

On ‘Safety’ and EU Externalization of Borders: *Questioning the Role of Tunisia as a “Safe Country of Origin” and a “Safe Third Country”*

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Abstract

This article questions whether Tunisia – a country of departure, transit and destination of migrants and refugees, and a key interlocutor in EU externalization and readmission policies – can be considered a “safe country of origin” for Tunisian nationals and a “safe third country” for foreigners in search of protection. In discussing the rapidly evolving domestic legal and political system and the treatment of minorities, vulnerable groups, and refugees in Tunisia, this article adopts a socio-legal perspective also relying on interviews with key stakeholders.

Finally, it proposes a reflection on the main (conceptual and empirical) elements of continuity between the “safe country of origin” notion and the “safe third country” one, by highlighting their deep relationship, how they may mutually influence each other, and the need to reconnect various perspectives on safety, avoiding reproducing Eurocentric analytic approaches, interpretations, and narratives.

Keywords

safety – externalization – migration control – readmission – refugees – safe country of origin – safe third country – Tunisia

1 Introduction

Since the mid-eighties, in parallel with the strengthening of EU external borders, and the creation of the Schengen area, seaborne migration through the Mediterranean has increased.¹ Focusing on the Central Mediterranean seaborne pathways to Europe, Tunisia has been emerging as one of the main countries of departure over the last decades: being only 35 nautical miles far from Italy (Pantelleria island), the sea routes connecting the two shores have been regularly travelled by fishermen over the centuries.² Moreover, the opening, and the closure of Tunisian routes to Italy were deeply affected both by domestic and regional political changes – such as the revolutions and wars in the MENA region – and by European policies of cooperation with North African countries.³

Starting in 1995 with the signature of Schengen Agreement, and subsequently in the frame of EU Neighborhood Policy, the cross-border cooperation between Italy and Tunisia was expanded, leading to what Celata et al.⁴ defined as “re-bordering of Italy-Tunisia frontier”.⁵ The country started becoming a key interlocutor with the EU, which endorsed an “externalization approach” to border management, namely a strategy aimed at outsourcing and delocalizing

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- 1 King, R. 1998. The Mediterranean: Europe's Rio Grande. *The frontiers of Europe*, pp. 109–134.
 - 2 Coletti, R. 2014. Resilienza Regionale e Regioni Transfrontaliere. Il Caso della Pesca nella Sicilia Sud Occidentale [Regional Resilience and Cross-Border Regions: The Case of Fisheries in South-West Sicily]. *Memorie geografiche* 12, pp. 289–292.
 - 3 Denaro, C. 2016. The reconfiguration of Mediterranean migration routes after the war in Syria: narratives of the ‘Egyptian route’ to Italy (and beyond). In N. Ribas-Mateos (eds) *Migration, Mobilities and the Arab Spring*. Edward Elgar Publishing.
 - 4 Celata, F., Coletti, R., and Stocchiero, A. 2017. Neighborhood Policy, Cross-border Cooperation and the Re-bordering of the Italy-Tunisia Frontier. *Journal of Borderlands Studies*, 32(3), pp. 379–393.
 - 5 Cassarino, J.P. 2014. Channelled policy transfers: EU-Tunisia interactions on migration matters. *European Journal of Migration and Law* 16(1), pp. 97–123; Giglioli, I. 2017. Producing Sicily as Europe: Migration, colonialism and the making of the Mediterranean border between Italy and Tunisia. *Geopolitics*, 22(2), pp. 407–428.

the responsibility for border surveillance and migration management, with the main purpose of preventing departures and reducing arrivals.⁶

A multiplicity of migration and border management tools – such as bilateral (formal and informal) agreements, strategic plans, dedicated funding lines – have been serving the cause of limiting “unwanted” arrivals from Tunisia and facilitating quick repatriation of those nationals reaching the European shores. If, on the one hand, externalization policies promoted the strengthening of sea (and land) border surveillance, with the aim of limiting departures, on the other hand, EU migration policies introduced more selective mechanisms of categorization of those reaching Europe (i.e. the so-called Hotspot Approach), amongst those “entitled” to seek asylum, and those allegedly travelling for “economic reasons”, such as Tunisian nationals, therefore to be channeled through detention and return pathways.⁷

Against this background, several scholars have analyzed the failures of EU readmission and reintegration policies in Tunisia, by highlighting how – rather than curbing irregular migration – they were “creating the conditions for repeated cycles of irregular migration, by which deportees were still keen to re-emigrate [...], fully aware of risking further deportation”.⁸ Beyond highlighting the inefficiency of externalization and readmission policies, main human rights concerns regard, inter alia, the risk of *refoulement*, but also the right to leave one’s own country in order to seek asylum, the right to life, the prohibition of inhuman and degrading treatments and of collective expulsions.

6 Casas-Cortes, M., Cobarrubias, S., and Pickles, J. 2016. Good neighbors make good fences': Seahorse operations, border externalization and extra-territoriality. *European Urban and Regional Studies* 23(3): 231–251; Cuttitta, P. 2018. Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode* 50(3): 783–803; Papageorgiou, V. 2018. The externalization of European borders. Center for International Strategic Analyses (KEDISA) Research Paper No. 23.

7 Pichou, M. 2016. Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights. *KritV, CritQ, RCrit. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft/Critical Quarterly for Legislation and Law/Revue critique trimestrielle de jurisprudence et de législation*, pp. 114–131; Sciarba, A. 2017. Categorizing migrants by undermining the right to asylum. The implementation of the «hotspot approach» in Sicily. *Etnografia e ricerca qualitativa*, 10(1), pp. 97–120; Tazzioli, M., and Garelli, G. 2020. Containment beyond detention: The hotspot system and disrupted migration movements across Europe. *Environment and planning D: society and space*, 38(6), pp. 1009–1027.

8 Suber, D.L. 2017. Failing Readmission: If sending migrants back won't work. A case study of Italy and Tunisia, Rosa Luxemburg, p. 11; Badalič, V. 2019. Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights, *Int. Migration & Integration* 20, pp. 85–100.

At the core of both externalization policies and migration management of foreigners and Tunisian nationals reaching (or attempting to reach) the EU, there was the (re)definition of Tunisia as a “safe country of origin” first and as a “safe third country”, subsequently. Nevertheless, the relationship between different connotations that the “safety concept” assumes when applied to countries of origin or so-called third countries, is only marginally present in the scientific debate. While most of scholarly contributions separately engage with the “safe country of origin” concept and with the “safe third country” one, in our article we propose a dialogue between these categories, based on the assumption that a simultaneous analysis of “safety for nationals” and “safety for non-nationals” can enrich both concepts. In other words, our aim is to contribute to de-fragment the debate on Tunisia’s safety, by highlighting continuities between those which are rather presented as two conceptual worlds, to be kept distinct.

Moreover, against a wide literature body addressing bordering tools, mechanisms, technologies, and infrastructures to control migration, much less doctrinal debate has been dedicated to assessing the legal and political – domestic and international – processes behind the redefinition of the neighboring countries as ‘safe’ ones. However, what is more evident about processes of definition of third countries as safe ones is their Eurocentric nature. Labelling a country as a safe one means softening European States’ attention toward their duty to ensure protection of nationals and foreigners who departed from that third country to reach Europe.

Bringing empirical references from fieldwork in Tunisia, including 10 in-depth and semi-structured interviews with key stakeholders,⁹ and analyzing a wide range of primary and secondary data sources, this article critically deals with the “safe country” concept from a socio-legal perspective.¹⁰ In particular, after providing a legal analysis of “safe country of origin” and “safe third country” concepts, this article examines them from an empirical standpoint, through the adoption of different research methods developed in the sociological and policy assessment field. Interviewed stakeholders’ selection was based

9 Interviews involved representatives of IOM, UNHCR, Save the Children operating in Tunisia, and the Tunis Center for Migration and Asylum (CeTuMa). Amongst the main issues which have been addressed during the interviews there was the Tunisian legal framework concerning border management, migration and asylum, the reception and detention system for third country nationals, and the role of International Organizations and NGOs in protecting migrant and refugee rights, as well as Tunisian citizens belonging to specific categories which are at risk of suffering human rights violations.

10 Banakar, R. and Travers, M. 2005. *Theory and Method in Socio-Legal Research*. Oxford: Hart Publishing.

on their involvement and role in implementing migration and asylum policies, as well as on their expertise on the main research issues.

After engaging with the current academic debate on the “safe country concept(s)”, with a view of putting into dialogue the main perspectives from which they originate (Section I), this article sheds light on the notions of “safe country of origin” and “safe third country” under the EU legal framework (Section II). Furthermore, after discussing why Tunisia – being simultaneously a country of departure, transit and destination and a key interlocutor in EU externalization and readmission policies – is an emblematic case study (Section III), Section IV and V give an overview of the socio-political situation of Tunisia, the degree of protection of the fundamental rights of vulnerable categories of people as well as the treatment migrants and refugees. Lastly, Section VI questions whether Tunisia can be a “safe country of origin” (SCO) for Tunisian nationals, who are either intercepted at sea or readmitted by European States (Section IV), as well as a “safe third country” (STC) for foreigners in search of protection (Section V). Therefore, we propose a reflection on the main (conceptual and empirical) elements of continuity between safety concepts, by highlighting their deep relationship, how they may mutually influence each other, and the need to reconnect various perspectives on safety, avoiding reproducing Eurocentric analytic approaches, interpretations, and narratives.

2 Whose Safety? Putting “Safe Country of Origin” and “Safe Third Country” Categories into Dialogue

Over the last three decades, European States have developed various mechanisms to shift responsibility for asylum seekers to other countries either within or outside Europe. Whilst internal transfers of responsibility within the EU are governed by the Dublin Regulation,¹¹ 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”.¹² Yet, most of the times, no formal agreement on attribution of State responsibility for refugees exists between a European State and a third country, thus giving an ample margin of discretion to governments to discern when a State is safe enough to assume responsibility for refugees.

11 The Dublin Regulation No 343/2003 has now been replaced by the 2013 Recast Dublin Regulation.

12 The concept of “first country of asylum” is also relevant, but its discussion exceeds the scope of this article.

As this article aims to discuss safety categories for Tunisian nationals as well as for migrants and refugees, it is first to be analysed what are the criteria to define safety of a non-European State under international and EU law. The notions of SCO and STC, which have been integrated into the EU Recast Asylum Procedures Directive (Articles 37 and 38), the 2016 proposal for an Asylum Procedures Regulation,¹³ and the asylum legislation of almost all EU Member States,¹⁴ continues to be very controversial.¹⁵

The concept of “safe country” has been described as “a procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed or imagined to be secure.”¹⁶

Under Article 37 and Annex 1 of Directive 2013/32/EU (Recast Asylum Procedures Directive), a SCO is a State

where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU (Recast Qualification Directive), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment. Moreover, according to Article 37, EU Member States “may retain or introduce legislation

13 See Article 45 of the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

14 Hailbronner, K. 1993. ‘The Concept of “Safe Third Country” and Expeditious Asylum Procedures: A Western European Perspective’, 5 *IJRL*, pp. 36–48; Byrne, R. and Shacknove, A. 1996. ‘The “Safe Third Country” Notion in European Asylum Law’, 9 *Harvard Human Rights Journal*, p. 185; Waidlich, S. 2000. First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection? *Georgetown Immigration Law Journal*, 14, p. 643; Costello, C. 2005. The asylum procedures directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection. *European Journal of Migration and Law*, 7(1), pp. 35–70.

15 Bartolini, G. 2008. ‘Osservazioni in Margine alla “Direttiva Procedure” 2005/85/EC’ in P. Benvenuti (ed), *Flussi Migratori e Fruizione dei Diritti Fondamentali*, Il Sirente; Zwaan, K. (eds), *The Procedures Directive. Central Themes, Problem Issues, and Implementation in Selected Member States*. Wolf Legal Publishers, 2008.

16 Goodwin-Gill, G.S. and McAdam, J. 2007. *The Refugee in International Law*. Oxford University Press, p. 392.

that allows for the national designation of safe countries of origin for the purposes of examining applications for international protection".¹⁷

When applied to 'third countries', the contours of the term 'safe' are clarified by Article 38 of the Recast Procedures Directive, according to which Member States can apply the STC concept only where in the third country concerned:

- (a) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
- (c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) the possibility exists to request refugee status and if found to be a refugee, to receive protection in accordance with the Geneva Convention.

With regards to the concept of "effective protection", Article 7(2) of the 2011 Recast Qualification Directive provides that: "protection against persecution or serious harm must be effective and of a non-temporary nature."¹⁸ The assessment of whether the readmitting third country is actually safe not only includes a verification of whether efficient asylum procedures are in place, or whether international human rights and refugee law instruments have been ratified, but also seeks to ascertain whether no peril exists for people in need of international protection to be sent onward back into the arms of their persecutors.¹⁹ However, even if a State is considered generally safe because of the presence of adequate asylum procedures and judicial oversight, every individual is entitled to rebut the presumption of safety of that country for him or her in that particular case.²⁰

17 Under paragraph 2 of Article 37 of the Recast Asylum Procedures Directive EU Member States "shall regularly review the situation in third countries that are designated as safe countries of origin". While the assessment of whether a country is a safe country of origin shall be based on information gathered from different sources (such as other EU Member States, European Union Agency for Asylum (EUAA), United Nations High Commissioner for Refugees (UNHCR), the Council of Europe and other relevant international organisations), Member States shall notify to the Commission those States that are designated as safe countries of origin in accordance with Article 37. See, paragraphs 3 and 4 of Article 37.

18 See also, *Abdulla*, ECLI:EU:C:2010:105.

19 See, e.g., ECtHR, *Hirsi and Others v Italy*, App. no. 27765/09, 23 February 2012, paras 128, 131, 152, 157.

20 See, e.g., *MSS v Belgium and Greece*, App no 30696/09 (21 January 2011) and Spijkerboer, T. 2011. 'Stretching the Limits. European Maritime Border Control Policies and International

Another element included in Article 38(2)(a) of the Recast Procedures Directive to identify a possible STC is the existence of a reasonable connection with the third country that could justify transfer to that State. However, Article 38 fails to specify what exactly a 'reasonable' connection means, thereby leaving it up to EU Member States to determine whether even mere transit could be per se a sufficient reason for that person to be removed to that specific country. Moreover, under Article 38(2)(b), Member States may decide either to adopt a case-by-case method to determine the safety of a country or to apply a more perfunctory approach based on national designation of countries generally considered to be safe.²¹ In any event, sending States must verify, on an individual basis, whether the readmitting country effectively respects these safety criteria.

All in all, it has been pointed out how removal to both a SCO and a STC is "a misguided approach to asylum which creates new problems and avoidable instances of *refoulement*".²² A joint report by AEDH, EuroMed Rights and FIDH,²³ while analysing the impact of SCO policies, identified three main limitations on the right to asylum: i) Presumption of inadmissibility of asylum applications: a heavier burden of proof; ii) No suspensive appeal: raising concerns over the principle of *non-refoulement*; iii) Accelerated or hasty procedures.

While looking instead at STC policies' impact on the right to asylum, scholars and practitioners have emphasized how the main pitfalls of the STC policy derive from the difficulty in determining the 'safety' of a third State and in finding a remedy for the problem of chain deportations, which can result in *refoulement*. This policy represents States' efforts, for reasons of "procedural economy", to expeditiously transfer asylum seekers on the basis of general assessments of "safety".²⁴ Such a risk increases as long as European States enforce removal by

Law' in MC Foblets et al (eds), *The External Dimension of the Immigration & Asylum Policy of the EU*, Bruylant.

21 Vedsted-Hansen, J. 2016. Asylum procedures directive 2013/32/EU. In *EU Immigration and Asylum Law*, Nomos Verlagsgesellschaft mbH & Co. KG, pp. 1285–1381.

22 Borchelt, G. 2002. 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards', *Columbia Human Rights Law Review*, 33, p. 522.

23 AEDH, EuroMed rights and FIDH. 2016. "Safe" countries: A denial of the right of asylum. Available at: https://euromedrights.org/wp-content/uploads/2016/10/AnalysePaysSurs-FINAL-EN-12052016_final.pdf.

24 Noll, G. 2000. *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Kluwer International Law.

means of bilateral readmission agreements without examining the merits of asylum applications.²⁵

Despite copious literature has addressed the shortcomings of such “safe country” policies, less attention has been paid to the interrelationship between the different perspectives from which the “safety” of a country is observed. Analyses of processes through which a country can simultaneously be labelled as a “safe country of origin” and as a “safe third country” are very rare in the scientific debate.²⁶

Most of the studies chose to address one of these categories, without problematizing the possible link between those definitions, as well as possible commonalities and differences between the different approaches to – and perspectives on – safety. This lack of connection can partially be justified by the “different purposes” behind the use of SCO and STC concepts: while the SCO concept is intended to impact the admissibility of an asylum claim, by assuming the lack of any “serious risk of persecution”,²⁷ the STC one is mainly set to provide a ground for those policies of deterrence, aimed at preventing people from reaching a “new” country of asylum.²⁸ Nevertheless, we consider important to promote a joint reflection on SCO and STC concepts, by analysing “safety” as a whole, and hypothesising that the “same” possible lack of safety would concurrently affect both nationals and non-nationals in a certain

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- 25 Giuffré, M. 2020, *The Readmission of Asylum Seekers under International Law*, pp. 37–113; Moreno-Lax, V. 2013. ‘The “Safe Third Country” Notion Revisited: An Appraisal in light of General International Rules on the Law of Treaties’, in Goodwin-Gill GS (ed), *International Migrations*, 2010 *Centre for Studies and Research in International Law and International Relations of The Hague Academy of International Law*, Martinus Nijhoff.
- 26 Costello, C. 2016. “Safe Country? Says Who?”, *International Journal of Refugee Law*, 28, pp. 605–606.
- 27 Martenson, H. and McCarthy, J. 1998. ‘In General, No Serious Risk of Persecution’: Safe Country of Origin Practices in Nine European States. *Journal of Refugee Studies*, 11(3), pp. 304–325; Hunt, M. 2014. The safe country of origin concept in European asylum law: Past, present, and future. *International Journal of Refugee Law*, 26(4), pp. 500–535; Engelmann, C. 2014. Convergence against the odds: The development of safe country of origin policies in EU Member States (1990–2013). *European Journal of Migration and Law*, 16(2), pp. 277–302; Costello, C. 2016. “Safe Country? Says Who?”, *International Journal of Refugee Law*, 28, pp. 605–606; Atak, I. 2018. Safe country of origin: Constructing the irregularity of asylum seekers in Canada. *International Migration*, 56(6), pp. 176–190.
- 28 Kjaergaard, E. 1994. The Concept of ‘Safe Third Country’ in Contemporary European Refugee Law. *Int’l J. Refugee L.*, 6, pp. 649; Gil-Bazo, M.T. 2006. The practice of Mediterranean states in the context of the European Union’s Justice and Home Affairs external dimension. The safe third country concept revisited. *International Journal of Refugee Law*, 18(3–4), pp. 571–600; Moreno-Lax, V. (2015). The legality of the “safe third country” notion contested: insights from the law of treaties. *Migration & Refugee Protection in the 21st Century: Legal Aspects*, pp. 665–721.

country. Finally, when looking into safety categories, it still seems crucial to consider the common background which leads to SCO and STC definitions and policies, namely the “protection elsewhere approach” which also permeates any form of border externalization.²⁹

3 Reflection on Tunisia as a Country of Destination, Transit, and Departure: (Dealing with) Multiple Perspectives on Safety

Despite a robust literature on the notion of SCO and STC, there is less research on the applicability of these two categories to the Tunisian context. Scholars have primarily focused on the guarantees necessary to prevent the sending State from violating its international human rights obligations toward third country nationals removed to allegedly ‘safe countries’ – the full gamut of these obligations arising from the mere fact that the sending State has encountered the asylum seeker at some point in time and space. However, much less abundant is the literature on the actual situation in the receiving countries. And, in this respect, critics have primarily focused on Libya, which has been, over the last decade, the main partner of the EU and Member States’ cooperation on externalized migration control.³⁰ In this context, public evidence of continuous and atrocious violations of the fundamental rights of migrants and refugees detained in Libya have led to the progressive participation of Tunisia as a new key interlocutor partially replacing Libya in search and rescue activities along with European States.³¹

29 Foster, M. 2006. Protection elsewhere: the legal implications of requiring refugees to seek protection in another state. *Mich. J. Int'l L.*, 28, pp. 223; Taylor, S. 2006. Protection Elsewhere/Nowhere. *International Journal of Refugee Law*, 18(2), pp. 283–312.

30 Giuffré, M. 2012, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Pushbacks to Libya?’ 2012, *International Journal of Refugee Law*, 24(4), pp. 692–734; Pijnenburg, A. 2018. From Italian pushbacks to Libyan pullbacks: Is Hirsi 2.0 in the making in Strasbourg?, *European Journal of Migration and Law*.

31 Farahat, A. and Markard, N. 2020. Places of Safety in the Mediterranean: The EU’s Policy of Outsourcing Responsibility. *Heinrich Boll Stiftung*. Available at: <https://eu.boell.org/sites/default/files/2020-02/HBS-POS%20brochure%20web-200219.pdf>; Bisiaux, S.A. 2020. La Tunisie, terre d’accueil ... des politiques européennes. *Plein droit*, 125; pp. 27–30; UN OHCHR. 2021b. Tunisia and Libya: UN experts condemn collective expulsion and deplorable living conditions of migrants. Available at: <https://www.ohchr.org/en/press-releases/2021/11/tunisia-and-libya-un-experts-condemn-collective-expulsion-and-deplorable>; Ben Amor, R. and Costa, M. 2021. ‘La Tunisie entre la classification de «pays sûr» et la réalité d’un pays à la dérive’. *Diritto, Immigrazione e Cittadinanza*, 3. Available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-3-2021/810-templatetunisia/file>; Cyr, L.C. 2021. ‘Refoulement par procuration’: L’impact des politiques

Although the proposal of creating disembarkation platforms in Tunisia, for people intercepted at sea on their way to Europe, has been currently side-lined, the EU strategy is increasingly geared towards supporting Tunisia's search and rescue services within the framework of a partnership which sees Tunisia engaged in the pre-emptive containment of migrants far from the European frontier. The "border management component" for Tunisia is primarily funded under the EU Trust Fund for Africa (EUTF) and has the Italian Ministry of Interior and the International Centre for Migration Policy Development (ICMPD) as implementing partners. While 'ensuring the free movement of bona fide travellers and goods', the main goal of the border management programme remains that of combatting irregular migration, by providing support to the strengthening of border management capacities of the target countries.³²

In this article, we therefore aim to bring together two different disciplines by applying the international and EU legal framework on safety to the Tunisian context. In the attempt to minimise Eurocentrism in the study of externalization and 'safe country' policies, we do not only offer an updated analysis of the rapidly evolving domestic legal and political system and the treatment of minorities, women, and refugees in Tunisia through the study of current legislation, emergency laws, and policy briefs, but we also include the voices of those actors who are most involved with migration and asylum issues in Tunisia.

As previously mentioned, Tunisia is simultaneously a country of destination, transit, and departure for migrants, asylum seekers and Tunisian nationals, respectively, with a 94% increase in UNHCR population of concern observed in 2020 and 2021.³³ Tunisia is also the first nationality of those who reach Italy by sea. As stressed by FTDES³⁴ and EuroMed Rights,³⁵ since 2019,

d'externalisation des frontières de l'UE sur les migrantes victimes de traite en Tunisie. *Report pour FTDES*. Available at: <https://ftdes.net/rapports/Refoulementparprocuration.pdf>.

32 For reasons of space, a thorough analysis of the policy of conditionality of EU funding and the EU-Tunisia cooperation on border management and migration by sea, including the definition of *place of safety* under the law of the sea and search and rescue norms, will be the object of another paper and cannot be exhaustively addressed here.

33 UNHCR. 2021(b). *Tunisia Situation map – Refugees and asylum-seekers*. Available at: https://reporting.unhcr.org/sites/default/files/UNHCR%20Tunisia%20Operation%20Map_May%202021.pdf; UNHCR 2022(b). *Tunisia Latest Updates*. Available at: <https://reporting.unhcr.org/tunisia>.

34 FTDES. 2021. *Report of June 2021: collective protests, suicide and migration*. Available at: <https://ftdes.net/en/ost-rapport-juin-2021-des-mouvements-sociaux-suicides-violences-et-migrations/>.

35 EuroMed Rights Report. 2021. *The New Pact on Migration and Asylum*. Available at: https://euromedrights.org/wp-content/uploads/2021/05/EN_4AnalysisPACT.pdf.

sea interceptions by Tunisian Coast Guard have started to grow: 4,177 people were intercepted back in 2019, 12,466 in 2020 and 25,657 in 2021. These operations concerned people of different nationalities travelling on board of boats departed from Tunisia, but also from Libya. According to Watch the Med Alarm Phone, during the second half of 2021, the Tunisian Navy intercepted around 1,600 people who departed from Libya.³⁶

4 Human Rights and the Socio-political Situation in Tunisia

This Section will examine the treatment of certain vulnerable groups in Tunisia, the limited access to rights and freedoms for Tunisian citizens, the socio-political context, as well as the general human rights situation of this country, which 11 years after the Tunisian revolution, and the starting of the democratic transition, still looks rather worrisome. In Section 5 we will instead focus on the specific perils faced by migrants, especially asylum seekers and refugees. Such a picture will then be helpful to question Tunisia as a “safe country of origin” and as a “safe third country” in Section 6 of this article. We believe indeed that an assessment of Tunisia as a (un)safe country of origin can somehow be a precondition for a comprehensive analysis of its (un)safety also for third country nationals.

4.1 *The “Self-Coup” and the Permanent State of Emergency*

On 25th July 2021, during the 64th anniversary of the Republic proclamation, after thousands of people poured onto the streets nationwide, Tunisia's president Kais Saied sacked the Prime Minister Mechichi – who sought the support of the moderate Islamist ruling party, Ennahda – and suspended the Parliament.³⁷ This measure further put at risk the political stability in Tunisia, whose balance was already fragile due to the continuous renewal of the “state of emergency” – first declared in July 2015 in the aftermath of an attack on a presidential guard bus claimed by the ISIL group.³⁸ Last renewal of the state

36 Alarm Phone. 2022. *Migrant resistance against yet another new level of brutality*. Central Mediterranean Analysis, July-December 2021. Available at: <https://alarmphone.org/en/2022/03/02/migrant-resistance-against-yet-another-new-level-of-brutality/>.

37 BBC News. 2021. *Tunisia's PM sacked after violent Covid protests*. Available at: <https://www.bbc.com/news/world-africa-57958555>.

38 DCAF Tunisie. 2015. *Décret présidentiel n° 2015-119 du 4 juillet 2015, proclamant l'état d'urgence sur tout le territoire*. Available at: <https://legislation-securite.tn/law/44972>; DCAF Tunisie 2021. (Presidential Decree No. 2015-119, of 4 July, stating the state of emergency on all the territory) *Décret présidentiel n° 2021-67 du 23 juillet 2021, portant prorogation*

of emergency dates to 20 February 2022 until the end of the year.³⁹ President Kais Saied also removed the immunity of the members of the Parliament by invoking Article 80 of the Constitution⁴⁰ whereby

the President of the Republic, in a state of imminent danger threatening the integrity of the country and the country's security and independence, is entitled to take the measures necessitated by this exceptional situation [... but] thirty days after the entry into force of these measures, and at any time thereafter, the Speaker of the Assembly of the Representatives of the People or thirty of the members thereof shall be entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional [... and] the Court shall rule upon and publicly issue its decision within a period not exceeding fifteen days.

However, because of the prolonged absence of a permanent Constitutional Court,⁴¹ the only way out of the current situation and “permanent state of emergency” seems to be parliamentary elections, which have been called for December 2022.⁴² While, at the beginning, “the coup” seemed to have quite a wide popular support, as people were publicly expressing their tiredness for the lack of transparency and accountability of the majoritarian Islamist party (Ennahda), after some weeks, people started to demonstrate against the suspension of the Parliament, mainly frustrated for the lack of political measures aimed at contrasting poverty, joblessness – growing from the 13% rate in 2010 to 18% in 2021⁴³ – and the cost of living. These protests reached their peak on

de l'état d'urgence. Available at: <https://legislation-securite.tn/law/105033>. (Presidential Decree No. 2021-67, of 23 July, establishing the extension of the state of emergency). See also Aljazeera. 2020. *Tunisia extends five-year-old state of emergency by six months*. Available at: <https://www.aljazeera.com/news/2020/12/26/tunisia-extends-five-year-state-of-emergency>.

39 Turan M.A. 2022. *Tunisia extends state of emergency until end of 2022*. Available at: <https://www.aa.com.tr/en/africa/tunisia-extends-state-of-emergency-until-end-of-2022/2506794>.

40 Cherkaoui, T. 2021. *Opinion – Tunisia's dangerous moment: A self-coup*. Available at: <https://www.aa.com.tr/en/analysis/opinion-tunisia-s-dangerous-moment-a-self-coup/2345542>.

41 HRW. 2021b. *In Tunisia, President's Power Grab and An Absent Constitutional Court*. Available at: <https://www.hrw.org/news/2021/08/27/tunisia-presidents-power-grab-and-absent-constitutional-court>.

42 The Guardian. 2021. *Tunisia's president calls constitutional referendum followed by elections in 2022*. Available at: <https://www.theguardian.com/world/2021/dec/14/tunisia-president-calls-constitutional-referendum-followed-by-elections-in-2022>.

43 Statista. 2020. *Tunisia: Unemployment rate from 1999 to 2020*. Available at: <https://www.statista.com/statistics/524516/unemployment-rate-in-tunisia/>; Statista. 2022. *Unem-*

the anniversary of the revolution, when hundreds of protesters rallied against President Saied, who had extended suspension of the Parliament.⁴⁴ The troublesome economic situation has been deeply exacerbated also by the Covid-19 pandemic, and protests by citizens have been multiplying over the past year.⁴⁵

When the legal framework which defines the state of emergency is characterized, such as in the Tunisian case, by a high degree ambiguity and vagueness on its scope of application, there is a greater risk for the arbitrary and politically targeted implementation of special laws.⁴⁶ At the same time, whilst a careful assessment of the proportionality and necessity of the measures adopted for security purposes – which often go beyond efforts to tackle the alleged terrorist threat by indiscriminately targeting any political opponents, civil society groups, journalists, and young protesters – should be ensured, it cannot be neglected that crises traditionally entail a reinforcement of the executive arm of the government to the detriment of judicial authority and parliamentary scrutiny with the consequent lack of effective domestic remedies of supervision of the executive and the limitation of fundamental rights and civil liberties.⁴⁷

4.2 *Political Repression of Protests, and Abuses by Police Authorities*

Beyond the overlapping between “state of exception” and “permanent state of emergency”, Tunisia is also experiencing an incomplete/unfinished process of transitional justice, a failing decentralization process as well as a widespread criminalization of social movements.⁴⁸

On 14 January 2021, pacific demonstrations were violently repressed by the police, through the “unmotivated use of teargas and pepper gas” against

ployment rate in Tunisia from 1st quarter 2019 to 1st quarter 2022. Available at: <https://www.statista.com/statistics/1237604/unemployment-in-tunisia-by-quarter/>.

44 Aljazeera. 2021. Hundreds protest in Tunisia on anniversary of revolution. Available at: <https://www.aljazeera.com/news/2021/12/17/hundreds-protest-in-tunisia-on-anniversary-of-revolution>.

45 See note no. 34.

46 Mariniello, T. 2019. Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system. *German Law Journal*, 20(1), pp. 46–71.

47 Basilien-Gainche, M.L. 2016. Etat d'urgence et lutte contre le terrorisme. La mécanique de l'entropie. *Journal Du Droit Administratif*; Fitzpatrick, J. 1994. Human Rights in Crisis: The International System For Protecting Rights During States of Emergency. *University of Pennsylvania Press*, pp. 19–31.

48 Ben Amor, R. and Costa, M. 2021. Diritto, Immigrazione e Cittadinanza 3/2021. Available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-3-2021/810-template-tunisia/file>.

demonstrators, including journalists.⁴⁹ Similar police abuses against protesters were observed in June 2021, when the UN Human Rights Office showed its concern for the grave abuses by the Tunisian police which rocked the capital for six nights. In these circumstances (justified by President Saïed as a measure against the oppression of social movements), “the government treated the protests with stigma, accusing them of sabotage, and gave the security services carte blanche to suppress them” and “more than 2,000 young people, 30% of whom were minors, were arrested”.⁵⁰

These events were just one episode in a series of security crackdowns on social and youth movements demanding constitutional rights,⁵¹ such as the January 2018 protests against social inequality – during which a journalist set himself on fire – that led to nearly 900 arrests and massive police intervention,⁵² and the more recent protests of July, November, and December 2021.⁵³

4.3 *Human Rights and Freedoms of Vulnerable Groups: Women, Lesbian, Gay, Bisexual, Transexual, Intersex, Queer (LGBTIQ) Persons, and Religious Minorities*

Despite significant developments, the Tunisian situation still presents many concerns related to human rights and freedoms of certain groups, such as women, LGBTIQ persons and religious minorities that will be discussed below.

4.3.1 Women

Despite the governmental efforts to deal with the issue of gender-based discrimination and violence, Tunisian women continue to be exposed to these risks. Indeed, despite being gender equality enshrined in the Tunisian

49 HRW. 2021. Tunisia: Police Use Violent Tactics to Quash Protests. Available at: <https://www.hrw.org/news/2021/02/05/tunisia-police-use-violent-tactics-quash-protests>.

50 Ben Amor, R. and Costa, M. 2021. Rapport conjoint de plaidoyer: Violences policières et criminalisation des activistes et des défenseures des droits humains. *ASF*.

51 Ibid.

52 New York Times (NYT). 2018. Nearly 800 arrested in Economic Protests in Tunisia. Available at: <https://www.nytimes.com/2018/01/12/world/africa/tunisia-tunis-protests-arrests.html>.

53 Amara, T. 2021(a). Protests across Tunisia target Ennahda party over political crisis. Available at: <https://www.reuters.com/world/africa/protests-across-tunisia-covid-19-surges-economy-suffers-2021-07-25/>; Amara, T. 2021(b). Tunisian protesters try to march on suspended parliament. Available at: <https://www.reuters.com/world/africa/tunisian-protesters-try-march-suspended-parliament-2021-11-14/>; France 24. 2021. Thousands protest against Tunisian president on 10th anniversary of uprising. <https://www.france24.com/en/africa/20211217-thousands-protest-against-tunisian-president-on-10th-anniversary-of-uprising>.

Constitution, women are still discriminated with regards to family law and succession in the framework of the 1956 Personal Status Code.⁵⁴

According to human rights organizations, Law 58 of 2017 on violence against women, which sets out new protection mechanisms for survivors, is still poorly implemented, especially with regard to the way in which the police deal with women's complaints about domestic violence.⁵⁵ Unfortunately, official national statistics on sexual and gender-based violence are not available, neither concerning lifetime physical and/or sexual intimate partner violence, nor concerning lifetime non-partner one.⁵⁶ According to UNICEF, there is a 5% of child marriages, which concerns the percentage of women aged 20 to 24 who were first married or in union before age 18.⁵⁷

However, despite the lack of systematic data collection processes, some sporadic attempts to measure the amplitude of sexual and gender-based violence (SGBV) in Tunisia provided a quite daunting picture. According to a 2016 report by the Ministry of Women, Families and Children, the 60% of Tunisian women are victims of domestic violence.⁵⁸ As occurred in many other countries, the 2020 pandemic lockdowns have exacerbated inequalities and SGBV issues.

4.3.2 LGBTIQ Persons

Another attention-worth human rights issue in Tunisia is discrimination against people of non-heterosexual orientation. According to Article 230 of the Tunisian Penal Code, homosexual behaviors are still considered a relevant criminal conduct, and are punished with detention up to three years.⁵⁹ Although, for decades, people suspected of being homosexual could lawfully

54 Human Rights Watch (HRW). 2020. Tunisia Events of 2020. Available at: <https://www.hrw.org/world-report/2022/country-chapters/tunisia>.

55 Ibid; Wilson Center. 2021. Tunisian Women Denouncing Violence Against Women. Available at: <https://www.wilsoncenter.org/blog-post/tunisian-women-denouncing-violence-against-women>.

56 Global Database on Violence against Women. 2022. Tunisia. Available at: <https://evaw-global-database.unwomen.org/fr/countries/africa/tunisia>.

57 Based on Demographic and Health Surveys (DHS), Multiple Indicator Cluster Surveys (MICS) and other nationally representative surveys. See also UNICEF Data 2022. Monitoring the situation of children and women. Available at: <https://data.unicef.org/country/tun/>.

58 Organisation Internationale de Droit du Développement (IDLO). 2017. Ending Violence Against Women in Tunisia through Shelters. Available at: <https://www.idlo.int/fr/news/highlights/ending-violence-against-women-tunisia-through-shelters>.

59 HRW. 2020. Tunisia: Two-Year Sentence for Homosexuality. Available at: <https://www.hrw.org/news/2020/07/06/tunisia-two-year-sentence-homosexuality>; HRW. 2021. Tunisia Events of 2020. Available at: <https://www.hrw.org/world-report/2021/country-chapters/tunisia>. See also International Lesbian, Gay, Bisexual, Trans and Intersex Association

be subject to anal inspection procedures, in 2017 these practices have been banned,⁶⁰ except in those cases in which an individual consent subsists.⁶¹ However, as also remarked by Human Rights Watch (2020), “this approach fails to recognize that consent is seriously compromised because trial courts can infer guilt from a refusal to undergo the exam”.⁶²

In this regard, the UN OHCHR Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, in the frame of the preliminary observations on the visit to Tunisia in June 2021, stated that LGBT people in Tunisia face “endemic violence” and expressed deep concern for the “lack of judicial sanctions against the serious violations” to which this group is exposed and for “the impunity that the police unions appear to enjoy”.⁶³ Main violations to which both LGBT persons and associations are constantly exposed straddle from violations of the right to privacy to harassment, from death threats to arbitrary detention and attacks.⁶⁴

4.3.3 Religious minorities

Another key aspect when it comes to the assessment of Tunisia’s safety is the freedom of religion and worship issues, which are very much related to freedom of expression. The Tunisian Constitution enshrines freedom of religion and faith and the prohibition of sanctioning apostasy. However, Islam is the proclaimed State religion, and the State has the mandate to protect it. The dominance of Islam religion materializes in a number of restrictions: the Tunisian President can only be Muslim (although non-Muslim persons have the right to vote for the office of the President of the Republic under Article 74 of the Constitution).

(ILGA). 2019. State-Sponsored Homophobia. Available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf.

60 News 24 (2017) Tunisia bans forced anal exams for homosexuality. Available at: <https://www.news24.com/News24/tunisia-bans-forced-anal-exams-for-homosexuality-20170922>.

61 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). 2019. State-Sponsored Homophobia. Available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf.

62 News 24 (2017) Tunisia bans forced anal exams for homosexuality. Available at: <https://www.news24.com/News24/tunisia-bans-forced-anal-exams-for-homosexuality-20170922>.

63 UN OHCHR. 2021. Preliminary observations on the visit to Tunisia by the Independent expert on protection against violence and discrimination based on sexual orientation and gender identity. Available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27174&LangID=E>.

64 UN OHCHR. 2021. Tunisia and Libya: UN experts condemn collective expulsion and deplorable living conditions of migrants. <https://www.ohchr.org/en/press-releases/2021/11/tunisia-and-libya-un-experts-condemn-collective-expulsion-and-deplorable>.

According to the Report of the Special Rapporteur on freedom of religion and belief, notwithstanding the constitutional commitment to freedom of religion and non-discrimination, “the ambiguity of some constitutional provisions which lend themselves to discrimination as it pertains to religion or belief should not be ignored”,⁶⁵ as well as the fact that the legal framework of reference on the issue “does not meet the international standards for the protection of freedom of association or indeed freedom of religion or belief”.⁶⁶

Coming to the consequences of these shortcomings in terms of impact on non-Muslim persons' lives, according to the Special Rapporteur's observations, in Tunisia “there are societal pressures against the conversion of Muslims to other religious groups; formerly Muslims who converted to other religions may be subject to social ostracism; and atheism is misperceived”.⁶⁷ Sporadic events of violence against non-Muslims have also been observed.⁶⁸

Moreover, even if blasphemy is not specifically penalized by Tunisian law, public order and public decency laws can be used to penalize or discourage proselytizing in public places as this is considered potentially harmful to the public order and public morals, according to Article 226 of the Tunisian Penal Code (Article 266(2)). Limitation of freedom of expression, including detention, occurs when personal statements are deemed offensive to Islam and the sacred values.

5 A Brief Overview on Migrants and Asylum Seekers in the Tunisian Context

This Section will discuss the main elements concerning the condition of migrants and refugees in Tunisia in view of a more detailed assessment of Tunisia as a “safe third country” in Section 6. Recent data on the overall migrant population are not available and IOM data on migrants' presence in Tunisia date back to 2018 – when they counted approximately 75,000

65 UN Human Rights Office of the High Commissioner (UN OHCHR). 2019. Preliminary findings of the visit to Tunisia by the UN Special Rapporteur on Freedom of Religion or Belief, Available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22956&LangID=E>.

66 Ibid.

67 Ibid.

68 US Department of State (USDOS). 2018. Report on International Religious Freedom: Tunisia. <https://www.state.gov/reports/2018-report-on-international-religious-freedom/tunisia/>.

migrants.⁶⁹ Apparently, IOM most recent monitoring tool, the Displacement Tracking Matrix (DTM), is not implemented in Tunisia, as data on the country are not available on the project website.⁷⁰ However, when looking at migrants' situation in the country, more recent statistics become available for specific categories.⁷¹ Using the migrant classification, no information is available on how many people amongst them are asylum seekers and refugees. According to information gathered during our interviews, the UNHCR – and its partners, such as the Tunisian Refugee Council – do register only some nationalities, so several others are prevented from accessing asylum.

Although having ratified the 1951 Geneva Convention on the Status of Refugees, its 1967 Additional Protocol, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷² Tunisia does not have an asylum legislation yet, so the legal framework governing migration and asylum remains incomplete.⁷³ This law has been widely proclaimed as “the immediate next step to be done” by both institutions and international organizations, but it is easy to understand how – notwithstanding Europe's pressure to make Tunisia appear as a safe and reliable partner country – in a moment of parliament suspension, the way to achieve it is still extremely long. Moreover, it cannot be neglected the concern of the Tunisian government that passing an asylum law would presumably make Tunisia appear as a “safe” country. Here the risks would indeed be twofold: on the one hand, the enactment of a new asylum law would push European States to increase pressure for the readmission of third country nationals who transited through Tunisia before reaching Europe, and on the other hand, would make the admission, processing, and reception of refugees a national responsibility for Tunisia.⁷⁴

69 Ben Amor, R. and Costa, M. 2021. Diritto, Immigrazione e Cittadinanza 3/2021. Available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-30-2021/810-tem-platetunisia/file>.

70 According to IOM, the Displacement Tracking Matrix is a system to track and monitor displacement and population mobility. See also IOM. 2020. Displacement Tracking Matrix (DTM), Tunisia – Migrants Presence Monitoring COVID-19 Rapid Needs Assessment. Available at: <https://dtm.iom.int/reports/tunisia—migrants-presence-monitoring-covid-19-rapid-needs-assessment>.

71 Ibid.

72 Organization of the African Union (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974, p. 80.

73 Ben Amor, R. and Costa, M. 2021. Diritto, Immigrazione e Cittadinanza, 3. Available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-3-2021/810-tem-platetunisia/file>.

74 Raach, F., Sha'at, H., & Spijkerboer, T.P. (2022). Country report Tunisia. Available at: <https://research.vu.nl/en/publications/country-report-tunisia>.

Interviewees confirmed that Tunisian authorities are generally cooperative with national and foreign agencies working on migration, providing, for example, unaccompanied minors with vocational training. International organizations are particularly active in informing migrants about their rights, their legal protection, and how healthcare can be accessed in the country.⁷⁵ However, in practice, the government is still reluctant about the adoption of an asylum and migration legislation because, inter alia, of the current internal economic and political situation. It is for this reason that reception centers for migrants are mainly managed by international organizations present in the country.

Reference to the right to political asylum and to the prohibition of extradition of political refugees is included in Article 26 of the Tunisian Constitution. However, this principle – which remains quite restrictive in its definition of asylum, recognizing it only for political reasons – has not been implemented through any national laws.⁷⁶ Moreover, although the 2014 Constitution does not confer specific protection to foreigners, it provides that “all persons” – regardless of their nationality – should be entitled to fundamental rights and freedoms, amongst which the right to life, dignity, and freedom of opinion.⁷⁷

Further steps forward on protection guarantees have been done with Law 61 of 2016 concerning “the prevention and fight against trafficking in persons.”⁷⁸ This Law was followed by Law no. 58/2017 of 11 August 2017 on “the elimination of violence against women” and Law no. 50/2018 of 23 October 2018 on “elimination of all forms of racial discrimination”. Against this background, the main legal reference on migration remains Law no. 1968-007 of 8 March 1968 concerning the “condition of foreigners in Tunisia”, which regulates the entry, stay and exit of foreigners. More specifically, Decree 1968-198 criminalizes irregular entry of foreigners in the country by subjecting it to the possession of a visa.

5.1 *Limited Access to Asylum: The Role of UNHCR*

Considering the lack of both a national asylum law in Tunisia and specific legal provisions on access to asylum, the UNHCR plays a crucial role in the whole

75 For instance, a circular guaranteeing the right of migrants to receive health care on an equal footing with nationals was adopted in 2018. Interview conducted by the authors with an international organization representative.

76 Ben Amor, R. and Costa, M. 2021a. *Diritto, Immigrazione e Cittadinanza* 3/2021, p. 39. Available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-3-2021/810-templatetunisia/file>.

77 Ben Achour, S. 2019. *Les libertés individuelles des étrangères et des étrangers en Tunisie: Les métèques de la République*. ADLI. Available at: https://tn.boell.org/sites/default/files/les_meteques_de_la_republique.pdf.

78 This law foresaw the establishment of a National Authority for the Fight against Trafficking in Persons (INLCTP).

refugee status determination (RSD) procedure. The presence and mandate of the UN Agency in the country was established by the 18 June 2011 cooperation agreement with the Tunisian government. In the frame of this agreement, UNHCR was formally authorized by the government to operate in the country, and to manage all refugees related issues, from access to the country until the exit. According to available information, main UNHCR activities would currently consist of registration of possible asylum seekers, refugee status determination procedures, legal information procedures – through their partners' activities (e.g., le Conseil Tunisien des Réfugiés) – provision of first aid at disembarkation points, management of reception facilities for people of concern, and finally selection of possible candidates for resettlement.

The dominant role of UNHCR across the whole refugee status determination process does not end with the possible recognition, or lack of recognition, but also concerns the possibility to appeal the negative decisions. According to interviewees, if a person appeals UNHCR decision, his/her claim for asylum will undergo a new assessment which – as a rule – is again conducted by the same Agency.⁷⁹

Unfortunately, as for most of European countries, Tunisia is featured by structural discrepancies in accessing asylum procedures and registration, according to nationality-based criteria. Even if this selection practice is not formalized in any public document or Standard Operational Procedures,⁸⁰ it very much recalls the Safe Country Lists drafted by EU member States, according to which those belonging to supposedly “safe countries” are channeled through so-called “accelerated asylum procedures”.⁸¹

As stressed by the interviewees, there is an informal agreement between UNHCR staff members on the nationalities which can be potentially considered as asylum seekers and those who cannot, and this would be reflected on the refugee status recognition rates for each nationality. Syrian and Eritrean nationals are amongst those who can aspire to be recognized as refugees, while persons from Sub Saharan Africa can generally not.

UNHCR manages two reception facilities in the South of Tunisia, one in Zarzis and one in Medenine and works in close cooperation with IOM, which

79 Interview with a former UNHCR and IOM staff member in Tunisia, June 2021; Interview with UNHCR Tunisia, June 2021.

80 According to the interviewees, the work on asylum and Tunisia as a place of safety started at least in 2019 but was never concluded.

81 Association for Juridical Studies on Immigration (ASGI). 2021. Policy Paper on the Amendment Procedure Regulation. Available at: https://www.asgi.it/wp-content/uploads/2021/10/Policy-Paper_Procedure_Regulation.pdf.

manages two reception facilities in the same cities, which should be dedicated to those who do not show their willingness to seek asylum.

Those who belong to nationalities who have low asylum recognition rates are often not registered by the UNHCR but, when they are, they wait longer than others to see their asylum claim assessed.⁸² After registration procedures, asylum seekers are provided with an UNHCR card, which, however, is not considered a proper identity document by Tunisian authorities: this card does not allow its holders to travel, work, and access the education system. In addition, although the right to health is recognized as a fundamental one, access to general and specialistic medical care is not granted for free to asylum seekers and refugees that thus face similar economic obstacles to those encountered by Tunisian citizens. Additionally, opportunities to access evacuation programs and resettlements are extremely limited.⁸³

According to interviewees, access to registration with UNHCR, as a first step of the asylum procedure, can depend on several factors, ranging from the way and place of access to Tunisian territory – land, sea, and air borders – to the availability of a determined governorate to “receive” asylum seekers. Reportedly, the assignment of foreign nationals to UNHCR facilities (for asylum seekers) and to IOM facilities (for so-called economic migrants) does not occur in accordance with official criteria and procedures. Since the UNHCR reception centers’ capacity is inferior to that of IOM centers, the latter often host asylum seekers and refugees, as well as persons with specific needs who could be of UNHCR’s concern. Some experts reported that, except specific nationalities (e.g. Syrian citizens and few others), after a border crossing, migrants are “*de plano*” sent to IOM centers, and moved afterwards to UNHCR camps if they show their willingness to seek asylum.⁸⁴

Starting in February 2022, more than 250 asylum seekers and refugees have undertaken a protest in front of UNHCR offices in Zarzis to denounce the lack of access to services and the inadequate reception conditions.⁸⁵ Many of them were seemingly deprived of the cash assistance and required to leave the reception facility without access to alternative solutions. Most of them were in Tunisia after failed sea crossings attempts, due to interceptions by Tunisian SAR authorities before they could reach Europe. According to one of the spokespersons of the protest, the UNHCR would have “abandoned its main

82 Interview with former UNHCR and IOM staff member 2022.

83 Interview with CETUMA President, June 2020.

84 Interview with former UNHCR and IOM staff member 2022.

85 Info Migrants. 2021. Tunisia: NGOs express solidarity with refugee protest. Available at: <https://www.infomigrants.net/en/post/39997/tunisia-ngos-express-solidarity-with-refugee-protest>.

role”, therefore depriving people of refugee protection and leaving them on the streets.⁸⁶ In April 2022, refugees moved their protest to Tunis, where they arranged a sit-in in front of UNHCR headquarter.

5.2 *Arbitrary Detention of Migrants*

When assessing the possibility to qualify Tunisia as a STC, it is also necessary to focus on the well-known practice of arbitrary detention of foreigners. According to Law no. 7 of 1968, foreign citizens who are found in a situation of administrative irregularity (due to irregular entry, stay and exit of the country) and/or who represent a threat to national security can be detained and expelled. Regrettably, the 1968 Law does not include references neither to a possible judicial review of detention, nor to the temporary limits that this measure should comply with. This gap, which is in contrast with Article 29 of the 2014 Constitution,⁸⁷ de facto allows authorities to make an extensive and instrumental use of provisions included in Law 7/68 whereby irregular migrants are criminalized and sanctioned with prison sentences and fines. Indeed, “in practice, ... non-nationals are regularly detained without legal basis or judicial control, are denied access to lawyers, and receive no written notification of the reason for their detention – raising serious concerns that non-nationals are being detained arbitrarily”.⁸⁸

As outlined by several NGO reports, our interviewees confirmed that the exact number and location of detention facilities is unknown, either by parliamentary members or International Organizations’ staff. Citing media sources, NGOs report that in Tunis there might be 13 detention facilities for migrants, 11 of which would be kept secret by authorities.⁸⁹ In all these detention centres – which are entirely under the control of the Ministry of the Interior, unlike prisons, which are instead managed by the Ministry of Justice – foreign citizens do not have adequate access to information, cannot contact lawyers or

86 Ibid.

87 Under Article 29 of the Constitution, “No one may be arrested or detained except in cases of flagrante delicto or on the basis of a court decision. The detainee is immediately informed of his rights and of the charge against him. He has the right to be represented by a lawyer. The length of arrest and detention is defined by law.”

88 Forum Tunisien pour les Droits Economiques et Sociaux (FTDES). 2020. Tunisia Issues Related to Immigration Detention. Available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/TUN/INT_CRC_NGO_TUN_44812_E.pdf.

89 Migreurop 2009. Fiche sur la politique de signature des accords de réadmission italienne. Available at: <http://www.migreurop.org/article1418.html>; *El Watan* 2009. Onze camps secrets d'enfermement de harraga en Tunisie. Available at: <https://www.elwatan.com/archives/actualites/onze-camps-secrets-denfermement-de-harraga-en-tunisie-04-07-2009>.

human rights organizations, do not receive a clear indication of the period of detention, and have no contact with the outside world. Detention conditions in those facilities have indeed been repeatedly denounced and subject to criticism due to their poor standards in breach of Article 9 of the ICCPR⁹⁰ and the use of torture.⁹¹

5.3 *Risk of Refoulement/Chain Deportation*

A direct consequence of arbitrary detention, but also a stand-alone violation of international human rights and refugee law, is represented by the various practices of *refoulement* of those seeking asylum – mainly reported as occurring at the Tunisian borders – and deportation to unsafe countries of origin.⁹²

According to interviews, media sources and NGO reports, *refoulement* at Tunisian land borders with Libya and Algeria are very frequent, and can concern persons with specific needs, women, and children. International Organizations such as UNHCR and IOM are not present at those borders and can only intervene if promptly alerted by local police authorities. This absence means that those who manage to cross the Algero-Tunisian border keep being exposed to the risk of death, due to the lack of access to any kind of assistance.⁹³

Media and NGOs have reported deportations to Libya, after previous operations of interceptions at sea by Tunisian Coast Guard and Navy, of people who were trying to reach Europe by boat.⁹⁴ On 10 November 2021, the UN OHCHR condemned Tunisia's collective expulsion of migrants and asylum seekers to Libya, highlighting how they were subjected to "brutal racism and arbitrary

90 Human Rights Committee (HCR). 2008. Concluding observations: Tunisia" Human Rights Committee. CCPR/C/TUN/CO/5. 23 April 2008. Available at: file:///C:/Users/mariagiulia/Downloads/CCPR_C_TUN_CO_5-EN.pdf.

91 UN Department of State (USDOS). 2011. 2010 Country Reports on Human Rights Practices – Tunisia. Available at: <https://2009-2017.state.gov/documents/organization/160078.pdf>.

92 Cyr, L.C. 2021. 'Refoulement par procuration': L'impact des politiques d'externalisation des frontières de l'UE sur les migrantes victimes de traite en Tunisie. *Report pour FTDES*. Available at: <https://ftdes.net/rapports/Refoulementparprocuration.pdf>; See also Amnesty International (AI). 2021. Algerian refugee deported from Tunisia now imprisoned in Algeria. Available at: <https://www.amnesty.org/en/latest/news/2021/09/algerian-refugee-deported-from-tunisia-now-imprisoned-in-algeria/>.

93 Nice-matin. 2021. Deux femmes et quatre enfants retrouvés morts de soif dans le désert en Tunisie. Available at: <https://www.nicematin.com/faits-divers/deux-femmes-et-quatre-enfants-retrouves-morts-de-soif-dans-le-desert-en-tunisie-707789>.

94 FTDES. 2021. Refoulement de migrants subsahariens vers la frontière libyenne: Face à la détérioration de la situation humanitaire en Libye, l'impératif de sauver des vies devient de plus en plus menace. Available at: <https://ftdes.net/refoulement-de-migrants-subsa-hariens-vers-la-frontiere-libyenne-face-a-la-deterioration-de-la-situation-humanitaire-en-libye-limperatif-de-sauver-des-vies-devient-de-plus-en-plus-menace/>.

expulsions to dangerous conditions”, including the risk of “chain deportation” to countries of origin.⁹⁵ In that case, dozens of migrants from sub-Saharan Africa were left at the Tunisia-Libya border, without “access to shelter, food, water and medical care” and facing “extreme threats of torture, abduction, and gender and sexual based violence”.⁹⁶ A final, but extremely concerning, element which contributes to question Tunisia as a STC consists in the practice of deportation to countries of origin (Algeria, Egypt, Libya) of people who had already been recognized as refugees in Tunisia.

6 Assessing Tunisia's Safety in the Light of International Human Rights and Refugee Law

This Section will attempt to briefly connect the underlying criteria of the SCO and STC notions under EU law with the elements discussed in Sections 4 and 5 concerning the treatment of nationals and non-nationals that depart from Tunisia to reach Europe. In assessing Tunisia's safety, we will thus focus on international human rights and refugee law.

Contesting first Tunisia as a SCO becomes crucial if we think that its inclusion in the list of ‘safe countries of origin’ (as, for instance, Italy has done) affects the way in which individual applications of Tunisian nationals are handled – thus frustrating the right to asylum – but also justifies their deportations, expulsions as well as direct and indirect pushbacks. This flawed approach, made operational through the conclusion of readmission agreements with European States (*in primis* Italy), rests on the idea that Tunisians irregularly crossing the border are migrants to be repatriated (on the basis of their nationality only) without a prior detailed assessment of their individual situation.

Under Article 37 of the Recast Asylum Procedures Directive, the assessment of a SCO should take into consideration:

- a) the relevant laws and regulations of the country and the manner in which they are applied; b) the observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against

95 UN OHCHR. 2021. Tunisia and Libya: UN experts condemn collective expulsion and deplorable living conditions of migrants. <https://www.ohchr.org/en/press-releases/2021/11/tunisia-and-libya-un-experts-condemn-collective-expulsion-and-deplorable>.

96 Ibid.

Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention; c) the respect for the *non-refoulement* principle in accordance with the Geneva Convention; d) provision for a system of effective remedies against violations of those rights and freedoms.

Applying these standards to the Tunisian context, it is possible to argue that the domestic socio-political situation appears deteriorated, despite the lack of indiscriminate violence due to an armed conflict. There has been indeed, a significant increase in the number of protests provoked by the political, social, and economic crisis. Tunisians contest indeed the extraordinary measures adopted by President Kais Saied from 25 July 2021 on and denounce the continuous violations of fundamental rights and liberties. Also the former UN High Commissioner for Human Rights has showed her preoccupation for the situation of human rights in the country raising questions on cases of kidnappings, forced disappearances and arbitrary detention of political opponents.⁹⁷ Therefore, although Tunisia is a signatory, inter alia, to the International Covenant on Civil and Political Rights⁹⁸ (ICCPR 1966), the Convention against Torture (CAT 1984),⁹⁹ the Convention on the Protection of All Persons against Enforced Disappearances (CED 2006),¹⁰⁰ and the African Charter on Human and Peoples' Rights (ACHPR 1981),¹⁰¹ the current internal situation shows how the state of security and the exceptional measures, created to face the crisis and counter the terrorism threat, significantly challenge the safeguard of human rights and civil liberties. Therefore, as visions on capital punishment, homosexuality, the rights of women and religious minorities are still quite conservative, concerns on the identification of Tunisia as a SCO cannot be dissipated.

We also contend that the role of European judges can be of great help in dismantling the labelling of Tunisia as a SCO. For instance, some Italian judges, recently called to decide on interim measures following the rejection of manifestly unfounded international protection claims (based on the SCO

97 See, Press briefing notes on Tunisia, 11 January 2022. Available at: <https://www.ohchr.org/en/2022/01/press-briefing-notes-tunisia>.

98 International Covenant on Civil and Political Rights (ICCPR). New York, 16 December 1966, in force 23 March 1976, 993 UNTS 171.

99 Convention against Torture (CAT), New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

100 International Convention for the Protection of all Persons from Enforced Disappearance (CED). New York, 20 December 2006. 2716 UNTS 3.

101 African [Banjul] Charter on Human and Peoples' Rights. 27 June 1981. Entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 rev. 5.

ground) have accorded the suspension of the deportation order due to the socio-political situation of Tunisia.¹⁰²

When border management is delegated to Tunisia deputised to the externalized control of migratory flows to Europe and to the containment of migrants and refugees, a thorough review of the safety of this country also for non-nationals contributes to showing the shortcomings in Tunisia's reception conditions and asylum procedures. In this regard, as Tunisia is more and more becoming a major actor in the implementation of 'pushback by proxy' European policies,¹⁰³ we intended to highlight the nexus between the effort made by EU Member States to strengthen Tunisian capacity of border management and surveillance of sea borders and the risk of detention and chain deportations which migrants are exposed to.

In gauging whether Tunisia can be considered a STC under the terms of Article 38 of the Recast Asylum Procedures Directive, it is important to discuss whether *non-refoulement* (either direct or indirect) and two correlated procedural entitlements, namely the right to access asylum procedures and the right to an effective remedy, can be effectively guaranteed in compliance with international human rights and refugee law, in particular the Geneva Convention and its 1967 Protocol, the CAT, the ICCPR, and the ECHR.

While a comprehensive analysis of the scope and content of these rights has already been conducted elsewhere,¹⁰⁴ this Section aims to analyse the compatibility of Tunisian migration and asylum law practice with the international legal framework summing up the main issues discussed in Section 5. In particular, the primary elements to consider in order to infer safety before removal are the express consent of the third State to readmit, protection against direct and indirect *refoulement*, respect for fundamental human rights, and access to a fair refugee status determination procedure.¹⁰⁵

Despite the ratification of the main international human rights and refugee law instruments as well as the inclusion of the right to political asylum and to the prohibition of extradition of political refugees in Article 26 of the Tunisian

102 Tribunale di Catania, Sezione Immigrazione, Decreto di fissazione udienza n. cronol. 3720/2022 of 12/07/2022, RG n. 7820/2022.

103 Migreurop and FTDES. 2020. Politique du non-accueil en Tunisie. Available at: <http://ftdes.net/rapports/ftdes.migreu.pdf>, p. 31; Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

104 See, e.g., Giuffré M., *The Readmission of Asylum Seekers under International Law* 2020, pp. 37–113.

105 See UNHCR *Global Consultations in Budapest Conclusions*. 30 September 2001, Available at: <http://www.unhcr.org/3b83b7314.html>.

Constitution, Tunisia still lacks an effective asylum legislation and does not offer national protection or mobility arrangements for refugees to the EU.¹⁰⁶ So far, interviews for refugee status determination are being conducted only by the UNHCR with several limitations concerning the procedure, including access to an effective remedy. Indeed, it is again the UNHCR that undergoes any appeal of a negative decision at first instance. Those who belong to nationalities who have low asylum recognition rates are often not registered by the UNHCR but, when they are, they wait longer than others to see their asylum claim assessed. Moreover, people seeking international protection are not adequately provided with legal assistance, translation services, and access to personal files, thus de facto being deprived of access to fair asylum procedures and effective remedies.

Tunisian authorities continue to delegate the management of several activities, such as the reception of refugees, to the UNHCR with the intent to avoid responsibility for the setting up of a national migration strategy and the creation of a national authority in charge of migration and asylum. However, because UNHCR reception centres' capacity is inferior to that of IOM centres, the latter often host asylum seekers and refugees, as well as persons with specific needs who could be of UNHCR's concern.

Section 5 also showed how several cases of *refoulement* of those seeking asylum have been reported – mainly occurring at the Tunisian borders – with deportation to unsafe countries of origin (including Libya) in breach of Article 33 of the Refugee Convention, Article 7 of the ICCPR, Article 3 of the CAT, and Article 2(3) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa.¹⁰⁷ Irregular migrants, including asylum seekers, are criminalized and sanctioned with prison sentences and fines. Whilst the exact number and location of detention facilities is unknown, foreign citizens are detained in the absence of formal orders, validation or judicial review of their detention and indication of the time limits. Furthermore, they do not have adequate access to information, cannot contact lawyers or human rights organizations, are detained in poor conditions, and are subjected to the risk of torture and inhuman and degrading treatments.¹⁰⁸ By depriving irregular migrants of their personal liberty, Tunisian authorities de facto hamper

106 Tan, N.F. and Vedsted-Hansen, J. 2021. Inventory and Typology of EU Arrangements with Third Countries: Instruments and Actors. Available at: <https://www.asileproject.eu/inventory-and-typology-of-eu-arrangements-with-third-countries/>.

107 Organization of the African Union (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974, p. 80.

108 Garelli G., Sossi F., Tazzioli M. (eds), *Report on the situation at the detention centre for foreigner of Al Wardia*, Tunisi, 2015.

their contact with the UNHCR, thus undermining refugees' access to asylum procedures.¹⁰⁹ Therefore, in most cases, Tunisia cannot be considered a STC as it does not offer fair and effective access to asylum procedures and remedies as well as a degree of protection of the fundamental rights of migrants and refugees comparable to international and European standards.

7 Looking at “Safety” as a Whole: Conclusive Remarks

After providing a socio-legal analysis of SCO and STC concepts, this article contested Tunisia's “safety”, both for nationals and non-nationals, with a view of promoting a dialogue between different perspectives on safety. If this research focused on a specific country, the same findings concerning the dialogue and interrelation between the notions of SCO and STC can be applied also to other geographical contexts. In other words, some features of the political situation of a State, which are relevant in its assessment as a SCO – such as, for instance, the existence of a state of emergency, the concerns related to political repression and abuses by police authorities and attacks to the human rights and freedoms of specific vulnerable categories, including women, LGBTIQ persons and religious minorities – cannot be left out when examining whether this State is in fact also a STC for non-nationals.

At the same time, when assessing first the criteria to determine whether a State is a STC for non-nationals – such as the presence/lack of an asylum system and of a national authority competent to determine refugee status, the risk of *refoulement* and chain deportations, the widespread practices of arbitrary detention, poor reception conditions and the lack of effective protection for migrants and refugees transiting through that country – it is not possible not to pay attention also to the political situation in the country, including the condition of the rights and freedoms of its own citizens.

For instance, if a European State precludes admissibility of the asylum application of a Tunisian national – who belongs to one of those vulnerable groups analysed in Section IV – on the sole ground that he/she comes from a SCO, de facto facilitates his/her *refoulement* because of the risk of persecution, torture or inhuman or degrading treatment or punishment. Likewise, assisting Tunisian authorities in pre-emptively pulling back refugees intercepted at sea can enhance their risk of chain *refoulement* to countries of origin or transit, or

109 Pera A. (2022). Politiche migratorie nell'ambito del partenariato UE-Tunisia. Cooperazione allo sviluppo, principio di solidarietà e aspettative tradite. *La Cittadinanza Europea Online*.

rather their confinement in a country (Tunisia) where no durable solutions are offered to certain categories of individuals in need of protection.

To conclude, looking at the enhanced cooperation between the EU and Tunisia, and the attempt of the EU to make this country, de facto, a major disembarkation area in the Mediterranean, a comprehensive assessment of the (un)safety of Tunisia both for nationals and non-nationals appeared more and more imperative also calling for continuous scholarly attention on the political and legal implications of such a partnership.

Moreover, this research emphasized the risk of outsourcing migration management and the interception of migrants' boats to North-African countries. Interdictions at sea, pullbacks, surveillance, and readmission policies are very unpopular measures among African populations, who lack interest in preventing migration, raising barriers, or offering their ports as disembarkation platforms for intercepted migrants. Therefore, the current security-oriented approach, which has proved to be enormously costly in terms of lives lost at sea and resources spent in militarizing the external frontiers of Europe, should be shelved in favor of different migration policies and strategies, able to produce a more inclusive narrative as applied to the mobility of people, be they citizens or foreigners.

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