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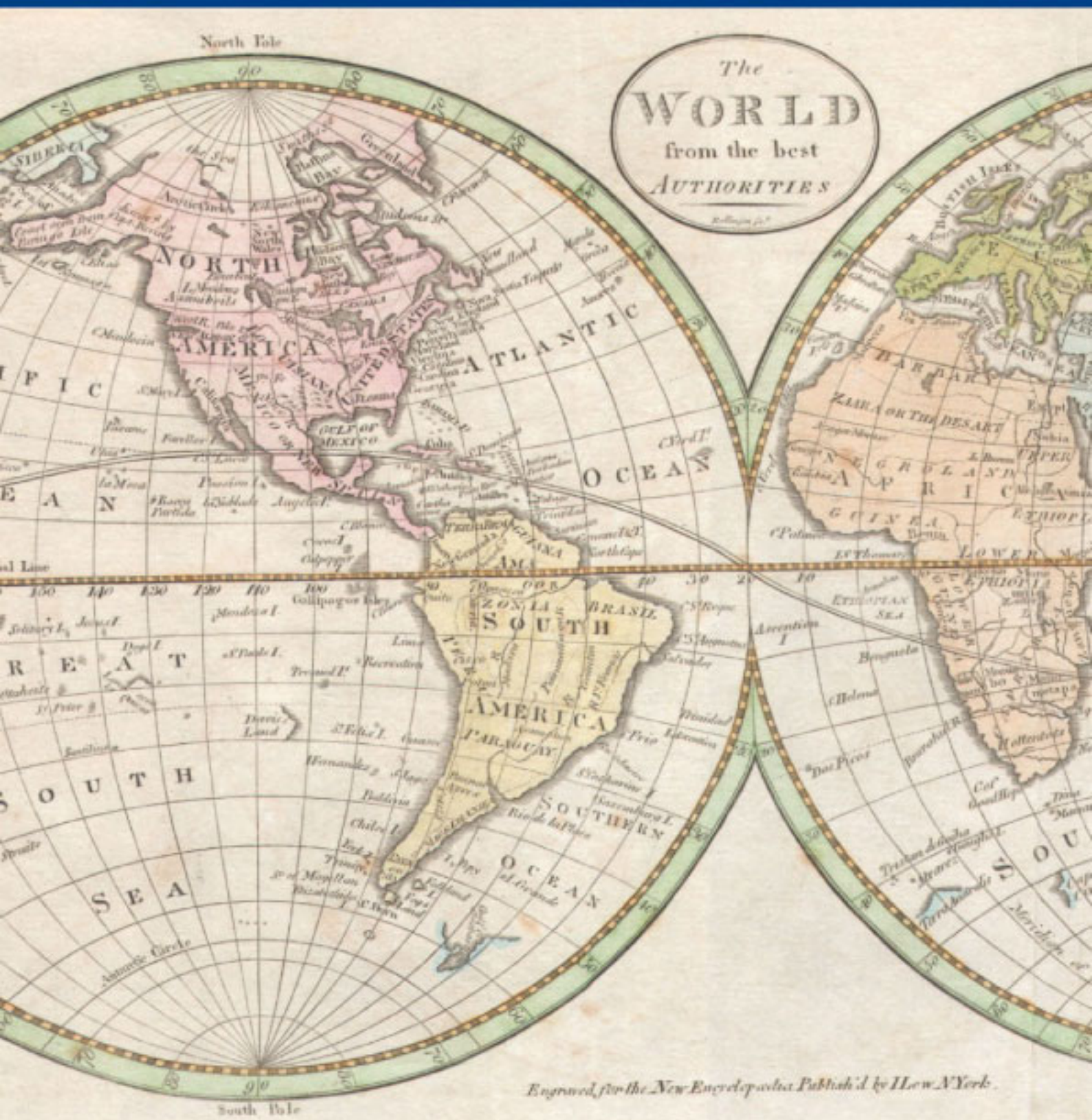

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RIVISTA DI
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Evolving asylum deterrence practices in Africa: The case of Tunisia and South Africa*

Chiara Scissa

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1. *Introduction*

Tunisia and South Africa are located at the opposite poles of the African continent. Their different geographical position has, in addition to other factors, influenced the different human mobility patterns that characterize them. Whereas Tunisia is a country of emigration, immigration and transit for migrants and asylum seekers from North and Sub-Saharan Africa, South Africa is mainly a State of immigration from Southern African countries.

In addition to their geographical position, these two countries differ in colonial past, model of the legal system (civil law vs common law), approach to international law (monistic vs dualistic approach) and linguistic/cultural tradition (French-speaking vs English-speaking country). These factors are relevant to understanding some of the reasons underlying their different stance to international refugee law as well as to the regional refugee protection framework. Although both countries have ratified the 1951 Convention relating to the Status of Refugees (the Refugee

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Convention), its 1967 New York Protocol as well as the Organization of African Unity (OAU) 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and People's Rights, the domestication of supranational treaties widely diverges[1]. Indeed, Tunisia still lacks a national law on asylum, and delegates the entire refugee status determination (RSD) procedure to the UN High Commissioner for Refugees (UNHCR). According to Cantor and Chikwanha, in monist African States - such as most civil law francophone States like Tunisia – the mere ratification of a treaty may be sufficient for its rules to have direct effect in national law. Hence, monism could justify the absence of domestic legislation on asylum[2]. By contrast, dualist States - such as common law anglophone States like South Africa – require international law to be specifically transposed at the national level to be effective. And in fact, South Africa has adopted specific norms that expressly refers to the obligations endorsed at international and regional level, including through the Refugee Convention, its 1967 Protocol as well as the OAU Convention. Arguably, however, there might be additional reasons why Tunisia has not yet adopted a national law on asylum, as the following Section will detail.

Despite these broad differences, moreover, both countries have in recent years embraced a restrictive approach to migration and the right to asylum. One major reason why this contribution focuses specifically on these two jurisdictions lies exactly on this peculiarity, namely that despite relevant differences, both Tunisia and South Africa have similarly implemented restrictive asylum policies and resorted to barriers to asylum. In addition, as later explained, these two jurisdictions allow for context-specific reflections concerning the influence of key internal and external exacerbating factors of obstacles to asylum, including the role of the EU in shaping them.

Among many other administrative, procedural and legal barriers to asylum, this contribution will focus on specific asylum deterrence strategies implemented in and by Tunisia and South Africa, namely illegal and

[1] Respectively, Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 137; Protocol relating to the Status of Refugees, adopted 31 January 1967, entered into force 4 October 1967, 606 UNTS 267; Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974, 1001 UNTS 45; African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58.

[2] D.J. Cantor – F. Chikwanha, *Reconsidering African Refugee Law*, in *International Journal of Refugee Law*, 2019.

indiscriminate detention and collective expulsions in Tunisia; arbitrary and indefinite detention and the closure of Refugee Reception Offices (RROs) in South Africa[3].

After having described the legal asylum frameworks and procedures eventually available in Tunisia and South Africa, with also emphasis on the relevance of supranational refugee and human rights norms, the contribution will provide a detailed description of the selected deterrence practices in the respective countries. Finally, reflections will be made on enabling factors that may have played a role in exacerbating the mentioned barriers.

2. *Asylum frameworks in Tunisia and South Africa*

Both Tunisia and South Africa are bound by the Refugee Convention and its Protocol and neither of them has made reservations. This is particularly relevant for South Africa, given that it is among the only three Southern African States to have adhered to the Refugee Convention with no reservations. Both are parties to the OAU Convention, which complements the Refugee Convention and adapts it to the specific African context. The OAU Convention expands the traditional refugee definition by providing the refugee status also «owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality» (Art. 1.2). In addition, both countries are signatories to the African Charter of Human and Peoples' Rights, namely the most important regional human rights treaty which drew inspiration from the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic, Social and Civil Rights, as well as the European and American Conventions on Human Rights. Art. 12 of the African Charter stipulates the freedom of movement (par 1), including the right to leave any country including their own and the right to return to one's own country (par 2), as well as the right to seek and obtain asylum (par 3). This provision also specifies that non-nationals who have been legally admitted may only be expelled by virtue of a decision taken in

[3] This contribution defines «deterrence» as a term widely used to cover a broad range of practices, regulated or not regulated by law, related to direct or indirect migration control. Please see, J. Vedsted-Hansen, *European governance of deterrence and containment. A legal perspective on novelties in European and Danish asylum policy*, in *Journal of Ethnic and Migration Studies*, 2025.

accordance with the law (par 4) and prohibits mass expulsions aimed at national, racial, ethnic or religious groups (par 5).

In addition to the African Charter, two further treaties are of relevance, as they enrich the African human rights system and have implications for refugee protection. These are the African Charter on the Rights and Welfare of the Child (African Children's Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[4]. The former was adopted in 1990 in order to supplement the provisions of the African Charter in relation to children and as a complementary mechanism to the UN Committee on the Rights of the Child. Its provisions apply to citizens as well as non-citizens. In particular, Art. 23 states that all appropriate measures are to be taken in order to ensure that children seeking the refugee status or who have been recognized as refugees receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the Children's Charter and other international human rights and humanitarian instruments to which the States are parties. As for the latter, the African Women's Protocol provides for special measures of protection for women asylum seekers and refugees. According to Art. 4(k), State Parties ensure that women and men enjoy equal rights in terms of access to the RSD procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law. Pursuant to Art. 10, women refugees have the right to a peaceful existence and to participate in the promotion and maintenance of peace. Finally, Art. 11 protects women asylum seekers, refugees, returnees and internally displaced against all forms of violence and sexual exploitation. It is relevant to note that African Children's Charter and the African Women's Protocol are only binding for South Africa, as Tunisia has not ratified these arrangements. Finally, the Constitutive Treaty of the African Union, which is legally binding for all its member States including South Africa and Tunisia, promotes and protects human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.

What is more, both Tunisia and South Africa are parties to Regional Economic Communities. Tunisia belongs to the Arab Maghreb Union (AMU) together with Algeria, Libya, Mauritania, and Morocco. Its founding

[4] Organisation of African Unity, African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990 and entered into force on 29 November 1999; Organisation of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 1st July 2003 and entered into force on 25 November 2005.

treaty aims to develop a regional market and has the free movement of persons and the harmonization of migration policy among its objectives[5]. However, since the Arab Spring in 2011 there have been no new developments in the AMU in the field of asylum. For its part, South Africa has adhered to the Southern African Development Community (SADC) together with other 15 States. Although the elimination of obstacles to regional mobility is set out in the SADC founding Treaty, freedom of movement is severely limited. This is due to the fact that Member States prefer to act nationally and bilaterally rather than multilaterally on migration issues. The lack of a Protocol on Free Movement is emblematic in this regard. A draft Protocol on the Free Movement of Persons within SADC was created in 1996 but, due to opposition by some member states including South Africa, it was replaced by a more restrictive Protocol on the Facilitation of Movement of Persons, which allows citizens of the community to travel without a visa for up to 90 days. However, only six States (Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zambia) have ratified the protocol out of the ten ratifications needed for it to enter into force and hence it is not yet legally binding. The Protocol enshrines relevant provisions, including protection against indiscriminate group or collective expulsion (Art. 24) as well as the reaffirmation of Member States's commitment to their obligations under international agreements on refugees and with relevant UN Agencies, including UNHCR (Art. 28)[6]. The fact that this Protocol is still not into force confirms that regional cooperation on asylum matters is quite limited. Among the few relevant arrangements, it is relevant to recall the 1998 Declaration on Refugee Protection within Southern Africa, where SADC countries expressed concern for the «security, social and economic burdens which the refugee phenomena have brought on the SADC countries that have generously provided and continue to provide asylum»[7]. To face refugee-related challenges, States agreed to recommit to the international and regional refugee conventions and to observe international standards for refugee protection. States also agreed to uphold regional cooperation so to efficaciously address the root causes of refugee movement. Other relevant instruments include the 2019 SADC Common Regional Policy Framework

[5] Traité instituant l'Union du Maghreb arabe, Marrakech 17 February 1989, United Nations Treaties Series No. 26844 (1989, 167).

[6] SADC, *SADC and UNHCR commit to strengthen cooperation based on shared priorities, values and strategies*, 9 March 2023, https://www.sadc.int/.

[7] SADC, *Declaration on Refugee Protection within Southern Africa 1998*, signed on 1 January 1998, par. C.

on Refugees and Asylum Seekers, whose text is however not publicly available, SADC Guidelines on Coordinated Border Management (2011), and the SADC-UNHCR Action Plan (2020-2024). SADC Member States are also developing a Regional Migration Policy Framework in order to promote regular, safe and orderly migration, which will also facilitate the development and implementation of National Migration Policies as well as tailored National Action Plans[8].

3. *Asylum procedures in Tunisia and South Africa*

As mentioned, Tunisia and South Africa have a different level of domestication of supranational refugee and human rights treaties. Although Tunisia's 2014 Constitution recognizes the right to political asylum (Art. 26), the country does not have a national law on asylum specifying its obligations towards refugees and asylum seekers under its jurisdiction, which is seen as the «most significant factor undermining the protection of vulnerable populations in Tunisia»[9]. In 2011, the Ministry of Justice was asked by the Government to prepare a draft law on asylum. Two draft law texts – one transposing the main provisions of the Refugee and OAU Conventions into national legislation, and another one setting up a national commission in charge of conducting RSD and providing protection and assistance to refugees – were developed[10]. These texts were reviewed by relevant Ministries as well as by an inter-ministerial working group. UNHCR also provided comments on the texts in September 2014 and in May 2016 they were referred back to the cabinet of the Ministry of Justice. The Ministry of Justice shared the texts with the Prime Minister's office for a final round of comments from all concerned ministerial departments. The text was then submitted to Parliament in 2018. Since then, the drafts have been in a deadlock and, as of now, there has been no progress on their adoption[11]. Given the lack of a national law, Tunisia has mandated the entire RSD procedure to UNHCR since June 2011 in light of a bilateral

[8] SADC, *SADC Develops Regional Migration Policy Framework*, 22 October 2020 https://www.sadc.int/.

[9] F. Raach – H. Sha'ath – T. Spijkerboer, *Country report: Tunisia. ASILE project*, May 2022, p. 3.

[10] UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: TUNISIA,* 3rd Cycle, 27th Session.

[11] F. Raach – H. Sha'ath – T. Spijkerboer, cit., p. 55.

cooperation agreement where the Tunisian government fully recognized UNHCR's mandate[12]. The entire process is internal, this meaning that UNHCR evaluates asylum claims and guarantees internal appeal in case of rejection. No external judicial remedy can be sought due to the absence of a specific law. The procedure is private and there is no access to the statistics or elements related to the practice in this matter which is considered confidential. Over time there has been criticism about the management of refugee camps by UNHCR and a few irregularities in the RSD procedure have been spotted[13].

As for South Africa, in 1995 and 1996 respectively it signed the OAU Convention and the 1951 Refugee Convention and its Protocol. Shortly after, South Africa enacted its Refugees Act 130 of 1998, which became operational in 2000. The Refugee Act explicitly transposes international and regional refugee treaties into the domestic legal order and is divided into three main parts: it provides for a refugee definition; it governs the processes for asylum application and provides for the rights and obligations of a refugee. Remarkably, it incorporates the broader refugee definition enshrined in the OAU Convention and even adds further grounds eligible for refugee protection (gender and tribe)[14].

Multiple branches under the Department of Home Affairs are involved in the asylum access adjudication procedure in South Africa. The Refugee Appeals Authority (RAA- formerly the Refugee Appeal Board or RAB) is responsible for examining appeals lodged by asylum applicants where their application is considered to be unfounded by a Refugee Status Determination Officer (RSDO), namely an official of the Department of

[12] UNHCR, *Submission by the United Nations High Commissioner for Refugees*, cit.

[13] R. Roesch – G. Jacovella – A. Bezzi – J. Garms, T*he Deficiencies of UNHCR's RSD Procedure: The Case of Choucha Refugee Camp in Tunisia*, in *Oxford Monitor of Forced Migration,* May 2014.

[14] Section 3 of the Refugee Act, titled «Refugee status», reads as follows: «Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing [or disrupting] public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge [elsewhere] in another place outside his or her country of origin or nationality; or (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)».

Home Affairs who, among other duties, interviews asylum seekers and takes the first decision on whether to grant refugee documentation or reject the asylum application. The RAA is an exclusively appellate body whose mandate is to hear and determine any question of law referred to it in terms of the Refugee Act, to hear and determine any appeal lodged after being rejected by the RSDO as unfounded, and to advise the Minister or the Standing Committee for Refugee Affairs (SCRA) on any matter referred to it by either body. In deciding on an appeal, the RAA may confirm, set aside or substitute a decision by the RSDO. Members of the RAA are appointed by the Minister of Home Affairs. A member serves for not more than five years and is eligible for reappointment.

The SCRA is a committee which has various duties and functions such as assessing whether to grant asylum seekers permission to study or to work while their asylum claim is pending. In addition, when the SCRA receives a RSDO decision rejecting an asylum claim as «manifestly unfounded», «abusive» or «fraudulent», it reviews that decision and alternatively 1) confirms the rejection of the asylum claim, which can be judicially challenged; 2) overturns the RSDO decision and grants the refugee status; or 3) requests the RSDO to make a new decision on the asylum application.

Finally, the Minister for Home Affairs is responsible for the administration of the Refugee Act and can appoint members of both the SCRA and the RAA, order the removal of a refugee or asylum seeker on grounds of national security, national interest or public order and, most importantly, to make a declaration for group recognition (*prima facie*)[15].

4. *Asylum deterrence: Tunisia*

Before 2011, Tunisia was an autocratic State with restrictive immigration and emigration policies. Irregular migration was sanctioned and managed through arbitrary detentions and expulsions, while imposing

[15] Refugee Act, cit., section 35. In the event of mass influx, the Minister of Home Affairs may declare 'any group or category of persons to be refugees either unconditionally, or subject to such conditions as the Minister may impose in conformity with the Constitution and international law.' The declaration and revocation of the same is by Gazette Notice. This provision has not been activated since the enactment of the Refugee Act in 2000. The only formal refugee group recognition that has taken place was accorded to Mozambicans under a Tripartite Agreement between South Africa and Mozambique and UNHCR in 1993, which was terminated in 1996.

penalties for anyone who had assisted irregular migrants and asylum seekers, including lawyers and doctors[16]. After the fall of the autocratic regime of Ben Ali, border control collapsed resulting in thousands of migrants entering and leaving the country through Tunisia's porous borders. In addition, civil society organizations started to proliferate and to advocate for the human rights of migrants in Tunisia. UNHCR began its mandate in the country and established the Choucha refugee camp in order to accommodate refugees fleeing civil war in Libya. Yet, despite the democratization process initiated after the Arab Spring, migration policies did not improve and remained securitized. Starting from 2013, Tunisia witnessed a series of political assassinations and growing geopolitical as well as continued economic constrains, which risked undermining its political stability[17]. As a result, migration was deprioritized from the political agenda. Despite the large-scale immigration from Libya, no political party tried to blame Libyan migrants for the multifaceted challenges that the country was facing, and no formal amendment was adopted in the legislation to regulate or limit their presence in Tunisia. Yet, according to Natter, «[…] this meant that the core of Tunisia's immigration regime inherited from the authoritarian era – the securitized approach and restrictive rules on entry and stay – has remained untouched»[18]. Some years have passed, and Tunisia is still facing severe economic constrains and political turmoil. In addition, it is now the principal departure point by sea for migrants and asylum seekers heading to Europe and is under the spotlight of EU's containment policies in third countries. Tunisia is currently experiencing a severe democratic downturn that is affecting the liberties and human rights of nationals and non-nationals alike. In particular, migrants and asylum seekers are increasingly stigmatized and, in contrast to the past, are scapegoated by the highest institutional profiles, inflaming violence and xenophobia against them. Racial discrimination has also increased in Tunisia, where certain nationalities of asylum seekers have been first denied access to asylum, and

[16] H. Meddeb, *Courir ou mourir. Course à el khobza et domination au quotidien dans la Tunisie de Ben Ali.* Centre d'Etudes et de Recherches Internationales (CERI), 2012.

[17] C. Cassarini, *L'immigration subsaharienne en Tunisie: De la reconnaissance d'un fait social à la création d'un enjeu gestionnaire*, in *Migrations Société*, 2020.

[18] K. Natter, *Tunisia's migration politics throughout the 2011 revolution: revisiting the democratisation–migrant rights nexus*, in *Third World Quarterly*, 2021, https://www.tandfonline.com/

then expelled[19]. The following analysis focuses on two main deterrence practices occurring in the country, whose impacts against foreigners are worsening in frequency and breadth.

4.1 *Illegal detention*

The detention of foreigners, including asylum seekers, in Tunisia constitutes a relevant legal challenge as it is poorly regulated and respected. It is relevant to note that, despite being mandated by international law, there is currently no alternative to detention provided by national law in Tunisia[20].

Art. 29 of the 2014 Constitution merely stipulates that the length of detention must be defined by law, and detainees are to be guaranteed various safeguards against arbitrary detention, including the right to information about the grounds for their detention and the right to legal assistance. Art. 30 also stipulates that detainees should be able to communicate with their relatives.

Unauthorized entry, stay, and exit of both nationals and foreigners are also explicitly criminalized and sanctioned by national law[21]. Art. 23 of Organic Law 68-7 concerning the situation of foreigners provides for fines and imprisonment for up to a year for those entering or exiting Tunisia without proper authorization or documentation, or who overstays their visa or residence permit. Art. 34 of Organic Law 1975-40 states that travelers, including Tunisian nationals, must enter or exit Tunisian territory at designated border crossing points. Any foreign national who violates these provisions can be expelled from the country and is subject to criminal sanctions according to Organic Law 68-7. Art. 24 of Organic Law 68-7 mandates fines and imprisonment of six months to three years for any foreigner using false documents or providing inaccurate information on

[19] Already in 2016, studies denounced that asylum seekers from Senegal were returned without the possibility of exercising their fundamental right to asylum. Similarly, Egyptians were automatically and immediately returned to Egypt without the opportunity to claim asylum in Tunisia. See, L. Harzalli, *Réfugiés subsahariens: Haro sur la Tunisie!,* in *Afrik.com*, 10 April 2013, http://www.afrik.com/

[20] Global Detention Project, *Tunisia Immigration Detention Profile*, 2020, https://www.globaldetentionproject.org. See also, UNHCR, *Compilation of International Human Rights Law and Standards on Immigration Detention*, 2018, https://www.Unhcr.org; UNHCR, *Detention Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012, https://www.Unhcr.org/

[21] FTDES, *Unauthorized migration in the jurisprudence of the Tunisian penal judiciary*, 30 July 2019, https://ftdes.net/. .

their identity, profession, or nationality. Art. 50 of Organic Law 1975-40 mandates the expulsion of foreigners who have been sentenced for violating the law, upon completion of their prison sentence. Their expulsion is automatic. It does not detail any judicial procedure, nor it provide any guarantees, such as the right to appeal.

In practice, the few procedural safeguards established at the constitutional level are rarely respected. Detainees are often not provided with access to a lawyer nor to a fair legal process. They cannot contact family members or consular authorities[22]. This is especially true for the Al-Wardia facility, which reportedly operates in breach of minimum procedural standards[23]. Here, the most common reasons for detention are irregularly crossing the border, overstaying, and falsification of official documents[24]. Yet, as noted by the UN Special Rapporteur on the Human Rights of Migrants, «many migrants are imprisoned in pre-trial detention for extensive periods, often up to a year, without even knowing the charges against them»[25]. After being kept in detention for long periods, migrants are often released in exchange of a fine, and then deported[26]. Moreover, according to the Tunisian Forum for Economic and Social Rights, some detainees have complained about the difficulty of accessing UNHCR to complete their registration and asylum applications[27].

Migrant and refugee children are also not exempted from detention and expulsion. Minors are often detained, in particular at Al-Wardia, where they are separated from adult detainees[28]. In 2019, 80 minors were allegedly detained in Al-Wardia[29]. There is evidence of children being expelled with adult migrants and being abandoned in the Libyan desert with no food or water[30]. The Special Rapporteur on the Human Rights of Migrants has also denounced the detention and deportation of migrant children for having irregularly crossed the border with Tunisia. While in detention, they were

[22] Special Rapporteur on the Human Rights of Migrants, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, Addendum, Mission to Tunisia*. OHCHR. A/HRC/23/46/Add.1, 3 May 2013, http://www.ohchr.org/.

[23] O. Tringham, *The Case for Legal Aid for Refugees in Tunisia,* in *Rights in Exile*, 20 June 2016, https://bit.ly/2Bq8HN2

[24] Tunisian Forum for Economic and Social Rights, *Migrants Placed in the Wardia Centre: Detained, then Deported or 'Forcibly' Returned*, 2019, https://ftdes.net/.

[25] Tunisian Forum for Economic and Social Rights, cit.

[26] Tunisian Forum for Economic and Social Rights, cit.

[27] Tunisian Forum for Economic and Social Rights, cit., p. 53.

[28] Special Rapporteur on the Human Rights of Migrants, cit.

[29] Tunisian Forum for Economic and Social Rights, cit.

[30] Tunisian Forum for Economic and Social Rights, cit.

impeded from having contact with their family and legal representatives[31]. These practices run counter Art. 31 of the Refugee Convention, according to which migrants shall not be penalized for having crossed a border irregularly, as well as Art. 34 of Organic Law 1975-40, which provides for exceptions to expulsion for convicted foreigners, implying that refugees would not be subject to penalties for illegal entry or exit. In addition, as widely recalled, the detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child[32].

4.2 *Indiscriminate detention and collective expulsions*

Since September 2021, collective expulsions of black foreigners from Tunisia to Libya and Algeria are more frequently detected with a peak since June 2023[33]. Evidence shows that national authorities - the Tunisian *Garde Nationale* - operates through «capture operations», as no legal procedures are followed, no judicial order is sought to legitimize detention, and the detainees are systematically deprived of money, personal belongings and documents[34]. People illegally detained are unable to speak with a lawyer. No legal documentation concerning their deprivation of liberty is provided and their individual circumstances are not taken into consideration. When arrested, people are told that it is just a routine check and that they would be soon released. Reports denounce the discriminatory and arbitrary arrest by the *Guarde Nationale* of whoever is Black in Tunisia regardless of their legal status. To be arrested are Black people – men, women, children – with or without documentation, including students, regular workers, asylum seekers, people with Tunisian passports, people with documents issued by

[31] Special Rapporteur on the Human Rights of Migrants, cit.

[32] UNICEF, *A home away from home for refugee and migrant children*. Advocacy Brief, UNICEF, August 2016, http://www.unicef.org/; UN Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005 (CRC/GC/2005/6), par. 61; UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68), par. 80.

[33] Alarm Phone, *Chain of push-backs from Tunisian ports to the Libyan desert!,* 3 October 2021, https://alarmphone.org/.

[34] Researchers X, *State trafficking. Expulsion and sale of migrants from Tunisia to Libya*, June 2023 – November 2024, https://statetrafficking.net/.

UNHCR, migrants intercepted at sea, and irregular migrants[35]. Indiscriminate detention of Black people in Tunisia amounts to severe human rights violations in breach of core principles enshrined in key international and regional treaties on refugee and human rights law to which Tunisia is bound, including the prohibitions of arbitrary detention and of racial discrimination.

What is more, while detained in prison, people suffer from diverse forms of violence, including sexual harassment, beating, and deprivation of food, water and healthcare amounting to torture, inhuman and degrading treatment. From here, the victims' faith depends on the route they will be forced to follow. They could indeed be transferred onto busses and left at the border with Algeria or be removed to Libya in open violation of their right to asylum, the principle of non-refoulement, and the prohibition of mass or collective expulsions.

In the first case, people are loaded onto buses and driven to the Algerian border, where they are abandoned in desert areas (so called «desert dumps») without any assistance, water or food, leaving them at risk of kidnapping, extortion, torture, sexual violence, and death. They are ordered to walk towards Algeria, where border officials often open fire against them[36]. Al Jazeera reported that hundreds of refugees and migrants, including children, have enforcedly disappeared after being captured in Tunis and are abandoned in the desert near Algeria[37].

In the second case, people are transferred onto buses and forcibly removed at the border with Libya, where they are detained again in degrading and inhumane conditions. At the Libyan border, prisoners are sold in exchange for money, hashish, and fuel. The most common selling prices range between 40 and 300 Tunisian dinars (12 to 90 euros) per person[38]. Women are usually more expansive than men. The selling of human beings, which is conducted by Tunisian uniformed personnel and Libyan militias, is therefore institutionalized and carried out with the connivence of both States. Once in Libya, people are again detained in overcrowded facilities in conditions violating minimum international

[35] InfoMigrants, *UN alleges Tunisian border guards rounded up migrants and passed them to Libya*, 12 June 2025, https://www.infomigrants.net/.

[36] Lighthouse reports, *Desert Dumps*, 21 May 2024, https://www.lighthousereports.com/; InfoMigrants, *Tunisia: Hundreds of migrants intercepted at sea are nowhere to be found*, 2 April 2024, https://www.infomigrants.net/.

[37] Al Jazeera, *Children, infants missing after Tunis police clear makeshift refugee camps*, 3 May 2024, https://www.aljazeera.com/.

[38] Researchers X, cit.

standards and remain at heightened risk of sexual abuses, including gender-based violence, and torture. They are divided into two groups: those who are able to pay immediately a ransom for their release and those who will be subjected to torture and violence. Those who cannot pay are detained for long periods and some of them become part of the activities that revolve around the management of the prisons or the release of the prisoners[39].

5. *Asylum deterrence: South Africa*

Akin to Tunisia, South Africa went through a radical transformation in its recent past, moving from the apartheid regime to a democratic one. Into force from 1948 to 1994, apartheid was a system based on racial superiority and segregation. During apartheid, asylum seekers and refugees were not recognized in South Africa as the country was not bound by any international and regional conventions on refugees and administered its refugee policy on an ad hoc basis. For instance, South Africa welcomed white people fleeing from Rhodesia and Mozambique, but refused to do so for black Mozambicans fleeing civil war[40]. Under apartheid, the 1991 Aliens Control Act institutionalized discrimination in migration policy with high control and deterrence over non-white migration[41]. People wishing to enter South Africa had to bear heavy costs for their applications, meet restrictive administrative and financial requirements, and discrimination based on nationality. Indeed, immigration from some African countries, such as Zimbabwe, was particularly discouraged[42]. In addition, foreign black

[39] M. Townsend, *The brutal truth behind Italy's migrant reduction: beatings and rape by EU-funded forces in Tunisia*, in *The Guardian,* 19 September 2024, https://www.theguardian.com/. According to The New Arab, a law is under development that would allow the deportation of irregular migrants from Tunisia to their countries of origin. The law allegedly includes exemptions for people who may be at risk of suffering torture or inhumane treatment in their home countries and the possibility for people to appeal deportation orders in administrative courts. If this law were adopted, collective expulsions would become institutionalized with a risk of systematizing them. See, The New Arab, *Tunisia parliament wants to legalise pro-Saied deportation of migrants law*, 27 January 2025, https://www.newarab.com/.

[40] The New Arab, cit.

[41] S. Peberdy – C. Rogerson, *Rooted in racism: The Origins of the Aliens Control Act,* in J. Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa*. Cape Town, 1998.

[42] S. Peberdy, *Imagining Immigration: Inclusive Identities and Exclusive Policies in Post-1994 South Africa*, in *AfricaToday*, 2001.

Africans were victims of racist discrimination and targeted for detention and repatriation with no possibility of judicial review. Undocumented migrants were banned from exercising basic human rights, such as access to healthcare and education. In addition, from 1986 to 1993, land borders with Zimbabwe, Botswana and Mozambique were militarized and protected with lethal electric fences.

After the end of the apartheid regime, South Africa ratified the most relevant refugees and human rights treaties and started to reform the 1991 national immigration and asylum policy. Yet, the apartheid rhetoric was still in place and massive deportations of irregular migrants from Mozambique occurred between 1994 and 1995[43]. Thanks to the intervention of third parties, the Refugee Act adopted in 1998 not only reflected South African international and regional commitments relating to refugees and ensured the principle of non-refoulement, access to asylum and to integration, but it also expanded protection by extending the refugee status to additional grounds of persecution beyond those provided by the 1951 Refugee Convention and the 1969 OAU Convention, namely tribe and gender[44]. Yet, the steady rise in migration inflows from neighboring countries in the years following the end of apartheid, which coincided with the outbreak of wars and economic collapse in neighboring countries, put the already scares financial resources of South Africa under pressure and made evident the systematic lack of adequate knowledge and administrative capacity of South Africa in managing migration flows. Over time, South Africa's open asylum and migration policy turned into containment and a wide range of deterrence measures have been implemented to curb migration. Two main barriers in this regard are examined in the following sections.

5.1 Arbitrary and indefinite detention

Migrants who have entered South Africa irregularly and who do not possess an asylum transit visa are considered to be illegal foreigners under the Immigration Act. Likewise, migrants who have been provided with said visa to apply for asylum at a Refugee Reception Office (RRO) and failed to do so within the timeframe prescribed by the law are equally considered illegal foreigners pursuant to Section 23(2) of the Immigration Act. Section

[43] J. Crush – D. McDonald, *Introduction to special issue: Evaluating South African immigration policy after apartheid*, in Africa Today, 2001.

[44] Section 3(a) of the Refugee Act.

32(2) requires that illegal foreigners must be detained and then deported; however section 34(1) confers discretion on the officer as to whether the individual must be detained. It also includes a range of safeguards including the obligation to bring the person before a court within 48 hours of their arrest for the court to determine whether to confirm their detention after having heard the immigration officer and the foreigner concerned, the need for the authorities to provide reasons in writing for the detention order, the right to appeal and review before a Court, the temporal limits of detention. Finally, Section 41 of the Immigration Act allows police and immigration officers to detain and verify the status of a person suspected of not being entitled to be in South Africa. The law mandates that the verification of immigration status should be carried out promptly and should be based on reasonable grounds.

Irregular migrants can be subject to administrative immigration detention for the purpose of deportation or criminal detention for the crime of entering and remaining in the country illegally. Specifically, under Section 34, administrative detention can last up to 30 days although the Magistrate Court may, on good reasonable grounds, extend detention for a maximum of 90 days if warranted. In any event, detention cannot be protracted beyond the maximum limit of 120 days. Section 49 of the Immigration Act provides for criminal sanctions of a fine or imprisonment for individuals who commit offences such as unauthorized entry, overstaying, and failing to comply with deportation orders, with penalties ranging from fines to prison terms of up to four years. In recent years, there has been a notable increase in persons arrested under both Section 49 and Section 34, whereby migrants are first given a criminal sentence and are then put in administrative detention pending deportation[45].

However, this contrasts with the Refugee Act, which generally prohibits the detention of asylum seekers and provides for specific norms to regulate it (i.e., Art. 23 - Detention of asylum seeker; Art. 29 – Restriction of Detention). In particular, the case law has interpreted the Refugee Act to imply that, from the moment asylum seekers apply for asylum until they receive a final decision of their claim, they should be protected from arrest and detention for entering and/or being in the country irregularly, except

[45] Lawyers for Human Rights, *Status of Immigration Detention in South Africa*, December 2023, https://lawyersforhumanrights.b-cdn.net/.

for the circumstances provided by the law[46]. Emblematically, in *Ulde v Minister of Home Affairs*, the Supreme Court of Appeal confirmed that foreigners cannot be detained arbitrarily or without just cause, and that Section 34 of the Immigration Act obligates officials to exercise their discretion, which must be construed in favour of liberty[47]. In *Bula v Ministry of Home Affairs*, which was decided before the entry into force of the current immigration and asylum framework, the Constitutional Court ruled that the protection provided by the Refugees Act trumped any punitive measures of the Immigration Act, provided an intention to apply for asylum had been evinced, and regardless of delay or any other reason[48].

However, recent amendments to the Refugee Act, adopted in 2017 but entered into force in 2020, have further curtailed the fundamental right to asylum and key guarantees. Indeed, according to Section 4(1)(h) of the Refugee Amendment Act if asylum seekers fail to present at a RRO with a valid asylum visa within five days from entry, asylum seekers will be detained at the RRO while being interviewed by an immigration officer to determine whether there were compelling reasons for not having complied with the law. This is consistent with the new Regulation 8(3) of the Refugee Act, which stipulates that asylum seekers who fail to enter the country through a designated port of entry or fail to obtain an asylum transit visa at the border must, *prior to being permitted to apply for asylum*, show good cause for their illegal entry or stay. Following the 2020 amendments, the judiciary has also provided for restrictive interpretation of the right to access asylum. For instance, in *Ashebo v Minister of Home Affairs and Others*, the Constitutional Court observed that the new provisions are not in contrast with Art. 31 of the Refugee Convention, as it «does not provide an asylum seeker with unrestricted indemnity from penalties»[49]. Furthermore, the Court held that a mere intention to apply for asylum is no longer sufficient to grant release from detention given the 2020 amendments. In *Lembore and Others v Minister*

[46] Among others, South African Supreme Court of Appeals, *Abdi v Minister of Home Affairs* (2011) ZASCA 2; South African Constitutional Court, *Arse v Minister of Home Affairs* [2010] ZASCA 9, 2012 (4) SA 544 (SCA); South African Constitutional Court, *Bula v Minister of Home Affairs* [2011] ZASCA 209, 2012 (4) SA 560 (SCA); South African Constitutional Court, *Ersumo v Minister of Home Affairs* 2012 (4) SA 581 (SCA).

[47] Supreme Court of Appeal, *Ulde v Minister of Home Affairs and Another* (320/08) [2009] ZASCA 34; 2009 (4) SA 522 (SCA); 2009 (8) BCLR 840 (SCA); [2009] 3 All SA 332 (SCA) (31 March 2009)

[48] South African Constitutional Court, *Bula v Minister of Home Affairs* [2011] ZASCA 209, 2012 (4) SA 560 (SCA).

[49] South African Constitutional Court, *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16.

of Home Affairs and Others, the High Court clarified that detention under the Immigration Act remains lawful until an applicant demonstrates valid reasons for their illegal entry or delayed asylum claim[50].

Not only do the 2020 amendments facilitate the use of detention, but the procedural and substantial safeguards that must be ensured in this context are rarely respected. Indeed, the detention of asylum seekers is often protracted without legal assessment and the time limits for detention are circumvented. Migrants and asylum seekers are often kept in arbitrary or indefinite detention without proper legal basis or judicial oversight and in degrading conditions in violation of the right not to be tortured or subject to cruel, inhuman or degrading treatment or punishment; freedom from arbitrary arrest or detention; the right to freedom of movement; and the right to fair trial and due process. The executive has justified several times the use of indefinite detention of illegal foreigners as this is in the best interest of justice and argued that releasing them would mean to perpetuate illegality by sending the wrong message to illegal migrants in the country[51]. Individuals are frequently arrested without reasonable ground, often perpetuated by xenophobia and anti-migrant sentiments or profiling. Furthermore, DHA officials frequently delay or fail to verify detainees' immigration status promptly, unlawfully holding people, including asylum seekers with pending claims. This gives rise to pervasive corruption where detainees are often released only after paying bribes. If people are unable to pay, they are kept in prolonged and arbitrary detention, violating the right to freedom and security. Corruption indeed plays a relevant role in detention dynamics in South Africa and determines not only the release of people already in detention, but also the destiny of those at the border. Evidence shows, in fact, that corrupted border officers threaten migrants to pay high sums to enter the country to seek asylum[52]. Those who cannot pay are immediately pushed back or often arrested and eventually sent to a Johannesburg migrant repatriation centre, Lindela[53]. In some cases, police

[50] High Court of South Africa – Guateng Division, *Lembore and Others v Minister of Home Affairs and Others* [2024] 2 All SA 113 (GJ).

[51] R. Amit, *Security rhetoric and detention in South Africa*, in Forced Migration Review, https://www.fmreview.org/.

[52] R. Amit, *Queue here for corruption. Measuring irregularities in South Africa's asylum system*. Lawyers for Human Rights and the African Centre for Migration & Society, July 2015, https://www.lhr.org.za/.

[53] United States Department of State - Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014: South Africa*, 2014.

officers even threaten documented migrants and asylum seekers with indefinite detention and bureaucratic hurdles unless they paid bribes.

Detention is also used against children. In 2004, over 100 children were detained at Lindela. The High Court of Pretoria censored this practice as unlawful and in violation of children's rights as provided by Section 28 of the Constitution – which establishes the duty to protect, fulfil, and promote children's rights -, the Children's Act 38 of 2005 and the African Children's Charter[54]. Again in 2023, NGOs denounced the arrest of migrant children and the risk of being deported in breach of their rights[55].

5.2. *Closure of Refugee Reception Offices*

Over time the DHA has implemented a wide number of procedural barriers to limit the number of asylum claims to be processed[56]. An emblematic example rests in the unlawful closure of half of RROs available in the country.

Included in the mandate of the Director General (DG) of the DHA is the (dis)establishment of RROs, in addition to the designation of RSDOs and of the administrative staff of the SCRA, and the designation of places where specified categories of asylum seekers should lodge applications[57]. The DG also has powers to withdraw an asylum seeker visa for specified

[54] South African Constitutional Court, *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) (22 September 2021).

[55] Global Detention Project, Lawyers for Human Rights, *South Africa: Submission Concerning Arbitrary Detention and Other Violations of the Human Rights of Migrants, Refugees, and Asylum Seekers,* September 2024, https://www.globaldetentionproject.org/.

[56] Among others, in 2006 the DHA used pre-screening questions to determine whether the person was eligible for asylum and quota system, which was used to set to max 20 the number of asylum claims to be registered per day. The DHA justified the use of pre-screening forms as a way to counteract the tendency of asylum seekers to abuse the national protection system, whereas the quota system was useful in order to ease the enormous pressure on RROs. Both practices were censored by the case law. The quota system was quashed in *Tafira* (2006) where the Court held that the practice precludes persons from applying for asylum and thus amounted to a violation of their right to seek asylum. In *Kiliko*, the quota system was declared to be unlawful and a violation of an asylum seekers' constitutional right to dignity and freedom of movement. See respectively, Transvaal High Court, *Tafira and Others v Ngozwane and Others* (12960/16) ZAGPHC 136 (TPD) 12 December 2006; African Constitutional Court, *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C).

[57] Refugees Act, sections 8, 9H, 20A, 21(1C).

reasons (usually security issues), and also to revoke an asylum seeker's right to work in case they fail to provide proof of employment after six months.

Between 2011 and 2012, the DG decided to close three out of the six RROs available in South Africa. In particular, they decided to shut down the RRO in Johannesburg, while closing the RROs in Cape Town and Port Elizabeth to *new* asylum seekers, this meaning that they would continue to process existing cases but would not accept new applications for asylum. For years, asylum seekers had to walk long distance to get to one of the only three RROs still open on the entire South African territory, namely Durban, Musina and Pretoria. In addition, significant pressure has been put on asylum seekers, as they are required by law to be registered at RROs within 5 days from entry. The arbitrary closure of three RROs had a severe impact on asylum seekers whose ability to exercise their right to seek asylum was impaired as well as their possibility to formalize their claim and get legal documentation. According to Amnesty International, asylum seekers in Cape Town and Port Elizabeth who had to travel to an open RRO took a trip «which ranges between 900km and 1.900km depending on the destination, takes a day or more and the cost of travel, accommodation, and food ranges anywhere from R900 ($62) to over R5.000 ($342) per trip»[58].

The reasons behind this choice were twofold. On the one hand, the DHA aimed to reduce the overall number of asylum seekers in South Africa. On the other hand, it planned to advance a legislative proposal to move RROs from their urban location to the borders in order to swiftly deport asylum seekers not in genuine need of protection[59]. However, the closure of urban RROs occurred before the new policy was even completely formulated[60].

In 2013, 2015 and 2018, judges declared this practice unlawful and procedurally unfair, and ordered the re-opening of these offices. However, it took numerous legal disputes before the RROs were finally reopened. For instance in 2015, the Supreme Court of Appeal ordered that the RRO in

[58] Amnesty International, South Africa: Living in limbo: Rights of asylum seekers denied, 29 October 2019, https://www.amnesty.org/en/documents/afr53/0983/2019/en/.

[59] Fatima Khan, Megan Lee, Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers, African Human Mobility Review, Vol. 4, No. 2 (August 2018), https://www.sihma.org.za/journals/Policy-Shifts-in-the-Asylum-Process-in-South-Africa.pdf

[60] Ngwato, T.P. 2013. Policy Shifts in the South African Asylum System: Evidence and Implications. African Centre for Migration and Society (ACMS) and Lawyers for Human Rights (LHR).

Port Elizabeth be fully restored by 1 July 2015, however it remained closed for other three years until October 2018. In its judgement, the Court expressed severe concerns regarding the DG's conduct in seeking to circumvent previous judicial orders, saying that «it is a most dangerous thing for litigants, particularly a state department and senior officials in its employ, to willfully ignore an order of court»[61]. The Court also recognized the particularly vulnerable position of asylum seekers, who «[…] experience grave difficulty in legalising their stay in this country. […] That especial vulnerability is recognised in our legislation governing the status of refugees»[62]. In a subsequent ruling of 2017, the Supreme Court of Appeal ordered the DHA to reopen the RRO in Cape Town, whose closure had been already censored in 2013. However, it only reopened in 2023 after 12 years[63].

6. *Influencing factors of asylum deterrence policies*

As seen, Tunisia and South Africa are notably different from many perspectives, yet they share a tendency towards asylum deterrence policies and practices. The following sections pinpoint to a series of factors that have arguably facilitated the emergence of asylum barriers. First is the turbulent past that Tunisia and South Africa share, where restrictive migration and asylum policies have been accompanied by intolerance and racism, so rooted to be institutionalized in the case of South Africa, against groups of a specific nationality or skin color. Such sentiments are still echoed in current deterrence policies. In addition, recent political and societal developments occurring in these countries may have further enabled the proliferation and severity of deterrence policies to the detriment of asylum seekers.

[61] Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another (831/2013) [2015] ZASCA 35; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) (25 March 2015), para. 35.

[62] Idem, para 2.

[63] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); [2018] 4 SA 125 (SCA) (29 September 2017)

6.1 Enabling factors in Tunisia

According to Amnesty International, there has been a «[…] drastic rollback of the human rights progress that Tunisia had made since the 2011 revolution»[64]. Indeed, since 2021, President Kais Saied has started to seize control of the State by passing a new Constitution, suspending the Parliament, dismantling judicial independence, and impairing the right to fair trial, freedom of expression and assembly. On 9 August 2022, the Administrative Tribunal issued a landmark decision, where it ordered the President to reinstate the 57 judges and prosecutors arbitrarily dismissed through decree law 2022-35. However, judges continue to be summarily dismissed, and lawyers keep on being victims of harassment. In June 2023, journalists, political opponents, and NGOs staff workers started to be arbitrarily detained and accused of conspiracy against state security in violation of Presidential decree law 2022-54 on cybercrime, which imposes heavy prison sentences for spreading «fake news» and «rumors» online and in the media. Political opposition has been equally pulled to pieces as almost all the members of the largest opposition party (Ennahda) have been arrested, and its headquarters have been closed. Travel bans in connection to criminal investigations have been also imposed. As of September 2023, at least 27 lawyers faced civil or criminal prosecution in relation to actions they took while defending their clients or for expressing their opinions. Several of them were accused of conspiracy against state security[65].

The democratic downturn occurring in Tunisia has also severely impacted on foreigners, including migrants, refugees and asylum seekers. In February 2023, President Saied linked undocumented Black African migrants to crime and a «conspiracy» to change Tunisia's demographics. In his words, «hordes of illegal migrants» arriving from Sub-Saharan countries were part of «a criminal plan to change the composition of the demographic landscape of Tunisia» and were the source «of violence, unacceptable crimes and practices»[66]. The UN Committee on the Elimination of Racial Discrimination (CERD) found that such remarks were in breach of the International Convention on the Elimination of All Forms of Racial

[64] Amnesty International, Tunisia: *Amnesty International's Secretary General denounces rollback of human rights upon concluding four-day visit,* 26 July 2024, https://www.amnesty.org/.

[65] Human Rights Watch, *World Human Rights Report: Tunisia,* 2024, https://www.hrw.org/.

[66] Human Rights Watch, cit.

Discrimination[67]. It also noted that, following such xenophobic statement in February, racial violence and attacks, vandalism, arbitrary evictions and job termination against Black migrants have notably increased in Tunisia as well as the number of Black people kept in arbitrary detention. In February and July 2023, Tunisian authorities reportedly arrested thousands of Black African foreigners indiscriminately, including both documented and undocumented people in Sfax and other cities. According to the UN High Commissioner for Human Rights, in June 2023 national security forces summarily and collectively expelled some 2.000 people of at least 16 African nationalities to remote areas along the Tunisian borders with Libya and Algeria[68]. Expelled people remained stranded at the borders with little access to water, food, or medical care. At least 28 migrants who were expelled to Algeria died at the border[69].

In addition to internal factors exacerbating asylum deterrence policies and severe violations of asylum seekers' rights, external factors are also visible in Tunisia, including, in particular, the role of the European Union (EU) and its Member States. Although, as said, the country does not have a national law on asylum, a provisional draft has been on the table for some time now. Yet, it has been so far blocked for several reasons. In particular, the government is concerned that passing an asylum law would make Tunisia a migration hotspot, and increase its burden in the field of migrants and refugees' reception, protection and integration. In particular, it fears that national provisions may be instrumentalized by the EU to frame it as a safe third country and thereby make it responsible for the management of vast numbers of asylum seekers, while pushing for the installation of offshore processing centers on Tunisian soil. Emblematically, in June 2023, ahead of a planned visit by European officials, President Saied declared that Tunisia would not accept becoming a «border guard» for other countries[70].

The government also fears that UNHCR would hand over the RSD procedure to national institutions, thus further increasing the government's responsibility in the asylum sphere. This would also mean that

[67] CEDR, *Press Release: Tunisia must immediately stop hate speech and violence against migrants from south of Sahara, UN Committee issues early warning*, 4 April 2023, https://www.ohchr.org/.

[68] UN High Commissioner for Human Rights, *Türk: Human rights are antidote to prevailing politics of distraction, deception, indifference and repression*, 11 September 2023, https://www.ohchr.org/.

[69] UN High Commissioner for Human Rights, cit.

[70] Reuters, *Tunisia will not be Europe's border guard, president says*, 10 June 2023, https://www.reuters.com/.

the government would need to allocate a budget for asylum matters, which is currently lacking as UNHCR's activities are financed by donors, in primis the EU. In addition to being a monist country, as underlined by Cantor and Chikwanha, the lack of a national asylum law seems to also be a direct response to EU unilateral interests in migration management in Tunisia[71].

Such concerns are not unjustified. Several scholars have pointed out that the EU's goal in cooperating with Tunisia is the containment of refugees and asylum seekers[72]. As scholars have shown, the vast majority of the legal, political, and financial instruments of cooperation are negotiated and implemented with limited or no transparency, and lack accountability mechanisms in the case of human rights violations occurring within their framework[73]. For instance, the EU-Tunisia Memorandum of Understanding on a strategic and global partnership (MoU), which was signed on 23 July 2023 in the presence of the EU Commission President Von Der Leyen and the Dutch and Italian Prime Ministers, covers a broad range of asylum-related aspects, from cooperation on migration control to prevention of departures by sea, from the fight against smuggling and trafficking to the return of irregular migrants from Tunisia to their countries of origin. In turn, the EU committed to strengthen cooperation and financial support to foster Tunisia's economic stability, trade and investment, green energy transition, and migration. As pointed out by Garcia Andreade and Frasca, the EU-Tunisia MoU «[…] is yet another illustration of the process of informalisation of international law-making to which the EU and its Member States significantly contribute, and of the proliferation of soft law instruments particularly in the external dimension of the EU migration

[71] B.A. Tinni – O. Djurovic – R. Djurovic – A. Hamadou - M. Ineli Ciger – C. Ovacık – F. Raach – H. Sha'ath – T. Spijkerboer – O. Ulusoy, *Shortcomings in EU Cooperation for Externalization of Asylum: Lessons from Niger, Serbia, Tunisia and Türkiye.* ASILE project, November 2023, https://www.asileproject.eu/.

[72] B.A. Tinni – O. Djurovic – R. Djurovic – A. Hamadou - M. Ineli Ciger – C. Ovacık – F. Raach – H. Sha'ath – T. Spijkerboer – O. Ulusoy, cit. See also, T. Strik – R. Robbesom, *Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control*, in *Netherland International Law Review*, 2024.

[73] For a deep analysis of these arrangements, please see F. Raach – H. Sha'ath, *Tunisia-EU Cooperation in Migration Management: From Mobility Partnership to Containment*, in S. Carrera E. Karageorgiou – G. Ovacik – N. Feith Tan (eds) *Global Asylum Governance and the European Union's Role. Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees*, 2025.

policy»[74]. Indeed, although it was presented as a non-binding political agreement, it may have likely infringed the principle of institutional balance pursuant Art. 13(2) of the Treaty on the EU (TEU) on two grounds. First, the Commission did not obtain prior approval from the Council before signing the MoU with a third country[75]. Second, the Parliament has not been consulted, which runs counter its power of political control and consultation as provided by Art. 14 TEU, which is also relevant in the context of the adoption of international soft agreements.

Not only the content of EU-Tunisia cooperation is driven by security concerns over migration movements, but also the financial side of these arrangements clearly reveals the EU's containment priorities. For instance, just 5% of the committed 105 million euros under the EU-Tunisia MoU is allocated to the protection of refugees and migrants in Tunisia. Rather, 62% of the budget is provided to the Tunisian Coast Guard and the Maritime Rescue Coordination Centre, among others, for police, search and rescue, returns and border management operations, while 17% is dedicated to returns and readmission[76]. Reports show that out of the asylum and migration-related projects that are financed through the EU Trust Fund for Africa (EUTF), adopted during the Valetta Summit in 2015, and the 2014-2020 European Neighborhood Instrument, border management activities receive 57.8% of the total EU budget allocated to Tunisia. Only 6.8% of the budget has been allocated to the protection of refugees[77]. In particular, most of EUTF's fund in Tunisia (44%, or €38 million) has been allocated to integrated border management, followed by assisted voluntary returns and migration management (23% or €20 million), community protection and stabilization (18% or €16 million) and labour migration (15% or €13 million)[78].

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[74] P. Garcia Andreade – E. Frasca, *The Memorandum of Understanding between the EU and Tunisia: Issues of procedure and substance on the informalisation of migration cooperation*, in *EU Immigration and Asylum Law and Policy*, 26 January 2024, https://eumigrationlawblog.eu/.

[75] See, Court of Justice of the EU, *Council v Commission*, C-660/13, where it observed that the Commission's power of international representation does not include the power to sign a political agreement as the previous consent of the Council is required (par. 36-40).

[76] EUobserver, *Gaza war "pressing" EU on Egypt anti-migrant deal*, 11 October 2023, https://euobserver.eu/

[77] F. Raach – H. Sha'ath – T. Spijkerboer, cit., p. 34.

[78] E. Casajuana – G. Jana Pintus, *Beyond borders, beyond limits. Critical analysis of EU financial support for border control in Tunisia and Libya*. Profundo, 2023, https://extranet.greens-efa.eu/.

All in all, it seems clear that the top priority that the EU is pursuing in its cooperation with Tunisia is the containment of migrants and refugees in the country. Yet, it is exactly this logic of deterrence that is undermining Tunisia's willingness to cooperate, as the clear pursuit of the EU's own interests and the consequent unilaterality of EU instruments in this field makes the EU an unreliable actor in the government's eyes.

6.2 Enabling factors in South Africa

Akin to Tunisia, a first driver of deterrence policies in South Africa may arguably be the progressively xenophobic and racist wave against foreigners, including refugees and asylum seekers, which is often merged with political rhetoric and propaganda. Politicians in South Africa are using migrants as a scapegoat by pushing a narrative according to which 15 million irregular migrants live in South Africa posing an unbearable burden on national economy and security[79]. Human Rights Watch has collected an impressive number of xenophobic declarations made by political leaders, whereby migrants would be responsible for drug trafficking and unemployment and have called for the mass deportation of illegal immigrants from South African cities[80]. The perception that foreigners have caused increasing rate in crime and unemployment in South Africa has also inflamed violence between natives and refugees[81]. In addition, according to the International Commission of Jurists, certain provisions of the Immigration Act, such as Section 41, allow warrantless searches by immigration officers and have allegedly encouraged unlawful enforcement practices by private individuals, such as the vigilante group called «Operation Dudula», which has resorted to violence in conducting unlawful forced evictions, public harassment, intimidation, and denial of access to schools and hospitals for foreign nationals. The case has been brought before the High Court of South Africa - Gauteng Division in the matter of

[79] Daily Maverick, *No ActionSA, no evidence that 15 million undocumented immigrants live in South Africa,* 7 July 2023, https://www.dailymaverick.co.za/.

[80] Human Rights Watch, *South Africa: Toxic Rhetoric Endangers Migrants,* 6 May 2024, https://www.hrw.org/.

[81] B. Dratwa, *Xenophobia: A Pervasive Crisis in Post-Apartheid South Africa*, in Georgetown Journal of International Affairs, 26 May 2024, https://gjia.georgetown.edu/.

Kopanang Africa Against Xenophobia and Others v Operation Dudula and Others, currently pending[82].

Xenophobia and political rhetoric have also been sponsored in the last White Papers issued by the DHA to the Ministry of Interior[83]. In the 2017 White Paper on International Migration for South Africa, the DHA called for the need to curb irregular migration and to promote restrictive policies in order to limit the number of low-skilled migrants and «fake» asylum seekers in the country, while attracting skilled and business persons[84]. According to the Department, «the asylum seeker regime is being abused by economic migrants resulting in over 90 per cent of the claims for asylum being rejected», an abuse that comes with high economic costs and waste of public resources[85]. In the 2023 White Paper on Citizenship, Immigration and Refugee Protection, the DHA reiterates the concerns expressed in 2017, with particular emphasis on abuses that overburden asylum and social system. The misguided idea that migrants are harming the national economy underscores many proposals in the 2023 White Paper, which fuels the social perception that migrants are stealing jobs from natives and wasting public resources. Instead of seeking adequate solutions to asylum issues, the DHA accuses the government of having adhered to the Refugee Convention and the 1967 Protocol without reservations, as this has allowed courts to establish extensive asylum guarantees in the country, in particular with regard to the principles of non-refoulement and non-penalisation, the right to a legal remedy and a fair trial, as well as other socio-economic, political and civil rights. To counteract «judicial activism», the DHA suggests leaving the Refugee Convention and its Protocol in order to re-join it with reservations like other countries. An additional reason for such a radical, and if pursued, unprecedented choice is the national inability to guarantee refugees all the socio-economic rights provided for by the Refugee Convention. UNHCR observed that «withdrawing from the 1951 Convention and its Protocol would set a negative precedent, both regionally

[82] International Commission of Jurists, *South Africa: ICJ urges high court to apply international law protecting migrants and refugees from discrimination and xenophobia in case involving vigilante attacks*, 8 July 2025, https://www.icj.org/.

[83] The White Paper is a broad, yet refined statement of government policy drafted by the DHA in order to propose legislative amendments or other policy proposals. The White Paper is sent to the Ministry for further discussion, input and final decisions.

[84] South African Department of Home Affairs, *White paper on international migration for South Africa*, July 2017, http://www.dha.gov.za/.

[85] South African Department of Home Affairs, cit., p. 59.

and globally»[86]. No signatory State has ever left these treaties, confirming their enduring relevance. In addition, UNHCR notes that while some States made reservations upon acceding to the Refugee Convention or its Protocol, 17 States have now withdrawn them. And many States that maintain reservations no longer apply them as more progressive national laws and policies have superseded them, including countries in Southern Africa.

In addition, the 2023 White Paper suggests a radical overhaul of the national asylum system, whereby the Refugees Act should be repealed in its entirety and be included in a single legislation dealing with citizenship, immigration and refugee protection enshrining more stringent requirements to qualify for protection and be eligible for citizenship. According to the Department's view, RROs should be moved from their urban location and be located at ports of entry to facilitate immediate assessment of asylum claims[87]. Here, RSDO officers would undertake «quick and virtual hearing» to swiftly separate genuine asylum seekers from economic migrants[88]. The DHA proposes to appoint either serving or retired judges or Senior Counsels as chairpersons of the appeal bodies. It is also suggested to review the qualification needed to be appointed as RSDOs, which is currently «grossly inadequate. Many of the appointees have never practiced law»[89]. At the time of writing, a legislative proposal on the subject has not been formulated yet. However, the eventual transfer of RROs at the border raises severe concerns as it would increase the risk of refoulement and removal of people at the border without due assessment of their asylum claim or personal conditions. In addition, the systemic corruption of officials involved in the asylum procedure, from immigration officers to border guards, further exacerbates the risk of human rights violations at the border and the lack of respect for the procedural and substantial safeguards at the core of the right to asylum. At the same time, the absence of adequate knowledge of the authorities appointed at RROs further exacerbates the risk of incorrect assessment of asylum claims with consequently a heightened risk of detention and deportation of asylum seekers in need of protection.

[86] UNHCR, *UNHCR's Observations on the 'White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa*, 1 January 2024, p. 3 https://www.refworld.org/.

[87] This proposal takes inspiration from para 9.1.13 of the resolution of the 55th ANC National Conference, held on 20 December 2022 and 5 January 2023.

[88] South African Department of Home Affairs, cit., par. 62.3.

[89] South African Department of Home Affairs, cit.

7. *Concluding remarks*

This contribution focused on Tunisia and South Africa as two widely divergent countries in Africa, which have however similarly endorsed deterrence asylum norms, policies and practices. After having analyzed the different asylum frameworks and procedures available at the national level, attention was devoted to emblematic barriers to asylum implemented respectively by Tunisia and South Africa in order to deter migration. Legal and procedural barriers have been analyzed both regulated and not regulated by law, yet equally in breach of asylum seekers' fundamental rights and key States' obligations. The analysis then moved to the evaluation of past and present political and societal factors that may have contributed to exacerbating asylum deterrence in Tunisia and South Africa. Xenophobia and political rhetoric are mentioned as relevant factors fueling hate and intolerance between natives and non-nationals both in Tunisia and South Africa. In addition, the pressure that the EU and its Member States is exercising on Tunisia in the field of migration cooperation is arguably aggravating intolerance and violence against migrants and asylum seekers in the country.

The impact of the aforementioned asylum barriers on the human rights of asylum seekers is all the more severe. Asylum seekers who are denied access to the fundamental right to asylum are at heightened risk of further human rights violations, including being exposed to refoulement in countries where their life could be threatened, detention, and ill-treatment. As seen, the role of domestic courts in counteracting deterrence measures in Tunisia and South Africa is widely different. Although South African courts can count on a solid legal framework which stem from supranational obligations as well as from the country's constitution, recent amendments to the national refugee law have reportedly curtailed substantial and procedural guarantees and have facilitated the use of detention in turn restricting access to asylum. For their part, Tunisian courts cannot rely on a national asylum law. In addition, no judicial remedy is available against violations of the right to access to asylum in Tunisia, which further limits their judicial scrutiny. This adds to the democratic downturn in the country and the severe attacks against judges, lawyers and NGOs that have severely compromised their mandate.

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ABSTRACT: Tunisia and South Africa are characterized by important geographical, linguistic, historical and legal differences that have contributed to shaping the right to asylum differently at the national level. Despite these differences, both countries have embraced a restrictive approach to the right to asylum in recent years, implementing deterrence norms, policies and practices. This contribution offers an overview of some of the most prominent barriers to asylum in these two countries and indicates key factors that are helpful to explain why Tunisia and South Africa, despite being poles apart in many respects, have equally implemented asylum deterrence measures.

KEYWORDS: asylum – deterrence – Africa – human rights – barriers.

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