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A Renewed Framework to Access International Protection: Seeking Asylum in the EU and in Partner Countries Under the New Pact and Informal Cooperation Agreements

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Aknowledgments

To him.

For the unconditional support.

For the extreme patience.

For always believing in me, especially when I do not.

A Renewed Framework to Access International Protection: Seeking Asylum in the EU and in Partner Countries Under the New Pact and Informal Cooperation Agreements

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Introduction

Effective access to international protection procedures is a right for all those fleeing their home country because of war, persecution or other serious human rights violations. However, there have been in recent years, a few developments challenging the traditional interpretation around the operationalization of such procedures in Europe.

This right to asylum is recognized under both international and EU law. The Charter of Fundamental Rights of the European Union (EU) includes the right to seek asylum in its article 18, which "shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees"[1]. The principle of *non-refoulement,* constituting the core of the 1951 Geneva Convention, forbids the country that receives asylum seekers from returning them to a country where they could be in danger of persecution based on "race, religion, nationality, membership of a particular social group, or political opinion"[2]. Consequently, the right to access international protection implies obligations for signatory states: "in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures"[3].

These obligations have been transposed into EU law since 1999, more specifically in the Common European Asylum System (CEAS), through a set of legislative instruments aimed at harmonizing asylum procedures and standards across member states. It establishes that "every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure"[4]. Put differently, this means that when implementing the EU asylum policy for the reception of asylum seekers and refugees across the EU, the EU and its Member States are mandated to ensure that access to international protection[5] remains effective.

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1 The Charter of Fundamental Rights of the European Union (EU), Title II - Freedoms - Article 18 - Right to asylum, *Official Journal 303 , 14/12/2007*

2 UNHCR, 1951 Convention and Protocol Relating to the Status of Refugees.

3 UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

4 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ L 180,* 29.06.2013, Recital 25.

5 In the EU acquis two forms of international protection exist: the subsidiary protection and the refugee status. In this work, the words international protection and asylum refer to both of them and are used interchangeably.

In early 2024 a "historic agreement"[6] was reached to reform the CEAS, culminating with the adoption of the New Pact on Migration and Asylum[7]. Additionally, in recent years, the EU (and, in some cases, member states as well) has introduced a number of cooperation agreements with third countries with the aim of outsourcing border management activities and asylum responsibilities, while facilitating the return and readmission of third-country nationals who are not allowed to remain in the EU. As for the package of reforms introduced by the New Pact, it is the result of more than three years of negotiations following its proposal in 2020[8]. According to the Commission, it "has been shaped by the lessons of the inter-institutional debates since the Commission proposals of 2016 to reform the [CEAS]"[9]. Presented as a "fresh start"[10], the New Pact aims to tackle the challenges posed by 'mixed migration flows' by emphasizing the need to ensure robust and fair management of external borders and streamline procedures on asylum and return, while establishing mutually beneficial partnerships with key third countries, both of origin and transit. However, the priorities underlying this package of legislative reforms echoes the measures undertaken to respond to what is referred to as the 2015 "migration crisis", and which have been criticized for having the effect of limiting the access to international protection procedures.

Following the significant surge in the arrival of asylum seekers in 2015 which revealed substantial systemic flaws in the implementation of the CEAS, the Commission Junker proposed a legislative package to reform the CEAS in 2016[11]. Along with the attempt to respond to the 'crisis' by means of legislation, temporary measures to address the 'crisis' were also undertaken, such as the establishment of hotspots, "facilities for initial reception, identification, registration and fingerprinting of asylum-seekers and migrants arriving in the EU by sea – at the external borders of the EU in Greece and Italy"[12]. Additionally, an agreement was concluded with Turkey aiming at externalizing asylum responsibilities by facilitating the

6 European Commission, "Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum", News Article, 20 December 2023.

7 European Council of the European Union, "The Council adopts the EU's pact on migration and asylum", Press release, 14 May 2024.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A New Pact on Migration and Asylum, COM/2020/609 final, 23.9.2020.

9 *Ibidem*.

10 European Commission, "A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity", Press Release, 23 September 2020, accessed 1 May 2024.

11 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, COM/2015/0240 final, 13.5.2015.

12 Luyten, Katrien and Orav, Anita, "Hotspots at EU external borders - State of play", European Parliamentary Research Service - Briefing, September 2020, p. 2

readmission of irregular migrants who reached the EU transiting from Turkey. While the negotiations of the 2016 reform package failed due to divergent views on burden-sharing established by the Dublin Regulation, substantial criticisms arose with regard to the hotspot approach and the EU-Turkey deal, whose combination resulted in limiting access to international protection[13].

Recent cooperation agreements which have been concluded between the EU and third countries present a number of similarities with the 2016 EU-Turkey deal. The EU-Tunisia Memorandum of Understanding (Hereafter EU-Tunisia MoU)[14], concluded in the summer of 2023 by a delegation comprising Ursula von der Leyen and the Prime Ministers of Italy and the Netherlands, is the first deal reached at EU level since the 2015 "migration crisis". Agreements with Egypt[15] and Lebanon[16] have followed, both shaped on the model of the EU-Tunisia MoU. The latter consists of a comprehensive agreement covering various topics, including migration. As we will see, as in the EU-Turkey deal, priority is given to collaboration for border management activities and return and readmission measures. The Pact itself puts the establishment of partnerships with third countries at the core of the renewed system it aims to establish. Yet, it seems to ignore the large number of criticisms associated with these deals, including the assumption that countries like Tunisia will ensure effective protection to asylum seekers.

The priorities and legislative measures established in the New Pact and the recent conclusion of cooperation agreements with third countries have the potential to limit access to international protection to the extent that they may lead to replicate the approach adopted in response to the 2015 "migration crisis". Consequently, the question this research aims to answer is how is the EU reconciliating its legal obligation to ensure effective access to international protection with the priority given to reinforcing border management measures and streamlining asylum and return procedures. To answer to this question, our analysis will delve into the New Pact, drawing on the texts of the provisional agreements of each instrument

13 Papadopoulou, Aspasia et al, "The implementation of the hotspots in Italy and Greece - A study", ECRE et al, 2016.

14 European Commission, "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia", Press release, 16 July 2023, accessed 28 April 2024. (Hereafter: EU-Tunisia MoU)

15 European Commission, "Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union", News Article, 17 March 2024.

16 Sallon, Hélène and Jacqué, Philippe, "EU-Lebanon deal aims to prevent Syrian refugees from reaching Cyprus", *Le Monde*, 4 May 2024.

adopted by the European Parliament on 10 April 2024[17], and the EU-Tunisia MoU, whose model was reapplied to the agreements that followed it. This analysis aims to provide a comprehensive overview of how the EU, both through legislative reforms and partnerships with third countries, is shaping the framework for accessing international protection.

This work will begin with some preliminary remarks on the EU asylum policy, that will highlight the interconnection between the priorities established in the New Pact and those pursued throughout the cooperation agreements with third countries. The first chapter will examine the main measures adopted to reinforce migration management at the EU external border, focusing on the three border procedures established by the Pact: Screening Regulation[18], the Asylum Procedure Regulation (APR)[19] and the Return Border Procedure Regulation[20]. The second chapter will focus on the legal provisions regulating the return of third country nationals who are not authorized to remain in the territory of the Member States where they have applied for asylum to their country of origin, first country of asylum or a safe third country. The concerns related to considering Tunisia as "safe" will be discussed in the light of the return and readmission measures agreed in the EU-Tunisia MoU. Finally, the third chapter analyzes the interplay between human rights compliance and accountability within the framework of EU asylum policy. Both the legal fiction on non-entry and the legal status of recent cooperation agreements with third countries will be discussed in the light of the obligations established by EU and international law. Overall, this work will assess the potential impact of the legislative reforms under the New Pact and the conclusion of cooperation agreements like the EU-Tunisia MoU on the right to seek asylum in the EU.

Preliminary Remarks: The Double Dimension of EU Asylum Policy

The EU asylum policy encompasses both an internal and external dimension which are intricately connected. While the internal dimension primarily refers to the CEAS[21], the external

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17 European Parliament, "MEPs approve the new Migration and Asylum Pact", Presse Releases, 10 April 2024, accessed 1 May 2024.

18 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of … introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 3.4.2024.

19 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 3.4.2024.

20 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a return border procedure, and amending Regulation (EU) 2021/1148, 3.4.2024.

21 Parusel, Bernd, "The external dimension of EU migration policy – new proposals, possibilities, and risks", *Sieps* – Swedish Institute for European Policy Studies, February 2023, p. 1.

dimension consists of "an intricate matrix of policy measures, legal instruments, and financial transfers for cooperation with third countries on the management of migration, borders and asylum"[22]. The interconnection between these two dimensions is made particularly clear by the Commission it its communication on the New Pact on Migration and Asylum: the response of the EU to existing challenges in this area needs "to include the EU's relationships with third countries, as the internal and external dimensions of migration are inextricably linked: working closely with partners has a direct impact on the effectiveness of policies inside the EU"[23].

The Internal Dimension: The CEAS and the New Pact on Migration and Asylum

As mentioned above, the internal dimension primarily refers to the CEAS[24], the legislative framework aimed at harmonizing asylum procedures and standards across member states. Since the 1990s, efforts continued to create a unified asylum process, responding to shifts in the internal market and geopolitical dynamics[25]. The Lisbon Treaty of 2009 solidified this process by providing the legal basis for the development and deepening of the CEAS. Article 78 TFUE states as follows: "[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement"[26].

Currently governed by five legislative instruments and one agency, the CEAS aims at aligning asylum procedures[27], sets up standards for reception conditions for asylum seekers[28], outlines criteria for granting international protection[29], and determines which member state is

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22 *Ibidem*.

23 European Commission, A New Pact on Migration and Asylum, *op. cit.*, see introduction..

24 Parusel, Bernd, *op. cit*., p. 1.

25 For a comprehensive overview of the establishment and development of the CEAS, see: Romano, Deborah, "Le Régime d'asile européen commun et le système de Dublin : une approche inadéquate de l'asile", Faculté des sciences économiques, sociales, politiques et de communication, Université Catholique de Louvain, 2021.

26 Consolidated Version of the Treaty on the Functioning of the European Union, Part Three: Union Policies and Internal Actions - Title V: Area Of Freedom, Security And Justice - Chapter 2: Policies on border checks, asylum and immigration - Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC), *Official Journal 115,* 09/05/2008.

27 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ L 180*, 29.6.2013.

28 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ L 180,* 29.6.2013.

29 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ L 337,* 20.12.2011.

responsible for processing asylum applications[30] with the support of EURODAC[31]. The European Union Agency for Asylum (EUAA) provides support to Member States in implementing the CEAS provisions. The Return Directive[32], adopted outside the framework of the CEAS since it does not apply exclusively to applicants for international protection, is also to be considered at the heart of EU asylum policy. However, the effective implementation of this framework has been object of substantial criticisms, especially in responding to the large flux of asylum seekers in 2015 and 2016, what is known as "migration crisis". This prompted a first attempt to reform the CEAS, with the Junker Commission proposing a recast of the CEAS in 2015[33]. Yet, negotiations reached an impasse due to substantial disagreements on burden-sharing and solidarity measures.

The New Pact on Migration and Asylum, as articulated by the European Commission, "has been shaped by the lessons of the inter-institutional debates since the Commission proposals of 2016 to reform the Common European Asylum System"[34]. This comprehensive framework aims to preserve prior compromises while incorporating new elements to achieve a balanced approach encompassing all facets of asylum and migration policy[35]. The New Pact, as of its adoption in April 2024, encompasses various legislative texts[36], some amending existing instruments and others being completely new. The new instruments introduced by this package

30 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *OJ L 180,* 29.6.2013.

31 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), *OJ L 180,* 29.6.2013.

32 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348,* 24.12.2008.

33 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, COM/2015/0240 final, 13.5.2015.

34 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A New Pact on Migration and Asylum, COM/2020/609 final, 23.9.2020.

35 *Ibidem*.

36 European Parliament, "MEPs approve the new Migration and Asylum Pact", Press Releases, 10 April 2024.

of reforms include the Screening Regulation[37], establishing uniform rules for identifying non-EU nationals upon arrival, the Asylum Migration Management Regulation[38] aims to introduce a new solidarity mechanism among Member States and delineate clear rules on responsibility for asylum applications, and the Crisis and Force Majeure Regulation[39] ensures EU preparedness to address future crises, including migrant instrumentalization. Additionally, the Asylum Procedures Directive is now a Regulation[40] aims to expedite asylum, return, and border procedures. Finally, the New Pact addresses return extensively across its legislative instruments[41], notably through the Border Procedure Regulation[42], and stresses the need to establish mutual beneficial partnerships with third countries.

As mentioned early in this work, the Pact's prioritization of swift asylum and return procedures at the EU external border while collaborating with countries of origin and transit to manage irregular migration will be further analyzed in the following chapters to highlight how these reforms aim at reshaping the conditions to access international protection.

The External Dimension: Cooperation Agreements with Third Countries and the EU-Tunisia MoU

As for the external dimension of EU asylum policy, it involves engaging with third countries and regions to manage migration flows, enhance border security, and address root causes of displacement[43]. It consists of "an intricate matrix of policy measures, legal instruments, and financial transfers for cooperation with third countries on the management of migration, borders and asylum"[44]. The main legal basis for the conclusion of agreements with third countries in this area is article 79 TFEU, which provides for the development of a "common immigration policy aimed at ensuring, at all stages, the efficient management of migration

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37 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of … introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 3.4.2024.

38 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of ... on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 3.4.2024.

39 Provisional Agreement on the Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, 3.4.2024.

40 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 3.4.2024.

41 Moraru, Madalina, "The new design of the EU's return system under the Pact on Asylum and Migration", *EU Odysseus Network - EU Immigration and Asylum Law and Policy*, 14 January 2021.

42 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a return border procedure, and amending Regulation (EU) 2021/1148, 3.4.2024.

43 Parusel, Bernd, *op. cit.*, p. 1.

44 *Ibidem*.

flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of illegal immigration and trafficking in human beings"[45]. Additionally, "[t]he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States"[46]. As we will see in the third chapter of this study, article 218 TFUE, establishing the procedure for the conclusion of international agreements, applies.

This external dimension has evolved over time, and as stressed by Bernd, it "tends to reappear on the agendas of EU decision-making bodies whenever migration flows increase and are perceived as a threat"[47]. In response to the 2015 "migration crisis", the Commission, in its European Agenda on Migration[48], proposed enhancing this external dimension through a partnership framework with third countries. While some partnerships, like those with Lebanon and Jordan, led to formal compacts, others were implemented through ad-hoc programs combining security- and development-oriented measures, link the one with Niger[49]. This strategy has faced criticism for its inconsistent support from member states and limited impact on returns[50]. The 2020 New Pact aims to address these shortcomings by fostering a more cohesive "team Europe" approach to migration policy, integrating both internal and external aspects more effectively[51].

In fact, in addition to the efforts to reform the internal dimension of EU asylum policy, the EU and its Member States are pursuing an approach aimed at externalizing the management of migration through collaboration with third countries. Already in 2020, the Commission announced a shift of paradigm in engaging with key external partners on migration, emphasizing an approach which will be tailor-made and based on a joint assessment of the interests of both the EU and its partner countries[52]. In November 2022, the European

45 Consolidated version of the Treaty on the Functioning of the European Union, Part Three - Union Policies and Internal Actions - Title V - Area of Freedom, Security and Justice, Chapter 2 - Policies On Border Checks, Asylum And Immigration, Article 79 (ex Article 63, points 3 and 4, TEC), *OJ C 202,* 7.6.2016.
46 *Ibidem*.
47 Parusel, Bernd, *op. cit.*, p. 1.
48 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, COM/2015/0240 final, 13.5.2015.
49 Pichon, Eric, "The external dimension of the new pact on migration and asylum - A focus on prevention and readmission", European Parliamentary Research Service – Briefing, April 2021, p. 4.
50 *Ibidem*.
51 *Ibidem.*
52 European Commission, "New Pact on Migration and Asylum: Questions and Answers", 23 September 2020, accessed 1 May 2024.

Commission unveiled its Plan for the Central Mediterranean Route[53], aligning with Italy's strategic focus[54]. Following years of internal discord among EU member states regarding migration and asylum policies, there is now a convergence of interests in bolstering collaboration with external partners to curb irregular migration[55]. This has resulted in the proliferation of agreements with third countries that are not only questionable in their content but also in their legal status. Like the 2016 EU-Turkey deal, aiming at facilitating the return of irregular migrants who reached the EU transiting from Turkey, agreements with Libya, Tunisia, and Egypt all aim to promote cooperation in managing migration flows by externalizing a series of responsibilities. The role that countries like Tunisia play in the management of migration flows is of paramount importance for the EU and its Member States.

In the past years, Tunisia has emerged as a focal point for the EU and its Member States, with Italy taking particular interest. This shift in attention is primarily driven by the constant rising influx of unauthorized migrants and asylum-seekers departing from Tunisia and arriving in Europe, mainly in Italy[56]. Notably, Tunisia has replaced Libya as the primary departure point in the Central Mediterranean region[57]. To comprehend these evolving migration patterns, one must consider first "the insecurity nexus connecting Tunisia to Libya"[58]: the surge in departures from Tunisia since 2017 can be attributed, in part, to the decreased accessibility of the Libyan route. Traffickers have demonstrated their ability to swiftly adjust to evolving conditions, resulting in an increasing proportion of migrants heading to Europe originating from Sub-Saharan countries, while Tunisians remain the predominant nationality among migrants undertaking the journey[59]. Second, the deepening economic crisis and the escalating authoritarian tendencies within Tunisia: "[b]eyond its effects on the local population and civil society, the latter also manifests in severe cases of discrimination and violence against sub-

53 European Commission, "EU action plan for the Central Mediterranean", 21 November 2022.
54 Barana, Luca and Okyay, S. Asli, "Shaking Hands with Saied's Tunisia: The Paradoxes and Trade-offs Facing the EU", *Istituto Affari Internazionali Commentaries*, 7 August 2023, p.1.
55 *Ibidem*.
56 For a comprehensive overview of the migration trends from Tunisia to Europe since 2009 as well as of the EU-Tunisia cooperation on migration and beyond, see: Colombo, Silvia, "Understanding migration from Tunisia: Domestic marginalisation, regional instability and the EU's over-securitisation approach", in Okyay S. Alsi, Barana Luca and Boland Colleen, "Moving Towards Europe – Diverse Trajectories and Multidimensional Drivers of Migration across the Mediterranean and the Atlantic", published by Peter Lang, 2023, Chapter 8, pp. 187-206.
57 Barana, Luca and Okyay, S. Asli, *op. cit.*, p. 1.
58 Colombo, Silvia, *op. cit.*, p. 198.
59 Colombo, Silvia, *op. cit.*, p. 198.

Saharan migrants residing in or transiting through Tunisia"[60]. Under rising pressure from Italy, the EU has responded by prioritizing Tunisia[61].

As for the content of the MoU, it outlines a comprehensive strategic partnership focusing on various key areas of cooperation. Overall, the memorandum outlines a comprehensive framework for cooperation between Tunisia and the EU across various sectors, emphasizing mutual benefit and sustainable development. Firstly, there is a commitment to enhance macroeconomic stability through EU support for Tunisia's economic growth and reforms. In specific sectors like agriculture, circular economy, digital transition, and air transport, the partnership aims to foster sustainable development through joint initiatives and projects. The partnership also emphasizes people-to-people contacts, aiming to enhance cultural, scientific, and technical exchanges, as well as cooperation in education and research. Finally, Migration and mobility are addressed through a holistic approach, focusing on addressing root causes of irregular migration, supporting sustainable development, and combating human trafficking while promoting legal pathways for migration and facilitating mobility between the two parties. Despite the comprehensiveness of this cooperation agreement, "for the EU the most important aspect of the partnership package is getting Tunisia on board to stem irregular migration towards Europe"[62]. While the agreement underscores the EU's commitment to incentivize cooperation on migration-related issues, the specifics of these negotiations remain opaque. What is known is that the EU will allocate approximately €100 million to Tunisia for migration control measures, along with a macro-financial aid package of €900 million covering various areas such as trade, investment, and energy cooperation. In exchange, Tunisia commits to cooperating on border security and facilitating the return of Tunisian citizens who irregularly enter or remain in Europe[63].

However, the conclusion of the EU-Tunisia MoU, alike other similar agreements, has raised several concerns which this work will assess in the light of the legislative reforms under the New Pact. The aim of this study is, in fact, of examining the EU's currently strategy encompassing both the internal and external dimensions of EU asylum policy and its impact on the right to seek asylum. Border management measures, a priority in both the New Pact and the EU-Tunisia MoU, will be the focus of the next chapter of this work.

60 Barana, Luca and Okyay, S. Asli, *op. cit.,* p.1.
61 *Ibidem.*
62 Barana, Luca and Okyay, S. Asli, *op. cit*., p.2.
63 Natter, Katharina, "Reinventing a Broken Wheel", *Verfassungsblog*, 5 September 2023.

1. The EU External Border: Consolidating Old Patterns?

What can be observed from the legislative instruments composing the Pact is that "the entire functioning of the 'new' system is built on the assumption of accelerated processing of asylum claims at the external borders and swift return to third countries of those migrants who are not found to be eligible for international protection in the EU"[64]. Since its proposal, emphasis has been put on the fact that "[t]he external border is where the EU needs to close the gaps between external border controls and asylum and return procedures"[65]. Consequently, the establishment of "faster, seamless migration processes and stronger governance of migration and borders policies"[66] is the core element of this new package of legislation. This objective is therefore to be pursued through, on one hand, legislative reforms and, on the other hand, "through comprehensive, balanced and tailor-made partnerships"[67]. Before delving into both aspects, it is important to bear in mind that all types of border management measures, from legal procedures to operational partnerships, should be aimed at ensuring effective "access to the territory and to fair and efficient asylum procedures"[68].

Regarding partnerships with third countries, the EU-Tunisia MoU showcases the priority given to border management. Both parties state that they aim to combat irregular migration to prevent loss of life and to dismantle the criminal networks involved in smuggling and trafficking[69]. They claim to enhance cooperation through an operational partnership, focusing on effective border management and the return of irregular migrants in line with international law. However, the MoU does not provide any specific details on how these goals will be achieved. In fact, the MoU lacks clarity about the division of responsibilities between the EU and Tunisia when it comes to border management measures. This ambiguity creates uncertainty regarding legal accountability, as the MoU does not clearly outline who is responsible for border control activities.

The reasons behind this ambiguity may be related to differing policy objectives between the two parties. While the EU has pledged significant financial support to Tunisia to enhance border management, Tunisia maintained that it is not a destination for irregular migrants and insists on retaining control exclusively over its borders. If the EU's primary objective is to

64 Barana, Luca and Okyay, S. Asli, *op. cit.*, p. 3.
65 *Ibidem*.
66 *Ibidem*.
67 *Ibidem*
68 UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.
69 EU-Tunisia MoU, *op. cit*.

strengthen collaboration with key third countries to reinforce external border management, countries like Tunisian are likely to use this kind of partnerships not only to gain international legitimacy but also to increase their leverage, seeking greater concessions tied to the much-needed financial assistance[70]. This is evidenced by Tunisian President Kais Saied's rejection of EU funding[71] but also by previous experience with Turkey[72]. This misalignment not only undermines the sustainability of these agreements, but also leads to vague and opaque language concerning the allocation of responsibilities at the expenses of a clear framework for migration flows management and access to international protection in compliance with the obligations established by the treaties.

Another problematic aspect is the MoU's reliance on traditional border control measures as a primary solution to irregular migration despite evidence suggesting their limited efficacy[73]. This approach can be read in the light of Müller and Slominski's study on legal orchestration dynamics and his concept of "externalisation through orchestration"[74]. Through a case study on EU migration governance in Libya, the authors shed lights on the recent EU approach consisting in providing significant material, technological, and financial assistance to intermediaries in the Mediterranean, enabling them to fulfill crucial legal requirements under international maritime law. Additionally, the EU endorses the legal status of their border management authorities and strengthens their authority through coordination and convening activities. However, according to the authors, the primary aim of EU orchestration is not to address capacity gaps for effective external border control but to navigate a legal landscape shaped by the European Court of Human Rights (ECtHR) in a manner that aligns with its restrictive migration agenda.

The ambiguous and vague articulation of the memorandum of understanding's objectives and responsibilities, together with the substantial financial support, seems to align with Müller and Slominski's assertion, indicating an intention to strengthen border management by

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70 Barana, Luca and Okyay, S. Asli, "Shaking Hands with Saied's Tunisia: The Paradoxes and Trade-offs Facing the EU", *Istituto Affari Internazionali Commentaries*, 7 August 2023, p. 2.

71 The Brussels Time, "Tunisian President rejects EU 'charity' aid, calling into question migration deal", 3 October 2023.

72 See for instance: Kroet, Cynthia, "Erdoğan threatens to open borders to migrants", *Politico*, 25 November 2016. Cook, Lorne and Fraser, Suzan, "EU greenlights major funding plan for refugees in Turkey", *AP*, 25 June 2021.

73 See for instance: Massey S. Douglas, Durand Jorge and Pren A., Karen, "Why Border Enforcement Backfired", *AJS*, 121:5, March 2016, pp. 1557–1600.

74 Müller, Patrick and Slominski, Peter "Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean", *Journal of European Public Policy*, 28:6, pp. 801–820, 2021.

circumventing the legal requirements established by the treaties and the existing legal framework. The proliferation of agreements with third countries aimed at managing migration flows and externalize border management responsibilities could in fact result in stricter border controls and encourage practices that hinder the right to seek asylum, such as pushbacks and accelerated removals. The experience of the 2016 EU-Turkey agreement and the pushbacks taking place at the Greek border[75] set a worrying precedent which confirms this assumption. By blurring lines of responsibility and focusing on the management of external borders, agreements such as the EU-Tunisia MoU could constitute an obstacle to access international protection: by not ensuring an adequate legal framework that clearly identifies responsibilities between the parties involved and their respective obligations in this regard, these agreements have the potential to make it more difficult for asylum seekers to reach EU territories and apply for international protection.

As for the internal dimension of EU policy and the Next Pact, "[t]he compromise is largely based on the idea of pushing the bulk of responsibilities on managing arrivals, reception and processing of asylum requests to the external borders"[76]. Since its proposal, the New Pact has been conceived as a way "to establish a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure – thereby integrating processes which are currently separate"[77]. Examining each instrument adopted in this regard will allow us to understand how, altogether, the Pact intends to effectively guarantee access to international protection to all those seeking asylum. The Screening Regulation, the Asylum Procedures Regulation and the Regulation establishing a Return Border Procedure will, therefore, be presented in the following paragraphs.

The first step to access international protection is a screening procedure. The Screening Regulation[78] emphasizes that effective border control is crucial for all EU Member States, not just for those at the external borders, to reduce illegal migration, combat human trafficking, and enhance internal security[79]. It aims to streamline the referral of third-country nationals to

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75 See for instance: Fallon, Katy, "Revealed: Greek police coerce asylum seekers into pushing fellow migrants back to Turkey", *The Guardian*, 28 June 2022.

76 Barana, Luca and Okyay, S. Asli, *op. cit.*, p. 3

77 European Commission, Communication on A New Pact on Migration and Asylum.

78 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of … introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 3.4.2024. (Hereafter: Screening Regulation).

79 *Ibid*., Recital 3.

the correct procedures in order to reduce delays, and deter applicants for international protection from absconding[80]. The screening at the external border applies to third-country nationals who do not fulfill the entry conditions set out in the Schengen Borders Code and have crossed the external border in an unauthorized manner, have applied for international protection during border checks, or have been disembarked after a search and rescue operation[81]. The regulation also applies to those "illegally staying within the territory of the Member States where there is no indication that those third-country nationals have been subject to controls at external borders"[82]. As for the screening at the external border, it "shall be carried out without delay and in any case be completed within seven days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing point"[83]. It shall comprise preliminary health, security and vulnerability checks, identification or verification of identity, and the registration of biometric data[84]. The process ends with the completion of a screening form, including the information collected during the screening, and the referral to the appropriate procedure. According to article 18 of the Regulation, third country nationals can be either relocated to another Member State or directed to the asylum procedure, while for those who haven't made an application for international protection, the 2008 Return Directive applies[85]. During the screening, the persons is not authorized to enter the territory[86].

If during the screening third country nationals have applied for asylum, the Asylum Procedure Regulation (APR)[87] applies. One of the novelties of the New Pact is that it replaces the Asylum Procedures Directive currently into force with a regulation, resulting in a higher level of harmonization among national asylum system across the EU. In fact, the preamble states that "[t]he current disparate asylum procedures in all Member States should be replaced with a common procedure for granting and withdrawing international protection" and that "[a]pplications for international protection made by third-country nationals and stateless persons should be examined in a procedure which is governed by the same rules, regardless of

80 *Ibid*., Recital 4.
81 *Ibid.*, art. 1 (a)
82 *Ibid.*, art. 1 (b)
83 *Ibid.*, art. 8 (4).
84 *Ibid.*, art. 8 (5).
85 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348,* 24.12.2008.
86 *Ibid.*, art. 6.
87 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 3.4.2024. (Hereafter: APR)

the Member State where the application is lodged to ensure equity in the treatment of applications for international protection, clarity and legal certainty for the individual applicant"[88]. Steve Peers notes that the Regulation maintains the fundamental principle that asylum seekers must have an "effective opportunity" to submit their application[89]. In this regard, the jurisprudence of the CJEU on the equivalent provision in the 2013 Directive -which prohibits national practices that hinder access to the asylum process "such as limitations on the numbers allowed to cross the border to apply, obligations to apply abroad in advance, pushbacks, and a refusal to consider applications in 'instrumentalisation' cases" - still apply[90].

The APR complements the Screening Regulation by establishing special procedures[91], including an asylum border procedure. The latter applies to asylum seekers who do not meet entry conditions and have not been authorized to enter a Member State's territory[92] and it is mandatory for in three cases: first, "the applicant, after having been provided with the full opportunity to show good cause, is considered to have intentionally misled the authorities by presenting false information or documents or by withholding relevant information or documents"; second, "there are reasonable grounds to consider the applicant a danger to the national security or public order of the Member States or the applicant had been forcibly expelled for serious reasons of national security or public order under national law"; finally, "the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless the determining authority assesses that a significant change has occurred in the third country concerned"[93]. Applications must be lodged within five days following registration or arrival in the Member State of relocation, and the procedure must be completed within a maximum of twelve weeks[94], during which the applicant is not permitted to enter the territory of the Member State[95].

It is worth noting that the obligation to apply the asylum border procedure is limited: "[i]n order to carry out the asylum border procedure, and the return border procedure [...] Member

88 *Ibid.*, Recital 5.
89 Peers, Steve, "The new EU asylum laws, part 7: the new Regulation on asylum procedures", *EU Law Analysis* - Expert insight into EU law developments, 28 April 2024.
90 *Ibidem*.
91 APR, *op. cit.,* Art. 42.
92 *Ibid.*, Art 43.
93 *Ibid.*, Art. 25.
94 *Ibid.*, Art 51.
95 *Ibid.*, Art. 43 (2).

States should take the measures necessary to establish an adequate capacity, in terms of reception and human resources, particularly qualified and well-trained staff, required to examine at any given moment an identified number of applications and to enforce return decisions"[96]. The notion of adequate capacity is a novelty introduced by the New Pact and refers to the number of applications which Member States are mandated to process under the border procedure. The Commission[97], based on a specific formula[98] and an adequate capacity of 30 000 at EU level[99], will calculate the maximum number of applications a Member State is required to examine in the border procedure per year. Once the assigned adequate capacity is reached at national level, "Member State shall no longer be required to carry out border procedures"[100]. Financial support from the 2021-2027 multiannual financial framework is made available for Member States to establish adequate capacity for implementing the border procedure[101].

If the application is rejected within the context of the asylum border procedure, the Return Border Procedure Regulation[102] applies. The aim, once again, is to "streamline, simplify and harmonize the procedural arrangements of the Member States"[103] regarding the return of applicants whose applications have been rejected. The introduction of this new regulation should be understood in light of the broader objective of the Pact, which seeks to establish "seamless and efficient links between all stages of the relevant procedures for all irregular arrivals"[104]. The persons subject to this procedure can be required "to reside for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones"[105]. Only if a Member State is unable to accommodate such persons in those locations, it may opt to use other locations within its territory[106]. Again, "[t]he requirement to reside at a particular location in accordance with this paragraph shall not be regarded as authorisation to enter into or stay on the territory of a Member State"[107].

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96 *Ibid.*, Recital 58.
97 *Ibid*., Art. 47 (1).
98 *Ibid*., Art. 47 (4).
99 *Ibid*., Art. 46.
100 *Ibid*., Art. 47 (2).
101 *Ibid*., Art. 76.
102 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a return border procedure, and amending Regulation (EU) 2021/1148, 3.4.2024, art. 1 (Hereafter: Return Border Regulation)
103 *Ibid.*, Recital 2.
104 *Ibid.*, Recital 6.
105 *Ibid.*, Art. 1.
106 *Ibidem*.
107 *Ibidem*.

Since its proposal in 2020, the Pact has received several criticisms from civil society[108] and academia, notably with regards to the compromised procedural guarantees, the potential for extensive use of detention and other significant human rights violations resulting from an extensive use of border procedures[109]. An analysis by Violeta Moreno[110] and a study published by ECRE and other civil society organizations[111] provide critical insights on the consequences of concentrating asylum application processing strictly at the external border, and how the conclusion of cooperation agreements with third countries might exacerbate these issues. Based on the experience of the 2015 "migration crisis", these perspectives raise significant concerns about the implications for access to international protection resulting from the procedures presented above, and their broader impact on asylum seekers' rights.

Violeta Moreno argues that access to international protection in Europe is being limited due to the growing association between migration and crisis, leading to the "exceptionalisation" of rights and legal safeguards[112]. According to the author, the narrative around crisis has allowed policymakers to focus on preempting unauthorized arrivals, often at the expense of basic rule-of-law principles and due process guarantees. As danger and instability are tied to the concept of crisis, policies are increasingly legitimizing mechanisms that undermine these safeguards. The incremental normalization of exceptions has shifted governance from adhering to rule-of-law standards to a regime that relies on derogations and legal fictions to manage asylum seekers. As these exceptions become normalized, they create a legal environment where non-access to international protection is progressively accepted. Moreno points out that this approach, resulting in a reduction of access to international protection, began with the 2015 "refugee crisis" and the hotspot system, and it has been further entrenched by reforms in the New Pact on Migration and Asylum.

Introduced by the European Agenda on Migration in response to the increase of arrivals through the Mediterranean in 2015, the hotspot approach "should be understood in relation to the broader reform of the CEAS, and an overarching strategy to end irregular migration flows into the EU"[113]. As pointed out by Moreno, "[d]iscursively, it designated the physical locations

108 PICUM, "More than 160 Civil Society Organisations call on MEPs to vote down harmful EU Migration Pact", 13 February 2024.
109 Other criticisms such as regarding the legal fiction of non-entry will be analyzed later in this work.
110 Moreno-Lax, Violeta, "Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU", *Queen Mary Law Research Paper*, no. 423, 8 February 2024.
111 Papadopoulou, Aspasia et al, "The implementation of the hotspots in Italy and Greece - A study" ECRE et al, 2016.
112 Moreno-Lax, Violeta, *op. cit.*
113 Papadopoulou, Aspasia et al, *op. cit.*, p. 7

where new arrivals tended to concentrate as well as the policy strategy to be applied in those locations"[114]. Nevertheless, "there was no specific legal framework sustaining the approach"[115]. Hotspots were implemented in Italy and Greece with the aim to swiftly identify, register and process migrants[116]. However, a study published by ECRE together with other civil society organizations deeply analyzed the implementation of the hotspot approach in these two countries and highlight the several concerns resulting from it: intended to manage migration at the EU external border, it often resulted in restrictive and repressive measures undermining asylum seekers' rights, including the right to have effective access to international protection. This is mainly due to the EU pressure to control the arrivals at the external borders[117]. According to Moreno, the hotspot approach has been now incorporated into the mainstream via the New Pact, specifically via the screening and different border procedures presented above.

The linkage made between hotspot approach and cooperation agreements with third countries, and their combined impact on access to international protection, is particularly interesting for the purpose of this work. The study conducted by ECRE identifies the 2016 EU-Turkey declaration, an agreement aiming at facilitating the return of irregular migrants to Turkey and whose legality has been object of harsh criticisms[118], as a turning point[119]. The conclusion of this deal had the effect of altering the objective and functioning of the hotspots: initially conceived as a tool for relocation and aimed at identifying and directing asylum seekers who were clearly in need of international protection, the focus shifted "towards a filtering between the regular asylum procedure in Greece, or return to Turkey"[120] and transforming Greek hotspots "into grand scale, closed, pre-removal detention centres"[121]. As we will see in the next chapter, the recognition of countries like Turkey as "Safe Third Country" is highly debated and raises a number of important legal concerns, due to its implications with regard effective access to international protection. According to Moreno, the reforms of the CEAS undertaken by the

114 Moreno-Lax, Violeta, *op. cit*., p. 9.
115 *Ibidem*.
116 Papadopoulou, Aspasia et al, *op. cit*., p. 7.
117 *Ibidem.*
118 Fernández Arribas, Gloria, "The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem", *European Papers*, 1;3, 2016, pp. 1097-1104.
119 Papadopoulou, Aspasia et al, *op. cit*., p. 12.
120 *Ibidem.*
121 Moreno-Lax, Violeta, *op.cit*., p. 11.

Pact "provide legal coverage to existing malpractices, consolidating pushback-like initiatives into 'the de facto general policy' of the EU"[122].

Moreno's conclusions, along with the evidence presented in ECRE's study, suggest that current trends in EU asylum policy carry significant risks in terms of respect of human rights, including the right to seek asylum. By concentrating a set of procedures at the EU's external borders and entering into cooperation agreements like the EU-Tunisia MoU, focusing on enhanced border management without clarifying under which conditions, there is a strong possibility of replicating the same dynamics that characterized the 2015 hotspot approach, including the risk of limiting ability to access international protection. It seems that the EU is reconciliating its legal obligation to ensure effective access to international protection with the priority given to reinforcing border management measures and streamlining asylum and return procedures by the facto consolidating old patterns that in the past, as we saw earlier, have jeopardize the effective access to international protection procedures. The following chapter delve into the Pact's legal provisions and the MoU's arrangements aimed at returning third-country nationals who do not have the right to remain in a Member State's territory, another current priority in EU asylum policy.

2. The EU return system: Legalizing Unsafety?

The EU return system includes all measures aimed at returning third-country nationals who do not have the right to remain in a Member State's territory to their country of origin or transit. In other words, it is "the area of the EU migration policy dealing with the expulsion of irregular migrants towards their countries of origin or transit countries"[123]. Return measures are relevant for this study because of the principle of *non-refoulement* which, by prohibiting returning asylum seekers to a country where they would likely face persecution due to their "race, religion, nationality, membership of a particular social group, or political opinion" [124], aims at ensuring effective access to international protection to asylum seekers.

Acknowledging the low return rates across the EU, the reinforcement of the EU return system has been at the core of the New Pact since its proposal: "EU migration rules can be credible only if those who do not have the right to stay in the EU are effectively returned"[125]. As seen

122 *Ibid*., p. 14.

123 Molinari, Caterina, "The EU and its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns", KU Leuven - Faculty of Law, Institute for European Law - Research Foundation, 17 May 2018, p. 1.

124 UNHCR, 1951 Convention and Protocol Relating to the Status of Refugees.

125 European Commission, A New Pact on Migration and Asylum, *op. cit*., p. 7.

in the previous chapter, the Pact, as it is today, maintains the original intention of the European Commission's proposal to "close the gaps between external border controls and asylum and return procedures"[126]. The adoption of the Border Procedure Regulation[127], presented above, is part of this objective. Partnerships with third countries are also at the core of the strategy to improve the efficiency of the EU return system, proving once again the interconnection between the internal and external dimension.

According to the CEAS, "[w]hilst internal transfers of responsibility within the EU are governed by the Dublin Regulation, access to asylum in EU countries and external transfers to non-EU third countries are performed through the concepts of 'Safe Country of Origin' and 'Safe Third Country'"[128] as well of "Safe Country of Asylum". As for the external dimension, the EU's return system encompasses a range of mechanisms and agreements aimed at facilitating return, readmission, and visa facilitation between the EU and third countries. It can take the form of "formal and informal dialogues, consultations and partnerships to discuss and organise migration and mobility; and financial support for migration-related measures abroad. There are operational components as well, such as deployments of the European Border and Coast Guard Agency (Frontex) outside the EU to secure borders, or to facilitate the return of rejected asylum seekers and the prevention of irregular migration"[129]. These mechanisms include both formal treaties and informal arrangements, with the latter increasingly becoming the preferred avenue for cooperation in this field[130]. In the following paragraphs, we will delve into both these dimensions. The EU-Tunisia agreement is our starting point, providing an example of cooperation agreement in this area. We will, then, reflect on the implications of this deal in the light of the relevant legal provisions established in the Pact.

Despite encountering resistance from Tunisian authorities in the past due to sensitivity surrounding the topic[131], cooperation on return remains central to the MoU provisions on migration. The MoU states that "[b]oth Parties agree to further support the return and readmission from the EU of Tunisian nationals in an irregular situation, in accordance with

126 *Ibidem*.
127 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of …establishing a return border procedure, and amending Regulation (EU) 2021/1148, 3.4.2024.
128 Giuffré Mariagiulia, Denaro Chiara and Raach Fatma, "On 'Safety' and EU Externalization of Borders: Questioning the Role of Tunisia as a 'Safe Country of Origin' and a 'Safe Third Country'", *European Journal of Migration and Law*, 24:4, 9 December 2022, p. 574.
129 Parusel, Bernd, *op. cit.*, p. 1.
130 Molinari, Caterina, *op. cit.*, p . 16.
131 Colombo, Silvia, *op. cit.*, p. 200.

international law, whilst respecting their dignity and acquired rights, and commit to work together towards their socio-economic reintegration in Tunisia, in particular by supporting the creation of economically viable projects for the benefit of local development and job creation"[132]. Additionally, "[t]he two Parties also agree to support the return of irregular migrants in Tunisia to their countries of origin in accordance with international law, whilst respecting their dignity"[133]. To sum up, cooperation on returns under the MoU encompasses a dual component: readmission from the EU of Tunisian nationals in an irregular situation to Tunisia and the return of irregular migrants in Tunisia to their countries of origin. In other words, Tunisia is a country of origin and transit for irregular migrants. In the following paragraphs, we will explore how the concepts of safe country of origin, first country of asylum and safe third country as defined in the CEAS impact the access to international protection for both Tunisian nationals and third country nationals reaching the EU through Tunisia.

The concept of safe country of origin implies that "the asylum seeker was (supposedly) obviously never in danger to begin with" meaning that "there is no risk of persecution or serious harm in a country, based on the legal and political situation there, taking account of the law, human rights record, non-refoulement and availability of effective remedies in that country"[134]. The assessment of whether a third country is considered a "safe country of origin" involves evaluating a range of information sources, including data from Member States, the EU Asylum Agency, the European External Action Service, the United Nations High Commissioner for Refugees, and other international organizations. The assessment also relies on existing common analysis of country-of-origin information[135]. This implies that when applying return procedures and concluding a readmission agreement with a particular country, the EU and its member states are obliged to carefully consider the actual situation the returnee will encounter if returned to his or her country of origin. In this regard, Luca Barana and Asli Selin Okyay point out the fact that "the authoritarian slide of Saied's rule has significant implications for the asylum requests by Tunisian nationals themselves, as well as their 'safe' return to Tunisia"[136]. The authors suggest "the EU and the member states in fact should be asking themselves whether Tunisia can be considered a 'safe country of origin'"[137].

132 EU-Tunisia MoU, *op. cit.*
133 *Ibidem*.
134 Peers, Steve, *op. cit.*
135 APR, Art 61.
136 Barana, Luca and Okyay, S. Asli, *op. cit.*, p. 5.
137 *Ibidem*.

The study conducted by Mariagiulia Giuffré, Chiara Denaro and Fatma Raach[138] is in line with this consideration. Their analysis point that, despite Tunisia's advancements in some areas, human rights and freedoms for vulnerable groups such as women, Lesbian, Gay, Bisexual, Transsexual, Intersex, and Queer (LGBTIQ) persons, and religious minorities face significant challenges. Women in Tunisia continue to face discrimination and gender-based violence, with reports indicating that police often mishandle complaints about domestic violence, leading to a lack of effective protection for survivors. The situation for LGBTIQ persons in Tunisia is also concerning, with the Tunisian Penal Code criminalizing homosexual behavior, subjecting individuals to detention and harsh punishment. "Endemic violence" against LGBTIQ individuals and the impunity enjoyed by police unions, who often face no consequences for violence against this group, are also noted. Religious minorities in Tunisia also experience restricted freedoms, despite the constitutional commitment to religious freedom. The dominance of Islam as the state religion creates societal pressures against religious conversion, with those who convert facing social ostracism or even violence.

For Tunisian nationals lodging an application for international protection in the EU, the Pact establishes an obligation to apply one of the special procedures in the APR, notably the accelerated procedure[139]. According to the Regulation, the implementation of this procedure is "[i]n the interest of swift and fair procedures for all applicants, whilst also ensuring that the stay of applicants who do not qualify for international protection in the Union is not unduly prolonged"[140]. However, exceptions to this obligation exist. Member States shall apply the accelerated procedure on the ground of "safe country of origin" provided that that the applicant "has the nationality of that country or he or she is a stateless person and was formerly habitually resident in that country", "does not belong to a category of persons for which an exception was made when designating the third country as a safe country of origin" and if "the applicant cannot provide elements justifying why the concept of safe country of origin is not applicable to him or her, in the framework of an individual assessment"[141]. Additionally, as Steve Peers points out, "[t]his move to a mandatory accelerated procedure for a potentially large proportion of applications – with an apparently absolute obligation to decide cases within three months – is watered down by the new possibility that the determining authority may simply decide that

138 Giuffré Mariagiulia, Denaro Chiara and Raach Fatma, *op. cit.*
139 APR, Art. 42 (1, e).
140 APR, Recital 56.
141 APR, Art. 61 (5).

the case is 'too complex', so the ordinary procedure must apply"[142]. In light of the discrimination experienced by some Tunisian citizens on due to their gender, sexual orientation and religion, which we presented earlier, "the interpretation of the various grounds for applying accelerated procedures will be crucial"[143], including whether Tunisia can indeed be considered a safe country of origin.

Concerning the concepts of first country of asylum and safe third country, they correspond respectively to "the idea that the asylum seeker (supposedly) already had protection elsewhere" or "could have sought protection elsewhere"[144]. To consider a third country "safe", it is necessary that the applicant was "not threatened on Refugee Convention grounds; not facing a subsidiary protection risk as defined in the Qualification Regulation; protected against refoulement under the Convention and removal to face an Article 3 ECHR risk (of torture or other inhuman or degrading treatment); and (as revised) able to enjoy 'effective protection' in the non-EU country (as defined by the Regulation), in place of (previously) being able to obtain refugee status under the Refugee Convention"[145]. Both concepts constitute a ground for inadmissibility of an application for international protection: "[t]he determining authority may assess the admissibility of an application [...] and may be authorised under national law to reject an application as inadmissible [if] a country which is not a Member State is considered to be a first country of asylum" or "a safe third country for the applicant [...] unless it is clear that the applicant will not be admitted or readmitted to that country"[146].

The Pact introduces three novelties with regard the three concepts presented above: the designation of safe countries of origin[147] and safe third country[148] at EU level, the notion of effective protection[149] and a new presumption of safety to apply the concept of safe third country. First, the designation of safe countries of origin and safe third country at EU level constitutes "a more fundamental step towards harmonisation" [150]. Concretely, it would consist of a common EU list of countries to be considered "safe" which in principle is to be adopted by the ordinary legislative procedure[151]. Based on a continuous review and assessment of the

142 Peers, Steve, *op. cit.*
143 *Ibidem.*
144 *Ibidem*.
145 *Ibidem*.
146 APR, Art 38 (1, a).
147 APR, Art. 62.
148 APR, Art. 64.
149 APR, Art. 57.
150 Peers, Steve, *op. cit.*
151 *Ibidem*.

situation, the Commission can suspend a country from the list by adopting a delegated act and, after three months, submit a proposal to remove it in accordance with the ordinary legislative procedure[152]. National lists will continue coexist, but "[w]here the designation of a third country as a safe third country or as a safe country of origin at Union level has been suspended [by delegated act], Member States shall not designate that country as a safe third country or a safe country of origin at national level"[153]. In case of modification of the EU list following the ordinary legislative procedure, Member States can include the concerned country in their national list only after two years from that amendment. Before that, the Commission retains a right of objection precluding the Member State to include in its national list the country that is no longer considered safe at EU level[154].

The second novelty concern the notion of "effective protection", "a new overarching definition" that is relevant for the designation of first country of asylum and safe third country[155]. According to the APR, "[a] third country that has ratified and respects the Geneva Convention within the limits of the derogations or limitations made by that third country, as permitted under that Convention, shall be considered to ensure effective protection"[156]. When that is not the case, including "the case of geographical limitations made by the third country"[157], "the third country shall be considered to ensure effective protection only where [the persons who fall outside of the scope of the Geneva Convention] are allowed to remain on the territory of the third country in question", "have access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of that hosting third country", "have access to healthcare and essential treatment for illnesses under the conditions generally provided for in that third country", "have access to education under the conditions generally provided for in that third country", and "effective protection remains available until a durable solution can be found"[158]. As Steve Peers points out, "[t]he new provision has presumably been inserted to confirm the practice of the EU institutions and Member States of assuming that Turkey meets the definition of 'safe third country' – a point not tested before the CJEU. But the new law means that even countries which have not ratified

152 APR, Art. 63.
153 APR, Art, 64 (2).
154 APR, Art 64 (3).
155 Peers, Steve, *op. cit.*
156 APR, Art. 57 (1).
157 *Ibidem*
158 APR, Art. 57 (2).

the Convention *at all* can be covered by the 'effective protection' concept"[159], leaving substantial discretion left to Member States in designing a country as "safe".

The third novelty is the new presumption of safety introduced by the Pact: "a presumption of safety 'may be considered fulfilled' if the EU and a non-EU country agree in a treaty that 'migrants admitted under this agreement will be protected in accordance with the relevant international standards and in full respect of the principle of non-refoulement'"[160]. The reference here is to formal international treaties, such as readmission agreements, which have historically played a role in facilitating the return of irregular migrants[161]. In fact, according to the treaty "[t]he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States"[162]. The EU-Tunisia MoU, that has we saw before, largely include return and readmission measures, is therefore covered by these two provisions. In light of the above discussion, two main questions emerge regarding the EU-Tunisia MoU. The first concerns the possibility of Tunisia qualifying as both a safe third country and a country of first asylum. The second concern relates to whether the EU-Tunisia agreement can fall under the new presumption of safety established by the New Pact, and presented above, according to which the conclusion of an agreement is sufficient to fulfill the conditions to consider Tunisia as a safe third country.

With regard the possibility of Tunisia qualifying as both a safe third country and a country of first asylum, the question revolves around questioning whether Tunisia offers "effective protection" within the meaning of the New Pact, as discussed earlier. Despite Tunisia's legislative advancements in safeguarding migrant rights since 2011, gaps persist in its asylum procedures, including the absence of specific asylum legislation and lingering security-focused priorities inherited from previous regimes[163]. In fact, despite Tunisia's ratification of the 1951 Geneva Convention, "has not been followed by its transposition into domestic law"[164] and "the

159 Peers, Steve, *op. cit.*
160 *Ibidem.*
161 Molinari, Caterina, *op. cit.*, p. 2.
162 Consolidated version of the Treaty on the Functioning of the European Union, Part Three - Union Policies And Internal Actions, Title V - Area Of Freedom, Security And Justice, Chapter 2 - Policies On Border Checks, Asylum And Immigration, Article 79, *OJ C 202,* 7.6.2016.
163 Geisser, Vincent, "Tunisie, des migrants subsahariens toujours exclus du rêve démocratique", *Migrations Société*, 177:3, 2019.
164 Nasraoui, Mustapha, "Les travailleurs migrants subsahariens en Tunisie face aux restrictions législatives sur l'emploi des étrangers", *Revue européenne des migrations internationales*, 33:4, 2017, p. 160.

right to asylum is not recognized in Tunisian law or practice"[165]. Not only the legal framework does not provide any effective protection, when looking at the other conditions which are necessary to fulfill the presumption of safety, notably the fact of having access to means of subsistence sufficient to maintain an adequate standard of living but also to healthcare, the case of Tunisia raise substantial concerns. Sub-Saharan African women refugees and asylum seekers in Tunisia face challenges, particularly regarding healthcare access, with legal ambiguity, financial constraints, societal perceptions, and gender dynamics significantly impacting their well-being[166]. Moreover, recent developments in Tunisia, including xenophobic rhetoric from President Saied as well as violent attacks towards migrants and their expulsions to the desert, highlight the evolving socio-political landscape and its controversial implications for migration governance[167]. By disregarding Tunisia's national asylum procedures and protection standards, the MoU poses challenges for the protection of irregular migrants returned to Tunisia, contradicting the notions of safety established by the CEAS, before and after the reforms brought by the New Pact.

With regard the question on whether the EU-Tunisia agreement can fall under the new presumption of safety established by the New Pact, the APR establishes the following: "[w]here the Union and a third country have jointly come to an agreement pursuant to Article 218 TFEU that migrants admitted under that agreement will be protected in accordance with the relevant international standards and in full respect of the principle of non-refoulement, the conditions of this Article regarding safe third-country status may be presumed fulfilled"[168]. To fall under this provision, an agreement between the EU and a third country shall, therefore, be concluded under the procedure established by article 218 TFUE[169] which "designs a general and uniform procedure for the lifecycle of international agreements with third States" and "impinges on different aspects of the negotiation and conclusion of international agreements: amongst other things, the issue of the external representation of the EU, the choice of the appropriate legal base of an agreement, the possible mixed nature thereof and the subsequent level of engagement of Member States, the envisaged parallelism between internal and external

165 *Ibidem*.

166 Jaaouene Montassar, Azouz Aya, Noomen Noomen , and Faizy Kholoud, "Barriers and Perceptions: Health and Socioeconomic Challenges Faced by Sub-Saharan African women refugees and asylum seekers in Tunisia", Research Gate, 15 August 2023.

167 Human Rights Watch, "Tunisie : Pas un lieu sûr pour les migrants et réfugiés africains noirs", 19 July 2023 and Natter, Katharina, "Reinventing a Broken Wheel", *Verfassungsblog*, 05 September 2023. Available at:

168 APR, Art. 59 (7).

169 Consolidated version of the Treaty on the Functioning of the European Union - Part Five: External Action By The Union - Title IV: Restrictive Measures - Article 218, *OJ C 115,* 9.5.2008.

procedures"[170]. However, the EU-Tunisia MoU, like other similar deal, have not been adopted according to the procedure of article 218 TFUE, making it an informal agreement.

Formal international treaties, such as readmission agreements, have historically played a role in facilitating the return of irregular migrants[171]. However, difficulties in negotiating and implementing these treaties have led to a decline in their use, prompting the adoption of informal cooperation tools instead[172]. Individual EU member states have taken the lead in informalizing readmission cooperation agreements with specific third countries, as seen in the Memorandum of Understanding between Italy and Libya in 2016[173]. Moreover, informal arrangements have been used to modify or enhance the conditions of existing readmission agreements. For instance, the EU-Turkey statement of March 2016 altered the terms of the 2014 readmission agreement[174], demonstrating the flexibility and adaptability of informal deals in governing the return of irregular migrants. Overall, the increasing prevalence of informal arrangements reflects a shift towards a more flexible and pragmatic approach to cooperation on return and readmission between the EU and third countries. The EU-Tunisia MoU is a primary example of this approach.

From the analysis of this chapter, one conclusion encompassing both of our questions above can be drawn. By overlooking Tunisia's lack of an appropriate framework for international protection and the substantial violations of human rights towards migrants and asylum seekers, including the principle of *non-refoulement*, the EU and its Member States appear to inadequately consider their obligations established in the CEAS. The EU-Tunisia MoU contradicts the provisions related to the concept of a safe third country (as well as first country of asylum) both in its content and form. This is evident in the assumption that returning and readmitting third-country nationals to Tunisia will result in their receiving "effective protection". Moreover, procedurally, the MoU bypasses the established legal basis in the treaty for concluding international agreements, raising concerns about its alignment with EU legal standards and its potential impact on the rights of asylum seekers. According to Eleonora Frasca and Emanuela Roman, this contradiction can be explained by the dual strategy the EU

170 Bruno, Paolo, "Navigating Art. 218 TFEU: Third States' Accession to International Conventions and the Position of the EU in This Respect", *European Papers*, Vol. 7:1, 2022, p. 335.
171 Molinari, Caterina, *op. cit*., p. 2.
172 *Ibid*., p. 14.
173 *Ibidem.*
174 *Ibid*., p. 15.

is pursuing "[i]n its attempts to outsource the 'asylum burden' to non-EU countries"[175]. This strategy consists in negotiating "an externalisation of asylum responsibilities by means of informal agreements whose adherence to the rule of law is questionable" while providing "a legally-sound legitimacy to the externalisation of protection responsibilities by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum into these informal agreements"[176]. Overall, "a faulty application of the [safe third country] concept in daily practice may limit, if not violate, the rights of many asylum seekers to seek and enjoy protection"[177].

In the following chapter, we will discuss how the EU intends to guarantee the respect of the right to seek asylum both in the Pact and in these 'informal' deals, while ensuring that the stakeholders responsible for human rights violations can be held accountable.

3. Human Rights Compliance: Reducing Accountability?

As we saw in the beginning of this work, when adopting and implementing measures in the framework of EU Asylum Policy, both in its internal and external dimension, the EU and its Member States shall respect a series of obligations deriving both from international and EU law. As far as human rights are concerned, compliance shall be ensured with regard the EU Charter of Fundamental Rights, the European Convention of Human Rights and the 1951 Geneva Convention. This work is focused on the right to seek asylum[178] and the obligation for the EU Member States to ensure effective access to international protection, in line with the principle of *non-refoulement*. In addition to these legal texts, the EU and its Member States shall also align with the jurisprudence of the CJEU and the European Court of Human Rights, which come clarifying and complementing the content and procedures established by EU and international law. This chapter aims to address the issue of accountability, a key concept of the EU's rule of law value[179], encompassing an institutional, procedural and substantive dimension and aiming at reducing arbitrariness in the exercise of public power[180]. While accountability is both judicial and democratic, this work will focus on the first kind which "entails the

175 Frasca, Eleonora, and Roman, Emanuela, "The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality", *European Papers*, 8:2, 2023, p. 956.
176 *Ibidem*.
177 *Ibid*., p. 955.
178 Charter of Fundamental Rights of the EU, Art. 18.
179 Molinari, Caterina, *op. cit*., p. 7.
180 Molinari, Caterina, *op. cit*., pp. 7-8.

amenability of the acts of public powers to independent judicial scrutiny"[181] whose absence "renders scrutiny as to the pre-eminence of the law impossible and paves the way for undisturbed and unsanctioned fundamental rights violations"[182]. Concerns regarding accountability for human rights violations stem from both the provisions of the New Pact, notably its border procedures, and the EU-Tunisia MoU, primarily due to its informal nature. It is thus important to explore what kind of measures the EU is taking to uphold human rights and establish accountability mechanisms in cases of violations.

As for the New Pact, in the first chapter of this work the screening, asylum and border procedures have been presented. During each of these procedures, third country nationals are not authorized to enter the territory. This is what is called "legal fiction of non-entry": it "is a claim that states use in border management to deny the legal arrival of third-country nationals on their territory, regardless of their physical presence, until granted entry by a border or immigration officer"[183] and "[i]t is usually applied in transit zones at international airports between arrival gates and passport control, signifying that the persons who have arrived have not yet entered the territory of the destination country". In other words, "[a]lthough physically present, [third country nationals crossing the border without authorization] are not considered to have legally entered the country's official territory until they have undergone the necessary clearance"[184]. While this fiction has been used by a number of Member States in the past years[185], it has been now incorporated in the CEAS through the New Pact.

However, since the Pact's proposal, several criticisms have emerged in this regard. Gustavo de la Orden Bosch points out how this legal fiction "might be in contradiction with the EU legal framework on asylum, both in force and proposed in the Pact"[186], notably with regard "the right to remain in the Member State's territory pending the examination of the application" as established by both the current asylum procedures directive and the APR[187]. According to Kelly Soderstrom, this fiction aims at providing liminal legal spaces whose nature "implies that states claim to possess no obligation to provide rights to incoming migrants that they usually would

181 *Ibid*., p. 8.
182 *Ibidem*.
183 Orav, Anita and Barlaoura, Nefeli, "Legal fiction of non-entry in EU asylum policy", European Parliamentary Research Service – Briefing, April 2024, p.1.
184 *Ibidem*.
185 *Ibid*., pp. 2-3.
186 De La Orden Bosch, Gustavo, "Pre-entry screening and border procedures as new detention landscape in the EU Pact on Migration and Asylum. The Spanish borders as a laboratory for immobility policies", *Peace & Security – Paix et Securité Internationales*, 2024, p. 11.
187 APR, Art. 10.

provide once the migrant has legally arrived in the state"[188]. By limiting their freedom of movement during the border procedures, third country nationals "are subjected to increased monitoring, and lack access to full judicial review" which "can exclude migrants from accessing rights, legal processes and procedures, and institutions in the host country"[189]. In general, under the renewed legal framework applicable at the EU external border, detention is easier to justify[190] and deportation is facilitated[191]. These considerations echo the issues which arose from the implementation of the hotspot approach, presented in the first chapter of this work, notably the increased risks for human rights violations including pushbacks. However, Peers observes that this legal fiction does not make borders "law-free zone" since the guarantees established by the regulations themselves apply, including the right to remain in the territory until the end of the procedure[192].

As already said earlier, providing access to the territory is nevertheless a necessary condition to give effect to the obligation of providing access to protection as established by the 1951 Geneva Convention. Gustavo de la Orden Bosch points out that "border procedures are not protection procedures, but classification procedures for rejection" and which "might provoke a delay of protection, in contradiction with the Refugee Convention"[193]. Kelly Soderstrom notes that State's responsibility to provide protection within the meaning of this convention is triggered by the crossing of "a legal border, not necessarily a physical border"[194]. According to the author, the fiction of non-entry introduced by the New Pact is a legal justification which allow Member States to distance themselves "from the obligation to allow an asylum seeker to apply for asylum and prevents states from being held accountable to the principle of non-refoulement"[195].

To ensure compliance with human rights obligations, the New Pact mandates Member States to establish an independent monitoring mechanism overseeing the screening[196] and asylum

188 Soderstrom, Kelly, "An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation", ECRE Commentary, September 2022, p. 2.
189 *Ibidem*.
190 Peers, Steve, *op. cit.*
191 Soderstrom, Kelly, *op. cit*., p. 2.
192 Peers, Steve, *op. cit.*
193 De La Orden Bosch, Gustavo, op. cit., p 10.
194 Soderstrom, Kelly, *op. cit*., p. 3.
195 *Ibidem.*
196 Provisional Agreement on the Proposal for a Proposal for a Regulation (Eu) 2024/… of the European Parliament and of the Council of … introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 3.4.2024, Art 10. (Hereafter: Screening Regulation)

border procedures[197]. This mechanisms shall "monitor compliance with Union and international law, including the Charter, in particular as regards access to the asylum procedure, the principle of non-refoulement, the best interest of the child and the relevant rules on detention, including relevant provisions on detention in national law, during the screening" and "ensure that substantiated allegations of failure to respect fundamental rights in all relevant activities in relation to the screening are dealt with effectively and without undue delay, trigger, where necessary, investigations into such allegations and monitor the progress of such investigations"[198]. According to the analysis of Peers, the emphasis appears to be on non-judicial mechanisms for safeguarding human rights[199]. While acknowledging the importance of non-judicial mechanisms, he highlights the absence of explicit provision for both judicial and non-judicial mechanisms particularly concerning pushbacks, which are illegal under both human rights and EU law[200]. Stefan and Cortinovis argue that while the new monitoring mechanism is crucial, it should complement rather than replace judicial oversight at the domestic level[201]. They suggest that if adequately independent and resourced, this mechanism could support judicial authorities and bolster their capacity to investigate pushback allegations[202].

According to Campesi, "one has to ask whether the envisaged monitoring mechanism will be able to effectively address the risk of human rights violations deriving from an approach which is premised on the idea of confining asylum seekers at the border"[203]. I argue that the requirement to establish a fundamental rights monitoring mechanism represents a strategic way to mitigate the inherent risks associated to the concentration of procedures at the external border, which are likely to be exacerbated by the legal fiction of non-entry. By stipulating the obligation for Member States to establish autonomous monitoring mechanisms, thereby ensuring adherence to the legal provisions governing asylum seekers' rights, this measure aims to set up a framework for holding them accountable when executing border procedures.

197 APR, Art. 43 (4).
198 Screening Regulation, Art. 10 (2).
199 Peers, Steve, "The new Screening Regulation – part 5 of the analysis of new EU asylum laws", *EU Law Analysis* - Expert insight into EU law developments, 26 April 2024.
200 *Ibidem*.
201 Cortinovis, Roberto and Stefan, Marco, "Setting The Right Priorities: Is the New Pact on Migration and Asylum Addressing The Issue of Pushbacks at EU External Borders?", 2021, pp. 186-187.
202 *Ibidem*.
203 Campesi, Giuseppe, "The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' For Migration Management", 2020, p. 201.

However, the effectiveness of this initiative hinges significantly upon its practical implementation.

The issue of accountability is key also when it comes to the external dimension of EU asylum policy, and perhaps even more important due to the collaboration and responsibility sharing with stakeholders who are not bounded by the CEAS. The EU and its Member States maintain, even when externalizing border and asylum management responsibility, an obligation to ensure compliance with the human rights obligations presented above, including effective access to international protection. As for the EU-Tunisia MoU, it contains minimal references to human rights standards. The agreement emphasizes the importance of "combating irregular migration to prevent loss of human lives and developing legal pathways for migration" and that "this approach shall be based on respect for human rights"[204]. However, the specifics of how this will be achieved remain unclear. Notably, no monitoring mechanism has been established to ensure the implementation of protection standards outlined in the Treaty and the CEAS. Consequently, one may ask who, given the EU is obligated by the treaties to uphold human rights, bears responsibility in the event of violations within the cooperation framework established by the MoU. This question gains further significance in light of reported human rights abuses in Tunisia, as previously discussed in this work. Can the EU and its Member States, through the conclusion of deals such as the MoU, be held responsible for violations occurring in Tunisia?

To answer to this question, Molnar's analysis[205] is key. When relocating border controls geographically and transferring or sharing border control responsibilities with states on the other side of the border, the involvement of multiple states and their varied cooperation patterns can lead to a diffusion and weakening of responsibility[206]. It is, therefore, unclear how international responsibility is attributed to EU Member States in cases of potential violations of internationally protected human rights, such as the right to leave, prohibitions against refoulement, collective expulsion, torture, and arbitrary detention, within the framework of extraterritorial border management[207]. To establish whether EU Member States bear international responsibility in situations involving activities conducted under international

204 EU-Tunisia MoU, *op. cit.*
205 Molnár, Tamás, "EU Member States' Responsibility Under International Law for Breaching Human Rights When Cooperating with Third Countries on Migration: Grey Zones of Law in Selected Scenarios", European Paper, 8:2, 2023.
206 *Ibid*., p. 1021.
207 *Ibid*., p, 1022.

cooperation but aimed at preventing migration towards the EU, Molnar mobilizes international law, and specifically the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The author argues that an extensive interpretation of article 16 ARSIWA would activate a form of derived or indirect responsibility[208]. More precisely, "extraterritorial border management activities, such as training, funding and capacity building in third countries, could potentially fall under the scope of art. 16 ARSIWA if three requirements are fulfilled"[209]: first, "the relevant state organ providing aid/assistance must have knowledge of the circumstances making the conduct of the assisted State internationally wrongful"; second, "aid/assistance must be provided to facilitate that conduct which must indeed result in a wrongful act"; finally, "conduct must be such that it would have been wrongful even if it had been committed by the assisting State itself"[210]. The persistent violations perpetrated by Tunisia against migrants and minority groups, coupled with the inadequate access to international protection, have been widely acknowledged and consistently condemned, as evidenced earlier in this study. Consequently, given the lack of adequate safeguards, the EU's decision to finance Tunisia to improve return, readmission, and border management makes the EU responsible for the human rights violations committed by Tunisia.

One may ask how the EU is reconciling its engagement with third countries that do not respect human rights, which is not compatible with the CEAS, given the procedural guarantees established in the Treaties. One of these guarantees is the obligation to explicitly specify the legal basis when adopting an act[211], with the "the purpose of ensuring the judicial accountability of EU institutions, whenever they decide to adopt an act having legal effects"[212]. As indicated earlier in this work, the main legal basis for the conclusion of agreements with third countries in EU asylum policy is article 79 TFEU, with article 218 TFUE establishing the procedure. The latter stipulates that while the Council decides to initiate negotiations and appoint negotiators, the European Parliament's consent is essential for concluding agreements in certain fields, including those related to illegal immigration. Furthermore, international agreements must be published in the Official Journal of the European Union, promoting

208 *Ibid*., p. 1025.
209 *Ibid*., p.1025.
210 *Ibid*., p. 1026.
211 Consolidated version of the Treaty on the Functioning of the European Union, Part Six - Institutional And Financial Provisions, Title I - Institutional Provisions, Chapter 2 - Legal Acts Of The Union, Adoption Procedures and Other Provisions, Section 2 - Procedures for the Adoption of Acts and Other Provisions, Article 296, *OJ C 202*, 7.6.2016.
212 Molinari, Caterina, *op. cit*., p. 9.

transparency and accountability[213]. Judicial scrutiny of these agreements is also ensured, with the CJEU empowered to review their legality[214]. Adherence to these procedures, coupled with judicial oversight, is essential for ensuring accountability and upholding fundamental rights in EU migration and asylum policy. However, in the EU-Tunisia MoU, as in other similar agreements, no reference is made the legal basis for their adoption.

According to Paula García Andrade and Eleonora Frasca, the language of the MoU, its vague commitments and lack of specific legal obligations indicate it is a non-legally binding instrument. Therefore, one may assume that given "that the EU-Tunisia agreement has a soft legal nature, the rules related to the conclusion of international agreements foreseen in Article 218 TFEU were not applicable, as this provision only governs the conclusion of fully-fledged international treaties between the EU and a third country". Katharina Natter adopts a different viewpoint, stating that the agreement between EU and Tunisia, led by "Team Europe", bypassed standard legal procedures, including those established by article 218 of the TFEU[215]. This work aligns with the latter position and argues that Article 218 TFEU applies because, despite the MoU's non-prescriptive language and terms that do not seem to create legally binding obligations[216], this position is disputable[217]. In fact, "these informal cooperation tools present several elements that might lead to the conclusion that they are intended to bind their signatories"[218]. Additionally, "their content has the potential to affect the legal situation of migrants, especially their fundamental rights to non-refoulement, asylum and effective judicial protection"[219]. Therefore, it is essential to consider the applicability of Article 218 TFEU to ensure that agreements like the EU-Tunisia MoU uphold the legal and human rights standards required for protecting asylum seekers, including the right have effective access to international protection.

It is also worth noting that, as discussed in the second chapter, the new presumption of safety in the Pact specifies that "[w]here the Union and a third country have jointly come to an agreement pursuant to Article 218 TFEU that migrants admitted under that agreement will be protected in accordance with the relevant international standards and in full respect of the

213 *Ibid*., p. 10.
214 *Ibid*., p. 11.
215 Natter, Katharina, "Reinventing a Broken Wheel", *Verfassungsblog*, 5 September 2023.
216 García Andrade, Paula and Frasca, Eleonora, "The Memorandum of Understanding between the EU and Tunisia: Issues of procedure and substance on the informalisation of migration cooperation", *EU Odysseus Network - EU Immigration and Asylum Law and Policy*, 26 January 2024.
217 Molinari, Caterina, op. cit., p. 33.
218 *Ibidem*.
219 *Ibidem*.

principle of non-refoulement, the conditions of this Article regarding safe third-country status may be presumed fulfilled". If such an agreement is not in place, then countries like Tunisia cannot be considered safe under this new presumption of safety. Therefore, the New Pact appears to confirm that, as a general rule, cooperation agreements in EU asylum policy should be adopted in accordance with the procedure outlined in Article 218 TFEU.

The legal uncertainty regarding the legal status of the EU-Tunisia MoU and similar agreements, resulting from the absence of a legal basis and the circumvention of procedures, poses concerns in terms of accountability and related human rights implications. This legal uncertainty can be read through the lens of the concept of "formal informality" proposed by Cardwell and Dickson[220]. This term refers to "the appearance of formality, insofar as resembling familiar or established tools (Regulations, Directives, international agreements), but lacking the procedural safeguards, transparency and classification provided by law and legal process"[221]. This interpretation aligns with what Reviglio refers to as a shift to soft law at Europe's borders[222]: bilateral migration agreements aiming at delegating border control responsibilities to third countries are structured as soft law and constitute legal and quasi-legal mechanisms, resulting in a blurred line between legal obligations and international responsibilities. According to Reviglio, this approach based on the use of soft law instruments favors informality and flexibility and promotes legal efficiency, focusing on achieving outcomes quickly, over legal validity. The resulting legal risk is that "[w]here decisions are made outside of legal frameworks, they become difficult to monitor, evaluate, and ultimately prevent judicial review by the Court of Justice of the EU (CJEU)"[223]. In other words, by sidestepping formal legal frameworks, these agreements enable executive powers to act with minimal oversight. Where accountability is reduced, compliance with human rights obligations is at risk of being compromised.

A last point which is worth considering is the fact that both the Pact and the EU-Tunisia MoU do not clearly distinguish between irregular migrants and asylum seekers. This distinction, which is already difficult to make in practice, is now blurred by the law itself[224], in particular by the screening procedures which applies to all those crossing the border irregularly.

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220 Cardwell, Paul James and Dickson, Rachel, "'Formal informality' in EU external migration governance: the case of mobility partnerships", *Journal of Ethnic and Migration Studies*, 49:12, pp. 3121-3139, 08 May 2023.

221 *Ibid*., p. 3122.

222 Reviglio, Martino, "The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity", *Global Jurist*, 23:1, pp. 23–41, 19 October 2022.

223 Natter, Katharina, *op. cit.*

224 De la Orden Bosch, Gustavo, *op. cit*., pp. 23-24.

According to Gustavo de la Orden Bosch, this has as a consequence the fact that "asylum seekers are increasingly considered as subjects of detention, by their association with irregular migrants"[225]. The same tendency can be observed in recent cooperations deals: "[w]hile formal (bilateral and EU) readmission agreements can only apply to third-country nationals irregularly present on the EU territory and can never apply to asylum seekers, informal multi-purpose agreements are vaguer in their wording and tend to associate different legal statuses – including potential beneficiaries of international protection – to a single 'catch-all' category of migrants not having the right to enter the EU"[226]. One may ask whether this legal choice of associating asylum seekers with irregular migrants, which underlies both the internal and external dimensions of the EU's asylum policy, is in fact "the result of the lessons learned" from the dominant debate during and after the 2015 "migration crisis", as stated in the 2020 Communication on the New Pact.

Conclusion

This work sheds light on the renewed legal framework for accessing international protection under the reforms introduced by the New Pact on Migration and Asylum and cooperation agreements like the EU-Tunisia MoU. The aim was to understand how the EU is reconciling its current priorities in asylum policy with its obligations under EU and international law. This study specifically focused on the commitment to provide effective access to international protection in line with the right to seek asylum in the EU Charter and the principle of non-refoulement under the Geneva Convention. Our analysis reveals that the renewed EU asylum legal framework enshrines practices of implementation which hinder the effective access to asylum procedures.

Since the proposal of the New Pact in 2020, the EU's approach to asylum has prioritized robust and fair management of external borders, streamlined procedures for asylum and return, and the establishment of mutually beneficial partnerships with key third countries, both of origin and transit. These priorities are reflected in the legislative reforms adopted in May 2024 and various cooperation agreements concluded since the summer of 2023. Several critical issues arise from the establishment of screening, asylum, and return border procedures, as well as the persistence of traditional border control measures through cooperation with third countries such as Tunisia. Our analysis revealed that the continued focus on border control risks

225 *Ibid*., p. 24.
226 Frasca, Eleonora, and Roman, Emanuela, *op. cit*., p. 952.

replicating the shortcomings of the EU's response to the 2015 "migration crisis", when the hotspot approach combined with the readmission agreement with Turkey resulted in limited access to international protection. By introducing new procedures concentrated at the external border and concluding agreements like the one with Tunisia, aiming at externalizing migration flows and asylum management measures, the EU appears to reinforce old patterns through the establishment of a renewed legal framework.

Regarding the enhancement of the EU return system, our analysis highlights contentious assessments of safety and protection concerning concepts like Safe Country of Origin, Safe Country of Asylum, and Safe Third Country. The case study of the EU-Tunisia MoU illustrates this complexity: Tunisia's persistent discrimination against minorities and migrant populations, along with its lack of an asylum legislative framework, will result in returnees will not receive "effective protection" as defined by both the current and renewed CEAS. Additionally, the New Pact exacerbates these concerns by allowing for the return of "inadmissible" asylum seekers to countries that have not signed or implemented the 1951 Geneva Convention through a new presumption of safety and a broader notion of "effective protection". Instead of prioritizing access to international protection procedures, the reforms under the New Pact effectively legalize unsafety by increasing discretion and potentially violating the principle of *non-refoulement*.

Concerning human rights compliance and judicial accountability within the framework of EU asylum policy, our analysis indicates that both the legal fiction of non-entry established by the New Pact and the "formal informality" of cooperation agreements risk undermining judicial scrutiny regarding human rights compliance. On one hand, considering those subjected to border procedures as not entered the territory of a Member States raises concerns on the asylum seekers' effective access to rights, legal processes and procedures. On the other hand, the lack of clear accountability mechanisms, especially in deals like the EU-Tunisia MoU, complicates the enforcement of human rights protections and shifts responsibility away from the EU and its Member States. While the Pact mandates the establishment of an independent monitoring mechanism to ensure adherence to human rights obligations during border procedures, there is a simultaneous effort to evade accountability through the conclusion of informal cooperative arrangements. However, this EU-Tunisia MoU, the underlying objective appears to be circumventing judicial oversight by apparent contradiction can be construed within a broader, more cohesive strategy: given the non-judicial character of border monitoring mechanisms and their efficacy contingent upon the discretion afforded to Member States, combined to the

informal nature of cooperation agreements like the CJEU. Building upon the precedent established by the 2015 "migration crisis", the EU and its Member States appear to use this approach to evade their human rights responsibilities as delineated by international law and the CEAS. The New Pact ostensibly serves this objective by furnishing a legal framework that legitimizes such practices.

In conclusion, the study reveals the critical need for a re-evaluation of EU asylum policy to ensure the protection and dignity of all individuals affected. Those seeking asylum in the EU originating or transiting from Tunisia face the risk of being returned without effective access to asylum procedures, either in the EU or Tunisia. By prioritizing effectiveness considerations in legislative provisions and externalizing asylum management measures through informal, the EU risks compromising its commitment to ensuring effective access to international protection under both EU and international law. To address these challenges, the EU must prioritize developing robust accountability mechanisms, enhancing transparency in migration governance, and ensuring that all measures comply with international and EU law. By doing so, the EU can better balance its migration control objectives with the imperative to protect the fundamental rights of asylum seekers, thereby upholding its commitment to human rights and the principles of international protection.

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