



# Country Report

# TUNISIA

## WP5. Country Reports

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## 1 Executive Summary

- Before giving a more detailed overview of the findings, one overarching finding merits attention. The most significant factor undermining the protection of vulnerable populations in Tunisia is the absence of a national asylum law specifying the state's legal obligations towards refugees and asylum seekers on its territory, and transferring responsibility for refugee status determination to the state. While the Asylum law has been drafted and reviewed by local and international legal experts for its alignment with the 2014 Tunisian constitution and international refugee law, it has been blocked by government due to several reasons. Key among them are: (1) the Tunisian government's concern that EU pressure – which is already high with regards to securing Tunisia's cooperation for the readmission of Tunisians from the EU – would increase even more. Policymakers worry that the presence of an asylum law – making Tunisia in theory a safe country for return - would be instrumentalized pushing for the (re)admission of third-country nationals who departed Tunisia, along with the installation of offshore processing centers on Tunisian soil. This concern has been fed by the plans for disembarkation platforms, and also by simply observing the implementation of European migration instruments in Libya. If such concerns would materialize, this would increase the number of third-country nationals that Tunisia hosts, which is a significant burden for a country that already has strained resources and a high unemployment rate. (2) Policy-makers' concerns about the increased financial strain that a national asylum law would present. Currently, with the absence of a government body responsible for asylum, the government does not have a budget earmarked for refugee status determination or for protection and assistance activities for refugees and asylum seekers. All such activities are carried out by UNHCR with funding from the EU and other external donors. Were an asylum law to be passed, it would be necessary for the government to allocate financial resources to oversee its implementation from the national budget, which is already strained and facing cut-backs. The EU may promise budgetary support related to this issue; however, if the support is eventually reduced or withdrawn (and the experience of governments in the region is that, sooner or later, this is what happens), the Tunisian government is faced with protection and asylum responsibilities which it is unable to shoulder.



- Tunisia's capacity for protection is not hindered by a lack of technical capacity: as respondents stated, the competence and ability of Tunisian officials to implement protection systems is high, and has been enhanced by a plethora of trainings, study visits, reference guides, and other forms of technical assistance and cooperation funded by the EU through various organizations. The most significant barrier to institutionalizing protection systems is therefore a political one: it is a lack of political will on the part of the Tunisian government due to the perceived insufficient political, logistical, and economic support on the part of the EU in helping Tunisia support its population and uphold its human rights obligations towards its own citizens and migrants and refugees it hosts. Across several interviews, researchers and civil society activists pointed to the lack of reciprocity present even under the framework of what is called a "privileged" partnership with the EU: Tunisia is still expected to provide significant concessions to the EU while continuing to receive little in return. Instead, EU pressure particularly on the topic of readmission is sustained, as evidenced by the latest action plan produced by the European Commission with regards to operationalizing the New Pact on Migration and Asylum with Tunisia (European Commission Services, 2021, p. 3) as well as recent French policy initiatives. The EU's focus on a narrow definition of its own interests, and the resulting one-sidedness of the EU's instruments, stands in the way of the necessary trust on the side of Tunisian governmental and civil society actors in the reliability of European actors. Without such trust, Tunisian policies and practices which would be more beneficial to both the EU and Tunisia are unlikely to materialize.
- Concerning transparency, there are two main concerns. First: the most crucial legal texts, being the agreements between Tunisia and Italy which have been at the basis of mass returns to Tunisia, are not public. Second, projects developed in the framework of political and financial instruments are primarily developed in an interaction between implementing organizations and the EU, with little or no interaction with Tunisian actors. While state functionaries are usually involved at least at some stage, civil society organizations are, if at all, involved only when the project has already taken shape.
- While there are functioning national accountability mechanisms in the field of torture and the trafficking of human beings, there are no accountability mechanisms in the field of asylum and immigration detention. As, in the absence of national asylum legislation, UNHCR does refugee status determination, no legal remedies are



available against a negative status determination. UNHCR does have internal complaint mechanisms, but these are not in conformity with the requirements in the CFR, ECHR or ACHPR. Concerning immigration detention: Tunisian legislation does not provide for immigration detention, and Tunisian authorities deny that it occurs. Human rights reports make clear that it occurs nonetheless, and this leaves detainees without legal remedies. Human rights practitioners are considering to bring this issue before an international accountability mechanism, concretely before the African Court of Human and Peoples' Rights. The European Court of Human Rights has also been approached concerning forced returns by Italy to Tunisia, but this court has a mixed track record. However, such international mechanisms (crucial as they are) have a limited capacity to provide legal remedies in individual cases.

- The compatibility with international law of EU-Tunisian instruments poses a number of problems, despite the fact that the formal texts refer to international human rights and refugee law as guiding principles. The texts of EU funded projects do not take into account human rights and refugee law in a meaningful way, i.e. if they are mentioned at all these references are generic and not operational. Human rights impact assessments are not part of EU instruments in Tunisia. As was noted above, the absence of legal remedies against negative refugee status determination decisions by UNHCR, as well as against de facto immigration detention, results in incompatibility with international and EU law. Furthermore, respondents voice concerns about the compatibility of the implementation of the (secret) MoUs between Italy and Libya, in particular on the points of the prohibition of collective expulsion and non-refoulement. Furthermore, respondents observe that border projects funded by the EU instrumentalize international maritime law in order to contain refugees and migrants in Tunisia. This results in tensions with the right to leave any country including one's own, the prohibition of collective expulsion and of refoulement, and of the obligation to bring persons in distress rescued at sea to a place of safety (which Tunisia arguably is not due to the absence of a functioning national asylum system).
- The results of the EU instruments are mixed. Whereas the capacities of government officials as well as civil society in the field of asylum and migration have been strengthened considerably, the implementation of a robust asylum system is hindered by the one-sidedness of the European instruments (resulting most notably in the absence of national asylum legislation, *supra*), as well as by the reliance on EU



funding – almost all activities (including core sovereign state functions such as refugee status determination) depend on EU funding.

- The overarching aim of the EU in cooperating with Tunisia has been the containment of migrants and refugees in Tunisia. Even activities aiming at enhancing the protection capacities of Tunisian authorities and civil society actors, as well as projects supporting the self-reliance of refugees, are framed by European actors (and understood by Tunisian actors) as projects aiming at containment.
- This is also reflected in the alignment of EU-Tunisia instruments with the GCR. EU funded projects ease some of the pressure by enabling refugee status determination and reception facilities, as well as enabling refugees to get at least some form of support. However, the populations benefiting from these activities are the same populations that are the object of the (as our research shows, financially more significant) European policies of exclusion. These policies of exclusion increase the pressure on Tunisia by containing in Tunisia refugees who might well prefer to travel onwards to Europe, where there are more realistic possibilities for self-reliance. There are no activities to promote the third major GCR aim, resettlement.



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## LIST OF ABBREVIATIONS

<b>ASF</b>	Avocats Sans Frontières (Belgique)
<b>ASGI</b>	Associazione Studi Giuridici sull'Immigrazione (Association for Juridical Studies on Immigration)
<b>BMPMaghreb</b>	Border Management Programme Maghreb – project funded by the EUTF and implemented by ICMPD
<b>CoE</b>	Council of Europe
<b>CTR</b>	Conseil Tunisien pour les Réfugiés
<b>DGCIM</b>	Direction Générale de la coopération internationale en matière de migration
<b>EC</b>	European Commission
<b>ENI</b>	European Neighborhood Instrument (2014 – 2020)
<b>EUTF</b>	European Trust Fund for Africa
<b>FTDES:</b>	Forum Tunisien pour les Droits Economiques et Sociaux
<b>IADH</b>	Institut Arabe des Droits de l'Homme
<b>IBM Tunisia</b>	International Border Management Tunisia – project funded by EUTF and implemented by ICMPD
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>INLTP</b>	Instance Nationale de Lutte Contre la Traite des Personnes
<b>INPT</b>	Instance Nationale pour la Prévention de la Torture
<b>INS</b>	Institut Nationale des Statistiques
<b>IOM</b>	The International Organization for Migration



<b>NDICI</b>	European Neighborhood and International Cooperation Instrument (2021– 2027)
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>ONM</b>	Observatoire Nationale Pour la Migration
<b>ProGreS Migration</b>	Programme Gouvernance Migration – funded by EUTF and implemented by ICMPD
<b>RSD</b>	Refugee Status Determination
<b>SAR</b>	Search and Rescue
<b>TAMSS</b>	Tunisian Association for Management and Social Stability
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNOPS</b>	UN Office for Services and Projects



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## 2 Introduction

This country report is a part of a series of four reports (concerning Niger, Serbia, Tunisia and Turkey) prepared under the ASILE project concerning arrangements between the EU and third countries of transit which provide modalities and facilities for the protection of persons seeking asylum while preventing onwards movement of such persons towards EU borders. The research within this working package focused on the political, legal and financial instruments and programmes employed in connection with these arrangements. This has resulted in four country reports concerning Niger, Serbia, Tunisia and Turkey. These country report will be at the basis of a comparative analysis to be published later.

The research has focused on the effectiveness, fairness and consistency of these instruments. Effectiveness is assessed considering the extent to which the 'policy objectives' of existing instruments and arrangements are met in practice, i.e. the actual expected or unexpected outputs and what has been specifically achieved by a policy. This analysis of instruments in terms of their own objectives is addressed by the research question concerning the results of instruments (*infra*). Fairness is examined from the perspective of states' responsibilities, and multistakeholder accountability, as well as standards of due process, legal certainty and accessibility by individuals. Fairness is here also assessed in light of guarantees and mechanisms for preventing corruption, fraud or misuse of financial instruments in the implementation phases of existing policies. It relates to the individual rights impacts of policies. These issues are addressed by means of research questions addressing transparency and accountability (*infra*). The effectiveness and fairness of policy instruments will be assessed in relation with the consistency of instruments with international and regional human rights standards, as well as fundamental rights and EU Treaty law. Special consideration is given to the countries' participation in relevant international and regional human rights and refugee protection instruments and monitoring courts and bodies. The consistency analysis will also address the compatibility of instruments with the Global Compact of Refugees (GCR). Consistency is addressed by means of the research questions concerning compatibility with international law, whether instruments promote mobility or containment, as well as alignment with the GCR.

A contribution which the four reports make to existing literature on European externalization of asylum and migration policy is that we highlight a hitherto underexposed ambivalence in European policy. As will become clear throughout the four country reports,



the central tension which the researchers have observed is that between the policy objective of containment of migrants and refugees in third countries on the one hand, and on the other hand the policy objective of supporting asylum systems in 3rd countries. The term containment is used for measures aiming at the prevention of departure of irregular migrants/asylum seekers towards the EU so as to prevent legal responsibility of the EU or European states (i.e. at preventing the applicability of the legal rules that are activated as soon as there is a jurisdictional link between a third country national and a European actors, i.e. the EU or a member state). Containment takes the form of prevention of departure (e.g. pull backs by third country coast guards); prevention of movement towards a point of departure (e.g. Nigerien Act 2016/36 criminalising domestic transport of undocumented persons to the northern border of Niger); or prevention of movement towards a third country neighbouring the EU (e.g. introduction of visa requirement for Syrians by Tunisia in 2012). Containment is in the interest of European actors because it limits their operational, legal and political responsibilities. Supporting asylum systems is, at first sight, in the interest of third countries because it reduces the burden they have to share. This can take the form of technical support (border control, asylum legislation), financial support for RSD and refugee reception, and operational support (in border control, RSD, training, refugee reception).

In all four country studies, we observe that European actors are supporting asylum systems in third countries as a tool for containment, which, ironically, leads to resistance by third country actors against support for their asylum systems. In generalizing terms (which will be specified in the country reports), the process is that European actors justify containment (as well as not merely containing irregular migrants/asylum seekers, but sending additional ones to third countries; e.g. plans for disembarkation platforms and the Danish/UK Rwanda schemes) by pointing to the improved quality of third country asylum systems. If third country asylum systems are up to the standards of international law, returns are possible (safe third country principle), and preventive containment as well as sending additional irregular migrants/asylum seekers are legitimate (compatible with international law) and optimal (a Euro can do so much more in Rwanda than in Europe).



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## 3 Methodology

### 3.1 General methodology of the work package

Conducting fieldwork in four different countries was already expected to be a challenge from the start of the project. However, the outbreak of the Covid-19 pandemic coincided with the start of the ASILE project and brought new challenges for the researchers. According to the initial plan, data collection in the four countries was to be conducted by the researchers at the VU Amsterdam and Aarhus University so as to ensure continuity and consistency of data collection. By the summer 2020, it was clear that (international) travelling would not be possible for the research team. Therefore, instead of collecting data from a distance or fundamentally changing the data collection strategy, the research team decided to work with national researchers in Niger, Serbia, Tunisia and Turkey. Working in cooperation with the national researchers provided the additional advantage of relying more on local expertise and limit the Eurocentric character of the research. Working with a multi-sited research team required developing a new methodology for data collection. Researchers in the four countries were identified through consultation with the members of the advisory board of the ASILE project in the country concerned.

Furthermore, another challenge to overcome was the fundamentally different backgrounds and the contexts of the selected countries for the field research. Each country, with unique bilateral relation histories with the European Union, varying governmental and civil society structures, traditions and experiences, required a tailor-made data collection strategy. To ensure that such the differences and nuances are reflected in the country reports, the national researchers and VU Amsterdam researchers revised and fine-tuned the data collection strategy in each country while the VU Amsterdam researchers developed the general methodology to provide the basis for continuity and the consistency of the research.

In the following sections, general methodology and national data collection methodologies are described in detail.

### 3.2 General methodology

The selection of the four country studies follows a most-different-system design. We have chosen countries that maximise divergence, the only convergence being the key variable of interest, namely: European actors are actively applying political, legal and financial instruments in the field of asylum in these countries. The axes of divergence are



- 1) Relation to the EU: Serbia is a candidate member State; Turkey has been a candidate for EU membership for a very long time, but its prospects of accession are the foreseeable future are dim; Tunisia has an Association Agreement with the EU without any prospect of accession; and Niger has no formal intuitional tie with the EU.
- 2) Colonial history: Serbia was part of the Ottoman empire, gained permanent full independent in 1878, and has then been part of the vicissitudes of Yugoslavia; Turkey has been a colonial power until the end of World War I, and has since then been a regional power; Tunisia has been part of the Ottoman empire until the French installed a protectorate in 1881, and became independent in 1956; Niger has been a French colony from 1900 until 1960.
- 3) Wealth: In 2020, Niger had a GDP of \$567,70; Serbia of \$7.730,70; Tunisia of \$3.521,60; and Turkey of \$8.536,40 (source World Bank).

As an initial step, a desk research had been conducted to map EU and/or Member State arrangements on asylum governance with four selected countries – Niger, Serbia, Tunisia and Turkey. The working paper *“Inventory and Typology of EU Arrangements with Third Countries”* was published in January 2021 by Nikolas Feith Tan and Jens Vedsted-Hansen as an outcome of the above mentioned desk study. The working paper mapped the political, legal and financial instruments implemented by the EU in/with these countries with the aim of ensuring international protection of persons in need of it while preventing their onwards movement towards EU borders. In addition to the instruments, the working paper provided the initial list of the actors involved in adopting and implementing the instruments.

On the basis of this working paper, two clusters of research questions were designed by the VU Amsterdam researchers. The first cluster addresses the formal issues of transparency, accountability and compatibility with international law. Whereas the first two of these are procedural in nature, the last one is both substantive and procedural. These questions were addressed for all actors involved (regional authorities, international organizations, national authorities and NGOs). The second cluster of questions is about outcomes of the instruments as implemented by the implementing actors. They concern the results of instruments in the instrument’s own terms; in terms of containment/mobility; and in terms of the Global Compact of Refugees.



The general research questions for all four countries (which could be adapted to the specific context in the country concerned, *infra* para. 3(b) and Annex 2) were the following:

1. Transparency: Have actors involved made the instruments used between the EU and the 3rd country public; more concretely
  - a. Has the instrument been prepared in a transparent, public process (transparency about draft documents, EU-3rd country talks and negotiations, parliamentary involvement, IO and NGO stakeholder involvement)?
  - b. Is adopted instrument itself laid down in a transparent, public document (treaty, MoU, exchange of letters, action fiche, parliamentary document)
  - c. Is the instrument implemented in a transparent, public manner (procurement, parliamentary involvement, IO and NGO stakeholder involvement)
2. Accountability: To what extent, and if so to whom, are procedures available to hold actors accountable for purported violations of international human rights and refugee law, including the EU Charter of Fundamental rights as well as regional (ECOWAS, AU) law (control of European, IO and national actors by international, regional and domestic judiciary, parliament, Ombudsperson, Court of Auditors) in the implementation of the instruments?
3. Compatibility: to what extent are the instruments (and to which extent are they implemented) compatible with international human rights and refugee law, including the EU Charter of Fundamental rights as well as regional (ECOWAS, AU) law, with an emphasis on their impact on the protection of vulnerable persons and groups against violence, exploitation and discrimination. Of particular interest is the European Ombudsman Opinion on the need to ensure human rights impact assessment by implementation actors of the EU-Turkey Statement (such as the Commission and EU Agencies like Frontex and EASO).
4. Results: specifically concerning technical assistance provided to enhance reception and protection capacities within the relevant third countries: were/are the partner states prepared to absorb and implement such assistance? To what extent have the arrangements resulted in effective and sustainable capacity-building in the reception and protection structures of the respective third countries?



5. Containment/mobility: which instruments have promoted the containment or, conversely, the mobility of individuals and groups seeking international protection?
6. Alignment: To what extent are the instruments (and to which extent are they implemented) in accordance with the three relevant GCR objectives (easing pressures on host countries; enhancing refugee self-reliance; and expanding access to third country solutions)?

Research questions 1 and 2 were addressed by analyzing, in particular, parliamentary documents and Official Journals. For accountability (Research question 3) legislation was the primary source. In addition, respondents were invited to share whether they were aware of the negotiation, agreement and implementation of the instruments, and whether they are aware of accountability mechanisms. Research question 3 was addressed by two methodologies. Respondents were invited to formulate their opinions on this topic; and the national researchers performed a legal analysis on this point. Research question 4 (results) was based on interviews, and on documents reporting about the implementation of the instruments both in the national and in the EU contexts. Research question 5 (containment/mobility) and 6 (alignment with the GCR) addressed on the basis of interviews and document analysis.

To ensure the consistency in the data collection, three extra steps were taken. (1) VU Amsterdam and CEPS organized a two-day methodology workshop for the national researchers conducting fieldwork research. Training sessions on fieldwork technics and ethics were provided by experts, each national data collection strategy was discussed and experts provided feedback on possible country specific problems. The training sessions provided a common understanding and approach to the fieldwork. (2) Following the workshop, regular meetings were organized with the national researchers and VU Amsterdam researchers to further develop the research questions and finalize the data collection strategy in the national context. (3) In December 2021, two online seminars were organized where the national researchers gave feedback to each other's draft reports and discussed common challenges and ways to navigate them. An Anglophone seminar brought together the national researchers from Serbia, Tunisia and Turkey and staff from VU Amsterdam and CEPS, while a Francophone seminar brought together the national researchers from Niger, Tunisia and staff from VU Amsterdam and CEPS.





### 3.3 National methodology

This paragraph describes the implementation of the general methodology outlined above at the national level.

#### 3.3.1 Participant identification and recruitment

The interview component of this study is meant to complement the legal analysis of the various instruments that was conducted. Thus, stakeholders to be interviewed were identified based on their presumed involvement and awareness of the various instruments covered in the report. Purposive sampling was used to identify parliamentarians, local and international organizations, academics, activists and independent researchers who would be able to evaluate the instruments along the criteria identified by drawing on their involvement in the negotiation, implementation, consultations, support services related to, or research about, the abovementioned instruments. To this end, purposive sampling was used to identify initial participants in the abovementioned categories, and recruitment continued through participant-referral (snowball) sampling.

#### 3.3.2 Interviewing

Between July and September 2021, 28 individuals were contacted for interviews. Three of them declined, 14 did not respond, or responded and did not proceed with interviews, and interviews were conducted with the remaining 11 interview participants (see Annex 1 below). Participants were contacted through various means: E-mail was the primary tool of communication, with follow-ups conducted through phone calls or messages across different messaging platforms including Whatsapp, LinkedIn and Facebook.

In order to obtain their informed consent, the country researcher told participants about the scope and objectives of the project, as well as the topics that the interview would cover. Participants were told that their responses would remain anonymous and no statements would be attributed to identified individuals. Participants' consent was sought to audio record interviews.



Below is a breakdown of the interview participant categories and response rates.

<b>Participant Type</b>	<b>Number of individuals/ organizations contacted</b>	<b>Did not respond or did not proceed with interview</b>	<b>Interviewed</b>	<b>Declined</b>
Members of Parliament	5	5	0	0
Government/ Ministry official	4	3	1	0
NGOs/activists	7	3	4	0
IOs/UN	4	2	2	0
Academics & Researchers	6	1	2	3
EU/CoE	2	0	2	0
<b>Total</b>	<b>28</b>	<b>14</b>	<b>11</b>	<b>3</b>

### 3.3.3 Limitations

As mentioned previously, the sample is not representative, and the findings of the study are limited by the low response rate, which can be explained by several factors. In July 2021, Tunisia experienced a devastating fourth wave of COVID-19, which resulted in some of the highest death and hospitalization rates on the African continent (BBC News, 2021). During this time, the government imposed more restrictive measures that included a “séance unique”, where public sector employees were working shorter hours, and those who could work from home were strongly encouraged to do so.

On July 25<sup>th</sup> Kais Saied, the President of Tunisia, invoked Article 80 of the constitution, which allowed him to introduce exceptional measures including the suspension of parliament and the lifting of parliamentary immunity. On September 22, he reinforced this



move by dissolving parliament (Reuters, 2021). These actions may have limited the willingness, ability, and authority of certain interview participants who were contacted to participate in this study. At the same time, UN and non-governmental organizations that were contacted, which included several prominent human rights organizations, were fully occupied with the political events which were at the forefront of their priorities.

The political and public health situation that unfolded during the duration of this study, in addition to the timing during the summer months, when several participants were on leave, made it very challenging to expand the participant pool in the study.

As a result, the analysis below evaluating the various instruments is predominantly informed by European perspectives – through the EU delegation and the Council of Europe – and civil society actors working on migration: this includes independent researchers, policy advisors, activists, and IGOs working on migration. While one judge who had participated in the preparation of the draft asylum law participated in this study, there was insufficient representation from government officials and members of parliament, to adequately represent the government's perspective. The discussions of the negotiations of the various instruments in particular would have benefited from greater representation in government respondents, who would have been the key actors involved in this process. The impact of the under-representation of state actors is mitigated by the inclusion in the analysis of large numbers of official documents, statements, speeches, that all convey a state/government position. These have an analytical status equivalent to governmental actors' involvement in the research process as respondents.

#### **3.3.4 Instruments Covered by the report**

The migration in the wake of the Arab Spring (2011) has been the event triggering EU policy initiatives in the field of Tunisian migration law and policy. For that reason, we have expanded the temporal scope of this country research in Tunisia to 2011-2021, instead of the period since 2015 in other country studies.<sup>1</sup>

Several bilateral and multilateral instruments between Tunisia and the EU cover mobility and asylum. The study analyses political instruments, including the Privileged Partnership

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<sup>1</sup> On the period before 2011 see Cassarino 2014.



Plan of Action (2013 – 2017) and the Joint Declaration for the Mobility Partnership between the EU and its participating member states (2014).

Legal instruments analyzed consist of bilateral agreements between Tunisia and EU member states (Italy in particular, but also France, Switzerland, Germany, and Belgium) through which provisions on readmission, security cooperation – particularly in relation to border management and control - and visa facilitation schemes are negotiated. Although these bilateral agreements are not EU instruments, it is necessary to take them into account so as to be able to analyze the EU-Tunisia instruments.

Financial instruments covered by this report include the European Neighborhood Instrument (ENI), which was the framework for bilateral cooperation between 2014 and 2020, and the EU Trust Fund for Africa (EUTF), which since 2015 has been the main financial instrument covering projects related to migration, asylum, and border control.

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## 4 The political, legal and financial instruments between the EU and Tunisia

Before introducing the political, legal and financial instruments that are the object of this study, the regional legal framework impacting Tunisian migration and asylum law and practice will be outlined.

### 4.1 The regional framework

The legal, political and financial instruments between the European Union and Tunisia which are the object of this study operate in a pre-existing regional and international framework. In addition to its international human rights obligations and its obligations arising from international refugee law, Tunisia is bound by regional instruments. Bilateral agreements with neighboring countries as well as the regional framework at the African and Maghreb level must therefore be taken into account when analyzing the various EU-Tunisia instruments.



#### 4.1.1 Law of the African Union

The African Charter of Human and Peoples' Rights<sup>2</sup> addresses refugee and migration issues in Article 12. It guarantees freedom of movement within the borders of a state; and the right to leave any country, and the right to return to one's own country. Furthermore, it stipulates that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions. Non-nationals who have been legally admitted may only be expelled by virtue of a decision taken in accordance with the law. Finally, mass expulsions (defined as expulsions "aimed at national, racial, ethnic or religious groups") are prohibited.

Furthermore, in Article 6 the ACHPR provides that "no one may be deprived of his freedom except for reasons and conditions previously laid down by law."

Tunisia is a party to the 1969 OAU Convention governing the specific aspects of refugee problems in Africa.<sup>3</sup> This Convention implements the 1951 Refugee Convention in the African context and, compared to that Convention, has two distinctive features. First, it expands the refugee definition so as to include every person who, "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, is compelled to leave his place of habitual residence" (Article 1(2)). Second, states party to the 1969 OAU Convention shall use their best endeavors to secure the settlement of refugees; where a state finds difficulty in continuing to grant asylum to refugees, other OAU member states shall take appropriate measures to lighten the burden of that member state in a spirit of African solidarity and international co-operation (Article II(1) and II(4)). Tunisia has signed, but not ratified the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention)<sup>4</sup>. This distinctive feature of this Convention is that it extends international legal protection to "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-

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<sup>2</sup> Reference African Charter of Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), [https://achpr.org/public/Document/file/English/banjul\\_charter.pdf](https://achpr.org/public/Document/file/English/banjul_charter.pdf)

<sup>3</sup> UNTS No. 14691 (1976).

<sup>4</sup> UNTS 3014 (2014).



made disasters, and who have not crossed an internationally recognized State border” (Article I(k)).

#### **4.1.2 Tunisia-Libya agreements**

Between Tunisia and Libya, there is free movement of nationals. Under the Convention on the Right to Property, Labor Law, the Exercise of Professions and Professions, the Right of Establishment and the Right of Movement, signed on 6 June 1973 between the Republic of Tunisia and the Libyan Arab Republic, free movement without a visa between the two countries has become the rule since 1988, when the borders between the two countries reopened.<sup>5</sup> In addition, Tunisia and Libya signed a bilateral agreement on employment and vocational training on 1 March 2012, of which the text has not been published. This agreement covers the recognition of professional competences and other instruments for stimulating economic interaction between the two countries.

#### **4.1.3 The Arab Maghreb Union**

The 1989 Treaty establishing the Arab Maghreb Union (consisting of Algeria, Libya, Mauritania, Morocco and Tunisia) foresees free movement of persons and has the harmonization of migration policy as one of its objectives. Although the integration process has halted 10 years ago as a consequence of political developments (the Arab Spring, as well as regional political tensions), the good faith following from being a signatory to this treaty may be pertinent for national policies potentially affecting free movement between the Maghreb states (Article 18 Vienna Convention on the Law of Treaties). The Marrakesh Agreement, concluded in 1989, established the Arab Maghreb Union (AMU).<sup>6</sup> Its purpose is to build a regional market whose main objective in the long term is the free movement of goods, people, capital and services. The Treaty provides in its articles 2 and 3 for the search for a "... common policy in different fields", among which "... the free movement of persons, services, goods and capital" and "... the achievement of

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<sup>5</sup> Tunisian Official Gazette, Decree No. 74-791 of 16 August 1974 publishing the Convention on the Right to Property, Labour Law, the Exercise of Professions and Professions, the Right of Establishment and the Right of Movement

<sup>6</sup> Traité instituant l'Union du Maghreb arabe, Marrakech 17 February 1989, United Nations Treaties Series No. 26844 (1989, 167), [https://www.ssatp.org/sites/ssatp/files/legal-instruments-fr/Annexes/III/Annex%20III-11\\_fr.pdf](https://www.ssatp.org/sites/ssatp/files/legal-instruments-fr/Annexes/III/Annex%20III-11_fr.pdf), accessed 28 November 2021.



the industrial, agricultural, commercial and social development of the Member States...”(article 2 and 3).

One of the highlights of the AMU agenda concerns the mobility of workers. In order to promote and facilitate this mobility, the AMU has taken a number of decisions to reduce administrative, legal and fiscal obstacles to regional migration, including, among others, the 1991 AMU Social Security Convention.<sup>7</sup> The purpose of this convention is, among other things, to promote the mobility of workers within the Maghreb by harmonizing the application of legislation relating to social insurance. The convention, which was ratified by Algeria, Libya and Tunisia in 1992, and by Mauritania in 1993, has not been implemented because Morocco has not yet ratified it. Taking into account the time spent since the signing and in order to take into account the evolution of the socio-economic situation in the member countries of the AMU, the 9th session of the AMU Ministerial Council in charge of training, employment, social affairs and the Maghreb community abroad held in July 2010 in Rabat, in Morocco, recommended the revision of this Convention. A meeting of Member States' experts on the subject was scheduled for May 2011 in Algiers but was postponed to a later date due to events in a number of countries in the region during 2011. With view to enhancing labor mobility, the AMU also attaches paramount importance to a more systematic integration of the issue of migration into national development policies and strategies. However, since 2011 there have been no new developments in the AMU.

#### 4.2 Political instruments

Tunisia and the EU concluded an Association Agreement in 1995.<sup>8</sup> Since 2011, Tunisia has become not only a country of origin of migrants, but also of transit and destination. In 2011, 28,000 migrants crossed to Italy from Tunisia (Fargues 2017, 11). The EU and Tunisia established a Privileged Partnership in 2012. The privileged partnership between Tunisia and the European Union is based on three pillars: political cooperation, economic and social integration and partnerships between people. The migration crisis of 2015 has once

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<sup>7</sup> Convention de sécurité sociale entre les Etats de l'Union du Maghreb arabe, signée à Ras Lanouf (Libye) les 9 et 10 mars 1991, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_isn=29617&p\\_lang=en](https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=29617&p_lang=en), accessed 8<sup>th</sup> of December 2021.

<sup>8</sup> EC-Tunisia Association Agreement, 17 July 1995, OJ L 97/2, 30 March 1998.



again put the migration issue at the center of attention of European authorities. A new European Neighborhood Policy document was adopted by the Commission in 2015.<sup>9</sup>

#### **4.2.1 Action Plan 2013-2017**

An action plan covering the period from 2013 to 2017 was adopted in the framework of the Tunisia-EU Privileged Partnership. This Action Plan establishes fairly broad cooperation in many areas. The Action Plan specifically addresses the protection of asylum seekers and refugees, and cooperation in the field of migration, mobility and security.<sup>10</sup>

The Action Plan mentions a number of actions and specific objectives:

- cooperation between Tunisia and the Office of the United Nations High Commissioner for Refugees, so as to enable it to fulfil its mandate;
- the development and implementation by Tunisia of national asylum legislation based on international principles and standards and to ensure the identification, protection and assistance and reception of asylum seekers and refugees;
- EU support for the development and implementation of national legislation, as well as for the strengthening of the capacities of a specialized administration in the field of asylum, including through the provision of advice, training and technical support;
- and the exchange of information between the EU and Tunisia on asylum policies, legislation and issues;
- in the area of migration, the Action Plan proposes a Dialogue on Migration, Mobility and Security with the aim of concluding a Mobility Partnership; and to implement the actions foreseen under the Mobility Partnership.

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<sup>9</sup> European Commission, Review of the European Neighbourhood Policy, JOIN(2015) 50 final, Brussels, 18.11.2015.

<sup>10</sup> *Relations Tunisie-Union Européenne: Un partenariat privilégié. Plan d'action 2013-2017*

[https://eeas.europa.eu/archives/delegations/tunisia/documents/press\\_corner/plan\\_action\\_tunisie\\_ue\\_2013\\_2017\\_fr.pdf](https://eeas.europa.eu/archives/delegations/tunisia/documents/press_corner/plan_action_tunisie_ue_2013_2017_fr.pdf).





#### 4.2.2 Mobility Partnership

In the context of the Action Plan 2013-2017, a Mobility Partnership was concluded on 3 March 2014 by Tunisia, the EU and ten Member States.<sup>11</sup> The primary objective of the partnership is "to establish a mobility partnership, based on dialogue and reciprocity, with the objectives of better managing both the movement of people for short stays and regular and professional migration taking place between their respective territories, taking into account the socio-economic situation and the state of the labor market of the signatory countries, to strengthen cooperation on migration and development, to prevent and combat irregular migration, smuggling of migrants and trafficking in human beings and to promote an effective return and readmission policy, while respecting human rights and international instruments on the protection of refugees, to promote the integration of migrants in a regular situation, in particular through anti-discrimination policies and for a fair recognition of their contribution to the development of countries of origin and residence."

The Mobility Partnership has been characterized by the promotion of migration and the fighting of irregular migration. The declaration proposes a circular migration scheme based on the promotion of selective regular migration, an enhancement of the role of nationals residing abroad in economic development and better management of regular short-stay stays through the granting of visas. It also aims to strengthen the prevention of irregular migration, smuggling of migrants and trafficking in human beings and the need to promote an effective readmission policy. It is in this context that several readmission agreements between Tunisia and EU Member States were concluded after 2011.

In 2016, the European Commission announced that was seeking "to take relations with Tunisia to the next level, building on the existing Mobility Partnership." Apart from addressing root causes of irregular migration by supporting necessary domestic reforms and Tunisia's socioeconomic development, the Commission intended to continue to support development and implementation of an effective national migration and asylum policy. It intended to swiftly conclude a visa facilitation agreement in parallel with a readmission agreement. Readmissions were also to be supported through practical co-

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<sup>11</sup> Commission Decision C(2013) 8581 final, Brussels, 4.12.2013. Text of the Mobility Partnership available at [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2013\)8581&lang=nl](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2013)8581&lang=nl) . The Member States are Germany, Belgium, Denmark, Spain, Italy, France, Poland, Portugal, United Kingdom and Sweden.



operation, the development of Tunisian readmission co-operation with African states, and the development of Tunisian biometric registration of its population. The Tunisian capacity for preventing irregular migration was to be improved through better border management. Tunisia was to be a pilot country for legal migration schemes, while existing mobility schemes were to be reinforced.<sup>12</sup>

In 2018, the EU-Tunisia Association Council adopted its strategic priorities for the period 2018-2020.<sup>13</sup> In the field of migration, these repeated the earlier proposals.

### 4.3 Legal Instruments

Negotiations for concluding a visa facilitation and readmission agreement between the European Union and Tunisia began in 2016.<sup>14</sup> Existing readmission agreements with EU Member States concern the readmission of nationals. It seems that the current discussions between Tunisia and the European Union concern the extension of the scope of readmission agreements to also include non-nationals. Tunisia's international obligations imply freedom of movement for nationals of neighboring countries (supra, para. 4(1)), in particular for nationals of Libya and, potentially, nationals of the Arab Maghreb Union (consisting of Algeria, Libya, Mauritania, Morocco and Tunisia). The existing bilateral readmission agreements covering Tunisian nationals are considered as effective.<sup>15</sup>

#### 4.3.1 Agreements with Italy

An agreement covering readmission between Italy and Tunisia has been concluded in 1998, the text of which has not been made public. According to the European Court of Human Rights' *Khlaifia* judgment it "contains provisions on bilateral cooperation for the

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<sup>12</sup> European Commission, Strengthening EU support for Tunisia, JOIN(2016) 47 final, Brussels, 29.9.2016, p. 12.

<sup>13</sup> OJ L293/39, 20.11.2018.

<sup>14</sup> European Commission Press Release IP/16/3394, 12 October 2016.

<sup>15</sup> Report from the Commission to the Council Assessment of third countries' level of cooperation on readmission in 2019, Brussels, 10.2.2021 COM(2021) 55 final : "While negotiations on an EU Readmission Agreement are ongoing, a readmission routine is in place in three quarters of Member States, covering 97% of the cases. Identification processes are conducted successfully, including through the use of biometrics, yet unevenly when it comes to interviews for Member States accounting for a quarter of return decisions issued and with delays and using up much time for the Member State representing almost two thirds of return decisions issued", p. 86, <https://www.statewatch.org/media/2297/eu-com-readmission-report-on-cooperation-restricted-com-2021-55-final.pdf>



prevention and repression of illegal immigration, the readmission of the two countries' nationals, the return of nationals of third countries outside the Arab Maghreb Union to their countries of last departure, and the taking-back of migrants after readmission in error. (...) t he Italian Government agreed to support Tunisia's efforts to combat illegal immigration by providing technical and operational material assistance and by making a financial contribution. Each Party undertook, at the request of the other Party and without further formality, to readmit into its territory any person who did not meet the conditions of entry or residence applicable in the requesting State, in so far as it had been established that the person concerned was a national of the requested State. The text refers to the documents required for the identification of those concerned and provides (part II, point 5) that if the consular authority of the requested State considers it necessary to hear the person concerned, a representative of the authority of that State may go to the court office, or to the reception center or medical facility where the migrant is legally residing, in order to interview him or her. The note verbale also describes the procedure for issuing a laissez-passer and for the removal of migrants, while indicating the Italian Government's undertaking "not to resort to mass or special removals" of the persons concerned."<sup>16</sup>

In 2000 and 2001, Italy and Tunisia implemented a visa scheme allowing large numbers of Tunisian job seekers to find work in Italy, considerably reducing irregular migration. The text of this scheme is not public.<sup>17</sup> At the time, cooperation between Tunisia and Italy privileged legal migration. This form of organized migration and contributed considerably to the reduction of illegal migration.

A Third agreement, the Police Cooperation Agreement signed on 13 December 2003, included a readmission cooperation clause. The main function of this new bilateral police cooperation agreement was to train the Tunisian police forces in the reinforced control of the maritime border with Italy through technical assistance and increased cooperation

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<sup>16</sup> European Court of Human Rights (Grand Chamber) 15 December 2016, *Khlaifia and Others v Italy*, application 16483/12, para. 40

<sup>17</sup> Mohamed Kriaa, *Diagnostic de la gouvernance de la migration de main d'œuvre en Tunisie: synthèse des recommandations*, Organisation Internationale du Travail / Gouvernement de Tunisie / Schweizerische Eidgenossenschaft, juillet 2014, p. 50-51.



between the authorities of the two countries.<sup>18</sup> Like the previous agreement, entry quotas for Tunisian migrant workers were proposed to encourage the Tunisian government to cooperate in the "fight against illegal immigration".

Fourthly, an administrative agreement was signed on 28 January 2009. This agreement was concluded between the Interior Ministers Mr. Roberto Maroni and Mr. Rafiq Haj Qacem (former Minister under the Ben Ali regime). The text is not public. It was agreed to expedite the issuance of Tunisian laissez passers for the return of Tunisian nationals, providing for 'simplified or accelerated procedures of identification', in close collaboration with the Tunisian consular authorities established in Italy.<sup>19</sup>

Fifthly, a Memorandum of Understanding was signed on 05 April 2011, the text of which has not been made public. It allowed for the deportation of a limited number of Tunisians, while the Italian government issued 'temporary humanitarian stay permits' to other Tunisians.<sup>20</sup> According to the European Court of Human Rights' Khlaifia judgment, in the agreement "Tunisia undertook to strengthen its border controls with the aim of avoiding fresh departures of irregular migrants, using logistical resources made available to it by the Italian authorities. In addition, Tunisia undertook to accept the immediate return of Tunisians who had unlawfully reached the Italian shore after the date of the agreement. Tunisian nationals could be returned by means of simplified procedures, involving the mere identification of the person concerned by the Tunisian consular authorities."<sup>21</sup>

#### **4.3.2 Agreements with Switzerland**

A Memorandum of Understanding between the Swiss Federal Council and the Government of the Republic of Tunisia on the establishment of a migration partnership

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<sup>18</sup> Emanuela Paoletti, 'Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms', December 20, 2012, <https://www.mei.edu/publications/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus>

<sup>19</sup> Jean-Pierre Cassarino, 'Channelled Policy Transfers: EU-Tunisia Interactions on Migration Matters', *European Journal of Migration and Law* 16(2014)1, 97-123.

<sup>20</sup> Cassarino 2014.

<sup>21</sup> Khlaifia, para. 37-38.



was signed in Tunis on 11 June 2012. The Memorandum of Understanding is available.<sup>22</sup> It emphasizes "the interdependence between migration and development as well as the need to manage migration as part of a comprehensive and integrated approach". It stipulates that "The provisions of this Memorandum of Understanding do not constitute any legal rights or obligations for the Signatories." The signatories are engaging in a dialogue and a reflection process to improve cooperation on the following points:

- management of migration flows;
- readmission of nationals;
- assistance with return;
- prevention of irregular migration;
- combating trafficking in migrants and smuggling of human beings;
- regular migration (including visas, consular and administrative matters as well as exchanges in the fields of education and training);
- migration and socio-economic development;
- relations with diaspora;
- integration;
- development of skills within the administrative authorities responsible for migration issues;
- and other areas concerning the movement of populations between the territories of the signatories.

A Cooperation agreement that specifically addresses migration between the Swiss Confederation and the Republic of Tunisia was concluded also on 11 June 2012. The object of the cooperation agreement is the entry, stay and return of persons to the territories of the Contracting Parties (Article 1).<sup>23</sup> The agreement underlines its compatibility with the international commitments of the contracting parties in the field of fundamental rights and the rights of refugees, and refers to compliance with the international law obligations of

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<sup>22</sup> Protocole d'entente entre le conseil federal Suisse et le gouvernement de la republique Tunisienne concernant l'instauration d'un partenariat migratoire, 11 June 2012, <https://www.news.admin.ch/news/message/attachments/27142.pdf>, accessed 28 November 2021.

<sup>23</sup> Accord de coopération en matière de migration entre la Confédération suisse et la République tunisienne, 11 June 2012, <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2014/586/20140816/fr/pdf-a/fedlex-data-admin-ch-eli-cc-2014-586-20140816-fr-pdf-a.pdf>, accessed 28 November 2021.



both Contracting Parties.<sup>24</sup> The agreement also mentions the possibility of granting a humanitarian visa under Article 4 paragraph 3: "Switzerland also undertakes to grant benevolent and diligent treatment to visa applications made by Tunisian nationals and presenting a humanitarian aspect". The agreement provides for the readmission of established or presumed nationals of Contracting Parties in an irregular situation. When after removal it appears that the removed person does not have the nationality of the stated to which she was removed (i.e. if the presumption of Tunisian nationality turns out to be incorrect), the removing state readmits the person (Article 6(2)). Guarantees of fundamental rights are mentioned in this respect. Indeed, the right to medical care, the necessary respect for the dignity and the physical and moral integrity of the person concerned are recognized.<sup>25</sup> The agreement also provides for cooperation in strengthening the capacity of the administration in border control.<sup>26</sup>

### 4.3.3 Agreements with Germany

The agreements between Tunisia and Germany are not officially available, but the text of the substantive provisions have been published online by the Tunisian civil society organization Nawaat, on which the content of this paragraph is based.<sup>27</sup> It is through

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<sup>24</sup> Article 22 of the Agreement states that "This Agreement shall not affect the obligations of the Contracting Parties arising in particular from: the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967; the agreements entered into by the Contracting Parties in the field of the protection of human rights, in particular the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966; the Vienna Conventions on Diplomatic and Consular Relations of 18 April 1961 and 24 April 1963 respectively; international treaties on extradition in force for the Contracting Parties".

<sup>25</sup> Article 7 para. 5, the right to guaranteed medical care to the person who is the subject of a readmission application, if his state of health so requires. Article 9: Right of persons in a situation of readmission "Within the limits of the legislation in force of the requesting Contracting Party, the latter shall take all measures to preserve the honour, dignity and physical and moral integrity of the person concerned and to create favourable conditions for his socio-economic reintegration". Section 10. Regulation of special cases "The competent authorities of the Contracting Parties shall consult each other when necessary to agree on arrangements to preserve the honour, dignity and physical and moral integrity of the persons concerned (in particular unaccompanied minors, sick persons, pregnant women, large families) and to guarantee them the exercise of their rights and obligations".

<sup>26</sup> Article 21 Technical and financial cooperation in the fight against irregular migration "Switzerland undertakes to strengthen the capacities of the services and units of the Tunisian administration in charge of cross-border movement on the one hand, and the prevention and fight against illegal border crossings and irregular emigration on the other".

<sup>27</sup> Protocole conjoint concernant la gestion de la mobilité, de la migration, du retour volontaire et du développement solidaire entre le gouvernement de la République de Tunisie et de la République Fédérale Allemande (Tunis, les 22 et 23 février 2017), <https://cdn.nawaat.org/wp-content/uploads/2017/03/Tunisie-allemande-migration-chaheh-merkel-Protocole-conjoint-gestion-mobilite-migration-retour-volontaire.pdf>, accessed 28 November 2021.



analytical reports mentioning the agreement that we were able to collect the following information: "In 2011, after the Tunisian revolution, Germany and Tunisia concluded an economic and political cooperation agreement to support Tunisia's democratic transition. This agreement proposes two labor migration projects:

- A first pilot project of "partnership of transformation in terms of health system" (TAPIG) which consisted in selecting 150 young Tunisian baccalaureate graduates for language training and health assistant or nurse in Germany, and who worked with fixed-term contracts of 5 years, in circular migration, in clinics in Hamburg.
- A second project that focused on the promotion of legal mobility of highly qualified Tunisian specialists. This project, organized and funded by the German development agency GIZ, focused on young engineers with higher education (civil engineering, metal construction, computer science, electromechanics and telecommunications networks). It allowed the sending of 102 candidates, highly qualified young Tunisians, to follow a language training and an internship in a German company, followed by a paid work stay in Germany. In 2012, Germany adopted the principle of the "EU Blue Card" to relax the conditions of entry and residence of highly qualified non-European foreigners, based on the needs of economies of the host countries<sup>28</sup>.

In 2016 and 2017, agreements between Tunisia and Germany were concluded as part of the Mobility Partnership (supra, para. 4(b)(ii)). A cooperation agreement was signed on 2 March 2017 (which is an integral part of the global agreement signed on 26 September 2016). The Joint Protocol on the management of mobility, migration, voluntary return and solidarity development between the Government of the Republic of Tunisia and the Federal Republic of Germany was signed on 02 March 2017.

We were able to consult the agreement of 2 March 2017 thanks to a document published on the website of a Tunisian association that is interested in the migration "Nawaat" mentioned above. The text of the agreement refers to the necessary respect for the rights of persons subject to a readmission procedure.<sup>29</sup> The preamble to the agreement provides that voluntary return must prevail. Germany undertakes to support development aid

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<sup>28</sup> Kriaa 2014, p. 53.

<sup>29</sup> <https://cdn.nawaat.org/wp-content/uploads/2017/03/Tunisie-allemaigne-migration-chaheh-merkel-Protocole-conjoint-gestion-mobilite-migration-retour-volontaire.pdf>



projects in Tunisia, including for returnees. Tunisia "reiterates its obligation to readmit its nationals whose entry into Germany is outside the applicable law or who are staying there illegally, and this in full respect of the rights of individuals, including the full application of remedies guaranteed by law and legal provisions (decrees, procedural codes etc.). The agreement states that Tunisia "readmits Tunisian nationals who will be returned individually on commercial flights or by group on special flights (up to 25 people)." In addition, Tunisia "accepts this measure exclusively when the Tunisian nationality of the Tunisian national to be readmitted is demonstrated."

Furthermore, the agreement foresees support in the following areas: exchange of information between the competent authorities concerning trafficking, smuggling networks and the persons involved as well as organized crime in connection with migration; technical support for the fight against illegal immigration; organization of training for consular and administrative staff on immigration, in particular the field of document fraud; cooperation to strengthen border control, including through material and equipment support; technical expertise for the protection of the security of national travel documents; and improvement of capacities for combating illegal migration and human trafficking.

#### **4.3.4 Agreement with Belgium**

A Memorandum of Understanding on Readmission was signed between Tunisia and Belgium on 17 July 2018. The Tunisian Government Decree No. 2019-1051 of 8 November 2019 concerning the memorandum of understanding between the Government of the Republic of Tunisia and the Federal Government of the Kingdom of Belgium on cooperation in the field of concerted migration, solidarity development and security, has been published in the Official Journal of the Republic of Tunisia.<sup>30</sup> However, the contents of the Memorandum are not publicly available. We were able to gather some information from a media report from the Belgian public broadcasting station RTBF. According to the report, the purpose of the agreement will be to strengthen the collaboration with Tunisia for the

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<sup>30</sup> *Journal Officiel de la République Tunisienne* n°92/2019, 15 November 2019.





return of persons staying illegally and who have been convicted in court. Tunisia undertakes to effectuate identification of persons to be deported within 45 days<sup>31</sup>.

#### 4.3.5 Agreement with France

The Franco-Tunisian agreement on the concerted management of migration and solidarity-based development was concluded on 28 April 2008.<sup>32</sup> Since it was concluded before 2011, we shall confine ourselves to summarizing the objectives pursued by the agreement, namely:

- Facilitate the movement of persons between France and Tunisia, in particular by issuing more widely the "circulation" visas that allow free access to French territory during their period of validity for a period of one to five years;
- Facilitate access to the French labor market for Tunisians with skills or in occupations in which French demand is not met. These facilities should allow the entry into France of more than 9,000 Tunisian professionals each year, according to different modalities. The nature of the residence permits granted by France under this agreement are: the "skills and talents" residence permit (1500 per year); salaried employment within the framework of the list of trades (3500 per year); "Young professionals" contracts (1500 per year); "Seasonal worker" contracts (2500 per year).

The Franco-Tunisian agreement does not contain a readmission clause. Readmission in practice is essentially based on the collaboration between the Tunisian consular services in France and the French authorities in the event of a final decision on removal. The 2008 Franco-Tunisian agreement is relevant for readmission in an indirect manner; on 28 September 2021, the French authorities decided to reduce the number of visas granted to

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<sup>31</sup> *Asile et migration : la Belgique signe un accord avec la Tunisie*, rbtbf.be, 17 July 2018 [https://www.rbtbf.be/info/belgique/detail\\_asile-et-migration-la-belgique-signe-un-accord-avec-la-tunisie?id=9974769](https://www.rbtbf.be/info/belgique/detail_asile-et-migration-la-belgique-signe-un-accord-avec-la-tunisie?id=9974769), accessed 23 November 2021.

<sup>32</sup> Published on the website of the French Interior Ministry, <https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-tunisien>, accessed 28 November 2021.



Tunisians in response to what they considered to be a lack of cooperation on the part of the Tunisian consular authorities in issuing laissez passers.<sup>33</sup>

## 4.4 Financial instruments

### 4.4.1 Overview

The financial instruments under which asylum and migration related projects are funded are the EU Trust Fund for Africa (EUTF), adopted during the Valetta Summit in 2015; and the European Neighborhood Instrument (ENI), which was used between 2014 and 2020.

### 4.4.2 Projects

#### 4.4.2.1 *Promoting the implementation of Tunisia's national migration strategy*

This 12.8 million Euro project runs for 42 months is funded by the EUTF, and is implemented by AFD, ICMPD, Expertise France and GIZ.<sup>34</sup> It is to be finished by 31 December 2022. One of its four components is to operationalize Tunisia's National Migration Strategy, by supporting the Tunisian institutions involved in its implementation, and by monitoring and supporting the National Institute of Statistics in conducting a qualitative statistical survey of households on migration in Tunisia (MED-HIMS) (implemented by ICMPD as ProGreS Migration phase I, 2018-2021). The principal result is to be that the National Migration Strategy is transformed into a plan of action, with a budget for the short and medium term, which is circulated and monitored, while the qualitative survey should be realized. Other components (not directly relevant for the current research) relate to the role of the diaspora in economic development (to be implemented by GIZ); the economic and social reintegration of returning Tunisian migrants (to be implemented by Expertise France); and addressing migration at the local level (to be implemented by AFD).

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<sup>33</sup> Business News, 2021; La Depeche 28 September 2021, <https://www.ladepeche.fr/2021/09/28/immigration-le-nombre-de-visas-accordes-par-la-france-a-lalgerie-et-au-maroc-divise-par-deux-9818315.php>, accessed 28 November 2021; Le Monde 29 September 2021, [https://www.lemonde.fr/afrique/article/2021/09/29/l-algerie-convoque-l-ambassadeur-de-france-en-reaction-a-la-decision-de-reduire-le-nombre-de-visas\\_6096501\\_3212.html](https://www.lemonde.fr/afrique/article/2021/09/29/l-algerie-convoque-l-ambassadeur-de-france-en-reaction-a-la-decision-de-reduire-le-nombre-de-visas_6096501_3212.html), accessed 28 November 2021.

<sup>34</sup> [https://ec.europa.eu/trustfundforafrica/region/north-africa/tunisia/favoriser-la-mise-en-oeuvre-de-la-strategie-nationale-migratoire-de-la\\_en](https://ec.europa.eu/trustfundforafrica/region/north-africa/tunisia/favoriser-la-mise-en-oeuvre-de-la-strategie-nationale-migratoire-de-la_en). Adopted 16 December 2016.



#### 4.4.2.2 *Programme Gouvernance Stratégie Migration Tunisienne, ProGreS Migration – phase II*

This EUTF-funded project<sup>35</sup> with a total cost of EUR 5.7 million was adopted in October 2020. The project, which is implemented by ICMPD (data management, share of budget €1.8 million) and Expertise France (reintegration, share of budget €3.9 million), builds on the first phase (above). The ICMPD component aims to implement political, legal, regulatory, and institutional frameworks for migration governance while improving knowledge and management of data related to migration. The Expertise France component (not directly relevant for the current research), aims at the socio-economic reintegration of Tunisian nationals who were repatriated from Europe.

#### 4.4.2.3 *Integrated Border Management (IBM) Project*

This project<sup>36</sup> financed in the framework of the European Neighborhood Instrument bears a total estimated cost of EUR 3,580,000, of which the contribution from the EU Budget amounts to EUR 3,000,000. It is implemented by ICMPD (border management, € 2 million) and UNHCR (asylum law, €900.000)<sup>37</sup> It is first and foremost an implementation of the Action Plan for the Privileged Partnership 2013-2017, particularly in its Chapter VI. It intervenes within the framework of the "Cooperation in the fields of migration, mobility and security". It is also part of the sector of concentration n° 2 of the Single Framework of Support Tunisia 2014-2015 "Consolidation of the constituent elements of democracy". In addition, the major activities undertaken under this programme consist in strengthening the capacities of the Tunisian authorities in the areas of irregular migration prevention. The project is structured around two complementary components, namely:

The first component "border management / prevention of irregular migration", whose objective is to strengthen Tunisian national border management capacities. This will require the modernization of working methods in order to secure border areas, but also to facilitate the lawful crossing of borders (as a factor of local and regional development). It

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<sup>35</sup> [https://ec.europa.eu/trustfundforafrica/region/programme-gouvernance-strategie-migration-tunisienne-progres-migration-phase-ii-o\\_en](https://ec.europa.eu/trustfundforafrica/region/programme-gouvernance-strategie-migration-tunisienne-progres-migration-phase-ii-o_en)

<sup>36</sup>[https://ec.europa.eu/neighbourhood-enlargement/system/files/2017-04/c\\_2014\\_7273\\_f1\\_annex\\_fr\\_v1\\_p1\\_782357.pdf](https://ec.europa.eu/neighbourhood-enlargement/system/files/2017-04/c_2014_7273_f1_annex_fr_v1_p1_782357.pdf)

<sup>37</sup> See on the remarkable role of ICMPD in European migration projects in Tunisia Naceur n.d., esp. p. 42-64.



will also strengthen the capacity for cooperation and coordination between the authorities in charge of border management.

The second component concerns "Asylum and International Protection", the main objective being to provide technical support to the Tunisian authorities in order to achieve the gradual establishment of a national refugee protection system - an objective that follows from an international obligation assumed by Tunisia because of its obligations under the 1951 Refugee Convention and the 1969 OAU Refugee Convention.

Phase II of the IBM project ran from December 2018 to December 2020. It was funded by Germany. Its overall objective is to contribute to building the capacity for protection, surveillance and border control of the Tunisian border agencies, while facilitating the movement of legitimate travelers and goods. It is implemented by ICMPD. No financial data are available.<sup>38</sup> It consists of three components:

- preparing the establishment of "Border" inter-agency training centers in the North and in the South of Tunisia, so as to strengthen the institutional capacity of the Tunisian border agencies,
- extending the local operational rooms of the Border Police Directorate of the General Directorate for National Security (DFE) and of the local watch of the Border Guard General Directorate of the National Guard (DGGF), as well as the creation of a Central operation Room and pilot local operational rooms for Customs, so as to improve the efficiency and security of border agency staff;
- and to facilitate commercial transit and passenger crossing (extension of the "Smart Traveler" mobile Customs application), so as to reinforce the three pillars of the Integrated Border Management concept in Tunisia.

The third Phase of the IBM project runs from June 2020 to June 2023<sup>39</sup>. It is funded by Austria, Denmark and Germany, and continues the support provided in the previous IBM projects. It is implemented by ICMPD. No detailed project data are publicly available, but

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<sup>38</sup> <https://www.icmpd.org/our-work/projects/support-programme-to-integrated-border-management-in-tunisia-phase-ii-ibm-tunisia-ii>, accessed 22 November 2021.

<sup>39</sup> <https://www.icmpd.org/our-work/projects/support-programme-for-the-tunisian-government-in-the-field-of-integrated-border-management-ibm-tunisia-phase-iii>, accessed 22 November 2021.



according to an investigative research report, the total cost of the project is EUR 8.3 million (FTDES 2021a). It consists of three components:

- Two inter-agency border management training centers will be established in Tunisia, so as to support the main Tunisian border agencies and strengthen their training capacity in border management in an inter-agency context.
- The networks and operational rooms of the three border agencies will be extended and modernized, so as to support the development of IT capacity to accurately and instantly communicate the security situation at borders.
- The Tunisian Customs Smart gate System will be expanded, so as to support the Tunisian customs in facilitating customs formalities.

#### **4.4.2.4 Border Management Project (BMP) Maghreb**

This project, with a budget of EUR 55 million, is financed through the EUTF, and was adopted on 6 July 2018. It covers Tunisia and Morocco, and is implemented by ICMPD. The EUR 55 million is shared between Morocco and Tunisia. Tunisia's portion was 50% (EUR 22.5 mil) according to the original action fiche<sup>40</sup>, and increased to EUR 34.5 million, according to a recent fact sheet published by the EU Trust Fund for Africa (EUTF 2021, p. 2) Its aim is to enhance the institutional framework of Morocco and Tunisia to protect, monitor and manage the borders, in line with international standards and human rights that identify and mitigate risks to rights holders at borders, while ensuring the free movement of bona fide travelers and goods. Expected results and activities undertaken to that end are described in somewhat nebulous terms.<sup>41</sup> These concern five issues:

- Increasing migration-related knowledge through discussing main priorities and strategies;
- Providing technical support to the relevant institutions and agencies so as to develop or improve structures/systems/processes/procedures/tools/working methods;

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<sup>40</sup> <https://ec.europa.eu/trustfundforafrica/sites/default/files/to5-eutf-noa-reg-07.pdf>, accessed 22 November 2021.

<sup>41</sup> Action document T05-EUTF-NOA-REG-07, <https://ec.europa.eu/trustfundforafrica/sites/default/files/to5-eutf-noa-reg-07.pdf>, p. 11-13.



- Support the relevant bodies and entities in developing a migration management support system (entry-exit), so as to enhance the standardized production and management of migration-related data;
- Providing equipment so as to enhance the physical and technical infrastructure of relevant institutions/entities;
- Developing and implementing trainings so as to improve dialogue and exchange between relevant actors at the local/regional/national/international level.

#### **4.4.2.5 *Enhancing self-reliance and access to rights for refugees and asylum-seekers in North Africa***

This project<sup>42</sup> runs from 2015-2025 and has a €15.440.072 budget, of which €11.500.000 is funded through EUTF while the remainder is contributed by various donors to UNHCR country operations. It is implemented by UNHCR in Egypt, Tunisia and Morocco, each of which are allocated 33% of the funds. The purpose of the project is to provide refugees and asylum-seekers in Egypt, Morocco and Tunisia with access to legal assistance, self-reliance, education and services that address particular vulnerabilities such as sexual and gender-based violence. Further, UNHCR integrates its capacity building and integration activities in the field of refugees and asylum-seekers in Tunisia into this project. In Tunisia, the project funds the activities of UNHCR relating to its core mandate (RSD, durable solutions, assistance or to the capacity building of Tunisian authorities and other key actors). The adoption of a national law on asylum is an important strategic objective, as well as the implementation of practices and policies that create a favorable protection environment. Concretely, the project addresses education; psycho-social assistance; legal assistance; the provision and management of a temporary reception center for refugees and asylum seekers; trainings on international protection for ministries, members of parliament, judges, lawyers, civil society journalists and service providers; and the development of teaching and information material.

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<sup>42</sup> <https://eutf.akvoapp.org/en/project/8159/#report>, accessed 29 November 2021.



#### 4.4.2.6 Facility for Migrant Protection and Reintegration in North Africa<sup>43</sup>

This programme has a budget of EUR 10 million<sup>44</sup> and is being implemented by IOM in Algeria, Egypt, Morocco, and Tunisia.<sup>45</sup> Funded activities focus on three main areas: 1) to enable Assisted Voluntary Return (AVR) for third country nationals wishing to leave North African countries and return to their countries of origin; 2) support to the reintegration of repatriated North African nationals back in their home countries, and 3) to increase the capacities of North African countries to strengthen their return and reintegration processes, which include identification and referral of target migrants.

#### 4.4.2.7 Summary

The financial information presented above (which does not include IBM phase II, about which no financial information is available) is summarized below in Table 1.

	protection	return of Tunisians	borders	governance
Promoting the implementation of Tunisia's national migration strategy		€ 2,500,000		€ 11,000,000
ProGreS Migration – phase II		€ 3,900,000		€ 1,800,000
IBM phase I			€ 2,000,000	€ 900,000
IBM phase III			?	
IBM phase III			€ 8,300,000	
BMP			€ 22,500,000	
Enhancing self-reliance and access to rights	€ 3,830,000			
<b>total</b>	<b>€ 3,830,000</b>	<b>€ 6,400,000</b>	<b>€ 32,800,000</b>	<b>€ 13,700,000</b>

Table 1: Financial summary of ENI and EUTF projects

The table above allows us to identify the EU policy priorities. In financial terms, enhancing Tunisia’s capacity to control its border gets 57,8% of the budget and is the EU’s top priority; as financial information on IBM phase II could not be included, this is an under-estimation. Less than half of this, 24,2% is spent on enhancing Tunisia’s migration management, while 11,3% is available for supporting the return of Tunisians from Europe, and merely 6,8% is available for refugee protection.

<sup>43</sup> [https://ec.europa.eu/trustfundforafrica/region/north-africa/regional/facility-migrant-protection-and-reintegration-north-africa\\_en](https://ec.europa.eu/trustfundforafrica/region/north-africa/regional/facility-migrant-protection-and-reintegration-north-africa_en), accessed 18 March 2022.

<sup>44</sup> <https://eutf.akvoapp.org/en/project/9914/#report>, accessed 18 March 2022.

<sup>45</sup> On what he calls the sub-contracting of the day-to-day assistance to migrants in Tunisia to IOM see Cassarini 2020.



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## 5 Analysis

### 5.1 Transparency

As mentioned in the general methodology, our analysis of the degree of transparency of the instruments refers to three key characteristics: a) the public character of the *text* of the adopted instruments (and funded projects), b) the public character of the *preparation* of the instruments, and c) the public character of the *implementation* of the instruments.

Each of the various instruments between the EU and Tunisia is subject to different negotiation, planning and implementation processes, some of which are more transparent than others. Participants noted varying degrees of transparency in relation to the different agreements. Legal and political instruments such as bilateral agreements with EU member states and the Privileged Partnership agreement are usually negotiated by the Tunisian Ministry of Foreign Affairs, and some are ratified by parliament. Other agreements – security cooperation agreements for example – may be signed with the Tunisian Ministry of Interior, and the texts are usually not publicly available or ratified by parliament. Financial instruments are more complex, as they involve the EU delegation in Tunisia, national authorities, and international organizations.

The agreement that was for our respondents most notable in its *lack* of transparency was that between Italy and Tunisia (TN2, August 13, 2021; TN1, August 6, 2021).

What is common across the *legal and political instruments* cited is that, according to our respondents, there was little transparency in the negotiation process. There is no practice of sharing preliminary drafts of the agreements, and participants interviewed had little clarity on the forms that various cooperation agreements took (e.g. formal agreements, memorandums of understanding, etc.). While parliament may have ratified the treaties, and while there may have been fora where members of civil society were invited to learn more about the instruments, these events were of a ceremonial rather than substantive nature. According to a researcher and policy advisor who was involved in the preparation of several of these instruments, members of civil society were *informed* rather than *consulted*, and parliament ratified the agreements with little substantive debate or opposition. This may also have been due to the fact that parliament did not necessarily have a clear framework through which to analyze the agreements and determine their suitability for the Tunisian context (TN1, August 6, 2021).





Due to the fact that little information is usually provided by Tunisian authorities about issues discussed in meetings with counterparts, or funding amounts and additional agreements agreed upon in these meetings, the main mechanism that *Tunisian* journalists, researchers and human rights organizations use to learn about discussions that may have taken place between Tunisian and the executive branch of the EU are through parliamentary inquiries *in Europe* (in Germany for example) submitted to national parliaments to gain access to the executive branch's actions abroad, or Access to Information requests submitted through Members of European Parliament (MEPs) to the European Commission to learn about specific meetings or agreements carried out by the executive branch of the member state, or the European Commission. These avenues are not equally available in all EU countries, as they are dependent on each member state's access to information laws. In the German national parliament this is a commonly used tactic; in Italy it has its limitations, and in France the mechanism does not exist. In this way, information about the latest developments is obtained from European citizens (journalists, activists and others) who are following these particular dossiers. However, information is usually received months after the fact or a specific meeting or agreement (TN9, September 23, 2021).

## 5.1.1 Bilateral treaties

### 5.1.1.1 Tunisia-France Treaty

The 2008 Franco-Tunisian treaty is considered to have been negotiated with a high degree of transparency (TN1, August 6, 2021). The treaty was ratified by the Tunisian parliament, and the text is publicly available. The main provisions in the Tunisian-French agreement related to mobility relate to improved access to visas for Tunisian nationals. There is little transparency, however, on the application of these provisions. The quotas allocated to visas for Tunisian nationals across all different categories (work, study, family reunification and tourism) appear to be arbitrarily decided and politicized. Access to visas remains limited by its high cost, arbitrary changes in the quotas for visa allocation set by France, and an opaque decision-making process that doesn't provide information about reasons for rejection (TN2, August 13, 2021). France recently reduced the number of visa to be issued to Tunisians (and Moroccans and Algerians) because of the purported unwillingness of these countries to readmit their own nationals (Le Monde 2021).



### 5.1.1.2 Tunisia-Italy Agreements

There is very little information available about the agreements between Italy and Tunisia. As already mentioned, the text of none of Tunisia's agreements with Italy is publicly available. Further, little information is shared by Tunisian authorities on any initiatives funded or implemented within the scope of the agreements.

For example, in August 2020, following the announcement of a new agreement between Italy and Tunisia to allocate 11 million EUR of funding to Tunisia for border control activities, three organizations (FTDES, ASF and the Associazione Studi Giuridici sull'Immigrazione (ASGI)) filed a request to Italian and Tunisian governments to be able to view the document and conduct an analysis on its compatibility with international law (InfoMigrants, 2020). The responses they received from the Italian government were that “no such agreement was signed in August 2020”, while the Tunisian Ministry of Interior responded with a list of items bought by Tunisia with Italian government funding, without clearly specifying the source or year of funding, adding further confusion to an existing lack of transparency (TN2, August 13, 2021; Association for Juridical Studies on Immigration, 2020). Later in the year, the Italian Ministry of Foreign Affairs signed an agreement with the UN Office for Services and Projects (UNOPS) to implement an 8 million EUR project titled “*Support to Tunisia's border control and management of migration flows*”. This project is a bilateral project funded directly by the Italian Ministry of Foreign Affairs through a “Migration Cooperation fund” that rewards Tunisian cooperation in the field of readmission (Association for Juridical Studies on Immigration, 2021).<sup>46</sup>

It is known that border protection and the combat of irregular migration comprise an important component of the two countries' security cooperation: Italy's Ministries of Interior and Defense work closely to train and equip their Tunisian counterparts. It is important to note that provisions related to security cooperation between the two countries would take the form of “Procès verbal” which does not require ratification by parliament and can be negotiated and agreed upon directly between the two Ministries involved (in this case, the Ministries of Interior) (TN9, September 23, 2021).

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<sup>46</sup> The action fiche has been published by ASGI, [https://sciabacaoruka.asgi.it/wp-content/uploads/2021/03/Concept\\_note.pdf](https://sciabacaoruka.asgi.it/wp-content/uploads/2021/03/Concept_note.pdf), accessed 24 November 2021.



Finally, with regards to readmission, there is a quota agreed upon informally between the two countries on the number of Tunisian nationals that could be repatriated from Italy to Tunisia on a weekly basis on the basis of the MoU Tunisia-Italy 2011. While access to this information is not available publicly, interview participants mentioned that it is clear such an agreement exists as all repatriations from Italy must obtain Tunisian consular approval; in recent years, the number of Tunisians who were returned has increased, and there is strong pressure from Italy to continue to increase this quota (EuroMed Rights, 2021).

#### **5.1.1.3 Other bilateral treaties**

The text of the agreements with Switzerland are public. The texts of the agreements with Germany are not public. The text of the Memorandum of Understanding with Belgium is not public.

#### **5.1.2 Plan d'Action (2014 – 2020) & Mobility Partnership (2014)**

These political instruments (supra para 4(b)) have resulted in the financing of the IBM project (supra para. 4(d)(ii)). The information and decisions that go into the annual programming document are the result of continuous dialogue and discussions between the EU Delegation and local actors (civil society, government, the private sector, and other institutions). Sectorial dialogues take place in this process, where stakeholders in each sector are brought together by the EU delegation to discuss priorities for annual programming. This approach has been successful in the water management sector, and a similar structure will be set up for the migration sector (TN8, September 17, 2021).

Consultations between the EU and various Tunisian stakeholders take place in formal settings, but are not limited to those events. Work relationships and discussions occur on an ongoing basis; this type of regular dialogue has more weight in informing the EU's Delegation's work in approving the annual programme in Tunisia than formal forums for consultation (TN8, September 17, 2021).

Specifically with regards to migration, there are different levels of discussion. At the *political* level, European Member states hold discussions with Tunisian security services in the Ministry of Interior, the Coast Guard, etc. At the *strategic* level, the Ministry of Foreign Affairs works with the EU delegation on strategic priorities with regards to migration. At the *operational* level, the Ministry of Social Affairs implements aspects of migration policies. (TN8, September 17, 2021, September 17, 2021). At this *operational* level, there are



forums held with civil society organizations along with various directorates general in the ministries (child protection, professional training, etc).

With regards to annual project planning in relation to bilateral programme planning, the EU delegation takes into account the requests of the ministries, but also take into account the current issues, and information obtained from discussions with civil society. For example, in terms of the protection of vulnerable populations, the EU Delegation adopted a EUR 3.6 million project for the protection of vulnerable migrants, allocated directly to civil society organizations rather than to ministries (European Commission, n.d.(c)). The EU Delegation cited this project as an example of how regular dialogue with non-governmental organizations leads to concrete results with regards to protection.

The responses of our interviewees show that civil society is absent from political & strategic consultations, and is at most involved only at the implementation stage. Civil society actors mention having been invited to consultations with regards to programming (TN6, September 15, 2021 TN10 October 4, 2021). Civil society organizations are referred to regularly by various ministries for their inputs on policies and activities. However, as mentioned earlier, civil society are invited to discussions in a symbolic rather than substantive manner: dialogue and consultation on formal agreements thus takes place in the form of discussions on a quotidian level rather than as written opinions on specific treaties (TN6, September 15, 2021), and various organizations have been pointed in their criticism on the lack of substantive involvement or consultation in higher level negotiations of agreements, as in the case of the Tunisia-EU Mobility Partnership (Euromed Rights, 2014). This is again echoed in a study carried out by Roman and Pastore (2020) on the framings of Tunisian civil society of EU migration policies. Their respondents from Tunisian civil society reiterated the view that migration issues in Tunisia are the purview of technocrats and “expert” NGOs that are already heavily involved in migration programming and policy-making. Migration issues are not widely debated, and the negotiation processes with the EU are relegated to obscurity for the majority of civil society actors. As one of their participants noted: “even cooperation with the EU in the field of migration is not made the object of political debate; negotiations with the EU are framed as a merely technical issue and they are not mediatized at all; Tunisian civil society has no idea of what the mobility partnership, the readmission agreement or the visa facilitation agreement are; the only actors involved in this, along with the Tunisian government, are some expert CSOs and NGOs” (Pastore & Roman, 2020, pp. 11-12).



### 5.1.3 Financial Instrument: EU Trust Fund for Africa

Finally, the process of elaboration of projects within the EU Trust Fund and the European Neighborhood Policy frameworks differs from the abovementioned processes, as the EUTF consists more of development assistance support rather than bilateral or multilateral cooperation. Some projects, such as BMP Maghreb, are regional in scope, with activities spanning North Africa, while others are specific to Tunisia. Our respondents report that Tunisian officials are not the sole, or the main actors involved in the elaboration of projects.<sup>47</sup> Rather, projects are developed by international organizations and submitted to the EU Trust Fund for funding, and will be approved according to the alignment of the EUTF's objectives.<sup>48</sup> In Tunisia, discussions between the EU Delegation and the Ministry of Development and International Cooperation, the Ministry of Social Affairs, and other national ministries concerned with migration and asylum issues, help determine government needs, and can inform the Delegations' annual operation programming, which includes decisions on which initiatives to fund and needs to address. An international organization representative stated that its reading of the migration field is also informed by regular dialogue with members of civil society and international organizations. (TN8, September 17, 2021). In all instances, however, no information is shared with the public while project proposals are being elaborated. Preliminary drafts are not shared publicly (neither in Tunisia nor in Europe) (TN9, September 23, 2021), and neither parliament nor civil society are involved in debating or submitting suggestions for modification to the projects. The final versions of action fiches for each project are posted online (European Commission, n.d. a); however, the projects' logical frameworks, consisting of detailed objectives and indicators, are not available publicly and there is little transparency when it comes to any subsequent amendments to the projects. As was evident in our description of the projects above (*supra* para. 4(d)(ii)) even for adopted projects that involve substantial funding the description of the activities in the publicly available documents remains unspecific.

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<sup>47</sup> This is in contrast to the EU Trust Fund for Colombia, where the Colombian government has a veto right as a participating partner, Carrera et al. 2018, p. 26-27.

<sup>48</sup> Carrera et al. 2018, p. 28-29, conclude the process of developing and approving projects for funding is "opaque". Comp. Spijkerboer and Steyger 2019 and Spijkerboer 2021.



As several interviewees noted, very often the ability to access information about a specific project depends on the interested party's ability to navigate various complicated websites and platforms, or familiarity with submitting parliamentary inquiries Access to Information requests to the European Commission (*supra* para 5(a)). As can be seen, information about project activities including training provided and equipment procured, along with project amendments, is not easy to obtain for members of the general public who do not have the technical knowledge or experience to know *where* to search for them, which impedes the ability of the public and human rights organizations to stay informed about project results, impacts, and any developments that may be concerning. Even with such skills, essential information is often not publicly available.

Finally, the results of monitoring and evaluation exercises conducted by the implementing organizations or by the EU are not publicly available, which makes it harder for the public to track the progress, including specific activities, outcomes, and impacts of the projects. "Thereby, ICMPD is creating powerful incentives for Tunisian authorities and civil society to abide and harmonize respective practices in line with European standards, bypassing parliamentary and public control and undermining Tunisia's sovereignty on security and migration related matters." (Naceur n.d. , 67)

#### **5.1.4 Conclusion**

Transparency is a matter of concern and is, as a general manner, not guaranteed in practice.

Whereas some formal bilateral treaties have been published and at least formal involvement of parliament is guaranteed in that context, the large majority of the instruments is characterized by a lack of transparency. The texts of the bilateral agreements between Italy and Tunisia is not public (the Italian government even denied the existence of an agreement about which the Tunisian government did provide some information, *supra*), while their manner of implementation is untransparent as well. In some contexts this is unclear even for the Tunisian authorities, as in the case of the reduction of the visa quota by France in 2021 (*supra*). While it is not unusual that the adoption of international agreements is opaque, it is remarkable that the text of the agreements is often not publicly available, while the implementation of agreements, even when the text is public, is not transparent (at times even for the Tunisian authorities).



Concerning the implementation of the Action Plan and the Mobility Partnership, there seems to be a different perception among actors from the European side working on their implementation, and Tunisian civil society actors. While European actors refer to sectorial dialogues and consultation of stakeholders, Tunisian civil society actors flag that they are part of the process only after crucial decisions have already been taken, and even then report feeling that their involvement is symbolic. The implementation process of the Action Plan and the Mobility Partnership are not transparent.

Projects funded through the financial instruments are developed by implementing organizations in an opaque process. This process may involve discussions with Tunisian authorities, but not civil society organizations. Once adopted, the action fiche of projects funded by the EUTF is public; we have been unable to locate meaningful information about two projects funded through the European Neighborhood Policy (IBM phase II and II, *supra*). However, information about the implementation of projects is scarce. Monitoring and evaluation reports about ongoing or finished projects are not publicly available. Even when the text of an action fiche is available, the adoption and the implementation of projects are not transparent.

## 5.2 Accountability

Few accountability mechanisms exist in Tunisia to hold actors accountable for potential violations of human rights committed within the framework of the instruments in question. This is largely due to the fact that Tunisia remains in a post-revolutionary transitional period, and the work on updating its legislative framework continues to be in progress. While recourses at the international level are available, processes are lengthy and require a significant amount of resources on behalf of the organizations submitting the complaints. Beyond creating jurisprudence through strategic litigation, international accountability mechanisms such as the European and African Courts for Human Rights therefore do not present practical pathways to obtain justice for refugees, asylum seekers, returned migrants or other vulnerable groups whose rights have been violated.

### 5.2.1 National Accountability Mechanisms

There are several recourses available at the national level to hold to account potential violations of human rights committed within the framework of the instruments – such as the implementation of returns on the basis of readmission agreements, immigration detention, border management and the implementation of the asylum procedure. However, all existing national accountability mechanisms have limitations that impede



their ability to function effectively and enforce the application of international human rights and refugee law in Tunisia.

Tunisia's 2014 constitution enshrines the right to political asylum in Article 26. It also contains several other provisions for the protection of human rights that are in line with international human rights norms. While work is underway to update the country's legal framework to codify the rights granted by the constitution, respondents observe that insufficient progress has made so far. As a result, gaps can be found, particularly with the absence of a law on asylum governance in Tunisia, leaving the judiciary to refer to various sources of international and domestic law in order to rule on cases related to asylum seekers (TN11, October 6, 2021), and in the field of detention.

None of the interview participants indicated awareness of an ombudsman to act as an accountability mechanism. Two participants in fact mentioned that this function ceased following the revolution in 2011, and has not been re-instated since then.

Finally, the Tunisian parliament's role remains quite minimal as an accountability mechanism. In post-revolutionary Tunisia, parliament (even before its suspension in July 2021) has been characterized by instability, high turnover, and limited ability to act as an oversight mechanism; this is largely due to parliamentarians' limited exposure to and experience of the application of human rights norms and international refugee law. In fact, as will be discussed later on, one component of UNHCR's capacity-building work in Tunisia has consisted of trainings and study visits for parliamentarians that introduce concepts and models of refugee and migrant governance, and enhance their awareness of how other similarly positioned states handle similar issues (TN5, September 6, 2021).

#### **5.2.1.1 National Body for the Prevention of Torture (INPT)**

In complement to the courts, there are several independent constitutional bodies in place related to the enforcement of particular laws in line with international conventions to which Tunisia is signatory. These constitutional bodies have full autonomy and report directly to the president. The National Body for the Prevention of Torture (INPT), works to uphold Tunisia's international commitments on the prevention of torture. The INPT was created under Organic Law No. 2013-43 of 21 October 2013. Under article 3, paragraph 4, of the Act, the body is competent to "Receive complaints and notifications concerning possible cases of torture and other cruel, inhuman or degrading treatment or punishment in places of detention, investigate such cases and transmit them, as appropriate, to the





competent administrative or judicial authorities". To this end, the Instance is tasked with accessing and allowing access to prisons, detention and retention centers in Tunisia in order to provide oversight and collect testimonies regarding torture and other human rights abuses (Instance Nationale pour la Prevention de la Torture, n.d.). When concerns are raised, cases are raised against the Ministry of Interior in the administrative court (OMCT et al., 2021). The INPT can be used to gain access to detention centers and provide legal assistance to irregular migrants detained within (TN2, personal communication, August 13, 2021).

#### **5.2.1.2 National Body for Combating Trafficking in Persons (INLTP)**

UNHCR works closely with the National Body for Combating Trafficking in Persons (INLTP), which oversees work related to the identification of victims of trafficking and ensuring they are able to access their rights and entitlements following identification. Article 1 of Organic Law 2016-61 of 3 August 2016 on preventing and combating trafficking in persons provides that "The role of the national authority is to protect, assist victims and punish acts that fall under the aegis of the law". In addition to a role for the INLTP, Tunisian courts have jurisdiction over the offences of trafficking (Article 27 of Organic Law 2016-61). The INLTP is competent to receive reports on trafficking in persons operations and transmits them to the public prosecutor (Article 46 Organic Law 2061-61). In addition to facilitating prosecution, the INLTP also works to provide the necessary medical assistance to the victims, the necessary social assistance to facilitate their social reintegration and to provide them with the necessary information regarding judicial and administrative procedures to regularize their situation and obtain adequate compensation for the damage suffered.

#### **5.2.1.3 Absence of asylum legislation**

The effectiveness of these two bodies in ensuring oversight and accountability is due to the fact that domestic legislation exists, aligned with Tunisia's international commitments, to clarify their mandates. However, the lack of specific legislation relating to asylum means that pursuing accountability for the violation of refugees' and asylum seekers' rights is less straightforward, as each case would need to be assessed against human rights provisions in various pieces of legislation.



#### 5.2.1.4 Detention

Although there is no mention of administrative detention of immigrants in Tunisian legislation (and hence no legal basis for it exists in Tunisian law) (Global Detention Project, 2020), it continues to be practiced in several “retention” centers across the country, most notably Ouardia and Ben Guerdane centres (TN2, August 13, 2021; Bisiaux, 2020, p. 54; Middle East eye, 2020; OMCT et al., 2021)<sup>49</sup>. Due to the fact that the centers are not officially recognized in Tunisian legislation, national courts are not a useful means for pursuing accountability for human rights violations committed within them or even for challenging the act of detention itself; no procedure for challenging immigration detention exists as it is deemed not to exist (TN2, August 13, 2021). What several civil society organizations have tried to do has been to protest the arbitrary nature of the detention, while calling on Tunisian authorities to end the practice of detention at Ouardia and other centers (OMCT et al., 2021). They also refer to the INPT in order to demand access to detention centers and to be able to raise concerns about human rights abuses that may take place within them (TN2, August 13, 2021).

#### 5.2.2 Accountability mechanisms within organizations

Many of the projects funded in the context of the EUTF and the European Neighborhood Policy are implemented by international organizations (UNHCR, IOM), NGOs or organizations such as ICMPD. NGOs whom UNHCR funds and partners within its work (such as the Tunisian Refugee Council and the Arab Institute for Human Rights) are held accountable to UNHCR’s code of conduct and complaints related to any potential violations of human rights committed by staff within these NGOs would go to one of several mechanisms put in place by UNHCR. These include physical boxes where complaints can be anonymously dropped, and an e-mail address where anyone could anonymously send a report of a potential human rights violation (UNHCR Tunisia, n.d. a). In both instances, the UNHCR country office investigates the complaints and works to address them. A third complaint mechanism is the option to contact UNHCR’s Inspector-General Office, located at the organization’s headquarters in Geneva directly. At times complaints may also be escalated by the country office to the Inspector General’s Office. The Inspector-General’s office acts independently, sending its own personnel to the

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<sup>49</sup> Note that the immigrant detention centres under the Ministry of Interior’s authority are to be distinguished from the reception centres run by the Tunisian Red Crescent, IOM, and UNHCR in Zarzis and Medenine, where migrants returned from sea are accommodated on a temporary and short-term basis.



country to conduct their investigation into any complaints that may arise. Complaint processes within UNHCR are confidential, such that even within the UNHCR offices only a few managers have access to the information and issues raised by the complaints. Further, UNHCR offices do not receive information about investigations from the Inspector General's Office (TN%? This interview took place on 6 Sep, 2021). The Inspector General's website contains an annual report on the activities of the office, submitted to the UN General Assembly. However, it does not have a geographical breakdown of the types of complaints raised or investigations conducted (UNHCR, n.d.).

No accountability mechanisms exist within ICMPD to provide oversight on any potential human rights violations conducted in the process of its work (TN3, August 24, 2021).

### **5.2.3 International accountability mechanisms**

Implementation of readmission agreements or of EU funded projects implemented within Tunisia can conceivably result in violations of international law (such as the African Convention of Human and Peoples' Rights, the European Convention of Human Rights and bilateral agreements such as the free movement agreements with Libya). The use of international accountability mechanisms in relation to human rights violations in Tunisia is very limited. Tunisian NGOs are pursuing some of the avenues available through strategic litigation at the European and African Courts of Human Rights, in order to create jurisprudence on certain actions related to detention and expulsion. However, while these initiatives are significant as strategic litigation there is a recognition that these mechanisms are not useful for pursuing accountability for individual cases.

An example is a case submitted to the European Court of Human Rights relating to the forced return of an LGBTQ Tunisian national to Tunisia by Italy, which occurred while implementing the Tunisia-Italy agreements (supra para. 4(c)(i)). Although the possibility of filing a complaint with the European Court of Human Rights exists, it is more useful as a form of strategic litigation rather than to materially improve the situation of the individual in question. This is due to the fact that the process is far too lengthy: the file was submitted to the Court in 2018 and has not yet been taken up by the court

Civil society organizations are looking into the possibility, and feasibility, of pursuing the issue of arbitrary detention of foreigners in Tunisia with the African Court for Human and Peoples' Rights (TN2, August 13, 2021).



#### 5.2.4 Conclusion

Accountability for possible human rights violations committed during the implementation of the instruments under review is problematic. This is problematic in particular on two points. First, as UNHCR does refugee status determination (RSD), negative status determination (which can result in substantial human rights issues) is not subject to judicial review. This is problematic in light of Article 14 ICCPR, Article 7(1)(a) ACHPR (to both of which Tunisia is a party), and with Article 13 ECHR (to which EU Member States are party) and Article 47 CFR (which EU institutions and member States are bound to observe when implementing EU law). This could be improved by the adoption of Tunisian asylum legislation which, however, has stalled due to (*infra*, para 5(d)(i)).

A second major problem is that migrants (among whom asylum seekers and refugees) are held in detention by the Tunisian authorities. Tunisian law does not foresee immigration detention, and therefore no legal remedy is available. This inaccessibility of a legal remedy against deprivation of liberty is at variance with Article 9(4) ICCPR and Article 6 and 7 ACHPR, to which Tunisia is a party. Both of these provisions require a legal basis for any deprivation of liberty. Involvement of the EU or its member states in these detention practices may constitute a violation of the same norm in Article 5(4) ECHR and Article 6 CFR.

#### 5.3 Compatibility with international law

The major international law obligations in relation with the rights of migrants, are the prohibition of the refoulement (Article 33 Refugee Convention), the right to leave any country (Article 13 of the Universal Declaration of Human Rights; Article 12(2) International Covenant on Civil and Political Rights; article 4 Protocol 4 ECHR; article 8(1) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), the right non-penalization of the illegal access to the refugees to the national territory (Article 31 Refugee Convention), the protection of migrants from the human trafficking (Article 5 of the Palermo Protocol), and the right to liberty (Article 6 ACHPR).

The texts of the legal, political and financial instruments concluded between Tunisia and the European Union or with the Member States of the European Union usually refer to the need to respect international law, particularly with regard to respect for the fundamental rights of migrants and the Geneva Convention relating to the Status of Refugees. It has been repeatedly recalled that the principle of non-refoulement must be respected. Tunisian national instruments implementing Tunisia's obligations under international law (which have been supported by EU funded projects) clearly and explicitly provide for the



protection of migrants who are victims of trafficking or acts of torture. Examples are Organic Law No. 2016-61 of 3 August 2016, on preventing and combating trafficking in persons and Organic Law No. 2013-43 of 21 October 2013 on the Prevention of Torture (above, para 5(b)(1)).

While the instruments analyzed in this study stipulate that they respect international law, in practice, the line between refoulement of refugees and the containment of migrants outside European territories can be a thin one. In addition, externalized European border management restrains the right to leave any country. Where authorities arrest migrants as part of border management, the right to liberty is at stake. In this way, the instruments raise serious questions of compatibility with international law. For this reason, a major real difficulty is the lack of information about these instruments (*supra*, para 5a), which concerns both the text of the instruments and their implementation. Therefore, a first and general point is that the absence of ex ante international law compatibility assessments; of ex post international law compatibility audits; and of detailed information about the implementation of the projects is problematic. The analysis below has been made without being able to rely on information which is available to European institutions, member states and implementing organizations but which is considered confidential.

In addition to general international law, the regional free movement agreements concluded with the neighboring countries legally strengthen the presence of non-nationals in Tunisia. Consequently it is contrary to Tunisia's obligations under these agreements to deprive these non-nationals of free access to and free movement throughout Tunisian territory. Libyan nationals enjoy evident free movement rights (*supra* para. 4(a)(ii)). Nationals of Morocco, Mauritania and Algeria (members of the Arab Maghreb Union) do not enjoy free movement because the agreement has not entered into force. However, the good faith following from being a signatory to this treaty may be pertinent for national policies limiting free movement between the Maghreb states. Introducing new restrictions can be considered as an act defying the object and purpose of the Arab Maghreb Union Treaty, which are contrary to Article 18 Vienna Convention on the Law of Treaties.

Civil society respondents have reported that the EU's approach to migration, which has predominantly been securitarian in nature, has emphasized stronger border controls, deterrence measures and the return of irregular migrants often at the expense, of protection and human rights. Respondents implementing EU-funded projects reported that these projects make reference to international refugee and human rights law where applicable (TN3, August 24, 2021; TN5, September 6, 2021).



When one looks at the action fiches of the pertinent projects (*supra*, para. 4(d)(ii)), however, it can be observed that references to human rights and non-refoulement are generic, and are not part of the operational elements of the action documents. In the Action fiche of the project ‘Promoting the implementation of Tunisia's national migration strategy’ (*supra*, para. 4(d)(ii)), the rights of migrants are mentioned twice in the description of the strategic objectives of the National migration strategy (p. 2-3), but this is not operationalized in the specific objectives (p. 6) or in the description of the principal activities (p. 7-8, 9, 11-12, 13-14). Concerning the project ‘Programme Gouvernance Stratégie Migration Tunisienne, ProGreS Migration – phase II’ (*supra*, para. 4(d)(ii)), there is a lot of emphasis on other overall aim of the project being a rights-based migration management (action fiche p. 1, 2 (2x), 3 (2x), 9, 13 (2x), 30). However, the description of the specific objectives (p. 13-22) does make clear the migration management aspects of the projects, but does not make clear how this is going to be rights based. The ‘Border Management Project (BMP) Maghreb’ project (*supra*, para. 4(d)(ii)) aims at enhancing an institutional border control framework in line with a rights-based approach (action fiche, p. 1). One of the specific objectives is that rights-based institutional and procedural frameworks on border management are progressively established (p. 11). However, the expected result related to this specific objective only mentions the enhancement of the technical infrastructure with the aim to provide more secure borders; the rights-based part is probably covered by the aim that this is “in line with international standards”. The accompanying text states that the provision of border control equipment will, among others “enable national authorities to comply with their international obligations” (p. 12). The passage concerning Tunisia does not refer to rights at all (p. 13-14). The project ‘Enhancing self-reliance and access to rights for refugees and asylum-seekers in North Africa’ (*supra*, para. 4(d)(ii)) has the word rights in its very name. The overall objective of the project is “to foster stability through increased access to rights for refugees and asylum-seekers in three North African countries and to reduce the risk of dangerous onwards movements to Europe” (action fiche, p. 15), which combines rights with migration control. The specific objectives include rights-enhancing activities such as increased access to services (education, health, psycho-social assistance, counselling, reception) and capacity building on the principles of international protection and asylum law (p. 15). The main objective concerning Tunisia is formulated as being “the establishment of a protection system that provides effective protection and supports the socio-economic inclusion of refugees in the country” (p. 19). This is elaborated on the points of education, psycho-social assistance, legal assistance, reception, and protection (p. 20-21). The protection component consists of a number of concrete activities



disseminating of international law, as well as managing mixed migration and data exchange. The publicly available documents about the IBM project (*supra*, para. 4(d)(ii)) do not at all refer to human rights or non-refoulement.

This shows that, if international (human rights) law is mentioned as being part of the framework of a project funded by the EU (which is not the case in one of the five projects), these mentions usually are non-operational, and it remains unclear how international (human rights) law is part of the project design or implementation. In only one project international human rights law is actually implemented in the project, be it that the text indicates that the EU finds human rights important because it is expected to result in less departures towards Europe.

### **5.3.1 Asylum law and Refugee Status Determination by UNHCR**

The draft asylum law that was elaborated through funding for UNHCR under the ENI in the IBM project (*supra* para. 4(d)(ii)) was reviewed by technical experts to ensure that it implements the 1951 Refugee Convention. In fact, the draft asylum law extends the refugee concept beyond 1951 convention to include the concept within 1969 OAU Convention. The draft went through several iterations, the most recent one having been presented by the Ministry of Justice in 2018 and submitted to Parliament (Ben Achour 2019a; Bisiaux 2020, p. 38; Veron 2020, p. 4). The law has been on hold at the Prime Minister's office since then. As it remains a draft law, there is no oversight mechanism to ensure procedures related to asylum and refugee rights are in line with international law until it is adopted.

UNHCR has been carrying out refugee status determination (RSD) independently (without judicial oversight) since June 2011, when it signed a cooperation agreement with the Tunisian government that fully recognized UNHCR's mandate (UNHCR, 2016; Ben Achour 2019a). Despite the absence of the law, UNHCR indicates that administrative procedures are still aligned with the 1951 Refugee Convention. Recognizing the refugee status conferred by UNHCR, the judiciary and relevant ministries ensure refugees' access to rights accorded them by the Refugee Convention are upheld (TN5). Social protections for refugees such as enrolment in national social security and the rights to employment granted by the Ministry of Employment to holders of a UNHCR document recognizing them as Convention refugees or registering them as asylum seekers, are in line with international refugee law.



A respondent working for an international organization noted that Tunisia was respectful of principle of non-refoulement. This respondent stated that asylum-seekers are not detained (but see *infra*, para. 5(c)(ii)); they are given the option to register with UNHCR and have freedom of movement. Their documentation – a registered asylum seeker card provided by UNHCR - is recognized, and through it they have the right to work and have access to social insurance. On occasion, this respondent noted, registered asylum seekers are ‘accidentally’ detained by Tunisian authorities. When this happens, UNHCR intervenes and secures their release. Overall, this respondent observed that the Tunisian government does recognize its responsibilities towards asylum seekers, but stops short of issuing its own documentation guaranteeing the rights of asylum seekers and refugees to residence and work (TN5).

However, as a case of Algerian national Slimane Bouhafs who was granted refugee status by UNHCR in Tunisia and was recently deported to Algeria under a political deal demonstrates, state practices do not always conform to international law (Amnesty International, 2021). It is hard to say whether Bouhafs’ refoulement was an exception, or an instance of a more common phenomenon.

### 5.3.2 Detention

We have received conflicting information on whether immigration detention occurs in Tunisia; on the basis of the information we have, the conclusion must be that it does. It should be noted that the immigrant detention centers under the Ministry of Interior’s authority are to be distinguished from the reception centers run by the Tunisian Red Crescent, IOM, and UNHCR in Zarzis and Medenine, where migrants returned from sea are accommodated on a temporary and short-term basis. As we understand, the factual situation in these centers does not amount to detention.

However, respondents and documentary sources indicate that immigration detention is practiced in several “retention” centers across the country, most notably Ouardia and Ben Guerdane centers (TN2; Bisiaux, 2020, p. 54; Middle East eye, 2020; OMCT et al., 2021). These centers do not have a clear legal status in Tunisia. The centers are under the authority of the National Guard, which falls under the Ministry of Interior (Veron, 2020, p. 8).





Article 6 ACHPR provides that everyone has the right to liberty. No one may be deprived of this right except for reasons and conditions previously laid down by law.<sup>50</sup> This means that detention of individuals is possibly only if there is an explicit basis for this in domestic law. There is no mention of administrative detention of immigrants in Tunisian legislation; hence no legal basis for it exists in Tunisian law. This means that the deprivation of liberty of migrants for immigration-related grounds constitutes a violation of Article 6 ACHPR. The absence of a legal basis also means that no legal remedy is available against migrant detention (*supra*, para 5(b)(i)). Nonetheless, at times courts step in. The Tunis Administrative Tribunal ordered the suspension of a deportation decision and a decision to keep the migrants in a detention centre. The court applied article 29 of the constitution which prohibits arrest or detention without a judicial order.<sup>51</sup>

### 5.3.3 Readmission: Repatriation of Tunisian nationals from Italy

The repatriation of Tunisian nationals from Italy, which is carried out within the framework of the Tunisia-Italy agreements, is an activity which does not conform to international refugee law, according to respondents in civil society organizations. According to one organization that has worked on legal support for repatriated Tunisians, Tunisian nationals are subject to simplified repatriation procedures, which do not provide for the chance for individual interviews, and therefore do not take personal circumstances for arriving to Italy into account and do not allow for the possibility of seeking asylum on the basis of those circumstances. For the simplified procedure to be carried out, it is only necessary for Tunisian consular officials to verify the individuals' nationality for them to be returned to Tunisia (TN2, August 13, 2021). This practice, particularly whenever it has been carried out with a large number of Tunisians at the same time, was addressed in the European Court of Human Rights judgement on *Khlaifia and others vs Italy*.<sup>52</sup> In the concrete circumstances of the applicants in that particular case, the Court found the removals not to constitute collective expulsion as prohibited by Article 4 Protocol 4 ECHR. However, according to civil society organizations, the practice as implemented in everyday occurrences violates the prohibition of collective expulsion, as well as the prohibition of refoulement because the individuals concerned are deprived of an effective opportunity to seek asylum. This has

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<sup>50</sup> Comp. Article 9 ICCPR, Article 5 ECHR.

<sup>51</sup> Judgement of the Administrative tribunal of Tunis, 4105335, 10th of July 2020.

<sup>52</sup> European Court of Human Rights (Grand Chamber) 15 December 2016, *Khlaifia and Others v Italy*, application 16483/12.



resulted in the repatriation of Tunisian nationals who had reason to fear for their lives back in their home country, be it due to their sexual orientation, religion, or otherwise (TN2, August 13, 2021; TN4, September 3, 2021; TN10, October 4, 2021). A case about the forced return of an LGBTQ Tunisian national to Tunisia by Italy, which occurred while implementing the Tunisia-Italy agreements, has been submitted to the European Court of Human Rights in 2018 (*supra*, para. 5(b)(iii)).

Further, respondents informed us that not only recently arrived Tunisian nationals have been sent back from Italy: those who have been long established in the country are also sent home, even if they may have stronger ties in Italy than in Tunisia at that point in time. One example cited by a respondent was that of a Tunisian national who was seeking medical treatment for tuberculosis in Italy that was not available to him in Tunisia, and who was sent back to Tunisia as he did not have legal authorization to reside in Italy. According to this respondent, such repatriations thus do not take into consideration vulnerability criteria, protection needs, or the harm perpetuated upon the individuals due to the severing of local ties (TN2, August 13, 2021). Further, their effectiveness may be limited, with evidence that some returnees attempt to depart once again towards Italy through irregular means (Poletti, 2020): as an example, the respondent knew of one returnee who was repatriated in October 2020 and had already departed once again to Italy at the time of the interview (TN2, August 13, 2021).

These cases concern the forced return to Tunisia of Tunisian nationals. We conclude that there is tension between these returns and international law because non-refoulement is insufficiently guaranteed. This is pertinent for the possibility of a possible EU-Tunisia readmission agreement which is to address the forced return of non-Tunisians to Tunisia (*supra* para 4(c)), as well as for the legality of pullbacks (*infra*, para. 5(c)(iv)).

#### **5.3.4 Border management: SAR, interceptions and pullbacks**

As has been observed by others, in international maritime practice there is a development in which European states fund North-African states to as to intercept boats with Tunisians and third country nationals departing from their shores and return them to, in our case, Tunisia. When the intercepted persons are in a situation of distress, these cases involve positive obligations of states to protect the right to life, which are operationalized in international maritime law in the obligation of search and rescue (SAR). Because these operations are funded by Europa and have replaced European interception/SAR operations such as operation Mare Nostrum and operation Sophia, they have been considered as



indirect pushbacks and therefore are labelled as pullbacks.<sup>53</sup> In the case of Libya, European involvement in these interceptions/SAR operations/pullbacks has been criticized by UN institutions because Libya is considered not to be a safe place of disembarkation as required by international maritime law.<sup>54</sup> The compatibility with international law of EU support for the Tunisian Coast Guard in similar operations depends on whether Tunisia can be considered as a safe place of disembarkation in the sense of international maritime law.

In practice, European union countries are practicing an instrumentalization of the international law obligations relating to maritime search and rescue.<sup>55</sup> A significant part of the EU's work on combating illegal migration has consisted of security cooperation and capacity-building of the Tunisian Coast Guard (Garde Maritime Nationale).<sup>56</sup> Notable projects include the abovementioned BMP Maghreb project, and the Integrated Border Management (IBM) Tunisia project (supra, para. 4(d)(ii)). Bilateral projects add to these EU funded projects. Germany has provided equipment including speedboats, lifeboats, and vehicles (European Commission Services, 2021, p. 9).<sup>57</sup> According to the European Commission Services (2021, p. 10), Italy has run a program worth 138 million EUR since 2011 to supply and equip border, policy, and security forces in Tunisia. In August 2020, the press reported that Italy agreed to provide Tunisia with 11 million Euros earmarked towards strengthening border control and training security forces, following an uptick in boat arrivals from Tunisia during the year (Euromed Rights, 2021, p. 6). Within the framework of its own security cooperation agreement with Tunisia, Malta provides training through its

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<sup>53</sup> Nora Markard; Violeta Moreno-Lax.

<sup>54</sup> UNHCR position on the designations of Libya as a safe third country and as a place of safety for the purpose of disembarkation following rescue at sea, September 2020, <https://www.refworld.org/docid/5f1edee24.html>; IOM Statement: Protecting Migrants in Libya Must be Our Primary Focus, 2 April 2019, <https://www.iom.int/news/iom-statement-protecting-migrants-libya-must-be-our-primary-focus>; IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya, Joint Statement IOM-UNHCR, 17 June 2021, <https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya>.

<sup>55</sup> Article 12 1958 Convention on the High Seas, UNTS vl. 450, p. 11, 82; UNCLOS; SAR.

<sup>56</sup> For an over view see Bisiaux 2020.

<sup>57</sup> In addition to these projects, Germany has funded Tunisia for €25 million fortifying its borders with Libya developing an electronic border surveillance system (Stahl & Treffler, 2019) within the framework of its bilateral security cooperation with Tunisia.



Armed Forces to promote “Inter-operability in the field of search and rescue and maritime law-enforcement” (European Commission Services, 2021, p. 10).

These activities to train and equip have led to an increase in the Coast Guard’s capacity to conduct interceptions/SAR operations/pullbacks. According to FTDES, which compiles statistics on the number of migrants intercepted by the Tunisian Coast Guard, in the first nine months of 2021, the Coast Guard returned 19,500 individuals back to Tunisian shores. In contrast to this, in the nine years prior (between 2011 and 2020), the same Coast Guard had returned 42,000 individuals in total (Le Figaro & AFP, 2021). In the same report, FTDES noted that the number of interceptions conducted by the Tunisian Coast Guard increased considerably following a visit by the Italian Minister of Interior and the EU Commissioner for Home Affairs to Tunisia in May 2021, where they secured an agreement from the Tunisian government to establish a hotline between Italy and Tunisian authorities dedicated to the exchange of information about irregular departures of boats from Tunisia (The Arab Weekly, 2021). How this exchange of information is taking place, and whether it involves MRCC Italy calling the Tunisian Coast Guard to conduct interceptions or rescues in international waters is not yet clear.

In addition to making the Tunisian Coast Guard pull back migrants, the EU also invokes the duty of shipmasters to save life at sea to pressure Tunisian fishermen and ships to retrieve migrants and bring them back to Tunisia while they were close to European coasts.<sup>58</sup> This is very much criticized by civil society associations, especially the Tunisian forum for economic and social rights.<sup>59</sup>

As nearly all respondents noted, however, in the absence of a national legal framework for protection and asylum in Tunisia, the country cannot be considered a safe place of disembarkation for the return of third country nationals who may want to invoke international refugee law. In addition, the evidence showing that asylum seekers may be subjected detention without legal basis in contravention of Article 6 ACHPR (supra para. 5(c)(ii)) also casts doubt as to whether Tunisia is a safe place of disembarkation. As a

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<sup>58</sup> Prof. Dr. Anuscheh Farahat and Prof. Dr. Nora Markard, *Places of Safety in the Mediterranean: The EU’s Policy of Outsourcing Responsibility*, <https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility>

<sup>59</sup> Fabian Heppe et Wajdi Filali, « La Tunisie est-elle un lieu sûr ? », <https://tn.boell.org/fr/2020/10/27/la-tunisie-est-elle-un-lieu-sur>



consequence, EU support for interceptions by the Tunisian Coast Guard arguably is a violation of the international maritime law requirement that people rescued at sea are brought to a place of safety, as well as the norms to which this notion of safety refer (non-refoulement and the right to liberty).

### **5.3.5 Human Rights Impact Assessments conducted by the European Commission**

The European Commission does not conduct human rights impact assessments related to its contracts in Tunisia implementing EU funded projects. Several participants mentioned monitoring exercises that the European Union conducts periodically by hiring independent third parties to assess EU-funded projects. However, these monitoring exercises evaluate projects according to their initial stated objectives and monitoring indicators rather than according to human rights or international law criteria. If the initial project document and logical framework included indicators related to human rights impacts, then this would be taken into consideration in the monitoring exercises. If not, then human rights impacts of the project activities would not necessarily be evaluated. Further, as mentioned earlier, these reports are not made public; they remain internal to the European Union and occasionally to the organization (TN5, September 6, 2021).

## **5.4 Results and limitations of EU-funded technical assistance**

Technical assistance related to asylum, migration, and border protection is delivered to Tunisia in projects funded primarily through the ENI and the EUTF. ENI and EU Trust Fund projects covering Tunisia cover the themes of migration governance (including labor migration governance, urban migration governance, and the creation of a national migration strategy), border management, migrant protection, the reintegration of returned Tunisians, and enhanced capacities for registering and assisting refugees and asylum seekers (supra para. 4(d)(ii)).

It is important to note that nearly all activities related to asylum and protection in Tunisia are funded by the EU. This includes registration and refugee status determination activities, as well as direct assistance activities. The following section draws on interview data to explain in more detail what technical assistance international and European organizations have provided to the Tunisian government, either in the field of strengthening Tunisia's protection capacities or in improving migration governance or border protection, through ENI and EUTF funding.



In the field of *migration governance*, a major component of UNHCR's activities (supra para. 4(d)(ii)); European Commission, n.d. b) has been strengthening the national protection framework across various stakeholders. UNHCR's work on improving the Tunisian national protection framework through the introduction of a national asylum law, which was funded<sup>60</sup> through the European Neighborhood Instrument (ENI) between 2015 and 2018 (TN5, September 6, 2021). UNHCR can be credited for mainstreaming refugee protection and rights awareness across various governmental and non-governmental actors. Through trainings aimed at judges, lawyers, journalists, members of parliament and ministry employees, the organization raised awareness about rights and protections related to refugees, and helped introduce some key measures that improved refugees' access to rights in Tunisia. As a result of this, there has been stronger response within the civil society sector that has conducted oversight on the work of the government, and has strongly advocated for refugees' access to justice. Civil society organizations, through a greater level of awareness about the state's legal obligation to its refugees, have held both UNHCR and the government accountable whenever refugees' access to justice or rights were violated.

Ministries that have also been keen to engage with UNHCR on this work and enhance the rights and protection accorded to refugees include the Ministry of Women, which has worked on child protection for asylum seekers and refugees, and include asylum seekers and refugees in their services focusing on gender-based violence. The Ministry of Employment has also been open to incorporating refugees and asylum seekers into the national social insurance scheme, largely due to UNHCR's efforts in this regard (TN5, September 6, 2021). Further, in 2020, refugees and asylum seekers were included in national social protection schemes during the COVID-19 crisis, as a result of UNHCR's awareness-raising efforts on this issue.

UNHCR carries out its capacity-building work through funding to the Arab Institute for Human Rights (IADH), and its work on registration and assistance to refugees and asylum seekers with the Tunisian Council for Refugees (CTR). UNHCR also works with the local NGO TAMSS, to promote refugees' self-reliance by helping them obtain vocational training and work (UNHCR Tunisia, n.d. b).

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<sup>60</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/c\\_2014\\_7273\\_f1\\_annex\\_fr\\_v1\\_p1\\_782357.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/c_2014_7273_f1_annex_fr_v1_p1_782357.pdf)



Finally as a result of IADH and UNHCR's work with governmental institutions, even in the absence of an asylum law, many administrative procedures and referencing mechanisms in place between various governmental bodies already apply the norms of refugee protection on an everyday level, according to one respondent (TN6, September 15, 2021).

In the meantime, the passing of three laws in recent years: the organic law n° 2013-43 of October 21, 2013, relative to the National Body for the Prevention of Torture, the organic law n°2016-61 of August 3, 2016 relative to the prevention and the fight against the trafficking of persons, and the organic law n°2018-11 of October 26, 2018 on the elimination of all forms of racial discrimination have strengthened legal protections for migrants who have experienced certain human rights violations in Tunisia. They have also been part of a drive to update an archaic national legal framework in order to be compatible with the 2014 Tunisian constitution and with international conventions that Tunisia has ratified. These laws were passed as a result of technical cooperation through the Council of Europe's programmes Programme Sud (I-III) (TN7, September 17, 2021; Council of Europe, n.d.).<sup>61</sup> While advances in this regard are laudable, practices related to the enforcement of these laws have lagged behind, largely due to insufficient training regarding the handling of such complaints in the legal system, from the initial point of contact of receiving the complaint at the level of the police, all the way to having the complaint addressed in court; this is addressed by another program currently being implemented by the Council of Europe called HELP (Human Rights Education for Legal Professionals<sup>62</sup>) (TN7, September 17, 2021).

Further, the Council of Europe has also worked extensively on supporting the capacity and operations of various constitutional bodies in Tunisia, two of which are the National Body for the Prevention of Torture (INPT), and the National Body for Combating Trafficking in Persons (INLTP), that are key to helping track and uphold the country's commitments on the human rights of people who were trafficked, and those who are in detention, as mentioned earlier. (TN7, September 17, 2021).

ICMPD has received funding from the EUTF for two projects: one – ProGreS Migration (Phases I and II, *supra*, para. 4(d)(ii)) – is concerned with improving migration governance by putting in place a national strategy for migration and implementing a national survey on

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<sup>61</sup> [http://south-programme-eu.coe.int/default\\_FR.asp](http://south-programme-eu.coe.int/default_FR.asp), accessed 24 November 2021.

<sup>62</sup> <https://help.elearning.ext.coe.int/>, accessed March 16, 2022



migration data. ProGreS Migration has improved the government's ability to gather data related to migration as demonstrated by the near conclusion of a two-year national survey on migration, carried out by the National Institute for Statistics (INS), in collaboration with the National Observatory on Migration, which is housed in the Ministry of Social Affairs. On the other hand, there has been limited success in approving and implementing a national migration strategy (TN1, August 6, 2021; TN3, August 24, 2021).

The BMP Maghreb project concerns *border protection and management*. The EU's funding and training of the Garde Maritime Nationale – the Tunisian Coast Guard through the BMP Maghreb project (EUR 34.5 million) has demonstrated results by strengthening the Coast Guard's maritime surveillance and interception capabilities. The Coast Guard's capacity has been enhanced through new equipment procured through this project, along with technical trainings organized by ICMPD on using the equipment, in addition to trainings related to project management, the improvement of maritime surveillance through data collection and information sharing activities (FTDES, 2021). Implementing organizations report that trainings have also focused on international legal norms, in order for the Coast Guard to do their border management work in an effective manner (TN3, August 24, 2021).

EUTF-funded projects focusing on the reintegration of Tunisians returned from abroad include the portion of ProGreS Migration Phase II that has been allocated to Expertise France (EF), as well as the project Facility for Migrant Protection and Reintegration in North Africa that is currently being implemented by IOM. No organizations working on the reintegration of repatriated Tunisians were interviewed

EUTF-funded work related to registering and assisting refugees and asylum seekers has been carried out by UNHCR's implementing partners: the Conseil Tunisien pour les Réfugiés (CTR) and the Tunisian Association for Management and Social Services (TAMSS). The CTR's capacity to register asylum seekers has increased significantly in the least two years. For example, in January 2019, the council had registered approximately 1,245 refugees to date. By July 2021, the total number of registered refugees and asylum-seekers had risen to approximately 8,000 individuals (TN4, September 3, 2021).

#### **5.4.1 Limitations to the effectiveness of EU-funded technical assistance in the absence of national asylum legislation**

Notwithstanding the above, there are significant limitations to the effectiveness of this work, related to the legal and economic context in Tunisia, the fact that some of the activities implemented have been more in donors' interest, being of limited relevance to





Tunisian actors in the field of migration and asylum, and quite importantly, the financial sustainability of the asylum system, which is currently fully funded by the EU.

The most significant impediment to the creation of a strong national protection framework has been the fact that the draft asylum law has been blocked by the national government in response to the European policy response it anticipates following the adoption of this law. According to our respondents, the Tunisian government is concerned that passing an asylum law will increase its burden of admitting, processing, and hosting refugees, asylum seekers and migrants in two ways. First, the passing of the asylum law is expected to lead to increased pressure from the EU for the readmission of third-country nationals and for offshore processing centers (the ‘disembarkation platforms’), and it is unclear to what extent the Tunisian authorities will be able to maintain their current position on this point in the future. The current position seeks to resist European pressure to increase the burden Tunisia has to shoulder. Secondly, the passing of the national asylum law will make refugee status determination as well as the reception of asylum seekers a national responsibility. While currently these activities are funded by the international community via UNHCR, it is feared that this funding will fall away once they can be represented as a national responsibility of the Tunisian state. Our respondents repeatedly emphasized across interviews that, if these scenarios indeed play out (increased influx of asylum seekers and refugees from Europe, and/or funding cuts) refugees in the country will not benefit from the protection of a legal framework that clearly outlines their rights. As a consequence, the adoption of a national asylum law could contribute to a deterioration of the position of asylum seekers and refugees in Tunisia. Our respondents report that the perception of the Tunisian authorities and civil society is that the EU’s support for the national protection framework is part of its externalization agenda. As Tunisian actors do not share the European externalization agenda, they have reservations about putting in place a national protection framework out of fear of it being instrumentalized for European externalization (TN1, August 6, 2021; TN2, August 13, 2021; TN4, September 3, 2021; TN6, September 15, 2021; TN9, September 23, 2021; TN10, October 4, 2021).

In the absence of a national legislative framework, the refugee determination process is outsourced to UNHCR, without a centralized government agency being in charge of asylum governance, presenting several limitations related to limited financial resources available to UNHCR, limited access to rights and protections for refugees, and insufficient financial resources available to the government to support and complement UNHCR RSD activities with other services and assistance to refugees and asylum seekers (TN2, August 13, 2021; TN5, September 6, 2021). *Firstly*, the growth in UNHCR’s resources to expand its



registration and RSD services has not kept up with the demand for those services by the increasing number of asylum seekers (TN4, September 3, 2021). The rights of refugees will, *secondly*, be limited as long as there is no governmental body tasked with governing them. As an example, the Tunisian government currently does not provide any residence permits to refugees, as they do in Morocco. Refugees therefore only have their refugee card as proof of status, which is issued by UNHCR. This limits their access to rights and services that they should be entitled to if they had proper government-issued permits. A *third* limitation relates to the scarce resources available to the Tunisian government and international organizations alike to support refugees. The concepts, policies and ideas developed as a result of various trainings and capacity building measures implemented with EU support cannot be meaningfully put into practice without the logistical support and funding available to make them possible. As several interview participants mentioned, there is a need for large-scale economic investment in Tunisia that can reap benefits to Tunisian would-be emigrants, residents, migrants and refugees alike through the creation of jobs, leading to improvement in socio-economic circumstances of all vulnerable populations mentioned. This will also reinforce the community and social cohesion approach implemented by international organizations, that aims to benefit both host communities and refugee and migrant populations within them as a way of addressing needs in a holistic manner.

*Fourthly* and finally, another limitation to the effectiveness of the work done with the EU's support, according to one respondent, is that many of its objectives and outputs are more useful and relevant to the EU than to national stakeholders. For example, ICMPD's EUTF-funded project "ProGreS Migration" supported the set-up of the National Observatory on Migration (ONM), which has been tasked with a national survey to gather migration-related data in light of the absence of up-to-date, reliable data on migrants in the country. However, this entity is completely disconnected from service provision, and in the view of some civil society actors, it was solely set-up to please European donors who wanted to have access to better data on migration in the country (TN2, August 13, 2021).

#### **5.4.2 Tunisia's Capacity to absorb funding and assistance**

Most respondents pointed out that wherever the effectiveness and sustainability in the technical assistance delivered to Tunisia are limited, it is not due to the limitations in Tunisia's capacity to absorb and implement such aid. Rather, the question is one of political will both on the Tunisian and European side, and focusing solely on technical aspects of the assistance misses this crucial point. Repeatedly in interviews participants noted that as



long as there is no clear vision on the part of the Tunisian government on the governance of migrants and refugees, and as long as there is no real incentive provided to the Tunisian government by European counterparts to improve its processes, hosting capacities, and services provided to refugees, technical assistance in the form of trainings will continue to be a superficial solution that elides the root causes of the problem (TN2, August 13, 2021; TN5, September 6, 2021; TN9, September 23, 2021; TN10, October 4, 2021).

As several participants have pointed out, the key reason for the Tunisian government's hesitancy in passing the draft asylum law have been related to the fact that the government does not feel it is being supported enough in hosting its current population of migrants and refugees, and, in line with its current securitarian approach to migration, associates growing EU pressure with regards to setting up disembarkation platforms in Tunisia and cooperating on the returns of third country nationals from Europe. (TN2, August 13, 2021; TN5, September 6, 2021; TN9, September 23, 2021; TN10, October 4, 2021). The Tunisian government sees this as a threat to its sovereignty; this view was articulated most recently by the former prime minister Hichem Mechichi at the Ministerial Conference on Migration Flow Management held in Portugal in May 2021 (Webmanagercenter & Tap 2021). Firstly, there has been widespread concern that passing an asylum law, thereby affirming Tunisia as a safe country, would increase the migratory pressure on the country, as European states speed up the returns of both Tunisians and third-country nationals who transited through Tunisia. While third-country nationals cannot be returned to Tunisia currently on the basis of existing bilateral readmission agreements, the EU is exerting strong pressure on Tunisia to agree to accepting them and negotiate a readmission agreement with the EU to reflect this. The EU's desire to do this is evidenced by public statements by EU officials and specific reference to seeking Tunisia's cooperation on accepting repatriated third country nationals in the leaked EU Action Plan for Operationalizing the New Pact (EU Commission Services, p. 3). This increases the burden on the country as it would host a larger number of migrants, while exerting efforts to secure cooperation on readmission to their countries of origin (Abderrahim, Fakhry & Riteig, 2021, p. 10). Further, Tunisian officials worry about the introduction of disembarkation platforms, an idea that they repeatedly assert publicly that they are against, due to the financial and logistical burden it places on Tunisia to host migrants and refugees in conditions that conform to human rights standards (Bisiaux, 2020, p. 35; Bobin, 2018). Thus, slow progress on the strengthening of protection systems in Tunisia and on approving a national asylum law rests heavily on reassurances and appropriate support provided by the EU to ensure that Tunisia's sovereignty with regards to the return of Third



Country Nationals and the installation of disembarkation platforms will be respected, and adequate investment will be provided to benefit both the country's own citizens and migrant and refugee populations hosted (Abderrahim, Fakhry & Riteig, 2021, p. 10).

### **5.4.3 Challenges to sustainability**

Several interrelated challenges to the durability of the EU's work in training, capacity-building, and assistance provision to migrants and refugees were mentioned in interviews. Key among them are the fragmented governance structure of migration and asylum in Tunisia, the lack of a clear legal framework concerning migration and asylum and relatedly no sustainability in funding for RSD and protection-related activities, political instability that prevents the formation of a clear vision and strategy, and high turnover among government staff, impeding the building of institutional memory.

One of the key challenges to the durability of EU interventions that was mentioned in several interviews is the fragmented governance structure of migration and asylum in Tunisia. A National Observatory on Migration (ONM) exists within the Ministry of Social Affairs; however, is it mainly concerned with Tunisian emigrants and returnees, and does not work on refugee governance (TN5, September 6, 2021). Many other ministries work on various aspects of refugee governance, including the Ministry of women and children, the ministry of employment, and others. This absence of a governmental structure with a specific mandate for migration and asylum governance means that there is no allocation in the national budget dedicated to assistance and service provision. The implication is that international organizations (through EU funding) are responsible for these issues. By creating this dependency, the EU has only temporarily assuaged an issue without addressing its sources. The concern remains that if the funding is reduced, support to migrants and refugees will also disappear, and the governmental actors involved in governance and service provision will have their work significantly curtailed.

The financial sustainability for activities concerning the registration and protection of refugees and asylum seekers would also be in question were the Tunisian government to adopt asylum legislation and institute a governmental commission in charge of asylum. A portion of the national budget must then be allocated to this portfolio, which is currently not the case: as stated above, currently the EU and other donors fund protection activities through international and non-governmental organizations. Given the country's strained resources and limited budget, its ability to fund protection activities in both the short and long-run is in question.



Further, political instability in the form of successive short-term governments (some of them interim governments) has stalled substantive progress in this area. With frequent changes in ministers and governments in the past several years, there has not been enough time to make substantive progress on an issue; further, the temporary nature of interim governments leads them to seek to maintain the status quo without initiating big changes in policy (TN5, September 6, 2021). This has meant an absence of vision, strategy and political will on the part of the Tunisian state to make progress related to asylum governance. Much of this is due to the fact that asylum and migration continue to be a low priority for the Tunisian state, where economic concerns are far more pressing of an issue. With a high unemployment rate of 17% (World Bank, 2021), high debt-to-GDP ratios and difficulty in securing international loans (The National News, 2021), officials are more focused on addressing the economic crisis and its related social and political unrest.

Related to the frequent changes in government, interview participants have noted a high turnover of government staff. With much of the capacity-building work of international actors being tied to conducting trainings to government staff, the benefits of the trainings remain limited to individuals, as the beneficiaries of the trainings do not remain in their positions long enough to implement the concepts and processes they have developed and contribute to change within their organization. This high turnover also prevents the development of an institutional memory (TN5, September 6, 2021).

## 5.5 Containment/mobility

Of all EU-related funding to Tunisia related to migration (across all instruments), 80% has gone towards migration governance, capacity-building, migration management, and diaspora mobilization for development. Only 20% has gone towards the protection of vulnerable migrants, refugees, and asylum-seekers, and towards supporting socio-economic integration (Veron, 2020, p. 14). Our own categorization of the migration projects in Tunisia funded through the European Neighborhood Policy or the EU Trust Fund (*supra* para. 4(d)(ii)) shows that enhancing Tunisia's capacity to control its border gets 57,8% of the overall EU expenditure on migration in Tunisia. This confirms that containment is the EU's top priority.

As can be seen from the mechanisms of elaborating and funding asylum and protection initiatives in Tunisia, asylum and migration in and from Tunisia are increasingly reformulated as security issues and as the combat of trafficking and irregular migration, and as border control initiatives that expand the work and technical capabilities of the



Tunisian national guard and police forces. This can be seen in the fact that much of the EU's and its member states' cooperation agreements with Tunisia are heavily weighted towards security cooperation; in its most recent Action Plan on Tunisia related to operationalizing the New Pact on Migration and Asylum, the European Commission's stated goals to manage migration and address forced displacement in Tunisia is nearly exclusively focused on containment, including calls for the Tunisian government to cooperate with Frontex, to increase the readmission of its own nationals and accept returned third country nationals, and to "prevent irregular departures from its coast" (European Commission Services, 2021, p.3), with minimal language devoted to the right to asylum and international protection. Even within the EUTF, the focus is heavily weighted towards border management initiatives rather than on strengthening protection capacities and reinforcing access to third-country solutions for vulnerable groups.

As a result, the overall effect of the various instruments on people seeking international protection has been one of containment, largely due to the fact that there has been a securitized approach to migration in the diplomatic and cooperation agreements with the European Union, couched in terms of "combating irregular migration". This has manifested itself in several ways: the increased barriers that these individuals face in being internationally mobile in a regular manner, and the difficulty for migrants in maintaining regular status in Tunisia, which further restricts their mobility within the country. As one respondent put it, Tunisia has signed several agreements since 2004 that has made it "Europe's policeman" (TN1, August 6, 2021), and those bordering practices have proliferated internally within the country, affecting the country's internal politics and migration controls.

Containment within Tunisia can be demonstrated by several examples: one direct linkage was the February 2004 amendment to the 1975 law governing passports and travel documents. This amendment was drawn up shortly following Tunisia's ratification of a police cooperation agreement with Italy in December 2003, and criminalized any form of facilitation of irregular migration or even assistance to irregular migrants (Ben Achour, 2019). This criminalization of irregular migration combined with the country's difficult economic situation has fueled racial tensions in the country and contributed to the ostracization of racialized migrants and refugees, the majority of whom are from Sub-Saharan countries (TN1, August 6, 2021).

Suspected of intending to depart the country through irregular means, sub-Saharan migrants experience intensified scrutiny and harassment from security forces in the coastal



regions; this has led them to move away from the coast and into interior regions, where they have felt safer. Authorities also try to restrict intercepted and returned migrants to the South of the country where there is a greater number of reception centers for them to be held in (TN10, October 4, 2021). Recently, there have also been reports of forced deportations of intercepted and returned sub-Saharan migrants to Libyan and Algerian borders (FTDES, 2021b).

The main issue raised with regards to this question has not been whether refugees and migrants are contained or are mobile: rather, the question has become more about how their means of being internationally mobile changed. Faced with increased restrictions on international mobility through regular means, Tunisians, refugees and migrants who do not want to stay in Tunisia have resorted to more dangerous irregular means to leave. According to one respondent working to provide services to refugees, most refugees and asylum seekers have stated clearly that they did not intend to stay in Tunisia in the longer term (TN4, September 3, 2021). This is due to several reasons: the lack of institutional support for local integration; limited rights granted to refugees and asylum seekers, and dire socio-economic circumstances. Asylum seekers now see refugee status in Tunisia as a trap that does not provide them with the safety and means that they require to survive (TN4, September 3, 2021). UNHCR's means are very limited and were often insufficient to be able to provide refugees with an adequate standard of living. Often refugees and asylum seekers resort to "negative coping mechanisms" – according to one respondent - as a result, which include either going to Libya and attempting a sea crossing from there to Europe, or departing by boat directly from Tunisia. Both pathways expose them to a much higher level of risk of violence, exploitation, and death (TN5, September 6, 2021).

Containment is also evident in the rapid increase in the number of refugees registered with UNHCR in the recent years. In January 2019 for example, there were 1,245 refugees and asylum seekers registered with UNHCR in Tunisia. By July 31, 2021, this number is over 8,500 people, not to mention the 3-4,000 people waiting to register as asylum seekers with UNHCR (TN4, September 3, 2021).

Intensified containment in the form of detention is also practiced on migrants, even if there is no legal basis for it in Tunisian law (*supra* para. 5(c)(ii)) and the legal status of the detention centers is not clear (TN2, August 13, 2021). While in theory refugees must be released once identified as such during disembarkation operations following interceptions at sea, and while people who are detained must have the ability to demand asylum, refugees and asylum seekers do end up in detention centers, with civil society and UN



organizations advocating for their release whenever the information comes to light (Global Detention Project, 2020).

Some participants did point out that the Tunisian constitution guarantees rights to mobility and asylum; however, without updated legislation to encode the rights enshrined in the constitution, the ways of protecting and upholding these rights remain limited (TN5, September 6, 2021).

One of the ways in which European countries try to incentivize Tunisia to cooperate with its external migration and asylum policies is the use of bilateral visa agreements. In this manner, according to our respondents the agreements concerning the mobility of Tunisians are related to asylum issues. Targeted visa facilitation under the Mobility Partnership and several bilateral agreements have led to an organized brain drain from the country, where highly skilled Tunisians in particular professions (most notably engineering and medicine) are recruited in high numbers to European countries, with their visas and work permits being fast-tracked (TN1, August 6, 2021; TN9, September 23, 2021). Targeted training programs that lead to greater opportunities for international recruitment and visa facilitation, have as a negative side effect a sustained emigration of highly skilled talent from Tunisia (TN8, September 17, 2021).

However, several concerns were raised in relation to these schemes by civil society activists: on the one hand, the increased access to mobility is highly selective, and has had ripple effects onto other Tunisian nationals who also seek the same opportunities but may not be eligible for any of the programs, and who seek to migrate through irregular means as a result. At the same time, while certain agreements mentioned greater access to tourist visas for Tunisians, this has remained highly elusive. Visas remain expensive in relation to the local cost of living, and the application process is difficult and not easily accessible, having been outsourced to private firms such as TLSContact to take care of it. Finally, the criteria used to grant visas, along with the duration given, are highly arbitrary and opaque. There are no reasons provided with rejections, and there is never a guarantee that even highly qualified Tunisian nationals will be able to obtain visas when they apply (TN2, August 13, 2021; TN10, October 4, 2021). Moreover, access to visas remains highly politicized and dependent on Tunisia's cooperation in facilitating the repatriation of its nationals: most recently, France announced a reduction in the number of visas to be approved for Tunisian nationals by 30% (*supra* para. 4(c)(v)), citing Tunisia's lack of cooperation in the readmission process of its citizens. These issues came up in interviews with researchers and human rights organizations as evidence of the pressure the EU is placing on Tunisia to cooperate





on readmission and border control activities, without the reciprocity of true partnership. As several participants noted, the difficulty and inaccessibility to visas for all but a small number of Tunisian nationals demonstrated that the discourse around “partnership” was illusory at best, and that any benefit the country may stand to gain from cooperating with the EU on migration, asylum and border control matters will be outweighed by the costs it faces (TN1, August 6, 2021; TN2, August 13, 2021; TN10, October 4, 2021).

## 5.6 Alignment with Global Compact on Refugees

Although EUTF-funded projects launched after 2018 make reference to the Global Compact for Refugees, their alignment with the Compact’s four main objectives (to relieve pressure on host countries, to strengthen the autonomy of refugees, to broaden access to solutions in third countries and to promote the conditions for return to countries of origin in safety and dignity) remains quite limited; in fact, as will be demonstrated below, many of the actions implemented through the various instruments are contradictory to the stated objectives of the GCR, resulting in a more onerous burden for the Tunisian state to bear in supporting asylum seekers, refugees, and its own population.

Further, it is important to note that the purpose and scope of the Global Compact for Refugees are not very well-known in Tunisia; many interview respondents were unfamiliar with the objectives of the GCR when asked whether bilateral and multilateral EU instruments (including funded projects) were in alignment with its objectives. Given that Tunisia hosts a relatively small number of refugees in comparison to the number of Tunisian emigrants to Europe and even the number of immigrants residing in Tunisia, it is understandable that migration issues are more salient in policy discourse than refugee-specific issues and instruments. In the Marrakech meeting to adopt the Global Compact for Migration in December 2018, the Tunisian delegation welcomed the adoption of the GCM, and emphasized the importance of European investment to promote local economic opportunities, which would reduce instances of irregular emigration to Europe and be more effective and beneficial to both sides than ad-hoc assistance.<sup>63</sup>

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<sup>63</sup> <https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/tunisia.pdf>



### 5.6.1 Easing pressure on host countries

There is a certain amount of contradiction in relation to the first objective, that of easing pressure on host countries including Tunisia. As some respondents have pointed out, the EU's securitized approach to migration in terms of more stringent border and migration controls have in fact *increased* migratory pressure on Tunisia, which previously was a country of emigration and – to a limited extent – transit, but which in recent years has played host to a growing number of migrants and refugees who faced greater barriers to international mobility as a result (TN2, August 13, 2021; TN9, September 23, 2021). The pressure on fishermen and the Tunisian coast guard has also increased, as greater numbers of migrants seek to depart the country through dangerous means; boats often capsize and require rescue operations.

Further, it is important to note that Tunisia's migratory dynamics are unique in relation to states neighboring the EU. While the country plays host to a rapidly growing number of undocumented migrants, asylum seekers and refugees, the biggest constraint for Tunisia in relation to the EU is the difficult economic situation and high unemployment rate that pushes *Tunisian* nationals to seek to migrate to Europe by irregular means, if formal ones are unavailable to them. This important and growing trend of emigration does not necessarily align with Tunisia's status as a host country, but does require specific support in terms of large-scale economic investment and development projects in the country that would simultaneously improve the condition of both Tunisian nationals and third-country nationals that the state is struggling to support (TN11, October 6, 2021).

The funding provided by the EU towards assistance for refugees – although quite meagre – makes some support possible. Without this funding, there would not be a budget going towards assistance. Even if not all activities undertaken with EU funding are sustainable, they allow UNHCR to furnish the minimum standards of protection response (TN5, September 6, 2021): registration of asylum seekers, refugee status determination, some livelihood opportunities. Critics point out, on the other hand, that due to the difficult conditions and minimal access to resources and supports that refugees find in Tunisia, both refugees and asylum seekers see the refugee status in Tunisia as a trap; respondents referenced refugees and asylum seekers deciding to go to Libya to pursue opportunities for livelihoods and onward mobility that they felt would be more in their interest, having despaired of improving their living situation in Tunisia even with refugee status (TN2, August 13, 2021; TN5, September 6, 2021; October 4, 2021).



To this end, it is important to note that much of the assistance that UNHCR is providing with EU funding is delivered through a social cohesion approach that recognizes the importance of providing assistance to both host communities and to refugees and asylum seekers residing within them.

### **5.6.2 Increasing the autonomy of refugees**

Work towards increasing the autonomy of refugees is quite limited. Some advances have been made, most notably the enrolment of refugees in the national social security system (TN5, September 6, 2021), and the granting of refugees the right to work. UNHCR works with a local NGO – TAMSS – on assisting refugees and asylum seekers to obtain vocational training and find work<sup>64</sup>. However, this has not been sufficient to contribute to an improvement in the autonomy of refugees.

Given Tunisia's high unemployment rate and difficult economic situation, it is understandable that there are limited opportunities to support the employment of refugees as a way of facilitating their integration. Jobs remain precarious, unstable and limited to certain sectors where language barriers may not be a problem.

### **5.6.3 Improving access to third country solutions**

Although refugee resettlement is what typically comes to mind in reference to “third country solutions”, there are in fact a variety of different programs and pathways that are possible to expand the access of vulnerable populations to third countries. What is most notable in the case of Tunisia is that virtually none of the instruments with the EU and European countries are aligned with this objective.

To begin with, there is no funding under EUTF projects earmarked towards resettlement, nor is there a target determined for this goal in the framework of EU projects. In the case of Tunisia, there are very few spots available for third country resettlement of refugees in recent years (TN5, September 6, 2021). UNHCR data on resettlement from Tunisia (below) confirm that, with the notable exception of 2012 and 2013 resettlement is insignificant. In

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<sup>64</sup> <https://help.unhcr.org/tunisia/fr/services-in-tunisia/employment-and-vocational-training/#:~:text=En%20tant%20que%20r%C3%A9fugi%C3%A9%20reconnu,formation%20continue%20du%20personnel%20technique>).



2012 and 2013, many Somalians, Sudanese and Eritreans were resettled to the United States of America.

	population	resettled absolute	resettled%
2011	4085	401	9,82
2012	1433	1933	134,89
2013	727	872	119,94
2014	895	64	7,15
2015	659	4	0,61
2016	646	3	0,46
2017	726	21	2,89
2018	1061	11	1,04
2019	1732	5	0,29
2020	2580	35	1,36
2021	2678	76	2,84

Resettlement from Tunisia; Source UNHCR, <https://www.unhcr.org/refugee-statistics/download?url=oioQyR> and <https://rsq.unhcr.org/en/#Obps>

Among the three durable solutions, local integration is usually the preferred option that UNHCR advocates for; however, in the case of asylum seekers and refugees in Tunisia this is particularly challenging, given that there is often a language barrier (particularly among Ethiopian and Eritrean refugees and asylum seekers), and few resources are available to facilitate refugees' language learning to ease their integration. Further, the socio-economic situation in Tunisia as well as the limited capacity of the Tunisian state to provide services both to Tunisian citizens and to refugees and asylum seekers mean that there are few institutional supports for integration.

Other potential third country solutions for refugees, asylum seekers, and vulnerable migrants in Tunisia include family reunification, study, scholarship and labor mobility schemes. The Mobility Partnership and visa provisions within bilateral agreements are meant to facilitate the mobility of highly skilled Tunisian workers; however, they fall short of extending these opportunities to third country nationals in Tunisia who may require access to international protection abroad. The improved access to visas for highly-skilled Tunisian workers this population does little to improve vulnerable groups' access to third country solutions (TN5, September 6, 2021).



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**Annex 1: List of interviewees**

	<b>Date</b>	<b>Person/organization interviewed</b>	<b>Level of Organization</b>	<b>Medium of Interview</b>
TN1	August 6, 2021	policy adviser and researcher	National	Online
TN2	August 13, 2021	Civil society practitioner	International	Online
TN3	August 24, 2021	International Organization Representative	International	Online
TN4	September 3, 2021	Civil society practitioner	National	Online
TN5	September 6, 2021	International Organization Representative	International	Online
TN6	September 15, 2021	Civil society practitioner	International	Online
TN7	September 17, 2021	International Organization Representative	International	Online
TN8	September 17, 2021	International Organization Representative	International	Online
TN9	September 23, 2021	Researcher	National	Face-to-face
TN10	October 4, 2021	Civil society representative	National	Online
TN11	October 6, 2021	Migration law practitioner	National	Online



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## Annex 2: National questionnaire

1. How is your institution/organization related to the **preparation** and/or **implementation** of EU-Tunisia arrangements on migration and asylum?
  
2. Specifically, what is the **nature** and **degree** of involvement of your institution/organization in the preparation and implementation of the instruments and projects listed above?
  
3. **Transparency:** Depending on the stage of the involvement of your institution/organization with the Instruments;
  - a.
    - i. How do you assess the transparency of the preparation of the Instruments?
      - (For governmental institutions and EU Delegation: Did you share information on the preparation of the Instruments with public?)
      - (For NGOs, academics, and IOs: Were you aware of any information on the preparation of the Instruments?)
    - ii. Were the Instruments **prepared** in a transparent process involving public participation?
    - iii. Were the draft versions of the Instruments shared with public? How were the talks and negotiations between EU and Tunisia conducted, were they reflected and accessible to public?
    - iv. Was there parliamentary involvement at the form of parliamentary debates or votings?
    - v. Were other stakeholders such as IOs and NGOs involved in the preparation of the Instruments such as through submission of written opinions or involvement in bilateral or multilateral discussions?
  - b.
    - i. In what form are the Instruments adopted (e.g. treaty, MoU, exchange of letters, action fiche, parliamentary document)?



- ii. What is the procedure and conditions for accessing these documents adopting the Instruments?
  - iii. Were they presented and debated in parliament?
  - iv. Are they laid down in a transparent, public document?
  - v. Are they accessible by public or any stakeholders?
- c.
- i. Would you say that the Instruments are **implemented** in a transparent, public manner? Is information about the implementation of the Instruments available publicly or to your institution/organization?
  - ii. To your knowledge and observation, what is the degree of parliamentary involvement, as well as IO and NGO stakeholder involvement in the implementation of the Instruments?
4. **Accountability:** To what extent, and if so to whom, are procedures available to hold actors accountable for purported violations of international human rights and refugee law in the implementation of the Instruments?
- The relevant legal sources can be domestic ones or international ones such as the European Convention on Human Rights or 1951 Refugee Convention (and for the EU Delegation: EU Charter of Fundamental Rights).
- a. Is there any such *administrative* control at national level and if yes, to what scope? (For governmental organizations: Are there any internal accountability mechanisms within your institution or through another governmental institution such as any hierarchical control, complaint procedures or advisory board?)  
  
(For NGOs and IOs: Are there internal accountability mechanisms available to your institution before any governmental institution such as any complaint procedures or advisory board?) If yes, does your institution/organization have any experience with such mechanisms?
  - b. Are there any *judicial* or *quasi-judicial* accountability mechanisms before institutions such as Ombudsman Institution, the Parliament (through parliamentary inquiries),



- and domestic courts? If yes, does your institution/organization have any experience with such mechanisms?
- c. (**For IOs:** Are there any mechanisms related to accountability within your organization that is available to *national stakeholders*? If yes, has it been used so far with respect to accountability regarding the Instruments?)
- d. Are there any accountability mechanisms available at the *international* level such as European Court of Human Rights, Human Rights Committee? If yes, are you aware of any applications or have your institution/organization had any experience before such mechanisms?
5. **Compatibility:** How do you assess the compatibility of the Instruments as well as their implementation with sources of human rights and refugee law including the:
- European Convention on Human Rights or 1951 Refugee Convention (and for the EU Delegation: EU Charter of Fundamental Rights),
  - the OAU Refugee Convention,
  - the African Charter on Human and Peoples' Rights
  - the Union du Maghreb Arabe
- a. Especially, to what extent do the Instruments address the protection of vulnerable persons and groups against violence, exploitation and discrimination?
- b. Does the European Commission conduct human rights impact assessments related to their contracts in Tunisia, and are those assessments publicly available/are you aware of them? Do you think this is necessary?
6. **Results:** Is your institution/organization involved in the **technical assistance** components of the Instruments to enhance protection capacities of Tunisia? If yes, please describe the relevant assistance actions as well as the role and degree of involvement of your institution/organization.
- a. Please assess the preparedness of Tunisia to absorb and implement such assistance. How are/were the technical assistance components implemented? What was the



- existing state in Tunisia concerning the areas of technical assistance and how did the assistance under the Instruments complement the existing capacity?
- b. What is the degree of effectiveness and sustainability in capacity building with respect to the protection structure of Tunisia? Do you assess them to be of permanent or temporary nature?
7. **Containment/mobility:** Considering the scope and purpose of the Instruments, what effects do you think they have on the mobility of individuals and groups seeking international protection? Do they promote their containment or mobility?
- a. Do the actions within the scope of the Instruments entail mobility restrictions, issuance of permits of stay with limited range or other such measures that affect the mobility of such people?
8. **Alignment:** To what extent are the Instruments (and to which extent are they implemented) in accordance with the three relevant GCR objectives (easing pressures on host countries; enhancing refugee self-reliance; and expanding access to third country solutions)? How do you assess the impact of the Instruments on Tunisia in line with the outlined objectives within the GCR?