



# ASILE

Global Asylum  
Governance and  
the European  
Union's Role

## **Inventory and Typology of EU Arrangements with Third Countries**

Instruments and Actors

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.



## TECHNICAL REFERENCES

Deliverable No.	D5.1
Dissemination level*	PU
Work package	5
Lead beneficiary	Aarhus University and VU Amsterdam
Contributing beneficiary/ies	Suleyman Demirel University and the Danish Refugee Council
Due date of deliverable	30 November 2020
Actual submission date	14 January 2021
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\* PU = Public

PP = Restricted to other programme participants (including the Commission Services)

RE = Restricted to a group specified by the consortium (including the Commission Services)

CO = Confidential, only for members of the consortium (including the Commission Services)

\* Nikolas Feith Tan has been in charge of drafting this working paper, while Jens Vedsted-Hansen was lead author on sections 2.1.3 and 2.2.2.



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## LIST OF ABBREVIATIONS

<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>ATPA</b>	Act on Asylum and Temporary Protection
<b>CJEU</b>	Court of Justice of the European Union
<b>EASO</b>	European Asylum Support Office
<b>ECHR</b>	European Convention on Human Rights
<b>ECOWAS</b>	Economic Community of West African States
<b>ECtHR</b>	European Court of Human Rights
<b>ETC</b>	Emergency Transit Centre
<b>ETM</b>	Emergency Transit Mechanism
<b>EUTF</b>	Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa
<b>FLO</b>	Frontex Liaison Officer
<b>FRIT</b>	Facility for Refugees in Turkey
<b>HAP</b>	Humanitarian admission programme
<b>GCR</b>	Global Compact on Refugees
<b>HDI</b>	Human Development Index
<b>IOM</b>	International Organization for Migration
<b>IPA</b>	Instrument for Pre-accession Assistance
<b>LFIP</b>	Law on Foreigners and International Protection
<b>NGO</b>	Non-governmental organisation
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TPR</b>	Temporary Protection Regulation
<b>UNHCR</b>	United Nations High Commissioner for Refugees



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# 1. INTRODUCTION

## 1.1 Background

This working paper maps and analyses EU arrangements with selected third countries of transit with a focus on the role of instruments and actors in the implementation of such arrangements. The working paper hones in on EU cooperation with Turkey, Serbia, Niger and Tunisia, with particular attention afforded to arrangements since the European migrant and refugee ‘crisis’ of 2015.

In mapping such arrangements, which encompass international relationships between the EU and third countries, the working paper provides a *country-by-country overview and inventory* of relevant political, legal and financial *instruments*. The paper also takes particular note of the role of both EU and third country *actors* in implementing these instruments. The term ‘arrangements’ here is used to refer to a set of binding and non-binding cooperation modalities undertaken between the EU and third countries of transit.

Given the rise of informalisation in EU arrangements with third countries,<sup>1</sup> the working paper is not limited to arrangements of a strictly legal character. Nevertheless, the working paper does limit its scope to those arrangements with the potential to impact the human rights and refugee law obligations of the EU, its member states or third countries. Indeed, it is important to note at the outset that the informal or non-binding form of particular arrangements does not mean such arrangements do not entail legal effects or consequences in their implementation.<sup>2</sup>

The paper analyses the role of EU cooperation in providing for *access to international protection*, either within the transit country or on the basis of **mobility** via third country solutions, conceived of in the Global Compact on Refugees (GCR) as ‘resettlement and complementary pathways to admission’.<sup>3</sup>

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<sup>1</sup> On informalisation in EU migration policy, for example, see Sergio Carrera, ‘On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes’, *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes, Brill Nijhoff 2018); Sergio Carrera, Juan Santos Vara, and Tineke Strik, eds. *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*. Edward Elgar Publishing, 2019; Andrea Ott, Andrea, ‘The “Contamination” of EU Law by Informalization?: International Arrangements in EU Migration Law’, *VerfBlog*, 2020/9/29, <https://verfassungsblog.de/the-contamination-of-eu-law-by-informalization/>.

<sup>2</sup> The EU-Turkey Statement is a prime example of this dynamic. See Section 2.1.3 below. See also CJEU, order of the General Court of 28 February 2017, case T-192/16 *NF v. European Council*, para. 71.

<sup>3</sup> Complementary pathways have been defined by UNHCR as ‘safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.’ UNHCR, *Complementary Pathways for Admission of*



This focus on access to international protection delimits the scope of the paper away from readmission agreements for the return of irregular migrants found not to need international protection.<sup>4</sup> The working paper further discusses how these arrangements form part of the EU's **containment** approach, by preventing onward movement in Turkey, Serbia, Niger and Tunisia towards EU borders, identifying elements of migration control in such arrangements.

Containment' is used here to refer to instruments and arrangements aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers to countries of transit or origin. These include restrictive visa requirements, carrier sanctions, the use of the 'safe third country' and 'safe country of origin' concepts, readmission agreements and arrangements, and interdictions at sea. The concept includes the range of practices, which aim at preventing refugees from fleeing beyond countries in the immediate vicinity of conflict and persecution, and consequent concentration of refugees in the Global South, where they often endure protracted human rights restrictions.<sup>5</sup>

As well as mapping EU arrangements with third countries of transit,<sup>6</sup> the paper briefly discusses current and potential legal issues and academic and judicial responses to selected arrangements. Most prominently, the EU-Turkey Statement has given rise to significant legal contestation, though less well-known are questions on the legality of the Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTF) under,

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Refugees to Third Countries: Key considerations, 2019) 5. The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees. Compact on Refugees paras 7 and 95.

<sup>4</sup> For recent work on readmission, see Mariagiulia Giuffr , *The Readmission of Asylum Seekers Under International Law* (Bloomsbury Publishing 2020).

<sup>5</sup> On the evolution of containment and related concepts in the literature, see T Alexander Aleinikoff, 'State-centered refugee law: From resettlement to containment' (1992) 14 *Michigan Journal of International Law* 120; Andrew Schacknove, 'From Asylum to Containment' (1993) 5 *International Journal of Refugee Law* 516; Bhupinder S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350; Gregor Noll and Jens Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in Philip Alston, Mara Bustelo and James Heenan (eds), *The EU and Human Rights* (The EU and Human Rights, Oxford: Oxford University Press 1999); Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 *Journal on Migration and Human Security* 28; Sergio Carrera and others, 'Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU. CEPS Research Reports, September 2018' (2018) Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452; and Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2019)

<sup>6</sup> We use the term 'transit country' with respect to these states to indicate the intended movement of asylum seekers toward the EU. At the same time, we also note that some 'transit' countries are equally countries of origin and host countries for refugees



*inter alia*, EU procurement law. These legal dimensions are intended to inform ASILE's future research on responsibility allocation and attribution.<sup>7</sup>

The working paper also presents a *typology* across these four EU arrangements, demonstrating both the breadth of modalities in EU arrangements and the interplay of containment and mobility approaches with third countries of transit. This typology indicates that while EU efforts are primarily focused on containment of asylum seekers in third countries of transit, certain mobility-based modalities are embedded in such arrangements. This dynamic has recently been described as one of 'contained mobility'.<sup>8</sup>

The working paper further locates EU arrangements against the background of the Global Compact on Refugees (GCR), with a focus on their *alignment with three GCR objectives*:

- easing pressures on host countries
- enhancing refugee self-reliance, and
- expanding access to third country solutions.

Finally, while this working paper has the primary aim of mapping EU arrangements with selected third countries, a number of trends are presented as preliminary conclusions to inform ASILE's future research. This final section thus briefly addresses *informalisation* in EU third country arrangements; *limited uptake of the GCR* in such arrangements; and the current *dominance of containment* in EU third country arrangements.

## 1.2 Aims

- To map EU arrangements with selected third countries of transit, particularly since 2015, against the background of the Global Compact on Refugees
- To analyse implementation of arrangements between EU and Turkey, Serbia, Tunisia and Niger, with a focus on instruments and actors
- To provide a typology of these arrangements encompassing both containment and mobility elements.

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<sup>7</sup> See <https://www.asileproject.eu/work-plan/>.

<sup>8</sup> For an overview of the relationship between containment and mobility in EU asylum policy vis-à-vis the GCR, see *ibid*.





## 2 Mapping EU Arrangements with Third Countries of Transit

### 2.1 EU–Turkey

#### 2.1.1 Country Snapshot

Turkey hosts the largest number of refugees globally with almost 4 million registered asylum seekers and refugees, including 3.6 million Syrians and 330,000 persons of other nationalities.<sup>9</sup> Since 2011, Turkey has formally maintained a conditional open-door policy to Syrians fleeing conflict, on the basis of temporary protection.<sup>10</sup> Turkey was also one of the five hosts of the Global Refugee Forum, held in December 2019.

Turkey is a party to the 1951 Refugee Convention and its 1967 Protocol but maintains a geographical limitation, circumscribing Turkey's obligations to provide Convention status to refugees from Europe. Turkey is a party to a number of key regional and international human rights treaties, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child.<sup>11</sup>

Turkey's first dedicated asylum law, the 2013 **Law on Foreigners and International Protection (LFIP)** contains safeguards against *refoulement* and core rights for asylum seekers and refugees in Turkey.<sup>12</sup> The LFIP provides for three protection categories:

- refugee, granted to refugees coming from Europe under the 1951 Convention;
- conditional refugee, which applies the Convention definition to refugees who originate from outside Europe;
- subsidiary protection, which protects asylum seekers who do not meet the refugee or conditional refugee definition but would face the death penalty, torture or inhuman degrading treatment or punishment or a serious threat of indiscriminate violence arising from armed conflict.

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<sup>9</sup> UNHCR, UNHCR Turkey Operational Update, January 2020.

<sup>10</sup> Meltem Ineli-Ciger, 'Protecting Syrians in Turkey: A Legal Analysis' (2017) 29 International Journal of Refugee Law 555.

<sup>11</sup> Following a coup attempt in July 2016, Turkey declared a state of emergency and derogated from certain provisions of the ECHR and ICCPR until July 2018.

<sup>12</sup> For a comprehensive profile of Turkish asylum legal and policy framework, see ASILE's country fiche on Turkey.



The Law also provides for humanitarian residence status, which allows asylum seekers who do not qualify for protection on the above bases but who cannot be returned to temporary stay in Turkey.

In October 2014, as a response to the increasing number of Syrians seeking protection in Turkey, the **Temporary Protection Regulation (TPR)**<sup>13</sup> was implemented, introducing a further temporary protection status, affording access to health care, the labour market, education, social assistance and permission to stay until the TPR is terminated.<sup>14</sup> The protection afforded under the TPR carves out an exception to the international protection statuses granted under the LFIP and is strictly temporary, without prospects for durable solution.<sup>15</sup>

The LFIP also established the Directorate General of Migration Management (DGMM), an authority under the Ministry of Interior, responsible for the coordination of asylum and migration issues in Turkey.<sup>16</sup>

### 2.1.2 Mapping EU Arrangements with Turkey

The EU and Turkey have a long history of cooperation on migration control stretching back to the early 1990s. As early as 1987, Turkey was identified as a 'transit space' given its role as country of first asylum for refugees fleeing the Iranian Revolution, the Iran-Iraq War and the First Gulf War.<sup>17</sup> Since then, Turkey has emerged as both refugee-hosting country and a country of origin of asylum seekers in the EU. While this working paper focuses on EU–Turkey arrangements since 2015, a brief historical account is vital to inform current cooperation.

Between 1963 and 1999, EU–Turkey relations were governed by an Association Agreement, prior to Turkey becoming a candidate country for EU membership. Since the 2001 **Accession Partnership Agreement**, a *legal instrument*,

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<sup>13</sup> Temporary Protection Regulation, (Official Gazette No. 29153 of 22 October 2014).

<sup>14</sup> Meltem Ineli-Ciger, 'How Have the European Union and the EU Asylum Acquis Affected Protection of Forced Migrants in Turkey?: An Examination in View of the Turkish Law on Foreigners and International Protection and the EU-Turkey Statement of March 2016', *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis, Brill Nijhoff 2018)

<sup>15</sup> Article 7(3) Temporary Protection Regulation, (Official Gazette No. 29153 of 22 October 2014).

<sup>16</sup> Ineli-Ciger, 'Protecting Syrians in Turkey: A Legal Analysis'.

<sup>17</sup> Ayşen Üstübcü, 'The impact of externalized migration governance on Turkey: Technocratic migration governance and the production of differentiated legal status' (2019) 7 *Comparative migration studies* 46, 5.



cooperation between the EU and Turkey has accelerated in the field of migration control.<sup>18</sup> In particular, EU efforts have focused on building up Turkey's national asylum and protection system along the lines of the EU asylum *acquis*.

In March 2005, Turkey adopted a National Action Plan for Asylum and Migration, as a result of a twinning exercise with Denmark and the United Kingdom, aiming to align Turkish asylum law with the EU asylum *acquis*.<sup>19</sup> In October 2008, the Migration and Asylum Bureau and the Bureau for Border Management within the Ministry for Interior was established, with EU support. The LFIP, passed in 2013 and entering into force in April 2014, establishes a comprehensive legal framework for the protection of asylum seekers and refugees 'that in many respects mirrors the EU asylum *acquis*'.<sup>20</sup>

In December 2013, following years of negotiation, the EU and Turkey signed a **Readmission Agreement**, a *legal instrument* providing for the reciprocal return of Turkish and third country nationals who 'entered into, or stayed on, the territory of either sides directly arriving from the territory of the other side'.<sup>21</sup> The EU–Turkey Readmission Agreement buttressed the extant Greece-Turkey Readmission Protocol from 2002.

Against this backdrop, Turkey's importance to the EU in migration control was heightened in 2015. In October of that year, as the EU grappled with the influx of approximately one million asylum seekers, the majority of whom were fleeing the Syrian conflict via the Aegean Sea between Turkey and Greece, the **EU-Turkey Joint Action Plan** was released. The plan, a *political instrument*, was activated on 29 November 2015.

The EU-Turkey Joint Action Plan sought to address the Syrian displacement crisis in three principal ways:

- addressing the root causes leading to the massive influx of Syrians
- supporting Syrians under temporary protection and their host communities in
- Turkey; and

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<sup>18</sup> Ibid 6.

<sup>19</sup> Ineli-Ciger, 'How Have the European Union and the EU Asylum Acquis Affected Protection of Forced Migrants in Turkey?: An Examination in View of the Turkish Law on Foreigners and International Protection and the EU-Turkey Statement of March 2016' 122,

<sup>20</sup> Ibid 115.

<sup>21</sup> Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507(01))



- strengthening cooperation to prevent irregular migration flows to the EU.<sup>22</sup>

With respect to *financial instruments*, In November 2015, the European Commission established the **Facility for Refugees in Turkey (FRIT)**,<sup>23</sup> a focused on humanitarian assistance, education, migration management, health, municipal infrastructure, and socio-economic support to refugees and host communities in Turkey. Operational since February 2016, the total budget coordinated by the Facility is EUR 6 billion.<sup>24</sup>

‘Humanitarian assistance’, focused on refugees’ basic protection, education, and health needs in Turkey, accounts for 59 per cent of FRIT funding.<sup>25</sup> The European Commission reports that 64 humanitarian assistance projects have been implemented through 19 partners under the Facility.<sup>26</sup> ‘Development assistance’ accounts for 41 per cent of the FRIT budget, focused on the longer-term health, education and socio-economic development of refugees in Turkey. Under the first tranche of FRIT funding, 26 projects were granted, with more to follow under the second tranche.<sup>27</sup> Notably, however, included under the rubric of ‘development assistance’ are projects related to migration management, including International Organization for Migration (IOM) support to the Turkish Coast Guard.<sup>28</sup> For example, in 2016 the EU provided EUR 14 million for ‘the procurement of fast response boats and mobile radar systems.’<sup>29</sup>

In addition to funding under the FRIT, the EU funds activities in Turkey via the **EU Regional Trust Fund in Response to the Syrian Crisis (‘Madad Fund’)**,

<sup>22</sup> European Commission, Fact Sheet – EU- Turkey Joint Action Plan, Brussels, 15 October 2015.

<sup>23</sup> Commission Decision of 24 November 2015, amended on 10 February 2016, and again on 14 March and 24 July 2018 (COM(2020) 162 final

<sup>24</sup> For the first tranche of the Facility in 2016-2017, EUR 3 billion was allocated. A further EUR 3 billion was made available for the second tranche of the Facility in 2018-2019. See European Commission, Fourth Annual Report On The Facility For Refugees In Turkey 2020, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/fourth\\_annual\\_report\\_on\\_the\\_facility\\_for\\_refugees\\_in\\_turkey.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/fourth_annual_report_on_the_facility_for_refugees_in_turkey.pdf) 3.

<sup>25</sup> European Commission, Fourth Annual Report on The Facility for Refugees in Turkey 2020 8.

<sup>26</sup> European Commission, Fourth Annual Report on The Facility for Refugees in Turkey 2020 8.

<sup>27</sup> European Commission, Fourth Annual Report on The Facility for Refugees in Turkey 2020 8.

<sup>28</sup> ‘EU Facility for Refugees in Turkey List of projects committed/decided, contracted, disbursed’ 28 September 2020 available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility\\_table.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility_table.pdf).

<sup>29</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd\\_commission\\_report\\_on\\_progress\\_made\\_in\\_the\\_implementation\\_of\\_the\\_eu-turkey\\_agreement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd_commission_report_on_progress_made_in_the_implementation_of_the_eu-turkey_agreement_en.pdf) 3.



a *financial instrument* which has a total budget of EUR 1.8 billion.<sup>30</sup> As with the FRIT, the EU contracts both Turkish government agencies and local and international non-governmental organisations (NGOs) to support refugees residing in Turkey.<sup>31</sup>

Finally, the EU also provides funding to Turkey the **Instrument for Pre-accession Assistance (IPA)** with the aim of aligning Turkish legislation and standards with those of the EU.<sup>32</sup> However, funding for migration management under the IPA has been folded into the FRIT. For example, IPA funding for migration management projects relating to reception centres and strengthening the operational capacities of the Turkish Coast Guard are listed as FRIT projects.<sup>33</sup> In addition, Frontex deploys a European Migration Liaison Officer to Turkey.<sup>34</sup>

On 18 March 2016 the European Council issued the **EU-Turkey Statement** in the form of a press release, following a meeting between representatives of the European Union<sup>35</sup> and of the Turkish government that had taken place in Brussels on the same day. This was the third meeting between the two parties since November 2015, officially 'dedicated to deepening Turkey-EU relations as well as addressing the migration crisis'.<sup>36</sup>

According to the press release, Turkey and the EU had reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. It was further stated that:

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<sup>30</sup> Commission Decision C(2014) 9615 of 10 December 2014 on the establishment of a European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund".

<sup>31</sup> [https://ec.europa.eu/trustfund-syria-region/sites/tfsr/files/eutf\\_syria\\_factsheet-english\\_13112018.pdf](https://ec.europa.eu/trustfund-syria-region/sites/tfsr/files/eutf_syria_factsheet-english_13112018.pdf)

<sup>32</sup> <https://www.avrupa.info.tr/en/instrument-pre-accession-assistance-ipa-880>

<sup>33</sup> 'EU Facility for Refugees in Turkey List of projects committed/decided, contracted, disbursed' 28 September 2020 available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility\\_table.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility_table.pdf).

<sup>34</sup> See <https://frontex.europa.eu/partners/liaison-officers-network/>

<sup>35</sup> In the wording of Press release 144/16 of 18 March 2016, the meeting was held between 'Members of the European Council' and 'their Turkish counterpart'. While the PDF version of the press release bears the heading 'International Summit', this term does not appear in the press release published on the website of the European Council and the Council of the European Union, indicating the European Council as the source of the press release: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 17 December 2020). This difference was pointed out when the legal nature of the EU representation at the meeting was disputed before the CJEU, cf. order of the General Court of 28 February 2017, case T-192/16 *NF v. European Council*, para. 55, further analysed in section 2.1.3 below.

<sup>36</sup> Press release 144/16 of 18 March 2016, issued by the General Secretariat of the Council, published on the website of the European Council and the Council of the European Union, entitled 'EU-Turkey statement, 18 March 2016'. Without prejudice to the legal nature of the statement, it will here be referred to as the 'EU-Turkey arrangement'.



‘[m]uch progress has been achieved already, including Turkey's opening of its labour market to Syrians under temporary protection, the introduction of new visa requirements for Syrians and other nationalities, stepped up security efforts by the Turkish coast guard and police and enhanced information sharing.’

Moreover, the EU had begun disbursing the EUR 3 billion of the FRIT for concrete projects and work had advanced on visa liberalisation and in the accession talks, including the opening of Chapter 17 in December 2015.

On 7 March 2016, Turkey had furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the same time Turkey and the EU recognised that ‘further, swift and determined efforts are needed’.<sup>37</sup>

In more operational terms, the press release continued by stating that ‘[i]n order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU.’ In order to achieve this goal, they agreed on nine additional action points, among which the first four had direct bearing on migration control and access to international protection and shall therefore be quoted in their entirety:

- (1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with

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<sup>37</sup> Press release 144/16 of 18 March 2016, p. 1.



UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

- (2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.
- (3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect.
- (4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.'



The remaining five action points mentioned in the statement were to address more general issues concerning the relations between the EU and Turkey:

- The fulfilment of the visa liberalisation roadmap was to be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met.
- The EU, in close cooperation with Turkey, would further speed up the disbursement of the initially allocated EUR 3 billion under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March 2016.
- The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.
- The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015.
- The EU and its Member States would work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which would be safer.<sup>38</sup>

In sum, the EU-Turkey arrangement provides for the return of irregular migrants who reach the Greek Aegean islands back to Turkey, on the basis of safe third country or first country of asylum concepts.<sup>39</sup> In exchange, the EU agreed to resettle from Turkey one Syrian refugee for every Syrian returned from the Greek islands, provide EUR 6 billion in funding via the FRIT, grant visa-free travel to Turkish nationals, and to reopen negotiations for Turkey's accession to the EU.<sup>40</sup>

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<sup>38</sup> Ibid., p. 2.

<sup>39</sup> The safe third country concept allows for the return of an asylum seeker to a particular country on the basis that they can access a fair and efficient asylum procedure and receive international protection in accordance with the 1951 Refugee Convention there. The first country of asylum concept allows for the return of a person to a country where they have already been recognised as a refugee, or otherwise enjoys international protection there, including freedom from *refoulement*. See further Asylum Procedures Directive arts 35 and 38.

<sup>40</sup> EU–Turkey statement, 18 March 2016; and European Commission, Progress report on the Implementation of the European Agenda on Migration, COM/2018/0250 final, 14 March 2018 6–7.





The European Commission claims the EU-Turkey Statement has been effective in drastically reducing the number of asylum seekers crossing from Turkey to Greece, via the Aegean Sea.<sup>41</sup> According to European Border and Coast Guard Agency (EBCGA or Frontex) statistics, for example, arrivals from Turkey to the EU reached 885,386 in 2015 and dropped to 60,151 in 2019, in fact representing an increase from intervening years.<sup>42</sup> Between April 2016 and April 2020, 2140 people were returned under the arrangement.<sup>43</sup>

From a legal perspective, the first point of the Statement has caused the most debate and criticism, due to the plan here stipulated to consider asylum applications made by persons arriving to Greece from Turkey unfounded or inadmissible according to the EU Asylum Procedures Directive.<sup>44</sup> This would imply returning these asylum seekers from Greece on the assumption that Turkey could be considered a 'first country of asylum' or a 'safe third country' for such applicants. The legal debate and the judicial responses to this part of the EU-Turkey arrangement are discussed below.

### 2.1.3 Existing and Potential Legal Issues in EU–Turkey Arrangements

#### *Turkey as A Safe Third Country /First Country of Asylum*

The 2016 EU-Turkey arrangement, as presented in the statement of 18 March 2016, gave rise to a number of legal issues. Among these, some had the nature of EU constitutional law insofar as it was questioned whether the EU side of the arrangement had complied with the institutional and procedural requirements under EU law for the conclusion of international agreements, in particular Article 218 TFEU. Connected to this issue, it became a separate question in which legal capacity the EU representatives had acted in the meeting and in the production and publication of the statement resulting from that meeting. These issues were examined by the EU Court of Justice in the case discussed below.

From the refugee law perspective, however, the most controversial issue was whether Turkey could lawfully be considered a 'safe third country' under

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<sup>41</sup> This claim is contested. See Thomas Spijkerboer, 'Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths' (2016) 28 *Border Criminologies*

<sup>42</sup> <https://frontex.europa.eu/along-eu-borders/migratory-map/>

<sup>43</sup> UNHCR, Returns from Greece to Turkey, 20 April 2020 <  
<https://data2.unhcr.org/en/documents/download/75075>> accessed 16 December 2020.

<sup>44</sup> Directive 2013/32 of 29 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60.



international law and EU law for the purpose of asylum seekers being returned to Turkey without even having their protection needs examined by the Greek authorities. Even before the EU-Turkey arrangement statement of 18 March 2016 was published, information about the ongoing negotiations between the EU and Turkey<sup>45</sup> triggered warnings by NGOs<sup>46</sup> as well as academic debate as to whether the arrangements on migration control and refugee protection that were expected to result from these negotiations would be legally tenable under international human rights and refugee law.

Thus, the German 'Verfassungsblog' published an interview with James Hathaway who appeared not to be entirely dismissive of the prospect of refugees being returned to Turkey upon spontaneous arrival to Greece, while other refugees would be resettled from Turkey to the EU. Arguing that states enjoy 'substantial latitude to require a refugee to benefit from protection in a state not of the refugee's choosing', he listed three requirements that would have to be met for a state to lawfully remove a refugee to accept protection in another country than the one in which he or she has sought recognition of refugee status: 'First, the destination state must be a state party to the Refugee Convention. Second, it must ensure that refugees are in fact recognized. And third, the destination state must in fact honor refugee rights', i.e. Articles 2-34 of the Refugee Convention. As regards the Refugee Convention, James Hathaway pointed to the geographical limitation entered by Turkey on its accession to the Convention, meaning that Turkey has no Convention obligations towards non-European refugees. He therefore posited that Turkey would have to withdraw its geographical limitation to the Refugee Convention in order to make the proposed pre-procedure returns from Greece lawful.<sup>47</sup>

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<sup>45</sup> The contours of the EU-Turkey arrangement had become known to the public already by the statement of 7 March 2016 by the EU heads of state or government, following a meeting with the Turkish prime minister (<https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>, accessed 27 September 2020).

<sup>46</sup> See, in particular, letter of 11 March 2016 from ECRE to the presidents of the European Council and the European Commission and the EU heads of state or government, and the annexed ECRE Memorandum to the European Council Meeting 17-18 March 2016: Time to Save the Right to Asylum.

<sup>47</sup> James C. Hathaway, 'Three legal requirements for the EU-Turkey deal: An interview with James Hathaway', Maximilian Steinbeis, *Verfassungsblog*, 9 March 2016 (<https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>, accessed 27 September 2020).



The interview statements by James Hathaway were met by opposing views in a blogpost by Kay Hailbronner.<sup>48</sup> In addition, Daniel Thym presented a different view, essentially defending the lawfulness of the forthcoming EU-Turkey arrangement in terms of international law and, in particular, EU law. He further argued the positive potential of the EU-Turkey arrangement as an exercise of international cooperation aimed at remedying a mass-influx scenario.<sup>49</sup>

A few days after the publication of the EU-Turkey statement, the UNHCR issued a memorandum in which the concepts of 'first country of asylum' and 'safe third country' were examined with a view to their application as inadmissibility grounds in the context of implementing point 1 of the EU-Turkey arrangement, quoted above. The comments were based on the understanding that Syrian asylum seekers would be returned from Greece by considering Turkey as their 'first country of asylum' under Article 35(b) of the Asylum Procedures Directive, while non-Syrians would be returned to Turkey as that country was to be considered a 'safe third country' for them, according to Article 38 of the Directive. In respect of both of these inadmissibility grounds, UNHCR emphasised the need to examine applications individually in order to provide the asylum seeker an opportunity to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment in Turkey, based on his or her individual circumstances. It was further emphasised that the individual asylum seekers would have to be able to appeal inadmissibility decisions to a court or tribunal and have a right to remain pending the outcome of the appeal.<sup>50</sup>

As regards the probably most crucial issue under the EU-Turkey arrangement, UNHCR held that the 'safe third country' concept as an inadmissibility ground under the Asylum Procedures Directive was to be understood as requiring that access to refugee status and to the rights of the Refugee Convention must be 'ensured in law, including ratification of the 1951 Convention and/or the 1967 Protocol, and in practice'.<sup>51</sup> The requirement of ratification of the Refugee Convention was, however, modified by the ensuing statement that Turkey 'must

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<sup>48</sup> Kay Hailbronner, 'Legal requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway', *Verfassungsblog*, 11 March 2016 (<https://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>, accessed 27 September 2020).

<sup>49</sup> Daniel Thym, 'Why the EU-Turkey Deal is Legal and a Stop in the Right Direction', *Verfassungsblog*, 9 March 2016 (<https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>, accessed 27 September 2020).

<sup>50</sup> UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, p. 2.

<sup>51</sup> *Ibid.*, p. 6. A similar position was taken by UNHCR as regards the possibility for Syrians to obtain Convention refugee status as a precondition for considering Turkey as a 'first country of asylum', *ibid.*, p. 5.



allow, in accordance with rules laid down in national law, non-European nationals or stateless persons who had their place of habitual residence outside Europe to request refugee status and to have access to all rights conferred by the 1951 Convention.<sup>52</sup> UNHCR thus appeared to have a pragmatic approach to the question of ratification of the Refugee Convention without any geographical limitation as a precondition for considering Turkey as a 'safe third country', pointing to *de facto* compliance with the refugee protection standards under the Convention as the decisive factor, rather than a *de jure* lifting of Turkey's geographic limitation.

As a kind of strategic indication, UNHCR pointed to the possibility for Greek courts to refer questions concerning the interpretation of the inadmissibility grounds in the Asylum Procedures Directive to the EU Court of Justice. Referring to the absence of a definition of the meaning of 'sufficient protection' in Article 35 as well as the absence of a clear understanding of the meaning of Article 38(1)(e) of the Directive, submitting a reference for preliminary ruling to the Court of Justice of the European Union (CJEU) was held to be the 'appropriate course of action'.<sup>53</sup>

Nonetheless, as will be seen in the next section, so far no referral to the CJEU appears to have been made by a Greek court or tribunal.

#### *Judicial responses to the 2016 EU-Turkey arrangement*

An attempt was indeed made to challenge the EU-Turkey arrangement as reflected in the statement of 18 March 2016 before the EU Court of Justice. Three third country nationals who had applied for asylum upon arrival to Greece, two of whom were residing on the island of Lesbos and one in Athens, brought actions before the CJEU General Court in which they sought the annulment of the 'agreement between the European Council and ... Turkey dated 18 March 2016', arguing that the EU-Turkey statement of that date was an act attributable to the European Council establishing an international agreement contrary to EU law inasmuch as it had been adopted in disregard of Article 218 Treaty on the Functioning of the European Union (TFEU).<sup>54</sup>

The European Council, supported by the Commission and the EU Council, alleged that the CJEU had no jurisdiction to rule on the action since no agreement or treaty in the sense of Article 218 TFEU had been concluded between the EU and

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<sup>52</sup> Ibid., p. 6.

<sup>53</sup> Ibid., p. 4 and p. 7, respectively.

<sup>54</sup> CJEU, orders of the General Court of 28 February 2017, cases T-192/16 *NF v. European Council*, T-193/16 *NG v. European Council*, and T-257/16 *NM v. European Council*. The three orders are essentially identical, hence references will here be made to the order in the former case only.



Turkey. Rather, the statement of 18 March 2016 was merely the ‘fruit of an international dialogue between the Member States and ... Turkey’ that, in light of its content and of the intention of the parties, was not intended to produce legally binding effects nor constitute an agreement or a treaty. The European Council further posited that the meeting of 18 March 2016 had constituted a meeting of the Heads of State or Government of the Member States of the European Union with the representative of the Republic of Turkey, not a meeting of the European Council in which Turkey had participated.<sup>55</sup>

One applicant, NF, disputed the contention that the European Council may, on the one hand, assert that members of that institution acted in their capacity as representatives of their governments or states and, on the other hand, assert that the Member States were thus able to act in the name of the European Union by binding it to a third country by the challenged agreement which, in his view, was moreover contrary to the standards laid down by applicable secondary EU law on asylum.<sup>56</sup>

Against that background, the Court of First Instance focused on the ‘authors of the contested measure’. It would therefore assess whether the EU-Turkey arrangement, as published by means of the press release of 18 March 2016, revealed the existence of a measure attributable to the European Council, and whether, by that measure, the European Council concluded an international agreement adopted in disregard of Article 218 TFEU and corresponding to the contested measure.<sup>57</sup>

In that regard, the Court observed that the EU-Turkey Statement of 18 March 2016 differs in its presentation in comparison with the previous statements published following the first and second meetings of the Heads of State or Government, by stating to be the result of a meeting between the ‘Members of the European Council’ and their Turkish counterpart, as well as by its reference to ‘the EU and ... Turkey’ having agreed on the additional action points. According to the Court, these terms ‘could, admittedly, imply that the representatives of the Member States of the European Union had acted ... in their capacity as members of the ‘European Council’ institution’ and had decided to conclude legally an agreement with Turkey outside of the procedure laid down in Article 218 TFEU.<sup>58</sup>

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<sup>55</sup> CJEU, order of the General Court of 28 February 2017, case T-192/16 *NF v. European Council*, paras. 27-28.

<sup>56</sup> *Ibid.*, para. 40. The latter statement is probably to be understood as alluding to lack of compatibility of the EU-Turkey arrangement with the Asylum Procedures Directive, an assertion that was not further elaborated upon by the applicants in the three cases.

<sup>57</sup> *Ibid.*, para. 47.

<sup>58</sup> *Ibid.*, paras. 53-56.



The differences were interestingly explained by the European Council as a reference to the Heads of State or Government making up the European Council, and as reflecting 'the emphasis on simplification of the words used for the general public in the context of a press release', respectively. Thus, the term 'EU' must be understood in this 'journalistic context' as referring to the Heads of State or Government of the EU Member States. The European Council argued that the form in which the EU-Turkey statement had been published, that of a press release, by its nature 'serves only an informative purpose and has no legal value'. On account of the target audience of such 'informative support', the press release in which the EU-Turkey statement had been set out 'intentionally used simplified wording, plain language and shorthand'. The 'inappropriate use of the expression 'Members of the European Council' and the term 'EU' in a press release' cannot in any way affect the legal status and the role in which the representatives of the Member States had met with their Turkish counterpart and cannot bind the European Union in any way.<sup>59</sup>

In the light of these explanations of the European Council and 'taking into account the ambivalence of the expression 'Members of the European Council' and the term 'EU' in the EU-Turkey statement', the Court held that reference would have to be made to the documents relating to the meeting of 18 March 2016. On the basis of an examination of such documents, the Court held that 'notwithstanding the regrettably ambiguous terms of the EU-Turkey statement, as published by means of Press Release No. 144/16' it was in their capacity as Heads of State or Government of the Member States that the representatives of those Member States met with the Turkish Prime Minister on 18 March 2016 in the premises shared by the European Council and the EU Council, namely the Justus Lipsius building in Brussels.<sup>60</sup>

The Court of First Instance therefore concluded as follows:

It is clear from that overall context preceding the online publication on the Council's website of Press Release No 144/16 setting out the EU-Turkey statement that, concerning the management of the migration crisis, the European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union and that it also did not commit the European Union within the meaning of Article 218 TFEU. Consequently, the European Council did not

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<sup>59</sup> Ibid., paras. 57-60.

<sup>60</sup> Ibid., para. 66.



adopt any measure that corresponds to the contested measure, as described by the applicant and of which the content was allegedly set out in that press release.

... independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure.

... even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.<sup>61</sup>

As the CJEU does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States, the General Court therefore held itself to lack jurisdiction and dismissed the three actions brought before the Court.<sup>62</sup>

The General Court's reasoning and conclusion has been subject to critical analysis. As part of this, the CJEU's response to the action concerning the EU-Turkey arrangement has been seen as an expression of bifurcation of law, reflecting the bifurcation of human movement towards Europe in the sense that people from the Global South are not only outside the territory of the European Union, but also outside the scope of European law.<sup>63</sup> More specifically, asylum seekers detained in camps in Greece, being exposed to return to Turkey as a result of the EU-Turkey arrangement, were not merely deprived of the right to enter EU territory in a lawful manner as asylum seekers. As a consequence of the approach taken by the CJEU, under which the Court on formalistic grounds considered itself without jurisdiction to rule on the compatibility of the arrangement with EU

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<sup>61</sup> Ibid., paras. 70-72.

<sup>62</sup> Ibid., para. 73.

<sup>63</sup> Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice', 31(2) *Journal of Refugee Studies* 2017, 216-39. For an analysis and critique of the CJEU General Court's reasoning, see pp. 222-25.



constitutional law and potentially secondary asylum law as well, the applicant asylum seekers were simultaneously in reality kept outside the scope of EU law.<sup>64</sup>

In a similar vein, the approach and legal reasoning of the CJEU, upholding the predisposition of the European Council, the Council and the Commission to manage migration outside the scope of applicability of EU law, can be considered as a clear example of the general tendency towards using informal, non-legal or extra-legal methods of governance in EU migration policy.<sup>65</sup> Importantly, however, this does not exclude the possibility that such arrangements may eventually entail direct or indirect legal effects or consequences in their implementation.<sup>66</sup> Thus, some of the action points under the EU-Turkey arrangement were intended to be implemented by way of activating mechanisms or exercising competences within EU law such as disbursing funds under the Facility for Refugees in Turkey, visa liberalisation and the Customs Union.<sup>67</sup>

An appeal by the three applicants to the Court of Justice was dismissed as manifestly inadmissible.<sup>68</sup> In so concluding, the Court of Justice held that the appeals had simply made general assertions that the General Court had disregarded a certain number of principles of EU law, without indicating with the requisite degree of precision the contested elements in the orders under appeal or the legal arguments specifically advanced in support of the application for annulment.<sup>69</sup> The ruling of the Court of Justice cannot therefore be said to have confirmed the General Court's finding that the CJEU lacks jurisdiction to rule on the lawfulness of the EU-Turkey statement.

Subsequently, there have in fact been signs suggesting that the CJEU is not necessarily entirely unprepared to scrutinize legal aspects flowing from the EU-Turkey arrangement. That could happen by way of a reference for preliminary ruling by a Greek court or tribunal, as proposed by UNHCR in the legal considerations on return of asylum seekers and refugees from Greece under the EU-Turkey arrangement, quoted above.

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<sup>64</sup> Ibid., pp. 231-33.

<sup>65</sup> Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, 2019, 12-13.

<sup>66</sup> Cf. Section 1.1 above. See also CJEU, order of the General Court of 28 February 2017, case T-192/16 *NF v. European Council*, para. 71, considering that 'even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016', that agreement would have been an agreement concluded by the Heads of State or Government.

<sup>67</sup> Press release 144/16 of 18 March 2016, points 5, 6 and 7.

<sup>68</sup> CJEU, order of the Court of Justice of 12 September 2018, joined cases C-208/17 P, C-209/17 P and C-210/17 P, *NF, NG and NM v. European Council*.

<sup>69</sup> Ibid., paras. 16-17.





Thus, the president of the CJEU has publicly expressed his reflections over the rulings in the cases *NF, NG and NM v. European Council*. Having referred to some of the academic critique raised against the orders of the General Court, he stated as follows: ‘Be that as it may, it is worth noting that the Court of Justice has not yet had the opportunity to rule on this matter. Although each of the three applicants brought an appeal against the corresponding order of the General Court, those appeals were drafted in an incoherent fashion and contained assertions and allegations that could not be raised in appeal proceedings. As a result, they were dismissed as manifestly inadmissible. That said, nothing would prevent a national court called upon to apply aspects of the EU-Turkey statement from referring preliminary questions to the Court of Justice.’<sup>70</sup>

#### 2.1.4 Conclusions

As the largest host of refugees globally at the EU’s doorstep, Turkey is the pre-eminent partner in the EU’s approach to migration control. With the EU–Turkey Statement at its crux, EU–Turkey arrangements in this area are highly legally and politically contested. Indeed, questions under both EU and refugee law remain unanswered.

What emerges from this overview of EU–Turkey arrangements in light of the GCR is an arrangement based primarily on containment, with the operation of the Greek hotspots acting as a bulwark against asylum seekers’ access to protection in the EU.<sup>71</sup> While mobility via third country solutions has been scaled up in recent years, they remain available to a miniscule number of refugees in Turkey. In this sense, the EU-Turkey Statement is an emblematic example of the dynamic of contained mobility.<sup>72</sup>

Simultaneously, EU funding flows both for the purposes of containment and to ease pressure on Turkey’s hosting of four million refugees via the FRIT and, to a lesser extent the Madad Fund. While EU funding also supports protection in Turkey, the precarious legal situation of Syrian protection holders undercuts prospects for durable solutions in the country.

#### **Table 1: EU–Turkey Instruments**

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<sup>70</sup> Koen Lenaerts, ‘The Court of Justice of the European Union and the Refugee Crisis’, in Koen Lenaerts et al (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, 2019, 3-19, at p. 10.

<sup>71</sup> Danish Refugee Council, *Fundamental rights and the EU hotspot approach*, 2017)

<sup>72</sup> Carrera and Cortinovis, *The EU’s Role in Implementing the UN Global Compact on Refugees: Contained mobility vs International Protection*.



	Political	Legal	Financial
Instruments	<p>Accession Partnership Agreement 2001</p> <p>EU-Turkey Joint Action Plan, October 2015</p> <p>EU-Turkey Statement, March 2016</p>	<p>Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, 2013</p> <p>Law on Foreigners and International Protection (LFIP)</p> <p>Temporary Protection Regulation (TPR)</p>	<p>EU Trust Fund in Response to the Syrian Crisis (Madad Fund) 2014</p> <p>Instrument for Pre-accession Assistance (IPA) 2014-20</p> <p>Facility for Refugees in Turkey 2016</p>

**Table 2: EU–Turkey Actors**

	EU	Turkey	Other
Actors	<p>Frontex</p> <p>Court of Justice of the European Union</p> <p>European External Action Service</p> <p>Delegation of the European Union to Turkey</p>	<p>Directorate General of Migration Management (DGMM)</p> <p>Turkish Coast Guard and Land Forces</p> <p>Union of Turkish Bar Associations (UTBA)</p>	<p>UNHCR, UNFPA, UNICEF, WFP, WHO, UNDP, ILO, IOM and WHH and NGOs such as Save the Children, GIZ, Danish Red Cross, Médecins du monde, Concern Worldwide, Danish Refugee Council, Mercy Corps, DAAD and ASAM<sup>73</sup></p>

<sup>73</sup> FRIT implementing partners. See ASILE's country fiche on Turkey.



## 2.2 EU–Serbia

### 2.2.1 Country Snapshot

Serbia, one of five EU candidate countries making up the Western Balkans region,<sup>74</sup> is a key transit country for asylum seekers to the EU moving north from Turkey and North Macedonia.<sup>75</sup> Serbia is flanked by EU member states Bulgaria, Romania, Hungary and Croatia to its east and north.

Yugoslavia became a party to the Refugee Convention in 1959, a ratification status that Serbia inherited upon independence. The 1992 Law on Refugees provided for technical reception, such as accommodation and refugee support, rather than protection status.<sup>76</sup> While the Serbian constitution includes a right to seek asylum, Serbia did not introduce its far more substantive **Law on Asylum** until 2008, setting out protection statuses broadly reflecting the EU asylum *acquis*.<sup>77</sup>

- Refugee status, reflecting Article 1A(2) of the Refugee Convention;<sup>78</sup>
- Subsidiary protection status, which protects against the death penalty, torture or inhuman degrading treatment or punishment or a serious threat of 'indiscriminate violence arising from external aggression or armed conflict or massive human rights violations';<sup>79</sup>
- Temporary protection status, applied in situations of mass influx where displaced persons 'cannot be returned to their country of origin or habitual Residence'.<sup>80</sup>

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<sup>74</sup> Namely Albania, Bosnia and Herzegovina, Kosovo, Montenegro and North Macedonia.

<sup>75</sup> Ivana Krstić, 'The Efficiency of the Asylum System in Serbia: Main Problems and Challenges', *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis, Brill Nijhoff 2018) 158.

<sup>76</sup> Marta Stojic Mitrovic, 'The Reception of Migrants in Serbia: Policies, Practices, and Concepts' (2019) 4 *Journal of Human Rights and Social Work* 17

<sup>77</sup> Official Gazette of the Republic of Serbia no. 109/2007. For an overview, see Mitrović, Marta Stojić. "Serbian migration policy concerning irregular migration and asylum in the context of the EU integration process." *Етноантрополошки проблеми* 9.4 (2014): 1105-1120.

<sup>78</sup> Law of Asylum, Official Gazette of the Republic of Serbia no. 109/2007, Article 2.

<sup>79</sup> Law of Asylum, Official Gazette of the Republic of Serbia no. 109/2007, Article 2.

<sup>80</sup> Law of Asylum, Official Gazette of the Republic of Serbia no. 109/2007, Article 2.



In March 2018, a new **Act on Asylum and Temporary Protection (ATPA)** introduced a number of reforms to Serbia's asylum system further closely aligned to EU standards.<sup>81</sup>

Notwithstanding a fairly robust legal framework, Serbia's asylum infrastructure has been widely criticised for reliance on the safe third country concept in determining the admissibility of protection claims.<sup>82</sup> One author summarises Serbia's transit profile as 'a significant number of stranded refugees have expressed their intention to apply for asylum, but the vast majority does not perceive Serbia as a country of permanent destination.'<sup>83</sup>

In August 2020, UNHCR reported 4,044 new arrivals in Serbia for the month, as well as 4,233 asylum seekers residing in asylum or reception centres. The Agency also reported 2,233 people were collectively expelled to Serbia without individual assessment from Romania, Hungary, Croatia and Bosnia and Herzegovina in that month alone.<sup>84</sup> UNHCR does not carry out resettlement from Serbia.<sup>85</sup>

## 2.2.2 Mapping EU Arrangements with Serbia

In 2015, Serbia became a key transit country on the 'Balkan route' to the EU, with the European Parliament estimating 596,000 people entered Serbia irregularly in that year.<sup>86</sup> The drastic increase of asylum flows in 2015 strained Serbia's fairly new asylum system.<sup>87</sup>

Following the peak of arrivals in October 2015, when 180,307 people entered the country, a cascade of border closures in the Western Balkans rapidly decreased

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<sup>81</sup> European Commission Staff Working Document, Serbia 2019 Report Accompanying Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy {COM(2019) 260 final 39.

<sup>82</sup> See, for example, Krstić, 'The Efficiency of the Asylum System in Serbia: Main Problems and Challenges' 183. For current applications challenging Serbia's application for the safe third country concept, see A.K. v Serbia, application no. 57188/16 (communicated 19 November 2018) and M.H. v Serbia, application no 62410/17 (communicated 26 October 2018).

<sup>83</sup> Mirjana Bobić and Danica Šantić, 'Forced migrations and Externalization of European Union Border Control: Serbia on the Balkan Migration Route' (2020) 58 International Migration 220 229.

<sup>84</sup> UNHCR, Serbia Monthly Update (August 2020).

<sup>85</sup> <https://help.unhcr.org/serbia/special-procedures/>

<sup>86</sup> Alice Greider, 'Outsourcing migration management: the role of the Western Balkans in the European refugee crisis' (2017) 17 Migration Policy Institute Danica Šantić, Claudio Minca and Dragan Umek, 'The Balkan Migration Route: Reflections from a Serbian Observatory' (2017)

<sup>87</sup> Bobić and Šantić, 'Forced migrations and Externalization of European Union Border Control: Serbia on the Balkan Migration Route' 12 fn 13.



the number of asylum seekers transiting in Serbia.<sup>88</sup> Subsequently, the blanket application of the safe third country concept vis-à-vis Serbia, notably by Hungary.<sup>89</sup> Since the events of 2015, the EU has aggressively pursued cooperation with Serbia in the area of migration control, including as regards Serbian accession to the EU.

In June 2015, as Serbia's pivotal role on the Balkan Route crystallised, the Working Group on Mixed Migration Flows was formed with five Serbian ministries, the Commissariat for Refugees and Migration and the EU Delegation in Serbia as members.<sup>90</sup> The working group remains in place today.

In October 2015, the 2015 **Western Balkans Route Statement** was released following a heads of government meeting convened by the EU with Albania, Austria, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Romania, Serbia, Slovenia and UNHCR.<sup>91</sup> The Statement, a *political instrument*, comprised a 17-point plan of action encompassing the following elements:

- Permanent exchange of information
- Limiting secondary movements
- Supporting refugees and providing adequate reception conditions
- Managing migration flows
- Border management
- Tackling smuggling and trafficking
- Information on the rights and obligations of refugees and migrants.<sup>92</sup>

In terms of *financial instruments*, since 2016, EU funding has been granted to Frontex, EASO, IOM and UNHCR under the under the second **Instrument for Pre-accession Assistance (IPA II)**.<sup>93</sup> A further Special Measure on Strengthening the Response Capacity of the Republic of Serbia to Manage

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<sup>88</sup> Ibid 7.

<sup>89</sup> Greider, 'Outsourcing migration management: the role of the Western Balkans in the European refugee crisis'.

<sup>90</sup> The Ministries of labor, employment, veteran and social Affairs; interior; and EU integrations. Bobić and Šantić, 'Forced migrations and Externalization of European Union Border Control: Serbia on the Balkan Migration Route' 228.

<sup>91</sup> European Commission, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, 25 October 2015, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_5904](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5904).

<sup>92</sup> European Commission, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, 25 October 2015, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_5904](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5904).

<sup>93</sup> <https://op.europa.eu/en/publication-detail/-/publication/a1a29056-8b2f-11e9-9369-01aa75ed71a1>



Effectively Mixed Migration Flows was passed by the European Commission in September 2019, granting EUR 27.45 million.<sup>94</sup>

In addition to funding under IPA II, the EU funds activities in Serbia via **Madad Fund**, a *financial instrument* which has funded four projects in Serbia since 2015, primarily focused on strengthening the migration management capacity of Serbian authorities and food assistance in government-run reception centres.<sup>95</sup> Funded bodies include Serbian national authorities, IOM and a range of international NGOs.<sup>96</sup>

Perhaps most notably, EU agencies have played an active role on Serbian territory, in cooperation with their Serbian counterparts. As well as deploying a European Liaison Officer to Serbia,<sup>97</sup> Frontex now carries out migration management on Serbian territory under a **Status Agreement**, a *legal instrument* signed in 2019 and approved by the European Parliament in January 2020.<sup>98</sup> Under the Agreement, Frontex officers ‘assist Serbia in border management, carry out joint operations and deploy teams in the regions of Serbia that border the EU’.<sup>99</sup>

Under the auspices of IPA II, the European Asylum Support Office (EASO) provides training and technical assistance to Serbian asylum officers, policymakers and judges to ‘to support the establishment or further development of asylum and reception systems in line with EU standards’.<sup>100</sup>

### 2.2.3 Existing and Potential Legal Issues in EU–Serbia Arrangements

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<sup>94</sup> Commission Implementing Decision of 30.9.2019 adopting a Special Measure as regards Strengthening the Response Capacity of the Republic of Serbia to Manage Effectively Mixed Migration Flows.

<sup>95</sup> European Commission, ‘EU Trust Fund for Syria’ <https://eutf-syria.akvoapp.org/> accessed 13 November 2020.

<sup>96</sup> See Table 4 below.

<sup>97</sup> See <https://frontex.europa.eu/partners/liaison-officers-network/> accessed 30 September 2020.

<sup>98</sup> Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia

<sup>99</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6303](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6303) accessed 29 September 2020.

<sup>100</sup> <https://easo.europa.eu/sites/default/files/IPA-II-phase-II.pdf>. For an overview of the operation of the Serbian asylum system, see Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia Periodic Report for January – June 2020*, (2020).



### *Safe Third Country concept*

The question as to whether Serbia could be considered a 'safe third country' has been raised first and foremost in connection with Hungarian asylum legislation adopted in 2015,<sup>101</sup> allowing for the rejection of asylum applications as inadmissible in all cases where the asylum seeker was attempting to enter Hungary from Serbia. The Hungarian authorities' assertion that Serbia was a safe country for all asylum seekers having transited through that country has been challenged within various legal frameworks and before both European courts.

First, the question of Serbia as a 'safe third country' was addressed in a preliminary ruling of the CJEU concerning the Dublin Regulation. A Pakistani national had irregularly entered Hungary from Serbia in August 2015 and lodged a first asylum application in Hungary, following which he was apprehended in the Czech Republic while attempting to reach Austria. As Hungary accepted to take the applicant back under the Dublin Regulation, he submitted a second application for asylum which was then considered inadmissible on the ground that Serbia was considered a 'safe third country' in his case. As he objected to the intended return to Serbia, the Hungarian court proceedings resulted in questions of interpretation of the Dublin Regulation being referred to the CJEU.

The CJEU ruled that Article 3(3) of the Dublin Regulation, according to which a Member State retains the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in the Asylum Procedures Directive, must be interpreted as meaning that the right to send an applicant to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible pursuant to the criteria of the Dublin Regulation for examining the application.<sup>102</sup> In other words, Hungary's policy of considering Serbia as a 'safe third country' could still be applied upon the transfer of this applicant back to Hungary, without the CJEU interfering with the Hungarian authorities' underlying assessment of Serbia in that regard.

The next significant case in which Hungary's policy concerning returns of asylum seekers to Serbia considered Bangladeshi nationals who had applied for asylum in Hungary upon transiting through Greece, North Macedonia and Serbia. They applied to the European Court of Human Rights, invoking Article 3 ECHR as a basis for objecting to the impugned return to Serbia. The European Court of Human Rights (ECtHR) examined whether the Hungarian authorities had fulfilled their procedural duty to assess properly the conditions for asylum seekers in Serbia by conducting a thorough examination of the accessibility and reliability of that

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<sup>101</sup> Hungary's government decree 191/2015 of 21 July 2015.

<sup>102</sup> CJEU, judgment of 17 March 2016, case C-695/15 PPU *Shiraz Baig Mirza*, paras. 37-53.



State's asylum system, based on all relevant generally available information on that system. In the Court's view, it did not appear that the Hungarian authorities had taken sufficient account of consistent information that asylum seekers returned to Serbia would run a real risk of summary removal to North Macedonia and Greece where they would be subjected to conditions incompatible with Article 3. In addition to the insufficient basis for the general presumption concerning Serbia as a 'safe third country', the Hungarian authorities had exacerbated the risks facing the applicants by inducing them to return to Serbia illegally. The ECtHR therefore concluded that Hungary had failed to discharge its procedural obligation under Article 3. Referring to the findings of the CPT and of the Special Representative of the Secretary General of the Council of Europe, and to the shortness of the period spent there by the applicants, the ECtHR considered that the conditions in the Röszke transit zone had not reached the minimum level of severity required to constitute a violation of Article 3. In contrast to the Chamber judgment, the ECtHR Grand chamber found the applicants not to have been deprived of their liberty within the meaning of Article 5 ECHR, hence their complaints under this provision were considered inadmissible by the ECtHR.<sup>103</sup>

Notably, the latter issue was decided differently by the CJEU which, in May 2020, held that the asylum seekers in the case pending before a Hungarian court had actually been exposed to deprivation of liberty in the Röszke transit zone as they could not lawfully leave that zone of their own free will in any direction whatsoever. In particular, they would not be able to leave the transit zone for Serbia, both because that would be considered unlawful by the Serbian authorities and would therefore expose them to penalties and because it might result in their losing any chance of obtaining refugee status and protection in Hungary. Furthermore, the CJEU held that the inadmissibility ground applied to reject the asylum seekers' application in Hungary could not be considered compatible with Article 33 of the Asylum Procedures Directive.<sup>104</sup>

This assessment of Hungarian legislation on 'safe third countries' was in line with the CJEU's preliminary ruling a couple of months earlier in a case referred by an administrative court in Hungary.<sup>105</sup> Here the CJEU held that the legislative provision allowing for the return of asylum seekers to Serbia, following the

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<sup>103</sup> ECtHR, Grand Chamber judgment of 21 November 2019, appl. no. 47287/15 *Ilias and Ahmed v. Hungary*. The Chamber judgment had been delivered on 14 March 2017, finding the applicants to have been deprived of their liberty in the Röszke transit zone.

<sup>104</sup> CJEU, judgment of 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU *FMS and Others*.

<sup>105</sup> CJEU, judgment of 19 March 2020, case C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal*.





rejection of their application as inadmissible and hence with no substance examination of their application in Hungary, was incompatible with Article 33 of the Asylum Procedures Directive for two reasons. First, Hungarian legislation did not comply with all the conditions for a third country to be considered as safe under Article 38(1) of the Directive, to which Article 33(2)(c) refers, in particular because the relevant legislative provision did not require the third country to fulfil the principle of *non-refoulement*.<sup>106</sup> Second, Hungarian legislation would allow for the return of an asylum seeker to Serbia merely due to previous transit through that country, while Article 38(2) of the Asylum Procedures Directive requires a connection to the assumed third country.<sup>107</sup>

### *Frontex operations in Serbia*

As noted above, under a 2019 Status Agreement, Frontex officers carry out joint operations on Serbian territory with their Serbian counterparts. Frontex has concluded five such Status Agreements with Western Balkan states, though currently only those with Albania, Montenegro and Serbia are ratified.<sup>108</sup>

Under the Status Agreement, Frontex officers 'assist Serbia in border management, carry out joint operations and deploy teams in the regions of Serbia that border the EU'.<sup>109</sup> Article 7 of the Agreement affords Frontex officers criminal, civil and administrative immunity from Serbian jurisdiction.<sup>110</sup> A further critical element in this Agreement is Article 9.5, provides for a mechanism to deal with alleged fundamental rights violations.<sup>111</sup>

A number of authors have raised concerns about Frontex's operational role in third countries, including with respect to a lack of human rights safeguards,<sup>112</sup> Frontex's responsibility for violations under international or EU human rights law,

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<sup>106</sup> Ibid., paras. 42 and 56.

<sup>107</sup> Ibid., paras. 47-50.

<sup>108</sup> <https://www.statewatch.org/news/2020/march/eu-border-externalisation-agreements-on-frontex-operations-in-serbia-and-montenegro-heading-for-parliamentary-approval/>

<sup>109</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6303](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6303)

<sup>110</sup> Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia article 7.

<sup>111</sup> Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia article 9.5.

<sup>112</sup> Florin Coman-Kund, 'The cooperation between the European Border And Coast Guard Agency and third countries according to the new Frontex regulation: Legal and practical implications', *The external dimension of EU agencies and bodies* (The external dimension of EU agencies and bodies, Edward Elgar Publishing 2019) 46;



notably the Charter of Fundamental Rights of the European Union,<sup>113</sup> and accountability mechanisms where breaches are established.<sup>114</sup>

## 2.2.4 Conclusions

EU–Serbia arrangements have historically taken place primarily in the context of Serbian accession to the EU. However, Serbia's emergence as a key transit state on the Balkan route in 2015 has shifted from a focus the alignment of Serbian national law and policy with the EU asylum *acquis* to more direct EU engagement on Serbian territory. The recent Status Agreement finalised between Frontex and Serbia exemplifies this more direct type of arrangement, with joint operations between Frontex and Serbian officers presents a fairly novel form of intensive cooperation between the EU and a third country of transit, raising questions of responsibility and attribution in the event of breaches of international and EU law. Moreover, Serbia is a key transit state designated a 'safe third country' despite outstanding questions of the compliance of this designation with the Asylum Procedures Directive and the ECHR.

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<sup>113</sup> Ibid; Mariana Gkliati, 'Frontex Return Operations and their Human Rights Implications' (2020) *Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement*, Bern: Peter Lang Editions, Forthcoming

<sup>114</sup> Lena Karamanidou and Bernd Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex* (2020); Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 *German Law Journal* 532.



**Table 3: EU–Serbia Instruments**

	Political	Legal	Financial	Other
Instruments	Western Balkans Route Statement	Act on Asylum and Temporary Protection 2014  Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia 2019	EU Trust Fund in Response to the Syrian Crisis (Madad Fund) 2014  Instrument for Pre-accession Assistance (IPA-II) 2014-20	

**Table 4: EU–Serbia Actors**

	EU	Serbia	Other
Relevant Actors	Frontex  EASO  European Commission,  European Parliament  Court of Justice of the European Union	Commissariat for Refugees and Migration  Ministry of Labour  Ministry of Interior  Ministry of Health  Group 484 (Regional Center for Minorities)  Asylum Protection Center  Belgrade Center for Human Rights	IOM  UNHCR  Working Group on Mixed Migration Flows  CARE Deutschland, Caritas, Catholic Relief Services, Danish Refugee Council, Oxfam Italy <sup>115</sup>

<sup>115</sup> Madad Fund implementing partners.



## 2.3 EU–Niger

### 2.3.1 Country Snapshot

The Republic of Niger, which became independent from France in 1960, is located on the edge of the Sahara Desert in West Africa. With Mali to the west, Nigeria to the south and Libya to the north-east, Niger is a transit country for asylum seekers *en route* to the EU via the Central Mediterranean, with the Saharan city of Agadez the main transit point for West African migrants and refugees.<sup>116</sup>

Niger is a party to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, and the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa. Niger's 1997 Refugee Law forbids *refoulement* and created the National Eligibility Commission responsible for national asylum procedures. The Refugee Law grants refugees the same rights as nationals regarding physical security, freedom of movement, health services, education, and identity documents.<sup>117</sup>

Niger is also part of the Economic Community of West African States (ECOWAS) and a party to the ECOWAS Treaty and its Free Movement Protocol.<sup>118</sup>

The poorest country in Africa, Niger places last on Human Development Index (HDI) reports on health, education and income.<sup>119</sup> Niger placed last overall for HDI value in 2018.<sup>120</sup> Niger hosts 228,000 refugees, of which 167,000 originate from Nigeria and 59,000 from Mali.<sup>121</sup> A further 191,900 internally displaced persons reside in the country and 38,000 asylum seekers.<sup>122</sup> Since 2017, 3,208 asylum seekers and refugees have been evacuated from Libya to Niger via UNHCR's Emergency Transit Mechanism (ETM).<sup>123</sup>

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<sup>116</sup> Julia Van Dessel, 'International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger' (2019) 21 *European Journal of Migration and Law* 435, 441.

<sup>117</sup> United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - Niger*, 17 June 2009, available at: <https://www.refworld.org/docid/4a40d2ae6c.html> accessed 10 September 2020.

<sup>118</sup> Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993; *The Economic Community of West African States Protocol A/P.1/5/79 Relating To Free Movement of Persons, Residence and Establishment*. Dakar, 29 May 1979.

<sup>119</sup> Selim Jahan (ed.) (2018). *Human Development Indices and Indicators: 2018 Statistical Update* (New York: United Nations Development Programme).

<sup>120</sup> UNHCR, 'Emergency Transit Mechanism' June 2020 update.

<sup>121</sup> <https://data2.unhcr.org/en/country/ner>

<sup>122</sup> <https://reporting.unhcr.org/niger>

<sup>123</sup> UNHCR, *Niger Emergency Transit Mechanism (ETM) Factsheet* (October 2020).



### 2.3.2 Mapping EU Arrangements with Niger

Since 2000, EU relations with Niger have been regulated by the **Cotonou Agreement**, a *legal instrument* encompassing EU cooperation with 79 African, Caribbean and Pacific countries until the end of 2020.<sup>124</sup>

Since the fall of Gaddafi in 2011 and Libya's subsequent descent into instability, the EU has stepped up cooperation with Niger, as part of the EU's security-development-migration concerns in the Sahel region.<sup>125</sup> The EU's **Sahel Regional Action Plan 2015-2020**, for example, calls for a focus on the development-migration nexus, including the promotion of international protection and mobility.<sup>126</sup>

The arrival of approximately one million asylum seekers to the EU in 2015, however, accelerated the EU's cooperation with Niger in the field of migration control. Following decline in movement across the Eastern Mediterranean, from October 2015, the Central Mediterranean emerged as the primary route for asylum seekers to Europe. Cooperation between the EU and Niger became a priority to control movement to Libya, the primary point of departure for Europe.<sup>127</sup>

In May 2015, the European Commission's **European Agenda on Migration** proposed the establishment of a 'pilot multi-purpose centre' to provide

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<sup>124</sup> Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, pp. 3-353).

<sup>125</sup> Julien Brachet, 'Manufacturing smugglers: From irregular to clandestine mobility in the Sahara' (2018) 676 *The ANNALS of the American Academy of Political and Social Science* 16; Daria Davitti and Anca-Elena Ursu, 'Why Securitising the Sahel Will Not Stop Migration' (2018) University of Nottingham Fransje Molenaar, 'Irregular migration and human smuggling networks in Niger' (2017) CRU Report, Clingendael Institut, The Hague Van Dessel, 'International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger'

<sup>126</sup> <https://reliefweb.int/report/world/eu-sahel-strategy-regional-action-plan-2015-2020>

<sup>127</sup> In 2016, 181,400 people reached Italy via the Central Mediterranean route. <http://data2.unhcr.org/en/situations/mediterranean>. See further Morten Bøås, 'EU migration management in the Sahel: unintended consequences on the ground in Niger?' (2020) *Third World Quarterly* 1, 6; Sébastien Moretti, 'Transit Migration in Niger: Stemming the Flows of Migrants, but at What Cost?' (2020) 3 *Migration and Society* 80.



information, local protection and resettlement opportunities, with support from UNHCR and IOM.<sup>128</sup> However, the pilot centre never materialised.

In terms of *legal instruments*, in May 2015, the EU supported the passage of the new **Law Against the Illicit Smuggling of Migrants**, which criminalises smuggling migrants north of Agadez up to the southern Libyan border.<sup>129</sup> According to one author, the new law has 'de facto criminalized the movement of third-country nationals north of Niger.'<sup>130</sup> Another scholar has characterised controls under the Law as 'internal carrier sanctions'.<sup>131</sup> Since the new law, movement of asylum seekers from Agadez to Libya has become more expensive, more dangerous and numbers have declined significantly.<sup>132</sup> According to the European Commission, for example, travel from Agadez dropped from 70,000 departures in May 2016 to 6,524 in January 2017.<sup>133</sup>

In November 2015, the **Valletta Summit Declaration** and the **Joint Valletta Action Plan**, from a summit between European and African leaders of government. These *political instruments* emphasised the following five pillars:

- Development benefits of migration and addressing root causes of irregular migration and forced displacement
- Legal migration and mobility
- Protection and asylum
- Prevention of irregular migration, migrant smuggling and trafficking

Return, readmission and reintegration.<sup>134</sup> With respect to *financial instruments*, further EU-Niger cooperation was flagged at the November 2015 Valletta Summit,

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<sup>128</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration. Brussels, 13.5.2015, COM(2015) 240 final 5.

<sup>129</sup> Loi 2015-36 Relative au Trafic Illicite de Migrants. Available at [https://www.unodc.org/res/cld/document/ner/2015/loi\\_relative\\_au\\_trafic\\_illicite\\_de\\_migrants.html/Loi\\_N2015-36\\_relative\\_au\\_trafic\\_illicite\\_de\\_migrants.pdf](https://www.unodc.org/res/cld/document/ner/2015/loi_relative_au_trafic_illicite_de_migrants.html/Loi_N2015-36_relative_au_trafic_illicite_de_migrants.pdf). For an overview of the content of the Law, see Thomas Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' in Paul Minderhoud, Sandra Mantu and Karin Zwaan (eds), *Caught in Between Borders: Citizens, Migrants and Humans, Liber Amicorum in Honour of Prof Dr Elspeth Guild* (Caught in Between Borders: Citizens, Migrants and Humans, Liber Amicorum in Honour of Prof Dr Elspeth Guild, Wolf Legal Publishers 2019) 50-1.

<sup>130</sup> [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_17\\_5234](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5234)

<sup>131</sup> Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' 51.

<sup>132</sup> Van Dessel, 'International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger', 441, 444;

<sup>133</sup> European Commission, Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration 3.

<sup>134</sup> Political Declaration, Valletta Summit, 11-12 November 2015; Action Plan, Valletta Summit, 11-12 November 2015.



where the **Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTF)** was launched with an overall aim of addressing ‘the crises in the regions of the Sahel and the Lake Chad, the Horn of Africa, and the North of Africa.’<sup>135</sup> Niger is the EUTF’s biggest recipient overall.<sup>136</sup>

Furthermore, in 2016, a migration control pillar was added to **EUCAP Sahel**, a civilian mission under EU Common Security and Defence Policy launched in 2012.<sup>137</sup> The European Council extended the mission’s mandate to support Nigerian security forces’ capability to ‘better control migration flows and to combat irregular migration and associated criminal activity more effectively,’<sup>138</sup> with a focus on the transit hub of Agadez. In 2017, for example, EUCAP Sahel donated five vehicles to Nigerian authorities for the purposes of migration control.<sup>139</sup> Frontex has one European Liaison Officer stationed in Niamey.<sup>140</sup> According to Spijkerboer, the EUTF and EUCAP Sahel are the ‘two main instruments which the EU currently uses to promote good governance’ in Africa in general, and Niger in particular.<sup>141</sup>

In 2016, the **EU Partnership Framework on Migration** identified Niger as one of five priority countries, enhancing the role of migration diplomacy in EU–Niger relations.<sup>142</sup> The stated short-term objectives of the Migration Partnership Framework, a *political instrument*, are:

- save lives at sea and in the desert;
- fight traffickers and smugglers’ networks that benefit from people’s despair;

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<sup>135</sup> Commission Decision C(2015)7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. For an overview of the operation of EU trust funds, see Thomas Spijkerboer and Elies Steyger, ‘European External Migration Funds and Public Procurement Law’ (2019) 4 *European papers* 493.

<sup>136</sup> Spijkerboer, ‘The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger’ 51. See further [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger_en).

<sup>137</sup> Davitti and Ursu, ‘Why Securitising the Sahel Will Not Stop Migration’ 2.

<sup>138</sup> EUAA, The EUCAP Sahel Niger civilian mission, April 2016.

<sup>139</sup> Spijkerboer, ‘The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger’ 53.

<sup>140</sup> See <https://frontex.europa.eu/partners/liaison-officers-network/>

<sup>141</sup> Spijkerboer, ‘The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger’ 51.

<sup>142</sup> The other priority countries are Ethiopia, Mali, Nigeria and Senegal. Tsion Tadesse Abebe, ‘Securitisation of Migration in Africa: The Case of Agadez in Niger’ (2019) 6.



- increasing returns of those who do not have the right to stay; and enable migrants and refugees to stay closer to home rather than embark on dangerous journeys; and
- open up legal ways to Europe for those in need, in particular resettlement.<sup>143</sup>

At the same time, EUR 500 million was transferred from the European Development Fund to support African partnerships through the EUTF.<sup>144</sup>

The EU's migration control efforts have hitherto largely focused on the north-eastern administrative unit of Agadez, located at a key point along the migration route between the Sahel and Maghreb.<sup>145</sup> According to one study, 20 per cent of all migrants who transit through Agadez travelled to Europe by boat in 2017.<sup>146</sup>

The EU also funds multiple migration-related projects in Niger. In general, EUTF funding for migration management projects outweigh projects related to national protection and reception. IOM has played a key role in the implementation of the EU's containment and return priorities. For example, the EUTF funds the following IOM projects:

- Migration Resource and Response Mechanism to promote alternatives to irregular migration, EUR 7 million<sup>147</sup>
- Sustainable Return from Niger (SURENI), focused on migration management and return, EUR 15 million<sup>148</sup>

According to Van Dessel, these projects amount to IOM participation in 'the externalization process of EU borders by undertaking the relocation of migration control in Niger in order to keep unwelcome individuals away from the EU territory.'<sup>149</sup> EU funding has also played a vital role in implementing border controls, for example contracting IOM to support the construction of border

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<sup>143</sup>

[https://eeas.europa.eu/sites/eeas/files/factsheet\\_ec\\_format\\_migration\\_partnership\\_framework\\_update\\_2.pdf](https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf)

<sup>144</sup> David Kipp, 'From exception to rule: the EU Trust Fund for Africa' (2018) 19.

<sup>145</sup> Abebe, 'Securitisation of Migration in Africa: The Case of Agadez in Niger' 7.

<sup>146</sup> Fransje Molenaar and Floor El-Kamouni-Janssen, *Turning the tide: The politics of irregular migration in the Sahel and Libya* (Clingendael, Netherlands Institute of International Relations 2017)

<sup>147</sup> [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/mecanisme-de-reponse-et-de-ressources-pour-les-migrants\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/mecanisme-de-reponse-et-de-ressources-pour-les-migrants_en)

<sup>148</sup> [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/renforcement-de-la-gestion-et-de-la-gouvernance-des-migrations-et-le\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/renforcement-de-la-gestion-et-de-la-gouvernance-des-migrations-et-le_en)

<sup>149</sup> Van Dessel, 'International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger', 441, 448.





posts.<sup>150</sup> IOM has further been involved in training Nigerian police in investigating document fraud.<sup>151</sup>

EU funding is also focused on national protection, evacuation and resettlement. The EUR 4.2 million AMIF-funded Regional Development and Protection Programme aims to improve the quality of national asylum procedures undertaken by Niger's National Eligibility Commission.<sup>152</sup> One EUTF project worth EUR 10 million is focused on protection of refugees in the Diffa region.<sup>153</sup>

UNHCR has led the EUTF-funded **Emergency Transit Mechanism (ETM)** for the evacuation of asylum seekers and refugees from detention in Libya to Niger since November 2017. Under a memorandum of understanding between UNHCR and the Nigerian government,<sup>154</sup> UNHCR evacuates likely refugees from Libya to the ETM site, located outside Niamey for refugee status determination and, for vulnerable refugees, referral for resettlement. The ETM has thus far supported the evacuation of 3,208 refugees and migrants from Libya and the resettlement of 2,454 refugees to *inter alia* Canada, EU member states, Norway and the United States.<sup>155</sup>

### 2.3.3 Existing and Potential Legal Issues in EU–Niger Arrangements

#### *ECOWAS Freedom of Movement*

Under Article 59 of the ECOWAS Treaty, citizens of the 15 ECOWAS member countries retain rights of 'entry, residence and establishment' in other ECOWAS member states, while Article 3 of the Protocol on Free Movement affords ECOWAS citizens visa-free entry for 90 days.<sup>156</sup> As several authors have pointed out, the EU's role in supporting Nigerian anti-smuggling legislation and border

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<sup>150</sup> Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' 53.

<sup>151</sup> Ibid 54.

<sup>152</sup> [https://ec.europa.eu/home-affairs/publications/regional-development-and-protection-programme-north-africa-rdpp-na-niger\\_en](https://ec.europa.eu/home-affairs/publications/regional-development-and-protection-programme-north-africa-rdpp-na-niger_en).

<sup>153</sup> [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables_en)

<sup>154</sup> UNHCR, 'Emergency Transit Mechanism' June 2020 update <https://reliefweb.int/sites/reliefweb.int/files/resources/77083.pdf>. The MoU is available at [https://www.asgi.it/wp-content/uploads/2019/05/memorandum\\_Niger\\_UNHCR.pdf](https://www.asgi.it/wp-content/uploads/2019/05/memorandum_Niger_UNHCR.pdf).

<sup>155</sup> UNHCR, 'Emergency Transit Mechanism' June 2020 update <https://reliefweb.int/sites/reliefweb.int/files/resources/77083.pdf>

<sup>156</sup> See further Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' 54-5; Clare Castillejo, *The influence of EU migration policy on regional free movement in the IGAD and ECOWAS regions* (Discussion Paper 2019)



control, are in tension with ECOWAS freedom of movement, creating a tension between EU and African policy objectives, with Niger in the crosshairs.<sup>157</sup>

### *The EUTF and EU law*

Recent scholarly work has challenged the legality of the EUTF under EU procurement law.<sup>158</sup> Article 3 of the Commission Decision of October 2015 creating the EUTF states that the 26 African countries to which the Trust is addressed are in 'crisis situation' such that EU public procurement procedures do not apply.<sup>159</sup> Moreover, this crisis situation remains in place for the duration of the EUTF, currently until 31 December 2020.<sup>160</sup>

Spijkerboer and Steyger argue that the modalities of the EUTF breach EU public procurement law on two bases. First, as the Commission Decision creating the EUTF fails to substantiate the existence of a crisis in the 26 African states; and second, because the blanket exception to public procurement is disproportionate. Accordingly, this lack of integration of EU public procurement law into external migration policy 'leads to a situation where the expenditure of billions of euros is vulnerable to political challenges, as well as to legal challenges from parties whose interests may have been harmed by the failure to apply public procurement procedures.'<sup>161</sup>

## 2.3.4 Conclusions

Since 2015, Niger has emerged as a key partner of the EU in the 'upstreaming' of containment to prevent the movement of asylum seekers to Libya and onward to Europe via the central Mediterranean.<sup>162</sup> Such is the EU's influence in Niger that the European Commission has previously labelled the country 'emblematic' of

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<sup>157</sup> See, for example, Castillojo, *The influence of EU migration policy on regional free movement in the IGAD and ECOWAS regions*; Amanda Bisong, 'Migration Partnership Framework and the Externalization of European Union's (EU) Migration Policy in West Africa: The Case of Mali and Niger', *Regional Integration and Migration Governance in the Global South* (Regional Integration and Migration Governance in the Global South, Springer 2020)

<sup>158</sup> Spijkerboer and Steyger, 'European External Migration Funds and Public Procurement Law'

<sup>159</sup> Commission Decision of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. Cf Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

<sup>160</sup> Spijkerboer and Steyger, 'European External Migration Funds and Public Procurement Law' 503.

<sup>161</sup> Ibid 521.

<sup>162</sup> Moretti, 'Transit Migration in Niger: Stemming the Flows of Migrants, but at What Cost?'



# ASILE

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what the EU can achieve with third countries, as ‘a proactive and constructive partner’.<sup>163</sup> EU arrangements take the form of funding anti-mobility efforts, increased border controls and promoting return via IOM. A secondary set of arrangements are focused on evacuation from Libya, national protection and resettlement, via UNHCR.

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<sup>163</sup> European Commission (2017). *Press release—Partnership Framework on Migration: Commission reports on results and lessons learnt one year on*. Strasbourg: EC, 13 June 2017.



**Table 5: EU–Niger Instruments**

	Political	Legal	Financial	Other
Instruments	<p>Valletta Summit Declaration 2015</p> <p>Joint Valletta Action Plan 2015</p> <p>Migration Partnership Framework 2017</p> <p>Sahel Regional Action Plan 2015-2020</p> <p>UNHCR - Niger Memorandum of Understanding (MoU) 2017</p>	<p>Cotonou Agreement</p> <p>Economic Community of West African States (ECOWAS) Treaty 1975</p> <p>ECOWAS Free Movement Protocol 1979</p> <p>Law Against the Illicit Smuggling of Migrants 2015</p>	<p>EUTF 2016</p> <p>Asylum, Migration and Integration Fund (AMIF)</p>	<p>European Union Capacity Building Mission in Niger (EUCAP – Niger)</p>

**Table 6: EU–Niger Actors**

	EU	Niger	Other
Actors	<p>EU External Action Service</p> <p>Delegation of the European Union to the Republic of Niger</p> <p>Frontex</p> <p>French Office for the Protection of Refugees and Stateless Persons (OFPRA)</p>	<p>National Eligibility Commission</p>	<p>IOM</p> <p>UNHCR</p> <p>Danish Refugee Council</p> <p>Aid Agency for Technical Cooperation and Development Concern Worldwide, GIZ, IMPACT Initiatives. Welthungerhilfe<sup>164</sup></p>

<sup>164</sup> EUTF implementing partners.



## 2.4 EU–Tunisia

### 2.4.1 Country Snapshot

Sharing a land border with Libya to the east, Tunisia has historically been a relatively minor transit country and point of departure for irregular migrants to Europe. This is beginning to change, however, as Tunisia has recently emerged as a significant source country for irregular migration on the central Mediterranean.

Tunisia is both a transit and origin country for irregular migration to the EU. Since the 2011 Tunisian revolution that ended the Ban Ali regime and launched the Arab Spring, Tunisians and other nationalities have sought protection in Europe in increasing numbers via the central Mediterranean.

Tunisia is a party to the 1951 Convention and its 1967 Protocol and the 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>165</sup> Article 26 of the post-revolutionary constitution, from January 2014, includes a right to political asylum as prescribed by law, however no national asylum legislation has yet been introduced.<sup>166</sup>

Since 1992, UNHCR has conducted refugee status determination and resettlement procedures in-country under an agreement with the Tunisian government. In 2011, following the arrival of one million asylum seekers arrived in Tunisia fleeing conflict in neighbouring Libya, this agreement was renewed.<sup>167</sup>

At the end of 2019, UNHCR reported 3,286 persons of concern in Tunisia, comprising 1,746 refugees, 1,523 asylum seekers and 17 'others of concern'.<sup>168</sup> While these numbers are fairly modest, they represent a three-fold increase from the previous year. UNHCR conducts small-scale resettlement from Tunisia.<sup>169</sup>

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<sup>165</sup> UNHCR, [UNHCR Tunisia Special Update](#), 16 July 2020.

<sup>166</sup> Vasja Badalič, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' (2018) *Journal of International Migration and Integration* 1 89.

<sup>167</sup> Carrera and others, 'Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU. CEPS Research Reports, September 2018' 27-28; Badalič, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' 89.

<sup>168</sup> UNHCR, [UNHCR Tunisia Operational Update](#), August 2020.

<sup>169</sup> UNHCR, [UNHCR Tunisia Operational Update](#), June 2020.



## 2.4.2 Mapping EU Arrangements with Tunisia

Since the early 2000s, Tunisia has been an EU partner in the field of migration control.<sup>170</sup> Until the Tunisian Revolution of 2011, the EU and its member states entered into a number of *ad hoc* arrangements with the Ben Ali regime, primarily focused on combating people smuggling, border control and readmission from the EU to Tunisia. In February 2004, notably, the Ben Ali regime passed the **Law 2004–6** which criminalised people smuggling and associated assistance to irregular migrants, with encouragement from the EU.<sup>171</sup>

Since the 2011 Revolution, broader EU-Tunisia cooperation has intensified through the adoption of two *political instruments*.<sup>172</sup> In 2012, the EU and Tunisia's post-revolution government established a **Privileged Partnership**, which was followed by a 2013-17 action plan.<sup>173</sup> In March 2014, the EU and Tunisia formed a **Mobility Partnership**, 'providing a comprehensive framework for policy dialogue and cooperation with Tunisia in all aspects of migration management.'<sup>174</sup> In particular the following elements are identified as key priorities:

- mobility, legal migration and integration
- the fight against illegal immigration and human trafficking
- return and readmission
- border management
- migration and development

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<sup>170</sup> Jean-Pierre Cassarino, 'Channelled policy transfers: EU-Tunisia interactions on migration matters' (2014) 16 *European Journal of Migration and Law* 97, 104.

<sup>171</sup> Badalič, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' 91

<sup>172</sup> Emanuela Roman, 'EU's migration policies in the eyes of "partner" countries' civil society actors: the case of Tunisia' (2019) 5 *Global Affairs* 203

<sup>173</sup> [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_17\\_1263](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1263)

<sup>174</sup> Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l'Union Européenne et ses Etats Membres participants, [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/declaration\\_conjointe\\_tunisia\\_eu\\_mobility\\_fr.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/declaration_conjointe_tunisia_eu_mobility_fr.pdf) ; European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final 12. On the implementation of EU Mobility Partnerships more broadly, see Natasja Reslow, 'Making and implementing multi-actor EU external migration policy: the Mobility Partnerships', *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes, Brill Nijhoff 2018).



- asylum and international protection.<sup>175</sup>

Notwithstanding this broad set of priorities, Tunisian civil society organisations have identified border control and readmission as the EU's primary focuses.<sup>176</sup>

Since 2014, the EU has supported Tunisia's **National Strategy on Migration**, funding the implementation of the Strategy through four partners to the amount of EUR 12.8 million.<sup>177</sup>

In terms of *financial instruments*, the **EUTF** funds Tunisian migration management and mobilisation of diaspora to the sum of EUR 89 million.<sup>178</sup> Most recently, for example, the EUTF has granted the International Centre for Migration Policy Development EUR 24.5 million aimed at 'strengthening technical capacities of the Tunisian Coast Guard'.<sup>179</sup> In 2017, a EUR 23 million security sector reform project provided capacity building support in the area of border management.<sup>180</sup>

In 2016, a **draft National Asylum Law** was put forward to the Tunisian parliament but remains stalled, possibly reflecting the relatively low priority afforded migration in Tunisian politics.<sup>181</sup> The European Commission's 2016 Communication on Strengthening EU support for Tunisia included migration management as a pillar for cooperation.<sup>182</sup>

In pursuing intensified cooperation with Tunisia, the EU has included key civil society organisations in dialogue.<sup>183</sup> While migration policy under the Ben Ali regime was previously controlled by the Ministry for Interior, three civil society

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<sup>175</sup> European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final 12.

<sup>176</sup> Roman, 'EU's migration policies in the eyes of "partner" countries' civil society actors: the case of Tunisia' 211

<sup>177</sup> <https://ec.europa.eu/trustfundforafrica/region/north-africa/tunisia/favoriser-la-mise-en-oeuvre-de-la-strategie-nationale-migratoire-de-la-en>

<sup>178</sup> European Union, EU Support on Migration in Tunisia, 27 October 2020, available at [https://ec.europa.eu/trustfundforafrica/sites/eueta/files/eutf-factsheet\\_27102020\\_-\\_tunisia\\_0.pdf](https://ec.europa.eu/trustfundforafrica/sites/eueta/files/eutf-factsheet_27102020_-_tunisia_0.pdf) accessed 12 November 2020.

<sup>179</sup> EU SUPPORT ON MIGRATION IN TUNISIA, EU Emergency Trust Fund for Africa – North of Africa window [https://ec.europa.eu/trustfundforafrica/sites/eueta/files/eutf-factsheet\\_tunisia\\_dec\\_2019.pdf](https://ec.europa.eu/trustfundforafrica/sites/eueta/files/eutf-factsheet_tunisia_dec_2019.pdf)

<sup>180</sup> European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final 14.

<sup>181</sup> Roman, 'EU's migration policies in the eyes of "partner" countries' civil society actors: the case of Tunisia' 210.

<sup>182</sup> European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final

<sup>183</sup> Roman, 'EU's migration policies in the eyes of "partner" countries' civil society actors: the case of Tunisia' 205



organisations have been party to 'tripartite' EU-Tunisia dialogues since 2016.<sup>184</sup> In addition, Frontex has deployed a European Migration Liaison Officer to the EU Delegation to Tunisia.<sup>185</sup>

### 2.4.3 Existing and Potential Legal Issues in EU–Tunisia Arrangements

As discussed above in relation to Niger, questions have been raised as to the compliance of the EUTF with EU law.

## 2.5 Conclusions

Tunisia is becoming an increasingly important partner in the EU's migration control approach. Historically a fairly minor transit country, Tunisia is today one of the key departure countries on the central Mediterranean route. EU arrangements with Tunisia are focused on border control to prevent irregular departures, with no national protection or mobility arrangements for refugees to the EU in place.

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<sup>184</sup> Ferruccio Pastore and Emanuela Roman, 'Framing migration in the southern Mediterranean: how do civil society actors evaluate EU migration policies? The case of Tunisia' (2020) 8 Comparative migration studies 1; Emanuela Roman, *Reversing the perspective: How European stakeholders react to migration policy frames of Southern Mediterranean counterparts*, (2018) Andrew Geddes and Luca Lixi, 'New actors and new understandings in European Union external migration governance? The case of EU-Tunisian migration relations', *EU external migration policies in an era of global Mobilities: Intersecting policy universes* (EU external migration policies in an era of global Mobilities: Intersecting policy universes, Brill Nijhoff 2018)

<sup>185</sup> European Commission, Migration on the Central Mediterranean route Managing flows, saving lives Brussels, 25.1.2017, JOIN(2017) 4 final 14.





**Table 7: EU–Tunisia Instruments**

	Political	Legal	Financial
Instruments	Privileged Partnership 2012  Mobility Partnership 2014  National Strategy on Migration 2014	Law 2004–6  Draft National Asylum Law 2016	EUTF 2016

**Table 8: EU–Tunisia Actors**

	EU	Tunisia	Other
Actors	Frontex  Delegation of the European Union to Tunisia  EU External Action Service  European Commission (DG DEVCO)	Tunisian Forum for Economic and Social Rights  Tunisian League for Human Rights  Tunisian Refugee Council  Maison du droit et des migrations  Beity  Association des Familles Victimes de l'Immigration Clandestine (AFVIC)  La Terre pour Tous	UNHCR  French Development Agency, International Centre for Migration Policy, Development Expertise France, GIZ <sup>186</sup>

<sup>186</sup> EUTF implementing partners.



### 3 Typology of EU Arrangements with Third Countries of Transit

This final section shifts from the descriptive account of EU arrangements third countries with a focus on in terms of *instruments and actors* offered above, to provide an initial classification according to the *content* of such arrangements. The section puts forward a typology of EU approaches present in one or more arrangements with Turkey, Serbia, Niger and Tunisia in terms of **containment** and **mobility**, the two overarching concepts underpinning the ASILE project.<sup>187</sup>

#### 3.1 Funding, Equipping and Training for Border Control and Migration Management

EU funding, equipment and training is aimed at strengthening the border control capacity of third country partners, often with a focus containment by preventing irregular departure toward the EU. In the case of Niger, notably, the EU has contracted IOM to build border posts and train and equip police for the purposes of migration control. With respect to Tunisia, a number of EU-funded projects provided capacity building support in the area of border management, including EUR 24.5 million aimed at 'strengthening technical capacities of the Tunisian Coast Guard'.<sup>188</sup> In Turkey, an explicit element of the EU–Turkey Statement is cooperation on the prevention of departures from Turkey, including through the enhancement of the Turkish Coast Guard's capacity in the Aegean Sea.<sup>189</sup> Similarly, in 2016, the EU granted EUR 28 million in sectoral budget support to strengthen Serbia's border control capacities.<sup>190</sup>

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<sup>187</sup> Carrera and Cortinovis, *The EU's Role in Implementing the UN Global Compact on Refugees: Contained mobility vs International Protection*. See further <https://www.asileproject.eu/the-project/>.

<sup>188</sup> European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final 14; EU Emergency Trust Fund for Africa – North of Africa window [https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet\\_tunisia\\_dec\\_2019.pdf](https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet_tunisia_dec_2019.pdf) accessed 13 November 2020

<sup>189</sup> European Commission, Second Report on the progress made in the implementation of the EU–Turkey Statement, Brussels, 15.6.2016 COM(2016) 349 final.

<sup>190</sup> European Union External Action, 'Serbia: EU increases support to migration and efficient border management' [https://eeas.europa.eu/headquarters/headquarters-homepage/39881/serbia-eu-increases-support-migration-and-efficient-border-management\\_hy](https://eeas.europa.eu/headquarters/headquarters-homepage/39881/serbia-eu-increases-support-migration-and-efficient-border-management_hy) accessed 13 November 2020.



### 3.2 Funding Refugee Protection

EU funding is also directed at the protection needs of refugees present in third countries, notably in Turkey where assistance under the FRIT is focused on refugees' basic protection, education, and health needs in Turkey.<sup>191</sup> In Niger, one EUTF project worth EUR 10 million is focused on protection of refugees in the Diffa region.<sup>192</sup> EU funding of protection needs in Serbia and Tunisia, primarily countries of transit, is less relevant, with both states hosting relatively small refugee populations.

### 3.3 Supporting National Asylum Systems

In some cases, the EU supports the development of national asylum and protection systems in third countries of transit, primarily through funding for UNHCR. In Niger, for example, the Asylum, Migration and Integration Fund (AMIF) has funded UNHCR's work on improving the timeliness and quality of national asylum procedures.<sup>193</sup> In Turkey, the FRIT funds UNHCR's work on 'access to fair and efficient national asylum-procedures and promoting procedural standards and safeguards' for refugees in Turkey.<sup>194</sup> In Serbia, EASO plays a direct role in strengthening Serbia's asylum system, through training and technical assistance.<sup>195</sup>

### 3.4 Supporting Anti-Smuggling Legislation and Policy

Containment-oriented arrangements with third countries feature active EU support for the introduction and enforcement of national legislation to combat people smuggling. In Tunisia, Law 2004–6 was passed by the Ben Ali regime with encouragement from the EU.<sup>196</sup> In Niger, the EU supported the passage of the Law Against the Illicit Smuggling of Migrants in 2015.<sup>197</sup>

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<sup>191</sup> European Commission, Fourth Annual Report on The Facility for Refugees In Turkey 2020 8.

<sup>192</sup> [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables_en)

<sup>193</sup> [https://ec.europa.eu/home-affairs/publications/regional-development-and-protection-programme-north-africa-rdpp-na-niger\\_en](https://ec.europa.eu/home-affairs/publications/regional-development-and-protection-programme-north-africa-rdpp-na-niger_en).

<sup>194</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility\\_table.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility_table.pdf);

<sup>195</sup> <https://easo.europa.eu/sites/default/files/IPA-II-phase-II.pdf>

<sup>196</sup> Badalič, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' 91

<sup>197</sup> Loi 2015-36 Relative au Trafic Illicite de Migrants. Available at [https://www.unodc.org/res/cld/document/ner/2015/loi\\_relative\\_au\\_trafic\\_illicite\\_de\\_migrants\\_html/Loi\\_N2015-36\\_relative\\_au\\_trafic\\_illicite\\_de\\_migrants.pdf](https://www.unodc.org/res/cld/document/ner/2015/loi_relative_au_trafic_illicite_de_migrants_html/Loi_N2015-36_relative_au_trafic_illicite_de_migrants.pdf). For an overview of the content



### 3.5 Deployment of Frontex Liaison Officers

A common arrangement across all four countries is the deployment of Frontex Liaison Officers (FLO). Frontex has FLOs posted in Ankara (since 2016), Niamey (since 2017), Belgrade (since 2017) and Tunisia (since 2017).<sup>198</sup>

### 3.6 Use of Safe Third Country Concepts

With respect to two of the four transit countries analysed here, the EU or its member states rely on the safe third country or first country of asylum concepts as a containment mechanism. Under the EU-Turkey Statement, as discussed at length above, the assignation of Turkey as a safe third country under international and EU law for the purpose of asylum seekers being returned to Turkey remains a contested legal issue.

Hungary's designation of Serbia as a safe third country has been the subject of recent litigation before both the CJEU and the ECtHR. As discussed above, the CJEU held in May 2020 that asylum seekers were both exposed to deprivation of liberty in the Röszke transit zone between Hungary and Serbia and faced a risk of indirect *refoulement* in breach of Article 33 of the Asylum Procedures Directive.<sup>199</sup>

In *Ilias and Ahmed v. Hungary*, the ECtHR found Hungary in breach of its Article 3 ECHR obligations for failing to conduct an adequate assessment of the risks faced by the applicants upon return to Serbia, notwithstanding its designation as a safe third country.<sup>200</sup>

The use of safe third country concepts in both Turkey and Serbia highlight a clear tendency by the EU and its member states (in these cases, Greece and Hungary, respectively) to prevent access to substantive EU asylum law procedures. In the alternative, reliance on safe third country concepts is made in the hope that national asylum and protection systems in transit states are adequate.

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of the Law, see Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' 50-1.

<sup>198</sup> See <https://frontex.europa.eu/partners/liaison-officers-network/>; European Commission, Strengthening EU support for Tunisia JOIN(2016) 47 final 14.

<sup>199</sup> CJEU, judgment of 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU *FMS and Others*.

<sup>200</sup> *Ilias and Ahmed v. Hungary*, Application No. 47287/15, 21 November 2019



### 3.7 Evacuation Mechanisms

A form of mobility embedded in the broader containment approach, the EUTF entirely funds ETM in Niger.<sup>201</sup> The ETM evacuates highly vulnerable asylum seekers and refugees from detention in Libya to a transit site outside Niamey. This cohort are detained as a direct result of EU-supported pullback practices by the Libyan Coast Guard.<sup>202</sup> After arrival at the transit site, evacuees undergo an asylum procedure and UNHCR seeks to resettle refugees via its resettlement programme.<sup>203</sup>

The ETM in Niger is not unique. UNHCR has established transit mechanisms in both Romania and Rwanda, with the purpose of evacuating asylum seekers and refugees from detention in Libya.<sup>204</sup> In September 2019, UNHCR announced a new ETM in Rwanda for the evacuation of 500 likely refugees from Libya.<sup>205</sup> The ETM Rwanda is funded by the EUTF to the sum of EUR 10.3 million.<sup>206</sup>

### 3.8 Resettlement and Complementary Pathways

Finally, some of the arrangements outlined above include mobility through resettlement and complementary pathways, as set out in the GCR. In the absence of a Union Resettlement Framework, two EU resettlement schemes have been undertaken since 2015. In the first, 19,452 refugees were resettled to the EU between 2015 and 2017. In the second, 43,827 refugees of pledged 50,000 have been resettled thus far.<sup>207</sup> In addition, EU-Turkey arrangements have included some expansion of resettlement and complementary pathways – namely

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<sup>201</sup> <https://eutf.akvoapp.org/en/project/8022/#summary>

<sup>202</sup> See, for example, Sergio Carrera and Roberto Cortinovis, 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility? CEPS Paper in Liberty and Security in Europe No. 2019-10, June 2019' (2019) ; Annick Pijnenburg, 'From Italian pushbacks to Libyan pullbacks: Is Hirsi 2.0 in the making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396

<sup>203</sup> UNHCR, Niger Emergency Transit Mechanism (ETM) Factsheet (December 2019). For a critical overview of the operation of the ETM in Niger, see ASGI, 'The "Emergency Transit Mechanism" program and the resettlement from the Niger: Legal analysis, current and future concerns' (November 2018) available at <https://www.statewatch.org/media/documents/news/2019/jul/ASGI%20Resettlement%20ETM%20-%20ENGLISH.pdf> accessed 29 September 2020.

<sup>204</sup> As far back as 2008, the Emergency Transit Centre (ETC) was established in Romania under a tripartite agreement between the Romanian government, UNHCR and IOM.

<sup>205</sup> <https://www.unhcr.org/news/press/2019/9/5d5d1c9a4/joint-statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html>

<sup>206</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6301](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6301)

<sup>207</sup> Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways 2-3.



humanitarian admission – to the EU. EU member states resettled 25,560 refugees from Turkey between April 2016 and December 2019.<sup>208</sup> Resettlement has further been scaled up from Niger, via the ETM, with 2,454 refugees resettled since 2017.<sup>209</sup> Relatedly, France has carried out small-scale extraterritorial asylum processing for the purposes of resettlement since 2017, whereby asylum seekers evacuated under the ETM have their international protection claims considered by the French Office for the Protection of Refugees and Stateless Persons.<sup>210</sup> Asylum seekers granted international protection are then resettled in France.

Beyond resettlement, a number of EU member states have admitted refugees in Turkey under complementary pathways. Notably, following the EU-Turkey Statement, Germany established HAP Turkey. Under this programme, 13,694 places originally planned for EU relocation were reassigned to HAP Turkey.<sup>211</sup>

## 4 Alignment with GCR objectives

This working paper is set against the backdrop of the implementation of the GCR, two years after the Compact's adoption by the United Nations General Assembly and one year after the first Global Refugee Forum.<sup>212</sup> While the implementation of the GCR has obviously been disrupted by the global COVID-19 pandemic,<sup>213</sup> it is important to highlight that thus far EU arrangements do not reflect significant engagement with the objectives of the GCR. Notably, for example, the GCR is not referred to in EU publications on the arrangements discussed, nor is the language of the GCR presently used in relation to key instruments, such as the EUTF or the Madad Fund.

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<sup>208</sup> However, some of this resettlement has taken place under the resettlement schemes noted above. See Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways 3 fn 8.

<sup>209</sup> UNHCR, 'Emergency Transit Mechanism' June 2020 update  
<https://reliefweb.int/sites/reliefweb.int/files/resources/77083.pdf>

<sup>210</sup> Anja Palm, *A French Processing Centre in Niger: The first step towards extraterritorial processing of asylum claims or (just) good old resettlement?* (2018).

<sup>211</sup> Pauline Endres de Oliveira, 'Humanitarian Admission to Germany—Access vs. Rights?' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe* (Humanitarian Admission to Europe, Nomos Verlagsgesellschaft mbH & Co. KG 2020) 206.

<sup>212</sup> For an account of the Forum, see Gillian D Triggs and Patrick CJ Wall, 'The Makings of a Success': The Global Compact on Refugees and the Inaugural Global Refugee Forum' (2020) 32 *International Journal of Refugee Law* 283

<sup>213</sup> For an account of the impact of the pandemic on the GCR, see Danish Refugee Council, *Exploring the impact of COVID-19 on the Global Compact on Refugees* (2020). See also, UNHCR, *The role of the Global Compact on Refugees in the international response to the COVID-19 pandemic* (Geneva, 2020).



As noted at the outset, this working paper is primarily concerned with the alignment of the EU's arrangement with three GCR objectives:

- easing pressures on host countries
- enhancing refugee self-reliance, and
- expanding access to third country solutions.

This section briefly discusses the scope of these three objectives, bearing in mind that they may remain contested, as well as making some preliminary findings on the alignment of the EU's arrangements with Turkey, Serbia, Niger and Tunisia with respect to each objective.

*Easing pressures on host countries* is not defined in the GCR, but arguably primarily involves the provision of material support (notably development assistance) to states in the Global South hosting significant numbers of refugees from Global North states and other funding actors.<sup>214</sup> EU–Turkey arrangements, notably, provides a useful example of EU policy in line with this objective, given Turkey hosts the most refugees in the world and the FRIT plays a role in alleviating the financial pressure on Turkey. In Serbia, EU funding under both IPA-II and the Madad Fund supports the protection capacity of Serbian authorities. In Niger, EUTF funding includes support to the Nigerian asylum system and material assistance to refugees in Niger. In Tunisia, while the Mobility Partnership lists national protection as a priority, current arrangements are generally focused on return and border control.

*Self-reliance* has been defined by UNHCR as 'the social and economic ability of an individual, a household or a community to meet essential needs (including protection, food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity.'<sup>215</sup> In the context of the GCR, self-reliance is focused on access to employment and education for refugees in first countries of asylum, with the overall aim of providing refugees opportunities to live in dignity.<sup>216</sup>

A significant number of EU FRIT projects are focused on enhancing refugee self-reliance, with an emphasis on longer-term socio-economic rights for refugees in Turkey. For example, at the 2019 Global Refugee Forum, Turkey pledged to construct kindergartens and schools for Syrian children in Turkey under the

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<sup>214</sup> Randall Hansen, 'The Comprehensive Refugee Response Framework: A Commentary' (2018) 31 *Journal of Refugee Studies* 131. Easing pressure on host countries could involve the opening up of mobility channels, overlapping with the expansion of third country solutions.

<sup>215</sup> UNHCR, *Self-reliance Handbook* (2006) 1.

<sup>216</sup> Hansen, 'The Comprehensive Refugee Response Framework: A Commentary'



auspices of FRIT funding.<sup>217</sup> The GCR objective of self-reliance is less marked in Serbia, Niger and Tunisia, countries which are more classical 'transit' states for asylum seekers on the move to the EU. Nevertheless, one EUR 10 million EUTF project worth focuses on refugee resilience in Niger's Diffa region,<sup>218</sup> while the Madad Fund included a food assistance project in government-run reception centres in Serbia.<sup>219</sup>

Finally, *expanded access to third country solutions* is conceived of in GCR as the increased use of resettlement and complementary pathways to admission, comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees.<sup>220</sup> EU–Turkey arrangements reflect some expansion of third country solutions by way of resettlement. While resettlement under the 'one-for-one' arrangement envisaged in the EU-Turkey Statement has not really materialised – given the very low number of Syrians returned under the arrangement – EU Member States resettled 25,560 refugees from Turkey between April 2016 and December 2019. With respect to complementary pathways, Germany established a humanitarian admission programme for Syrians in Turkey (HAP Turkey). In contrast to resettled refugees, beneficiaries under HAP Turkey currently receive a shorter residence permit and wait longer to access permanent residence, reflecting the temporary object of humanitarian admission.<sup>221</sup>

In Niger, the establishment of the ETM and resulting resettlement represents an expansion of third country solutions from the country. While EU-Tunisia arrangements include a focus on future potential legal migration avenues, this element is primarily applicable to Tunisians seeking employment or labour opportunities in the EU, rather than third country solutions for refugees in Tunisia.<sup>222</sup> No resettlement or complementary pathways are currently operating in Serbia.

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<sup>217</sup> <https://globalcompactrefugees.org/index.php/channel/pledges-contributions>

<sup>218</sup> EUTF, 'Projet intégré d'appui à la résilience des populations vulnérables réfugiées, déplacées, retournées et hôtes de la région de Diffa, Niger' [https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables\\_en](https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables_en) accessed 17 November 2020.

<sup>219</sup> European Commission, 'EU Trust Fund for Syria' <https://eutf-syria.akvoapp.org/> accessed 13 November 2020.

<sup>220</sup> Compact on Refugees paras 7 and 95.

<sup>221</sup> de Oliveira, 'Humanitarian Admission to Germany–Access vs. Rights?' 218; <https://resettlement.de/en/humanitarian-admission-programmes/>.

<sup>222</sup> Tunisian civil society organisations have called for a facilitated visa regime for Tunisian nationals. See Pastore and Roman, 'Framing migration in the southern Mediterranean: how do civil society actors evaluate EU migration policies? The case of Tunisia' 15.





## 5 Conclusions

The 2015 European Agenda on Migration placed cooperation with third countries as a central element of the EU's approach to asylum and migration control.<sup>223</sup> The 2020 New Pact on Migration and Asylum reiterates the central role of such cooperation in managing migration to the EU.<sup>224</sup> Between the Agenda and Pact, the passage in December 2018 of the Global Compact for Refugees was an attempt at a 'more equitable basis for predictable and equitable burden- and responsibility-sharing' among the UN member states.<sup>225</sup>

While this working paper has the primary aim of mapping EU arrangements with selected third countries, a number of trends are worth noting as preliminary conclusions to inform ASILE's future research. This final section thus briefly addresses *informalisation* in EU third country arrangements; hitherto *limited uptake of the GCR* in such arrangements; and the current *dominance of containment* in EU policymaking.

### 5.1 Informalisation of Instruments, Plurality of Actors

Of the EU instruments with third countries since 2015 mapped above, to our knowledge the only instrument of an explicitly legally binding nature is the Status Agreement between the EU and Serbia with respect to Frontex migration control operations on Serbian territory.<sup>226</sup> This is in keeping with the clear trend of informalisation in EU external relations more broadly, and asylum policy in particular.<sup>227</sup> While it is beyond the scope of this working paper to assess the particular implications of such policy trajectories, a clear concern here is a tendency for EU policy to be conducted beyond the limits of binding law. The use of informal arrangements, such as the EU-Turkey Statement, seem designed to avoid the triggering of substantive EU law, thus potentially placing EU activities beyond the pale of EU law. Such informality further weakens transparency and accountability within the EU legal order. Equally, such arrangements create

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<sup>223</sup> European Commission, A European Agenda on Migration COM(2015) 240 final, Brussels, 13.5.2015, COM(2015) 240 final.

<sup>224</sup> European Commission, Communication on a New Pact on Migration and Asylum, Brussels, 23.9.2020 COM(2020) 609 final.

<sup>225</sup> Global Compact on Refugees para 3.

<sup>226</sup> Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia.

<sup>227</sup> Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, 2019, 24.



parallel concerns under general international law, including in terms of attribution of conduct for internationally wrongful acts.<sup>228</sup>

Simultaneously, while EU instruments with third countries are increasingly informal, the actors implementing them are increasingly varied. While EU agencies EASO and Frontex are physically present in a number of third country arrangements, notably with Serbia, EU financial instruments also fund a broad range of international organisations (notably IOM and UNHCR) and international and national NGOs as implementing partners. While the involvement of multiple actors in this area is not new as such, the dizzying array of projects and actors under, notably, the EUTF and the Madad Fund, require further research in the relevant third countries.<sup>229</sup>

## 5.2 Limited Uptake of the GCR

Thus far, EU arrangements do not reflect significant engagement with the objectives of the GCR. Indeed, the GCR remains a relatively new instrument and its implementation has been disrupted by the global COVID-19 pandemic.<sup>230</sup> It is important to note here that while the GCR is a non-binding instrument, it is explicitly grounded in hard international law, in particular the 1951 Convention and its 1967 Protocol.<sup>231</sup> In turn, these international instruments anchor the Treaty on the Functioning of the European Union and Charter of Fundamental Rights of the European Union as the foundations of the Common European Asylum System.

Nevertheless, the non-binding nature and generality of the GCR's objectives may have contributed, or facilitated, the political tendency, limiting the Compact's impact on EU arrangements to date. For example, the GCR is not referred to in EU publications on the arrangements discussed above, nor is the language of the GCR presently used in relation to key instruments, such as the EUTF or the Madad Fund. Perhaps most tellingly, even while the New EU Pact on Migration and Asylum is also a non-binding policy document, the GCR is only mentioned in

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<sup>228</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd Session, UN Doc. A/56/10 (2001a)

<sup>229</sup> Geddes and Lixi, 'New actors and new understandings in European Union external migration governance? The case of EU-Tunisian migration relations' 63.

<sup>230</sup> For an account of the impact of the pandemic on the GCR, see Danish Refugee Council, *Exploring the impact of COVID-19 on the Global Compact on Refugees* (2020). See also, UNHCR, *The role of the Global Compact on Refugees in the international response to the COVID-19 pandemic* (Geneva, 2020).

<sup>231</sup> Global Compact on Refugees para 3.



the EU Pact with respect to third country solutions to admission in the EU.<sup>232</sup> In sum, while current EU arrangements include some clear overlap with GCR objectives, more substantial alignment with the Compact remains to be seen.

### 5.3 Containment as the Dominant Paradigm in EU Arrangements

EU arrangements with Turkey, Serbia, Niger and Tunisia in this field show a predominant focus on containment in EU policymaking. While mobility via the GCR's suite of third country solutions are present in certain EU arrangements, they remain relatively small-scale and often *ad hoc* in nature. Moreover, mobility policies are often embedded in broader containment approaches, notably in the case of the EU-Turkey Statement's 'one-for-one' resettlement arrangement and the ETM in Niger as a corollary to EU policy in Libya. As a result, while containment remains the dominant paradigm in EU arrangements, a dynamic of 'contained mobility' can also be observed.<sup>233</sup>

The containment-heavy focus of current EU arrangements make access to international protection in third states particularly crucial, with onward mobility options remaining rare. While further research is required to make definitive findings on access to asylum in third countries of transit, this working paper indicates that current EU arrangements sometimes fail to allow access to international protection. Whether Turkey and Serbia, for example, can lawfully be considered a 'safe third country' under international and EU law remain an open question. In Niger, there appears to be little uptake of national protection, though UNHCR reports the country is turning into an 'alternative space for protection'.<sup>234</sup> In Tunisia, the current absence of a national asylum system forecloses the possibility of gaining national protection in the country.

Finally, a key area for further research relates to the legal limits of such containment arrangements. While this working paper has flagged a set of current

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<sup>232</sup> Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609, and Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C(2020) 6467, 23 September 2020. See further, Sergio Carrera, 'the New EU Pact on Migration and Asylum' CEPS Policy Insight No. 2020-22, September 2020.

<sup>233</sup> For an overview of the relationship between containment and mobility in EU asylum policy vis-à-vis the GCR, see Carrera and Cortinovis, *The EU's Role in Implementing the UN Global Compact on Refugees: Contained mobility vs International Protection*.

<sup>234</sup> UNHCR Niger, Factsheet Mixed Movements - November 2020, <https://data2.unhcr.org/en/documents/details/83051> accessed 17 November 2020.



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and potential legal questions, further research is required to unpack the applicability of international human rights, refugee law and EU law standards to these EU arrangements.



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The ASILE project has  
received funding from the  
European Union's Horizon  
2020 research and innovation  
programme under grant  
agreement No 870787

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