

Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights

Vasja Badalič

Abstract

The article analyzes how crimmigration law, combined with a range of illegal practices employed by the Tunisian authorities, negatively impacts on the human rights of irregular migrants, in particular asylum seekers, in Tunisia. By placing Tunisia's migration policy within the broader EU strategy of externalizing migration controls, the article shows how the EU supports, and relies on, Tunisia's systemic violations of human rights in order to prevent irregular migrants from reaching the EU. The central part of the article is divided in four sections, with each section examining the impact of Tunisia's migration policy on a specific human right. The first section analyzes how legislation criminalizing irregular migration and migration-related activities, together with illegal practices used by Tunisian security forces (e.g., pushing back irregular migrants at Tunisian borders, detaining irregular migrants in order to prevent them from making asylum claims), deprive irregular migrants of their right to seek asylum. The second section examines how practices adopted by Tunisian security forces (e.g., refusing to allow irregular migrants to have access to lawyers and interpreters) undermine the right to due process in both criminal proceedings and proceedings for protection status determination. The third section argues that measures adopted by the Tunisian authorities (e.g., preventing refugees with protection status from obtaining residency permits) violate the refugees' right to work, while the fourth section analyzes how the criminalization of irregular departure from Tunisia violates the right to leave a country, including one's own country.

Keywords

Tunisia, European Union, externalization of migration controls, irregular migration, asylum seekers, crimmigration law, human rights, right to seek asylum

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Introduction: The Politics of Prevention

The externalization of migration controls to third countries is one of the central pillars of the European Union's (EU) migration policy (EC 2015). Since the late 1990s, the EU has sought to outsource "migration management" to third countries in order to prevent irregular migrants, including asylum seekers, from reaching EU territory (Boswell 2003; Casas et al. 2011). By supporting measures aimed at stopping EU-bound irregular migrants in transit countries in North Africa and the Middle East, EU member states wanted to avoid any legal obligations towards potential asylum seekers (Casas-Cortes et al. 2016; Mitsilegas 2015; MSF 2015).^[1] One of the North African countries the EU included into its plan to create an effective pre-frontier "buffer zone" against irregular migration was Tunisia, historically a transit country for irregular migrants trying to reach the EU from other parts of Africa, a sending country of Tunisian citizens seeking better livelihoods in the EU (Boubakri and Mazzella 2005; Natter 2015; Romdhani 2016), and, more recently, a destination country for migrants, mostly Libyans, fleeing from conflict zones (IOM 2014).

The agreements on migration signed by Tunisia and the EU, and the bilateral agreements between Tunisia and several European countries, including Italy, France, Germany, and Switzerland (GDP 2014; Mazzoleni 2016), reveal that EU member states outsourced, or they still seek to outsource, to Tunisia the following "migration management" operations. First, one of the key objectives pursued by the EU is to use the Tunisian security forces to prevent irregular migration from Tunisia to the EU by stopping "boat people" trying to reach Italian shores from Tunisian territory (Frontex 2013). In addition, EU member states, in particular Italy, want the Tunisian security forces to intercept at sea boats with irregular migrants who embark on their journey towards the EU from Libyan territory. The EU expects Tunisia to take in intercepted irregular migrants from Libya and process their asylum claims on Tunisian territory (Traynor 2015, GDP 2015). In early 2017, Italy, backed by the EU, was close to sign an agreement with Tunisia to take in 200 intercepted "boat people" from Libya per month (Fubini 2017).

Second, the EU would like to see Tunisia cooperate, via Frontex, in the collection and sharing of intelligence on migration flows from Tunisia to EU territory. Although the EU included Tunisia, in 2013, into the Seahorse Mediterranean Network, a program aimed at establishing a communication network to exchange information on irregular migration between North African countries (e.g., Libya, Egypt, Tunisia, and Algeria) and EU countries, EU officials still had to persuade Tunisia, in early 2017, to actively participate in the program (EMHRN 2013; EC 2017b).

Third, the EU put pressure on Tunisia to enact legislation criminalizing migration-related activities (e.g., smuggling of migrants and human trafficking) in order to limit the assistance provided to irregular migrants passing through Tunisian territory towards the EU (Cassarino 2014).

Fourth, EU member states exerted pressure on Tunisia to accept the return of Tunisian citizens who irregularly migrated to the EU and third country

^[1] Besides the EU, the USA and Australia are the primary destination countries that have externalized their border controls in order to prevent irregular migrants, including asylum seekers, from reaching their territories (Frelick et al. 2016). The USA, for example, started to externalize migration controls under the Reagan administration, with an agreement between the USA and Haiti that authorized the USA to interdict and detain "boat people" from Haiti before returning them back to Haiti (ibid.). The USA also externalized migration controls to Mexico and Central American countries in order to secure their assistance in reducing the flow of irregular migrants into the USA (Jones and Roney 1989). Australia's efforts to externalize border controls go back to 2001 when the Australian navy began intercepting "boat people" on the high seas and forcibly returning them to Indonesia or the Pacific island states of Nauru or Papua New Guinea (Magner 2004; HRW 2002). The returns to Indonesia were carried out despite the fact that Australia and Indonesia had no agreement to guarantee the protection of intercepted refugees from refoulement >>>

citizens who reached the EU by irregularly transiting through Tunisia. A number of EU countries, for example Italy, France, and Switzerland, have signed with Tunisia bilateral agreements on readmission (Mazzoleni 2016). In addition, Tunisia signed with the EU, in early 2014, the Mobility Partnership Agreement, a framework for cooperation on migration that included a provision on readmission (UGTT et al. 2014).

The EU was able to impose the externalization of migration controls on Tunisia by linking effective “migration management” to the substantial financial assistance provided by the EU to Tunisia. Being Tunisia’s most generous provider of aid and its most important trading partner gave the EU considerable leverage in the process of defining key aspects of Tunisia’s fight against irregular migration (Mazzoleni 2016). On the one hand, the EU provided financial assistance for the political, economic, and social development of Tunisia. This kind of support became particularly important for Tunisia after the toppling of the Ben Ali regime in 2011 when the country entered into a period of prolonged political instability and deteriorating economic conditions. In the post-revolutionary period, from 2011 to 2016, EU assistance to Tunisia amounted to about € 2 billion in total, which was used to support the transition to a democratic system and achieve the country’s fiscal stability (EC 2016). In addition, European financial institutions have granted loans worth € 2.6 billion for infrastructure, private sector development, and water sanitation projects in Tunisia (ibid.). Taking advantage of Tunisia’s vulnerable position, the EU used its financial support for the democratic transition as leverage in the process of convincing the Tunisian authorities to sign the Mobility Partnership Agreement, a declaration that defined the general objectives of a common “migration management” strategy. During the pre-revolutionary years, the Ben Ali regime was able to avoid signing such an agreement, but the fragile post-revolutionary political elite needed the backing of the EU and thus had little choice but to accept the EU strategy on preventing irregular migration (Limam and Del Sarto 2015; Eyster and Paoletti 2016).

On the other hand, EU member states also used visa facilitation programs for Tunisian citizens seeking work in the EU as an incentive to convince the Tunisian authorities to adopt EU-friendly migration measures, in particular the readmission of irregular migrants who reached the EU from/through Tunisia. In 1998, for example, Italy and Tunisia signed a readmission agreement after Italy agreed to allocate an annual quota of 3000 work visas for Tunisian citizens (Natter 2015). In 2008, France reached a similar agreement with Tunisia, promising work permits for 9000 Tunisian citizens per year in return for cooperation on readmission and the prevention of irregular migration (ibid.). Over the following years, the tactic of linking readmission programs to visa facilitation programs became part of EU policy (EC 2016; Reslow 2015).

In addition to the financial assistance for economic and social development, Tunisia received from the EU funding for improving its “migration management” operations, in particular funding for strengthening control on its borders. First, EU member states provided Tunisia with the equipment needed to control its land and sea borders. In 2011, for example, Italy agreed to donate to Tunisia patrol boats and a hundred off-road vehicles for the fight against irregular

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(HRW 2002). Australia’s migration-control externalization policy, called the “Pacific Solution,” was later expanded to Sri Lanka and Malaysia (Frelick et al. 2016). In late 2014, the Australian parliament passed legislation that gave the government the power to detain “boat people” and transfer them to any country chosen by the minister of immigration and border protection (KCIRL 2014). Given that the designation of a third country to serve as an offshore processing country did not need to be determined by reference to the international obligations or domestic law of that country, it seemed that the Australian government wanted to have the power to return irregular migrants even to third countries where their rights could be at risk (ibid). By externalizing their border controls to third countries, both the USA and Australia started to return irregular migrants, including asylum seekers, to countries where migrants had no guarantees that their basic human rights would be respected (e.g., the right to seek and enjoy asylum, the right to liberty, the right to remedy ...) (AI 2017, Frelick et al. 2016).

migration to Italy (Tazzioli 2011). In late 2012 and early 2013, Italy handed over to Tunisia three patrol boats (Frontex 2013). Second, EU member states granted to Tunisia funding to build the infrastructure needed for enhancing migration control. In 1998, for example, Italy agreed to provide financial assistance for the creation of migration detention centers in Tunisia (Vassalo Paleologo 2009). And third, the EU provided funding for capacity building support in the area of border control (EC 2017a).

The kind of migration-related funding provided by the EU to Tunisia indicated that the EU's central objective was to prevent irregular migration to the EU and not to improve mechanisms for protecting the rights of irregular migrants, including asylum seekers (Planes-Boissac et al. 2010). In part, the EU justified its position by claiming that irregular migration represented a potential security risk. This view was, to a large extent, based on the assumption that irregular migrants represented a potential terrorist threat (Frontex 2016; Frontex 2017). In addition, the EU justified its fight against irregular migration by claiming it was a humanitarian effort that aimed at saving people's lives by dismantling the criminal groups involved in the smuggling and trafficking of irregular migrants (EC 2016). These two EU narratives on irregular migration were largely shared by both pre-revolutionary and post-revolutionary Tunisian governments. In the pre-revolutionary period, the Tunisian authorities portrayed irregular migrants as a security threat for the country and used it as a pretext to refuse to consider protection requests from asylum seekers (Planes-Boissac et al. 2012; Laacher 2007). In post-revolutionary Tunisia, the idea that irregular migrants represented a potential terrorist threat gained momentum after the escalation of war in Libya, with irregular migration seen as a way for terrorist groups to infiltrate Tunisia (Driss 2016). In both pre-revolutionary and post-revolutionary Tunisia, successive governments also adopted the view that the fight against irregular migration was a fight against criminal groups involved in people smuggling. After the Ben Ali regime enacted, in 2004, legislation criminalizing the smuggling of irregular migrants, the fight against human smuggling became part of Tunisia's migration policy (Loi Organique 2004).

^[2] The term "crimmigration law," coined by Stumpf (2006), denotes the merger between criminal law and migration law that took place in the following areas: the substance of criminal law and migration law started to overlap (e.g., proliferation of grounds for excluding/deporting non-citizens convicted of crimes, actions by migrants that were previously civil violations became criminal offenses, focus on detaining and deporting non-citizens likely to represent a threat to national security), the enforcement of migration law became similar to the enforcement of criminal law, and the procedural aspects of prosecuting migration-related violations started to resemble aspects of criminal procedure (Stumpf 2006; García Hernández 2014; García Hernández 2015).

With the prevention of irregular migration promoted as a fight against terrorism and crime, it seemed almost inevitable that Tunisia embraced crimmigration law as a means to tackle irregular migration. Crimmigration law, the convergence of criminal law and migration law (Stumpf 2006), strengthens the perception of migrants as criminal offenders and, consequently, creates the impression that they represent a permanent security risk (García Hernández 2014), both of which can be useful for policy makers trying to portray irregular migration as a potential security threat.^[2] In Tunisia, both pre-revolutionary and post-revolutionary governments used laws criminalizing irregular migration and migration-related activities as one of the key tools for enhancing migration controls. Such approach fell neatly into the EU anti-migration strategy that viewed the criminalization of irregular migration as one of the cornerstones of the fight against irregular migration both within and beyond EU borders (Mitsilegas 2013; Mitsilegas 2015; Crépeau 2013b).

The main objective of this article is to analyze how crimmigration law, combined with a range of illegal practices employed by the Tunisian authorities,

negatively impact on the human rights of irregular migrants, in particular asylum seekers, in Tunisia. The central part of the article is divided in four sections, with each section examining the impact of Tunisia's migration policy on a specific human right. The first section analyzes how legislation criminalizing irregular migration and migration-related activities, together with illegal practices used by Tunisian security forces (e.g., pushing back irregular migrants at Tunisian borders, detaining irregular migrants in order to prevent them from making asylum claims), deprive irregular migrants of their right to seek asylum. The second section examines how illegal practices adopted by Tunisian security forces (e.g., refusing to allow irregular migrants to have access to lawyers and interpreters) undermine the right to due process in both criminal proceedings and proceedings for protection status determinations. The third section argues that measures adopted by the Tunisian authorities (e.g., preventing refugees with protection status from obtaining residency permits) violate the refugees' right to work, while the fourth section analyzes how the criminalization of irregular exit from Tunisia violates the right to leave a country, including one's own.

By placing Tunisia's migration policy and practices within the broader EU strategy of externalizing migration controls, the article will show how the EU supports, and relies on, Tunisia's systemic violations of human rights in order to prevent irregular migrants from reaching the EU.

Denying the Right to Seek Asylum

After the fall of the Ben Ali regime in early 2011, Tunisia included the right to seek asylum in its new constitution. Article 26 of the post-revolutionary constitution, promulgated on 27 January 2014, states that the right to political asylum shall be guaranteed as prescribed by law. In the first years of the revolutionary process, triggered by the desire to create a democratic and human right-based system in the country, it seemed that the new political elite was serious about guaranteeing irregular migrants the right to seek asylum, a fundamental human right originally enshrined in the Universal Declaration of Human Rights (UDHR) and reaffirmed in numerous UN General Assembly Resolutions (UN General Assembly 1948; IMBR 2013). That hope, however, soon dissipated. Despite being bound by international law and its new constitution, post-revolutionary Tunisian governments refused to assume their obligation to enact legislation on asylum and thus failed to establish specific administrative measures for fair and efficient status determination procedures. With the issue of protection for asylum seekers still being a low priority for Tunisian policy makers, Tunisia remains without an asylum law (Garelli and Tazzioli 2017).

Although both pre-revolutionary and post-revolutionary governments consistently refused to enact legislation for establishing protection status determination mechanisms, they did allow the UNHCR to take over the process of adjudicating asylum claims (Planes-Boissac et al. 2010; US Department of State 2017). In 1992, the UNHCR signed its first agreement with Tunisia to become the sole authority responsible for determining refugee status (Planes-

Boissac et al. 2012). After the revolution, in September 2011, the UNHCR and the Tunisian government signed a new agreement reaffirming UNHCR's role in protection status determination procedures (ibid.). Even though irregular migration is treated as a criminal offense, the law provides for exceptions for situations covered by the 1951 Refugee Convention, thus ensuring, at least on paper, that irregular migrants have the right to apply for protection status at the UNHCR office in Tunis (Loi Organique 1975).

Despite the agreement with the UNHCR, the Tunisian authorities, both pre-revolutionary and post-revolutionary, created many obstacles that prevented irregular migrants from lodging asylum claims, thus depriving them of their right to seek asylum. The overall strategy of stopping irregular migrants in their attempts to make asylum claims consisted of two tactics. The first tactic, which included “push-backs” at the borders and detentions, was to prevent asylum seekers from reaching the UNHCR office, while the second tactic aimed at limiting the work of individuals and organizations that assisted asylum seekers in procedures for protection status determination.

Preventing Asylum Seekers from Reaching the UNHCR

First, the Tunisian security forces prevented asylum seekers from lodging asylum claims by carrying out, from time to time, “push-backs” of people fleeing from Algeria and the conflict in Libya (Crépeau 2013a). This tactic gained momentum after 2013 when the Tunisian government reached an agreement with Algeria and Libya to enhance border control in order to stop irregular migration from both countries. The agreement included major upgrades on cross-border security that aimed at cracking down on the smuggling of migrants (DRC 2014).

Second, the Tunisian security forces prevented asylum seekers from reaching the UNHCR by detaining them in migration detention centers and deporting them back home. This tactic depended on the criminalization of irregular migration which was first introduced in 1968. On 8 March 1968, the Tunisian government, led by President Habib Bourguiba, passed the Organic Law 1968–7 that criminalized the irregular entry, stay, and exit of the country. Article 23 of the Law 1968–7 provided for a penalty of 1 month to 1 year in prison and a fine of 6 to 120 Tunisian dinars [from 2.3 to 46 €] for non-citizens who entered or exited Tunisia without proper documentation or overstayed their temporary visa or residence permit (Loi Organique 1968). The Law 1968–7 also introduced a harsh penalty—up to 3 years in prison—for foreign citizens who evaded deportation or who, after being expelled from Tunisia, returned to the country without authorization (ibid.).

Treating unauthorized entry into the country as a criminal offense was the cornerstone of Tunisia's practice of preventing irregular migrants from making asylum claims at the UNHCR. The criminalization of irregular migration, which enabled the Tunisian security forces to keep in detention all irregular migrants, including asylum seekers, paved the way for the introduction of the illegal practice of not allowing detained irregular migrants to reach the UNHCR.

Although the law guaranteed the right to apply for asylum, detained irregular migrants were not able to exercise their right because they were not allowed, after being arrested, to reach the sole authority responsible for adjudicating asylum claims. On the one hand, the Tunisian security forces locked irregular migrants in officially recognized migration detention facilities. In the pre-revolutionary period, between 2005 and 2011, the International Committee of the Red Cross (ICRC), at the time the only international organization allowed to visit Tunisian detention facilities, acknowledged it identified many foreign citizens imprisoned for offenses encompassing violations of migration law (e.g., the irregular entry into the country) (Planes-Boissac et al. 2012). The ICRC officials were not able to provide the exact number of detained irregular migrants, but they argued there was a “significant degree of turnover” of foreign citizens held for brief periods of time in detention facilities “spread across the country” (ibid.). Those detained, among them potential asylum seekers, had no access to the UNHCR.^[3] In post-revolutionary Tunisia, the local authorities adopted a similar approach. Although they started to allow the UNHCR and local human rights organizations to visit irregular migrants detained in prisons and the two officially recognized migration detention centers, the so-called “reception and orientation centers,” the number of visits remained limited, which, consequently, curtailed the access of detained asylum seekers to the UNHCR (GDP 2015; Tringham 2016; Crépeau 2013a). The two migration detention centers were Wardia Center, located on the southern fringes of Tunis, and the detention center in Ben Guerdane, a city in the south of the country (GDP 2014; Tringham 2016). Although the Tunisian National Guard allowed independent observers from local and international organizations to visit Wardia, probably Tunisia’s largest detention center for irregular migrants, the center remained many times inaccessible (Tringham 2016). In addition, basic data about Wardia Center were not publicly available, for example, there were no official figures on how many people were being detained and deported (Tazzioli 2015).

On the other hand, the Tunisian security forces prevented irregular migrants from applying for asylum by locking them in secret migration detention centers that were completely off-limits for the UNHCR or any other organization. Although the Tunisian authorities insisted they had only two detention centers for irregular migrants, research evidence indicated there were between 10 to 13 detention centers in the country (UN Human Rights Council 2017; Mazzoleni 2016; Crépeau 2013; Benouaret 2009; Benouaret 2010). In both pre-revolutionary and post-revolutionary Tunisia, irregular migrants held in secret detention centers whose exact locations remain unknown had no chance to get access to legal aid and make an asylum claim. Deprived of their basic rights, including the right to seek asylum, the detainees were either forced to pay for their own deportation to their country of origin, or, if they did not have the funds to pay for their flight back home, they were dumped by the Tunisian security forces in the desert on the Tunisian-Algerian border (DRC 2014; GDP 2015).

[3] According to Planes-Boissac et al. (2012), in the pre-revolutionary years the Tunisian authorities also prevented international organizations, including the UNHCR, from having access to parts of the country where irregular migrants were located. Between 1992 and 2011, the UNHCR was not allowed to travel outside Tunis and visit other parts of the country to identify asylum seekers. In that period, the UNHCR received asylum seekers only at the office of its operational partner, the Tunisian Red Crescent, in central Tunis. It was in the post-revolutionary years that Tunisia started to allow the UNHCR and other international organization to move freely across the country.

Limiting Assistance for Asylum Seekers During Status Determination Procedures

Unlike the abovementioned two tactics that deprived irregular migrants of their right to seek asylum by physically preventing them from getting in contact with the UNHCR, the third tactic opted for a subtler approach. The third tactic, which was used in both the pre-revolutionary and post-revolutionary period, relied on the criminalization of migration-related activities to limit any kind of assistance provided to asylum seekers. By criminalizing migration-related activities, including the provision of humanitarian aid, the Tunisian authorities put pressure on individuals and organizations offering assistance to asylum seekers, thus making it more difficult for asylum seekers to be successful in status determination procedures.

The first effort to criminalize migration-related activities was made in 1968 when the Bourguiba regime passed Organic Law 1968–7. Article 25 of the 1968–7 law stipulated that individuals who, directly or indirectly, knowingly helped or attempted to facilitate the entry, exit, and stay of irregular migrants in the country shall face imprisonment from 1 month to 1 year and a fine of between 6 and 120 Tunisian dinars [from 2.3 to 46 €] (Loi Organique 1968). A key problem with that law was that it did not distinguish between volunteers providing humanitarian aid to irregular migrants and people smugglers who helped irregular migrants in order to obtain financial or other material benefit.

The second effort that introduced new criminal offenses and tougher sanctions for migration-related activities occurred in 2004. In order to respond to the EU call for establishing a legal framework for tackling the problem of people smuggling, the Ben Ali regime passed, in early February 2004, the Law 2004–6 (Cassarino 2014). The law was originally enacted to implement the Protocol against the Smuggling of Migrants (2000), endorsed by the international community to intensify the fight against criminal networks profiting from people smuggling. The Ben Ali regime, however, criminalized not only human smuggling but also any form of assistance provided to irregular migrants. The Law 2004–6, for example, criminalized the hosting and transporting of irregular migrants on Tunisian territory. A penalty of 4 years in prison and a fine of 10,000 Tunisian dinars [about 3800 €] was introduced for “anyone who has sheltered persons entering or exiting Tunisia illegally, [...] or has provided them with accommodation [emphasis added]” and “[a]nyone providing them with any type of transportation [emphasis added]” (Loi Organique 2004). By refusing to distinguish between people smugglers and humanitarian workers, the 2004–6 law criminalized any form of assistance to irregular migrants, including the provision of humanitarian aid and medical treatment (Ben Jemia and Ben Achour 2014).

Furthermore, the Law 2004–6 criminalized the non-denouncement of irregular migrants and the individuals helping them. The law provided sentences of up to 3 months in prison and a fine of 500 Tunisian dinars [about 190 €] for “anyone who, even if covered by the obligation of professional secrecy, fails to immediately report to the proper authorities information or activities that have come to his attention regarding the performance of

an offence [i.e. irregular migration] described in the present chapter [emphasis added]" (Loi Organique 2004). The failure to report knowledge on the whereabouts of irregular migrants, and those who assisted them, thus became punishable. It was especially disturbing to see that the law expected even professionals bound by professional secrecy (e.g., doctors, lawyers) to inform the authorities if they came in contact with irregular migrants (Loi Organique 2004, Crépeau 2013a).

Both the criminalization of humanitarian assistance and the criminalization of non-denouncement of irregular migrants and the people helping them negatively impacted on irregular migrants seeking asylum. By penalizing all individuals who assisted migrants irregularly staying in the country, the law posed a threat to the work of civil society groups trying to help irregular migrants on their path towards asylum. The criminalization of assistance to asylum seekers reduced their chances to receive any kind of assistance as they attempted to obtain protection status (Planes-Boissac et al. 2010). In addition, by stipulating that humanitarian workers and other professionals involved in assisting irregular migrants had to operate as spies for the authorities, the 2004–6 law severely undermined the trust between irregular migrants and humanitarian workers. By creating an environment of mistrust, the law forced irregular migrants to be more cautious when seeking help and thus indirectly reduced their access to the services provided by humanitarian organizations (Ben Jemia and Ben Achour 2014). As a result, the law negatively impacted on the chances of asylum seekers to be successful in status determination procedures.

Denying the Right to Due Process

By externalizing its migration controls to Tunisia, the EU deprived irregular migrants, including asylum seekers, of their right to a due process of law, a fundamental human right recognized in several international legal instruments, including the UDHR and the International Covenant on Civil and Political Rights (ICCPR) (UN General Assembly 1948; UN General Assembly 1966a). All migrants, irregular and regular, have the right to due process before the courts of law and all other authorities administering justice, as well as the authority charged with making protection status determinations (IMBR 2013). The right to due process includes access to legal aid and representation, and to an interpreter to interpret in a language a migrant can understand (*ibid*). Although Article 14 of the ICCPR expressly recognizes the right to legal assistance only in criminal cases, the UN Human Rights Committee asserted that Article 14 applies to both criminal and civil cases (UN Human Rights Committee 1984; IMBR 2013). Therefore, host states should provide asylum seekers with access to legal assistance in protection status determination procedures. In addition, all migrants have to be informed of their right to have a lawyer and an interpreter immediately after becoming a party in criminal or any other proceedings (IMBR 2013). If migrants cannot afford to pay for a lawyer and interpreter, host countries have to provide them free of charge (*ibid*).

In both pre-revolutionary and post-revolutionary Tunisia, the local authorities regularly denied irregular migrants the right to due process in both criminal proceedings and status determination proceedings. First, by refusing to provide access to legal aid and representation, the Tunisian authorities denied the right to due process to irregular migrants who applied for asylum at the UNHCR (Tringham 2016). When the Tunisian security forces allowed detained irregular migrants to get in contact with the UNHCR in order to apply for asylum, asylum claimants remained without access to legal assistance prior and during the status determination process (ibid.). Asylum claimants also did not have access to legal aid if they appealed the decision on asylum made by the UNHCR (ibid.). In addition, in some cases, asylum claimants were not provided with trained and qualified interpreters to help them during status determination procedure (Roesch et al. 2014).

Second, irregular migrants were deprived of their right to due process during criminal proceedings, usually by being denied access to a lawyer. The courts did not appoint defense lawyers for irregular migrants who stood trial for unauthorized entry into the country (Tringham 2016). In addition, many irregular migrants allegedly involved in criminal offenses not encompassing violations of migration law were detained by the security forces and denied access to a court of law (Crépeau 2013a). After being arrested, they were held in pretrial detention for long periods of time, even up to a year, without being charged (ibid.). While held in detention, migrant detainees were refused the permission to see a lawyer, to get in contact with their family members and their consular authorities (ibid.). It was only after they paid a fine that they were released without charges and deported (ibid.).

Denying the Right to Work

All migrants, including asylum seekers and refugees, have the right to work, defined not as an absolute right to obtain employment, but rather as a right to the opportunity to gain a living by work that an individual freely chooses and accepts (UN General Assembly 1966b). This right, a fundamental human right, entails a number of rights in the workplace, including the right to just and favorable conditions of work (e.g., minimum working age, maximum working hours, safety and health standards, protection against discrimination, and unfair dismissal), the right to fair and equal remuneration, and the right to form trade unions and engage in collective bargaining with employers (UN General Assembly 1966b; IMBR 2013). With respect to labor conditions and employment, host countries have to provide migrants a treatment as favorable as that accorded to citizens by existing labor laws (IMBR 2013).

In both pre-revolutionary and post-revolutionary Tunisia, the local authorities denied many refugees with protection status the right to work by preventing them from getting access to the formal labor market. Refugees could not enter the formal labor market because the Tunisian authorities refused to issue them 'cartes de séjour', residency permits, key documents that allowed all migrants to legally reside and work in Tunisia (Tringham 2016,

Planes-Boissac et al. 2012). After being granted protection status, refugees had to obtain a residency permit at the police station closest to their place of residence in order to legally stay and work in the country, but because the Tunisian authorities refused to provide them with the permits, the refugees remained in a precarious position (Tringham 2016). There is currently still no provision in Tunisian laws recognizing refugee status, and, therefore, the laws governing foreign citizens — the Organic Laws passed in 1968, 1975, and 2004 — are applied to refugees with respect to residency. That means that refugees with protection status still have to obtain a residency permit if they want to live and work legally in the country.

Before the 2011 revolution, access to residency permits was “purely a chance occurrence” for refugees with protection status—only about 40% of refugees received a residency permit and were thus allowed to legally reside and work in Tunisia (Planes-Boissac et al. 2012). After the revolution, the Tunisian authorities continued to refuse granting residency cards to refugees (Tringham 2016). The refugees who were not granted residency permits were treated by the Tunisian authorities as “semi-illegals” who were not allowed to live and work in Tunisia and could even be deported (Planes-Boissac et al. 2012).^[4] Only individuals with legal status—i.e., individuals with a residency permit—had the right to access the formal labor market, while those without a residency permit, including refugees with protection status, remained without the right to work (ibid.).

Denying the Right to Leave One’s Own Country

Several international legal instruments, including the UDHR and the ICCPR, express the right to leave any country, including one’s own (UN General Assembly 1948; UN General Assembly 1966a; Harvey and Barnidge 2007). This right is not absolute as state parties are allowed to impose, in specific circumstances, restrictions on the movement of people trying to leave their country (Guild 2013, Markard 2016). When states decide to limit the right to leave, they must demonstrate that the laws prohibiting the exit from the country meet the test of legality and necessity, come under one of the grounds listed in Article 12 (3) of the ICCPR, and are consistent with other provisions of the ICCPR (UN Human Rights Committee 1999; Harvey and Barnidge 2007; Guild 2013; Gallagher and David 2014). According to Article 12 (3) of the ICCPR, the right to leave a country can only be subjected to restrictions that are necessary to protect national security, public order, public health or morals, and the rights and freedoms of others (UN General Assembly 1966a; UN Human Rights Committee 1999).

The Tunisian authorities subjected the right to leave the country to a restriction that was not justified within the terms of Article 12 (3). The restriction, introduced by the Bourguiba regime in 1975, was the detention of Tunisian citizens who tried to irregularly exit the country. The Organic Law 1975–40, which criminalized the irregular departure of Tunisian citizens, stated that if Tunisians irregularly exited the country, they shall be punished, upon return, with a 15-day to 6-month prison sentence and/or a fine of 30 to 120 Tunisian

^[4] Before the 2011 revolution, there were even a few cases of deportations of refugees with residency permits. In some cases, whole families were deported, for example, an Ivoirian couple with a 2-month-old infant (Planes-Boissac et al. 2012).

dinars [from 11 to 46 €] (Loi Organique 1975). That law was also embraced by the post-revolutionary political elite. Despite including in the new Tunisian constitution, under Article 24, a provision stating that every citizen has the right to leave the country, the post-revolutionary political elite refused to repeal the law that criminalizes the irregular exit of Tunisian citizens. Although the 1975–40 law clearly contravenes the new constitution, it remains in place.

By embracing the criminalization of irregular departure from the country, both pre-revolutionary and post-revolutionary political elites violated the right—a fundamental human right—of their citizens to leave the country (Crépeau 2013a). The only difference between the pre-revolutionary and post-revolutionary period was that the post-revolutionary authorities less systematically prosecuted the criminal offense of irregularly leaving one's own country. Before and during the 2011 revolution, many Tunisians citizens were held in detention centers after being arrested for irregularly migrating from the country, but after the revolution, the number of detainees dropped (ibid.). In the post-revolutionary period, the security forces usually detained for only a few days Tunisians intercepted while fleeing the country. After paying a small fine, the detainees were released (ibid.).

Conclusion: The Externalization of the Fight Against Human Rights

The similarities between Tunisia's pre-revolutionary and post-revolutionary migration policies and practices indicate that the fight against irregular migration is, in effect, a fight against human rights that transcends the dichotomy between an authoritarian regime and a democratic system. Although the post-revolutionary authorities introduced a few minor improvements in "managing" irregular migration (e.g., improving access for UNHCR officials to migration detention centers, decreasing the number of Tunisians imprisoned for irregularly leaving their country), they, to a large extent, adopted the migration policy of the pre-revolutionary period. Despite the transition into a democratic system that was supposed to be based on human rights, the post-revolutionary political elite retained all laws enacted by the ancien régime to criminalize irregular migration and migration-related activities. The post-revolutionary authorities also adopted the illegal practices used by the pre-revolutionary regime to thwart the in/outflow of irregular migrants (e.g., pushing back irregular migrants at the borders, preventing detained irregular migrants from reaching the UNHCR, and denying irregular migrants the right to due process).^[5]

In both the pre-revolutionary and post-revolutionary period, the Tunisian authorities pursued three key objectives: first, to stop cross-border movements in order to prevent irregular migrants, including asylum seekers, from reaching the EU; second, deny irregular migrants the right to seek asylum in Tunisia; and third, deny refugees with protection status the right to live and work in Tunisia. All three objectives were part of a strategy that aimed to prevent irregular migrants to seek and enjoy asylum in either Tunisia or the EU.

^[5] Due to the secrecy surrounding the Tunisian fight against irregular migration, it is not possible to provide an estimate about how many migrants became victims of human rights violations. In both the pre-revolutionary and post-revolutionary period, there were no exact data about how many people had been detained and deported from Tunisia without being given the opportunity to reach the UNHCR for lodging an asylum claim (Planes-Boissac et al. 2012; Tazzioli 2015). There is also no data about how many people were pushed back at the borders by the Tunisian security forces and thus prevented from lodging asylum claims in Tunisia (Crépeau, 2013a).

In both pre-revolutionary and post-revolutionary Tunisia, the EU tacitly supported, and relied on, the local authorities in the fight against human rights of irregular migrants. Although EU member states many times stressed their commitment to protect irregular migrants in Tunisia, as well as in other North African countries that became part of the EU external border program (EC 2016), it was clear that their primary objective was to prevent, at any cost, large numbers of irregular migrants from reaching EU territory. In pursuing this objective, the EU did not consider adopting a human rights-based approach, but, on the contrary, chose to rely on Tunisia's anti-migration measures that systemically violated human rights. It is possible to see how the EU gave precedence to the prevention of irregular migration over human rights by examining its priorities in negotiations conducted with Tunisia on migration issues. When, for example, EU member states negotiated readmission agreements with Tunisia, they ignored Tunisian's violations of human rights and focused exclusively on convincing Tunisia to accept back its citizens and third country citizens who irregularly crossed the Mediterranean Sea. EU member states used the visa facilitation program for Tunisian citizens as an incentive for Tunisia to readmit irregular migrants but not as an incentive to convince Tunisia to improve its record on human rights.

By indirectly supporting human rights violations in Tunisia, the EU undermined its declared commitment to provide protection for asylum seekers. Although most EU member states have rights-based standards and procedures for evaluating asylum claims within their jurisdictions, they nevertheless rely on third countries systemically violating human rights in order to prevent irregular migrants from reaching EU territory and making asylum claims in one of the EU member states (Frelick et al. 2016). By outsourcing migration controls to Tunisia, where asylum seekers are regularly subjected to violations of their fundamental rights, the EU avoided its international obligations towards asylum seekers coming from/through Tunisia.



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*** **Vasja Badalič**, is a research fellow at the Institute of Criminology at the Faculty of Law in Ljubljana, Slovenia. His primary fields of research are contemporary imperialism and the “war on terror” (e.g. the impact of the “war on terror” on the civilian population in Afghanistan and Pakistan), migration (e.g. EU’s migration policy on its external borders and refugees’ rights in Pakistan, Iran, Turkey, Lebanon and Syria), and workers’ rights in “third-world” countries (e.g. workers’ rights in export processing zones). He combines theory with extensive field-work, frequently visiting the Middle East and Central Asian countries, in particular Afghanistan and Pakistan. Currently, he works on a project called Crimmigration between human rights and surveillance.

He is the author of three single-authored monographs: *The Terror of ‘Enduring Freedom’: War in Afghanistan and Pakistan*, Krtina Publishing house, Ljubljana 2013 (in Slovenian); *The Red Machinery: The Beat of Chávez’s Revolution*, Študentska založba Publishing house, Ljubljana 2011 (in Slovenian); and *For 100 Euros a Month: The Production System of Global Capitalism*, Krtina Publishing House, Ljubljana 2010 (in Slovenian).

Before joining the Institute of Criminology, Vasja Badalič worked as a freelance journalist, reporting for Slovenian news media from the Middle East (Iraq, Lebanon, and Syria), Central Asia (Afghanistan), South Asia (India, Bangladesh, and Pakistan), and Latin America (Venezuela, Colombia, Bolivia, Mexico, Honduras, and Nicaragua). His work frequently appeared in Slovenian newspapers and magazines such as *Delo*, *Dnevnik*, *Večer*, and *Mladina*. He continues writing for Slovenian news media. He has appeared many times on Slovenian radio and television as an expert on Afghanistan and Pakistan.

Within the RISE project, Vasja Badalič would like to cooperate with organizations interested in research on contemporary imperialism and the “war on terror”, migration, and the exploitation of workers in “third world” countries.

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