

ASILE

Global Asylum Governance and the European Union's Role

Asylum for Containment

EU arrangements with Niger, Serbia, Tunisia and Turkey

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This text is the outcome of a collective research project; the researchers are listed in alphabetical order. The authors are grateful to Solveig Als, Nikolas Feith Tan and Philippe Frowd for their feedback to an earlier version of this text.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement nº 870787. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.

TECHNICAL REFERENCES

Deliverable No.	
Dissemination level*	
Workpackage	
Lead beneficiary	
Contributing beneficiary/ies	
Due date of deliverable	
Actual submission date	
Author(s)	

* PU = Public

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

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LIST OF ABBREVIATIONS

ACP	The African, Caribbean and Pacific states
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CFR	Charter of Fundamental Rights of the European Union
CSO	Civil society organisations
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUTF	EU Emergency Trust Fund
ECHR	European Convention on Human Rights
ECOWAS	The Economic Community West African States
ETM	Emergency Transit Mechanism
FRiT	EU Facility for Refugees in Turkey
GCR	Global Compact on Refugees
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights
ICMPD	International Centre for Migration Policy Development
IOM	International Organization for Migration
IPA	EU Instrument for Pre-Accession Assistance
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAU	Organisation of African Unity
RSD	Refugee Status Determination
SAR	Search and Rescue
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

Since 2015, Europe has intensified its cooperation with third countries in the field of asylum and migration. This report synthesises four country studies concerning European political, legal and financial instruments in this field in Niger, Serbia, Tunisia and Turkey. These very different case studies allow for the identification of fundamental challenges of European external asylum and migration policy (i.e. challenges which are not specific to just one third country).

Third countries are hesitant to cooperate with strengthening their asylum systems out of concern of becoming an extraterritorial European hotspot

Europe supports asylum systems in third countries by technical means (advice, training), operational assistance (such as Frontex missions) as well as financial support for refugee status determination, refugee reception, migration and border management. With the important exception of Turkey (where the overwhelming majority of funding was spent on assisting refugees), only a limited portion (between 7 and 28%) of EU funds were spent on refugee protection. The rest was spent on for the return of migrants and refugees, security (in particular reinforcing border control and enhancing Coast Guard capacity), and governance capacity. Third countries are eager to cooperate with the EU when it comes to strengthening their capacities in the field of policing and security. However, when it comes to reinforcing their asylum infrastructure, third countries are hesitant to cooperate because they are aware that the aim of European support is the containment of refugees and asylum seekers on their territory. The case of Turkey, which adopted EU inspired asylum legislation in 2013 and now hosts the largest refugee population in the world, has been a lesson for other countries. While non-cooperation takes different forms in different contexts, it is visible in all four countries.

Asylum and migration cooperation with the EU suffers from a lack of legitimacy

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While European actors obviously notice this non-cooperation, they interpret it as purely self-interested. From a European perspective it is logical and legitimate to think that refugees can be contained in third countries if these countries have functioning asylum system. However, third countries do not find this obvious and legitimate; they fail to see why they are better placed than European states to host refugees. If one thinks of Niger (per capita income in 2021 $ 594,90) or Tunisia (per capita income in 2021 $ 3.924,30), it seems obvious that the EU (per capita income in 2021 $ 38.234,10; source World Bank) is better able to host refugees and asylum seekers than these countries. For Serbia it remains unclear why it would host refugees and asylum seekers coming from Turkey via the EU member states of Greece and Bulgaria. An important root cause of the current refugee situation in Northern Africa is the disintegration of Libya that followed a NATO military intervention initiated by France and the US in 2011. Europe has contributed in significant ways to the problem; financially it is much better able to carry the burden; so why should Tunisia and Niger be willing to do that for them?

The lack of legitimacy leads to untransparent decision-making bypassing democratic procedures

The lack of legitimacy from the perspective of third countries helps to explain why cooperation between European actors and third countries often is untransparent or even secret, involves local actors selectively, and bypasses or even undermines democratic procedures. Open, democratic decision-making is problematic in third countries because of the lack of legitimacy of cooperating with the EU. In this manner, EU external asylum and migration policy is at odds with a foundational element of its external action, which is the promotion of democracy.

Asylum and migration cooperation contributes to violations of the rule of law

EU external asylum and migration policy contributes to the rule of law by supporting the development of a legislative basis for state action in the field of migration and asylum. However, at the same time it also contributes to violations

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of international law in third countries (specifically: the right to leave any country; the right of freedom of movement within the territory of a state; the prohibition of collective expulsion; and the right to an effective legal remedy). Also, EU external asylum and migration policy is characterised, on a number of issues, by the absence of effective legal remedies against potential or actual violations of European law or human rights law by European actors themselves (concretely this concerns large scale refoulement, and the Frontex Status Agreements).

The containment aims of asylum support can result in a normative vacuum

European instruments supporting asylum systems in third countries (which are generally speaking positive in terms of international law and the Global Compact on Refugees) are often adopted in the framework of containment policies, which are problematic in light of the same instruments. This interlinkage makes it hard to evaluate European instruments as to their compatibility with international law and the Global Compact, because this evaluation depends on the frame one adopts (is only the asylum support project taken into account, or also the containment policy of which it is part?). The resulting difficulty in making a normative evaluation of policy measures can contribute to a normative vacuum.

European actors need to become more familiar with third country perspectives; this should be operationalised in EU funded research projects

In its design and in its implementation, EU external asylum and migration policy is based on misperceptions. This concerns in particular the normative underpinnings of third country non-cooperation. This misperception hinders effective cooperation. Research in this field can contribute to providing European policy makers with better insight in third country perceptions. This requires giving third country researchers a key role in designing, reviewing and implementing research projects.

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Recommendations

- European commitments will be seen as more reliable if they are long-term and comprehensive, as opposed to the short-term projects adopted on an ad hoc basis that are typical for current policy instruments such as FRiT and EUTF (paragraph 3.3).
- European commitments will be seen as more reliable if they are formal and take the form of legislation and treaties instead of, as they increasingly do, MoUs, non-public texts and press releases (paragraph 3.3, 4.1, 4.3).
- European commitments will be seen as more legitimate if European actors do not seek to negotiate bilaterally with individual third countries which may have a weak position, but instead engage with the African Union or regional economic communities such as ECOWAS (paragraph 4.2).
- European commitments will be seen as more reliable if they are unconditional commitments, instead of relying on issue linkage such as between readmission and visa facilitation (paragraph 3.3)
- In order to increase the democratic control of European activities, there should be transparency concerning all documents, as well as transparent criteria for the timing and subject of CSO consultations as well as for selecting the CSOs to be involved (paragraph 4.1 and 4.2).
- In order to improve the rule of law conformity of the European activities, (1) project documents should operationalise human rights objectives in a specific manner; (2) an ex ante human rights audit should be performed, as recommended by the European Ombudsperson in the context of the EU-Turkey Statement, and should be made public; (3) ex post monitoring and evaluation reports should be performed and should be made public (paragraph 5).
- European actors need to be more familiar with the perspectives of third countries; one way of getting more insight in this is to promote and fund

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researchers from the countries involved to carry out an independent research agenda (paragraph 2.2)

- EU funded (as well as other) research projects involving third countries should give a key role to third country researchers; the ethics of the cooperation with third country researchers should be an element of grant procedures, as well as of review procedures (paragraph 2.2.3).

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1. Introduction

The research of which this report synthesises the outcomes makes an inventory of European arrangements in the field of asylum with four countries since 2015 (except for Tunisia, where we went back to 2011). The year 2015 was chosen because it marks a notable intensification of European migration and asylum policies in third countries. The binding and non-binding cooperation arrangements to be analysed have been subdivided into political instruments (declarations, strategy documents, partnerships); legal instruments (readmission agreements, EU-initiated national legislation); and financial instruments which provide EU funding for migration and asylum projects in the four countries (predominantly the EU Trust Fund for Africa, the Madad Fund for Syrian refugees, and the Facility for Refugees in Turkey),[1] as well as, in the case of Serbia, Pre-Accession (IPA) Funding.[2]

2. Methodology

Conducting fieldwork in four different countries was expected to be a challenge from the start of the project. However, the outbreak of the Covid-19 pandemic coincided with the start of the ASILE project and brought additional challenges. According to the initial plan, data collection in the four countries was to be conducted by researchers from the Vrije Universiteit Amsterdam and Aarhus University so as to ensure the consistency of data collection. By the summer of 2020, it was clear that (international) travel would not be possible. Therefore, instead of collecting data from a distance or fundamentally changing the data collection strategy, the research team decided to work with national researchers in Niger, Serbia, Tunisia and Turkey. Working with a multi-sited research team required developing a new methodology for data collection.

[1] Tan and Vedsted-Hansen (2021).
[2] Djurovic, Djurovic and Spijkerboer (2022), 20.

Another challenge was the fundamentally different backgrounds and contexts of the selected countries. Each country, with unique bilateral relation histories with Europe, varying governmental and civil society structures, traditions and experiences, required a tailor-made data collection strategy. To ensure that such differences and nuances are reflected in the research outputs, the national researchers revised the data collection strategy in each country while the Amsterdam-based researchers developed the general methodology to ensure the consistency of the research.

2.1. Case selection

The four countries were selected as part of a most-different-system design.[3] We have chosen countries in a way that maximises divergence, the only convergence being the key variable of interest, namely: European actors (i.e. EU institutions and EU member states) are actively applying political, legal, and financial instruments in the field of asylum in these countries. Countries diverge in wealth, geopolitics, relation to the EU, as well as colonial history.

1. Relation to the EU: Serbia is a candidate member State. Turkey has had an Association Agreement with (the predecessors of the) EU since 1963, began accession negotiations in 1987, and has been a candidate member state since 1999; prospects of accession in the foreseeable future are dim. Tunisia has an Association Agreement with the EU since 1995 without any prospect of accession. Niger has no formal institutional tie with the EU, but is part of the treaty framework between the EU and the African, Caribbean and Pacific (ACP) states;[4] it is a member of the Economic Community West African States (ECOWAS).

2. Colonial history: Serbia was part of the Ottoman Empire, gained permanent full independence in 1878, and has since then shared the vicissitudes of the various Yugoslavian states; Turkey has been the centre

[3] Otner (2010).
[4] Ayouba Tinni, Hamadou and Spijkerboer (2022), 27-28; Montoute and Virk (2017).

of the Ottoman Empire until the end of World War I, and has since then been a regional power; Tunisia has been part of the Ottoman Empire until the French installed a protectorate in 1881, and became independent in 1956; Niger has been a French colony from 1900 until 1960.

3. Wealth: In 2021, Niger had a per capita GDP of $594,90; Tunisia of $2.934,30; Serbia of $9.215,00; and Turkey of $9.586,60. For comparison, the per capita GDP in the EU was $38.234,10 (source World Bank).

2.2. Addressing Eurocentrism in this research project

In the analysis presented in this report, quite some attention will be paid to the power differences between the EU and its member states on the one hand, and on the other hand Niger, Serbia, Tunisia and Turkey. However, this analysis is not only *about* power difference, but has also been developed *within* it. This research has been commissioned and funded by the EU, and designed and coordinated by European researchers; field work in Niger, Serbia, Tunisia and Turkey has been undertaken by local researchers who implemented a pre-designed methodology. This dynamic poses a number of methodological challenges. We will outline these challenges; then indicate how we have tried to address them; and finally draw some broader methodological conclusions on international collaborative research.

2.2.1. Challenges and opportunities

In addition to the challenges which will be outlined below, the involvement of national researchers in the research methodology as a consequence of Covid provided opportunities for national researchers. It allowed them to realise their own research agendas. The structure of the research team had a positive impact for national researchers. It enabled them to work in an international setting beyond the confines of their national contexts, including opportunities for international visibility through publications and networking. For some researchers, the project also provided space for critical research relatively free from the self-censorship they are forced to impose on themselves in a local

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research setting. This project facilitated access to international academic and policy making setting.

Concerning the challenges, to begin with the research design of this project reflects a European perspective. The main research question concerns the impact of European policy interventions in the four countries concerned. This question can easily lead to methodological nationalism in the sense that it is simply assumed that Europe is an important factor in these countries. It may be overlooked that in all the countries concerned there have been long-standing migration and asylum policies and practices with which European policies interact. The Ottoman empire (of which Turkey, Serbia and Tunisia were part) had a very long tradition in governing populations, of which migration and asylum were part. Niger is part of a region where since centuries mobility has played a key role as part of everyday life, about which normative positions have been developed. In both contexts, this history impacts current-day legal and policy approaches to migration and asylum. Focusing on European policy interventions risks ignoring or underestimating the importance of other contexts.

Furthermore, the research questions and methodology were designed by European academics within the constraints of a call for proposals of the European Commission. The original research design followed a standard extractivist pattern. In each country, a European academic was to conduct 15-20 interviews with people who had been lined up by a local academic or NGO (who was to function as what journalists would call a fixer). The European academics would return home with the data and produce the analysis. When this turned out to be impossible due to Covid, the budget reserved for these research visits was used to hire two researchers in each country, who implemented a standard methodology. The national researchers were paid considerably less than their European counterparts. This would have been the case anyway due to European funding rules, but this was exacerbated because the involvement of the national

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researchers was not part of the design but of a Covid mitigation strategy. Funding had to be found in the margins of the budget.

In addition, the research outcomes are to be disseminated in academic publications. Both career stage and the international prestige of the home institution of the researchers impact the publication options of researchers. Researchers working in European universities have better conditions for writing texts that can be published in international journals (better technical support from their home universities) while they also have easier access to publication venues (being already more familiar with and to journals, publishers). In addition, publication strategies may be different for junior and senior researchers, for Anglophone and Francophone researchers, for researchers working for NGOs or at universities, as well as for academics from European universities or from universities that are marginalised in the political economy of academic production.

2.2.2. Approach

Aware of these challenges and opportunities, a number of interventions have been made so as to limit the impact of the eurocentrism inherent in the project design, and to realise the opportunities which the project provides.

First of all, in recognition of their in-depth knowledge of the context in their countries, national researchers have relied on their own insights to appropriate the research project and to adapt the standard methodology according to their expertise. This resulted in the inclusion of EU sponsored national legislation in the research on Niger and Tunisia, and in adaptation of the time frame for Tunisia (2011-2020 instead of 2015-2020). More generally, national researchers departed from the standard research methodology when that seemed appropriate in light of their national context or in light of a perspective they wanted to bring forward. This process resulted in country reports that are less standardised than is usual in

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this kind of project (and therefore are harder to use in a comparative analysis), but that were at the same time much richer than usual as well.

Secondly, when the first drafts of the country reports were available, an online meeting of all researchers was organised in which they provided feedback to each other's drafts. This allowed them to communicate with each other (instead of exclusively with the European coordinators), and to build on each other's expertise. It allowed for a bottom-up process of developing joint research outcomes. The present synthesis report was developed in a gradual process in which the national researchers gave input in various phases. In phase one, a short document based on the country reports was circulated with bullet points to be included in the analysis, to which all researchers gave extensive feedback (more bullet points, points to be taken out, changes). On the basis of this, in the second phase a draft was written which was discussed during a two day in person meeting of the research team. In phase three, national researchers gave written input for a following version of the text. This allowed for drafting a new draft of the report of which the main lines reflected the joint analysis of the research team. After that, in the fourth and final phase the document was circulated for amendments and a definite text of this report was drafted.

Less concrete, but possibly as crucial, has been sensitivity to the challenges inherent in international research cooperation between global North and South research institutions. Such awareness does not change the political economy of knowledge production,[5] but it can help in seizing the opportunities that research projects such as the present one offer. In particular, it helps in doing good research if national researchers are not seen as deliverers of the empirical data (the raw material) which is then to be analysed and theorised (processed) by the European coordinators. This is a dominant approach (which was also adopted in the design

[5] Landau (2012).

phase of this project, but had to be abandoned due to Covid) which results in outcomes that do not use the analytical potential of the national researchers.

2.2.3. Lessons learnt

Evaluating this aspect of the research methodology, we draw the following conclusions.

Limiting the Eurocentric character of research methodology has added value for the quality of research. First, maximising the input of national researchers leads to more profound outcomes because of their awareness of local contexts and dynamics that cannot be captured by short-term visitors who do a series of interviews. This is not only a matter of a better grasp of the empirical material; familiarity with the context also impacts the analysis. Examples of analyses that are unlikely to be made with a Eurocentric methodology are the analysis of the fractures within the Nigerien state (*infra* para. 4.2); and the reason why Tunisia has not adopted the asylum legislation which was drafted with support of the EU (*infra* para. 4.2). A general analysis that reflects the specific input of the national researchers is the realisation that what European actors see as non-cooperation of third states is a normative position reflecting views of global justice held by state and non-state actors in the four countries concerned (*infra* para. 7). Second, national researchers are more likely to be aware that that migration policy is partly to be understood in terms of other issues. Research that focuses on migration policy has a tendency to look for causes and effects in the field of migration, while other policy issues may have a dominant influence. This kind of insight comes more naturally if one has lived in a place for years, followed public debate and politics, etc. An example of this is the awareness that in Turkey migration policy is an element of Turkish geopolitics (*infra* para. 3.3), and that in Serbia accession to the EU is an overriding interest (*infra* para. 3.3).

This is not to say that national researchers are always right. Obviously, national researchers have different capacities, perspectives and approaches. Also, as

indicated above, cooperating with researchers from other countries is helpful in analysing the situation in one's own country, and in developing a more general analysis. National researchers' close-up perspective was balanced with the inputs of researchers from other countries who could engage in abstraction beyond local intricacies.

In sum, we think that our efforts to mitigate the impact of the Eurocentric design of the research project have had a positive effect on the quality of the outcomes, despite the fact that the inequality between researchers from different countries is a context that we are unable to change. However, improvements going beyond what we have done can be made even within the current context. In particular in an early phase, it is crucial that researchers from non-European countries are involved in the design of research projects (research questions, methodology, selection of case studies). Furthermore, it is crucial that the role of national researchers in the research process is specified in the project proposal, so as to ensure that they are co-authors and not merely providers of raw data. Finally, in the design phase it should be ensured that researchers from non-European countries get equal pay for equal work. The European Commission as well as other (governmental and non-governmental) international organisations should develop standards that can be applied in the selection and evaluation of research projects.

2.3. The relation between interviewers and respondents

In all four countries, arranging the interviews relied heavily on the existing networks of researchers. In all countries, the researchers were active in the national context and were not seen as outsiders by respondents. However, researchers in Tunisia and Turkey observed that many respondents had the idea that via the interviews they could speak to the EU. This affected their discourse. In particular, respondents who worked for the national authorities formulated only minimal criticism of national policies, emphasised the importance of continued EU funding, hesitated both to report that aims were achieved and that projects were

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not successful, out of concern of funding cuts. In Niger and Serbia this was different, because the researchers were deeply embedded in the context they were researching (the Serbian researchers as a very active NGO, the Nigerien researchers as part of a small community of people working on migration). This limited the space for strategic responses because respondents were aware these would be recognised as such by the researchers.

This implies that the data coming out of the interviews is coloured by the relation between the researchers and the interviewees. We have tried to be sensitive to this in the analysis presented here, but we concluded that it is difficult to objectivise this.

3. Supporting asylum systems for containment

The European Union is quite explicit about its policy aim to prevent asylum seekers from reaching the borders and the territory of the EU. In policy documents, third country nationals who try to reach EU borders in order to seek asylum are referred to as "irregular migrants", while preventing such "irregular migration" is seen as requiring cooperation with third countries of origin and transit in the fields of prevention of departure as well as the return of undocumented migrants. The policy on the prevention of asylum seekers reaching the territory of the EU is inserted in discourses on saving migrant lives and the prevention of migrant smuggling.[6] In line with the terminology in the wider ASILE project, this policy aim is referred to as containment. There are particular spatialities of containment that EU instruments are helping construct. In all four countries, borders, camps, and deportations have been funded and reinforced through European instruments in order to physically contain migrants and asylum seekers in space, or move them further away from the European border and inhibit their ability to reach European borders. In Niger, the Emergency Transit Mechanism and the asylum bureau in

[6] For example European Commission (2020), passim.

Agadez are ways of containing asylum seekers in Niger both spatially and temporally, while they wait for the results of their asylum applications. Camps feature in this mechanism, as in the Hamdalaye transit centre where refugees wait for asylum and in Agadez.[7] In Serbia, the spatiality of containment is manifest in the funding of reception capacities for migrants pushed back from Croatia, Hungary and Romania, thus building the conditions necessary for Serbia to become a safe third country for refugees expelled from EU territory.[8] The combination of the three EU-Turkey instruments (FRiT, EU-Turkey Readmission Agreement, and the EU Turkey Statement) contribute to the containment of migrants on Turkish territory by ensuring Turkey accepts deportees. Further, the Statement was accompanied by the closure of the Syrian-Turkish border, which has further prevented Syrian refugees' access to asylum (*infra*, para. 5.1.1). In Tunisia, the strengthening of border controls has been heavily funded by the EUTF, with additional pressure mounting for Tunisia to agree to a readmission agreement with the EU that would include third country nationals. This is another mechanism to contain migrants' mobility to third countries.[9]

At the same time that it seeks to contain refugees on territories outside the EU, the European Union undertakes action to support refugees in third countries. In this context, EU policy documents point most notably to the Emergency Transit Mechanism, which evacuates people from Libya to Niger and Rwanda for onward resettlement; to the support for Syrian refugees in Turkey, Lebanon, Jordan and Iraq; as well as to the funding provided by the EU and its member states to supporting refugees i.a. via UNHCR.[10] Also, it is evident from the fieldwork that was done for this project that the EU promotes the adoption of asylum legislation in third countries.

[7] Ayouba Tinni, Hamadou and Spijkerboer (2022), 25, 46-50.
[8] Djurovic, Djurovic and Spijkerboer (2022), 35-36, 39-41.
[9] Raach, Sha'ath and Spijkerboer (2022), 26.
[10] European Commission (2020), 19.

The European Union sees the policies aiming at containment and at improving the asylum systems in third countries as closely related. They are to be implemented as part of comprehensive Migration Partnerships so as to strengthen migration governance and management.[11] From the perspective of the EU, asylum for containment is a logic; the two policy aims are entirely compatible. However, state and non-state actors in third countries also see the containment of refugees and the improvement of asylum systems in third counties as closely related, but they draw different conclusions from that connection than European countries do. The EU is perceived as working on the construction of an asylum system in third countries that will allow the EU to contain refugees there.[12] From the perspective of third countries, there is a tension between asylum and containment; they do want to improve their asylum system, but they do not want to be the place where refugees and asylum seekers are contained. A main theme running through our analysis is that, while from a European perspective it is logical and legitimate to think that refugees can be contained in third countries if these countries have functioning asylum system, third countries themselves do not find this obvious and legitimate; they fail to see why they are better placed than European states to host refugees.

3.1. With the exception of Turkey, only a minority of EU funding is for refugee protection

In three of the four countries, containment outweighs refugee protection when one looks at EU expenditure. In Niger, 21% of the funding covered in our research was dedicated to refugee protection.[13] For Serbia this was 28%,[14] and for Tunisia 7%.[15] The rest of EU funds were used for projects for the return of migrants and refugees, security (in particular reinforcing border control and enhancing Coast

[11] Ibid., 17-24.
[12] Ayouba Tinni, Hamadou and Spijkerboer (2022), 20; Djurovic, Djurovic and Spijkerboer (2022), 24-25; Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 53-54; Raach, Sha'ath and Spijkerboer (2022), 64-66.
[13] Ayouba Tinni, Hamadou and Spijkerboer (2022), 43.
[14] Djurovic, Djurovic and Spijkerboer (2022), 44.
[15] Raach, Sha'ath and Spijkerboer (2022), 39.

Guard capacity), and governance capacity. In contrast, of EU expenditure in Turkey the overwhelming part has been spent on assistance to refugees.[16] It should be noted however that the 6 billion EUR for 3.6 million Syrian refugees for six years amounts to a mere 1.666 EUR per refugee for six years, and 278 EUR per year – not enough to cover the expenses.

3.2. Third countries willingly cooperate in strengthening their capacities

Third country governments are generally willing to cooperate with projects which reinforce their capacities in the field of policing and security. A notable example of this is that the EU provided 80 million EUR of direct budget support to the Nigerien government, earmarking the contribution (15 million EUR for equipment of the Interior Security Forces) and attaching specific conditions (sufficient progress in the implementation of the security component of a programme to combat migrant smuggling).[17] Other EU projects also fund the Nigerien security apparatus.[18] The Tunisian authorities readily cooperate when projects increasing governmental capacities in the field of policing (in particular border management).[19] In Turkey, the two EU-funded projects relating to migration and border management assisted the Turkish migration management authorities in establishing a migrant detention centre and funding six Coast Guard vessels.[20]

3.3. Third states hesitate to cooperate with asylum projects for fear of becoming a European hotspot

However, when it comes to supporting the asylum infrastructure of third countries, one can observe hesitations to cooperate in the four countries. This hesitance to cooperate is contextual.

[16] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 28-29, 48-49.
[17] Ayouba Tinni, Hamadou and Spijkerboer (2022), 25-26, 37.
[18] Ayouba Tinni, Hamadou and Spijkerboer (2022), 38-43.
[19] Raach, Sha'ath and Spijkerboer (2022), 63-64.
[20] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 28-29. Comp. Canga and Behrman 2022.

For the Nigerien authorities who are in conversation with European actors, the financial stakes are big. Projects reinforce general state capacities and provide precious funding for core state functions. As a consequence, projects are supported by the state institutions which benefit directly from them. At the same time, state institutions which do not benefit directly from these projects have no reason to support them. The Emergency Transit Mechanism (ETM) is an arrangement agreed between the state of Niger, UNHCR and IOM, and funded by the EU. In the framework of the ETM, certain categories of people are transferred from Libya to Niger, with a view to admission as a refugee in European countries and Canada.[21] The ETM was negotiated from the Nigerien side by two directorates within the Ministry of the Interior. Not included in the negotiations on and the development of the ETM were key players such as the foreign ministry, and the regional and local authorities where refugees were to be hosted.[22] The local authorities were not involved in the development of the UNHCR bureau in Agadez, and are critical of it because as they see it, it turns their city into a European hotspot.[23] This results in limited support for the ETM and for the hotspot in Agadez from key players.

For Serbia, gaining EU membership is a major policy aim which outweighs many other policy interests. As a consequence, Serbia aligns it asylum and migration policy with the EU acquis (over which it had no say and which is a given).[24] Serbia accepted the Readmission Agreement (including an obligation to readmit third country nationals who transited through Serbia). However, in particular the effects of the Dublin Regulation and the notion of safe third countries pose a risk for Serbia. If Serbia were to have an effective asylum procedure and a functioning system of reception for asylum seekers and refugees, EU member states could

[21] Ayouba Tinni, Hamadou and Spijkerboer (2022), 23-25, 75, 82-85.
[22] Ayouba Tinni, Hamadou and Spijkerboer (2022), 46-48.
[23] Ayouba Tinni, Hamadou and Spijkerboer (2022), 48-51, 76-77.
[24] Djurovic, Djurovic and Spijkerboer (2022), 16-17.

return asylum seekers to Serbia on the basis of the EU-Serbia Readmission Agreement, which provides for the readmission of third country nationals who transited through Serbia to EU member states.[25] In practice, a number of practices in Serbia mitigate this risk. Serbia remains irresponsive to requests for readmission from EU member states on the basis of the EU-Serbia Readmission Agreement;[26] despite asylum legislation which is in line with EU standards, access to the Serbian asylum procedure is problematic, and for those who succeed in accessing it recognition rates are low;[27] reception facilities are limited and often substandard.[28] As a consequence of these shortcomings, the European Court of Human Rights ruled that removal of two asylum seekers to Serbia was a violation of Article 3 ECHR, referring to "a significant risk of refoulement from Serbia" as well as to "lack of administrative capacity and resources in Serbia at the relevant time to assess asylum claims in accordance with international standards and to protect against refoulement; accounts of cases where aliens re-entering Serbia from Hungary were put on buses directly to the border with North Macedonia; accounts of cases of denials of the right to apply for asylum in Serbia to individuals readmitted from Hungary; information about an automatic application of Serbia's list of safe third countries to those who have transited, inter alia, through North Macedonia and Greece."[29] While it is difficult to establish whether or not the authorities concerned consciously sabotage the implementation of their obligations under these legal instruments, in any case there is little incentive for them to address the operational challenges they experience. Effective implementation of their legal obligations would result in considerably more migrants and refugees ending up in Serbia.[30]

[25] Djurovic, Djurovic and Spijkerboer (2022), 22-23.
[26] Djurovic, Djurovic and Spijkerboer (2022), 23.
[27] Djurovic, Djurovic and Spijkerboer (2022), 32.
[28] Djurovic, Djurovic and Spijkerboer (2022), 32.
[29] ECtHR 21 November 2019, *Ilias and Ahmed v Hungary*, application no 47287/15, para. 159. Comp. Djurovic, Djurovic and Spijkerboer (2022), 32-33.
[30] Djurovic, Djurovic and Spijkerboer (2022), 17, 24-25.

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The major shortcoming of the Tunisian asylum system, namely the absence of asylum legislation, is in part a consequence of Tunisian concerns about European containment policy. The Tunisian authorities are concerned that adopting the Asylum Bill (which has been drafted with assistance of UNHCR and EU funding) will lead to increasing European pressure to admit third country nationals seeking international protection. The European encouragement to adopt asylum legislation is seen as an element of the European policy to characterise neighbouring countries, including Tunisia, as safe third countries. Equally, there are concerns that the EU will at some moment stop funding the Tunisian refugee status determination and refugee reception systems which, in light of Tunisia's financial situation, would be problematic. The Tunisian government has not submitted the Asylum Bill to Parliament because it fears that, once adopted, it will facilitate European containment policies. The evident overall focus of European actors on containment of refugees in Tunisia is seen as problematic by Tunisian government and civil society actors.[31]

Through the EU-Turkey Statement, Turkey was effectively declared to be a safe third country, and is seen as such in Greek legal practice.[32] For Turkey, there are two ways to limit the impact of this. The first is to limit the influx of Syrian and other refugees via the Syrian, Iraqi and Iranian border; the second is to allow for onward travel of refugees in the direction of Europe. It should be noted that for Turkey, migration and asylum are an element of a much wider policy context. It may be willing to swallow negative policy outcomes in the field of migration and asylum if it gains enough in others (such as its stakes in the Syrian conflict, its interests concerning the Kurdish question, its membership of NATO and its accession to the EU). It should be noted that two elements of the EU-Turkey Statement from which Turkey would have benefited have not been implemented

[31] Raach, Sha'ath and Spijkerboer (2022), 64-73.
[32] Ovacık (2021), 75.

(visa waiver and accelerated EU accession talks).[33] While European actors relate this to non-compliance with requirements concerning these issues themselves, Turkish respondents perceive this as illustrative of the EU's exclusive focus on its own interests. The incidents at the Turkish-Greek land border in March 2020 are seen by Turkish state actors in this context, while European actors consider this as a form of blackmail from the side of the Turkish authorities.

In conclusion, the European policy of supporting asylum systems in third countries in order to further its containment policies is ambiguous and even contradictory. Because of the power difference, third countries are not in a position to reject cooperation with the EU outright. On the other hand, they frustrate the effective implementation of European containment policies because they consider these as unfair. The manner in which this combination of cooperation and frustration plays out is highly contextual and changeable, and closely related to the power dynamics between the EU and the country concerned. But the tendency of third countries to frustrate effective implementation of European containment policies on their territories is foreseeable, and it is hard not to see the legitimacy of the perspective of the third countries concerned. Our respondents in Niger, Tunisia and Serbia explicitly invoked such legitimacy issue, while we infer the existence of such issues for our Turkish respondents.[34]

4. Democracy

In this paragraph, we address issues relating to democratic control. While there is an obvious relation between democracy and the rule of law (the rule of law is the subject of the next paragraph), they are distinct. Whereas the rule of law is about legality and legal certainty (*infra*, para. 5), we will address here the extent to which

[33] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 31, 47. See more generally on the link between readmission and visa facilitation Cassarino and Marin (2022), 16-20.
[34] Ayouba Tinni, Hamadou and Spijkerboer (2022), 47-51, 75-85; Djurovic, Djurovic and Spijkerboer (2022), 45-46, 75-78, 80-84, 85-88; Raach, Sha'ath and Spijkerboer (2022), 64-66.

cooperation between the EU and third countries is transparent, involves local actors, and is subject to formal parliamentary procedures.

In all four countries included in this research, there are concerns that cooperation with the EU 'asylum for containment' agenda (*supra*) will lead to European hotspots on their territory. To some extent this phenomenon has already occurred. Turkey hosts 3,6 million Syrian refugees, a number of whom would probably have moved onwards to Europe had it not been for the Turkish implementation of the EU-Turkey Statement.[35] Reception facilities in Serbia are populated by asylum seekers who mostly want to transit to EU member states but are temporarily unable to do so. The Facility for asylum in Agadez (Niger) hosts people whose aim it is to travel onward to Europe, but whose assessment is that the UNHCR bureau in Agadez may provide a more realistic possibility to do so than travelling to the North-African shores of the Mediterranean. These policies are controversial because they are seen as not being in the interest of the populations of the third countries concerned.

Other aspects of European policies may be controversial domestically in third countries too. An EU intervention that has been widely noted in Niger was the technical assistance (in the form of drafting the bill) of Act 2015-36 implementing the UN Palermo Protocol against migrant smuggling, as well as operational assistance in its implementation.[36] The implementation of this law is seen as undermining free movement in the ECOWAS zone. In addition, it introduces a requirement of documentation for transportation within Niger. In light of the limited accessibility of documentation (because of the limitations of the civil registration system as well as on account of the costs of documentation), this denies many Nigerien nationals the possibility to travel within the territory of

[35] It should be noted however that the EU-Turkey statement has not caused the decline in the number of people crossing the Aegean; this decline had already occurred by the time the EU-Turkey statement was adopted in March 2016, and therefore logically speaking cannot have been its cause because the decline preceded the statement, Spijkerboer (2016).
[36] Comp. Wilén (2022).

Niger.[37] CSOs have brought a case before the ECOWAS court of Justice.[38] In the Turkish context, it is controversial that the EU resettles only a minimal number of Syrian refugees (namely a mere 0,8% of the Syrian refugees in Turkey).[39]

European actors as well as actors in the four countries seek to side-step potential or actual opposition against the adoption and implementation of EU instruments in a number of ways.

4.1. Secretive forms of cooperation

One of the ways in which domestic unrest or opposition to cooperation between the EU and third countries can be limited is by operating in confidential or even secret contexts. The Memoranda of Understanding between Tunisia and Italy from 1998, 2009 and 2011 were and are secret; such secret agreements are undemocratic by their very nature.[40] It is remarkable that even when Tunisia was a functioning democracy between 2011 and 2021, migration agreements with Germany (2011, 2017) and Belgium (2018) remained secret.[41] In Niger, basing the ETM on a Memorandum of Understanding was partly inspired by a wish to circumvent the Nigerien parliament.[42] In Serbia there is little or no information available about the implementation of measures that may be controversial domestically, such as the implementation of the Readmission Agreement.[43] The European Commission has ceased giving transparent information about the implementation of the EU-Turkey statement since October 2017,[44] while there is no information about the implementation of the EU-Turkey Readmission Agreement.[45] Reportedly there is a Readmission Protocol between Bulgaria and

[37] Ayouba Tinni, Hamadou and Spijkerboer (2022), 69.
[38] ASGI (2022).
[39] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 46.
[40] Raach, Sha'ath and Spijkerboer (2022), 26-28.
[41] Raach, Sha'ath and Spijkerboer (2022), 30-33.
[42] Ayouba Tinni, Hamadou and Spijkerboer (2022), 47.
[43] Djurovic, Djurovic and Spijkerboer (2022), 46-47.
[44] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 31-32.
[45] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 33-34.

Turkey, which is not public.[46] The monitoring and evaluation of EU funded projects is not public.[47]

The motivations for the secretiveness are hard to establish, and may vary. Tunisian journalists, researchers and civil society organisations work with European journalists and CSOs to access information from European institutions,[48] which suggests that in this case it is the Tunisian authorities that appreciate discretion. On the other hand, the absence reporting on the implementation of the EU-Turkey Statement from the EU side after 2017[49] suggests that, here, the EU sees little interest in transparency.

4.2. Selective involvement of local actors

European actors whom we interviewed for our research insist that local governmental and non-governmental actors are involved in the development and implementation of the cooperation with third countries. Our research shows however that such involvement, if any, is selective. Some actors are side-lined. An example of this is the side-lining of the national parliament, core government institutions such as the RSD authority, the Ministry of Foreign Affairs, as well as local authorities in the conclusion of the Memorandum of Understanding concerning the ETM in Niger.[50] Another example is the exclusion of the representative of the Serbian Ministry of EU Integration who insisted that the response to the refugee and migration challenges since 2015had to be covered by separate additional emergency funding and should not be considered as part the regular Serbia-EU Accession Negotiation process.[51] This may seem a minor issue but in fact concerns the question whether peripheral EU member states (which Serbia hopes to become soon) are to bear the uneven distribution of the migration

[46] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 34.
[47] Raach, Sha'ath and Spijkerboer (2022), 46; Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 35-36.
[48] Raach, Sha'ath and Spijkerboer (2022), 41.
[49] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 31.
[50] Ayouba Tinni, Hamadou and Spijkerboer (2022), 46-48.
[51] Djurovic, Djurovic and Spijkerboer (2022), 36-37.

of asylum seekers resulting from the Dublin system and wider European migration policies.

Furthermore, European actors control the consultations with local actors. They decide whether actors will be involved, if so which actors, at which stage of decision making, whether the consultations will inform, modify or amend European programming, whether the consultations will be substantive or purely procedural. Actors in third countries are not aware of the criteria European actors use for deciding about these issues, and find the process of consultations opaque.[52]

In some cases, local actors are not involved at all. Major instruments concerning Africa are unilateral EU documents, such as the 2015 Regional Action Plan for the Sahel, the 2017 Migration Partnership Framework and the 2021 Comprehensive Strategy for the Sahel.[53] While the 2015 Western Balkans statement formally was a joint statement of the political leaders of the countries involved, Serbia was not involved in its drafting and the text is perceived as an EU document.[54] Countries that hope to accede to the EU (Serbia, Turkey) adopt asylum legislation that conforms to the EU acquis, over which they have no say and the wisdom of which (for example concerning the uneven effects of the Dublin system) they cannot effectively dispute.

4.3. Undermining of democratic procedures

The preference which European actors (EU institutions itself, member states) display for informal and secret arrangements with third countries (*supra*, para. 4.1) undermines democratic procedures. Informal documents (Memoranda of Understanding, but also the 2016 EU-Turkey Statement[55] and the 2015 Western

[52] Raach, Sha'ath and Spijkerboer (2022), 33-46 ; Djurovic, Djurovic and Spijkerboer (2022), 51-53; Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 34-36. See also Pastore & Roman 2020.
[53] Ayouba Tinni, Hamadou and Spijkerboer (2022), 22-23, 26, 61.
[54] Djurovic, Djurovic and Spijkerboer (2022), 45.
[55] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 37-38.

Balkan Route Leaders' Statement which led to the closing of the Western Balkans route[56]) undermine procedures in which parliaments have a role in the ratification of international agreements.[57] Neither the Turkish nor the European Parliament were, for example, involved in approving the EU-Turkey Statement.[58] If in addition to being informal such documents are also secret, parliaments are even unable to exercise their supervisory function outside formalised ratification processes and outside formal sites of public debate. This approach side-lines not only national European parliaments and the European Parliament,[59] but also the Nigerien, Turkish and Tunisian parliaments.[60]

In conclusion: in all countries included in this research there are concerns about the establishment of European hotspots on their territory. As a consequence, it is easier for the EU to cooperate in the field of migration and asylum with third countries which are not well-functioning democracies. Third countries with well-functioning democratic systems are less likely to cooperate with EU migration and asylum policies because containment of refugees and asylum seekers in Niger, Serbia, Tunisia or Turkey is unlikely to be seen as legitimate by the local population. The exception to this may be Serbia, where the negative effects of European containment policies are seen as outweighed by the benefits of EU accession.

5. Rule of Law

EU instruments in the four countries covered in our research contribute to the rule of law[61] by supporting the development of a legislative basis for state action in the

[56] Djurovic, Djurovic and Spijkerboer (2022), 19-22, 45-46.
[57] Comp. Cassarino 2022, Roman 2017; House of Lords International Agreements Committee (2022), 9-10.
[58] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 30-32.
[59] Carrera, Den Hertog and Stefan 2017; Spijkerboer (2017), 220-225.
[60] Ayouba Tinni, Hamadou and Spijkerboer (2022), 47; Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 30; Raach, Sha'ath and Spijkerboer (2022), 40-43.
[61] We rely on the operationalisation of the notion of 'rule of law' by the Venice Commission (2011).

field of migration and asylum. Creating such a legal basis is conducive to legality (basing state action on law) and legal certainty (limiting state discretion in the field of refugee protection and migration management). However, EU instruments also lead to rule of law concerns, in two different ways. First, in some cases the implementation of the instruments contributes to violations of international legal norms by third countries. Secondly, during the implementation of the instruments, in some cases there are no effective legal remedies against potential or actual violations of European law or human rights law by European actors (EU institutions or EU member states).

5.1. Contributing to violations of international law in third states

In all four country studies, we identified cases in which European instruments contribute to human rights violations in third states. As a general observation, it can be noted that in the Tunisian case study all references to international law in documents concerning EU funded projects were analysed. Human rights and non-refoulement are mentioned regularly. However, such references are mostly part of the generic parts in the documents (for example the paragraphs on the overall aim or strategic objectives of a project). They are not to be found in the operational parts of the funding documents, such as the paragraph on operational objectives or expected results.[62]

5.1.1. The right to leave any country, including one's own

The right to leave any country, including one's own, has been laid down in numerous international law instruments (Article 2(2) Protocol 4 ECHR; Article 12(2) ACHPR; Article 12(2) ICCPR).[63] Turkey has closed its borders with Syria and has introduced visa requirements for Syrian nationals. The Turkish border closure is a logical response to Europe's policy to contain refugees in Turkey as laid down

[62] Raach, Sha'ath and Spijkerboer (2022), 52-55; comp. on Niger Ayouba Tinni, Hamadou and Spijkerboer (2022), 61-62.
[63] See on the right to leave any country Markard (2016).

in the EU-Turkey Joint Action Plan and the EU-Turkey Statement.[64] The containment of Syrian refugees within Syria is explicitly endorsed in the EU-Turkey Statement.[65] This means that people are unable to leave a territory where, prima facie, they have a well-founded fear of being persecuted, and where they face a real risk of being subjected to torture or inhuman or degrading treatment. This means that the EU is implicated in denying Syrians the right to leave their country. In Tunisia, European actors have undertaken considerable steps so as to equip and train the Tunisian Coast Guard, often with EU funds. While these activities are presented as contributing to the Tunisian international maritime law obligations concerning search and rescue, many in Tunisia observe that international maritime law is instrumentalised by European actors so as to prevent predominantly Tunisians to leave Tunisia.[66] Similarly, the EU funded equipment and training of the Turkish Coast Guard, which is presented as contributing to Turkish search and rescue capacity, prevents that both Turkish nationals and third country nationals leave Turkey.[67] The Nigerien Act 2015-36 deprives people of the possibility to leave Niger in the direction of Libya or Algeria, even when they are lawfully present on Nigerien territory because they are ECOWAS citizens.[68] This legislation was legitimised as contributing to the prevention of the loss of lives in the Sahara and on the Mediterranean.[69]

In all these cases, European actors are implicated in denying people to leave any country, including their own. This may take the form of enabling third countries to do so through funding (Turkey, Niger, Tunisia); or by enticing them to do so by policies which create an interest for the third country to prevent leaving (Turkish

[64] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 44, 50-51.
[65] Paragraph 9 reads: "The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe", https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf.
[66] Raach, Sha'ath and Spijkerboer (2022), 58-61. Comparable criticism comes from an Egyptian CSO, Refugees Platform in Egypt (2022).
[67] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 23, 29, 55.
[68] Ayouba Tinni, Hamadou and Spijkerboer (2022), 51.
[69] Ayouba Tinni, Hamadou and Spijkerboer (2022), 29-31.

border closure); and by endorsing border closure (EU-Turkey statement). Needless to say, preventing people from exercising their right to leave any country, including their own, also prevents them from exercising the right to ask for asylum and to have their asylum application examined (Article 18 CFR; Article 12(3) ACHPR).

5.1.2. The right to freedom of movement

The right of liberty of movement within the state where one is lawfully present is likewise well-established in international law (Article 2(1) Protocol 4 ECHR; Article 12(1) ACHPR; Article 12(1) ICCPR).

In Niger, Act 2015-36 was drafted in the framework of projects of EU member states, while its implementation was supported by several European projects. Article 20 of this Act requires transport companies to ensure that all passengers are in the possession of documents allowing them to enter the destination state. This requirement is, in line with the text of the Act, also applied on domestic bus trips, in particular from the capital Niamey in the south-west of Niger to Agadez in the north of the country.[70] While this legislation has been presented as having as its main aim to save lives (in the Sahara desert and on the Mediterranean Sea), it also affects Nigerien nationals. According to World Bank data, in Niger 36% of births are not registered, while of those whose birth has been registered many do not have the means to acquire identity documents. Therefore, Act 2015-36 deprives a substantial number of Nigerien nationals from the right of free movement within their own country. In addition to Nigerien citizens, ECOWAS citizens also are legally present on Nigerien territory thanks to ECOWAS free movement law, a freedom that has for a long time been widely accepted throughout West Africa.[71] They are equally deprived of the right to move from, for example, Niamey to Agadez. As this effect has not been made explicit during the

[70] Ayouba Tinni, Hamadou and Spijkerboer (2022), 28-32.
[71] Ayouba Tinni, Hamadou and Spijkerboer (2022), 32, 65-71.

legislative process, no justification had been provided. Therefore, the infringement of the right to free movement amounts to a violation.

Tunisia is also part of free movement agreements with other Maghreb countries.[72] Tunisian measures to prevent Libyan nationals, as well as Algerian, Moroccan and Mauritanian nationals, from entering its territory limit the obligation to promote free movement. In the case of Libyan nationals they violate bilateral free movement law.[73]

5.1.3. The prohibition of collective expulsion, the right to ask for asylum

The prohibition of collective expulsion is well entrenched in international law (Article 4 Protocol 4 ECHR; Article 12(5) ACHPR). Individuals have a right to ask for asylum and to have their asylum application examined (Article 18 CFR; Article 12(3) ACHPR). The pushbacks performed by Serbian state agents at the border with North Macedonia constitute evident violations of these rights (NB: the pushbacks carried out by EU Member States are addressed in the next paragraph). These pushbacks were carried out by the Serbian border police, which were supported through IPA (Instrument for Pre-Accession) funding and Integrated Border Management (IBM) projects implemented by, among others, IOM.[74] The Turkish acts denying people the right to leave any country, including their own (the Turkish border closure, the support for the Turkish – and Tunisian – Coast Guards, *supra*[75]), are foreseeable (and foreseen, *viz*. the EU-Turkey Statement) consequences of European instruments.

[72] Raach, Sha'ath and Spijkerboer (2022), 22-23.
[73] Raach, Sha'ath and Spijkerboer (2022), 53.
[74] Djurovic, Djurovic and Spijkerboer (2022), 73.
[75] In December 2022, the EU adopted a 220 million EUR programme to support further border control measures at Tuekry's Eastern border, including surveillance masts, cameras, lightning systems, https://neighbourhood-enlargement.ec.europa.eu/news/eu-adopts-new-programmes-support-refugees-and-border-management-turkiye-worth-over-eu12-billion-2022-12-12_en, accessed 16 January 2023.

5.1.4. Absence of effective legal remedies in EU funded projects

Everyone whose fundamental rights are violated has the right to an effective remedy (Article 13 ECHR; Article 47 CFR; Article 7 ACHPR; Article 14 ICCPR). European projects fund non-governmental, intergovernmental and international organisations to carry out activities in the field of refugee protection and migration management. In a number of cases, such organisations de facto exercise state functions. A clear example is UNHCR, which in Tunisia does refugee status determination (RSD).[76] In Turkey, NGOs and international organisations implement key provisions for Syrian refugees. In Niger, UNHCR provides shelter to people transported from Libya in the framework of the ETM. Refugees in this centre have protested against reception conditions.[77]

Many NGOs and international organisations have internal complaint mechanisms.[78] Although it is positive that these organisations provide essential services, and although it is positive that there are internal complaint mechanisms, it is problematic that cases where individuals feel their fundamental rights have been violated in the process do not have access to an effective remedy that lives up to the standards of international law. An internal complaint mechanism does not constitute recourse to an impartial authority. This is of particular concern where such complaints may concern core *de facto* state functions (recognition as a refugee; guaranteeing the most basic necessities of life to vulnerable persons).

Despite the fact that ICMPD plays a major role in the build-up of Tunisia's border management capacity, according to our information this international organisation does not even have such an internal complaints mechanism.[79]

[76] Raach, Sha'ath and Spijkerboer (2022), 50-51, 55-56.
[77] Ayouba Tinni, Hamadou and Spijkerboer (2022), 25, 73.
[78] Raach, Sha'ath and Spijkerboer (2022), 50-51; Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 40.
[79] Raach, Sha'ath and Spijkerboer (2022), 51.

5.2 No effective legal remedies against (potential) violations by European actors

Another rule of law concern is the absence of effective legal remedies against potential or actual violations of European law or human rights law by European actors themselves.

5.2.1 Large scale refoulement

A first issue of concern is the returns by European states of people to Serbia, Tunisia and Turkey. The EU member states Croatia, Hungary and Romania engage in massive pushbacks towards Serbia as a systematic daily practice. According to UNHCR, in 2020 more than 25.000 pushbacks occurred, and in 2021 almost 28.000.[80] Although these pushbacks have been addressed by the Serbian Constitutional Court, the Serbian Ombudsperson, the Court of Justice of the EU and the European Court of Human Rights,[81] they continue to occur in large numbers on a daily basis. The implementation of the agreements between Italy and Tunisia on the immediate return of both Tunisian nationals and third country nationals leads to grave concerns among Tunisian human rights organisations. They point to the collective nature of many of these returns (and they dispute the correctness of the European Court of Human Rights' judgment on the issue[82]). They also refer to Tunisians whose return, they argue, violated international refugee law, and point to a pending case at the European Court of Human Rights concerning a LGBTQ Tunisian national.[83] The implementation of the EU-Turkey statement has *de facto* established Turkey as a safe third country.[84] This is problematic because Turkey maintains the geographical limitation to the 1951 Refugee Convention; because Turkey has at times not acted in conformity with the principle of non-refoulement; and because Turkey hardly has the capacity to offer

[80] Djurovic, Djurovic and Spijkerboer (2022), 23-31, 70-72.
[81] Djurovic, Djurovic and Spijkerboer (2022), 29-31, 59-62, 66.
[82] ECtHR (Grand Chamber) 15 December 2016, *Khlaifia and Others v. Italy*, 16483/12.
[83] Raach, Sha'ath and Spijkerboer (2022), 51, 57-58.
[84] Ovacık (2021), 75.

the 4 million refugees it hosts effective international protection.[85] Also, there are consistent reports about refoulement by the Greek authorities[86], which increased after the EU-Turkey statement.[87] The manner in which these returns to Serbia, Tunisia and Turkey are implemented by EU member states is such that domestic remedies in the EU member states concerned are not effective. This means that, in effect, only the European Court of Human Rights is an option for an effective remedy. However, a supranational court, while having a crucial role in complementing domestic remedies concerning purported human rights violations, cannot fulfil the role of a court of first instance to protect individuals against violations.[88]

5.2.2 The Frontex status agreement

A second case in which no effective legal remedies are available concerns the Frontex status agreement in Serbia.[89] This agreement foresees immunity from Serbian jurisdiction for Frontex staff engaged in Frontex activities in Serbia. Because of Frontex's involvement in border management activities and the rights violations that do occur at Serbian borders, this makes the issue of remedies against purported rights violations by Frontex staff more than theoretical. The immunity concerns only actions performed in the exercise of the official functions of Frontex staff in accordance with the relevant plan of action. Having in mind that it is the Executive Director of Frontex who decides whether actions were performed in the exercise of the official functions of Frontex staff in accordance with the relevant plan of action, this means that in effect Frontex has the unilateral capacity to exclude its staff from Serbian jurisdiction, which could provide an effective remedy. In such a case, actions are only subject to Frontex's internal complaint mechanism.[90] Such an internal complaint mechanism (laudable as it

[85] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 41-42.
[86] https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/ .
[87] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 39.
[88] Comp. ENNHRI 2022.
[89] See on Frontex Status Agreements in general Letourneux (2022).
[90] Djurovic, Djurovic and Spijkerboer (2022), 57-58.

may be in itself) is not an effective remedy as required by international law. This means that the Executive Director of Frontex has the power to unilaterally decide whether a purported human rights violation by Frontex staff will be subject to an effective remedy, or to an internal complaints mechanism which is not an effective remedy.

6. Framing

As has been shown above, European instruments aiming at containment and at supporting the asylum capacities in third countries are closely related. One of the consequences of this is that the evaluation of European instruments in terms of compatibility with international law or with the Global Compact on Refugees (GCR) depends on how the object of analysis is defined. While this issue arises in all four country studies, it has been identified specifically in the country report on Niger on the point of the Emergency Transit Mechanism (ETM).[91]

6.1 The Emergency Transit Mechanism

The ETM offers a multi-stakeholder framework for cooperation between Niger, UNHCR, IOM and several European States, and is funded by the EU. UNHCR staff identify vulnerable refugees in detention centres in Libya in need of international protection, who are then transferred to Niger. From Niger, most are subsequently resettled in a third country.[92] The evaluation of the ETM varies in relation to the framework adopted. When the analysis is limited to the resettlement of refugees from Niger to third countries, the ETM is a form of resettlement and burden sharing that is fully in line with the 1951 Convention and its Protocol, with the 1969 OAU Refugee Convention, as well as with the GCR (point 5, Guiding Principles). The assessment is already different when one includes in the analysis the fact that the refugees were transported to Niger from Libya by UNHCR, before

[91] Ayouba Tinni, Hamadou and Spijkerboer (2022), 63-64 on the compatibility of the ETM with international law, and 82-85 on its compatibility with the GCR. More generally on the tension between asylum and containment ibid., 72-73.
[92] Ayouba Tinni, Hamadou and Spijkerboer (2022), 23-26.

potentially being resettled from Niger to other states. From this point of view, the ETM first increases Niger's burden, before alleviating it mostly (a number of refugees who are not resettled remain the responsibility of Niger). Finally, if one takes into account the fact that refugees displaced from Libya to Niger were often "pulled back" from the Mediterranean Sea towards Libya generates an even more critical assessment of the ETM. The Libyan Coast Guard is funded by the EU to implement the "pull backs" of migrants (including refugees) from the Mediterranean to Libya, where many end up in the infamous detention camps. Notwithstanding the unimaginable living conditions in these camps, which are well known to European actors, European projects facilitating the "pull backs" have been continued.[93] The situation in these camps is the reason for UN agencies (UNHCR, IOM) to advocate the disembarkation of survivors at sea in Europe instead of in Libya.[94] Detainees from these camps are transported to Niger in the context of the ETM. Taken together, EU supported projects result in the interception of people on the high seas; their transport to Libya where they are exposed to inhuman treatment; and their subsequent transportation to a third country (Niger). At no moment before they arrive in Niger has their appeal to non-refoulement been assessed in accordance with international law (as required by Article 3 and 13 ECHR). All the elements of this process are facilitated in a decisive way by European actors. Taken together, such actions were held to be contrary to the European Convention on Human Rights.[95] The Court found the return of Hirsi Jamaa and others to Libya a violation of Article 3 and 13 ECHR for two reasons. First, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to serious human rights violations. Secondly, the Court observed that, because of what was known about the human rights situation in Eritrea and Somalia at the time, Hirsi Jamaa and others had an arguable claim that their repatriation would violate Article 3 ECHR. Therefore, their return to

[93] I.a. Kos (2019), 9-54.
[94] Joint Statement IOM-UNHCR, 'IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya', 17 June 2021, www.iom.int.
[95] ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, 27765/09.

Libya would only be acceptable if Italy could reasonably expect Libya to offer sufficient guarantees against repatriation in violation of Article 3 ECHR.[96] On the basis of the available human rights information, the court concluded that when Hirsi Jamaa and the others were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their countries of origin.[97]

To sum up: the evaluation of the ETM changes substantially depending on whether one only takes the ETM's resettlement element into account (where the evaluation is outright positive); whether one also includes the fact that refugees evacuated to Niger from Libya (positive from a humanitarian point of view, but leaving Niger with a slightly heavier burden than it would have without the ETM as not all evacuees are resettled); or whether one includes the fact that many evacuees have been intercepted (with decisive European support) in the Mediterranean before being brought to the Libyan detention camps and being evacuated (this is the chain of events which was deemed contrary to international human rights law in the Hirsi Jamaa judgment).[98]

6.2 Framing in Serbia, Tunisia and Turkey

Although this issue was not explored in the other three country reports, this phenomenon of the normative evaluation of EU instruments depending on the frame adopted for the analysis can also be observed in EU policy documents[99] and in the other countries covered in this research. The EU has supported Serbia in adopting high caliber asylum legislation.[100] This is certainly in full conformity with international refugee law and the GCR. However, if one analyses the European support for asylum capacities in Serbia in combination with the EU-Serbia Readmission agreement and the tens of thousands of pushbacks to Serbia by EU

[96] Ibid., 151-152.
[97] Ibid., 156.
[98] Ayouba Tinni, Hamadou and Spijkerboer (2022), 63-64 and 82-85.
[99] Commission 2020; Ayouba Tinni, Hamadou and Spijkerboer (2022), 22.
[100] Djurovic, Djurovic and Spijkerboer (2022), 31-33.

member states that have taken place continuously since 2016, the compatibility with international law and the GCR becomes problematic. The pushbacks, which constitute large scale and blatant violations of international and European law, are justified by referring to the existence of Serbian asylum legislation. Looking at the wider context, one may conclude that actions in full conformity with international law (support the development of Serbian asylum law) are used as a pretext for large scale violations of international law. In Tunisia, European projects have contributed to Tunisia's border management capacities, including its capacity to carry out search and rescue operations. Seen in isolation, this enhances Tunisia's capacities to live up to its obligations under international maritime law. However, as Tunisian civil society organisations observe, this increased SAR capacity is instrumentalised so as to prevent Tunisians and third country nationals from leaving Tunisia, and to return third country nationals to Tunisia while it does not qualify as a safe third country.[101] Seen in this light, the compatibility with the principle of non-refoulement becomes problematic. For Turkey, one can observe that the substantial support by the EU for adopting state of the art asylum legislation, as well as for hosting refugees enhances Turkey's capacities to live up to its obligations under international law, and eases the pressure on the country hosting the largest number of refugees world-wide.[102] It should be noted that the 6 billion EUR for 3.6 million Syrian refugees for six years amounts to a mere 1.666 EUR per refugee for six years, and 278 EUR per year – not enough to cover the expenses. However, the Facility for Refugees in Turkey (FRiT) was part of a package deal which included Turkey's willingness to prevent departures from Turkey towards the EU, as well as Turkey's willingness to readmit asylum seekers from the Greek islands. Containment of Syrians within Syria was also a foreseen element of EU-Turkey cooperation.[103] If one takes the package as a whole as the object of analysis, the compatibility with international law is problematic because Turkey does not qualify as a safe third country, while it seems incompatible with

[101] Raach, Sha'ath and Spijkerboer (2022), 58-61.
[102] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 22-29, 58-60.
[103] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 44, 50-51.

the GCR because it increases the pressure on Turkey by not allowing onward movement of refugees towards Europe while providing only homeopathic resettlement options (0,8% of Syrian refugees have been resettled under the EU-Turkey statement[104]).

What these instances share is that their evaluation in light of international law and the GCR varies with the frame that is adopted. If one takes a narrow frame and looks exclusively at asylum support activities (the ETM, supporting SAR capacity, supporting high quality asylum legislation, co-funding refugee reception), the evaluation can be quite positive. However, if one enlarges the frame and evaluates the measures within the policy context in which they were taken, compatibility with international law and the GCR becomes questionable, and in some cases highly questionable. The choice of the frame is essentially up to the observer, and therefore carries considerable consequences.

7. Conclusion and policy recommendations

As outlined in paragraph 2, there is considerable tension between Europe's policy objective of containment and its objective of supporting asylum systems in third countries. From an internal European perspective, the tension does not exist: it is entirely logical that, if asylum capacities in third countries are good, European actors can legitimately force refugees and asylum seekers to stay there and return them there. The tension does exist once one is aware of the perspective of the third countries involved. From their point of view, it is illogical and even illegitimate that the EU and its member states want them to do what they are not willing to do themselves, namely host refugees and asylum seekers. If one thinks of Niger (per capita income in 2021 $ 594,90) or Tunisia (per capita income in 2021 $ 3.924,30), it seems obvious that the EU (per capita income in 2021 $ 38.234,10; source World Bank) is better able to host refugees and asylum seekers than these

[104] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 46.

countries. Additionally, an important root cause of the current refugee situation in Northern Africa is the disintegration of Libya that followed a NATO military intervention initiated by France and the US in 2011.[105] Europe has contributed in significant ways to the problem; financially it is much better able to carry the burden; so why should Tunisia and Niger be willing to do that for them? If one thinks of Serbia, it is unclear why Serbia should be willing host refugees and asylum seekers many of whom are coming from EU member states (Greece, Bulgaria) and want to go to EU member states.[106]

In paragraph 3.3, we have shown that European actors try to change the perception of third countries that European containment policies are illogical and illegitimate, by supporting the asylum and migration management systems in third countries. These efforts have three limitations. First, even though they may affect esp. the financial assessment that third countries make, it does not change their normative position (Europe is not willing to host refugees; why would we be?). Second, European support never covers the full costs of hosting refugees (think of not all ETM evacuees being resettled from Niger, *supra* para. 5.1, or of the 278 EUR per Syrian refugee per year which FRiT contributes, *supra* para 6.2). Third, European promises are short term and conditional, and are therefore seen not reliable in the long run (e.g. visa freedom and EU accession in the EU-Turkey statement which did not materialise;[107] concerns about continued funding of RSD in Tunisia;[108] concerns about the continuity of the funding of the Serbian reception and migration management system).[109]

[105] Chivvis (2013); Weighill and Gaub (2018).
[106] E.g. the Serbian right wing politician Dragan Marković Palma, 'Dragan Marković Palma: Ne dolaze migranti dronovima u Srbiju nego preko Evropske unije'[Dragan Marković Palma: Migrants are not coming to Serbia by drones, but through the European Union], *Danas online* 17 October 2022, https://www.danas.rs/vesti/politika/dragan-markovic-palma-ne-dolaze-migranti-dronovima-u-srbiju-nego-preko-evropske-unije/.
[107] Ovacık, İneli-Ciğer, Ulusoy and Spijkerboer (2022), 31, 47.
[108] Raach, Sha'ath and Spijkerboer (2022), 64-66.
[109] Radovic, Radovic and Spijkerboer (2022), 81.

In some contexts, European instruments succeed in changing the assessment of third countries that European containment policies are illogical and illegitimate, with the result that they are willing to co-operate (*supra*, para. 3.2). The clearest example of this is Serbia, where the prospect of EU accession is of such overriding importance that Serbia is willing to accept measures which risk increasing the burden of refugee reception in Serbia. However, because such an increase goes against Serbian interests and is not seen as legitimate by Serbian actors, there are insufficient incentives to effectively implement the measures which the Serbian government has accepted. The Serbian asylum authorities do not succeed in dealing with the challenges relating to the asylum procedure and reception; they have no incentive to do so because if they did, this could well increase these challenges because EU member states would return more asylum seekers to Serbia.[110] In Niger a hesitant attitude of local authorities, who have not been involved in the development of the ETM and the asylum office in Agadez, can be observed.[111] In Tunisia, in the context of the Asylum Bill the government has not been convinced to cooperate at all.[112] Similarly, Tunisia has not accepted the idea of European offshore processing centres, and has not accepted to include third country nationals in readmission agreements.[113] Turkey has regularly threatened to limit its implementation of the EU-Turkey Statement, as it did in March 2020. It seems evident that EU-Turkey cooperation in the field of migration has increased the agency of Turkey; the EU depends on Turkey for its own migration policy, and as a consequence Turkey has gained in power vis-à-vis the EU.[114] At the same time, it has become the country hosting the biggest number of refugees world-wide. It may be that in this manner the situation in Turkey functions as a warning for Tunisia not to adopt, as Turkey has done, asylum legislation modelled on the EU asylum acquis because this fits with European containment policy.

[110] Djurovic, Djurovic and Spijkerboer (2022), 77-78, 80-81.
[111] Ayouba Tinni, Hamadou and Spijkerboer (2022), 48-51, 52-53, 76-77, 82-83.
[112] Raach, Sha'ath and Spijkerboer (2022), 64-66.
[113] Raach, Sha'ath and Spijkerboer (2022), 26, 65.
[114] Comp. on Serbia and North Macedonia Webb (2022).

This central tension between supporting asylum and migration management capacities and containment also influences the democratic deficit which characterises the implementation of European instruments with and in third countries. Instruments concluded between European actors and third states are often secretive (*supra*, para. 4.1); local actors are involved selectively (*supra*, para. 4.2); and there is a preference for undemocratic procedures as full-fledged democratic procedures may not lead to the desired result (*supra*, para. 4.3).[115] This shows a tension between European migration policy objectives, and its wider objective of promoting democratic values and practices. Similarly, European containment objectives result in contributing to violations of international law by third states (*supra*, para. 5.1), and by an absence of accountability for potential or actual human rights violations by European actors themselves (*supra*, para. 5.2). Finally, the combined asylum-containment approach results in normative ambiguity, because the normative evaluation of European actions depends on whether the evaluation takes into account only isolated actions, or draws the policy context of which they form part into the picture (*supra*, para. 6).

8. Recommendations

The analysis presented here shows that relevant actors in third countries do not consider the EU and EU member states as reliable and credible partners in the field of asylum, but as self-interested actors seeking to impose their will on third states by relying on their superior power position. Eventually this results in an external migration and asylum policy that has limited effects. Third country cooperation is necessary yet occurs only to a limited extent because the policy third countries are expected to cooperate with is considered as increasing the responsibilities of third countries, and therefore as illegitimate. If the EU and its member states want to change the perception third countries hold of them, this will need a long-term effort to fundamentally re-think the assumptions of its policy. We propose the

[115] Informalisation is a more general characteristic of European external migration policy, i.a. Roman 2017 and Seeberg & Zardo (2020).

following elements for such re-thinking (and indicate on which paragraphs the recommendation is based).

- European commitments will be seen as more reliable if they are long-term and comprehensive, as opposed to the short-term projects adopted on an ad hoc basis that are typical for current policy instruments such as FRiT and EUTF (paragraph 3.3).

- European commitments will be seen as more reliable if they are formal and take the form of legislation and treaties instead of, as they increasingly do,[116] MoUs, non-public texts and press releases (paragraph 3.3, 4.1, 4.3).

- European commitments will be seen as more legitimate if European actors do not seek to negotiate bilaterally with individual third countries which may have a quite weak position, but instead engage with the African Union or regional economic communities such as ECOWAS (paragraph 4.2).

- European commitments will be seen as more reliable if they are unconditional commitments, instead of relying issue linkage such as between readmission and visa facilitation (paragraph 3.3)

- In order to increase the democratic control of European activities, there should be transparency concerning all documents, as well as transparent criteria for the timing and subject of CSO consultations as well as for selecting the CSOs to be involved (paragraph 4.1 and 4.2).

- In order to improve the rule of law conformity the European activities, (1) project documents should operationalise human rights objectives in a specific manner; (2) an *ex ante* human rights audit should be performed, as recommended by the European Ombudsperson in the

[116] Cassarino (2022).

context of the EU-Turkey Statement,[117] and should be made public;[118] (3) *ex post* monitoring and evaluation reports should be performed and should be made public (paragraph 5).

- European actors need to be more familiar with the perspectives of third countries; one way of getting more insight in this is to promote and fund researchers from the countries involved to carry out an independent research agenda (paragraph 2.2)

- EU funded (as well as other) research projects involving third countries should give a key role to third country researchers; the ethics of the cooperation with third country researchers should be an element of grant procedures, as well as of review procedures (paragraph 2.2.3).

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[117] Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18 January 2017.
[118] Raach, Sha'ath and Spijkerboer (2022), 61.

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

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