

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



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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.

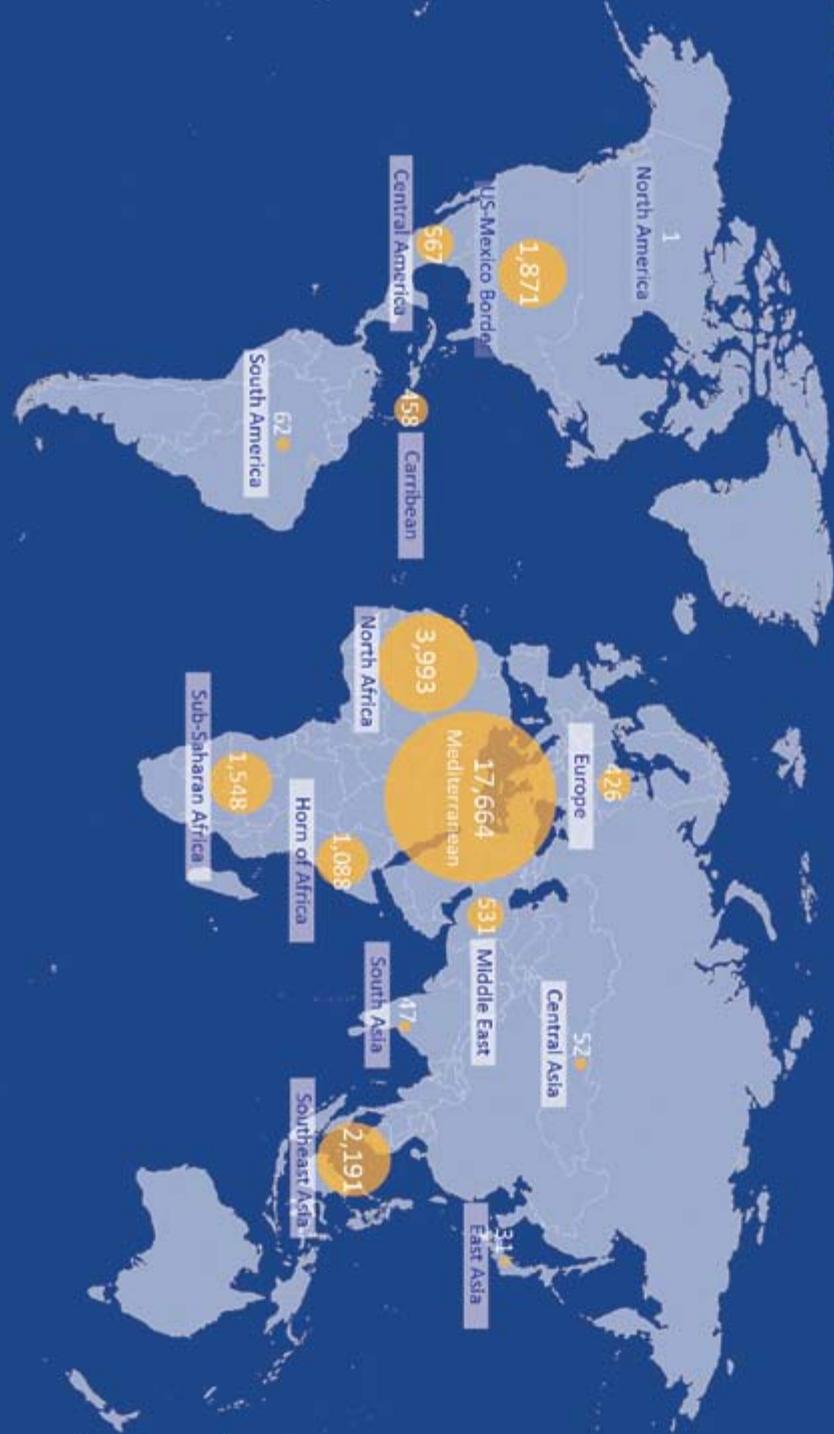
Determining the applicable law in transboundary irregular migration requires applying the universal jurisdiction principle to irregular migration offenses, so that any criminal law applies to any crime against the perpetrator in the territory of the State wherever it is committed and whatever the nationality 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