrant with a fine of not less than one thousand dinars and not more than three thousand dinars. The penalty shall be doubled if the offender is entrusted with guarding, supervising, or controlling

the ports, crossing points, or boundaries, or monitoring them (A4 / 2). The penalty shall be imprisonment and a fine of not less than twenty thousand dinars and not more than fifty thousand dinars, if the result of the transfer of illegal immigrants to the inside or abroad is permanent disability, and the penalty shall be life imprisonment if the act results in death.

5. The crime of not reporting illegal migration offenses: A penalty of not less than one year and a fine of not less than one thousand dinars and not more than five thousand dinar to any person who deliberately refrains from taking legal action in the offenses stipulated in the law against illegal migration as soon as he is informed about it or is informed of it by virtue of his job. If the act is committed as a result of negligence, the penalty is a fine of not less than five hundred dinars and not more than five thousand dinars (m 7).

6. Forfeiture: The court shall confiscate the amounts collected from the crime. It shall also confiscate objects, means of transport, or tools used or intended for use in committing illegal migration offenses, unless signs of good gestures third parties is proved.

7. Exemption from Punishment: The law exempts anyone who has informed the competent authorities of information that enables to know about the crime prior to its execution, or led to the reduction of its effects, the detection of the perpetrators or their arrest (p. 8).

8. Expulsion: According to article 6 of the law, a foreigner sentenced to one of the crimes stipulated in the law of illegal migration must be deported from the territory of Libya once he has executed the sentence. Although the Libyan legislature has omitted the status of some special cases of illegal migrants who prove that they cannot return home for fear of their lives. Moreover, the Libyan legislator in the law against illegal immigration did not guarantee the deportee the right to challenge the decision to deport, contrary to the Algerian legislator who authorized the appeal to the Minister of Interior's decision to deport from Algerian territory by a case brought before the Administrative Court in (5) days from the date of notification of this decision. In this case, due to the sensitivity of the proce-

dure and its gravity, the emergency judge should adjudicate the case no later than (20) days from the date of the case's registration.⁷

9. Legal guarantees for Illegal migrants: The law provides that migrants should be treated in a humane manner that preserves their dignity and rights and does not abuse their money and property at the time of their arrest (Article 10) However, reports of human rights organizations indicate that there are many violations of migrants' rights In detention centers in Libya, such as arbitrary and inhuman conditions of detention, torture, forced labor, sexual violence and ill-treatment.⁸

It should be noted that Libya has ratified a number of complementary conventions and protocols in the area of combating organized crime and smuggling of migrants⁹, as follows:

(A) United Nations Convention for the Suppression of Transnational Organized Crime New York 15 November 2000: Adopted by the United Nations General Assembly Resolution No. 25 at the 55th session on 15 November 2000, signed by Libya on 13 November 2001 and ratified on 18 June 2004.

(B) Protocol against the Smuggling of Migrants by Sea, Land and Air supplementing the Convention on the Suppression of Transnational Organized Crime - New York 15 November 2000: Adopted by General Assembly resolution 25, 55th session. It was signed by Libya on 13 November 2001 and ratified on 24 September 2004.

(C) Human trafficking: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention

7 - In accordance with the third and fourth paragraph of Article (31) of Law No. 11 of 2008 of 25 June 2008 concerning the conditions of entry, residence and movement of foreigners to Algeria.

8 - Report of the United Nations Support Mission in Libya on Human Rights Violations against Migrants in Libya, 13 December 2016, referred to above.

9 - Muhannad Abdul Razek al-Mortadi al-Obeidi, International Agreements in United Nations Framework (its current situation and the Libyan position thereon), Tripoli: Tripoli World Scientific Library, 1, 2009, pp. 179-180.

against Transnational Organized Crime, New York 15 November 2000: Adopted by General Assembly resolution 25, 55th Session. Signed by Libya on 13/11/2001 and ratified on 24/9/2004

Criminal responsibility of migrants:

According to article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, migrants are not subject to criminal prosecution, as they are a target for the conduct stipulated in article 6 of this Protocol.

But the Libyan legislator has recognized the criminal responsibility of the illegal migrants. Article (6) of the law on combating Illegal migration provides for imprisonment, and a fine of not more than 1000 dinars and expulsion from Libyan territory. Which led some to call for amending the law in line with Article 5 of the Protocol against the Smuggling of Migrants.

Although the Supreme Court has confirmed on the occasion of its ruling in Constitutional Appeal No. 1/57 on its meeting held on 23/12/2013, that the international conventions to which the Libyan state is linked shall be effective immediately upon completion of ratification procedures by the legislative authority of the State. It is even more powerful than domestic legislation that if there were any contradiction between both, the international convention's rule shall be applied, without the need to amend any domestic legislation that might contradict with them.

It appears that many misdemeanors and infractions circuits at Subordinate Courts did not apply the rule mentioned in the law that criminalize and penalize irregular migrants in Law No. (19) of 2010, by neglecting it for being in contradiction with Article 5 of the Protocol against the Smuggling of Migrants Of the United Nations Convention against Transnational Organized Crime, which exempts migrants from prosecution as they are considered victims and not criminals.

Second paragraph

Regulatory mechanisms to combat irregular migration

The Ministry of the Interior (formerly the Secretariat of the People's Committee for Public Security), as set forth in Law No. (19) of 2010, is responsible for arresting irregular migration offenders, seizing the funds gained from the crime and means of transport used in smuggling, and transferring arrested criminals to judicial authorities. And monitoring borders through several agencies, departments and central departments that are headed by the Immigration Control Authority and the Passport and Nationality Authority, which review their duties as follows:

First: The Anti-Illegal Immigration Authority:¹⁰

10 - The Anti-Illegal Immigration Authority is concerned with the following:

- 1 - Study and develop strategic plans that will reduce the phenomenon of illegal immigration in Libya.
2. The seizure, placement and follow-up of illegal migrants in Libya and the completion of deportation procedures to their countries of origin.
3. Conduct investigations into the smuggling of persons, infiltrators through the Sahara and border areas and take all legal measures against them.
4. Direct supervision of the anti-infiltration and smuggling centers and the border crossing points, preparing a detailed statement and forwarding it to the competent authorities.
- 5 - Document the data on infiltrators and smugglers and those whose visas have expired and whose residence in the country are determined in a manner contrary to the law.
- 6 - To serve centers that combat infiltration and smuggling and to harbor what is referred to them from the competent authorities who are in the country in ways contrary to the legislation governing residence and work.
7. make forms, cards and the questionnaire information for smugglers, infiltrators and persons with disabilities who are caught in cases of illegal migration, trafficking human beings and organized crime, and unloading and analyzing them for reference when necessary.
8. Preparation of an annual training plan to train local and international staff.
9. Coordination with regional and international security agencies to combat organized crime

The Anti-Illegal Immigration Authority was established by Council of Ministers Decision No. 386 on 4 June 2014. Its headquarters is located in Tripoli and has several branches in the rest regions of the country. It is affiliated by Ministry of the Interior, but has legal personality, independent financial autonomy and its own executive power .

Second: Passports and Nationality Department:

The Department of Passports and Nationality was established in 1951 after Libya's independence, it passed through several stages of change and development, most recently in 2008 when the General Administration of Passports became the Passport and Nationality Authority pursuant to the Council of Ministers Decision No. 314 of 2008, headquartered in Tripoli. It enjoys its own legal personality and has an independent financial autonomy in all Libyan cities. The Department undertakes the following tasks:

1. Issuing and granting passports and national cards and organizing access to them.
2. Control the movement of entry and exit to Libya through the approved ports.
3. Issuing approvals for granting visas for entry and passage to foreigners through consulates.

The department follows several departments that have a direct relationship with the fight against irregular migration, mainly the Department of Passport Investigates, conducts research, and arresting violators of the laws governing entry, exit and residence in Libyan territory, administrating ports that examine passports within official borders, sea ports and airports, as well as administrating the Office of Foreign Affairs and branches of the Passport Authority deployed in various Libyan cities.

In addition, there are other frameworks concerned with migration, including the Ministry of Labor and Rehabilitation, which oversees enumeration of expatriate workers in various institutions in public and private sectors. The Ministry of Health also grants health certificates, which are a prerequisite for obtaining

residence or working in the public sector.¹¹

Third paragraph

Libyan judicial system's limits and restraints in the fight against irregular migration

First we would like to mention that the Libyan legislator, in light of irregular migration serious economic, social, political and security implications, he sought to establish partial courts and prosecution for illegal migration crimes. They were established by the Supreme Judicial Council Decision No. (10) for the year 2006 for establishing courts and prosecutions to combat illegal migration. In its first article, the decision stipulates that within the jurisdiction of each primary court, a partial court shall be established to combat illegal migration, which shall be competent to hear criminal cases relating to the offenses set forth in Law No. (6) of 1987 on the regulation of entry residence and departure for foreigners in Libya, While the second article of the same resolution provides for the establishment of a partial prosecution within the jurisdiction of each court case concerned with investigating criminal cases and crimes in violation of the provisions of Law No. (6) of 1987 which we referred to.

The Supreme Council of Judicial Authorities also issued Decree No. (62) for the year 2010 to establish a specialized court and two subdivisions. Article (3) of this decree stipulates that "a partial court shall be established within the jurisdiction of North Tripoli primary court, called the Anti-Illegal Immigration Court, which shall be competent to adjudicate the cases of misdemeanors stipulated in Law No. (19) of 2010 related to illegal migration, within the limits of jurisdiction of Suwani courts and the north, south and east of Tripoli Primary court», while Article 4 of the same decision stipulated that a partial prosecution section is to be established to combat illegal migration within the jurisdiction of the court referred to prosecute criminals, file cases and investigate the crimes stipulated in Law No. (19) for the year

11 - Dr. Yassin Mahmoud Al-Najaj, «Legal and Regulatory Frameworks for Combating Illegal Migration in Libya», Libyan Affairs Magazine, an independent quarterly journal on studies on contemporary Libya, 1 July 2016, pp. 30-33.

2010.

However, these specialized courts were not activated up till now and we do not know what the reasons behind that non-activation. However irregular migration jurisdiction remains a difficult question. According to Article 4 of the Libyan Penal Code, which stipulates that "the provisions of this law shall apply to any Libyan or foreigner who commits in Libyan territory, one of the offenses set forth therein". This principle means that the Penal Code applies to any crime within the national territory regardless of the nationality of the perpetrator or the victim, the same concept can be found in article 5 which stipulates that anyone who commits outside the country an offense that would make him a perpetrator or a partner of a crime that has taken place completely or partially shall be punished.

However, this principle loses its validity for irregular migration offenses which goes beyond borders and territory, which is likely to conflict with other laws and necessarily entails a conflict of jurisdiction for every incident.

Determining the applicable law in transboundary irregular migration requires applying the universal jurisdiction principle to irregular migration offenses, so that any criminal law applies to any crime against the perpetrator in the territory of the State wherever it is committed and whatever the nationality of the perpetrator or the offender was. So any state that could arrest them would be able to hold them accountable for their acts according to its national law and punish them.

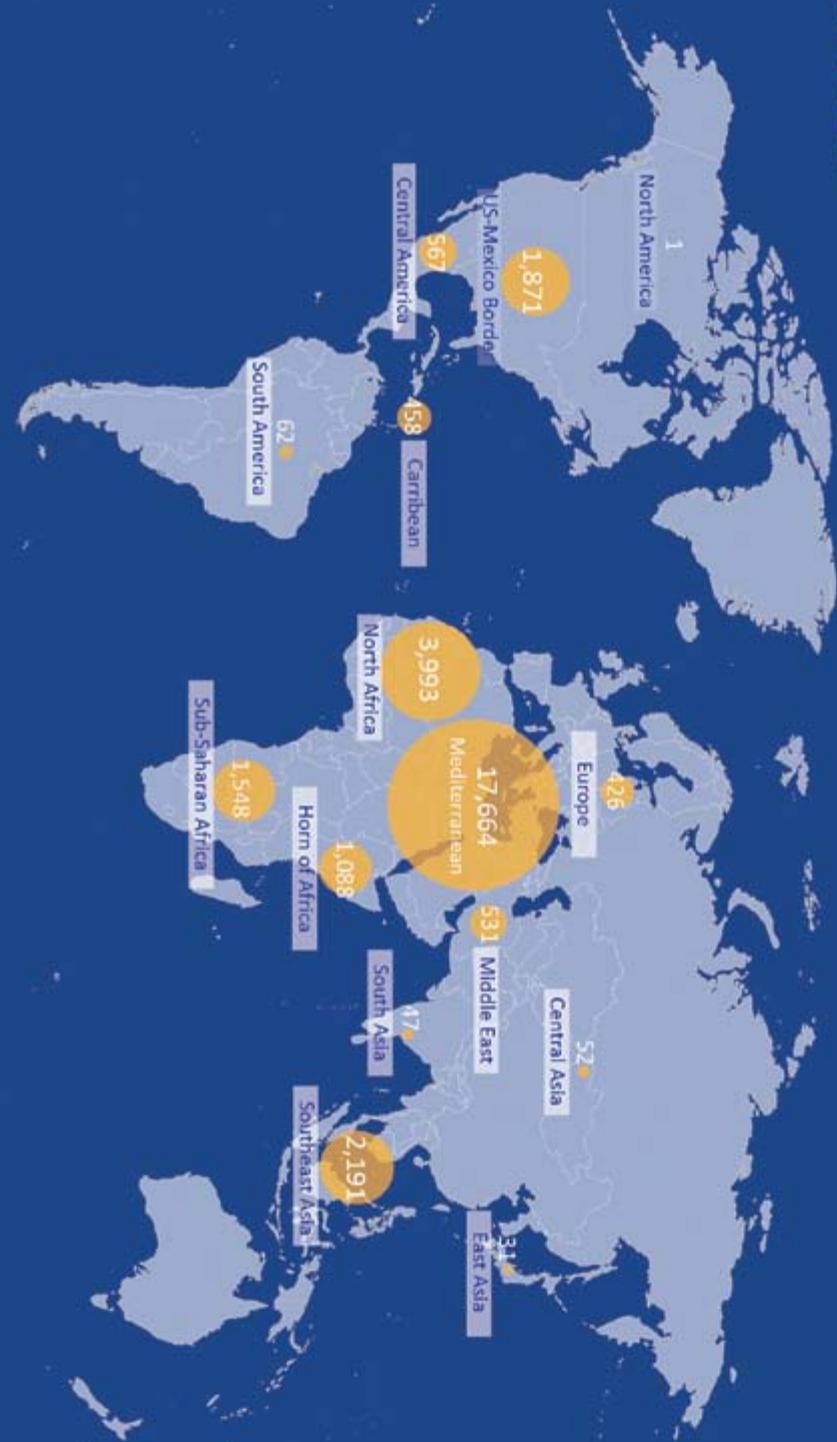
However, applying the universal jurisdiction principle in absolute terms, by applying the penal code to any criminal arrested in the territory of the State, whatever the State in which the criminal offense was committed and whatever the nationality of the offender was may lead to another contradiction between states' laws, where every state would have jurisdiction even if we should apply another law to the case, and this contradicts with the principles of the Penal Code itself, which is essentially a territorial law. This makes applying this principle difficult in practice, so it is more appropriate to restrict the principle to be applied to certain

types of offenses, including some transboundary irregular migration offenses, so we could gather the needed efforts to fight against this type of criminality by every mean whether legislative, judicial or executive.

Recommendations

1. To strengthen international and regional cooperation in the fight against irregular migration and urge all countries to accede to international conventions related to the subject.
2. Security coordination and cooperation between Libya and neighboring countries in the field of combating irregular migration is a must.
3. To amend national legislation to be in conformity with related international conventions and to aggravate punishments to smuggling migrants crime in light of the seriousness of the consequences of that crime.
4. To activate illegal migration courts and tribunals, and to increase the efficiency of judicial officers, members of the public prosecution and judges concerned with the implementation of law against illegal immigration, all in their fields of expertise.
5. To activate regional and bilateral agreements between Libya and neighboring countries in the field of combating organized crime, especially the agreements concluded with Italy and the Arab Maghreb countries, related to the exchange of expertise, information and control of common borders.
6. In order to alleviate the problem of jurisdiction, and in view of the serious consequences of irregular migration and smuggling of migrants, there is a need to develop or establish international tribunals to combat irregular migration, in the light International Criminal Court's experience and within its the jurisdiction.

Missing Migrants Global Overview: Jan 2014 - Dec 2018
International Organization for migration report



30,510 MIGRANT FATALITIES

MISSING MIGRANTS PROJECT
GLOBAL OVERVIEW
Jan 2014 - Dec 2018



interview with

Mr. Tarek El Lamloum

Head of Biladi Human
Rights Organization in Libya

Do you think that the phenomenon of irregular migration has aggravated after the changes in the Arab region?

Although irregular migration existed even before the changes witnessed in the Arab region, especially Libya, but the change is in ratios, and the issue is to types of violations that are taking forms and patterns which are very disturbing.

Can the migration procedures in the European Union be linked to the increase in irregular migration?

Despite the European Union's harsh policies, which have completely undermined all the values and conventions ratified by Europe and despite Europe's claim that the number of migrants arriving on Italy's shores has decreased but how many are entering Libya and how many are travelling through the sea and getting lost? That is the important question?

What are the social characteristics for the most involved categories in irregular migration?

The number of minors and unaccompanied children is high, and it is also surprising that the number of women is increasing.

Can it that be considered irregular migration happens primarily due to economic reasons?

We can't be sure about that, if we talk about the numbers of migrants entering Libya, for example, many of them are seeking protection such as the Syrians, Yemen, Somalia and Eritrea, all of them fleeing conflicts out fear of reprisals. Currently, the majority of those who are in detention centers in Libya are asylum seekers.

What are the most important effects and consequences of irregular migration?

Countries of origin, transit and reception are affected but the most serious impact falls upon countries of origin, as it gets emptied of its citizens in large frightening batches, especially that among migrants there are children and women who are exposed to horrifying things during their journeys. I think that the world is dealing horribly with the issue of migration and they focus on impacts on countries of transit and destination, saying that migrants and asylum-seekers are the main cause for instability and chaos in the receiving countries.

Are the effects of irregular migration limited to migrants or does it extend to their families and relatives? What is the nature of these effects?

There is no doubt that all those who are around migrants and asylum seekers are directly affected in all psychological, social and economic aspects. The loss of their children and their families to the fate of the unknown desert is terrifying, and the majority of migrants and asylum seekers are abducted and blackmailed in exchange for payments to release their children.

Some consider that irregular migration is no longer a limited phenomenon and turned into a community tradition in Tunisia, for example, is this true?

This not true and contradicts with reality, migration has its own reasons even the ones that the youth seek and being called reckless and looking for a European mirage for dreaming about it, it is an attempt to find justifications and excuses for the failure of those governments. All migrations, even those of economic motives, the Arab youth sought it only after they exhausted themselves and tried everything to live. but they even accepted living below the poverty line,

but they were deprived of this life too, but severe economic conditions, security constraints, not to mention sensing the vast difference between them and the neighboring countries, for example, the Gulf States, all that pushed them to migration.

Given the changes that have taken place in the region after the revolution, can irregular migration become a gateway for terrorists arriving in Europe?

For many years migration existed and will continue to exist, and it's normal to find between migrants various types of people, asylum seekers, smugglers, and criminals "terrorists", It has not been proven that extremist groups have moved as associations across the sea or even in the desert in large numbers so we can say that they would take it as route to Europe, Extremism exists in Europe from several parties and most of the operations that took place in Europe was made by holders of European passports who are born in Europe.

In your opinion, who is responsible for that or what is the order of taking responsibility?

The international community and decision-makers should take responsibility for that, the solution is not impossible, encouraging development in countries of origin and reducing external interference and promoting conflicts in their countries will have a significant impact on reducing migration, or at least it will be more organized and secure for children and women.

Can the growing phenomenon of regular migration be seen as an indicator of governments' failure to respond to the demands and achieve the dreams of their citizens?

There is no doubt in that .. Governments and decision-makers are the cause of this disaster, which destroys young people and unfortunately they are oppressed by adults and retirees who compete them on jobs.

What are the necessary measures to combat this phenomenon on Human rights level and on the legal level?

- To continue to ask the authorities and decision-makers to abide by international conventions and treaties they have rati-

fied and signed.

- To put pressure on countries that have not ratified such as Libya to ratify and implement agreements governing the status of asylum seekers.
- There should be a new UN treaty and agreement that would make the UN Charter a reference to establish a criteria and an urgent plan to resolve the issue of asylum seekers and protect them and to assume responsibility for all States in this matter.
- International organizations and donors from the European Union should give their support to small projects and development for youth and minors in Africa and conflict countries.

Migrant platforms between European pressures and North African countries' rejection



Massoud Al-Ramadani
Human rights activist and former president
of the Tunisian Forum on Economic and
Social Rights

We should talk about Migration on basis of human rights' principles, the most important of which is the Universal Declaration of Human Rights, which guarantees the freedom of movement for people from one country to another. This freedom of movement includes the right to move inside or outside the country. No country can stand against that or stop it. According to the Geneva Convention, everyone is entitled to seek asylum in a country if he/ she is persecuted in his/her country because of his political views or religious beliefs.

European restrictions on immigration:

Those are the main principles, but the fact is that elections in most western democracies whose former focus has been on

economic and social programs are now largely based on combating migration and repelling migrants. In many cases, The extent of firmness in the face of their flow across the sea, and the reduction of acceptance of asylum claims, based on preconceived ideas promoted by the European right that immigrants are the cause of all diseases of society, from unemployment to manifestations of violence and extremism is what decides who wins elections.

Due to the difficulty of reducing the flow of irregular migration, in particular because of the economic and social problems in the countries of the southern Mediterranean and the high rates of poverty, crises and civil wars that sometimes occur in African countries, the countries of the North of the Mediterranean have focused on strict security solutions and sea surveillance by all possible electronic and human means, it even became acceptable to prevent civil society organizations from helping migrants at sea, which resulted in the rise of death rates despite the decrease in irregular migrants' numbers.¹

Italy closed its ports to the rescue ship "Aquares", which was carrying around 600 irregular migrants rescued at sea, which made the ship withdraw from its mission due to harassments of countries such as Italy, Malta and France, that reached the point of preventing the ship from registering in ports, "we failed to defend ourselves against the invasion of migrants" (Victor Urban, Prime Minister of Hungary)

In the face of the economic crises that are shaking Europe and the failure of traditional parties to find appropriate solutions to pressing social issues and the flows of migrants coming from the Middle East and Africa, and while European fear of loss of employment in a world that have a vulnerable economic situation, and fear of losing the "European identity" in a world that is imprisoning itself in closed identities, migration has become a major issue in which the that measures of the European right's belief in traditional human values, the populist right wing has exploited this fear and has focused, during its campaigns, on

¹ - UNHCR report, 6 July 2018 « with declining numbers of arrivals and high death ratios, UNHCR calls for enhanced search and rescue»

economic and social threats that are facing Europe.

Hungarian Prime Minister Victor Urban won through his motto “Christian Values” and the right-wing Italian League led by Matteo Salvini won because of its the hostility for migrants.

In the face of the overwhelming victory that right-wing parties have been making because of the tough attitude towards migrants, other parties have begun to realize that winning elections cannot be achieved through traditional slogans of fiscal justice, employment and social welfare, and that the European voter can only be convinced through a clear position on the issue of migration and accepting or rejecting migrants, but the adopting the same approach of the extreme right-wing position seems difficult to digest to some traditional European parties, in addition to the fear that the issue of migration will cause the fragmentation of the fragile EU, as it seems that each country wants to transfer the issue to the neighboring country instead of showing solidarity, This prompted the Interior Minister of Italy, Enzo Maffiro Melanesi, to “address the consciences of European governments”, calling on the EU countries to set up screening platforms in countries of origin and transit for migrants so that asylum claims can be handled more easily. And to convince migrants to not come to Europe “.²

However, the most important statement of the Italian minister is his call for Europe to change its migration policy and to request a mandatory mechanism that would require Europe to redistribute asylum seekers. That is the reason for the disagreement between European countries.³

Change Dublin’s Regulation?

Italy wants to get rid of the Dublin Regulation, which states that asylum claims are examined in the first country where the student has registered and insists on the need to distribute migrants to EU countries, which is not accepted by other European countries such as Hungary and Austria. Both Italy and Greece

2 - Russia Today Arabic website: Italy: Europe Must Change Its Position on Migration, Posted: 17-06-2018, Source: dpa <https://ar.rt.com/kdsp>

3 - The same resource mentioned “31”

are the most vulnerable to accept migrants, as they can be considered the two gates of Europe, but after the agreement signed with Turkey in 2016, to curb irregular migration, Italy became the country and destination favored by death boats of migrants.

At the meeting in Brussels on Thursday, 28 June 2018, the dispute between the various European countries over who bears the responsibility of migrants got deeper, The most prominent issue at this summit was the dominance of the far-right political speech in the debates, a takeover that gave the impression that migration was the most important European issue and that the continent was “under the siege of migrants” despite the significant decrease in numbers of migrants during the first months of 2018.⁴

Landing platforms in North African countries:

Prior to the Brussels summit, EU Council President Donald Tusk said that the council would present a Danish-Austrian proposal calling for landing platforms outside the EU countries, in which migrants will be screened both asylum seekers in need of international protection and economic migrants, the first category’s demands will be accepted while the second category will be excluded is at the necessary speed and the lowest cost. According to the draft document of the proposal presented by Tusk to the Council, “such platforms will provide quick procedures to distinguish between the two categories and reduce the motive to embark on those risky trips”, he meant travelling to Europe by sea.⁵

Just a reminder , The idea of these platforms is not entirely new. The former German Interior Minister, Thomas Demizer, proposed in 2014 the establishment of “welcome centers” in Africa to reduce the number of deaths at sea.

Lack of clarity:

4 - Araby Pots Website: The European Union met in Brussels to resolve the refugee crisis, and these are the most important decisions they have agreed upon <http://bit.ly/2RkqQ64>

5 - Migrant News, Published: 25-06-2018, Save hundreds of immigrants in two separate operations off the Spanish and Libyan coasts, <http://bit.ly/2KtrMov>

But the proposal, which was accompanied by a lot of secrecy and ambiguity, had many unanswered questions, for example, who will determine the criteria for acceptance of asylum claims ?, How will the countries of origin be negotiated with, and what if the countries of origin refused the return of their migrants whose demands were not accepted? Especially since there are pledges not to forcibly return them to their countries.

North African countries' rejection:

After discussing the issue Platforms following the European Summit in Brussels in June 2018, the official positions of the South Mediterranean countries, Tunisia, Algeria, Morocco, Libya and Egypt, focused on rejection, it is one of the few times where all these countries have the same position towards European policies.

The Tunisian foreign minister, for example, said that his country does not accept opening these platforms for receiving or collecting illegal migrants and we completely reject its establishment on our territory."⁶

The civil society's position does not differ from the official one even if it was based on different principles, in a statement issued on August 6, 2018, the Tunisian General Union of Labor expressed its rejection for making Tunisia a shelter for migrants and a "policeman to guard the European shores" .

The Tunisian Forum for Economic and Social Rights expressed its appreciation for the official Tunisian position which rejected the establishment of the platforms and renewed its call to the Tunisian government to "hold this position in the face of all the pressures and out of respect for the Tunisian revolution and the principles of January 2014 Constitution" (3 July 2018).

The European right-wing's attempt to cope with migrants failed:

6 - Al-Sabah Newspaper, Tunis, 24 July 2018

Many attempts to discourage migrants preceded the platform's proposal, including counter-propaganda at sea and harassing rescue teams. During August 2017, Tunisian sailors banned the C-Star vessel, which was carrying activists from "Identity Generation/ Jeel Alhawya" , a right-wing organization calling for " Defending Europe "and raise slogans against migrants such as" Do not make Europe your home " and prevented them from refueling and buying food at the port of Sfax, that's right after being prevented from docking in the port of Zarzis, based on a tip of information that the ship's task is to intercept ships and boats carrying migrants and to prevent them from humanitarian assistance, and this ship has collected for this purpose donations estimated at 170 thousand euros to chase migrants and prevent them from reaching European coasts.⁷

The Tunisian General Union of Labor had sent an appeal to the Tunisian sailors not to "leave the boat of racism" to desecrate the ports of Tunisia. The Tunisian Forum for Economic and Social Rights also appealed to the Tunisian sailors not to "cooperate with those who promote racism and hatred"⁸

It isn't just a Tunisian rejection:

During his visit to Mauritania last July, French President Emmanuel Makron failed to convince Mauritanian President Mohamed Ould Abdel Aziz of his plan to set up an migration landing platform. The latter believes that Mauritania will not accept this and that "the solution to the migration issue is not to build reception centers But in addressing the causes of migration "which, in his opinion, to help the countries to which the youth belongs to overcome poverty and unemployment. ⁹Egypt also expressed its refusal "to turn into a backyard in order to solve European migration problems"

European retreat?

7 - Jazeera Net on 10-08-2017, Tunisian sailors heading for the «Expulsion of the Migrants» ship, Khamis Ben Brik – Tunisia <http://tiny.cc/9vae8y>

8 - Al-Quds Al-Arabi, 7 August 2017, mobilization in Tunisia against the C-Star anti-illegal immigration ship <http://tiny.cc/pnbe8y>

9 - Al-Shorouk Al-Tunisia, Date of publication: 10-07-2018

At a press conference held in Tunisia on 26 October 2018, Jean-Claude Juncker, President of the European Commission, stressed that Tunisia would not be a platform for establishing camps and screenings. And that “This issue is not on the agenda and should not be addressed at all”¹⁰

This decline appears to be due to the rejection of African countries, after some African countries, together with the Organization of African Unity (OAU), have moved to address the project in all countries of the continent.

So the European demands from southern countries has lessened. At the beginning of November 2018, UNHCR spokesperson Natasha Barto confirmed that the EU favored “regional settlements on the issue of migration and landing platforms”.¹¹

In other words, the Union has begun to prepare specific agreements with certain countries, under which European countries will provide financial assistance and in return the South Mediterranean countries should commit more firmly to combat irregular migration.

This is exactly what the EU is seeking now, where discussions are being held with Egyptian President Abdel Fattah el-Sisi on “generous funding” in return for more firm migration control measures. Egypt is expected to request financial assistance and loans in exchange for such benefits, the same goes for Tunisia, Morocco and Libya.¹²

It seems that Tunisia has begun to apply strict procedures, especially during the current year. According to a study by the Tunisian Forum on Economic and Social Rights, the number of

10 - Euroactiv, 5 novembre 2018, EU lowers its ambitions on African migration control, <https://www.euractiv.com/section/development-policy/news/eu-lowers-its-ambitions-on-african-migration-control/>

11 - Euroactiv, 5 novembre 2018, EU lowers its ambitions on African migration control, <https://www.euractiv.com/section/development-policy/news/eu-lowers-its-ambitions-on-african-migration-control/>

12 - The same previous mentioned resource “40”

migrants who were prevented from passing the Mediterranean increased from 3187 in 2017 to 6369 in 2018, from the beginning of the year to September 2018.

Secret refoulement?

In addition, on the basis of an Italian-Tunisian agreement dating back to 2011, forced returns to Tunisia are conducted weekly, with weekly flights from Italy to Tunisia, estimated at forty hours per week, away from the observers' eyes and in total silence from the Tunisian authorities, the fact that dissatisfies civil society organizations.¹³

Summary:

Migrants landing platform is a proposal by the EU Council in June at the Brussels Summit that aimed to prevent irregular migrants' arrival to Europe by setting up shelters in the countries of the South Mediterranean, North Africa in particular, in order to screen them, and address asylum seekers' demands, and those who prove to be migrating for economic and social reasons would be returned to their country of origin, this approach comes within the framework of the European policy that aims to reduce the flow of foreigners and to assign them to another parties. However, this trend was strongly opposed by the countries of North Africa, such as Tunisia, Algeria, Morocco, Egypt, Mauritania and Libya. It also had a negative feedback from civil society organizations, This is not only a rejection of European policies that do not respect national sovereignties, but also a rejection to their disrespect for human rights. According to the Geneva Convention, everyone has the right to leave his country and seek asylum in any other country that guarantees his safety, and the financial assistance that they want to give would be given to authorities that do not “respect” human rights, asylum rights and does not protect migrants legally. Although these platforms would reduce migration flows to Europe, they would not reduce attempts to sail through the sea to search for better conditions for living in the face of poverty and instability

13 - Capitalis, Tunis news, 15 August 2018 <http://tiny.cc/pfde8y>

that those people are experiencing in their countries.

Even in the countries of southern Europe, where shelters for migrants fleeing the hell of war and poverty was established, conditions are bad and worsening as the number of irregular migrants is increasing. "Médecins Sans Frontières" organization which visited the Moria camp on the Greek island of Lesbos in July / July last 2018 that "warned that the situation there is deteriorating in light of the continuing clashes, violence, incidents of sexual violence and mental illness within the camp, which hosts 8 thousand migrants, while the maximum capacity of it is not more than 3,000"¹⁴

In recent years, European policies have increasingly dominated by security approaches and with the continued flow of migrants they are now seeking to get rid of this flow crisis by deporting them to another country through making deals with governments. According to observers, both solutions, security or deportation, As long as there are deep dilemmas in the southern Mediterranean, including poverty, unemployment, political repression and civil wars won't be successful.

Even the Marrakesh UN Convention on the " Safe, Orderly and Regular Migration" ratified by 164 countries in the world last December showed a sharp division within the European Union, despite its non-mandatory nature, but it raised many points that the right-wing governments in Europe rejected, including "improving basic services for migrants" and "to ensure that the presenting services does not include any discrimination against them",

In face of all these failed attempts, perhaps it is time for Europe to look at migration differently and face it through a clear strategy that excludes security responses, a strategy that takes into account human rights principles and consecrates international solidarity. Only then do migrants, of all kinds, would turn from a burden to countries of origin and host States to contributing to their enrichment.

14 - Muhajer news, 23-07-2018, «a catastrophic deterioration in the conditions of migrants in the Maria camp in Greece»

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A Sun-regional independent non-governmental organization founded in 2015 that aims to create favorable climate to the progress of the democratic structure based on the principles of the human rights in its interrogations and comprehensiveness.

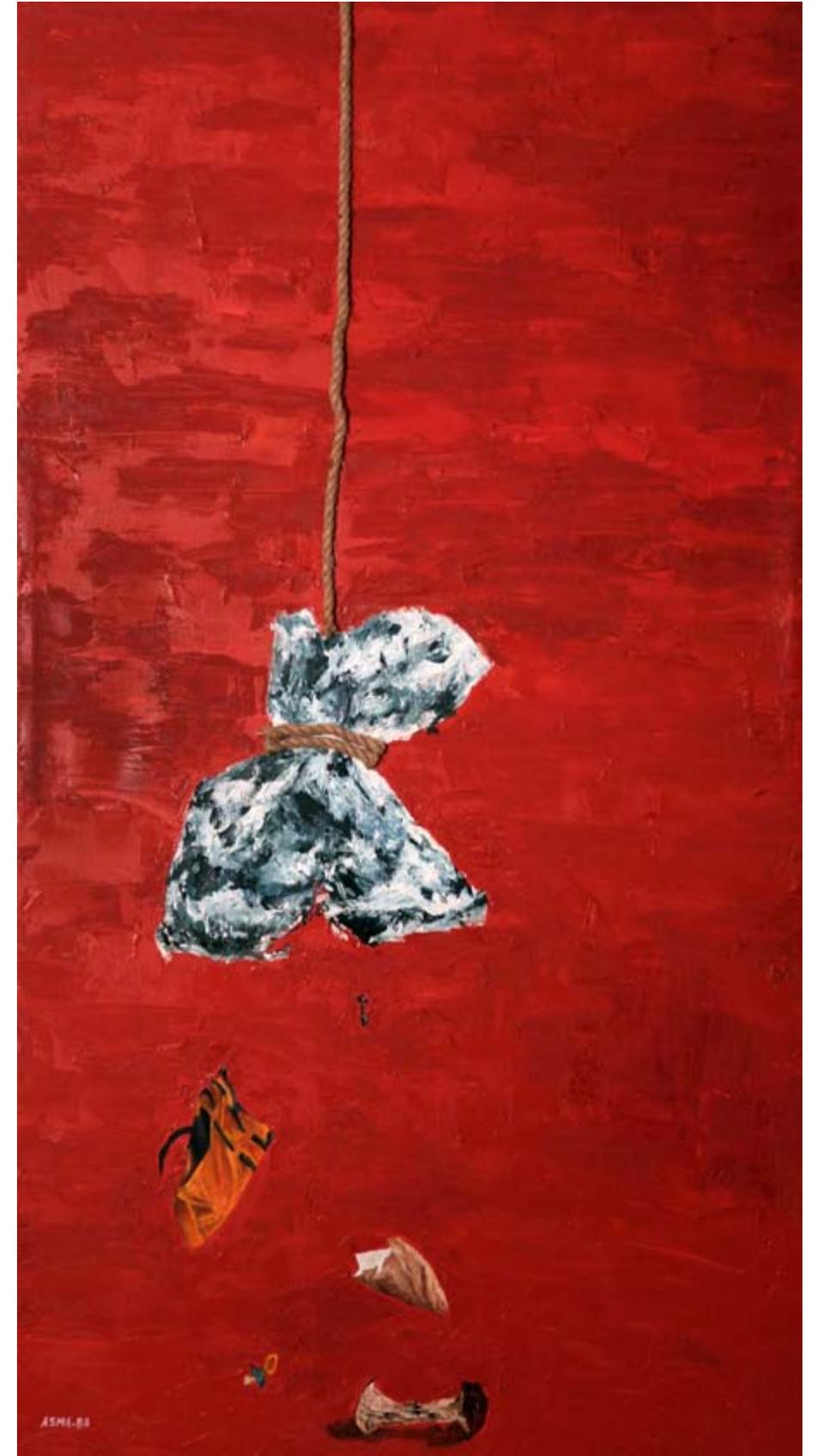
DAAM seek to support and promote paths and sustainable development ground via capacity development and supporting efforts designed to reform policies and legislation.

This would help fitting the principles of democracy based on human rights and contributing of knowledge production about the reality and the paths of democratic transition in the related countries. DAAM works in cooperation with relevant stakeholders from the civil society organisations and bodies locally, regionally, and internationally, including governmental bodies, political forces and civil society activists.

مركز دعم التحول الديمقراطية وحقوق الانسان «دعم»

مؤسسة شبه اقليمية غير حكومية مستقلة تأسست عام 2015، تهدف إلى خلق مناخ ملائم للتقدم بالبناء الديمقراطي المستند إلى مبادئ حقوق الانسان في تكاملها وشموليتها، وتسعى إلى دعم وتعزيز مسارات مؤسسات ديمقراطية وتشاركية على أسس المدنية والمساواة والتنمية المستدامة، وذلك من خلال تنمية القدرات ودعم الجهود الرامية إلى إصلاح السياسات والتشريعات بما يلائم ميادئ الديمقراطية المرتكزة على حقوق الانسان والاسهام في انتاج معرفة حول واقع ومسارات التحول الديمقراطي في البلدان المعنية.

وتعمل المؤسسة بالتعاون مع الأطراف المعنية من مظمات وهيئات المجتمع المدني المحلية والاقليمية والدولية، والجهات الحكومية والقوى السياسية وناشطين المجتمع المدني.





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