



**Universidade do Minho**  
Escola de Direito

**The Legal and Policy Relevance of EU Mobility Partnerships:  
A comparative study of Morocco and Cape Verde**

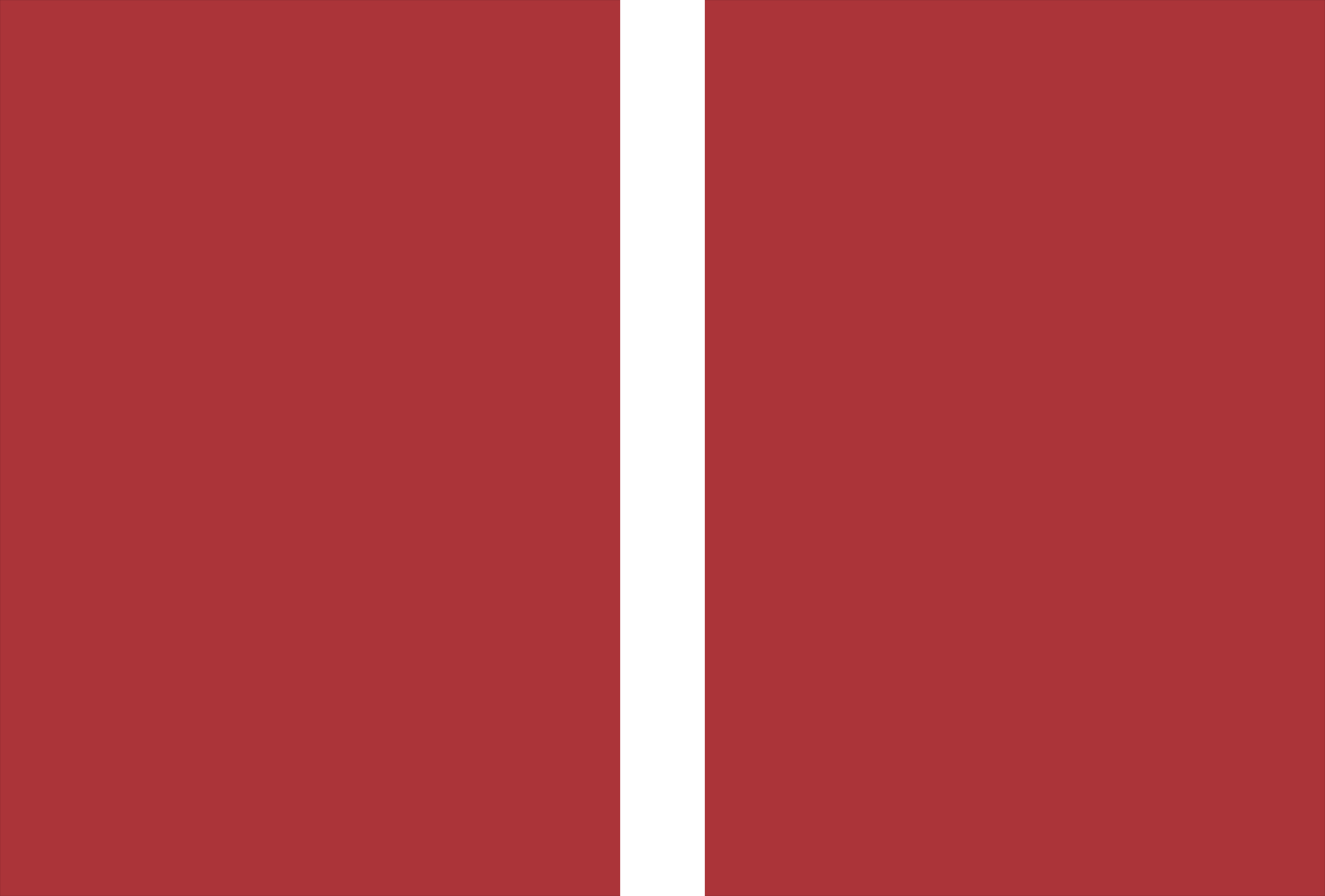
Fanny Tittel-Mosser

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**The Legal and Policy Relevance of EU Mobility  
Partnerships: A comparative study of Morocco  
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**The Legal and Policy Relevance of EU Mobility Partnerships: A comparative study of Morocco and Cape Verde**

Tese de Doutoramento em Direito  
Especialidade em Ciências Jurídicas Gerais

Trabalho efetuado sob a orientação da  
**Professora Doutora Patrícia Jerónimo**  
e do  
**Professor Doutor Maarten Peter Vink**

fevereiro de 2018

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Assinatura:



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Declaro ter atuado com integridade na elaboração da presente tese. Confirmando que em todo o trabalho conducente à sua elaboração não recorri à prática de plágio ou a qualquer forma de falsificação de resultados. Mais declaro que tomei conhecimento integral do Código de Conduta Ética da Universidade do Minho.

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A handwritten signature in blue ink, consisting of a stylized, cursive 'F' followed by a period.



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## **ABSTRACT**

### **The Legal and Policy Relevance of EU Mobility Partnerships: A comparative study of Morocco and Cape Verde**

What is the legal and policy relevance of Mobility Partnerships for the development of migration policies and laws in third countries? The aim of this thesis is to assess whether the soft law nature of Mobility Partnerships precludes any legal and policy relevance of this instrument, in particular for third countries, and if so, to understand what factors may be conducive or detrimental to the potential legal and policy relevance of Mobility Partnerships. The first hypothesis is that Mobility Partnerships while being soft law instruments, are not without relevance for the development of the legal and policy frameworks in Morocco and Cape Verde. The second hypothesis is that three main factors condition the way Mobility Partnerships can be relevant for legal and policy developments in third countries: the state of relations between third countries and EU Member States, the power of negotiation of a third country and its level of administrative capacity.

The thesis combines a comparative legal analysis of the development of the legal frameworks in Morocco and Cape Verde with an empirical study of the implementation of Mobility Partnerships' projects. It is the connection between the legal analysis, the empirical analysis and the data obtained during the extensive fieldwork conducted in Cape Verde, Morocco, Belgium, Portugal and France that allowed us to provide a comprehensive overview of the implementation of Mobility Partnerships, their relevance for third countries and the role and interests of the different actors involved in the negotiation and implementation of Mobility Partnerships.

The thesis begins by analysing the legal nature of the Mobility Partnership instrument. In Chapter 2 we present the methodology and case selection used to conduct the analysis. In Chapter 3 we analyse the implementation of the Mobility Partnership from an empirical perspective. In Chapter 4 we analyse the legal and policy developments that occurred in Morocco and Cape Verde since the conclusion of their respective Mobility Partnership and discuss whether these developments are related to the Mobility Partnerships or not. In Chapter 5, we examined to what extent and how the

three factors previously identified influence the legal and policy relevance of Mobility Partnerships for Morocco and Cape Verde.

One of the main reasons why the EU preferred Mobility Partnerships to be soft law instruments was its flexibility. In this thesis we found that Mobility Partnerships are flexible instruments that can be adapted to new political priorities. Therefore, they can play a role in continuing discussions between the EU and third countries.

Moreover, Mobility Partnerships are soft law instruments with potential legal and policy relevance for third countries. Our conclusion is that Mobility Partnerships have a “differentiated relevance”. Differentiated relevance means that in some cases legal and policy changes can be imposed by the EU, while in other cases the EU can support them according to the interests of the third country. The level of influence of the EU and Member States in the legal and policy developments as well as in the content of the new legal acts or policies can be differentiated depending on external factors. We argue that with a low level of negotiation power, the Mobility Partnership is mainly used as a tool by the EU and Member States to impose their interests upon the third country. Whereas, with a high negotiation power, the Mobility Partnership is used as a tool by the EU and the third country to achieve both their objectives. Moreover, the occurrence of legal transplants and policy transfer is higher if the country has a low power of negotiation. If a country has a low administrative capacity it will also be more likely to be influenced in its legal and policy development and the risk of transposition *ad-litteram* of legal provisions is even higher when the third country and a Member State have strong postcolonial ties and a tradition of legal transplant.

Finally, we argue that Mobility Partnerships do not deliver on their promise of increased mobility. However, this does not mean that Mobility Partnerships are not relevant for enhancing migrants’ rights. Both Mobility Partnership played a significant role in the development and implementation of immigration and asylum strategies in Cape Verde and Morocco aiming at enhancing the rights of immigrants living in these third countries and to improve their integration.

## RESUMO

**A relevância jurídica e política das Parcerias para a Mobilidade da UE: um estudo comparativo sobre Marrocos e Cabo Verde.**

Qual é a relevância jurídica e política das Parcerias para a Mobilidade para o desenvolvimento de políticas e leis de imigração em países terceiros? O objetivo deste trabalho é avaliar se a natureza não vinculativa das Parcerias para a Mobilidade impede qualquer relevância jurídica e política deste instrumento, em particular para os países terceiros, e, em caso afirmativo, procurar entender que fatores podem ser favoráveis ou prejudiciais a essa potencial relevância, jurídica e política, das Parcerias para a Mobilidade. A primeira hipótese que pretendemos testar é a de que as Parcerias para a Mobilidade, apesar de serem instrumentos de *soft law*, não são sem relevância para o desenvolvimento dos quadros jurídicos e políticos em Marrocos e em Cabo Verde. A segunda hipótese é a de que três fatores principais condicionam a forma como as Parcerias para a Mobilidade podem ser relevantes para a evolução jurídica e política em países terceiros: o estado das relações entre países terceiros e Estados-Membros da UE, o poder de negociação de um país terceiro e seu nível de capacidade administrativa.

A dissertação combina uma análise jurídica comparativa da evolução dos quadros legais em Marrocos e em Cabo Verde com um estudo empírico da implementação de projectos das Parcerias para a Mobilidade. É a conexão entre a análise jurídica, a análise empírica e os dados obtidos durante o amplo trabalho de campo realizado em Cabo Verde, Marrocos, Bélgica, Portugal e França, que nos permite obter uma visão abrangente da implementação das Parcerias para a Mobilidade, sua relevância para países terceiros e o papel e os interesses dos diferentes atores envolvidos na negociação e implementação das Parcerias para a Mobilidade.

A dissertação começa por analisar a natureza jurídica das Parcerias para a Mobilidade. No Capítulo 2, apresentamos a metodologia e a seleção de casos utilizados para realizar a análise. No Capítulo 3, analisamos a implementação das Parcerias para a Mobilidade a partir de uma perspectiva empírica. No Capítulo 4, analisamos os desenvolvimentos jurídicos e políticos ocorridos em Marrocos e em Cabo Verde desde a conclusão das suas respectivas Parcerias para a Mobilidade e discutimos se esses desenvolvimentos estão relacionados com as Parcerias para a Mobilidade ou não. No Capítulo 5, examinamos se e em que medida os três fatores

anteriormente identificados influenciam a relevância jurídica e política das Parcerias para a Mobilidade para Marrocos e Cabo Verde.

Uma das principais razões pelas quais a UE prefere que as Parcerias para a Mobilidade sejam instrumentos de *soft law* é a sua flexibilidade. Nesta dissertação, descobrimos que as Parcerias para a Mobilidade são instrumentos flexíveis que podem ser adaptados a novas prioridades políticas. Por conseguinte, podem desempenhar um papel nas discussões contínuas entre a UE e os países terceiros.

Além disso, as Parcerias para a Mobilidade são instrumentos de *soft law* com potencial relevância jurídica e política para países terceiros. A nossa conclusão é a de que as Parcerias para a Mobilidade têm uma "relevância diferenciada". A relevância diferenciada significa que, em alguns casos, a UE pode impor soluções jurídicas e políticas, enquanto, em outros casos, a UE pode apoiá-las de acordo com os interesses do país terceiro. O nível de influência da UE e dos Estados-Membros nos desenvolvimentos jurídicos e políticos, bem como no conteúdo dos novos diplomas legais ou políticas públicas, pode ser diferenciado dependendo de fatores externos. Argumentamos que, com um baixo nível de poder de negociação, as Parcerias para a Mobilidade são usadas principalmente como uma ferramenta pela UE e os Estados-Membros para impor os seus interesses a países terceiros. Considerando que, com um elevado poder de negociação, as Parcerias para a Mobilidade são utilizadas como ferramenta pela UE e pelo país terceiro para atingir os respectivos objectivos. Além disso, a ocorrência de transplantes jurídicos e a transferência de políticas é maior se o país terceiro tiver um baixo poder de negociação. Se um país terceiro tiver uma capacidade administrativa baixa, também será mais provável que seja influenciado no seu desenvolvimento jurídico e político e o risco de transposição de disposições legais é ainda maior quando o país terceiro e um Estado-Membro têm fortes laços pós-coloniais e uma tradição de transplantes jurídicos com origem na antiga Metrópole.

Finalmente, argumentamos que as Parcerias para a Mobilidade não cumprem a sua promessa de uma maior mobilidade. No entanto, isso não significa que as Parcerias para a Mobilidade sejam irrelevantes para o reforço dos direitos dos migrantes. Ambas as Parcerias para a Mobilidade analisadas desempenharam um papel significativo no desenvolvimento e na implementação de estratégias para imigração e asilo em Cabo Verde e Marrocos destinadas a reforçar os direitos dos imigrantes que vivem nesses países terceiros e melhorar as suas condições de integração.

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## LISTS OF ABBREVIATIONS

<b>ACP</b>	African, Caribbean and Pacific
<b>ANAPEC</b>	Agence Nationale pour la Promotion de l'Emploi et des Competences
<b>BRA</b>	Bureau des réfugiés et apatrides
<b>CAMM</b>	Common Agendas for Migration and Mobility
<b>CAMPO</b>	Center for Migrant Support at the Country of Origin
<b>CCME</b>	Conseil de la Communauté Marocaine à l'Etranger
<b>CEAS</b>	Common European Asylum System
<b>CNDH</b>	Comissão Nacional de Direitos Humanos (in Cape Verde)
<b>CNDH</b>	Commission Nationale des Droits de l'Homme (in Morocco)
<b>DG</b>	Directorate-General
<b>DG Devco</b>	Directorate-General for International Cooperation and Development
<b>DG Home</b>	Directorate General Migration and Home Affairs
<b>DGI</b>	Directorate-General of Immigration
<b>DG NEAR</b>	Directorate-General for Neighbourhood and Enlargement Negotiations
<b>EASO</b>	European Asylum Support Office
<b>EC</b>	European Communities
<b>ECJ</b>	European Court of Justice
<b>ECOWAS</b>	Economic Community of West African States
<b>EEAS</b>	European External Action Service
<b>ENP</b>	European Neighbourhood Policy
<b>EU</b>	European Union
<b>EURA</b>	EU Readmission Agreement
<b>GAM</b>	Global Approach to Migration
<b>GAMM</b>	Global Approach to Migration and Mobility
<b>GADEM</b>	Groupe Antiraciste de Défense et d'Accompagnement des Etrangers et Migrants
<b>GIZ</b>	Gesellschaft für Internationale Zusammenarbeit
<b>ICCPR</b>	Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

<b>INS</b>	Immigration and Naturalisation Service
<b>IOM</b>	International Organisation for Migration
<b>JHA</b>	Justice and Home Affairs
<b>MCMREAM</b>	Ministère chargé des MRE et des affaires de la Migration
<b>MIEUX</b>	Migration EU eXpertise
<b>MoU</b>	Memorandum of Understanding
<b>MPF</b>	Migration Partnership Framework
<b>MRE</b>	Marocains Résidents à l'Étranger
<b>NGO</b>	Non-Governmental Organisation
<b>NIP</b>	National Immigration Policy (Cape Verde)
<b>NIS</b>	National Immigration Strategy (Cape Verde)
<b>NSIA</b>	National Strategy for Immigration and Asylum (Morocco)
<b>RAMED</b>	Régime d'assistance médicale
<b>RDPP</b>	Regional Development and Protection Programme
<b>RPP</b>	Regional Protection Programme
<b>SALT II</b>	second Strategic Arms Limitations Treaty
<b>SPRING</b>	Support for the Partnership, Reforms and Inclusive Growth
<b>TEC</b>	Treaty establishing the European Community
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## Introduction

The first developments of the external dimension of migration policy date back to 1985 with the adoption of a decision by the Commission of the European Communities “Setting Up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries”<sup>1</sup>. The entry into force of the Amsterdam Treaty in 1999 marks the beginning of the communitarization of EU migration policy. The same year (1999), the Tampere programme was launched as the main framework for the development of a Common EU asylum and migration policy that was presented by the Commission in an official communication in 2000<sup>2</sup>. The conclusions of the General Affairs and External Relations Council of 2002 followed the same trend and repeated the need to “intensify cooperation on the management of migration flows with third countries”<sup>3</sup> and to “intensify EU partnership with countries and regions of particular relevance”<sup>4</sup>. The African and Mediterranean regions have been a political priority for the EU in terms of the fight against irregular migration and particularly for border control and readmission agreements<sup>5</sup>. Emma Haddad observes that external developments of migration policy are more likely than internal developments, because “everything is somehow less sensitive when it takes place in another country”<sup>6</sup>. This means that Member States are more hesitant to consent to internal legal developments at the EU level than to developments in the external dimension of migration policy. This should not be surprising, since this way Member States and the EU can share the “burden” of asylum seekers and refugees with neighbouring third countries, requiring their help to reinforce borders and prevent migrants from entering their territory irregularly<sup>7</sup>.

The externalisation of migration control is not a new phenomenon and has existed since the fall of the Soviet bloc in the 1990’s, slowly shifting from the East towards EU’s

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<sup>1</sup> Commission of the European Communities, ‘Commission Decision of 8 July 1985 Setting Up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries’ 85/381/EEC OJ L 217, 14 August 1985 1, 26.

<sup>2</sup> European Commission, ‘A Community Immigration Policy’ COM(2000) 757 final, Brussels, 22 November 2000.

<sup>3</sup> General Affairs and External Relations Council, ‘2463rd Meeting of the General and External Relations Council’ 14183/02, Brussels, 18 November 2002, V.

<sup>4</sup> *ibid.*

<sup>5</sup> Sergio Carrera and Raül Hernández I Sagrera, ‘The Externalisation of the EU’s Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?’ (2009) CEPS Working Document 321 1, 31.

<sup>6</sup> Emma Haddad, ‘The External Dimension of EU Refugee Policy: A new Approach to Asylum?’ (2008) 43(2) *Gov Oppos* 190, 197.

<sup>7</sup> Sandra Lavenex, ‘Shifting Up and Out: The Foreign Policy of European Immigration Control’ (2006) 29(2) *West Eur Politics* 329, 337-338; Virginie Guiraudon, ‘European Integration and Migration Policy: Vertical Policy-making as Venue Shopping’ (2000) 38(2) *JCMS* 251, 251; Sandra Lavenex and Nicole Wichmann, ‘The External Governance of EU Internal Security’ (2008) 31(1) *J Eur Integr* 83, 91.

neighbourhood in the South<sup>8</sup>. Sandra Lavenex argues that the “external dimension” of EU asylum and immigration policies has “always” existed involving non-European countries to “share the burden of migration control”<sup>9</sup>. Additionally, several authors have argued that the EU uses a strategy of externalisation to fight against irregular migration flows<sup>10</sup> and that the externalisation of EU’s migration policy trend will not stop<sup>11</sup>. Christina Boswell for example, argues that the EU externalises “traditional tools of domestic or EU migration control” such as the strengthening of border controls, the fight against human trafficking and readmission agreements<sup>12</sup>. Moreover, she argues that the EU also uses “preventive” tools in order to allow asylum seekers to make an asylum application “closer to home” or to guarantee more rights to immigrants and refugees in third countries.

Since 2005, the Global Approach to Migration (GAM) has been the predominant framework for the external dimension of the EU’s migration and asylum policy<sup>13</sup>. In 2011, the GAM became the Global Approach to Migration and Mobility (GAMM). The main instruments used for the implementation of the GAMM are Mobility Partnerships and Common Agendas for Migration and Mobility (CAMM). Since the Arab Spring uprisings in 2011 and with the “migration crisis”, the EU increasingly needs third countries’ assistance in order to manage migration flows. The Commission in 2011 affirmed that Mobility Partnerships should become the principal framework for cooperation with third countries on migration<sup>14</sup>. In 2014, the Commission established the Asylum, Migration and Integration Fund<sup>15</sup> with a total of EUR 3.137 billion for 2014-2020, highlighting the importance of Mobility Partnerships as the main strategic, comprehensive and long-term cooperation framework for migration management with third countries and invited the EU to pursue and increase the use of this tool. The Commission suggests in the “European Agenda on Migration” that the EU and the

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<sup>8</sup> Sandra Lavenex (n7) 330.

<sup>9</sup> Ibid 335.

<sup>10</sup> Joanne van Selm, ‘Immigration and Asylum or Foreign Policy: The EU’s Approach to Migrants and Their Countries of Origin’ 143 in Sandra Lavenex and Emek Uçarer (eds), *Migration and the Externalities of European Integration* (Lanham MD Lexington Book 2002); Christina Boswell, ‘The “External Dimension” of EU Immigration and Asylum Policy’ (2003) 79(3) *International Affairs* 619.

<sup>11</sup> Sandra Lavenex and Emek M. Uçarer, ‘The External Dimension of Europeanization: the Case of Immigration Policies’ (2004) 39(4) *Cooperation and Conflict* 417; Virginie Guiraudon (n7) 252.

<sup>12</sup> Christina Boswell (n10) 620.

<sup>13</sup> Commission of the European Communities, ‘Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies’ COM(2008) 611 final, Brussels, 8 October 2008.

<sup>14</sup> Macarena Nuño, ‘Migration Policies of the European Union with its Mediterranean Partners: Need for Greater Mobility’, Study, Directorate-General for External Policies of the Union, Directorate B, European Parliament PE 457.131 (2014) 1, 16.

<sup>15</sup> For more information see: [https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en) ‘Accessed 15 January 2018’.

Member States should “work together with partner countries to put in place concrete measures to prevent hazardous journeys”<sup>16</sup>. Subsequently, the EU put forth a communication establishing a new Migration Partnership Framework (MPF) with third countries under the “European Agenda on Migration”, stating the importance of providing “capacity building to the host communities and relevant institutions”<sup>17</sup>.

In 2007, the Commission introduced Mobility Partnerships as an innovating tool to achieve the Global Approach to Migration’s objectives of enhanced dialogue and cooperation with third countries<sup>18</sup>. In 2008 the first two pilot Mobility Partnerships were concluded with Cape Verde and Moldova, followed by Georgia (2009), Armenia (2011), Azerbaijan (2013), Morocco (2013), Tunisia (2014), Jordan (2014) and Belarus (2016). Mobility Partnerships are Joint Declarations in which the objectives are set following the objectives of the GAM/GAMM. Mobility Partnerships are composed of the text of the Joint Declaration and an Annex which is a list of projects designed to implement the Mobility Partnership. Mobility Partnerships projects’ topics are directly linked to the different pillars of the GAM(M). The list of projects proposed in the Annex to the Joint Declaration can evolve in line with emerging policy priorities and new projects can be proposed if new policy priorities arise. Therefore, Mobility Partnerships can play a role in continuing discussions between the EU and third countries. The number of projects and the number of Member States participating in any Mobility Partnership varies.

The notion of circular migration has been closely related to the Mobility Partnership tool<sup>19</sup>. Before the launch of the first Mobility Partnerships, academics and policy makers welcomed the new tool with enthusiasm. Circular migration was perceived as “an important shift in migration patterns” for countries of origin<sup>20</sup>. However, with the conclusion of the first Mobility Partnerships criticism started to be raised. It is often assumed that Mobility Partnerships are unfair tools created in favor of the EU and its Member States, failing to provide new opportunities for legal migration to third country

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<sup>16</sup> European Commission, ‘A European Agenda on Migration’ COM(2015) 240, Brussels, 13 May 2015.

<sup>17</sup> European Commission, ‘Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration’ COM(2016) 385 final, Strasbourg, 7 June 2016 1, 6.

<sup>18</sup> European Commission, ‘On Circular Migration and Mobility Partnerships between the European Union and Third Countries’ COM(2007) 248, Brussels, 15 May 2007.

<sup>19</sup> Ibid 4.

<sup>20</sup> Global Commission on International Migration, ‘Migration in an Interconnected World: New Directions for Action’, Report of the Global Commission on International Migration, 5 October 2005 1, 31.

nationals<sup>21</sup>. Mobility Partnerships have also been criticised for achieving EU's "disguised" externalisation of migration control<sup>22</sup>. Stefan Brocza and Katharina Paulhart<sup>23</sup> concur with this argument and describe Mobility Partnerships' first interests as expanding EU's migration scope of influence and externalisation of its borders.

Mobility Partnerships are non-binding instruments concluded between the EU, interested Member States and a third country. They are widely presented in the literature as soft law instruments or defined as being of "soft legal nature" or of "non-legal nature"<sup>24</sup>. Some accounts are less straightforward and refer to Mobility Partnerships as having a "complex legal nature"<sup>25</sup>. Traditionally, bilateral and binding agreements have been the legal instrument of choice in the field of international migration with the disadvantage of leading to sometimes incoherent regulations. In parallel to the development of legal instruments, the EU resorts to non-binding instruments to cooperate with third countries on migration and asylum issues.

Several authors<sup>26</sup> argue that, although non-binding, soft law instruments may nevertheless have legal effects or relevance. Pieter VerLoren van Themaat argues that, due to their non-binding nature, soft law instruments rarely lead to actual changes in the hard law framework of the third countries involved<sup>27</sup>. However, despite its non-binding nature, it was observed that Mobility Partnerships can have concrete legal implications especially regarding visa facilitation and readmission<sup>28</sup>. The link of reasoning behind this is that Mobility Partnerships often combine interests from both

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<sup>21</sup> Sergio Carrera and Raúl Hernández I Sagrera, 'Mobility Partnerships: "Insecurity Partnerships" for Policy Coherence and Migrant Workers Human Rights in the EU' 97 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance: The promise of partnership* (London, New York: Routledge 2011) 101.

<sup>22</sup> Euromed Rights, 'EU-Morocco Mobility Partnership: Border Control at the Expense of Human Lives?' (2014) <http://www.euomedrights.org/publication/eu-morocco-mobility-partnership-border-control-at-the-expense-of-human-lives/> 'Accessed 20 August 2017'.

<sup>23</sup> Stefan Brocza and Katharina Paulhart, 'EU Mobility Partnerships: a Smart Instrument for the Externalization of Migration Control' (2015) 15(3) *Eur J Futures Res* 1, 6.

<sup>24</sup> Sergio Carrera and Raúl Hernández I Sagrera (n5) 28; Sergio Carrera and Raúl Hernández I Sagrera (n21) 97. Panos Koutrakos, *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011)164-165; Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London New York: Routledge 2012) 209-210.

<sup>25</sup> European Commission (n18) 3.

<sup>26</sup> Pieter VerLoren van Themaat, *The Changing Structure of International Economic Laws: A Contribution of Legal History, of Comparative Law and of General Legal Theory to the Debate on a New International Economic Order* (Brill 1981) 233; Sergio Carrera and others, 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020' (2011) CEPS Policy Brief No 240 1, 6; Linda Senden, 'Soft Law, Self-regulation and Co-regulation in European Law: Where do they Meet?' (2005) 9(1) *EJCL* 1, 23; Filippa Chatzistavrou, 'L'Usage du Soft Law dans le Système Juridique International et ses Implications Sémantiques et Pratiques sur la Notion de Règle de Droit' [2005] <http://leportique.revues.org/591> 'Accessed 17 January 2018' 1, 7; Francis Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' 453 in Gerd Winter (ed), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos, Baden-Baden 1996) 461-463.

<sup>27</sup> Pieter VerLoren van Themaat (n26) 233.

<sup>28</sup> Sergio Carrera and others (n26) 6.

EU (e.g. an effective readmission policy of third country nationals) and third countries (e.g. access for its nationals to the territory of the EU through visa facilitation).

Legal and policy relevance is the terminology adopted in this thesis. The term relevance implies some “reasonable connection” with something. In the Oxford dictionary, relevance is defined as “[t]he quality or state of being closely connected or appropriate”. According to the Cambridge dictionary, relevance is “the degree to which something is related or useful to what is happening or being talked about”. The term relevance has been used previously in the literature to refer to “legal effects” of soft law. Fabien Terpan, for example, uses the term “legal relevance”<sup>29</sup>, but in a restrictive manner as synonymous with susceptibility to be used in a court of law. We use the term relevance in a broader way. Legal relevance includes potential legal effects. The notion of “effects” implies a more direct causality, which could be difficult to prove as usually many factors, actors and interests are at play in any given scenario. The analysis of the relevance of Mobility Partnership is therefore more appropriate.

In this thesis we focus on the “external relevance” of Mobility Partnerships. As such, this thesis does not engage with the relevance of Mobility Partnerships in the internal EU and Member States’ legal frameworks. Instead we look at their relevance in the legal framework of the partner third countries. We are discussing to what extent the implementation of Mobility Partnership projects is linked to the legal and policy developments occurring in a third country. By doing so we take a novel approach, examining the consequences of Mobility Partnerships for third countries and the immigrants living in these third countries. If Mobility Partnerships are relevant, the legal framework and migrants’ access to rights in the third country could be positively or negatively impacted by their implementation. In the literature relative to Mobility Partnerships, the question of the rights of immigrants’ in the third country is rarely raised. This can be explained by the fact that third countries are usually seen as countries of emigration rather than countries of immigration, despite the changes occurring in international migration and the new role undertaken by third countries as destination countries<sup>30</sup>. Second, we reflect on the third country’s political agenda

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<sup>29</sup> Fabien Terpan, ‘Soft Law in the European Union—The Changing Nature of EU Law’ (2015) 21 *ELJ* 68, 71.

<sup>30</sup> Mohamed Berriane, Hein de Haas and Katharina Natter, ‘Introduction: Revisiting Moroccan Migrations’ (2015) 20(4) *The Journal of North African Studies* 503, 517.

instead of considering it as a passive recipient of EU's external migration policy. In order to understand the legal and policy changes occurring in a third country, the full geopolitical context has to be studied<sup>31</sup>. This thesis examines the argument according to which third countries with a geopolitical importance for the EU can have a dynamic relation with the EU. Additionally, we discuss whether Mobility Partnerships can be used as a tool to support a domestic political agenda in a third country.

The aim of this thesis is to assess whether the soft law nature of Mobility Partnerships precludes any legal and policy relevance of this instrument, in particular for third countries, and if so, to understand what factors may be conducive or detrimental to the potential legal and policy relevance of Mobility Partnerships, including historic ties between the third country and an EU Member State, interests of all parties (EU, Member States and third country), conditionality, political context and administrative capacity.

Most scholars assume that Mobility Partnerships are one-sided and driven by EU's "more for more" conditionality putting a high pressure on third countries<sup>32</sup>. We discuss whether the EU and the Member States through the implementation of a Mobility Partnership influence the content of the laws and policies being developed. We also look at whether the latter use it to push their own migration policy agenda and impose their own values upon the third country or whether third countries play a more active role in these developments. More dynamic relations can be understood as relations that are considering the interests of the third country, which is not only a passive beneficiary, by opposition to one-sided relations. Sergio Mananashvili considers that Mobility Partnerships are "indirectly impacting on the diffusion of EU asylum standards"<sup>33</sup>. However, the level of EU and Member States' influence in the legal and policy developments may vary depending on the third country's power of negotiation and administrative capacity.

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<sup>31</sup> Myriam Cherti and Michael Collyer, 'Immigration and Pensée d'Etat: Moroccan Migration Policy Changes as Transformation of "Geopolitical Culture"' (2015) 20(4) *The Journal of North African Studies* 590, 599-600.

<sup>32</sup> Sergio Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (2016) CEPS Papers in Liberty and Security in Europe; Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'EU Migration Policy in the Wake of the Arab Spring What Prospects for EU-Southern Mediterranean Relations?' (2012) *MEDPRO Technical Report* 1, 15; Stefan Brocza and Katharina Paulhart (n23).

<sup>33</sup> Sergio Mananashvili, 'The Diffusion of the EU Asylum Acquis in the Eastern Neighbourhood: A Test for the EU's Normative Power' (2015) 20(2) *EFAR* 187, 193.



Drawing on Jean-Pierre Cassarino's notion of "reversed conditionality"<sup>34</sup>, this thesis examines the premise that Mobility Partnerships may not always be one-sided and that the implementation dynamics largely depend on the third country's power of negotiation and the interests of the different parties. In other words, the relations between different parties to a Mobility Partnership may be more dynamic than what is often assumed. The various factors studied throughout this thesis can help to explain why in some cases Mobility Partnerships are more dynamic and less "unbalanced" than in others.

The hypotheses discussed in this thesis are as follows. The first hypothesis is that Mobility Partnerships while being soft law instruments, are not without relevance for the development of the legal and political frameworks in Morocco and Cape Verde. We first analyse the legal nature of Mobility Partnerships and from there we seek to ascertain whether Mobility Partnerships have legal and policy relevance or not, focusing on their potential "external relevance". In other words, the potential legal and policy relevance that a Mobility Partnership can have for the legal and political systems of a third country (*in casu*, Morocco and Cape Verde). We answer the following questions: If Mobility Partnerships are soft law instruments can they be legally relevant? Can they be policy relevant? What types of legal and policy relevance can Mobility Partnership have and under which circumstances?

The second hypothesis is that three main factors condition the way Mobility Partnerships can be relevant for legal and policy developments in third countries. Arguably, three main factors potentially condition the way Mobility Partnerships can be relevant for third countries: the state of relations between third countries and EU Member States, the power of negotiation of a third country and its level of administrative capacity. These factors can be favourable or detrimental to the legal and policy relevance of Mobility Partnerships. We also look at two separate ways in which these three factors can be instrumental for the relevance of Mobility Partnerships. The first way is to discuss whether the three factors influence positively or negatively the proposition and implementation of legally and policy relevant projects. The second, is

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<sup>34</sup> Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42(2) *The International Spectator* 179 <https://halshs.archives-ouvertes.fr/hal-01232695/document> 'Accessed 13 January 2017'.

to look at the influence that the EU and the Member States can have in the content of the newly developed policy and legal acts.

We aim to answer for instance the following questions: What factors favour the conclusion of Mobility Partnerships and/or the suggestion or implementation of projects? Do postcolonial ties (or other strong bilateral ties), the power of negotiation and/or the level of administrative capacity influence the proposition and implementation of projects? Did any changes occur in the legal frameworks of Morocco or Cape Verde after their conclusion of the Mobility Partnership and can these changes be related to the implementation of Mobility Partnerships? Do the three factors mentioned previously influence the content of the laws and policies developed through the Mobility Partnership?

The geographical focus of this thesis is Africa and the research specifically focuses on the case studies of Morocco and Cape Verde. At the time of the start of this PhD research (2014), three Mobility Partnerships were concluded with African countries: Cape Verde (2008), Morocco (2013) and Tunisia (2014)<sup>35</sup>. To be able to examine the influence of postcolonial ties, it was important in the case selection to choose third countries that were former colonies. Out of the third countries which concluded a Mobility Partnership, Cape Verde, Morocco and Tunisia have postcolonial ties with an EU Member State. Cape Verde is a former Portuguese colony while Morocco and Tunisia were both French Protectorates. Both France and Portugal are participants in the Mobility Partnerships with these three countries. As such, Cape Verde was chosen as it is the only third country that concluded a Mobility Partnership and has postcolonial ties with Portugal. As Moroccans represent a larger group of migrants in France and Portugal than Tunisians, the second case study chosen was Morocco. The existence of a Moroccan and Cape Verdean diaspora population in France and Portugal would allow us to study the mobility possibilities from the third country to Europe but also the potential rights of the diaspora abroad and their possibilities concerning return. Moreover, Morocco concluded its Mobility Partnership in 2013 whereas Tunisia only concluded it in 2014, leaving less time for the implementation process which can be an issue in the evaluation of the implementation stage of projects. Moreover, these two

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<sup>35</sup> The Mobility Partnership with Jordan was concluded at the end of 2014 when the case selection was already completed.

countries are interesting case studies to observe the two other factors that may influence the relevance (if any) of Mobility Partnerships: the power of negotiation and administrative capacity of a third country. According to an official from the EU Delegation in Cape Verde, the reasons why Cape Verde was chosen as a pilot Mobility Partnership are its small size, its geographic location, its small population, the fact that it is not a big threat for migration flows and that it is culturally close to the EU because of its historical ties with Portugal<sup>36</sup>. Oppositely, the EU has considered Morocco as a “gate-keeper” for over a decade in the externalisation of its migration control to neighbouring third countries<sup>37</sup>. This gives the two countries a different geopolitical importance for the EU, conferring them, more or less power of negotiation. Moreover, Miller argues that developing countries are usually lacking administrative capacity<sup>38</sup>. Following Miller’s argumentation, as both Morocco and Cape Verde are developing countries, we can argue that they are lacking administrative capacity to different degrees<sup>39</sup>. Chapter 2, on the methodology, further details the case selection.

While the literature on Mobility Partnerships is fairly extensive<sup>40</sup>, few studies cover their implementation. Daniel Wunderlich, for example, discusses the coherence in the implementation of EU External Migration Policy but only takes Mobility Partnerships as examples among other instruments<sup>41</sup>. Natasja Reslow conducted an analysis of the implementation of the Mobility Partnership in Cape Verde at the starting phase of the implementation<sup>42</sup>. She also analysed the implementation of Mobility Partnerships but focused on the process used to assess the success or failure of the implementation itself<sup>43</sup>. To date no comprehensive overview of the implementation of the Mobility

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<sup>36</sup> Interview 39, EU Delegation, Praia, 25 February 2016.

<sup>37</sup> Lavenex (n7) 94.

<sup>38</sup> Jonathan Miller, ‘A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplants Process’ (2003) 51(4) *Am J Comp L* 839, 857.

<sup>39</sup> *Ibid.*

<sup>40</sup> See for example: Sergio Carrera and Raúl Hernández I Sagrera (n5) 28; Sergio Carrera and Raúl Hernández I Sagrera (n21) 97; Stefan Brocza and Katharina Paulhart (n23); Panos Koutrakos (n24) 164-165; Bart Van Vooren (n24) 209-210; Jean-Pierre Cassarino, ‘EU Mobility Partnerships: Expression of a New Compromise’ (2009) Migration Policy Institute; Natasja Reslow, ‘Migration and Development? An Assessment of Recent EU Initiatives’ (2010) 6(1) *JCER* 3; Natasja Reslow, ‘Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships’ (2012) 34(3) *JEI* 223; Natasja Reslow, ‘The Role of Third Countries in EU Migration Policy: The Mobility Partnerships’ (2012) 14 *EJML* 393; Meng-Hsuan Chou and Marie Gibert, ‘The EU-Senegal Mobility Partnership: from Launch to Suspension and Negotiation failure’ (2012) 8(4) *JCER* 408; Steffen Angenendt, ‘EU Mobility Partnerships: the “Most Innovative and Sophisticated Tool” of European Migration Policy?’ (2014) migration strategy group policy brief; Julia Maisenbacher, ‘The Political Economy of Mobility Partnerships – Structural Power in the EU’s External Migration Policy’ (2015) 20(6) *NPE* 871.

<sup>41</sup> Daniel Wunderlich, ‘Towards Coherence of EU External Migration Policy? Implementing a Complex Policy’ (2013) 51(6) *Int Migr* 26.

<sup>42</sup> Natasja Reslow, *Partnering for Mobility? Three-level Games in EU External Migration Policy* (Datawyse / Universitaire Pers Maastricht 2013).

<sup>43</sup> Natasja Reslow, ‘EU “Mobility” Partnerships: An Initial Assessment of the Implementation Dynamics’ (2015) 3(2) *Politics and Governance* 117; Natasja Reslow, “Not Everything that Counts can be Counted”: Assessing “Success” of EU External Migration Policy’ [2017] *Int Migr* 1.

Partnership with Morocco exists and this thesis aims at filling this gap by providing a detailed empirical analysis of its implementation. Giving an overview of the implementation of Mobility Partnerships not only allows us to answer the question of what Mobility Partnerships deliver but, it also allows us to potentially link the projects' implementation to legal and policy developments in the third country, in the case where Mobility Partnerships are legally and policy relevant. Finally, the present study aims to contribute to the development of a methodology for the empirical analysis of the implementation of Mobility Partnerships that might be replicated in other third countries which are (current or future) parties to Mobility Partnerships with the EU.

There has been little empirical research into the possible relevance of soft law instruments for third countries and even less on the relevance of Mobility Partnerships for external legal and policy developments. The questioning about the type of instrument that Mobility Partnerships really are is particularly novel as it has largely been neglected in the literature and can have particularly important consequences. Another novelty of this thesis is the discussion about the relevance of Mobility Partnerships for the legal and policy framework of a third country. There have been few empirical investigations into "external effects" of soft law instruments and even fewer on the relevance of Mobility Partnerships on external legal and policy developments. The relation between administrative capacity and Mobility Partnerships, the relation between the Member States and third countries and the negotiation of Mobility Partnerships or the relation between conditionality, "reversed conditionality" and Mobility Partnerships have already been studied<sup>44</sup>. But what is novel in the approach of this thesis is that these criteria are looked at in relation to the relevance of Mobility Partnerships and the potential intertwining of the three criteria.

Whilst some studies have been carried out on Mobility Partnerships, there is still insufficient scientific understanding of the consequences of their implementation. First, it is striking that the last evaluation of Mobility Partnerships conducted by the EU dates back to 2009<sup>45</sup>. In this evaluation the European Commission concluded that Mobility

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<sup>44</sup> See for example on administrative capacity and Mobility Partnerships: Natasja Reslow and Maarten Vink, 'Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa' (2014) 53(4) *JCMS* 857; On the relation between Member States and third countries and the negotiation of Mobility Partnerships: Meng-Hsuan Chou and Marie Gibert (n40); on conditionality, reversed conditionality and Mobility Partnerships: Jean-Pierre Cassarino (n34).

<sup>45</sup> Commission of the European Communities, 'Mobility Partnerships as a Tool of the Global Approach to Migration' SEC(2009) 1240 final, Brussels, 18 September 2009 1, 4.

Partnerships are a “promising, innovative and comprehensive tool” and “the most innovative and sophisticated tool” of the GAM <sup>46</sup>. This description shows the importance that the Commission gave to Mobility Partnerships. In the Commission’s view, it should be extended and applied to two or three more countries. Subsequently, seven more Mobility Partnerships have been concluded. Today, nine Mobility Partnerships have been signed but with the exception of Moldova in 2012<sup>47</sup>, no other third country participated in an official evaluation by the EU, nor an independent assessment of the implementation of its Mobility Partnership since 2009. The 2009 evaluation focused on the conclusion process and the content of Mobility Partnerships, rather than on their actual implementation. However, now that the oldest Partnerships have been in place for almost ten years, it is time to conduct an analysis of the implementation of Mobility Partnerships and to discuss their relevance for third countries. This evaluation is crucial to learn “what” Mobility Partnerships are concretely delivering so far and whether they keep their promises in terms of “mobility”. To gain an in-depth understanding of the implementation of Mobility Partnerships, it is essential to look at the specific content of the projects being implemented. This research does not only contribute to filling the knowledge gap on the implementation dynamics and relevance of the Mobility Partnerships but can also benefit the negotiations and implementation of more novel instruments such as the MPF and EU Compacts by drawing best practices and providing a better understanding of the geopolitical context and the interplay between different interests.

To address the questions raised in this thesis, a legal analysis of the developments on the legal framework in both countries has been conducted in parallel with the empirical analysis of the projects being proposed and implemented in the framework of the Mobility Partnership. It is the connection between the legal analysis, the empirical analysis and the data obtained during the extensive fieldwork conducted in Cape Verde, Morocco, Belgium, Portugal and France (69 interviews) that allowed us to provide a comprehensive overview of the implementation of Mobility Partnerships, their relevance for third countries and the role and interests of the different actors involved

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<sup>46</sup> Ibid.

<sup>47</sup> In Moldova, an evaluation was conducted by an expert contracted by the IOM Mission to Moldova. The evaluation was jointly agreed on by the Moldovan government, EU and Member States officials at the High-Level Mobility Partnership Meeting in 2011. The evaluation report can be found here: <http://www.mfa.gov.md/img/docs/eu-moldova-mobility-partnership-evaluation.pdf> ‘Accessed 29 January 2018’.

in the negotiation and implementation of Mobility Partnerships. The interviews were conducted with EU, Member States and third country officials, policy makers, the staff of implementing organisations as well as migrants' representatives in Cape Verde, Morocco, Portugal and France. Interviewing migrants' representatives helped to have insights into the way potential legal and policy changes are perceived by the target population. Furthermore, this thesis aims to provide an overview of the evolution of the legal framework and policies in Cape Verde and Morocco and link these developments to concrete Mobility Partnership projects to discuss the existing connections between them and clarify the relevance of Mobility Partnerships in these developments.

The thesis begins by giving an overview of the internal and external developments of the European migration policy agenda. After presenting the internal and external developments of EU's migration policy in Chapter 1, we then analyze the Mobility Partnership instrument itself. Chapter 1 highlights the importance of understanding the legal nature of Mobility Partnerships. In the third section, we seek to answer the following questions: what are Mobility Partnerships? Are they EU legal acts? How do they fit in the EU legal architecture? Then, we discuss the soft law nature of Mobility Partnerships by giving an overview of the main trends in the literature on the recognition of soft law as such (does soft law exist? Can soft law be a source of law?) and a presentation of the main criteria used in the literature to differentiate soft law from hard law and non-law. The criteria identified to define soft law instruments are applied to the Mobility Partnership instrument. The last two sub-sections present the two main hypotheses of the thesis. The first concerns the potential of legal and policy relevance of Mobility Partnerships on the development of the legal and policy frameworks of a third country. Finally, three factors potentially influencing the way Mobility Partnerships could be relevant are detailed (hypothesis two). Chapter 1 provides an important opportunity to advance the understanding of the position of Mobility Partnerships in the plethora of instruments used by the EU in the implementation of the goals of its external migration policy. More importantly, it helps to better understand the Mobility Partnership instrument itself, its functioning and its potential relevance. In the last subsection, the different criteria that could potentially influence the relevance of Mobility Partnerships, if relevant, are discussed.

In Chapter 2 we present the methodology and case selection used to conduct the analysis. This will include the choice of Morocco and Cape Verde as case studies and the distinct phases of the research (the legal analysis and the empirical analysis). In this Chapter we also present how the respondents to the interviews have been selected, the distinct phases of the interviews as well as the structure of the interviews. The Chapter ends with some ethical considerations.

The aim of Chapter 3 is to better understand the Mobility Partnership tool via the cases of Morocco and Cape Verde from their conclusion to their implementation. This Chapter is key in the general analysis of the thesis, as without an analysis of the implementation of the Mobility Partnership, the discussion of its potential legal and policy relevance is not possible. The first section of this Chapter discusses the context of the adoption of the Mobility Partnerships with Cape Verde and Morocco. First, we explain the general policy orientation at the EU level at the time of the negotiation of both Mobility Partnerships. Then we conduct the analysis of the specific context in Cape Verde and Morocco at the time of the negotiation of the Mobility Partnerships. Afterwards, we examine the content of both Mobility Partnerships. This second section explores the relationship between the Mobility partnership tool and the broader EU policy related to migration, notably the implementation of the GAM and the GAMM. The last section provides an overview of the implementation of both Mobility Partnerships. First, we consider the scoreboard, as it is the tool used to “monitor” the implementation of the Mobility Partnerships. Then, we give an overview of the different actors and their roles. Finally, we provide a general overview of the implementation of both Mobility Partnerships. This overview includes distinct stages of implementation: *in preparation, ongoing, concluded and deleted/ not implemented*. Projects are also divided into three different typologies: *preexistent, concomitant* and *new*. Moreover, we give an overview of the type and theme of the projects. Additionally, we discuss the links between projects being implemented and the evolution of interests and policy priorities.

The aim of Chapter 4 is to analyse the legal and policy developments that occurred in Morocco and Cape Verde since the conclusion of their respective Mobility Partnership. A set of legal provisions in relation to migration, including the access to socio economic and political rights for migrants is reviewed. The analysis considers distinct phases of

the migration process: emigration, stay in a foreign country and return. In the first part of the Chapter, we present the existing legal framework in relation to migration in force at the time of the conclusion of the Mobility Partnerships in Cape Verde and in Morocco. This means giving a description of the laws in force in Cape Verde in 2008 and in Morocco in 2013. The second part of the Chapter displays the legal framework as it is today. The focus of the Chapter is on the national laws of Cape Verde and Morocco starting from the Constitution and covering several aspects such as migration law, asylum law, criminal law, labour law, laws related to education, health, housing, social security, civil law and nationality law. Then we discuss whether national laws are in conformity with the country's international obligations or not. The international instruments are mainly comprised of the Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and the African Charter on Human and Peoples' Rights. Then, multilateral agreements, such as the Protocol of Free Movement of people and rights to residence and establishment concluded by Cape Verde in 1982, within the framework of the Economic Community of West African States (ECOWAS), and bilateral agreements between Morocco or Cape Verde and a particular Member State are presented. Bilateral agreements can cover different issues such as visa waivers, readmission agreements, social security agreements or labour agreements. By looking at the before and after picture of the legal and policy frameworks in Morocco and Cape Verde, we highlight potential legal and policy developments which occurred since the conclusion of the Mobility Partnership. If such developments occurred we analyze the role played by the Mobility Partnership, if any, in the developments. This analysis also helps us to have a better understanding of immigrants' access to rights in the third country and whether these rights were affected, positively or negatively, by the implementation of a Mobility Partnership.

Chapter 5 puts in context our analysis of the implementation of the Mobility Partnerships in Morocco and Cape Verde and the comparative analysis of the legal and policy developments in both countries by giving first-hand insight to the complexity and interaction of several factors and actors. The last Chapter aims at giving some insights of how the implementation of Mobility Partnerships projects can lead to legal and policy developments. We discuss the legal and policy relevance of Mobility



Partnerships in Morocco and Cape Verde according to the three criteria identified in Chapter 1: the state of relations between third countries and EU Member States, the level of administrative capacity of a third country and its power of negotiation. In the first section we discuss the importance of the postcolonial ties. We also consider Member States cooperation preferences as they can explain their behaviour when participating in a Mobility Partnership. In Section 2 we explain why the concepts of negotiation power and conditionality are central to the analysis of the relevance of the Mobility Partnership. This Section is divided into three parts with each of them coinciding with a type of conditionality and a level of power of negotiation. In the last Section we discuss whether the level of administrative capacity of a third country can condition the relevance of Mobility Partnerships presenting the links between administrative capacity, development aid and capacity building. The potential existence of legal transplants and policy transfer is analysed.

The thesis ends with a conclusion including some observations on what the Mobility Partnerships with Morocco and Cape Verde have delivered so far, the relevance of Mobility Partnerships to enhance migrants' rights in third countries and the ability of Mobility Partnerships to support the externalization of EU's migration policy.



# Chapter 1 Mobility Partnerships in the Context of EU External Migration Governance

## 1.1. Introduction

This Chapter begins by giving an overview of the internal and external developments of the European migration policy agenda. For some time, migration issues were discussed at the intergovernmental level, first through ad hoc groups and later under Title VI, on Justice and Home Affairs of the Maastricht Treaty. It is only starting from the Amsterdam Treaty that Member States agreed to confer more power to the EU institutions. We will see that this process has been slow and that to date the creation of an effective common migration and asylum policy has not been achieved. Even though the literature on the developments of EU's migration policy is already extensive<sup>1</sup> it is important to start this Chapter by explaining how the EU's and Member States' interest in migration matters have evolved until this day and where Mobility Partnerships fit in the multitude of legal and non-legal instruments used by the EU to achieve its policy objectives. In the first section, we give a chronological overview of the internal and external developments of EU's migration policy and of the creation of an EU legal framework on migration, followed by a discussion of the role and complementarity between different instruments leading to the introduction of the GAM(M). Mobility Partnerships, the main subject of this thesis, are the key instrument of implementation of the GAMM's objectives. The GAMM is the predominant framework for the external dimension of the migration and asylum policy.

After presenting the internal and external developments of EU's migration policy this Chapter will then go on to analyze the Mobility Partnership instrument itself. We will discuss the characterisation of Mobility Partnerships made by the EU Commission and the arguments put forward in their defence (e.g.: flexibility, rapidity of conclusion, triple win). After tracing the evolution of Mobility Partnerships in the official discourse we will present the instrument in itself: its structure, content and monitoring mechanisms. This will aim to complete the understanding of the structure and functioning of the Mobility

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<sup>1</sup> Paul Craig and Gráinne de Búrca, *EU Law, text, cases and materials* (Oxford University Press 2012); Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping (2000) 38(2) *JCMS* 251; Steve Peers, 'Building Fortress Europe: the Development of EU Migration Law' (1998) 35 *Common Mark Law Rev* 1235.

Partnership tool. Once the tool is presented, the last point, and maybe the most complex, will be to understand its legal nature. Mobility Partnerships are presented as non-binding instruments, soft law instruments or as having a soft legal nature<sup>2</sup>. But few studies have examined what that exactly means in concrete terms. Beyond the shared understanding of Mobility Partnerships as being a soft law instrument, a notion which is often simply taken for granted, few authors have questioned what Mobility Partnerships actually are (what type of instrument they are) and what consequences they can have. This Chapter highlights the importance of understanding the legal nature of Mobility Partnerships.

The last two sub-sections present the two main hypotheses of the thesis. The first concerns the potential of legal and policy relevance of Mobility Partnerships on the development of the legal and policy frameworks of a third country. Initially, the potential relevance of Mobility Partnerships will be discussed (hypothesis one). Then the distinct types of possible legal and policy relevance will be presented (direct/ indirect), and the potential of Mobility Partnerships to have such relevance on third countries' legal and policy framework will be discussed. Finally, we will consider three factors which may influence the way in which Mobility Partnerships are or are not relevant for the partner third countries (hypothesis two). These three criteria are the state of relations between third countries and the EU Member States (including postcolonial ties between Member States and third countries), the power of negotiation (including the use of conditionality by the EU and Member States and the potential use of "reversed conditionality" by third countries) and the administrative capacity of a third country (including the possibility for normative diffusion and legal transplants to occur). We will consider these potential factors and try to determine if and to what extent they interfere in the negotiation and the way the Mobility Partnerships are implemented and whether they influence legal and policy developments or not.

This Chapter provides an important opportunity to advance the understanding of the position of Mobility Partnerships in the plethora of instruments used by the EU in the

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<sup>2</sup> Sergio Carrera and Raúl Hernández I Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?' (2009) CEPS Working Document 321 1, 28; Sergio Carrera and Raúl Hernández I Sagrera, 'Mobility Partnerships: "Insecurity Partnerships" for Policy Coherence and Migrant Workers Human Rights in the EU' 97 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance: The promise of Partnership* (London, New York: Routledge 2011) 97; Panos Koutrakos, *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011) 164-165; Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London New York: Routledge 2012) 209-210.

implementation of the goals of its external migration policy. More importantly, it will help to better understand the Mobility Partnership instrument itself, its functioning and its potential relevance.

## **1.2. International migration in the EU policy agenda**

### **1.2.1. Internal developments**

Since the 1970's migration issues have gained exponential importance and Member States have slowly realized the necessity of acting together on these issues even though they were, and still are, reluctant to give up on their sovereignty in this regard.

#### **1.2.1.1. Informal contacts in the 1970's - 1980's**

During the 1970's and 1980's, EU Member States started to discuss migration and security issues at the intergovernmental level. First, the Trevi group was created (1976) following a proposal by the Prime Minister of the United Kingdom, during the European meeting in Rome<sup>3</sup>. The aim of the Trevi group was to cooperate on police and counter terrorism actions. The European Community's institutions were excluded from this cooperation network. In 1985, the Schengen Agreement was signed by France, Germany, Belgium, the Netherlands and Luxembourg. The main aim of the Schengen Agreement was to allow the free movement of people and goods within the Schengen area by taking down internal borders. As complementary measures, the Schengen Agreement aimed at strengthening its external borders control and harmonising its visa policies. The Schengen Agreement is an example of cooperation between the Member States outside the Treaty framework. Additionally, the Single European Act was concluded in 1986 fixing the deadline for the achievement of the internal market by 31 December 1992<sup>4</sup>. The Single European Act was presented as the starting point of European integration giving the Community new competencies on immigration and asylum law<sup>5</sup>. The European Parliament was included in the legislative process for the first time. The Council, with its support and when intervening following any of the

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<sup>3</sup> European Council, Rome 1-2 December 1975, Bull. EC 11- 1975 1, 9.

<sup>4</sup> Single European Act OJ L 169, 29.6.1987.

<sup>5</sup> Steve Peers (n1) 1236.

Commission's proposal, could adopt a legislative proposal by qualified majority as well as superseding a rejection by the European Parliament and adopt a proposal unanimously<sup>6</sup>. Both the Parliament and the Commission issued several non-binding documents on migration, such as the guidelines for a Community Policy on Migration, where the Commission discussed the evolution of the European migration policy<sup>7</sup>. In these guidelines the Commission made several proposals related to harmonised "entry, residence and employment" regulations for third country nationals and took a decision "setting up a prior communication and consultation procedure on migration policies in relation to nonmember countries"<sup>8</sup>. This decision would, according to Marco Martiniello, allow for a better cooperation between the Commission and the Member States "without any binding constraints"<sup>9</sup>. As a response to the Commission's decision, the Council adopted a resolution stating that "matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States, without prejudice to Community agreements concluded with third countries"<sup>10</sup>. The Council argued that the proposals made by the Commission would threaten Member States' sovereignty<sup>11</sup>. Additionally, the Single European Act launched cooperation on asylum<sup>12</sup>. Later, the Ad Hoc Group on Immigration was created (1986) on the initiative of the United Kingdom's<sup>13</sup> presidency as a response to the signature of the Schengen Agreement and the Single European Act.

Despite the reluctance of Member States to cooperate at a supranational level, the harmonisation of migration and asylum policy and a better coordination on internal and external borders became necessary. The latter was originally carried out at the intergovernmental level by the Ad Hoc Group on Immigration supervised by the

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<sup>6</sup> Paul Craig and Gráinne de Búrca (n1) 143.

<sup>7</sup> Commission of the European Communities, 'Guidelines for a Community Policy on Migration, Commission Communication Transmitted to the Council on March' 1985 COM(85) 48 final, 7 March 1985, Bulletin of the European Communities, Supplement 9/85; F. Marinaro, 'Report Drawn Up on Behalf of the Committee on Social Affairs and Employment on the Communication from the Commission of the European Communities to the Council (Doc. C2-6/85- COM(85) 48 final) on Guidelines for a Community Policy on Migration together with a Draft Council Resolution', Working Documents 1985-86, Document A2-4/85, 1 April 1985.

<sup>8</sup> Commission of the European Communities, 'Commission Decision of 8 July 1985 Setting Up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries' OJ L 217, 14.8.1985.

<sup>9</sup> Marco Martiniello, 'The New Migratory Europe: Towards a Proactive Immigration Policy?' 298 in Craig A Parsons and Timothy M Smeeding, *Immigration and the Transformation of Europe* (Cambridge 2006) 315.

<sup>10</sup> Council Resolution of 16 July 1985 on 'Guidelines for a Community Policy on Migration' (85/C 186/04) Official Journal C 186, 26/07/1985 3.

<sup>11</sup> Andrew Geddes, *The Politics of Migration and Immigration in Europe* (London: SAGE Publications 2003) 131; Marco Martiniello (n9) 315.

<sup>12</sup> Marco Martiniello (n9) 317.

<sup>13</sup> SEMDOC, 'Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community', Brussels, 28 April 1987 in Tony Bunyan, *Key texts on justice and home affairs in the European Union, Volume 1* (Statewatch 1997) 9.

Coordinators' Group<sup>14</sup>. Following the signature of the Schengen Agreement in 1985 and the Single European Act in 1986 the regularization of the different ad hoc groups<sup>15</sup> started with the appointment of the Coordinator's Group in 1988<sup>16</sup>. The Coordinator's group was designated to examine the activities carried out by interior ministries in intergovernmental groups such as the Trevi and Ad Hoc Group on Immigration and aimed at examining the necessary adjustments required by the elimination of the internal borders. These adjustments related to "strengthening external borders controls, immigration and asylum policies, measures against terrorism, international crime, drug trafficking, police and judicial cooperation, and the exchange of information and intelligence in the above fields"<sup>17</sup>. Subsequently, the Coordinators' Group adopted a work programme in 1989 called the "Palma Document" which also listed their responsibilities<sup>18</sup>. On the issue of immigration, the "Palma Document" included specific actions to be taken in relation to "external frontiers", "internal frontiers and inside the territory of the Community", "admission to Community territory (visa policy)", "grant of asylum and refugee status" and "removal"<sup>19</sup>. It is also interesting to point out that immigration at the time was discussed because of the creation of the common European Market rather than as an issue of its own<sup>20</sup>.

The signature of the Convention implementing the Schengen Agreement<sup>21</sup> and the inclusion of Italy, Portugal, Spain and Greece into the Agreement marked a turning point. The implementation of the Schengen Agreement required the conclusion of the first agreements on the regulation of issues such as visa, asylum, police cooperation, judicial cooperation and border control. In 1990, the Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (the Dublin Convention) was adopted by the

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<sup>14</sup> Steve Peers (n1) 1238.

<sup>15</sup> For example: the Schengen group, the Rhodes group, the Trevi group, the ad hoc immigration group, the mutual assistance group, the European anti-drug committee, the Berlin group and the horizontal group. For more information on these groups see: Sarah Collinson, *Beyond Borders: West European Migration Policy towards the 21st Century* (London: Royal Institute of International Affairs 1993).

<sup>16</sup> Tony Bunyan, 'Trevi, Europol and the European State' 1 in Tony Bunyan, *Statewatching the Bew Europe: A Handbook on the European State* (London: Statewatch 1993) 8.

<sup>17</sup> *Ibid.*

<sup>18</sup> SEMDOC, "The Palma Document" Free Movement of Persons: A Report to the European Council by the Coordinator's Group, Madrid, June 1989' in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, Volume 1* (Statewatch, 1997) 12.

<sup>19</sup> *Ibid* 13-16.

<sup>20</sup> Marco Martiniello (n9) 313.

<sup>21</sup> European Union, 'Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")', 19 June 1990.

Conference of Plenipotentiaries<sup>22</sup>. The Dublin Convention determines the Member States responsible for the examination of asylum applications. The draft Convention on the crossing of external borders<sup>23</sup> was also an important sign of the efforts made by the Trevi Group<sup>24</sup>. In 1991, the Ad Hoc Group on Immigration prepared the Report WGI 930, which was adopted by the Member States' ministers responsible for immigration<sup>25</sup>. This report included a work programme for 1992 concerning migration and asylum policy. The work programme on migration included: the harmonization of admission policies, a common approach to the question of irregular immigration, a policy on the migration of labour, the situation of third-country nationals and a migration policy in the broad meaning of the term (including preparation of readmission agreements). The work programme on asylum covered, among other things, the application and implementation of the Dublin Convention. Finally, the Council resolution of 30 November 1992 sets a definition of "manifestly unfounded applications"<sup>26</sup>, marking another important evolution in the building up of a common asylum application process. During the meeting in London, two separate acts introduced two other key notions: "safe third country"<sup>27</sup> and "safe country of origin"<sup>28</sup>. "Safe country of origin" relates to a country where its own citizens are usually not persecuted, while "safe third country" means the country, other than its own country, where an asylum-seeker should have applied for asylum. When the country of origin is safe then the asylum claim is rejected because the criteria to become a refugee are not met, but if a third country is safe then it means that the asylum application should have been made there.

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<sup>22</sup> European Union, 'Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention")', 15 June 1990, Official Journal C 254, 19/08/1997.

<sup>23</sup> Draft Convention between the Member States of the EC on the Crossing of their External Borders - SN2335/91, WGI 829 undated.

<sup>24</sup> Helene Lambert, 'Asylum Seekers, Refugees and the European Union Case Studies of France and the UK' 112 in Robert Miles and Dietrich Thränhardt, *Migration and European Integration: the Dynamics of Inclusion and Exclusion* (Fairleigh Dickinson Univ Press 1995) 128-129.

<sup>25</sup> SEMDOC, 'Report from Ministers Responsible for Immigration to the European Council Meeting in Maastricht on Immigration and Asylum Policy, SN 4038/91 (WGI 930), 3 December 1991' 9 in Tony Bunyan, *Supplement to: "Key Texts on Justice and Home Affairs in the European Union, Volume 1 (1976-1993)"*.

<sup>26</sup> Council of the European Union, 'Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution on manifestly unfounded applications for asylum")', 30 November 1992.

<sup>27</sup> Council of the European Union, 'Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (Resolution on safe third countries)', 30 November 1992.

<sup>28</sup> European Union, 'Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (Conclusions on safe countries of origin)', 30 November 1992.



### 1.2.1.2. The Maastricht Treaty

The Maastricht Treaty, or the Treaty on European Union, was concluded in February 1992 and entered into force in 1993<sup>29</sup>. Three remarkable characteristics of this Treaty are the creation of the European Union (EU), the creation of the Euro and the establishment of a “three-pillar” structure. Initially, seven titles were proposed and included into the tree-pillars structure<sup>30</sup>. The first pillar became the European Communities (EC) and included three pre-existing community treaties: the Treaty establishing the European Atomic Energy Community, the Treaty establishing the Coal and Steel Community and the Treaty establishing the European Economic Community. It also included the visa policy (Titles I to IV). The second and third pillars were new pillars created by the Maastricht Treaty. The second pillar comprised the common foreign security and defence policy (Title V) and the third pillar, the “Justice and Home Affairs” pillar, which covered immigration and asylum policy, criminal cooperation and judicial cooperation. After 2003 this last pillar was renamed “Police and Judicial Co-operation in Criminal Matters”.

Article K.1 (pillar III) of the Maastricht Treaty lists the areas that should be regarded as “matters of common interest”, which included asylum policy, border management and immigration policy. This pillar was outside of the EC and therefore, the European Court of Justice (ECJ) had no jurisdiction and the usual legal instruments (regulations, directives and decisions) could not be used<sup>31</sup>. In response, new instruments for intergovernmental cooperation were designed under the third pillar and were listed in Article K.3(2) which gave the Council competence to approve “joint positions<sup>32</sup>”, “joint actions<sup>33</sup>” or “conventions”. Conventions were clearly binding as they had to be ratified

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<sup>29</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5.

<sup>30</sup> Paul Craig and Gráinne de Búrca (n1) 15.

<sup>31</sup> Jörg Monar, 'Justice and Home Affairs: The Treaty of Maastricht as a Decisive Intergovernmental Gate Opener' (2012) 34(7) *J Eur Integr* 717, 726.

<sup>32</sup> Joint position defined by the JHA Council on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention, OJ L63, 4/3/1996 (it is the only one concluded).

<sup>33</sup> Five Joint Actions have been concluded: Joint Action on airport transit visa, OJ L63, of 4 March 1996; Joint Action on reception and repatriation of refugees, displaced persons and asylum seekers, OJ L114, of 26 April 1999; Council Joint Action 97/11/JHA concerning a uniform format for residence permits confirms the need to harmonise the format of residence permits issued by Member States to third-country nationals, OJ L 7, of 10 January 1997; 97/154/JHA: Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children OJ L 63, 4.3.1997; Council Decision of 30 November 1994 on a joint action adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State 94/795/JHA OJ L 327, 19 December 1994.

by each of the Member States<sup>34</sup>. The Europol Convention<sup>35</sup> was the only convention proposed under the Maastricht Treaty that entered into force. The legal nature of the joint positions and joint actions was not clear and was open to Member States' interpretation<sup>36</sup>. For example, Jörg Monar notes that "Portugal and the United Kingdom took the view that 'joint actions' were not automatically binding"<sup>37</sup>. Steve Peers adds that "joint positions" never openly conferred legal effects<sup>38</sup>. Because of the uncertainty regarding their legal nature and whether they would be binding and have legal effects, these instruments were not widely used<sup>39</sup>. Instead of the new instruments foreseen by Article K.3(2), the Member States preferred using already known instruments, such as resolutions, conclusions and recommendations<sup>40</sup>.

The resolution on family reunion was agreed upon in 1993<sup>41</sup>. Peers noted that the "detailed conditions for such reunion, the precise definition of 'children', and the extension of reunion to other family members" were left up to the Member States<sup>42</sup>. Consequently, the legal effects of this resolution were weak as it was non-binding and largely depended on the Member States' determination to "ensure legislative conformity"<sup>43</sup>. In 1994, the Justice and Home Affairs (JHA) Council adopted the resolution on admission for employment<sup>44</sup>. Again, the resolution was non-binding and therefore did not create effective rights even though, according to Steve Peers, it was assumed that the Member States would have to adhere to it in the future<sup>45</sup>. The other resolutions adopted on immigration during this period raised similar issues<sup>46</sup>. The question of the legal nature of these resolutions was raised because, even though they were non-binding, the resolutions said that Member States would have to "conform" to them without any clarification of what that concretely meant. The resolution on third-

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<sup>34</sup> Jörg Monar (n31) 727.

<sup>35</sup> The Europol Convention OJ C 316 of 26 November 1995.

<sup>36</sup> Virginie Guiraudon (n1) 256 argues that they are binding documents.

<sup>37</sup> Jörg Monar (n31) 727.

<sup>38</sup> Steve Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2011) 14-15.

<sup>39</sup> Wenceslas de Lobkowicz, *L'Europe de la Sécurité Intérieure : une Elaboration par Etapes* (La documentation Française 2002) 66.

<sup>40</sup> See a list of examples in Martin Baldwin-Edwards, 'The Emerging European Immigration Regime: Some Reflexions on Implications for Southern Europe' (1997) 35(4) *JCMS* 497, 501.

<sup>41</sup> SEMDOC, 'Harmonisation of National Policies on Family Reunification, Copenhagen, 1 June 1993, SN2828/1/93' 98 in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, Volume 1* (Statewatch, 1997).

<sup>42</sup> Steve Peers (n1) 1241.

<sup>43</sup> *Ibid.*

<sup>44</sup> Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment, OJ C 274, 19 September 1996.

<sup>45</sup> Steve Peers (n1) 1243.

<sup>46</sup> For the list of instruments see for example: Martin Baldwin-Edwards (n40) 501.

country nationals with long-term residence, concluded in 1996<sup>47</sup>, was even weaker than the other resolutions, as it did not require that the Member States put their national law in conformity<sup>48</sup>.

We can argue that the expectations of increased harmonisation through the design of these innovative instruments were frustrated as the Member States overwhelmingly used pre-existing “soft law” instruments. This is in line with the preference of Member States for enhancing cooperation on justice and home affairs issues without losing sovereignty, which was also why the three-pillar structure was created<sup>49</sup>. Under the Maastricht Treaty, these matters were still handled intergovernmentally rather than by the Community<sup>50</sup>.

A significant aspect of the third pillar is that Article K.4(1) created a new Coordinating Committee (also called K4 Committee) to carry on the work of the Coordinator’s Group. The Coordinating Committee replaced the previous intergovernmental structures such as the Trevi Group and the Ad Hoc Group on Immigration<sup>51</sup>. For example, the Ad Hoc Group on Immigration became “Steering Group I” and its sub-groups became working groups reporting to Steering Group I<sup>52</sup>. For the first time, the Commission and the Parliament were included in migration policy discussions, albeit with considerable limitations. Articles K.4 and K.6 specified that the Commission should be “fully associated” and the views of the EU Parliament “duly taken into consideration”. This means that the Commission shared the right of initiative with the Member States but did not have this right on its own. Moreover, the role of the EU Parliament was purely consultative. Indeed, it could only issue opinions or comments on instruments already adopted by the Council. Steve Peers adds that proposals on migration law made by the Member States were never sent to the Parliament and were developed secretly<sup>53</sup>. Virginie Guiraudon talks about “venue shopping” to refer to the advantage given to Member States by the intergovernmental structure, as it allowed the Member States to

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<sup>47</sup> Council Resolution of 4 March 1996 on the Status of Third-Country Nationals Residing on a Long-Term Basis in the Territory of the Member States, OJ C 80, 18 March 1996.

<sup>48</sup> Steve Peers (n1) 1257.

<sup>49</sup> Paul Craig and Gráinne de Búrca (n1) 15; Didier Bigo and Elspeth Guild, ‘La Mise à L’Ecart des Etrangers : La Logique du Visa Schengen’ [2003] *Cultures & Conflicts*, Paris: L’Harmattan.

<sup>50</sup> Paul Craig and Gráinne de Búrca (n1) 17.

<sup>51</sup> Jörg Monar (n31) 728.

<sup>52</sup> Steve Peers (n1) 1239.

<sup>53</sup> Steve Peers (n1) 1239.

“circumvent national constraints on migration control”<sup>54</sup>. This was also the reason why the three pillars structure of the Maastricht Treaty conferred the Member States an important level of decision-making power whereas it restricted the competences of the EU institutions<sup>55</sup>. Nevertheless, on a few occasions, Member States were reminded not to exceed their competencies. This was the case in 1997 with the adoption by the Council of the resolution on combatting marriages of convenience<sup>56</sup>. Peers argues that the competence of the Council in the third pillar to regulate the legal status of a person marrying a Community national in another Member State was disputed<sup>57</sup>. Moreover, it was said to be in contradiction with the *Diatta* ruling on the loss of residency rights for separated spouses<sup>58</sup>, in which the Court had held that even though a couple lives separately their marriage is not dissolved until they divorce and therefore to qualify for a right of residence as a family member it is not necessary to live permanently together. As a response, the Council added the mention that “this resolution is without prejudice to Community law”<sup>59</sup>.

Regarding asylum and particularly the Dublin Convention, in 1994, Germany made a proposal for “burden-sharing” of asylum seekers<sup>60</sup>. This proposal was made to complete the Dublin Convention, which did not foresee such a “burden-sharing” mechanism. During the early 1990’s Germany was the major recipient of asylum seekers coming from former Yugoslavia and particularly Bosnia which explained its interest in a system based on solidarity and joint effort<sup>61</sup>. The system proposed by Germany was one of proportional distribution of asylum seekers based on population, size of the country and Gross domestic product, but the other Member States rejected the proposal<sup>62</sup>. The Council, however, acknowledged Germany’s concerns and introduced the idea of “solidarity” and “burden sharing” in case of large asylum seeker flows in a Council resolution in 1995<sup>63</sup>. In 1995, the Schengen agreement entered into force and internal borders were removed between Germany, Belgium, France,

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<sup>54</sup> Virginie Guiraudon (n1) 251.

<sup>55</sup> Saskia Bonjour, Ariadna Ripoll Servent and Eiko Thielemann, ‘Beyond Venue Shopping and Liberal Constraint: a New Research Agenda for EU Migration Policies and Politics [2017] *J Eur Public Policy* 1, 2-3.

<sup>56</sup> Council Resolution of 4 December 1997 on Measures to be Adopted on the Combating of Marriages of Convenience OJ C 382, 16 December 1997.

<sup>57</sup> Peers (n1) 1259.

<sup>58</sup> Case 267/83 [1986] ECR 567.

<sup>59</sup> Council Resolution (n56) C382/1.

<sup>60</sup> Council Document 7773/94 ASIM 124.

<sup>61</sup> Eiko Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing’ (2004) 6 *EJML* 47, 49-50.

<sup>62</sup> Timothy James Hatton, ‘European Asylum Policy’ (2005) 194 *Natl Inst Econ Rev* 106, 109.

<sup>63</sup> Council Resolution of 25 September 1995 on Burden- Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, OJ C 262, 7 October 1995.

Luxembourg and The Netherlands, creating the Schengen area. Following the entry into force of the Schengen agreement Member States who were part of the Schengen area decided to intensify their cooperation on migration management and mobility in the EU with third countries<sup>64</sup>. We will discuss this point in further detail in the section related to the EU external migration policy.

The flexibility introduced in the field of international migration by the Maastricht Treaty had the disadvantage of leading to fragmented and sometimes incoherent regulations<sup>65</sup>. The problem raised by several authors was that it would be possible for the Member States not to take part in an agreement or to take part only partially or even to join only at a later stage<sup>66</sup>. The Maastricht Treaty introduced the possibility of opt-out which meant that a Member State could decide that it would not be part of a legally binding instrument. For example, the United Kingdom decided to opt-out from the Social Chapter before the signature of the Maastricht Treaty<sup>67</sup>. The United Kingdom also opted out from the Economic and Monetary Union and Denmark concluded a protocol allowing it to potentially join the Euro later<sup>68</sup>. In the subsequent “Edinburgh Agreement”<sup>69</sup> (1992) Denmark decided not to participate in the Euro. Moreover, in the same agreement, Denmark opted-out from all future defence agreements, from the citizenship of the European Union and from Justice and Home Affairs policies<sup>70</sup>. Even though Denmark “would participate fully” in cooperation on Justice and Home Affairs, it was exempted from certain areas of home affairs. The European Council had no choice but to accept Denmark’s opt-outs as it would otherwise not have been able to ratify the Maastricht Treaty, obstructing its entry into force.

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<sup>64</sup> Macarena Nuño, ‘Migration Policies of the European Union with its Mediterranean Partners: Need for Greater Mobility’, Study, Directorate-General for External Policies of the Union, Directorate B, European Parliament PE 457.131 (2014) 1,11.

<sup>65</sup> Paul Craig and Gráinne de Búrca (n1) 19.

<sup>66</sup> Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Bloomsbury 2000); Bruno de Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001).

<sup>67</sup> Catherine Barbard, ‘Flexibility and Social Policy’ 197 in Gráinne de Búrca and Joanne Scott, *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000) 197.

<sup>68</sup> Maastricht Treaty, 1992, Protocol on certain provisions relating to Denmark.

<sup>69</sup> Council of the European Union, Edinburgh, 11-12 December 1992: Conclusions of the Presidency.

<sup>70</sup> Council of the European Union, Denmark and the Treaty on European Union, Official Journal C 348, 31 December 1992.

### 1.2.1.3. The Amsterdam Treaty and the communitarisation of the migration policy

The Amsterdam Treaty was signed in 1997 and entered into force in 1999<sup>71</sup>. One of the fundamental reforms brought about by the Treaty was the right given to EU institutions to adopt Directives and Regulations that have authority over national law. The Amsterdam Treaty gave increased powers to the EU institutions including a stronger position to the European Parliament and jurisdiction to the ECJ. Moreover, Title IV invites for the gradual creation of an “area of freedom, security and justice”<sup>72</sup>. Migration and asylum became a shared competence between the European Commission and the Member States as they were moved from Title VI of the Maastricht Treaty (pillar III) into the new Title IV “Visa, asylum, immigration and other policies related to free movement of persons” of the Treaty establishing the European Community (pillar I). The communitarisation of the migration and asylum policy explains why the Commission declared that the Amsterdam Treaty was one of the basis of a “common policy on migration and asylum”<sup>73</sup>. This came as a response to the criticisms directed against the lack of effectiveness of the intergovernmental approach used in the Pillar III of the Maastricht Treaty. Christof Roos notes that one of the reasons for the change in the structure laid in “the shortcomings in achieving effective measures under existing institutional rules”<sup>74</sup>. This criticism can also be found in the Vienna Action Plan of December 1998 where a call was made for the use of binding instruments instead of the soft law instruments (resolutions, recommendations) used so far<sup>75</sup>. The objective of the Vienna Action Plan was to implement in practice the provisions of the Treaty of Amsterdam on the creation of the area of freedom, security and justice. It should be noted that some aspects in the third pillar, such as legal migration, remained in the Pillar III due to the opposition to their transfer to pillar I by the Member States<sup>76</sup>.

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<sup>71</sup> Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997.

<sup>72</sup> Virginie Guiraudon (n1) 253.

<sup>73</sup> Commission of the European Communities, ‘Integrating Migration Issues in The European Union’s Relations with Third Countries’ COM(2002) 703 final, Brussels, 3 December 2002 1, 17.

<sup>74</sup> Christof Roos, *The EU and Immigration Policies: Cracks in the Walls of Fortress Europe?* (Palgrave Macmillan 2013) 52.

<sup>75</sup> Justice and Home Affairs Council, ‘Action plan of the Council and the Commission on how Best to Implement the Provisions of the Treaty of Amsterdam Establishing an Area of Freedom, Security and Justice’ (3 December 1998) 1999/C 19/01.

<sup>76</sup> Penny Henson and Nisha Malhan, ‘Endeavours to Export a Migration Crisis: Policy-Making and Europeanisation in the German Migration Dilemma’ (1995) 4(3) *German Politics* 128, 137; Christian Joppke, ‘Immigration Challenges the Nation-State’ 5 in Christian Joppke (ed), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press 1998) 7.

It is important to note that decision-making on migration and asylum was however not fully “communitarised” from the entry into force of the Amsterdam Treaty. Article 73o paragraphs 1 and 2 of the Treaty indicates that

“during the period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. After that five-year period, the Council shall act on proposals from the Commission”.

This means that the European Commission had to share its competences with Member States during five years before being able to propose an initiative on its own. Additionally, before the end of the five years transitory period a set of actions had to be taken in order to create a common asylum and migration policy. Articles 73j and 73k listed the measures that should be adopted by the Council according to the procedure defined in Article 73o. It included measures on “asylum”, “refugees and displaced persons”, “immigration policy” and “measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States”. These issues were still a shared competence between the Commission and Member States during the five years transitory period<sup>77</sup>. In other words, the main issues of controversy between the Member States on migration issues. After the transitory period, initiatives could no longer solely come from the Member States, meaning that the Commission had to be involved. The Commission could make proposals directly to the Council and proposals from the Member States to the Council had first to be examined by the Commission.

During the five years transitory period the Tampere programme was the main framework for the development of a common EU asylum and migration policy. The Tampere Summit, in October 1999, assessed the impact of the Amsterdam Treaty and addressed future progress in the creation of an area of freedom, security and justice<sup>78</sup>. The four areas covered by the Tampere Summit were: a common EU asylum and migration policy, a European area of justice, the fight against crime and stronger

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<sup>77</sup> Virginie Guiraudon (n1) 253.

<sup>78</sup> Council of the European Union, ‘Presidency Conclusions, Tampere European Council, 15-16 October 1999’, 16 October 1999.

external action<sup>79</sup>. In order to establish the area of Freedom, Security and Justice, a Common European Asylum System (CEAS) and a common European migration policy became necessary and equally as important as the creation of the Single Market. Satvinder Juss argues that the Tampere Summit was characterized by a shift from the “Fortress Europe” ideology towards a more cooperative approach<sup>80</sup>. For the first time, a multi-annual programme determining the priorities of the justice and home affairs area was concluded by the European Council. This meant that all intergovernmental measures concluded before the entry into force of the Amsterdam Treaty had to be renegotiated and transformed into EU law. As noted earlier, the main problem with the intergovernmental instruments was their lack of enforcement mechanisms.

To create a CEAS two steps had to be followed. First, the national policies had to be harmonized and, second, an EU-wide system had to be adopted<sup>81</sup>. The creation of a common asylum system required binding legislative instruments. The Commission was put in charge of formulating a full legislative package in the area of asylum<sup>82</sup>. The Tampere programme stated that the Dublin Convention would follow the Geneva Convention of 1951, including the principle of non-refoulement<sup>83</sup>. According to the Programme, the Commission was to oversee, jointly with the Member States, the drafting of a similar legislative package in the areas of border management, migration and visa policy.

In order to monitor the achievements made in the implementation of actions foreseen by the Amsterdam Treaty, the Vienna Action Plan and the Tampere Conclusions, the Commission initiated a “scoreboard” in 2000<sup>84</sup>. The deadlines to adopt the different measures were translated in a timetable, the scoreboard, in order to provide an easy overview of the progress made in the implementation of each action. Gradually, the EU has internally legislated, developing EU law on migration and asylum matters. The Eurodac Regulation<sup>85</sup> and the European Refugee Fund<sup>86</sup> have been adopted under

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<sup>79</sup> Commission of the European Communities, ‘Immigration, Integration and Employment’ COM(2003) 336 final, Brussels, 3 June 2003.

<sup>80</sup> Satvinder S. Juss, ‘The Decline and Decay of European Refugee Policy’ (2005) 25(4) *Oxf J Leg Stud* 749, 754.

<sup>81</sup> Timothy James Hatton (n62) 110.

<sup>82</sup> Commission of the European Communities (n79).

<sup>83</sup> Timothy James Hatton (n62) 110.

<sup>84</sup> Commission of the European Communities, ‘Action Plans and Scoreboards: Scoreboard to Review Progress on the Creation of an Area of Freedom, Security and Justice in the European Union’ COM(2000) 167, Brussels, 24 March 2000.

<sup>85</sup> Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of “Eurodac” for the Comparison of Fingerprints for the Effective Application of the Dublin Convention OJ L 316, 15 December 2000.

<sup>86</sup> Decision No 596 of the Council of 28 September 2000 establishing a European Refugee Fund, OJ L252, 6/10/2000.



the Amsterdam Treaty. Additionally, several proposals have been made, eleven of which were the initiative of the Commission alone<sup>87</sup>. The Commission recognised the Amsterdam Treaty and the Tampere Programme as a turning point in the way migration and asylum issues were being addressed.

In the early 2000's, the demographic and economic situation in Europe led to the need to urgently approve an immigration policy<sup>88</sup>. In 2000, the Commission issued a critical Communication observing that although the Council set the framework for common immigration and asylum policies, there remained a shortcoming in its implementation as the migration pressure and labour shortages increased<sup>89</sup>. The main axes of this new asylum and immigration policy were the cooperation with third countries, the creation of a common European asylum system, the fair treatment of third country nationals legally residing in the EU and migration flows management. This Communication also marked a shift from the "zero" immigration policies and recognised that such a goal was "no longer appropriate"<sup>90</sup>. The Conclusions of the European Council in Laeken in 2001 reiterated the dedication of the EU to the policy orientations defined at the Tampere Summit, and the necessity for a renewed impetus to implement the basis of the common European asylum system<sup>91</sup>. It was only in 2004 that the qualified majority voting (instead of unanimity) and the co-decision with the Parliament applied to all areas of migration and asylum policy, except legal migration for the purpose of employment. In this regard, the Commission criticised the Member States' stance, arguing that, even though legal (economic) migration was a national competence, there was a need for common rules to regulate the issue<sup>92</sup>. As the Commission noted, the admission of legal migrants in one Member State has indirect effects on all Member States as legal migrants, depending on their status, will have the right to travel in the Schengen area, provide services or resettle.

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<sup>87</sup> For an overview of the proposals made until 2001 see: Commission of the European Communities, 'Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union (First half of 2001)' COM(2001) 278 final, Brussels, 23 May 2001.

<sup>88</sup> Macarena Nuño (n64) 11.

<sup>89</sup> Commission of the European Communities, 'A Community Immigration Policy' COM(2000) 757 final, Brussels, 22 November 2000 1.

<sup>90</sup> Ibid. 3.

<sup>91</sup> Council of the European Union, 'Presidency Conclusions, European Council meeting in Laeken', 14 and 15 December 2001 SN 300/1/01 REV 1.

<sup>92</sup> Umberto Melotti, 'Migratory Policies and Political Cultures in Europe: Is there Something New?' [2008] Heinrich Böll Stiftung: <https://heimatkunde.boell.de/2008/03/01/migratory-policies-and-political-cultures-europe-there-something-new> 'Accessed 17 January 2017'.

Finally, the communitarisation of immigration and asylum did not put an end to the flexibility and opt-out possibilities present in the Maastricht Treaty. Denmark, the United Kingdom and Ireland, which had opted out of Schengen and Title IV, were given even more flexibility as they now could decide to take part on a case by case basis. A Protocol attached to the Amsterdam Treaty allows the United Kingdom and Ireland to maintain a Common Travel Area and another Protocol grants an opt-out to the United Kingdom and Ireland from immigration, asylum and civil law issues (Title IV TEC). Also adding to the “flexibility”, the Amsterdam Treaty introduced the procedure of enhanced cooperation, which means that a minimum of nine Member States can cooperate without involving the Member States that do not want to participate. Enhanced cooperation was not an option for action in the second pillar. Enhanced cooperation requires the consultation of the European Parliament and unanimity between the participating Member States in order to adopt a new rule. This procedure was formalised by the Lisbon Treaty in 2009 also including defence operations under the second pillar.

#### **1.2.1.4. Legal and policy developments after Amsterdam**

The Nice and Lisbon Treaties, of 2001 and 2007 respectively, brought about considerable changes, enhancing the EU’s power to manage migration<sup>93</sup>. The Nice Treaty entered into force in 2003, one year before the five-year transitory period foreseen in the Amsterdam Treaty came to an end in 2004, as foreseen by article 73o. The Nice Treaty transformed the institutional structure of the European Union in preparation for the enlargement in 2004 to ten Eastern European countries. For example, the number of seats at the Parliament allocated to each Member States was recalculated, the rules of the qualified majority were changed, and a maximum number of Commission members was introduced as well as the rotation system of the Commission. Moreover, the qualified majority vote was extended to several issues such as the freedom of movement for citizens of the Union (Article 18 TEC) but also to asylum, refugees and immigration policy with two exceptions. According to Article 63(2)(b) and 63(3)(a) of the EC Treaty, the rules on “promoting a balance of effort

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<sup>93</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 80, 10.3.2001 and Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C 306, 17 December 2007.

between Member States in receiving and bearing the consequences of receiving refugees and displaced persons” and “conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion” are excluded from the qualified majority voting. Moreover, Article 64 TEC<sup>94</sup> allowed the council to take temporary decisions to fight the consequences of an unexpected arrival of third-country nationals to one or more Member States.

Major changes introduced by the Lisbon Treaty<sup>95</sup> were the abolishing of the three-pillar structure and the institution of the European Union becoming a single legal entity succeeding to the European Communities. It is through Chapter 2 (Articles 77 to 80) of the Treaty on the Functioning of the European Union (TFEU) that the EU gains competencies on asylum, borders and immigration. Article 78(3) foresees the adoption of provisional measures in the case of a sudden inflow of third country nationals. Article 79(5) states that the EU and the Member States share competence on the number of migrants allowed to enter a Member State for labour purposes. This article was introduced as a safeguard since EU Member States are unwilling to renounce their competence over legal migration<sup>96</sup>. Article 80 prescribes that migration issues will be solved under “the principle of solidarity and fair sharing of responsibility”. Moreover, the Lisbon Treaty enhanced the power of the EU Parliament, broadening its competencies to encompass legal migration. According to Article 67 TEC, the Parliament had the power of co-decision on matters concerning internal and external border controls, conditions and procedures for issuing visas and rules on a uniform visa, freedom to travel for third-country nationals, asylum policy and irregular migration. On matters of legal migration, however, the Parliament had only a consultative role and Member States had to vote by unanimity. The Lisbon Treaty extended co-decision and qualified majority voting on regular immigration applying it to both irregular and regular immigration, the Parliament becoming a co-legislator equivalent to the Council. Steve Peers declared that the Lisbon Treaty succeeded in entirely communitarising EU’s migration policy<sup>97</sup> and James Hampshire conceded that the Lisbon Treaty

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<sup>94</sup> Consolidated Version of the Treaty Establishing the European Community OJ C 325/33 24 December 2002.

<sup>95</sup> The Treaty of Lisbon is composed of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) which it amends. The TFEU constitutes the foundation of EU law.

<sup>96</sup> Natasja Reslow, ‘Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships’ (2012) 24(3) *J Eur Integr* 223, 224.

<sup>97</sup> Steve Peers, ‘Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon’ (2008) 10(2) *EJML* 219.

“marked the coming of age of European migration governance”<sup>98</sup>. This can be explained by the fact that for the first time the objectives of the EU migration and asylum policy were binding for the Member States. The Court of Justice of the EU has also gained full jurisdiction in the field of immigration and asylum.

Since 2001, a set of secondary legislation on asylum, migration and human trafficking was adopted and the area of freedom, security and justice was put at the top of the EU’s political agenda<sup>99</sup>. The first relevant legal instrument adopted after the Amsterdam Treaty was the Directive on temporary protection<sup>100</sup>. It was followed by the Directive on minimum standards for the reception of asylum seekers<sup>101</sup> and the conclusion of the Dublin Regulation II<sup>102</sup> replacing the 1990 Dublin Convention<sup>103</sup>. Dublin II is similar to Dublin I as it defines the standards and procedure for distributing one asylum application to one Member State. EURODAC<sup>104</sup> aims at supporting the implementation of the Dublin Regulation II creating together the “Dublin system”. The EURODAC system is a database used to identify individuals that already made an asylum request in a Member State in order to avoid the multiplication of asylum claims made by one person.

In the field of immigration, the question of the integration of immigrants had been initially raised in the Presidency Conclusions adopted at the European Council of Seville in 2002<sup>105</sup>, which restated the prominence of deepened cooperation with third countries. In 2002, the Directive defining the facilitation of unauthorised entry, transit and residence was adopted<sup>106</sup>. Then, in 2003, two Directives were adopted about the admission and residence of third-country nationals. The first one is the Directive on

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<sup>98</sup> James Hampshire, ‘European Migration Governance since the Lisbon Treaty: Introduction to the Special Issue’ (2016) 42(4) *J Ethn Migr Stud* 537, 542.

<sup>99</sup> Commission of the European Communities, ‘Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations’ COM(2004) 401 final, Brussels, 2 June 2004 1, 3.

<sup>100</sup> Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof 2001/55/EC of 20 July 2001.

<sup>101</sup> Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers 2003/9/EC of 27 January 2003.

<sup>102</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National.

<sup>103</sup> Council of the European Union, ‘on Refugees and Exiles, Report on the Application of the Dublin II Regulation in Europe’ AD3/3/2006/EXT/MH (2006) 1, 10.

<sup>104</sup> Council Regulation (EC) No 2725/2000 (n85); Council Regulation (EC) No 407/2002 of 28 February 2002 Laying Down Certain Rules to Implement Regulation (EC) No 2725/2000 Concerning the Establishment of “Eurodac” for the Comparison of Fingerprints for the Effective Application of the Dublin Convention OJ L 62, 5 March 2002.

<sup>105</sup> Council of the European Union, ‘Presidency Conclusions of the Seville European Council, 21-22 June 2002’ 13463/02, Brussels, 24 October 2002.

<sup>106</sup> Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorized Entry, Transit and Residence, OJ L 328, 5 December 2002.

family reunification<sup>107</sup>. Family reunification covered the main share of migration flows at the time. For example, it represented over half of the migrants entering France and Portugal<sup>108</sup>. The Directive defined the right to family reunification for legally residing third country nationals, the conditions for access to family reunification and the rights of the family members successfully allowed to enter the territory of a Member State. The second Directive focused on the status of third-country nationals who are long-term residents<sup>109</sup>. This Directive came as a response to the critics against the notion of “European citizenship” which was not recognised to third country nationals, therefore denying them rights that were granted to EU citizens outside of their country of nationality, such as for example the right to vote and to be elected in local elections<sup>110</sup>. According to Patrícia Jerónimo, the aim of the Directive was to overcome the difficulties posed by the fragmented and ad hoc nature of the regime applied to third country nationals and to provide them with equal treatment, or a common legal status as close as possible to what is enjoyed by EU citizens<sup>111</sup>. However, she argues that even though the legal status of third country nationals has been strengthened by the Directive it does not eliminate some of the serious difficulties<sup>112</sup>. Some examples of the difficulties that third country nationals still face are the absence of the right to vote or to be elected in local elections, discrimination on the basis of nationality or the lack of right to move to and reside in any Member State of their choice<sup>113</sup>.

In 2004, the Commission issued its last report on the implementation of the Tampere Programme<sup>114</sup>. The Communication highlighted that improvements occurred in most areas of JHA, that public opinion was in favour of cooperation at the EU level on asylum and migration affairs and that JHA was now a priority for the EU<sup>115</sup>. The Commission also observed that “Member States are sometimes reluctant to cooperate within this new European framework when their interests are at stake”<sup>116</sup>. Moreover, this

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<sup>107</sup> Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification OJ L 251, 3 October 2003.

<sup>108</sup> Alex Balch and Andrew Geddes, ‘Connections between Admission Policies and Integration Policies at EU-Level and Given Linkages with National Policy Making’ (2012) WP1, Promoting Sustainable Policies for Integration 1, 7.

<sup>109</sup> Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents, OJ L 16, 23 January 2004.

<sup>110</sup> Patrícia Jerónimo, ‘Imigração e Cidadania na União Europeia: o Estado de Residente de Longa Duração’ 325 in Alessandra Silveira, *Direito da União Europeia e Transnacionalidade* (Quid Juris 2011) 325-328.

<sup>111</sup> Patrícia Jerónimo, ‘A Cidadania como Instrumento de Inclusão: Significado e Alcance da Promessa de uma Cidadania Cívica da União Europeia’ 182 in Joaquim Freitas da Rocha, *Anuário Publicista da Escola de Direito da Universidade do Minho – Tomo I, Ano de 2012 – Responsabilidade e Cidadania* (Departamento de Ciências Jurídicas Públicas Escola de Direito da Universidade do Minho 2012) 211-212.

<sup>112</sup> *Ibid* 214; Patrícia Jerónimo (n110) 328.

<sup>113</sup> *Ibid* 214.

<sup>114</sup> Commission of the European Communities (n99).

<sup>115</sup> *Ibid* 3-4.

<sup>116</sup> *Ibid* 4.

assessment indicates that the right of initiative shared with the Member States sometimes had the effect that national concerns were given priority over Tampere priorities<sup>117</sup>.

The second phase of the creation of the common European asylum system and the second multi-annual area of freedom, security and justice program started with the Hague Programme in 2004<sup>118</sup>. The Commission noted that, even though some encouraging progress had been made, improvements were still necessary<sup>119</sup>. Moreover, the Commission urged the Member States to adopt a consistent refugee and subsidiary protection status and a united process for the award and revocation of the asylum status<sup>120</sup>. On migration issues, the Commission encouraged the establishment of an approach in favour of legal labour migration while fighting irregular migration and human trafficking by emphasising policies on return and readmission<sup>121</sup>. Alex Balch and Andrew Geddes highlighted the five main topics of the Hague Programme: “a common European asylum system; Legal migration and the fight against illegal employment; Integration of third country nationals; The external dimension of asylum and migration policy; and the management of migration flows”<sup>122</sup>. They underline two major points of attention. The first one is that legal migration was cited clearly in the framework of the fight against illegal employment, and the second is that “management of migration flows” was included in the new “external” dimension. Alex Balch and Andrew Geddes noted that the Hague Programme underlined the notion of “externalisation” of policy in the sense of cooperation with third countries<sup>123</sup>.

On immigration issues, two new Directives were adopted, in line with the official position at the time, favouring selected economic migration<sup>124</sup>. As a response to the ageing and declining European population, the EU needed more economic migrants.

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<sup>117</sup> Ibid.

<sup>118</sup> Council of the European Union, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ 2005/C 53/01 OJ C 53/1 3 March 2005.

<sup>119</sup> Commission of the European Communities (n99).

<sup>120</sup> Ibid 10.

<sup>121</sup> Ibid 9-10.

<sup>122</sup> Alex Balch and Andrew Geddes (n108) 14.

<sup>123</sup> Ibid 16.

<sup>124</sup> Council Directive 2004/114/EC of 13 December 2004 on the Conditions of Admission of Third-Country Nationals for the Purposes of Studies, Pupil Exchange, Unremunerated Training or Voluntary Service OJ L 375, 23 December 2004; Council Directive 2005/71/EC of 12 October 2005 on a Specific Procedure for Admitting Third-Country Nationals for the Purposes of Scientific Research OJ L 289, 3 November 2005.

In 2005, the Commission presented a Green Paper<sup>125</sup> in which it put forward an economic migration policy without going as far as creating a common framework on the issue, to prevent an overlap with Member States' competences on legal migration. However, the Commission argued that, even though it recognised that decisions on the numbers of economic migrants entering the Member States were a national prerogative, these decisions were affecting other Member States and therefore "more harmonised common rules and criteria at EU level for admitting economic migrants" should be taken<sup>126</sup>. In December 2005, the Council Presidency Conclusions called for a coherent immigration policy<sup>127</sup>. This includes proposals for a "common asylum policy, fight illegal immigration and trafficking in human beings, ensure fair treatment of regular migrants and build partnerships with countries of origin and transit"<sup>128</sup>. Following the publication of this Green Paper, the Commission disclosed its "Policy Plan on Legal Immigration"<sup>129</sup> underlining the importance of integration of legal migrants. The Policy Plan proposed initiatives to develop common EU rules in the field of legal migration but also tools to improve the access and exchange of information and monitor the migration of third country skilled workers in order to propose solutions to the Member States. The Policy Plan also made four proposals for Directives pertaining to legal migration: on the conditions of entry and residence of highly skilled workers, seasonal workers and remunerated trainees and on the procedures regulating the entry into, temporary stay and residence of Intra-Corporate Transferees<sup>130</sup>.

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<sup>125</sup> Commission of the European Communities, 'Green Paper on an EU Approach to Managing Economic Migration' COM(2004) 811 final, 11 January 2005.

<sup>126</sup> Ibid 4.

<sup>127</sup> Council of the European Union, 'Presidency Conclusions of the Brussels European Council of 15 and 16 December 2005' SN 15914/01/05, 30 December 2005 2 (III Africa).

<sup>128</sup> Commission of the European Communities, 'The Global Approach to Migration One Year on: Towards a Comprehensive European Migration Policy' COM(2006) 735 final, Brussels, 30 November 2006 1, 11.

<sup>129</sup> Commission of the European Communities, 'Policy Plan on Legal Migration' COM(2005) 669 final, Brussels, 21 December 2005.

<sup>130</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer' COM(2010) 378 final, Brussels 13 July 2010 (which became Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer OJ L 157, 25 May 2014); European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment' COM(2010) 379 final, Brussels, 13 July 2010 (which became Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers OJ L 94, 28.3.2014); European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Pupil Exchange, Remunerated and Unremunerated training, Voluntary Service and au Pairing' COM(2013) 151 final, Brussels 25 March 2013 (which became Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and au Pairing OJ L 132/21, 21 May 2016); European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Condition of Entry and Residence of Third-Country Nationals for the Purposes of High Skilled Employment' COM(2016) 378 final, Strasbourg, 7 June 2016.

In 2007, the developments of the Common European Asylum System were still not satisfying, and the European Parliament pointed out that “in the absence of a genuine common European asylum system and a single procedure, the Dublin system will continue to be unfair both to asylum seekers and to certain Member States”<sup>131</sup>. The lack of harmonisation between national asylum laws, even after the adoption of several directives to that effect, is still a reality. After the first phase of the Common European Asylum System, the Commission also issued a Green Paper on the Future CEAS<sup>132</sup>. In the Green Paper, the Commission recognised that the Dublin System “may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location”<sup>133</sup>. Therefore, the Commission called for a system that explicitly assigned responsibility to the Member States in order to avoid “asylum shopping”<sup>134</sup>. In this Green Paper, the Commission highlighted two objectives that needed to be reached in the second phase: “a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States”<sup>135</sup>. It also underlined the importance to “adopt an integrated, comprehensive approach to asylum” making progress in “all aspects of asylum process”<sup>136</sup>. Like on migration policy, following the Green Paper on asylum, a Policy Plan was adopted to guide the action of the EU<sup>137</sup>. The four principles leading EU’s action on asylum included in the Policy Plan were: upholding the Union’s humanitarian and protection tradition and ensuring fundamental rights when implementing the CEAS; establishing a system where all asylum seekers are treated equally; enhancing the efficiency of the asylum system; and assuring solidarity within and outside the EU<sup>138</sup>.

In 2008, the Council adopted the “European Pact on Immigration and Asylum” with the aim to establish a common European asylum system by 2012<sup>139</sup>. It included rigorous

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<sup>131</sup> European Parliament resolution of 2 September 2008 on the Evaluation of the Dublin System 2007/2262(INI), (2007).

<sup>132</sup> Commission of the European Communities, ‘Green Paper on the Future Common European Asylum System’ COM(2007) 301 final, Brussels, 6 June 2007 1.

<sup>133</sup> Ibid 10.

<sup>134</sup> Ibid 11.

<sup>135</sup> Ibid 3.

<sup>136</sup> Ibid.

<sup>137</sup> Commission of the European Communities, ‘Policy Plan on Asylum and Integrated Approach to Protection Across the EU’ COM(2008) 360, Brussels, 17 June 2008 1.

<sup>138</sup> Ibid 11.

<sup>139</sup> Council of the European Union, ‘European Pact on Immigration and Asylum’ 13440/08 ASIM 72, Brussels, 24 September 2008 1.



provisions on irregular migration and return. For example, the European Council agreed to conclude readmission agreements “so that each Member State has the legal instruments to ensure that illegal immigrants are expelled”<sup>140</sup>. It also approved to develop cooperation with third countries on the fight against irregular immigration under the frame of the Global Approach to Migration<sup>141</sup>. Again, it decided to formulate incentives to promote “voluntary” return<sup>142</sup>. The European Pact stated five major objectives to be transposed into concrete measures: organise legal immigration in accordance with Member States’ priorities, needs and reception capacities; ensure that irregular immigrants return to their countries of origin or transit; enhance the effectivity of border control; build a “Europe of asylum” and cooperate with third countries<sup>143</sup>.

The Stockholm Programme<sup>144</sup> (2009) is in line with the ongoing position of the EU towards legal migration and continues to emphasise return and readmission instruments to fight irregular immigration. There were no crucial changes in terms of migration policy but the Stockholm programme acknowledged the chances and difficulties that important migration flows pose and underlined that, when well-managed, migration can benefit everyone<sup>145</sup>. The Stockholm Programme highlighted the necessity for solidarity with the Member States receiving the overwhelming majority of asylum claims and stressed the essential role the European Asylum Support Office (EASO) would have. The Action Plan Implementing the Stockholm Programme includes seven points of attention: Delivering an area of freedom, security and justice for Europe’s citizens; Ensuring the protection of fundamental rights; Empowering European citizens; Strengthening confidence in the European judicial area; Ensuring the security of Europe; Putting solidarity and responsibility at the heart of EU’s response in migration and asylum matters and contributing to a global Europe<sup>146</sup>. Concretely, the main actions foreseen related to immigration are the consolidation and implementation of the GAM as well as migration and development activities. Moreover, the determination to attract highly qualified legal migrants while increasing border control to fight against irregular, low skilled, migrants is still at the core of the

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<sup>140</sup> Ibid 7.

<sup>141</sup> Ibid 8.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid 4.

<sup>144</sup> Council of the European Union, ‘The Stockholm Programme: an Open and Secure Europe Serving and Protecting Citizens’ 2010/C 115/01, 4 May 2010 1.

<sup>145</sup> Ibid 5.

<sup>146</sup> European Commission, ‘Delivering and Area of Freedom, Security and Justice for Europe’s Citizens: Action Plan Implementing the Stockholm Programme’ COM(2010) 171 final, Brussels, 20 April 2010.

discussions. Interestingly, the creation of an immigration Code by 2013 was foreseen, aiming at consolidating EU's immigration law similarly to the EU Visa Code<sup>147</sup> and Schengen Borders Code<sup>148</sup>, but it has not yet been created. Concerning asylum, the focus was on the creation of an integrated external borders management and a "common area of protection" with harmonised procedures to respond to asylum claims and the sharing of responsibilities between Member States. The focus was also on the evaluation and improvement of the EU resettlement programme<sup>149</sup> proposed in 2009 by the Commission and the extension in 2010 of Regional Protection Programmes (RPP) to the Horn of Africa and eastern North Africa. This last point falls under EU external migration policy and therefore will be discussed in further details in the next section. According to Alex Balch and Andrew Geddes, the developments in migration and asylum policy that occurred since the Amsterdam Treaty show a change of EU's position from a policy based on harmonisation to "more practical or pragmatic attempts to find alternative methods to achieve common goals"<sup>150</sup>. The push towards the creation of an immigration Code is a good example of rationalisation rather than harmonisation of migration policy. Additionally, several tools, such as the EASO, are included in the Stockholm programme to support Member States to respond to asylum claims strengthening the operational approach to asylum.

A new set of different Directives and Regulations on migration, asylum and human trafficking were subsequently adopted between 2009 and 2014. Two Directives are of significant importance for the development of EU migration policy. The first one is the creation of the EU Blue Card in 2009 allowing the issuance of special residence and work permits for highly-skilled workers<sup>151</sup>. The second is the so-called Return Directive which sets the conditions for ending irregular stays and for detaining third country nationals with the aim of returning them to their respective countries of origin, to a country of transit or to a third country, if the third-country national wishes to do so (Article 3(3)). The Return Directive also sets procedural safeguards for the non-EU

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<sup>147</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15.9.2009.

<sup>148</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) OJ L 105, 13 April 2006 (no longer in force).

<sup>149</sup> Commission of the European Communities, 'on the Establishment of a Joint EU Resettlement Programme' COM(2009) 447 final, Brussels, 2 September 2009.

<sup>150</sup> Alex Balch and Andrew Geddes (n108) 14.

<sup>151</sup> Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2009/50/EC of 25 May 2009, OJ L 155, 18 June 2009.

nationals throughout the return procedure<sup>152</sup>. In terms of asylum, two Regulations have been adopted between 2009 and 2014. The first one is Dublin III<sup>153</sup> which sets the criteria and procedure for determining which Member State is responsible for an asylum claim made by a third country national. The second is the use of EURODAC<sup>154</sup> to determine which Member State is responsible for an asylum claim according to the Dublin III Regulation.

The legal developments towards the creation of a common asylum and migration policy have also gradually benefited from specific financial support (other than the European Social Fund created in 1957). It started in 2000 with the creation of the European Refugee Fund that aimed at supporting the Member States' "burden-sharing" for those States with an external border receiving a significantly higher number of asylum claims. Other funds have been created such as the European Fund for the Integration of Third-Country Nationals (2007-2013), the External Borders Fund (2007-2013) and the Return Fund (2008-2013). In 2014 these different funds have been replaced with the Asylum, Migration and Integration fund<sup>155</sup> following a Proposal for a Regulation of the European Parliament and of the Council from 2011<sup>156</sup>. This fund covers all areas of the common migration and asylum policy (asylum, legal migration and integration, return and solidarity). More recently, the Internal Security Fund was created in 2014 aiming at financing the protection of external borders, the common visa policy, the internal security strategy and cross-border crimes, and the management of risks and crisis.

In March 2014, the Commission presented its conception on the future agenda for Home Affairs<sup>157</sup>. These conceptions are not different from EU's position so far and the Commission still aims at favoring highly qualified legal migration and fighting irregular,

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<sup>152</sup> Council Directive on common standards and procedures in Member States for Returning Illegally Staying Third-Country Nationals 2008/115/EC of 16 December 2006, OJ L 348/98, 24 December 2008.

<sup>153</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person OJ L 180, 29 June 2013.

<sup>154</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with 'Eurodac' Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 Establishing a European Agency for the Operational Management of Large-Scale IT Systems in the area of Freedom, Security and Justice OJ L 180, 29 June 2013.

<sup>155</sup> EU Regulation of the European Parliament and of the Council, establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, 516/2014, 16 April 2014.

<sup>156</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Asylum and Migration Fund' COM(2011) 751 final, 15 November 2011.

<sup>157</sup> European Commission, 'An Open and Secure Europe: Making it Happen' COM(2014) 154 final, Strasbourg, 11 March 2014.

unwanted immigration. It is on the basis of this Commission's communication that the European Council and European Parliament could start discussing the strategic guidelines. Strategic guidelines for legislative and operational planning within the area of freedom, security and justice were presented in June 2014 during the European Council<sup>158</sup> as a follow up to the Stockholm Programme that expired in December 2014. The strategic guidelines cover the 2014-2020 period. The central goal for the coming years is the "full transposition and effective implementation of the CEAS" but also the adoption of a global approach to migration. In 2014, the President of the European Commission, Jean-Claude Juncker, presented Political Guidelines which included a chapter entitled "Towards a New Policy on Migration"<sup>159</sup>. The content of the New Policy was not different from the migration policy so far (to fight irregular migration, to welcome high skilled migrant workers and to implement the CEAS).

The start of the "migrant crisis" in 2015 led the EU to try to take more effective action. Following the drowning of several thousand migrants since February 2015, the European Council held an emergency meeting on April 23 during which the Member States agreed to follow a 10-point Action Plan<sup>160</sup>. This Action Plan is focusing on the migration crisis in the Mediterranean and is officially aiming at avoiding the loss of lives. When looking at some of the points proposed, the security aspect rather than the humanitarian one can be noticed. For example, points nine and ten focus on the externalisation of migrants and asylum reception, which does not directly aim at saving lives but rather to share the "burden" of asylum seekers and immigrants with third countries. Following the extraordinary European Council meeting, the European Parliament adopted a Resolution on 29 April where it called for the application of a temporary protection scheme and for the enlargement of the mandate of the EASO to increase its operational role in the processing of asylum applications<sup>161</sup>. On 13 May 2015, the Commission published "A European Agenda on Migration" aimed at designing a "coherent and comprehensive approach to reap the benefits and address

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<sup>158</sup> Council of the European Union, 'Extract from the 26 - 27 June 2014 European Council Conclusions Concerning the Area of Freedom, Security and Justice and some related Horizontal Issues' OJ C 240, 24 July 2014.

<sup>159</sup> Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the Next European Commission', Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014.

<sup>160</sup> European Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration', Press release, IP/15/4813 Luxembourg, 20 April 2015.

<sup>161</sup> European Parliament Resolution of 29 April 2015 on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies 2015/2660(RSP), Strasbourg, 29 April 2015.

the challenges deriving from migration”<sup>162</sup>. The Commission admitted that the creation of a common European immigration policy was a failure and that the EU now needed to try a new method connecting internal and external policies on migration<sup>163</sup>. In relation to asylum, the Commission recognised the need to launch provisional measures for the distribution of asylum seekers<sup>164</sup>. The Commission also proposed several actions to be taken in the medium and long term, such as the revision of the “blue card” system and the creation of an EU-wide relocation and resettlement scheme. Subsequently, in December 2015, the European Border and Coast Guard was created<sup>165</sup>.

In April 2016, the Commission announced the reform of the EU asylum and migration systems<sup>166</sup> and in May and July 2016 seven specific proposals to achieve the reform of the CEAS were advanced<sup>167</sup>. This includes the proposal of Dublin IV, which was not well received. A study from the European Parliament, published in 2016, criticised the inefficiency of the Dublin system and argued that Dublin IV instead of solving the problem would “probably aggravate current imbalances in responsibilities among Member States”<sup>168</sup>. On migration issues, four axes of action were presented: revising the Blue Card Directive, attracting innovative entrepreneurs to the EU, developing a more coherent and effective model for regular migration management at EU level, and

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<sup>162</sup> European Commission, ‘on a European Agenda on Migration’ COM(2015) 240 final, Brussels, 13 May 2015 1, 2.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid 4.

<sup>165</sup> European Commission (n160).

<sup>166</sup> European Commission, ‘Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ COM(2016) 197 final, Brussels, 6 April 2016.

<sup>167</sup> European Commission, ‘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’ COM(2016) 467, Brussels 13 July 2016; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents’ COM(2016) 466, Brussels, 13 July 2016; European Commission, ‘Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection’ (recast) COM(2016) 465 final/2, Brussels, 15 September 2016; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and Amending Regulation (EU) No 516/2014 of the European Parliament and the Council’ COM(2016) 468, Brussels, 13 July 2016; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person’ (recast) COM(2016) 270 final/2, Brussels, 4 May, 2016; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the Establishment of ‘Eurodac’ for the Comparison of Fingerprints for the Effective Application of [Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person], for Identifying an Illegally Staying Third-Country National or Stateless Person and on Requests for the Comparison with Eurodac Data by Member States’ Law Enforcement Authorities and Europol for Law Enforcement Purposes’ (recast) COM(2016) 272 final/2, Brussels, 4 May 2016; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010’ COM(2016) 271 final, Brussels, 4 May 2016.

<sup>168</sup> Francesco Maiani, ‘The Reform of the Dublin III Regulation, Study for the Civil Liberties, Justice and Home Affairs Committee’, Directorate General for Internal Policies, Policy Department C Citizens’ Rights and Constitutional Affairs, European Parliament, PE 571.360 (2016) 1, 6.

strengthening cooperation with key countries of origin<sup>169</sup>. Subsequently, in October 2016, the European Parliament and the Council adopted a proposal for a European travel document for the return of irregular migrants<sup>170</sup>. The creation of this travel document would support the implementation of the European Agenda on Migration and the EU Action Plan on return which we will examine in greater detail in the following sub-section, as they refer to the external dimension of EU migration policy. Similarly, in 2017, the European Parliament adopted a resolution “on addressing refugee and migrant movements” which is also essentially focused on the return of third country nationals<sup>171</sup>. In November 2017 a draft resolution for a regulation on “criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person” was adopted by the European Parliament<sup>172</sup>. This proposal includes: a permanent and automatic relocation mechanism without thresholds, the possibility for asylum seekers with ties to a specific Member State to be relocated there in order to make their asylum claim. Asylum seekers without ties would be able to choose between four different countries in which to make their asylum claim and the possibility for a group of up to 30 people to ask to be registered together and be transferred to the same Member State<sup>173</sup>. These measures, according to the European Parliament, aim at avoiding secondary movements<sup>174</sup>. Applicants with small chances of receiving protection would be filtered and would have to launch their asylum claim in the Member State of first entry without the possibility to be relocated. A three-year transition period is foreseen to allow Member States that are not used to receiving asylum seekers to gradually take responsibility and move towards a fair share.

Finally, it is important to say a few words about the favourable disposition of the Commission towards the use of soft law instruments as a “complement” to Community law<sup>175</sup>. The necessity to use soft law to ensure flexibility within the EU has been

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<sup>169</sup> European Commission (n166) 16-19.

<sup>170</sup> European Parliament, Resolution of 12 April 2016 on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration, 2015/2095(INI).

<sup>171</sup> European Parliament, Resolution of 5 April 2017 on Addressing Refugee and Migrant Movements: the Role of EU External Action, 2015/2342(INI).

<sup>172</sup> European Commission, ‘Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person’ (recast) COM(2016) 0270 – C8-0173/2016 – 2016/0133(COD)).

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Commission of the European Communities, ‘An Open Method of Coordination for the Community Immigration Policy’ COM(2001) 387, Brussels, 11 July 2001 1, 6.

underlined in the Commission's White Paper on Governance of 2001, putting the accent on "opening up the policy-making process" to promote "better involvement and more openness" as well as more responsibility<sup>176</sup>. It should be noted that neither the Communications from the Commission nor the multi-annual programmes are binding instruments. In 2001, the Commission also suggested applying the Open Method of Coordination to migration issues<sup>177</sup>. In the Communication on an Open Method of Coordination for the Community Immigration Policy, the Commission declared that "an open procedure for coordination will lead to the identification of common objectives" aiming towards a common policy on asylum and immigration as well as providing "a framework for reviewing with the Member States the implementation of these legal instruments"<sup>178</sup>. Besides legislation on integration there were also several soft law instruments that were adopted, such as the Common Basic Principles on Integration, adopted by the Justice and Home Affairs Council in 2004<sup>179</sup>. The Justice and Home Affairs Council aim at drafting a common European integration policy and it notes that the Common Basic Principles on Integration can be used as guidelines for the application and assessment of present and future integration policies<sup>180</sup>.

## 1.2.2. EU external migration policy

### 1.2.2.1. The building of an EU external migration policy

At the international level, from early on, the EU has concluded multilateral or bilateral agreements that partially covered migration issues<sup>181</sup>. The first Association Agreement was signed with Greece in 1961<sup>182</sup> before the country joined the EU and as of today, 24 Association Agreements are in force, including one with Morocco (2000)<sup>183</sup>, the

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<sup>176</sup> Commission of the European Communities, 'European Governance: a White Paper' COM(2001) 428, Brussels, 25 July 2001 1, 3-5.

<sup>177</sup> Commission of the European Communities (n175).

<sup>178</sup> Ibid 6.

<sup>179</sup> Council of the European Union, '2618th Council Meeting Justice and Home Affairs', Brussels, 19 November 2004, 1415/04 (Press 321).

<sup>180</sup> Ibid.

<sup>181</sup> For a full list of international agreements, both bilateral and multilateral, concluded by the EU with third countries in the field of migration see: Paula García Andrade and Ivan Martín, 'EU Cooperation with Third Countries in the Field of Migration', Study, DG for Internal Policies, Policy Department C, European Parliament, PE 536.469, 2015 available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL\\_STU\(2015\)536469\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf) Annex II, 141 ff, 'Accessed 1 February 2018'.

<sup>182</sup> Accord Créant une Association entre la Communauté Economique Européenne et la Grèce, Journal Officiel de l'Union Européenne P 26/1963, 18 Février 1963, 294.

<sup>183</sup> ECSC, Council and Commission Decision of 24 January 2000 on the Conclusion of the Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Kingdom of Morocco 2000/204/EC.

latest being concluded with Ukraine in 2017. Association Agreements are treaties between the EU, its Member States and a third country which create a framework for cooperation.

From the 1990's on, the Mediterranean region became one of the main focuses of the EU foreign policy. In 1994, the Commission presented cooperation with third countries as the main factor for an efficient immigration policy<sup>184</sup>. The Commission emphasised the necessity of a coherent approach to immigration and asylum policies and the advantages of cooperating with prospective third countries<sup>185</sup>. Cooperation with third countries on migration issues is not new as it was already used before the entry into force of the Maastricht Treaty on issues related to migrant workers and their family. In 1995, the Barcelona Euro-Mediterranean Conference was held establishing the Euro-Mediterranean Partnership also known as the Barcelona Process<sup>186</sup>. The three main objectives of the Barcelona Process were: the definition of a shared area of peace and stability, the construction of a zone of shared prosperity and the rapprochement between people through a social, cultural and human partnership. Migration was not yet a central focus of the dialogue, even though it already had a clear importance for the Commission<sup>187</sup>. Today, nearly all southern-Mediterranean countries involved in the Barcelona Process took advantage of the opportunities presented by the cooperation framework to conclude a Euro-Mediterranean Agreement Establishing an Association<sup>188</sup>. Despite these positive results, the Barcelona Process is considered by many as a failure as it did not reach its goals, mainly the goal of creating a space of peace and security in the Middle-East and Northern Africa<sup>189</sup>. However, Khader Bichara, for example, disagrees with this assessment pointing out that it was through the Barcelona Process that Israel and its Arab neighbours sat on the same cooperation table<sup>190</sup>. Subsequently, in 1998, the High-Level Working Group on Asylum and Migration was created by the European Council and aimed at producing a joint plan of

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<sup>184</sup> Commission of the European Communities, 'on Immigration and Asylum Policies' COM(94) 23 final, Brussels, 23 February 1994 1, 2.

<sup>185</sup> Ibid.

<sup>186</sup> Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme [http://www.eeas.europa.eu/archives/docs/euromed/docs/bd\\_en.pdf](http://www.eeas.europa.eu/archives/docs/euromed/docs/bd_en.pdf) 'Accessed 5 August 2017'.

<sup>187</sup> Commission of the European Communities (n184) 6.

<sup>188</sup> Algeria (EMAA 2005), Morocco (EMAA 2000) and a DCFTA is currently under negotiation, Israel (EMAA 2000), Jordan (EMAA 2002), Egypt (EMAA 2004), Lebanon (EMAA 2006) as well as Tunisia (EMAA 1998) and a DCFTA is currently under negotiation.

<sup>189</sup> Richard Youngs, 'Ten years of the Barcelona Process: A Model for Supporting Arab Reform?' (2005) FRIDE Working Paper n°2; Alexander Geiger, "Barcelona Process: Union for the Mediterranean" Readjusting the Euro-Mediterranean Partnership' (2008) EU Office of the Friedrich-Ebert-Stiftung in Brussels <http://library.fes.de/pdf-files/bueros/bruessel/05364.pdf> 'Accessed 5 August 2017'.

<sup>190</sup> Khader Bichara, *Europa por el Mediterraneo: de Barcelona a Barcelona (1995-2009)* (Icaria, 2009).



action “targeted at the situation in the most important countries of origin of asylum-seekers and migrants”<sup>191</sup>. This group was aimed at targeting the root causes of migration but in practice it only focused on the fight against irregular migration, readmission and border control<sup>192</sup>. Concomitantly to the entry into force of the Amsterdam Treaty, the European Council adopted the Tampere programme<sup>193</sup>.

In the Tampere programme, the Commission proposed its first community immigration policy<sup>194</sup>. In this document, the EC invited the Member States to work towards a “comprehensive approach to migration”, a goal which has been consistently reiterated in the European discourse from that point on<sup>195</sup>. The multi-annual programme stressed that “Partnerships with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development”<sup>196</sup>. The cooperation with third countries was the main axis for the external aspect of the migration policy. Christina Boswell argues that it is the unsuccessful control of migration flows through European migration policies that led EU Member States to cooperate with third countries<sup>197</sup>. She distinguishes between two ways of implementing this cooperation. First, through “outsourcing” migration control and, second, by addressing the root causes of migration hoping that migrants will be less willing to come to Europe. In order to address these root causes, the Tampere Programme aimed at fighting against poverty, ameliorating living conditions and access to the national labour market, deterring conflict and building up democracy<sup>198</sup>. Ernst Georg Ravenstein already looked at the “root causes” of migration in 1885. He was one of the first scholars to argue that the major causes for migration are economic and therefore migration and development are two inseparable concepts<sup>199</sup>. Based on Ravenstein’s work, the push-pull theory has been developed<sup>200</sup>. The push-pull theory looks at the context in the country of origin (root causes) and the context in the country of

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<sup>191</sup> Council of the European Union, ‘Terms of Reference of the High-Level Working Group on Asylum and Migration: Preparation of Action Plans for the Most Important Countries of Origin and Transit of Asylum Seekers and Migrants 5264/99’, Brussels, 13 January 1999, 1.

<sup>192</sup> Niels Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Leiden: Martinus Nijhoff 2009) 23-24.

<sup>193</sup> Council of the European Union (n78).

<sup>194</sup> Commission of the European Communities (n89).

<sup>195</sup> *ibid* para 11.

<sup>196</sup> *ibid*.

<sup>197</sup> Christina Boswell, ‘The “External Dimension” of EU Immigration and Asylum Policy’ (2003) 79(3) *International Affairs* 619.

<sup>198</sup> Council of the European Union (n78) Point 11.

<sup>199</sup> Ernst Georg Ravenstein, ‘The Laws of Migration’ (1885) 48(2) *J Royal Stat Soc* 167; Ernst Georg Ravenstein, ‘The Laws of Migration’ (1889) 52(2) *J Royal Sta. Soc* 241.

<sup>200</sup> Everett S. Lee, ‘A Theory of Migration’ (1966) 3(1) *Demography* 47; Constantine Passaris, ‘Immigration and the Evolution of Economic Theory’ (1989) 27(4) *Int Migr* 525.

destination in order to explain migration from one country to the other. The Tampere Programme seems to follow the push-pull theory, which states that some factors are determining whether people will migrate or not. These factors include the lack of economic opportunities and political repression<sup>201</sup>. The “root causes” addressed by the Tampere Programme correspond to the push factors according to the push-pull theory. Ronald Skeldon as well as Stephen Castles, Hein de Haas and Mark J Miller criticise this theory<sup>202</sup>. They claim that it is too simplistic and that it does not take several other factors into account such as migrants’ agency<sup>203</sup>. They also declare that push factors such as demography or environment should not be taken separately from other factors that can influence the living conditions of prospective emigrants by giving the example of Eastern European Country where despite a negative population growth there is still a high emigration rate<sup>204</sup>. Stephen Castles, Hein de Haas and Mark J Miller argue that the push-pull theory is unsuccessful in explaining situations such as return migration or parallel emigration and immigration from and to a country<sup>205</sup>. Despite the criticisms in the academic literature, the belief according to which development of the country of origin can stop emigration seems to be vivid in policy makers’ minds and will be recurrent in the developments of EU’s external migration policy as we will see throughout this Chapter.

The notions of dialogue, partnership and cooperation with third countries were, since 1999, present in every main EU communication on migration and the accent was increasingly put on these goals throughout the years. In 1999, the main focus of the EC was on economic migration. Following the Tampere European Council, the EU also launched the EU-Africa Partnership. The first Africa-EU Summit was held in Cairo in April 2000, two years before the establishment of the African Union (2002). This marked the first time that the EU held discussions with Africa at the continental level<sup>206</sup>. At the sub-continental level, since 2000, the Cotonou Agreement (a Partnership Agreement) has constituted the main cooperation tool between the EU and African,

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<sup>201</sup> Stephen Castles, Hein de Haas and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (Palgrave Macmillan 2014) 28.; Thomas K. Bauer and Klaus F. Zimmermann, ‘Causes of International Migration: A Survey’ 95 in Cees Gorter, Peter Nijkamp and Jacques Poot (eds), *Crossing Borders: Regional and Urban Perspectives on International Migration* (Aldershot 1998) 103.

<sup>202</sup> Ronald Skeldon, *Population Mobility in Developing Countries: A Reinterpretation* (Belhaven Press 1990) 125-126.; Stephen Castles, Hein de Haas and Mark J Miller (n201) 25.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid 29.

<sup>205</sup> Ibid.

<sup>206</sup> Council of the European Union, ‘Africa-Europe Summit under the Aegis of the OAU and the EU, Cairo Declaration’, Conseil/00/901, Cairo, 3-4 April 2000 <http://europa.eu/rapid/press-release PRES-00-901 en.htm> ‘Accessed 5 August 2017’.

Caribbean and Pacific (ACP) countries<sup>207</sup>. It focuses mainly on development cooperation matters but it also addresses migration issues<sup>208</sup>. Article 13 of the Cotonou Agreement stipulates a return and readmission obligation for ACP countries. Cape Verde is part of the ACP countries and has been cooperating with the EU under this framework. Both Association and Partnership agreements include readmission clauses, which means that these countries technically have the obligation to take back their own nationals who are staying in Europe irregularly.

Sandra Lavenex underlines that even though Directorate-General (DG) Justice and Home Affairs' central work relates to domestic politics it has established an active foreign policy agenda since the 2000's<sup>209</sup>. This foreign policy agenda aims at linking third countries to EU policy goals notably on areas such as the fight against irregular migration. The conclusions of the General Affairs and External Relations Council of 2002 followed the same trend and repeated the need to "intensify cooperation on the management of migration flows with third countries"<sup>210</sup> and to "intensify EU partnership with countries and regions of particular relevance"<sup>211</sup>. Morocco was one of the countries listed in the General Affairs and External Relations Council's conclusions<sup>212</sup>. The Commission's communication on "[i]ntegrating migration issues in the European Union's Relations with third countries"<sup>213</sup> followed up on the Seville European Council's conclusions from 2002. In Seville, the Council proposed the integration of the immigration policy into the EU's relations with third countries, primarily on border control and readmission<sup>214</sup>. Migration became a "major strategic priority for the European Union" following the European Council in Seville underlining the importance to include third countries in the development and implementation of EU's migration policy<sup>215</sup>. The Commission communication included references to the need for dialogue and partnership with third countries on migration questions<sup>216</sup> and advanced

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<sup>207</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part 2000/483/EC, signed in Cotonou on 23 June 2000.

<sup>208</sup> Ibid, Article 13.

<sup>209</sup> Sandra Lavenex, 'Justice and Home Affairs and the EU's New Neighbours: Governance Beyond Membership?' 89 in Karen Henderson, *The Area of Freedom, Security and Justice in the Enlarged Europe* (Palgrave Macmillan 2005) 93.

<sup>210</sup> General Affairs and External Relations Council, '2463rd Meeting of the General and External Relations Council' 14183/02, Brussels 18 November 2002, V.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid. VI. The complete list was: Albania, China, the Federal Republic of Yugoslavia, Morocco, Russia, Tunisia, Ukraine and Libya. It is interesting to note that nor Cape Verde nor Moldova, which would later be taken as pilot cases for the Mobility Partnership, were part of this priority list.

<sup>213</sup> Commission of the European Communities (n73).

<sup>214</sup> Council of the European Union, 'Seville European Council 21 and 22 June 2002' POLGEN 52, Brussels, 24 October 2002 1, 10-11.

<sup>215</sup> Commission of the European Communities (n73) 4.

<sup>216</sup> Ibid.

the idea of “partnership on migration stemming from a definition of common interests with third countries” as a way to manage migration flows more effectively<sup>217</sup>. A few months later, the Council encouraged the Commission and the Member States to coordinate their actions in the field of migration and development policies<sup>218</sup>. In addition, the Mediterranean Transit-Migration Dialogue, an inter-regional inter-governmental advisory forum, started in 2002 promoting migration management schemes<sup>219</sup>.

In 2003, the European Neighbourhood Policy (ENP) was launched. The Southern-Mediterranean countries covered by the Barcelona Process became included in the ENP<sup>220</sup>. The Barcelona Process and the ENP were presented as complementary. The Strategy Paper on European Neighbourhood Policy set the priorities for the cooperation with third countries, including cooperation on migration, asylum and visa policies<sup>221</sup>. The ENP was designed to work mainly through bilateral cooperation using Action Plans that are jointly accepted by the EU and a specific third country<sup>222</sup>. One of the areas of cooperation between the EU and the partner countries is migration and mobility. EU policy documents underline the necessity to cooperate with third countries towards a successful migration policy<sup>223</sup>.

Readmission Agreements are a key instrument in the EU migration policy in relation to third countries. They create an obligation for the countries concluding these agreements to accept the return of irregular migrants staying in the territory of the other party. All EU Readmission Agreements (EURAs) include the obligation to readmit the third country’s own citizens but also third country nationals who transited through their territory before entering Europe. It is the question of the readmission of these third country nationals which is the main point of contestation made by third countries<sup>224</sup>. So

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<sup>217</sup> *ibid.* 46

<sup>218</sup> Council of the European Union, ‘Council Conclusions on migration and development’ 8927/03, Brussels, 5 May 2003 1, 5.

<sup>219</sup> For more information: <https://www.icmpd.org/our-work/migration-dialogues/mtm/participants/> ‘Accessed 17 January 2018’.

<sup>220</sup> Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia.

<sup>221</sup> Commission of the European Communities, ‘European Neighbourhood Policy: Strategy Paper’ COM(2004) 373 final, Brussels, 12 May 2004 1, 17.

<sup>222</sup> David Cadier, ‘Is the European Neighbourhood Policy a Substitute for Enlargement?’ 52 in *The Crisis of EU enlargement*, LSE IDEAS Report, November 2013, 52; Stephan Keukeleire and Jennifer MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan 2008) 272.

<sup>223</sup> Commission of the European Communities, ‘Thematic Programme for the Cooperation with Third Countries in the Areas of Migration and Asylum’ COM(2006) 26 final, Brussels, 25 January 2006.

<sup>224</sup> European Commission, ‘Evaluation of EU Readmission Agreements’ COM(2011) 76 final, Brussels, 23 February 2011 1, 8-9.

far, the EU has concluded Readmission Agreements with 17 countries<sup>225</sup>. The first Readmission Agreement was concluded with Hong Kong and entered into force in 2004<sup>226</sup>. The EU concluded a Readmission Agreement with Cape Verde in April 2013<sup>227</sup>, this is the only EURA concluded with an African country. No Readmission Agreement has been concluded with Morocco so far, even though discussions have been ongoing since the year 2000<sup>228</sup>. Negotiations are also active with two countries which concluded a Mobility Partnership, Belarus and Tunisia<sup>229</sup>. It should be noted that third countries have also concluded Readmission Agreements bilaterally with several Member States, usually without including nationals of another third country<sup>230</sup>.

In 2004, the first EUROMED Migration programme was launched aiming to implement an inclusive and common method to reinforce effective dialogue and cooperation on migration, mobility and international protection between the European Neighbourhood Instrument, the South Partner Countries and the EU Member States, as well as between the South Partner Countries themselves<sup>231</sup>. In the same time (2004), FRONTEX, the European Border and Coast Guard Agency, was established by Council Regulation 2007/2004<sup>232</sup>. Even though the agency's mandate evolved since 2004 it is necessary to bear in mind that the Member States stay responsible for the external borders, FRONTEX only enables cooperation. FRONTEX has signed 18 working arrangements<sup>233</sup> with third countries, including Cape Verde, and several more are being negotiated<sup>234</sup>.

Additionally, the Commission developed the Regional Protection Programme in 2005<sup>235</sup>. Theoretically, the RPP aims at developing the capacity of third countries in

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<sup>225</sup> Readmission Agreements have been concluded with: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde.

<sup>226</sup> Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing Without Authorization OJ L 17, 24 January 2004.

<sup>227</sup> Agreement between the European Union and the Republic of Cape Verde on the Readmission of Persons Residing Without Authorisation OJ L 282/15 24 October 2013.

<sup>228</sup> Katharina Natter, 'The Formation of Morocco's Policy Towards Irregular Migration (2000–2007): Political Rationale and Policy Processes' (2014) 52(5) *In. Migr* 15, 18.

<sup>229</sup> Paula García Andrade and Ivan Martín (n181) 37.

<sup>230</sup> *Ibid* 9.

<sup>231</sup> For more information: <https://www.icmpd.org/our-work/migration-dialogues/euromed-migration-iv/> 'Accessed 17 January 2018'.

<sup>232</sup> Council Regulation Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2007/2004, 26 October 2004, OJ L 349, 25 November 2004.

<sup>233</sup> Working arrangement have been signed with Russia, Ukraine, Moldova, Georgia, FYROM, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan and Kosovo, see: <http://frontex.europa.eu/partners/third-countries/> 'Accessed 4 August 2017'.

<sup>234</sup> Working arrangements are being negotiated with Niger, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Tunisia.

<sup>235</sup> Commission of the European Communities, 'Regional Protection Programmes' COM(2005) 388 final, Brussels 1 September 2005 1.

the field of international protection by implementing a set of core activities. These activities consist of: improving the general protection situation in the host country; establishing effective Refugee Status Determination procedures; improving reception conditions; benefitting the local community hosting refugees; providing training in protection issues; building on the United Nations High Commissioner for Refugees's Project Profile for persons of concern; abiding by resettlement commitment<sup>236</sup>. In practice, the implementation of the RPP aims at involving third countries in the procedure of reception of asylum seekers<sup>237</sup>. The externalisation approach used by the EU includes the development of asylum law and reception capacities in third countries in order to involve them in the procedure of reception of asylum seekers and sharing of the "burden" of asylum seekers and refugees with neighbouring third countries. Several authors argue that the externalisation of migration policy will not stop<sup>238</sup>. Moreover, the externalisation of immigrants and asylum reception is widely criticised for several reasons<sup>239</sup>. The main reason is that the externalisation is usually done with countries that have low or even inexistent capacity to receive asylum claims or to grant protection rights. In this case, the externalisation does not only place an unfair "burden sharing"<sup>240</sup> on the third country but also insure less rights for asylum seekers and migrants themselves. If the third country towards which the migration flows are redirected is not party to the 1951 Refugee Convention then migrants will benefit of a lower standard of legal protection, including the non-application of the principle of *non-refoulement*<sup>241</sup>. Moreover, if the third country has only a fragile set of norms to protect migrants and asylum seekers, they can be more prone to ill-treatments, detention or the non-recognition of their status of victim of human trafficking for example. The European Commission, in 2010 and 2011 launched two new RPP programmes in the

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<sup>236</sup> Ibid 4.

<sup>237</sup> Ibid.

<sup>238</sup> Sandra Lavenex and Emek M. Uçarer, 'The External Dimension of Europeanization: the Case of Immigration Policies' (2004) 39(4) *Coop Confl* 417; Virginie Guiraudon (n1) 252.

<sup>239</sup> Bill Frelick, Ian Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) *JMHS* 190; PRO Asyl, 'Out of Sight, Out of Mind: Externalisation of Migration and Refugee Policies' (5 August 2016) <https://www.proasyl.de/en/news/out-of-sight-out-of-mind-externalisation-and-regionalisation-of-migration-and-refugee-policies/> 'Accessed 12 October 2017'; Carolina Lopez Curzi, 'The Externalization of European Borders: Steps and Consequences of a Dangerous Process' Open Migration (12 July 2016) <http://openmigration.org/en/analyses/the-externalisation-of-european-borders-steps-and-consequences-of-a-dangerous-process/> 'Accessed 12 October 2016'; Amnesty International, 'EU: Action not Words Needed to End Suffering of Thousands' (14 September 2015) <https://www.amnesty.org/en/latest/news/2015/09/eu-action-not-words-needed-at-jha-to-end-suffering-of-thousands/> 'Accessed 12 October 2017'.

<sup>240</sup> Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29(2) *West Eur Politics* 329, 335; Sandra Lavenex and Nicole Wichmann, 'The External Governance of EU Internal Security' (2008) 31(1) *J Eur Integr* 83, 91.

<sup>241</sup> Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' *Govt. & Opposition* 249, 266.

Horn of Africa and North Africa<sup>242</sup>. Recently, new financial instruments (EU Regional Trust Fund in Response to the Syrian Crisis, EU Emergency Trust Fund for Africa, Facility for Refugees in Turkey) have been created to help support the policy of externalisation of the reception of immigrants and refugees. These instruments are aimed at involving third countries in the procedure of reception of asylum seekers<sup>243</sup> and in sharing the “burden” of asylum seekers and refugees with neighbouring third countries<sup>244</sup>.

In December 2005, the Council adopted a strategy to create a new partnership with Africa: “The EU and Africa: Towards a Strategic Partnership”, presenting the EU’s new policy orientate on towards Africa and the Mediterranean region<sup>245</sup>. Preliminary work on the Strategy started in July 2006<sup>246</sup>. Notably, it was said that the new Strategy would help the Member States that had recently joined the EU to build their cooperation with Africa<sup>247</sup>. In November 2006, during the Tripoli EU-Africa Ministerial Conference on Migration and Development, the Joint Africa–EU Declaration on Migration and Development<sup>248</sup> was successfully adopted by African and European Heads of State and Government. Its content was in conformity with the policy priorities set by the EU Member States during the European Council meeting in 2005. In the Joint Africa–EU Declaration the EU and the Member States agreed to consider the creation of circular migration mechanisms with third countries<sup>249</sup>. The topic of circular migration will be further developed in the next section on Mobility Partnerships.

The Africa-EU Dialogue on Migration and Mobility includes the Rabat Process, which was launched in 2006 as the first Euro-African Ministerial Conference on Migration and Development<sup>250</sup>. But it was only after the second EU-Africa Summit, in Lisbon in 2007, that the EU-Africa Partnership became the official network of cooperation between the EU and Africa. This cooperation is based on the Joint Africa-Europe Strategy adopted

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<sup>242</sup> Paula García Andrade and Ivan Martín (n181) 43.

<sup>243</sup> Commission of the European Communities (n235).

<sup>244</sup> Sandra Lavenex and Nicole Wichmann (n240) 91.

<sup>245</sup> Council of the European Union (n127) 2 (III Africa).

<sup>246</sup> Council of the European Union, ‘The EU and Africa: Towards a Strategic Partnership – The Way Forward and Key Achievements in 2006’ 16630/06, Brussels, 11 December 2006, 1, 8.

<sup>247</sup> *Ibid* 18.

<sup>248</sup> European Union, ‘Joint Africa-EU Declaration on Migration and Development (Tripoli, 22-23 November 2006)’, 23 November 2006.

<sup>249</sup> *Ibid*, 5.

<sup>250</sup> For more information on the Rabat Process: <https://www.rabat-process.org/en/> ‘Accessed 17 October 2017’.

in 2007<sup>251</sup>. The new joint strategy covers several areas, one of them being migration and development. The Rabat process targets African countries along migration routes from and via North, West and Central Africa (including Morocco and Cape Verde). The proposed goal of the Rabat Process is to develop dialogue and cooperation on migration more generally, including legal migration and mobility; prevention of irregular migration and measures to counteract it; migration and development; and international protection<sup>252</sup>. The Rabat Process is also designed to help to highlight shared priorities to promote active cooperation among the countries along the migration route between Central, Western, Northern Africa and Europe. Additional regional dialogues with other regions of interest for the EU exist. The Prague Process, the Budapest Process and the Khartoum Process constitute these additional regional dialogues. The Prague Process is a regional migration dialogue and policy process supporting migration partnerships between countries of the European Union, Eastern Partnership, Western Balkans, Central Asia, Russia and Turkey<sup>253</sup>. In the context of the GAMM the Prague Process is considered as the main regional dialogue process towards the East<sup>254</sup>. The Budapest Process is one of the most durable informal framework where more than 50 governments, from Europe and its eastern neighbours, and 10 international organisations meet to discuss the development of an inclusive and long-term system for “orderly migration”<sup>255</sup>. In the South, the Khartoum Process is a platform for political cooperation between countries along the migration route between the Horn of Africa and Europe<sup>256</sup>. It is also sometimes identified as the EU-Horn of Africa Migration Route Initiative<sup>257</sup>. The Khartoum Process is also included in the Africa-EU Dialogue on Migration and Mobility and it embodies in a way the East-Africa version of the Rabat process (the Rabat process includes West Africa).

In addition, the EU started concluding Visa Facilitation Agreements; the first one with Russia, entered into force in 2007<sup>258</sup>. The EU has been concluding Visa Facilitation

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<sup>251</sup> The Africa-EU Strategic Partnership, A Joint Africa-EU Strategy (2007) [http://www.africa-eu-partnership.org/sites/default/files/documents/eas2007\\_joint\\_strategy\\_en.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/eas2007_joint_strategy_en.pdf) 'Accessed 4 August 2017'.

<sup>252</sup> European Commission, 'Fact Sheet, The European Union's Cooperation with Africa on Migration', Brussels, 22 April 2015 [http://europa.eu/rapid/press-release\\_MEMO-15-4832\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4832_en.htm) 'Accessed 4 August 2017'.

<sup>253</sup> Building Migration Partnerships, Prague Ministerial Conference, Joint Declaration (2009) <file:///C:/Users/ed/Downloads/BMP%20Joint%20Declaration%20EN.pdf> 'Accessed 13 October 2017'.

<sup>254</sup> For more information about the Prague Process see: <https://www.pragueprocess.eu/en/> 'Accessed 13 October 2017'.

<sup>255</sup> For more information about the Budapest Process: <https://www.budapestprocess.org/> 'Accessed 17 October 2017'.

<sup>256</sup> For more information about the Khartoum Process: <https://www.khartoumprocess.net/> 'Accessed 17 October 2017'.

<sup>257</sup> Maximilien Stern, 'The Karthoum Process: Critical Assessment and Policy Recommendations' (2015) IAI Working Papers 15/49, December <http://www.iai.it/sites/default/files/iaiw1549.pdf> 'Accessed 25 November 2017'.

<sup>258</sup> Agreement between the European Community and the Russian Federation on the Facilitation of the Issuance of Visas to the Citizens of the European Union and the Russian Federation OJ L 129, 17 May 2007.



Agreements that aim at simplifying the issuance of Schengen visas for third country nationals. Concretely, they facilitate the issuance of multiple-entry visas, reduce or waive the visa fee and reduce the duration of the visa application process. It should be noted that it only applies to defined categories of people and does not apply to the entire population of the third country that concluded it. So far, twelve Visa Facilitation Agreements<sup>259</sup> have been concluded, including one with Cape Verde, which was concluded in 2012<sup>260</sup>. The Visa Facilitation Agreements should not be mistaken for Visa Exemption Agreements that allow citizens from a particular third country to enter the EU and to travel to different Schengen countries without a visa for a maximum period of three months during a six-month period. The Visa Exemption Agreements are directly linked to the Schengen Area. They are open to all the citizens of a third country benefiting of such an agreement, travelling to the EU for any reason except to work. There are currently 60 countries benefitting from such an agreement<sup>261</sup>. Some exceptions exist to this rule such as EU visa waivers being granted only to holders of non-ordinary passports (such as diplomatic passports) or a school pupil travelling in the context of a school excursion (Article 4 of the Regulation No 539/2001).

Subsequently, in addition to the existing policy dialogue frameworks, and as a response to the “failed” Barcelona Process, France proposed the creation of a “Mediterranean Union” with the intention to further a French conception of Euro-Mediterranean relations<sup>262</sup>. The “Mediterranean Union” became the Union for the Mediterranean in 2008 and is complementing the ENP, taking into account the diversity of contexts and countries in the southern region. The Union for the Mediterranean includes projects in the fields of economy, environment, energy, health, migration, education and social affairs<sup>263</sup>. Following the Arab Spring in 2011, the ENP was revised giving more weight to the political, economic and security stabilisation of the south Mediterranean region<sup>264</sup>. Political cooperation between EU and southern Mediterranean countries gained significant political appeal.

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<sup>259</sup> Visa Facilitation Agreements have been concluded with: Russia, Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia, Georgia, Moldova, Ukraine, Armenia, Azerbaijan and Cape Verde.

<sup>260</sup> Agreement between the European Union and the Republic of Cape Verde on Facilitating the Issue of Short-Stay Visas to Citizens of the Republic of Cape Verde and of the European Union OJ L 282/3 24.10.2013.

<sup>261</sup> Regulation (EU) No 509/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 539/2001 Listing the Third Countries Whose Nationals must be in Possession of Visas when Crossing the External Borders and those whose Nationals are Exempt from that Requirement OJ L 149, 20.5.2014.

<sup>262</sup> Sarah Wolff, *The Mediterranean Dimension of the European Union's International Security* (Palgrave Macmillan UK 2012) 93.

<sup>263</sup> For more information about the UfM: <http://ufmsecretariat.org/who-we-are/> 'Accessed 17 October 2017'.

<sup>264</sup> European Commission, 'A New Response to a Changing Neighbourhood' COM(2011) 303 final, Brussels, 25 May 2011 1, 28.

The EU has also relied on smaller scale instruments of dialogues usually linked to the implementation of association or cooperation agreements<sup>265</sup>. These instruments, related to Africa, are the following. The Social Affairs and Migration Working Group, which is linked to the Association Agreements concluded with Morocco, Tunisia and Jordan and the Dialogue on Migration, Mobility and Security which includes Morocco, Tunisia, Jordan and Lebanon and was initiated in 2011 as a response to the Arab Spring<sup>266</sup>. The accent in this Dialogue is put on security aspects mainly the fight against irregular migration<sup>267</sup>.

2012 marked a shift with the creation of a new type of RPP, the Regional Development and Protection Programmes (RDPPs). The first RDPP to be launched was aimed at Lebanon, Jordan and Iraq<sup>268</sup>. Additionally, according to Article 7 of the Regulation establishing a European Asylum Support Office, the EASO supports the external dimension of the CEAS<sup>269</sup>. The EASO reinforces the exchange of information between the EU Member States and assists third countries by providing capacity building, executing RPP/RDPPs or taking part in resettlement activities. In addition, the EASO External Action Strategy adopted in 2013 by the Management Board of EASO, defines the EASO's geographical priorities as well as the activities it can undertake<sup>270</sup>. The first activities were implemented in 2014 through the project on the participation of Jordan in the work of the EASO as well as the participation of Tunisia and Morocco in the work of the EASO and FRONTEX<sup>271</sup>. The financial instrument funding the ENP, the European Neighbourhood and Partnership Instrument became the European Neighbourhood Instrument in 2014. The European Neighbourhood Instrument also supports regional (e.g. EU Regional Trust Fund in Response to the Syrian Crisis), neighbourhood-wide (e.g. promoting interregional dialogue) and cross-border (e.g.

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<sup>265</sup> Paula García Andrade and Ivan Martín (n181) 28.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> European Commission, 'New EU Regional Development and Protection Programme for Refugees and Host Communities in Lebanon, Jordan and Iraq', Press release, Brussels, 16 December 2013.

<sup>269</sup> Regulation of the European Parliament and of the Council 439/2010 of 19 May 2010 Establishing a European Asylum Support Office OJ L 132/11 29.5.2010.

<sup>270</sup> European Asylum Support Office, EASO External Action Strategy (2012) <https://www.easo.europa.eu/sites/default/files/public/EASO-External-Action-Strategy.pdf> 'Accessed 4 August 2017'.

<sup>271</sup> European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2014 (2015) 81. <https://www.easo.europa.eu/sites/default/files/public/EASO-Annual-Report-2014.pdf> 'Accessed 4 August 2017'.

Mediterranean Sea Programme) cooperation programmes as well as civil society organisations in partner countries<sup>272</sup>.

Furthermore, in 2014, the EU-Africa Summit was held in Brussels and the third Action Plan (2014-2017) was adopted together with the Africa-EU Declaration on Migration and Mobility<sup>273</sup>. Later the same year, the fourth Euro-African Ministerial Conference on Migration and Development was held in Rome (November 2014) and the Rome Declaration and Programme for 2015-2017 were adopted during this conference. The Rome Programme is the strategic framework of the Rabat Process for the period 2014-2017. They identify two priorities: migration and development and the prevention and fight against irregular migration and human trafficking<sup>274</sup>. In 2014, the ACP-EU migration dialogue also took place, based on Article 13 of the Cotonou Agreement. The meeting was held among members of Parliament of the 78 ACP States and 78 European Parliament counterparts. The aim of this meeting was to examine policy orientations in the area of human trafficking and smuggling of migrants and to find areas of cooperation on these matters. Several recommendations were made after the meeting<sup>275</sup>. These recommendations included: ratifying comprehensive legislation on both trafficking in human beings and smuggling of migrants and implementing such national legislations; raising awareness regarding human trafficking and smuggling; encouraging cross-border and international cooperation among countries of origin, transit and destination with a specific focus on the South-South dimension; enhancing the collection of data; promoting a victim centred approach; setting up efforts to dismantle criminal networks and prosecute criminals; improving the coordination among the different services involved in this field at national level; and involving the private sector.

The last phase in the developments of EU's external migration policy began with the start of the migration crisis in 2015. The Commission suggests in the "European Agenda on Migration" that the EU and the Member States should "work together with

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<sup>272</sup> For more information on activities supported by the ENI: [https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview\\_en](https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en) 'Accessed 17 October 2017'.

<sup>273</sup> Fourth EU-Africa Summit, 2-3 April 2014, Brussels, EU-Africa Declaration on Migration and Mobility <file:///C:/Users/fanou/Downloads/142097.pdf> 'Accessed 4 August 2017'.

<sup>274</sup> Rome Declaration and Programme for 2015 – 2017 adopted at the fourth Euro - African Ministerial Conference on Migration and Development, held in November 2014.

<sup>275</sup> ACP-EU Joint Document, ACP-EU Dialogue on Migration and Development: Recommendations from the ACP-EU Experts' Meeting on Trafficking in Human Beings and Smuggling of Migrants, ACP-UE 2111/15, Brussels, 11 May 2015.

partner countries to put in place concrete measures to prevent hazardous journeys”<sup>276</sup>. In this document cooperation with third countries is again highlighted as the pivotal point of the EU response to migration flows. Subsequently, the EU put forth a Communication Establishing a New Migration Partnership Framework with Third Countries under the “European Agenda on Migration”, stating the importance of addressing “the root causes of irregular migration and forced displacement and to provide capacity building to the host communities and relevant institutions”<sup>277</sup>. The parallel can here be drawn with the Tampere programme launched almost two decades ago which aimed at addressing the “root causes” of migration. As presented previously, this approach has been criticised in the literature<sup>278</sup>. A key component of the MPF is the EU compacts. EU compacts resort to “all means available” to fight irregular migration and externalise the reception of migrants and refugees to third countries; “all means available” including development aid policy tools. The “European Agenda on Migration” as well as the MPF are based on the principles of the GAMM that we will present in the next section<sup>279</sup>.

Related to the migration crisis, several other policy developments occurred in 2015. The EU-Turkey Joint Action Plan was concluded 29 November 2015. Turkey agreed to take back all irregular migrants crossing the border to Greece coming from Turkey against EU’s financial support<sup>280</sup>. Additionally, the Valetta Summit took place in November 2015. In Valetta, European and African officials discussed the European migration crisis. At the end of the Summit a political declaration and an action plan were adopted. In this Action Plan there are five main objectives: address the root causes of irregular migration; enhance cooperation on legal migration and mobility; increase the protection of migrants and asylum seekers; fight against human trafficking; and cooperate on return, readmission and reintegration<sup>281</sup>. Following the Summit, the EU created an Emergency Trust Fund to support development in Africa, in return for African countries’ cooperation in the fight against irregular migration<sup>282</sup>.

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<sup>276</sup> European Commission (n162) 4.

<sup>277</sup> European Commission, ‘on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration’ COM(2016) 385 final, Strasbourg, 7 June 2016 1, 6.

<sup>278</sup> See for example: Stephen Castles, Hein de Haas and Mark J Miller (n201) 25-54.

<sup>279</sup> European Commission (n162).

<sup>280</sup> European Commission, ‘Fact Sheet: EU-Turkey Joint Action Plan’, Brussels, 15 October 2015 [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm) ‘Accessed 4 August 2017’.

<sup>281</sup> Valletta Summit, 11-12 November 2015, Action Plan: [https://www.consilium.europa.eu/media/21839/action\\_plan\\_en.pdf](https://www.consilium.europa.eu/media/21839/action_plan_en.pdf) ‘Accessed 17 October 2017’.

<sup>282</sup> Ibid.

The Joint EU-Africa Strategy, the Rabat and the Khartoum Processes are used to oversee the execution of the action plan adopted during the Valetta Summit<sup>283</sup>.

The European Council of June 2015 requested that the Commission create a European Return Programme<sup>284</sup>. High-level political dialogues on readmission were launched to focus on return and readmission with specific countries<sup>285</sup>. Consequently, President Juncker presented the EU Action Plan on return in September 2015. In the EU Action plan on return, the Commission reiterated the idea of proposing visa facilitation agreements in exchange for the conclusion of readmission agreements, even though this seemed at times to be an insufficient bargaining chip<sup>286</sup>. But the EU Action Plan on return also benefits from an increase of funding, amounting to EUR 800 million dedicated to return in Member States' national programmes in the period 2014-2020<sup>287</sup>. The principal goals of the EU Action Plan on return are enhancing voluntary return, strengthening the role of FRONTEX and creating a system that would ensure a better enforcement of return<sup>288</sup>.

In the framework of the Joint Africa-EU Strategy, a programme aiming at supporting the Africa-EU Migration and Mobility Dialogue was launched in 2016, aimed at enhancing the governance of migration and mobility inside Africa and between Africa and the EU and improving migrants' rights<sup>289</sup>. In March 2017, the Commission approved a renewed Action Plan on return<sup>290</sup> and a Recommendation<sup>291</sup> to better ensure the effective implementation of EU rules on return and significantly improve return rates. In May 2017, the Commission and the European External Action Service (EEAS) published proposals for future cooperation ten years after the launch of the Joint Africa-EU Strategy in a joint communication<sup>292</sup>. This communication aimed at setting the EU and Member States' objectives at the Africa-EU Summit that was held

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<sup>283</sup> Council of the European Union, 'Summary of Discussions, High Level Working Group on Asylum and Migration' 5657/17, Brussels, 31 January 2017 1, 11.

<sup>284</sup> European Commission, 'State of the Union 2015', Speech, 9 September 2015.

<sup>285</sup> European Commission, 'EU Action Plan on return' COM(2015) 453 final, Brussels, 9 September 2015 1, 12.

<sup>286</sup> Ibid 14.

<sup>287</sup> Ibid 2.

<sup>288</sup> Ibid 3-10.

<sup>289</sup> The Africa-EU Partnership, Support to the Africa-EU Migration and Mobility Dialogue (2016) <http://www.africa-eu-partnership.org/en/documents/support-africa-eu-migration-and-mobility-dialogue> 'Accessed 4 August 2017'.

<sup>290</sup> European Commission, 'Communication on a More Effective Return Policy in the European Union - A Renewed Action Plan' COM(2017) 200 final, Brussels, 2 March 2017.

<sup>291</sup> European Commission, 'Recommendation on Making Returns more Effective when Implementing the Directive 2008/115/EC of the European Parliament and of the Council' C(2017) 1600 final, Brussels, 7 March 2017.

<sup>292</sup> European Commission, 'Joint Communication for a Renewed Impetus of the Africa-EU Partnership' JOIN(2017) 17 final Brussels, 4 May 2017.

at the end of November 2017<sup>293</sup>. These objectives are mainly related to security and the development of the labour market in Africa, mostly targeting youth<sup>294</sup>. In October 2017, the European Parliament issued a report including recommendations for the Africa-EU Summit<sup>295</sup>. According to the report, focus should be put on economic development, good governance, human development, migration and mobility and environment<sup>296</sup>. Subsequently, on 16 November 2017 the European Parliament adopted a resolution setting their position for the Africa-EU Summit<sup>297</sup>.

### 1.2.2.2. The GAM/GAMM

EU migration policy orientations were in practice embodied in the GAM, introduced at the Hampton Court's European Council, in October 2005. Three weeks after the Hampton Court's European Council, the Commission adopted a Communication on the priority actions for responding to the challenges of migration<sup>298</sup> – the “First follow up to Hampton Court” – in which the idea of win-win was presented for the first time. The Commission stressed “the benefits of migration for all partners”<sup>299</sup>, the EU, the Member States and the partner third country. The launch of the GAM was the first key step towards the realisation of the political discourse in vogue since 1999.

Since 2005, the GAM is the predominant framework for the external dimension of the migration and asylum policy<sup>300</sup>. In November 2006, the Commission made a first evaluation of the implementation of the GAM focusing on the efforts made by the EU to discuss migration issues with African countries<sup>301</sup>. The Commission proposed to add legal migration and integration to the GAM<sup>302</sup>. The Commission in the Communication a Common Immigration Policy for Europe: Principles, Actions and Tools presented the need to refocus the GAM towards a more coordinate and coherent approach<sup>303</sup>. The

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<sup>293</sup> Joint declaration of 5th African Union-European Union Summit, 30 November 2017 [http://www.consilium.europa.eu/media/31991/33454-pr-final\\_declaration\\_au\\_eu\\_summit.pdf](http://www.consilium.europa.eu/media/31991/33454-pr-final_declaration_au_eu_summit.pdf) 'Accessed 14 January 2018'.

<sup>294</sup> Ibid 5.

<sup>295</sup> European Parliament, 'EU-Africa Strategy: a Boost for Development' 2017/2083(INI), 24.10.2017 Committee Report Tabled for Plenary, single reading.

<sup>296</sup> Ibid 7-8.

<sup>297</sup> European Parliament, 'Resolution of 16 November 2017 on the EU-Africa Strategy: a Boost for Development' 2017/2083(INI).

<sup>298</sup> Commission of the European Communities, 'Priority Actions for Responding to the Challenges of Migration: First Follow-up to Hampton Court' COM(2005) 621 final, Brussels, 30 November 2005.

<sup>299</sup> Ibid 5.

<sup>300</sup> Commission of the European Communities, 'Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies' COM(2008) 611 final, Brussels, 8 October 2008 1.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid 4-5.

<sup>303</sup> Commission of the European Communities, 'a Common Immigration Policy for Europe: Principles, Actions and Tools' COM(2008) 359 final, Brussels, 17 June 2008 1.

Commission described in this document its vision of a common migration policy organised around three main axes “prosperity, security and solidarity”<sup>304</sup>. In two further documents of 2009, the cooperation between the Member States on migration issues was highlighted by the Commission as well as by the Council<sup>305</sup>.

Later, with the Arab Spring in 2011, a renewed focus was given to migration but this time with a more comprehensive perspective. In 2011, the GAM became the Global Approach to Migration and Mobility <sup>306</sup>. In the Communication on the GAMM, the Commission argues that the focus should not only be on the fight against irregular migration but also on mobility<sup>307</sup>. By fully including the idea of mobility, the GAM evolved into a more strategic approach to migration management; this is when the notion of mobility was fully integrated into EU migration policy. With the GAMM, the EU tries to put forth a more balanced and attractive framework for cooperation with third countries, by enhancing possibilities for legal migration and migration and development initiatives<sup>308</sup>. International protection has also been included in the GAMM<sup>309</sup>. Several factors can explain this evolution. The first factor is the entry into force of the Lisbon Treaty which extends the ordinary legislative procedure to immigration and integration issues. Following the entry into force of the Lisbon treaty, migration was considered as a priority area and included as such in the Stockholm programme<sup>310</sup>. Additionally, Catherine Withol de Wenden, argues that the GAMM was proposed by the EU as a reaction to the influx of migrants and refugees after the start of the Arab Spring uprisings in Southern Mediterranean countries in 2011<sup>311</sup>. Accordingly, Sergio Carrera, Leonhard den Hertog and Joanna Parkin argue that with the Arab Spring, the EU had to adapt its migration policy by considering the increasing migration flows coming from the region as well as the potential security threats that could arise from the political unrest<sup>312</sup>. The Communication on a Partnership for Democracy and Shared Prosperity of 2011 stated the justification EU’s shift in its migration policy, emphasizing that a

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<sup>304</sup> Ibid 4.

<sup>305</sup> Commission of the European Communities, ‘Mobility Partnerships as a Tool of the Global Approach to Migration’ SEC(2009) 124 final, Brussels, 18 September 2009 1, 9; Council of the European Union, ‘Brussels European Council 18-19 June 2009: Presidency Conclusions’ 112252/2/09 Brussels, 10 July 2009 1, 14.

<sup>306</sup> European Commission, ‘The Global Approach to Migration and Mobility’ COM(2011) 743 Brussels, 18 November 2011 1.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> James Hampshire (n98) 540.

<sup>310</sup> European Council (n144).

<sup>311</sup> Catherine Withol de Wenden, ‘Révolutions Arabes et Migrations : Schengen face aux Accords Bilatéraux de Contrôle des Frontières’, *Esprit* 2011/8 (Août/septembre) 162.

<sup>312</sup> Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘EU Migration Policy in the Wake of the Arab Spring, What prospects for EU-Southern Mediterranean Relations?’ (2012) MEDPRO Technical Report No. 15/August 2012 1,1.

“radically changing political landscape in the Southern Mediterranean requires a change in the EU’s approach to the region”<sup>313</sup>.

The aims of the GAMM are divided into four pillars: “legal migration and mobility, irregular migration and trafficking in human beings, international protection [which did not exist under the GAM] and maximising the development impact of migration and mobility”<sup>314</sup>. The High-Level Working Group on Asylum and Migration is the central forum for strategic discussions within the GAMM framework. The GAMM is implemented through two specific instruments: the Common Agendas for Migration and Mobility and the Mobility Partnerships. The CAMM is a soft law instrument designed as a substitute to Mobility Partnerships for third countries who are not yet ready to fully commit to collaborate on all areas required to conclude a Mobility Partnership; mainly by the conclusion of a Readmission Agreement in return for a Visa Facilitation Agreement<sup>315</sup>. The CAMM is not a static instrument and can evolve into a Mobility Partnership over time. For now, only two CAMMs have been concluded; one with Ethiopia<sup>316</sup> and one with Nigeria<sup>317</sup>. Other CAMMs are being discussed with South Africa, Brazil, Ghana and India<sup>318</sup>. Both concluded CAMMs are built on the same model including a preamble summarising the existing cooperation between the EU and the third country and a list of the main objectives of the tool. These objectives follow the four pillars structure of the GAMM. The areas of action of the CAMM are “research, data collection, exchange of best practices and capacity building”, but no specific projects are proposed in the CAMM’s Joint Declaration<sup>319</sup>. The GAMM is also executed through the instruments that build up the external migration policy of the EU. The GAMM stresses the necessity to utilise the entire range of EU policy tools in the field of external migration<sup>320</sup>. Finally, the Mobility Partnership instrument will be described in the following section in detail as it is the core instrument in our analysis.

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<sup>313</sup> European Commission, ‘A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean’ COM(2011) 200 final Brussels, 8 March 2011 1, 3.

<sup>314</sup> European Commission (n306) 6.

<sup>315</sup> Paula García Andrade and Ivan Martín (n181) 34.

<sup>316</sup> Council of the European Union, ‘Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Democratic Republic of Ethiopia and the European Union and its Member States’ Brussels 11 November 2015.

<sup>317</sup> Council of the European Union, ‘Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States’ Brussels 12 March 2015.

<sup>318</sup> Paula García Andrade and Ivan Martín (n181) 34.

<sup>319</sup> Ibid 35.

<sup>320</sup> European Commission (n306) 10.



## 1.3. Mobility Partnerships

### 1.3.1. Origin, rationale and expectations surrounding Mobility Partnerships

The Commission introduced the “Mobility Package”<sup>321</sup> tool aiming at facilitating the management of EU’s migration policy with third countries based on the Franco-German initiative for a “New European Migration Policy”<sup>322</sup>. Nicolas Sarkozy and Wolfgang Schäuble presented this initiative during the G6 in July 2006. They proposed to use circular migration to decrease irregular migration towards the EU<sup>323</sup>. The Franco-German initiative foresaw the conclusion of partnerships between Member States and a third country leading to a “European partnership” composed of the sum of all the bilateral partnerships<sup>324</sup>. Steffen Angenendt as well as Sergio Carrera and Raúl Hernández I Sagrera consider that the Franco-German initiative for a “New European Migration Policy” provided a solid basis to the development of Mobility Partnerships<sup>325</sup>. When the Commission first proposed Mobility Partnerships (still called “Mobility Packages” at the time) it already recommended that they should “provide the overall framework for managing such movements<sup>326</sup> and would bring together the opportunities offered by the Member States and the European Community, while fully respecting the division of competences as provided by the Treaty”<sup>327</sup>. Legal migration was already a central element of “Mobility Packages”. Franco Frattini is said to have been the one who mentioned “Mobility Partnerships” for the first time, instead of “Mobility Packages”, during the Africa-EU Summit in Tripoli<sup>328</sup>. Subsequently, in the 2006 evaluation of the GAM, the Commission declared that “Mobility Packages” should be a central goal when discussing legal migration issues<sup>329</sup>. The European Council in 2006 invited the Commission to incorporate legal migration “into the Union’s external policies in order to develop a balanced partnership with third countries” and “to present

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<sup>321</sup> Jean-Pierre Cassarino, ‘EU Mobility Partnerships: Expression of a New Compromise’ (2009) Migration Policy Institute.

<sup>322</sup> Nicolas Sarkozy and Wolfgang Schäuble, ‘New European Migration Policy, a Franco-German Plan presented by Nicolas Sarkozy and Wolfgang Schäuble to G6 Immigration Ministers Meeting in the UK’ 26 October 2006 1.

<sup>323</sup> Ibid 4.

<sup>324</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2) 12.

<sup>325</sup> Steffen Angenendt, ‘Circular Migration: A Sustainable Concept for Migration Policy?’ (2007) Stiftung Wissenschaft und Politik (SWP) Comments 11 Berlin; Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2).

<sup>326</sup> “Such movements” referring to legal migration.

<sup>327</sup> Commission of the European Communities (n128) 7.

<sup>328</sup> Franco Frattini, ‘Migration and Development: Time for Creative and Courageous Approaches’, Speech to the EU-Africa Ministerial Conference on Migration and Development, Tripoli, 22 November 2006.

<sup>329</sup> Commission of the European Communities (n128) 7.

detailed proposals on how to better organise and inform about the various forms of legal movement between the EU and third countries by June 2007”<sup>330</sup>. According to the Commission, thanks to Mobility Partnerships and circular migration schemes, the EU could solve the problem of labour market shortages by allowing the entry into the labour market of legal labour migrants proportionally to their needs<sup>331</sup>. This explains why legal migration was presented as one of the main goals of Mobility Partnerships.

Legal migration is a highly sensitive issue as it touches upon Member States’ sovereignty, which explains why the Member States never sought to include the issue into the “common” EU migration policy. By covering legal migration issues, Mobility Partnerships raised the question of competence<sup>332</sup>. The principle of conferred powers is fundamental in EU law as it defines what the competences of the EU are and what competences remain those of the Member States. This principle is formulated in Articles 4 and 5 of the Treaty on European Union<sup>333</sup>. It is clear that the EU should only act within the framework of its competences, as stipulated in Article 5. Article 5 rules that

“in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

Both Articles 4 and 5 establish that “competences not conferred upon the Union in the Treaties remain with the Member States”. It is therefore important to distinguish between EU competences, shared competences and competences of the Member States. The principle of conferred powers guarantees that new legislation is adopted by the competent authority in conformity with the division of powers<sup>334</sup>. If a competence has not been transferred to the EU, the national authorities must adopt the legal provisions. If it is a shared competence, it is the Council and the authorities of the

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<sup>330</sup> Council of the European Union, ‘Brussels European Council 14–15 December 2006 – Presidency Conclusions’ 16879/1/06 Brussels, 12 February 2007 1, 9.

<sup>331</sup> Anna Triandafyllidou, ‘Circular Migration: Introductory Remarks’ 1 in Anna Triandafyllidou, *Circular Migration between European and its Neighbourhood: Choice or Necessity?* (2013 OUP Oxford) 7

<sup>332</sup> Commission of the European Communities (n128) 7; Commission of the European Communities (n305) 2.

<sup>333</sup> European Union (n29).

<sup>334</sup> Linda Senden, *Soft Law in European Community Law Modern Studies in European Law* (Bloomsbury Publishing 2004) 78.

Member States that have to agree on the legal provisions and if it is an EU competence, the Council and the European Parliament can adopt the act autonomously. In practice, there are many areas of shared competences between the EU and the Member States. Article 5 adds that “the use of Union competences is governed by the principles of subsidiarity and proportionality”, which means that the actions taken have to be suitable to achieve a given goal but “should not exceed what is necessary”. Several authors have stressed the importance of the notion of proportionality<sup>335</sup>. Article 1 of the Protocol on the application of the subsidiarity and proportionality principles confirms that “each institution shall ensure constant respect for the principles of subsidiarity and proportionality”<sup>336</sup>.

As noted by Piet Van Nuffel, the principle of subsidiarity has been at the centre of debates on the defence of Member States’ competences in decision-making at the national level against the “ever-expanding action” of the EU<sup>337</sup>. The application of the principle of subsidiarity raises several important questions, such as that of knowing when a Member State cannot sufficiently achieve the objectives of an action proposed by the EU, and when is the EU better able to reach these objectives than the Member States. It should be noted that, in order to evaluate the ability of Member States to reach the objective on their own, it is not the political will that is evaluated but the actual resources and capacity of Member States to reach the objective<sup>338</sup>. Moreover, determining that the EU is better able to reach the objective than the Member States means that the EU has to prove its added value over Member States’ actions<sup>339</sup>. Several authors argue that, if the results obtained by the EU are merely equal to (not better than) those achieved by the Member States, there is not enough reason for the EU to act<sup>340</sup>. However, only few cases involving issues of subsidiarity have been presented to the ECJ and the ECJ has consistently supported EU’s action<sup>341</sup>. Some

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<sup>335</sup> Gráinne de Búrca, ‘The Principle of Proportionality and its Application in EC Law’ 105 in Ami Barav and Derrick Arthur Wyatt (eds), *YBEL 13* (Oxford University Press Oxford 1993) 117; Jan Jans, Proportionality Revisited (2000) 27(3) *Legal Issues of Economic Integration* 239, 240.

<sup>336</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007.

<sup>337</sup> Piet Van Nuffel, ‘The Protection of Member States’ Regions Through the Subsidiarity Principle’ 55 in Carlo Panara and Alexander De Becker, *The Role of the Regions in EU Governance* (Springer Science and Business Media 2010) 55.

<sup>338</sup> *Ibid* 59.

<sup>339</sup> *Ibid* 60.; Aurélien Portuese, ‘The Case for a Principled Approach to Law and Economics: Efficiency Analysis and General Principles of EU Law’ 275 in Klaus Mathis, *Law and Economics in Europe: Foundations and Applications* (Springer Science and Business Media 2013) 290.

<sup>340</sup> Trevor Hartley, *The Foundations of European Union Law* (OUP Oxford 2010) 122; Aurélien Portuese (n339) 290.

<sup>341</sup> Carlo Panara, *The Sub-National Dimension of the EU: A Legal Study of Multilevel Governance* (Springer 2015) 82.

authors claim that the judicial activism of the ECJ was pivotal in the enlargement of EU competences, namely in fundamental rights matters<sup>342</sup>.

The first case presented to the ECJ where the principle of subsidiarity was raised was the *SPO Case*<sup>343</sup>, in 1995. The *SPO Case* concerned the validity of a decision applying competition rules. The SPO argued that the Commission was not competent to decide in the field of competition and therefore it was against the principle of subsidiarity. The ECJ refused to recognise the principle of subsidiarity in that case because it “did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed”<sup>344</sup>. Therefore, the principle of subsidiarity could not be used in court before the entry into force of the Maastricht Treaty. In the *Working Time Directive Case*<sup>345</sup>, where the United Kingdom requested the ECJ to annul a directive limiting working-time throughout Europe, the Court argued that it was not in a position to evaluate the benefits of the directive<sup>346</sup>. In the *Germany v European Parliament and Council Case*<sup>347</sup>, Germany argued that a Directive on credit institution was not valid because it did not explicitly state in its text why the Council was competent to vote this Directive and therefore was in breach of the principle of subsidiarity. The ECJ decided that the Directive was not adopted in breach of the principle of subsidiarity and that even though the text of the Directive did not specifically state why the Council was competent rather than Member States it was clear that action at the EU level could best achieve its objectives<sup>348</sup>.

In the more recent *Vodafone Ltd and others v Secretary of State for Business Enterprise and Regulatory Reform Case*<sup>349</sup>, the Court took a stance. It would favour EU legislation over national legislation as it would effectively lead to harmonisation and the strengthening of the common market<sup>350</sup>. This Case was about Regulation No 717/2007 adopted by the United Kingdom and Northern Ireland relating to the prices

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<sup>342</sup> Jessica Guth, ‘Transforming the European Legal Order: The European Court of Justice at 60+’ (2016) 12(1) *JCER* 455; Sionaidh Douglas-Scott, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis [2006] *Common Mark Law Rev* 629.

<sup>343</sup> Case T-29/92 (1995) *SPO and others v. Commission*, II-289.

<sup>344</sup> *Ibid.* II-293 Para 12.

<sup>345</sup> Case C-84/94 (1996) *United Kingdom v. Council*, I-5793.

<sup>346</sup> *Ibid* I-5802 para 23.

<sup>347</sup> C-233/94 (1997) *Germany v European Parliament and Council*, I-2441.

<sup>348</sup> *Ibid* I-2953 para 28.

<sup>349</sup> Case C-58/08 (2010) *Vodafone Ltd and others v Secretary of State for Business Enterprise and Regulatory Reform*, I-4999.

<sup>350</sup> *Ibid* para 38 and 48.

payable by users of public mobile telephone networks for retail roaming services. The Regulation declares a maximum limit for the roaming costs. The regulation also imposes a ceiling for roaming costs paid by the consumer's network to the foreign network which that consumer uses. According to the Court, the fixation of a maximum limit for roaming costs would protect consumers against excessive costs<sup>351</sup>. Moreover, a common approach at the EU level was necessary to avoid the distortion in the EU market as operators would act within a comprehensible regulatory framework<sup>352</sup>.

The principle of subsidiarity had already been examined in relation to the Open Method of Coordination, some viewing it as non-democratic because of the exclusion of the European Parliament from the process<sup>353</sup>. In a 2007 resolution<sup>354</sup>, the European Parliament expressed its concerns about soft law as leading to abuses of power by the executive<sup>355</sup> and being non-democratic<sup>356</sup>. Understandably, the European Parliament has usually been against the use of soft law<sup>357</sup>, arguing that it is being used to circumvent the decision-making process. The text of the motion stressed that the concept of soft law was not clearly and commonly defined and that therefore it "should not be used in any documents of the Community institutions"<sup>358</sup>. This coincided with the Commission's push for the use of soft law instruments, such as Mobility Partnerships, to deal with sensitive issues in the area of migration. The Opinion of the Committee on Culture and Education reiterated this stance<sup>359</sup>.

Mobility Partnerships were introduced in 2007 by the EU Commission with the aim to "give operational substance to the EU's Global Approach to Migration"<sup>360</sup>. The Commission's Communication on Circular Migration and Mobility Partnerships between the EU and Third Countries recognised Mobility Partnerships as "novel approaches to improve the management of legal movements of people between the

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<sup>351</sup> Ibid para 38.

<sup>352</sup> Ibid para 47.

<sup>353</sup> Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) 21 *ELJ* 68, 82.

<sup>354</sup> Resolution of the European Parliament, Non-legislative Resolution on Institutional and Legal Implication of the use of "Soft Law" Instruments, 2007/2028 (INI)(2007).

<sup>355</sup> Ibid, para. 17.

<sup>356</sup> Ibid, Preamble para I, X.

<sup>357</sup> Oana Andrea Stefan, 'European Soft law: New Developments Concerning the Divide between Legally Binding Force and Legal effects' (2012) 75(5) *Mod Law Rev* 879, 888.

<sup>358</sup> Ibid A of the Motion for a European Parliament Resolution.

<sup>359</sup> Ibid B of the Committee on Culture and Education.

<sup>360</sup> Commission of the European Communities, 'Circular Migration and Mobility Partnerships between the European Union and Third Countries' COM(2007) 248 final, Brussels, 15 May 2007 1, 2.

EU and third countries”<sup>361</sup>. Mobility Partnerships would be negotiated with “third countries that have committed themselves to cooperating actively with the EU on management of migration flows, including by fighting against illegal migration, and that are interested in securing better access to EU territory for their citizens”<sup>362</sup>. Accordingly, the Commission lists a set of commitments that third countries are expected to be willing to fulfil when agreeing to participate in a Mobility Partnership. This list includes the commitment to conclude a Readmission Agreement including nationals of other third countries and the fight against irregular migration and human trafficking<sup>363</sup>. A list of commitments that the EU has to observe is also included in the communication and covers the creation of legal migration channels, financial and technical assistance, circular migration schemes and the conclusion of visa facilitation agreements<sup>364</sup>. In practice, Mobility Partnerships would give perspectives of mobility and legal migration to third countries, including circular migration, in exchange for their cooperation in the fight against irregular immigration, the intensification of border management and their consent to start negotiations on Readmission Agreements<sup>365</sup>.

According to the Commission, the content of the Mobility partnerships will vary from country to country according to their specific context as well as EU member States’ interests. The Council in its conclusions on extending and enhancing the GAM describes the topics that can be covered by Mobility Partnerships, namely:

“the offer of legal migration opportunities, adapted in particular to the specific Member States’ labour market needs, while fully respecting the competences of the Member States and the principle of Community preference on the one hand, and a genuine cooperation on preventing and combating illegal immigration, trafficking in and smuggling of human beings as well as effective readmission and return policy while respecting the protection of human rights, on the other hand”<sup>366</sup>.

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<sup>361</sup> Ibid 2.

<sup>362</sup> Ibid 3.

<sup>363</sup> Ibid 4.

<sup>364</sup> Ibid 5-8.

<sup>365</sup> Ibid; Council of the European Union, ‘Brussels European Council 14 December 2007: Presidency Conclusions’ 16616/1/07 REV 1, Brussels, 14 February 2008.

<sup>366</sup> Council of the European Union, ‘Council Conclusions on Extending and Enhancing the Global Approach to Migration’, Luxembourg, 17-18 June 2007, 3 para 10.

The context of the adoption of the first Mobility Partnerships was highly influenced by economic considerations. The EU wanted to use this new tool in order to support the market needs for cheap and flexible workers and enhance the single market's competitiveness<sup>367</sup>. Circular migration was at the heart of the discussions when Mobility Partnerships were developed, and they were considered the ideal tool to support legal migration opportunities for third country workers<sup>368</sup>.

Since 2008, nine Mobility Partnerships have been concluded with the following countries: Cape Verde and Moldova in 2008, Georgia in 2009, Armenia in 2011, Morocco and Azerbaijan in 2013, Tunisia and Jordan in 2014 and Belarus in 2016. Mobility Partnerships have been proposed to Senegal, Egypt and Ghana but have either been rejected or negotiations have stalled<sup>369</sup>. Mobility Partnerships are concluded between the EU, interested Member States and a third country. This means that all member States do not have to be party of a Mobility Partnership. The number of Member States participating in a Mobility Partnership can vary, since no Member State is obligated to participate. Cape Verde is the Mobility Partnership with the lowest number of Member States participating (only five). In general, it can be said that Mobility Partnerships concluded with countries of the Eastern Partnership have more Member States participating than Mobility Partnerships with countries of the Southern Mediterranean. In the Mobility Partnership with Azerbaijan eight countries participated, ten with Armenia, 15 with Moldova, 16 with Georgia and only seven for the new Mobility Partnership with Belarus. In the South, nine Member States concluded the Mobility Partnership with Morocco, 10 for Tunisia and 12 for Jordan.

Since the launch of the Mobility Partnerships, the EU Commission has been enthusiastic about the use of this migration management tool and describes it as “the most innovative and sophisticated tool” of the GAM<sup>370</sup>. In the early evaluation of the two pilot Mobility Partnerships (with Cape Verde and Moldova), the Commission

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<sup>367</sup> Julia Maisenbacher, 'Political Economy of Mobility Partnerships: Structural Power in the EU's External Migration Policy' (2015) 20(6) *New Political Economy* 871.

<sup>368</sup> Anna Triandafyllidou (n331) 7; Meng-Hsuan Chou and Marie Gibert, 'The EU-Senegal Mobility Partnership: from Launch to Suspension and Negotiation Failure' (2012) 8(4) *JCER* 408, 409.

<sup>369</sup> On the proposition of a Mobility Partnership to Senegal and Ghana see: Meng-Hsuan Chou and Marie Gibert, (n368); Tine Van Crielinge, 'The EU-Africa Migration Partnership: a Case Study of the EU's Migration Dialogue with Ghana and Senegal' (2010) EUI Migration Working Group, European University Institute, Florence, Italy; Natasja Reslow and Maarten Vink, 'Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa' (2015) 53(4) *JCMS* 857. On the proposition of a Mobility Partnership to Egypt see: Peter Seeberg, 'Mobility Partnerships and the EU, Part I: Where are we Regarding Implementation and what will be the Consequences?' (2014) Center for Contemporary Middle East Studies.

<sup>370</sup> Commission of the European Communities (n305) 4.

declared that the tool is “promising, innovative and comprehensive” which “merit being further developed, improved and replicated” and that it<sup>371</sup>

“may represent a valuable framework for increasing transparency, enhancing synergies, triggering cooperation and ensuring more cost-efficient operations between partners, between the Commission and Member States, and inside them, between various ministries and departments involved”.

Additionally, the Stockholm Programme predicts “continued and expanded use of the Mobility partnership instrument as the main strategic, comprehensive and long-term cooperation framework for migration management with third countries”<sup>372</sup>.

The literature concerning Mobility Partnerships is prolific, many of it being published early, in 2008 and 2009, at the time of the negotiation and conclusion of the pilot Mobility Partnerships. Most of the literature at the time concerns both the content and structure<sup>373</sup> of the Mobility Partnership, the way they have been concluded<sup>374</sup> or their place in the broader context of EU’s External policies<sup>375</sup>. Roderick Parkes, for example, links Mobility Partnerships and the ENP<sup>376</sup>. He criticizes the soft law nature of Mobility Partnerships considering that there is no guarantee that they will effectively be implemented<sup>377</sup>. According to Parkes, the legal migration opportunities in Mobility Partnerships seem to be limited and there is no real joint ownership of the projects, as they are mostly imposed by the EU and Member States to third countries. He also criticizes the fact that not all Member States have to participate to a Mobility Partnership, leading to “fragmented schemes”<sup>378</sup>. However, not all authors were pessimistic about Mobility Partnerships. For example, Natasha Ward compared Mobility Partnerships and the Economic Partnership Agreement concluded between the EU and the Caribbean Forum countries and she argues that the provisions on legal

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<sup>371</sup> Ibid 8.

<sup>372</sup> Council of the European Union, ‘The Stockholm Programme: And Open and Secure Europe Serving and Protecting the Citizens’ 17024/09 Brussels, 2 December 2009 1, 62.

<sup>373</sup> Sandra Lavenex and Rachel Stucky, ‘Partnering for Migration in EU External Relations’ 116 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance: The Promise of Partnership* (London: Routledge 2011) 127-134.

<sup>374</sup> Sergio Carrera and Raúl Hernández I Sagrera (2011) (n2) 100.

<sup>375</sup> Roderick Parkes, ‘EU Mobility Partnerships: A model of Policy Coordination?’ (2009) 11(4) *EJML* 327; Katharina Eisele, *The External Dimension of the EU’s Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Martinus Nijhoff Publishers 2014).

<sup>376</sup> Roderick Parkes, ‘Mobility Partnerships: Valuable Addition to the ENP Repertoire?’ (2009) SWP Working Papers FG 1 2009/03 Berlin: Stiftung Wissenschaft und Politik.

<sup>377</sup> Roderick Parkes (n375) 331.

<sup>378</sup> Roderick Parkes (n375) 344.



migration seem to be more promising to third country nationals than the provisions on legal migration included in the Economic Partnership Agreement<sup>379</sup>. Even after the conclusion and implementation of several Mobility Partnerships, Natasha Ward still stayed positive towards Mobility Partnerships concluding that Mobility Partnerships have the capacity to enable mobility<sup>380</sup>. Jean-Pierre Cassarino also sees Mobility Partnerships from a positive angle and considers them as “a new generation of temporary labour-migration schemes”<sup>381</sup>.

The Commission explicitly underlined the non-binding nature of Mobility Partnerships in the 2009 working document on “Mobility Partnerships as a tool of the Global Approach to Migration”<sup>382</sup> and the recurring reason offered for favouring this type of instrument is its flexibility. Additionally, Mobility Partnerships are widely presented in the literature as soft law instruments or defined as being of “soft legal nature” or of “non-legal nature”<sup>383</sup>. First, non-binding instruments offer a safe way to deal with uncertainty<sup>384</sup> as they are flexible<sup>385</sup>, which means that these instruments can be adapted to changes in policy priorities and circumstances<sup>386</sup>. In the EU context, flexibility is an important feature and becomes increasingly so as the EU grows, and the legislative process becomes more burdensome<sup>387</sup>. When the impact of an agreement is not known, non-binding instruments help to deal with the uncertainty as the States will not have to commit themselves to an obligation that might have negative effects for them in the future<sup>388</sup>. Michael Bothe agrees with this line of argumentation and claims that it is only when a State is sure that it can fulfil its obligations that it accepts to be bound by them<sup>389</sup>. Moreover, the “voluntary nature” of Mobility

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<sup>379</sup> Natasha Ward, ‘Comparing EU-Mobility Partnerships and the Provisions for Temporary Movement of Labour in the Cariforum-EC Economic Partnership’, Paper presented at the conference Swiss migration and EU mobility partnerships: unveiling the promise (2008) Bern, 12-13 December as cited in Natasja Reslow, *Partnering for Mobility?: Three-Level Games in EU External Migration Policy* (Datawyse / Universitaire Pers Maastricht 2013).

<sup>380</sup> Natasha Ward, ‘Facilitating the Temporary Movement of Natural Persons: Economic Partnership Agreements Versus Bilateral Migration Agreements and Mobility Partnerships’ 143 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (Eds) *Multilayered Migration Governance: The promise of partnership* (London: Routledge 2011).

<sup>381</sup> Jean-Pierre Cassarino (321).

<sup>382</sup> Commission of the European Communities (n305) 4.

<sup>383</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2) 28; Sergio Carrera and Raúl Hernández I Sagrera (2011) (n2) 97. Panos Koutrakos (n2) 164-165; Bart Van Vooren (n2) 209-210.

<sup>384</sup> Pierre-Marie Dupuy, ‘Soft Law and the International Law of the Environment’ (1991) 12 *Mich J Int'l L* 420, 423.

<sup>385</sup> Paula Garcia Andrade, ‘The Legal Feasibility of the EU’s External Action on Legal Migration: The Internal and the External Intertwined’ (2013) 15(3) *EJML* 263, 277.

<sup>386</sup> Bart Van Vooren (n2) 209.

<sup>387</sup> Fabien Terpan (n353) 89.

<sup>388</sup> Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(1) *Int Organ* 421, 423.

<sup>389</sup> Michael Bothe, ‘Legal and Non-Legal Norms - A Meaningful Distinction in International Relations?’ (1980) 11 *NYIL* 65, 91.

Partnerships is considered favourable by the Commission as it believes that Mobility Partnerships “w[ould] be supported by motivated signatories”<sup>390</sup>.

Secondly, non-binding instruments are perceived to be a “tool of compromise”<sup>391</sup>. It is easier to negotiate a non-binding agreement than a legally binding one. Favouring non-binding content can allow the different partners to propose more significant measures, which would not be accepted in the case of the negotiation of a binding agreement. Besides, in some cases, a non-binding agreement is the only solution available as no binding agreement would be reached<sup>392</sup>. This can be seen as the advantage of low “contracting costs”<sup>393</sup>. Abbott adds that it can also lead to “mutually beneficial cooperation” without favouring only the powerful States<sup>394</sup>. The question of power is also raised as Mobility Partnerships can be perceived as unbalanced and mostly in favour of the EU and the Member States at the detriment of the third country. For example, it is sometimes argued that Mobility Partnerships only represent ways for the EU to strengthen the control on irregular migration and push for readmission agreements while promising legal migration opportunities that are rarely put into practice<sup>395</sup>.

Thirdly, non-binding instruments have the advantage of lowering the sovereignty costs associated with highly sensitive issues by dispensing with the often long and difficult national ratification procedures<sup>396</sup>. Abbott argues that sovereignty costs are high on topics that are directly linked to territory, citizenship or security, which are the intrinsic symbols of sovereignty<sup>397</sup>. Migration and asylum issues are clearly part of these “high sovereignty costs” topics, which is why non-binding instruments are so common in the EU in these particular fields. Member States would like for the EU to take relevant measures on delicate issues such as migration but do not want to lose or concede sovereignty<sup>398</sup>. For example, Bart Van Vooren argues that the non-binding nature of

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<sup>390</sup> Commission of the European Communities (n305) 4.

<sup>391</sup> Kenneth Abbott and Duncan Snidal (n388) 444.

<sup>392</sup> Hartmut Hillgenberg, ‘A Fresh Look at Soft Law’ (1999) 10(3) *EJIL* 499, 501.

<sup>393</sup> David M Trubek, Patrick Cottrell and Mark Nance, “Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity’ (2005) University of Wisconsin Law School Legal Studies Research Paper Series 1002 1, 11-12.

<sup>394</sup> Kenneth Abbott and Duncan Snidal (n388) 423.

<sup>395</sup> Sandra Lavenex and Rahel Kunz, ‘The Migration–Development Nexus in EU External Relations (2008) 30(3) *J Eur Integr* 439; Sergio Carrera and Raúl Hernández I Sagrera (n2); Meng-Hsuan Chou, ‘European Union Migration Strategy Towards West Africa: the Origin and Outlook of “Mobility Partnerships” with Cape Verde and Senegal’ (2009) EUSA Working Paper 1.

<sup>396</sup> David M Trubek, Patrick Cottrell and Mark Nance (n393) 11-12.

<sup>397</sup> Kenneth Abbott and Duncan Snidal (n388) 436-437.

<sup>398</sup> Fabien Terpan (n353) 89.

Mobility Partnerships was seen as a way to overcome the EU's division of competence in migration matters<sup>399</sup>. Mobility Partnerships could include a broader spectrum of actions than a binding agreement could and enhance the coherence of EU external relations on migration, including labour migration<sup>400</sup>.

In the literature, one of the main criticisms directed against the use of non-binding instruments pertains to the power imbalance that these instruments may create. Prosper Weil raises the issue of power in the relationship between States and argues that binding instruments are a shield for weaker States<sup>401</sup>. It is noted that binding instruments, by definition, force all parties to abide by the rules, whereas non-binding instruments favour powerful States that have "greater control over international outcomes"<sup>402</sup>. Kenneth Abbott and Duncan Snidal, for instance, argue that non-binding instruments tend to reinforce the perspectives and interests of powerful countries<sup>403</sup>.

The question of the "triple win" claim in relation to migration related policies or tools has been extensively debated in the literature<sup>404</sup>. Triple win includes both parties to an agreement plus the migrants potentially affected by the agreement. According to the Commission, the core of the debate on this issue relates to labour and economic migration<sup>405</sup>. In the EU migration policy, the notion of circular migration has been closely related to the Mobility Partnership tool<sup>406</sup>. A novelty in the EU discourse in 2011 was the idea that Mobility Partnerships would result in a triple win situation<sup>407</sup>. In a Communication on a Dialogue for Migration, Mobility and Security with the Southern Mediterranean countries, the Commission argued that Mobility Partnerships are

"a crucial tool, beneficial for both sides to ensure better and more effectively managed migration and mobility, *not only of the citizens of partner countries but*

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<sup>399</sup> Bart Van Vooren (n2) 210.

<sup>400</sup> Ibid.

<sup>401</sup> Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *Am J Int Law* 413, 442.

<sup>402</sup> Kenneth Abbott and Duncan Snidal (n388) 448.

<sup>403</sup> Ibid 450.

<sup>404</sup> Rahel Kunz, Sandra Lavenex and Marion Panizzon, 'Introduction: Governance Through Partnerships' 1 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds) *Multilayered Migration Governance: The Promise for Partnerships* (Routledge 2011) 2 and 12; Stephen Castles and Derya Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?' 27 in Graziano Battistella (ed), *Global and Asian Perspectives on International Migration* (Global Migration Issues 4, Springer 2014) 27; Particularly about Mobility Partnerships: Natasha Ward (n380) 147; Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' 1 in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010) 1-2 on the notion of "international migration management".

<sup>405</sup> Commission of the European Communities (n125); Commission of the European Communities (n129).

<sup>406</sup> Commission of the European Communities (n360) 4.

<sup>407</sup> European Commission, 'Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries' COM(2011) 292 final, Brussels, 24 May 2011 1.

*also for the nationals of other countries, in particular those of sub-Saharan Africa and of the Middle East, who increasingly reside on or transit through the territory of the Southern Mediterranean countries*<sup>408</sup>.

In other words, the Commission suggested that Member States in need of workers, would have access to foreign labour markets thanks to legal labour migration schemes. Migrant workers could be a response to the need of workforce in some EU Member States. Migrant workers would also benefit of new labour mobility opportunities. Additionally, the sending countries, would benefit from these schemes since migrants would contribute to the country's development by sending remittances and making investments in their country of origin from abroad. However, the triple-win approach quickly lost its momentum as circular migration was widely criticised and labour needs in Member States decreased<sup>409</sup>. The literature contests the EU's claim that circular migration is beneficial for sending countries and migrants. For example, Carrera and Hernández I Sagrera were critical of the inclusion of circular migration schemes into Mobility Partnerships rather than long term legal migration schemes<sup>410</sup>. They argue that Mobility Partnerships are "insecurity partnerships" where third country nationals are considered as economic units rather than human rights holders<sup>411</sup>. In 2011 Carrera and Hernández I Sagrera published another article in which they further criticized circular migration opportunities provided by the Mobility Partnerships with Moldova, Cape Verde and Georgia<sup>412</sup>. They argued that concretely these Mobility Partnerships give "few tangible examples of effective 'circular migration' initiatives"<sup>413</sup>.

In 2011, the Commission presents Mobility Partnerships as the primary tool to translate the GAMM into practice, defining them as a "long-term framework based on political dialogue and operational cooperation"<sup>414</sup>. Later in 2011, the Commission presented Mobility Partnerships as the main framework for cooperation with third countries<sup>415</sup>. Contrary to the position of the Commission, most of the literature is pessimistic concerning the effectivity of Mobility Partnerships and at best, academics consider that

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<sup>408</sup> Ibid 7 (emphasis added).

<sup>409</sup> Stephen Castles and Derya Ozkul (n404) 27; Piyasiri Wickramasekara, 'Circular Migration: A Triple Win or a Dead End' (2011) International Labour Organization.

<sup>410</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2)

<sup>411</sup> Ibid.

<sup>412</sup> Sergio Carrera and Raúl Hernández I Sagrera (2011) (n2)

<sup>413</sup> Ibid 101.

<sup>414</sup> European Commission (n407) 11.

<sup>415</sup> European Commission (n306) 10.

it is an empty shell that will have no influence on migrants' mobility rights<sup>416</sup>, at worse, it is a tool to provide EU Member States with access to a dispensable work force<sup>417</sup>, or simply a migration management tool, hindering the access of third country nationals to Europe<sup>418</sup>. Mobility Partnerships were presented by the Commission as offering partner third countries access to more development opportunities and to offer economic migrants increasing opportunities for legal migration<sup>419</sup> but Meng-Hsuan Chou for example, refutes this argument<sup>420</sup>. She argues that projects proposed or implemented in third countries (she takes the specific examples of Cape Verde and Senegal) are "primarily benefit[ing] the Union at the expenses of migrants, countries of origin or transit and other private actors"<sup>421</sup>.

Even though Mobility Partnerships are depicted by the Commission as being cooperation tools offering a balanced partnership and said to be established only in cases where they are likely to bring added value compared to existing agreements<sup>422</sup>, several authors criticize these arguments<sup>423</sup>. Several authors argue that Mobility Partnerships are not balanced partnerships and that there is no real cooperation between the EU and Member States and the third country. Meng-Hsuan Chou and Marie Gibert, for example, argue that the EU uses an "our-size-fits-all" approach with third countries or what Reslow and Vink would call a "take it or leave it" approach<sup>424</sup>. Reslow highlights the "take it or leave it" approach taken in the cases of Moldova, Cape Verde and Senegal, where the same Mobility Partnership text was unilaterally proposed by the EU to these third countries with little room for negotiation<sup>425</sup>. This view is supported by Lavenex and Stucky who argue that Mobility Partnerships are not balanced and that there is a higher number of projects aimed at fighting irregular migration and controlling migration flows than projects on legal migration or migration and development, which would be in the interest of third countries<sup>426</sup>. They also underline that the "scope for third countries to express their concerns [is] limited" in the

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<sup>416</sup> Sandra Lavenex and Rahel Kunz (n395).

<sup>417</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2) 33.

<sup>418</sup> Meng-Hsuan Chou (n395) 20-22.

<sup>419</sup> Council of the European Union, 'Commission Staff Working Document - Mobility Partnerships as a Tool of the Global Approach to Migration' 13489/09 Brussels, 21 September 2009 1, 4.

<sup>420</sup> Meng-Hsuan Chou (n395) 5.

<sup>421</sup> Ibid 8.

<sup>422</sup> Council of the European Union (n419) 2.

<sup>423</sup> See for example: Sandra Lavenex and Rahel Kunz (n395); Sergio Carrera and Raúl Hernández I Sagrera (n2); Meng-Hsuan Chou (n395).

<sup>424</sup> Meng-Hsuan Chou and Marie Gibert (n368); Natasja Reslow and Maarten Vink (n369).

<sup>425</sup> Natasja Reslow, 'The Role of Third Countries in EU Migration Policy: The Mobility Partnerships' (2012) 14 *EJML* 393, 395.

<sup>426</sup> Sandra Lavenex and Rachel Stucky (n373).

negotiations of the Mobility Partnerships<sup>427</sup>. Sergio Carrera and Raúl Hernández I Sagrera concur with this argument and note that there is a clear focus on the issues of irregular migration and border control<sup>428</sup>. Anna Triandafyllidou argues that Mobility Partnerships replicate power relations “where the EU sets the rules of the game and third countries have to abide by these rules”<sup>429</sup>. She also argues that the language used in the Communication introducing Mobility Partnerships<sup>430</sup> is highly unequal<sup>431</sup>. Another reason put forth in the argument that relations between the EU and the partner third country are being one-sided, is that Mobility Partnerships make development aid, trade relations and visa policies conditional upon the cooperation of third countries with an EU agenda of migration control<sup>432</sup>. It is generally agreed in the literature that Mobility Partnerships put more pressure on the third country than on participating Member States<sup>433</sup>.

The first Mobility Partnerships were concluded with third countries with a weak leverage vis-à-vis the EU and only after the Arab Spring did this pattern change. Nevertheless, the relations between different parties to a Mobility Partnership may be more dynamic than what is often assumed<sup>434</sup>. Beyond their conflicting interests, the EU, Member States and third countries can share a common objective on migration management<sup>435</sup>. Natasja Reslow argues that third countries are prominent players in the EU's migration policy<sup>436</sup>. Taking the example of Cape Verde and Senegal, she discusses the role of domestic preferences of the third country in its decision to participate in a Mobility Partnership with the EU and the cost/benefits calculation of their cooperation with the EU. Others have also pointed out that third countries have their own priorities when negotiating with the EU and the Member States<sup>437</sup>. The stated overall goal of Mobility Partnership is to create a “balanced partnership with third

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<sup>427</sup> Ibid 132.

<sup>428</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2).

<sup>429</sup> Anna Triandafyllidou (n331) 8.

<sup>430</sup> Commission of the European Communities (n360).

<sup>431</sup> Anna Triandafyllidou (n331) 8.

<sup>432</sup> Sergio Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (2016) CEPS Papers in Liberty and Security in Europe; Sergio Carrera, Leonhard den Hertog and Joanna Parkin (n312) 15; Stefan Brocza and Katharina Paulhart, 'EU Mobility Partnerships: a Smart Instrument for the Externalization of Migration Control' (2015) 3(15) *Eur J Futures Res* 1.

<sup>433</sup> Carrera and Hernández I Sagrera (2009) (n2) 321; Carrera and Hernández I Sagrera (2011) (n2); Mohamed Limam and Rafaella Del Sarto, 'Periphery under Pressure: Morocco, Tunisia and the European Union's Mobility Partnership on Migration' (2015) EU Working Paper RSCAS 2015/75.

<sup>434</sup> Fanny Tittel-Mosser, 'Reversed Conditionality in EU External Migration Policy: the Case of Morocco' (manuscript under review).

<sup>435</sup> Ibid.

<sup>436</sup> Natasja Reslow (n425) 394.

<sup>437</sup> Abdelmalek Sayad, *The Suffering of the Immigrant* (Wiley 2004).

countries adapted to specific EU Member States' labour markets"<sup>438</sup>. This goal links legal migration and the fight against irregular migration through border management, migration control and readmission agreements<sup>439</sup>.

The added value of Mobility Partnerships can be diverse. Agnieszka Weinar, for example, argues that projects with added value could be proposed by two actors: a group of Member States or by the European Commission<sup>440</sup>. This would mean that bilateral projects proposed by a Member State to the third country without including other Member States or the EU are usually not adding value to the existing relationship with the third country. The existence of added value of Mobility Partnerships has been doubted by Paula García Andrade as she observed that the Member States tend to include projects in the Annex that have already been proposed bilaterally<sup>441</sup>. Another type of added value can be related to legal migration. As we saw previously in this section, legal migration was presented as one of the novelties of the Mobility Partnership. Agnieszka Weinar argues that a Member State modifying its legal order to open new legal migration channels would be a "clear value added of a Mobility Partnership"<sup>442</sup>. Sergio Carrera and Raül Hernández I Sagrera argue that Mobility Partnerships have little added value in enabling legal migration opportunities for citizens from third countries<sup>443</sup>. One of the main criticism towards Mobility Partnerships is that they do not fulfil the promises of enhanced legal migration towards Europe<sup>444</sup>.

Finally, in 2014, the Commission established the Asylum, Migration and Integration Fund<sup>445</sup> with a total of EUR 3.137 billion for 2014-2020, highlighting the particular importance of Mobility Partnerships as the main strategic, comprehensive and long-term cooperation framework for migration management with third countries and invited the EU to pursue and increase the use of this tool. Moreover, the launch of a Mobility Partnership Facility<sup>446</sup> in 2016, designed to secure specific funding for some Mobility

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<sup>438</sup> Commission of the European Communities (n360) 2.

<sup>439</sup> Ibid 3.

<sup>440</sup> Agnieszka Weinar, 'Mobility Partnerships – What Impact do they have on Legal Migration and Mobility? the Migration Policy Centre, European University Institute, Florence <http://www.migrationpolicycenter.eu/publication/mobility-partnerships-what-impact-do-they-have-on-legal-migration-and-mobility/> 'Accessed 25 August 2017'.

<sup>441</sup> Paula García Andrade and Ivan Martín (n181) 33.

<sup>442</sup> Agnieszka Weinar (n440).

<sup>443</sup> Sergio Carrera and Raül Hernández I Sagrera (2009) (n2).

<sup>444</sup> Sergio Carrera and Raül Hernández I Sagrera (2011) (n2) 101.

<sup>445</sup> For more information see: [https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en) 'Accessed 15 January 2018'.

<sup>446</sup> For more information see: <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mobility-partnership-facility-mpf/> 'Accessed 15 January 2018'.

Partnerships' initiatives, suggests that the enthusiasm from the Commission towards this instrument is not declining.

### 1.3.2. Content of Mobility Partnerships

Mobility Partnerships are Joint Declarations concluded between the EU, interested Member States and a third country. They are composed of a Joint Declaration text and, except for the Mobility Partnerships with Tunisia and Jordan, an Annex with a list of projects designed for the implementation of the Mobility Partnership.

The Joint Declaration starts with a preamble that summarizes the relations between the EU and the third country and lists the regional or bilateral dialogues that the third country is part of or the existence of legal instruments such as Association Agreements. Then, it establishes the goals of the Mobility Partnership, taking into consideration the context of the third country. The content of the Joint Declaration does usually not differ extensively from one Mobility Partnership to the other and the goals are always phrased around the four pillars of the GAMM. Once the general objectives are set, a list of specific objectives is presented under each of the four pillars of the GAMM. It should be noted that asylum and international protection did not exist under the GAM which means that the Mobility Partnerships concluded before the entry into force of the GAMM do not include objectives related to this topic (this is the case of the Mobility Partnerships with Cape Verde, Moldova and Georgia). The list of projects in the Annex is designed to translate the objectives in practical terms.

The last section of the Joint Declaration is about the implementation of the Mobility Partnership. Some key points should be underlined here. First, Mobility Partnerships are “conceived as a long-term cooperation framework”, which means that the content of the Mobility Partnership will evolve over time and according to the context and relations with the third country. What evolves is not so much the text of the Joint Declaration but rather the projects listed in its Annex. Moreover, the number of Member States party to the Mobility Partnership can also change, as Member States can decide to join at a later stage (e.g. The Netherlands joined the Mobility Partnership with Cape Verde when it was already in effect). There are no provisions about a Member State



“leaving” the Mobility Partnership, nor has this question been raised in the literature. As the proposal and implementation of projects by a Member State is not mandatory, its inaction could have the same result as if it would be leaving the Mobility Partnership. The second point is that Mobility Partnerships are “based on political dialogue”, which means that the Joint Declaration is a “political” document, rather than a legal document and therefore does not aim at being legally binding. This also appears clearly in the “disclaimer” clause that usually appears at the end of the Joint Declaration and which mentions that “the provisions of this joint declaration and its Annex are not designed to create legal rights or obligations under international law”<sup>447</sup>. Even though non-binding, the text of the Joint Declaration still foresees that all parties to the Mobility Partnership “confirm their intention to cooperate at an operational level”, arguably creating a moral obligation. The Mobility Partnerships with Morocco, Jordan and Belarus include a clause that does not exist in the six other Mobility Partnerships. This clause states that the partner third country “will take action to ensure that the objectives of this partnership are attained, taking account of the technical and financial means available”. The clause also includes the notion of “balanced” partnership and of “visa facilitation and readmission package”, which are not present in the other Joint Declarations.

The Annex is considered a living document, which is expected to evolve over time according to the interests of the different parties to the partnership. The projects can be proposed either by the EU, one or several Member States, the third country, or a combination of these. Save for the Mobility Partnerships with Cape Verde, Moldova and Georgia<sup>448</sup>, as noted earlier, the projects are divided into the four thematic categories of the GAMM: enhancing legal migration, fighting against irregular migration, migration and development, and international protection. From a review of the projects listed in the Mobility Partnerships entered into so far, it seems clear that there are usually few projects related to asylum and international protection. The three other categories seem to have a more balanced number of projects, even though the focus on irregular migration and border control is clear when we look at the content of the projects. Therefore, it is important to look at each project in order to see what it really covers. For example, it may seem that the number of projects related to legal

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<sup>447</sup> All Joint Declarations can be found here : [https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en) ‘Accessed 15 January 2018’.

<sup>448</sup> In these countries’ projects are divided into three thematic categories, excluding international protection.

migration is similar to that of projects related to border management and the fight against irregular migration, but, in reality, the projects aiming at enhancing the possibilities for legal migration can be almost inexistent. It is not uncommon that projects clearly designed to fight against irregular migration end up being categorized as legal migration projects. This is the case with the Mobility Partnership with Cape Verde, in which an important project aiming at fighting irregular migration and supporting return initiatives is included under the legal migration heading. In the case of Morocco, this is even more apparent because projects linked to border management are included under the legal migration heading. Several studies have argued for the need to look beyond the statistics in this respect and pointed out that, even if the number of projects under the heading “legal migration” is high, the fact is that most of these projects do not result in an increase in legal channels for migration<sup>449</sup>. Most commonly, these projects serve to provide information to potential migrants on the risks of irregular migration or on the existing options for legal migration<sup>450</sup>. It should be added that the overwhelming majority of projects result from bilateral initiatives between individual Member States and the third country and only a few are joint projects proposed by several Member States together. Significantly, in every Mobility Partnership, the Annex includes projects on the negotiation of a readmission agreement and visa facilitation agreement, which comes as no surprise since one of the preconditions for a third country to enter a Mobility Partnership is that it accepts to start negotiations of such agreements with the EU.

The context of adoption and aim of each Mobility Partnership depends on the state of the relations between the EU, participating Member States and the third country. Several authors have observed that Member States decide to participate in a Mobility Partnership because the aim of the negotiations is in line with their own national policies and the projects they propose reflect their policy preferences<sup>451</sup>. The list of projects proposed in the Annex to the Joint Declaration is constantly evolving and new

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<sup>449</sup> Paula García Andrade and Ivan Martín (n181); IOM, ‘The European Union-Moldova Mobility Partnership 2008-2011: Evaluation Report’ (2012) Available at: <http://www.mfa.gov.md/img/docs/eu-moldova-mobility-partnership-evaluation.pdf> ‘Accessed 31 October 2017’ 1, 11; European Training Foundation, ‘Migration Support Measures from an Employment and Skills Perspective: Tunisia’ (2015) Available at: [http://www.etf.europa.eu/webatt.nsf/0/2938DD5003574A3EC1257E9A002BF071/\\$file/MISMES%20Tunisia.pdf](http://www.etf.europa.eu/webatt.nsf/0/2938DD5003574A3EC1257E9A002BF071/$file/MISMES%20Tunisia.pdf) ‘Accessed 30 October 2017’ 1, 8.

<sup>450</sup> Paula García Andrade and Ivan Martín (n181); IOM (n449); European Training Foundation, ‘Migration Support Measures from an Employment and Skills Perspective: Georgia’ (2015) [http://cadmus.eui.eu/bitstream/handle/1814/36841/MISMES\\_Georgia.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/36841/MISMES_Georgia.pdf?sequence=1&isAllowed=y) ‘Accessed 10 August 2017’ 1, 4.

<sup>451</sup> Ibid 31; Natasja Reslow (n96) 226-227.

projects can be proposed if new policy priorities arise. Therefore, the Mobility Partnership can play a role in continuing discussions among the EU, its Member States and partner third countries<sup>452</sup>. New policy priorities on both the EU and third countries' side can lead to negotiations about the implementation of new initiatives<sup>453</sup>.

### 1.3.3. Monitoring and evaluation mechanisms

The Commission (particularly the Directorate General for Migration and Home Affairs) oversees the general management of the Mobility Partnerships, but it does not implement the projects<sup>454</sup>. The Member States are the ones in charge of the projects' implementation. The Commission organizes senior official meetings with the representatives of all countries party to the Mobility Partnership. The meetings are, in principle, supposed to be held on a bi-annual basis, but, depending on the dynamism of the implementation of the Mobility Partnership and its stage of implementation, the meetings can occur less often. For example, the Mobility Partnership with Cape Verde is not dynamic and the last two meetings occurred in 2014 and 2017. The monitoring of the implementation of Mobility Partnerships is conducted by a Mobility Partnership task force in Brussels comprised of representatives of the Commission and the Member States and through "cooperation platforms" in third countries composed of Member States' embassies, the EU Delegation and the third country's representatives<sup>455</sup>. The cooperation platform coordinates the activities in the Partner Country and monitors the implementation of the Mobility Partnership<sup>456</sup>. In the case of Cape Verde, for example, the cooperation platform is the "Groupe Local de Suivi", which existed prior to the conclusion of the Mobility Partnership. According to Paula Garcia Andrade, the involvement of Member States in the monitoring of the implementation of Mobility Partnerships is feeble<sup>457</sup>.

The Commission is also in charge of overseeing the updating of the scoreboard<sup>458</sup>. The scoreboard is the only monitoring tool for Mobility Partnerships which exists so far.

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<sup>452</sup> Fanny Tittel-Mosser (n434).

<sup>453</sup> Ibid.

<sup>454</sup> Interview 3, DG Home Affairs, Brussels, 18 November 2015.

<sup>455</sup> Natasja Reslow, 'EU "Mobility" Partnerships: An Initial Assessment of Implementation Dynamics' (2015) 3(2) *Politics and Governance* 117, 118.

<sup>456</sup> Council of the European Union (n419) 5-6.

<sup>457</sup> Paula Garcia Andrade and Ivan Martín (n181) 104.

<sup>458</sup> Council of the European Union (n419) 5.

The scoreboards in the different Mobility Partnerships are all based on the same model: a list of projects with information on their stage of implementation, the country or entity which proposed the project as well as those responsible for its implementation and some budgetary information. Depending on the scoreboard, this information is sometimes only approximate, not available or not up to date<sup>459</sup>. Moreover, scoreboards are not easily accessible from open sources/databases and have to be requested from the Directorate General for Migration and Home Affairs (DG Home). On the contrary, the scoreboard for Moldova is accessible to all as it is online (it is the only scoreboard available online), it is regularly updated and includes a fair amount of information<sup>460</sup>.

It is important to note that Mobility Partnerships (except those with Morocco, Tunisia and Jordan) foresee the possibility to conduct an evaluation “whenever necessary”. This possibility is still largely unexplored as the only official evaluation so far was conducted by the Commission in 2009<sup>461</sup>. The 2009 evaluation exercise focused on the conclusion process and on the content of the existing Mobility Partnerships, rather than on their actual implementation. Now that the first Partnerships have been in place for almost ten years, it is arguable that an analysis of the implementation of Mobility Partnerships needs to be conducted in order to assess their actual impact. In particular, given the political importance of Mobility Partnerships.

In any case, the non-binding nature of Mobility Partnerships means that, even if the one party to the agreement do not implement the projects and the purported goals are not met, it is not possible to impose sanctions on any of the partners<sup>462</sup>. It should be mentioned, however, in this respect, that the European Court of Auditors oversees the inspection of external migration expenditure including the funds allocated to the implementation of Mobility Partnership projects. The European Court of Auditors has completed a Special Report in 2016 relating to the spending on migration under two external funding instruments: the European Union Neighbourhood Policy Instrument and the Thematic Programme on Migration and Asylum under the Development Cooperation Instrument<sup>463</sup>. The Court found that there was a lack of overview of the funded actions

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<sup>459</sup> We will discuss this point in more details in Chapter 3.

<sup>460</sup> You can find the scoreboard for Moldova here: <http://scoreboard.mfa.gov.md/> 'Accessed 15 January 2018'.

<sup>461</sup> Commission of the European Communities (n305).

<sup>462</sup> Ian Bache and Stephen George, *Politics in the European Union* (Oxford: Oxford University Press 2006) 35.

<sup>463</sup> European Court of Auditors, 'Special Report No 9/2016, EU External Migration Spending in Southern Mediterranean and Eastern Neighbourhood Countries until 2014', Luxembourg, 2016.

and that a proper assessment of what was occurring was sometimes difficult considering the limited or unclear information available<sup>464</sup>. The Court concluded therefore that “[t]he total amount of expenditure charged to the EU budget could not be established during the audit”<sup>465</sup>. Moreover, the Court of Auditors stressed the point that more information is needed on what exactly is being funded and implemented, as the various categories and descriptions of projects are often vague and/or overlapping<sup>466</sup>. The Court also noted that the fund allocation seemed to be privileging projects related to the fight against irregular migration<sup>467</sup>. This confirms the existing criticisms found in the literature that we mentioned above and raises to interrogations about how “balanced” the approach underlying Mobility Partnerships really is.

### 1.3.4. The legal nature of Mobility Partnerships

Mobility Partnerships have been portrayed as soft law instruments, but little research has been conducted on where they fit in the EU legal architecture. It is however key to have a clear understanding of the type of instrument that Mobility Partnerships are, as this can influence the existence of legal and policy relevance (hypothesis 1). Subsequently, drawing from the literature, we will present the three main factors that could influence the relevance of Mobility Partnerships (hypothesis 2).

#### 1.3.4.1. Mobility Partnerships in the EU legal architecture

The Communication on circular migration and Mobility Partnerships between the European Union and third countries, which introduced the Mobility Partnership concept, stated that “Mobility partnerships will necessarily have a *complex legal nature* as they will involve a series of components, some of which will fall in the Community's remit and others in the Member States”<sup>468</sup>. However, the Commission never specified what it meant by a “complex legal nature”. Are Mobility Partnerships EU legal acts? Or are they something else?

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<sup>464</sup> Ibid.

<sup>465</sup> Ibid 7.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid., see figures 4 and 5 of the Special Report.

<sup>468</sup> Commission of the European Communities (n360) 3 (emphasis added).

First, we should recall the inclusion of the “disclaimer” clause in every Mobility Partnership stating that “the provisions of this joint declaration and its Annex are not designed to create legal rights or obligations under international law”. This clause makes it clear that the authors of the Joint Declaration do not intend to create rights and obligations. This is an important first point as, without a clearly stated “will of the authors” to the opposite effect, Mobility Partnerships could be considered as an international agreement due to its structure and content. It is widely held in the international law literature and case law that the main conditions for the existence of legal effects are the aim and identity of the authors, as well as the content of the instrument, and not the type of instrument in itself<sup>469</sup>. For example, in the International Court of Justice Case *New Zealand v France*, of 1974, on the conduction of nuclear tests by France in the South Pacific, the ruling of the International Court of Justice was that the simple declaration by France of its commitment to stop conducting nuclear tests in the South Pacific was legally binding because of “the intention and circumstances in which it was made”<sup>470</sup>. In this case, several public declarations had been made by French representatives announcing that they would stop conducting nuclear tests in the South Pacific. The declarations were made through a communiqué from the President of the Republic’s Office, a diplomatic note addressed to the Ministry of Foreign Affairs of New Zealand, a letter from the President of the Republic to the Prime Minister of New Zealand, a statement at a press conference by the French Ministry of Defense and a speech at the General Assembly of the United Nations given by the Minister for Foreign Affairs<sup>471</sup>. These declarations taken all together imply the good faith of the different “authors” which can lead to the expectation by other States that France would keep its promise. It must be noted, however, that the aim of the authors does not always determine if a soft law instrument can have legal effects. In the case concerning the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*<sup>472</sup>, the International Court of Justice ruled that the minutes of a meeting held between government officials of Qatar and Bahrain and the letters exchanged between both governments were to be considered as legally binding instruments, even

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<sup>469</sup> See for example Linda Senden (n334) 249.

<sup>470</sup> Case *New Zealand v France* (1974) ICJ Rep. 253 477.

<sup>471</sup> Eighth report, A/CN.4/557, para 71 and 72.

<sup>472</sup> Case *Qatar v. Bahrain* [1994] ICJ Rep 112, 112.

though it was established that the government official of Bahrain had only had the intention to give a political significance to the meeting and the exchange of letters<sup>473</sup>.

According to Sergio Carrera, “Mobility Partnerships are political declarations that fall outside the classical remits of European law or international law. They need to be seen as an experimental method of external governance on migration management as they are not enforceable (legally binding) upon the EU member states”<sup>474</sup>. The Commission, on its part, acknowledges that Mobility Partnerships, being Joint Declarations, do not fit into any type of EU legal act and that they are negotiated under political guidelines set by the Council<sup>475</sup>. It was noted by several authors that the procedure of negotiation and signature of Mobility Partnerships does not really diverge much from the procedure adopted to conclude mixed agreements<sup>476</sup>. Mixed agreements are international agreements concluded between the EU and its Member States and one or various third countries<sup>477</sup>. They are concluded in areas where the EU does not have full competency. Mobility Partnerships are negotiated by the Commission, the Presidency of the Council, representatives of the interested Member States and representatives of the third country. Who signs a Mobility Partnership on behalf of the EU is not consistent. In the case of the Mobility Partnership with Belarus, it was signed by the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos<sup>478</sup>. In the case of Cape Verde, Louis Michel, the Commissioner responsible for development policy and Jacques Barrot, the Vice-President of the European Commission responsible for justice, freedom and security signed the Mobility Partnership<sup>479</sup>. In the case of Moldova and Georgia three signatures on behalf of the EU appeared on the Mobility Partnerships. They were signed by Jacques Barrot, Benita Ferrero-Waldner the European Commissioner for External Relations and European Neighbourhood Policy and Tobias Billström, Sweden’s Minister for Migration and Asylum Policy (for the

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<sup>473</sup> Ibid 116-122.

<sup>474</sup> Sergio Carrera, ‘The EU’s Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration’ (2011) CEPS Liberty and Security in Europe 1, 4.

<sup>475</sup> Commission of the European Communities (n360) 3.

<sup>476</sup> Paula García Andrade and Ivan Martín (n181) 32; Uyen Do and Thomas Huddleston, ‘Negotiating Migration’ 277 in *the Euro-Mediterranean: The Potential for EC Mobility Partnerships* (IEMed-CIDOB Mediterranean Yearbook 2009) <http://www.migpolgroup.com/public/docs/163.NegotiatingMigrationintheEuro-Med.pdf> ‘Accessed 8 January 2018’.

<sup>477</sup> Allan Rosas, ‘The European Union and Mixed Agreements’ 200 in Alan Dashwood, Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell 2000); Henry Schermers, ‘A Typology of Mixed Agreements’ 23 in David O’Keeffe and Henry Schermers (eds), *Mixed Agreements* (Kluwer 1983).

<sup>478</sup> European Commission, ‘EU Launches Mobility Partnership with Belarus’, Press release, Luxembourg, 13 October 2016.

<sup>479</sup> Commission of the European Communities, ‘The European Union and Cape Verde enter into a Mobility Partnership’, Press release, Luxembourg/Brussels, 5 June 2008.

Mobility Partnership with Georgia)<sup>480</sup> or Dragutin Mate, the Slovenian Minister for Home Affairs (for the Mobility Partnership with Moldova)<sup>481</sup>. EU Commissioner for Home Affairs, Cecilia Malmström signed alone the Mobility Partnerships with Jordan<sup>482</sup>, Tunisia<sup>483</sup>, Morocco<sup>484</sup> and Azerbaijan<sup>485</sup> but co-signed the Mobility partnership with Armenia with Jerzy Miller, Poland's Minister of the Interior and Administration<sup>486</sup>. When a minister of a Member State co-signed a Mobility Partnership it was because the country he represents was holding the Presidency of the Council of the European Union.

Concerning the content of Mobility Partnerships, they combine initiatives on legal economic migration, which is the exclusive competence of Member States, with the proposition of the conclusion of a visa facilitation agreement which is the exclusive competence of the EU. Additionally, most of the projects aimed at fighting irregular migration such as border control and readmission are shared competences. This hints towards the argument that Mobility Partnerships could be mixed agreements, if they were hard law, but that the soft law nature has been preferred by the EU for several reasons that were exposed earlier, including flexibility and rapidity of conclusion.

As Mobility Partnerships are not hard law mixed agreements, Member States do not ratify them, and the European Parliament is excluded from its adoption process. A report of 2015 by the European Parliament qualifies Mobility Partnerships as “non-conventional concerted acts or non-normative agreements”<sup>487</sup> because they lack (*a priori*)<sup>488</sup> scrutiny by the ECJ and because they do not aim at creating rights and obligations. Sergio Carrera, for instance, has expressed concern over the fact that Mobility Partnerships lack “democratic control by the European Parliament and judicial scrutiny by the Court of Justice in Luxembourg”<sup>489</sup>. He had previously argued that

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<sup>480</sup> Commission of the European Communities, ‘The European Union and Georgia enter into a Mobility Partnership’, Press release, Brussels 30 November 2009.

<sup>481</sup> Council of the European Union, ‘Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova’ 9460/08 ADD1 Brussels, 21 May 2008.

<sup>482</sup> European Commission, ‘EU-Jordan: a New Partnership to Better Manage Mobility and Migration’, Press release, Brussels 9 October 2014.

<sup>483</sup> European Commission, ‘EU and Tunisia Establish their Mobility Partnership’, Press release, Brussels, 3 March 2014.

<sup>484</sup> European Commission, ‘Migration and Mobility Partnership signed between the EU and Morocco’, Press release, Brussels, 7 June 2013.

<sup>485</sup> European Commission, ‘Mobility Partnership signed between the EU and Azerbaijan’, Press release, Brussels, 5 December 2013.

<sup>486</sup> Council of the European Union, ‘Joint Declaration on a Mobility Partnership between the European Union and Armenia’ 14963/11 ADD1 Brussels, 6 October 2011.

<sup>487</sup> Paula García Andrade and Ivan Martín (n181) 32.

<sup>488</sup> *Ibid.*

<sup>489</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2) 4.



Member States purposely chose the soft law nature of Mobility Partnerships so that the ECJ would be excluded<sup>490</sup>. Mobility Partnerships might escape juridical control, but as we saw in the previous section, they are under financial accountability as the Court of Auditors is in charge of examining spending on migration, including funds used to finance Mobility Partnership projects.

In what pertains to judicial scrutiny by the ECJ it is worth noting that that possibility is not entirely off the table. The Court is competent to rule on the legality of a measure adopted by the Council, whatever the nature or form of this measure, as long as it has legal effects<sup>491</sup>. In this thesis we discuss the relevance of Mobility Partnerships. We argue that even though an instrument is non-binding, it does not mean that it cannot have legal relevance. Legal relevance includes potential legal effects. As we will discuss later in this section, legal effects of Mobility Partnerships may be difficult to prove. Nevertheless, if legal effects can be attributed to Mobility Partnerships, then the ECJ would be competent to judge their legality. This possibility should therefore not be entirely dismissed and the question of the jurisdiction of the ECJ might be posed in the future.

### **1.3.4.2. Mobility Partnerships as soft law**

#### **1.3.4.2.1. Concept and nature of soft law**

Soft law is not a new topic of interest and has already been widely discussed in the literature. According to René-Jean Dupuy, Arnold McNair first used the concept of soft law, in the 1930s<sup>492</sup>. However, McNair used the term soft law distinctively from the way it is used today. He considered as being “soft”, the legal principles that were not precise and were, therefore, challenging to apply in court, but he did not consider soft law as something different from hard law<sup>493</sup>. Today, there is still no consensus about what exactly soft law is and what instruments can be classified as soft law instruments, but it is now generally agreed that soft law means “not legally binding” and a tentative list

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<sup>490</sup> Ibid.

<sup>491</sup> Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'It Wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (2017) CEPS Policy Insights 2017-15 1, 4.

<sup>492</sup> René-Jean Dupuy, 'Declaratory Law and Programmatic Law: From Revolutionary Custom to "Soft Law"' 247 in Robert Akkerman, Peter van Krieken, and Charles Pannenberg (eds), *Declarations on Principles: A Quest for World Peace* (Sijthoff, Leyden 1977) 252.

<sup>493</sup> Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) *EJIL* 1075, 1081.

is likely to include guidelines, resolutions, conclusions, communications, declarations, memoranda of understanding, strategies, action plans, reports, etc.

With the adoption of the Universal Declaration of Human Rights, by the General Assembly of the United Nations, in 1948, probably one of the most influential soft law instruments to date, the concept started to be used more frequently<sup>494</sup>. It was in the 1970s that the term soft law started to be widely used, mainly in the field of international environmental law, following the 1972 Stockholm Conference. Similarly, the Stockholm Declaration is a soft law instrument which is legally significant as it is generally considered as the basis of international environmental law<sup>495</sup>. Additional outcomes of the Stockholm Conference were the creation of the United Nations Environmental Programme and the enhanced action of Non-Governmental Organisations (NGOs) that led to the development of numerous other soft law instruments in the field of environment protection<sup>496</sup>, making it the most prolific field in terms of soft law in international law at the time, greatly contributing to the development of this field of international law.

Classical international law literature on the subject is dominated by a debate between authors not recognizing soft law as any kind of law (the legal positivists) and those considering it as a source of international law (the rationalists)<sup>497</sup>. On the positivists' camp, for example, Prosper Weil<sup>498</sup> argues that soft law does not exist as there is either law or no law at all. According to Weil, there is a "normativity threshold" between non-legal and legal and between what is a norm and what is not<sup>499</sup>. Soft law is problematic because it does not fit neatly into any of the two categories (law/no law) and, by not allowing a clear distinction, it can, according to Prosper Weil, "destabilize the whole international normative system"<sup>500</sup>. In a similar vein, Jan Klabbers argues that the recognition of soft law would mean the end of public international law because of the

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<sup>494</sup> Michele Olivier, 'The Relevance of "Soft Law" as a Source of International Human Rights' (2002) 35(3) *Comp Int Law J South.Afr* 289, 298.

<sup>495</sup> Pierre-Marie Dupuy (n384) 422.

<sup>496</sup> *Ibid* 433-423.

<sup>497</sup> About legal positivism, see for example: Prosper Weil (n401); Jan Klabbers, 'Informal Instruments before the European Court of Justice' (1994) 31 *Common Mark Law Rev* 997. About rationalism, see for example: Gregory Shaffer and Mark Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minn Law Rev* 706, 707; Richard Baxter, 'International Law in "Her" Infinite Variety' (1980) 29(4) *ICLQ* 549; Kenneth Abbott and Duncan Snidal (n388) 421.

<sup>498</sup> Prosper Weil (n401).

<sup>499</sup> *Ibid* 415

<sup>500</sup> *Ibid* 423

difficult distinction between soft law and hard law<sup>501</sup>. Klabbers does not consider soft law as “real law” but does nevertheless consider that soft law may have legal effects<sup>502</sup>. Indeed, he concedes that soft law cannot be of total legal insignificance<sup>503</sup>. Jan Klabbers considers that soft law is meant to become hard law over time and so he argues that soft law can be seen as “presumptive law”<sup>504</sup>. Presumptive law means that an act is presumed to be hard law unless it is proved otherwise; if it is proven not to be hard law then it is non-law<sup>505</sup>.

On the rationalist camp, Kenneth Abbott and others identify three types of legalization depending on “the degree of *obligation*, *precision*, and *delegation* involved in a legal regime” and argues that the distinction is not so much between hard and soft law, but between harder law and softer law<sup>506</sup>. In order to have hard law all three criteria have to be present. “Hard legalization” corresponds to a situation when at least the *obligation* and *delegation* criteria are high<sup>507</sup>. In other words, for “hard legalization” the instrument must be legally binding and subject to judicial review and enforcement. When none of the criteria is met, there is no legalization. According to Abbot, soft law corresponds to everything in between hard law and no legalization, with various degrees of one or several criteria (but one criterion must be strong). “Hard legalization” is the hardest degree of soft law, the one that is the closest to hard law. It is the fact that all criteria do not have to be met that leads to the adoption of soft law in cases where hard law would be too costly for the parties involved<sup>508</sup>. Similarly, Richard Baxter argues that soft law is a source of international law that can have various levels of “intensity”<sup>509</sup>.

The question of whether soft law is a source of international law has also been disputed in the literature. It is widely accepted that Article 38 of the Statute of the International Court of Justice, which lists the sources of international law, is not exhaustive<sup>510</sup>. As

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<sup>501</sup> Jan Klabbers (n497) 998-999.

<sup>502</sup> Jan Klabbers, ‘The Redundancy of Soft Law’ (1996) 65(2) *NJIL* 167.

<sup>503</sup> *Ibid* 167.

<sup>504</sup> Jan Klabbers, ‘Law-Making and Constitutionalism’ 81 in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 115-116.

<sup>505</sup> *Ibid* 111-121.

<sup>506</sup> Kenneth Abbott and others, ‘The Concept of Legalization’ (2000) 54(3) *Int Organ* 401.

<sup>507</sup> *Ibid* 402.

<sup>508</sup> *Ibid*.

<sup>509</sup> Richard Baxter (n497) 566.

<sup>510</sup> Jean d’Aspremont, *Formalism and the Sources of International Law* (Oxford University Press Inc 2011) 149; Joost Pauwelyn, ‘Is It International Law or Not, and Does it Even Matter?’ 125 in Joost Pauwelyn, *Informal International Lawmaking* (Oxford 2012) 133; Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) 328; Hugh Thirlway, *The Sources of International Law* (Oxford 2014) 6.

we saw earlier, Declarations adopted by the General Assembly of the United Nations can have considerable significance in the development of whole branches of international law, and they are not mentioned as such in Article 38. Besides, States have increasingly committed themselves to instruments that are not listed as sources of international law in Article 38.

Article 38 rules that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Treaties are agreements concluded between States or International Organizations. Parties to a treaty are bound to certain obligations for which they are held accountable. International custom is defined in Article 38(1)(b) as “evidence of a general practice accepted as law”. There are two distinct types of customary law; the first type is *jus cogens* which is a norm from which no derogation is permitted<sup>511</sup> and that is globally accepted as such by the international community. The second type of customary law is not binding on all States but only on a group of States and covers general practice and the recognition of an instrument as law by a group of States<sup>512</sup>. Article 38 does not make the distinction between the distinct types of customary law. The notion of *jus*

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<sup>511</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, 1155 331, para 53. *Jus cogens* is a “peremptory normal of general international law”.

<sup>512</sup> Restatement (Third) of the Foreign Relations Law of the United States para 102(2) (1986). The exact definition given here is “customary practice of States followed from a sense of legal obligation”.

*cogens* was recognised later on by the Vienna Convention on the Law of Treaties, of 1969<sup>513</sup>.

In the case of judicial decisions or scholarly works, they are not direct sources of international law, but they contribute to recognizing and developing rules that exist already. According to Article 38, they are “subsidiary means for the determination of rules of law”. Per Article 59 of the Statute of the International Court of Justice, “the decision of the Court has no binding force except between the parties and in respect of a particular case”. Article 94(1) of the United Nations Charter adds that “each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”<sup>514</sup>. The Court has no means to enforce its decisions. The United Nations Security Council can decide to enforce a ruling from the Court according to Chapter XIV of the United Nations Charter<sup>515</sup>, but permanent members of the Security Council can use their veto in order to make the enforcement of such a decision impossible. The enforcement of the International Court of Justice ruling in the case *Nicaragua v United States*<sup>516</sup> was made impossible due to the use by the United States of its veto power<sup>517</sup>. Besides, the Security Council can only request the enforcement of a decision if “international peace and security” are at risk<sup>518</sup>. This shows that, in practice, the decisions of the International Court of Justice are not binding and usually do not create law. For this reason, Andrew Guzman and Timothy Meyer argue that the rulings of the International Court of Justice are soft law<sup>519</sup>.

The discussion about the use and meaning of soft law instruments is more recent in EU law than in international law, even though the first mention of soft law instruments can be found as far back as 1962 in relation to competition law<sup>520</sup>. In EU law there are three types of sources<sup>521</sup>. Primary sources are composed of Treaties and Related Acts

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<sup>513</sup> United Nations (n511).

<sup>514</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>515</sup> *Ibid.*

<sup>516</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, International Court of Justice (ICJ), 27 June 1986.

<sup>517</sup> Attila Tanzi, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ (1995) 6 *EJIL* 539, 544-545.

<sup>518</sup> United Nations (n514).

<sup>519</sup> Andrew Guzman and Timothy Meyer, ‘International Soft Law’ (2010) 2(1) *JLA* 171, 172.

<sup>520</sup> Oana Andrea Ștefan, ‘European Competition Soft Law in European Courts: a Matter of Hard Principles?’ (2008) 14(6) *ELJ* 753, 758.

<sup>521</sup> EUR-Lex - I14534 - EN, Sources of European Union law <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:I14534> ‘Accessed 1 November 2017’; Ursula Smartt, *Optimize Public Law* (Routledge 2014) 41.

and they have priority over the other categories of sources of law<sup>522</sup>. Secondary sources are composed of EU legislation including Regulations, Directives and Decisions. The label “tertiary sources” is sometimes used to categorize soft law instruments<sup>523</sup>. Soft law has to conform to primary and secondary sources as their non-binding nature puts them at the bottom of the legal hierarchy<sup>524</sup>. Soft law as a source of EU law is not unanimously recognised<sup>525</sup>. Article 288 of the TFEU<sup>526</sup> lists regulations, decisions and directives as binding legal acts adding that recommendations and opinions are not binding. We can infer from the fact that Treaties are not cited as a source of hard law that this list is not exhaustive. No mention of soft law is explicitly made in this article. It can be difficult to establish the difference between hard law and soft law in EU law as terminology is not sufficient to determine the legal nature of an act or instrument. Automatically associating the name and the nature of the act should be avoided<sup>527</sup>. Soft law instruments can be comprised of guidelines, resolutions, conclusions, communications, declarations, memoranda of understanding, strategies, action plans and reports etc. This list is not exhaustive and only gives examples of what can be considered as soft law, not meaning that all these instruments, in each particular case, fulfil the criteria to be considered as such.

Since the early 1990’s the EU was in favour of a deregulation in EU law-making<sup>528</sup>. The necessity to use soft law to ensure flexibility within the EU has been underlined in the Commission’s White Paper on Governance of 2001, putting the accent on “opening up the policy-making process” to promote “better involvement and more openness” as well as more responsibility<sup>529</sup>. The same year, the Commission suggested to apply the Open Method of Coordination to migration issues<sup>530</sup>. In this Communication, the Commission already declared that “an open procedure for coordination will lead to the identification of common objectives” aiming towards a common policy on asylum and immigration. Linda Senden argues similarly, underlining that the EU is aiming at restraining the creation of hard law to the strict minimum<sup>531</sup> attempting to use

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<sup>522</sup> Linda Senden (n334) 37.

<sup>523</sup> *ibid* 55

<sup>524</sup> *Ibid* 56

<sup>525</sup> *Ibid*.

<sup>526</sup> Consolidated Version of the Treaty on the Functioning of the European Union Article 288, 2008 OJ C 115/47.

<sup>527</sup> Filippa Chatzistavrou, ‘L’Usage du Soft Law dans le Système Juridique International et ses Implications Sémantiques et Pratiques sur la Notion de Règle de Droit [2005] <http://leportique.revues.org/591> ‘Accessed 17 January 2018’ 1, 7.

<sup>528</sup> Council Resolution (EC) C 224/5 on legislative and administrative simplification in the field of the internal market, OJ 1996.

<sup>529</sup> Commission of the European Communities (n176) 3-5.

<sup>530</sup> Commission of the European Communities (n175).

<sup>531</sup> Linda Senden, ‘Soft Law, Self-regulation and Co-regulation in European Law: Where do they Meet?’ (2005) 9(1) *EJCL* 1, 7.

alternative instruments such as soft law<sup>532</sup> to achieve this goal. The use of soft law is also seen as beneficial by the legal service team of the European Commission who argue in favour of a more extensive use of soft law<sup>533</sup>. According to the legal service, soft law is considered as a way to “guide” the transposition of secondary law at the Member States level and to insure uniformization between Member States<sup>534</sup>. The European Parliament, on the other hand, has been against the use of soft law since only a few years after its first appearance in EU law, arguing that it was being used to circumvent the decision-making process<sup>535</sup>.

#### 1.3.4.2.2. Criteria for the identification of soft law instruments

After discussing whether soft law is a source of law or not, in this subsection we will talk about the criteria usually employed when distinguishing between hard law, soft law and non-law. The different criteria proposed in the literature to identify soft law instruments and norms are not uniform and some criteria contradict each other. This is not surprising as there is no commonly agreed upon definition of soft law and authors often put forward their own definitions and criteria in relation to their own field of law. The main criteria used to distinguish soft law from hard law and from non-law are *obligation, bindingness, delegation, enforcement, precision, voluntary compliance, and the aim of the authors*. These criteria are not necessarily alternative, and they are often combined in the literature.

#### *Obligation*

Usually, the existence of an *obligation* suggests that a norm legally binds the parties<sup>536</sup>. Kenneth Abbott and Duncan Snidal<sup>537</sup> and later Fabien Terpan<sup>538</sup> use the criterion of *obligation* in order to determine if an instrument is of a soft law nature or not. We saw previously that Kenneth Abbott and others were using a combination of three criteria to determine if an instrument was hard law, soft law or non-law. These criteria are

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<sup>532</sup> Ibid 8

<sup>533</sup> European Commission, ‘Quality of Legislation Team, Complexity of EU Law in Domestic Implementing Process’, Service Juridique, Brussels, 3 July 2014.

<sup>534</sup> Ibid 8.

<sup>535</sup> Oana Andrea Stefan (n357) 888.

<sup>536</sup> Ibid 888.

<sup>537</sup> Kenneth Abbott and Duncan Snidal (n388) 423.

<sup>538</sup> Fabien Terpan (n353) 72-73.

*Obligation, Delegation and Precision.* According to Kenneth Abbott and others, when there is hard law then *obligation* must be high, as hard law involves the existence of a binding obligation and it has to be combined with *delegation*. When there is no law then there is no *obligation*. In the case of soft law, the terms of the instrument somehow bind parties. This means that the degree of legal *obligation* is lower than in the case of hard law and that there might be no combination with the *delegation* criteria.

According to Fabien Terpan, there are two types of soft law that can be taken from the literature. The first type of soft law is when there is a binding norm (*obligation*) with a soft dimension and the second type of soft law is a non-binding norm (no *obligation*) with legal relevance. Soft law is opposed to hard law where the norm is strictly binding. It is also opposed to non-law when there is a non-binding norm that is also without legal relevance<sup>539</sup>. According to Fabien Terpan, an obligation can have a soft dimension, this means that either the source or the content of the obligation is soft<sup>540</sup>. The source can be soft when the obligation is not included in a binding legal act, such as a Treaty, or if the way they are expressed is not clear. He gives the example of an “obligation to achieve a particular result” being stronger than a “best effort obligation”<sup>541</sup>. The only existence of an obligation is not sufficient in order to define soft law as the norm has to be enforceable. If the *obligation* is binding without a soft dimension, then it is hard law. The criterion of *obligation* is not used by Fabien Terpan to differentiate soft law from non-law.

Soft obligations can be subjective, which means that a State can still decide to what extent to abide by such obligations, if it does it at all<sup>542</sup>. This is what happens with international agreements that can be characterised as “political treaties”<sup>543</sup>. The latter are mainly related to war matters, as was the case with the Yalta Agreement and the Atlantic Charter<sup>544</sup>, and, in case of non-compliance by a State, there is no real possibility of enforcement. These agreements are still considered as being soft law. Richard Baxter adds to this list “joint statements of policy”<sup>545</sup>, arguing that the non-compliance with the soft obligations that they create cannot be seen as a “violation”

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<sup>539</sup> Ibid 71.

<sup>540</sup> Ibid 71-72.

<sup>541</sup> Ibid 73.

<sup>542</sup> Tadeusz Gruchalla-Wesierski, (A Framework for Understanding “Soft Law” (1984) 30 *McGill Law J* 37, 73; Baxter (n497) 551.

<sup>543</sup> Arnold McNair, *The Law of the Treaties* (1961) 513.

<sup>544</sup> Baxter (n497) 550.

<sup>545</sup> Ibid 551.



and therefore cannot be enforceable, since they are only based on the *will of the parties* to comply.

### *Bindingness*

Many definitions of soft law consider the criterion of *bindingness*. For example, Linda Senden, Daniel Thürer, Francis Snyder and Gustaaf Brochardt and Karel Wellens consider *bindingness* as a criterion to distinguish hard law from soft law<sup>546</sup>. Francis Snyder and Linda Senden consider rules of conduct, which are non-legally binding, as soft law instruments<sup>547</sup>. Gustaaf Brochardt and Karel Wellens also define soft law as rules of conduct that are *non-binding*, in the sense of justiciability, but which aim at having practical effects (and maybe legal effects)<sup>548</sup>. Alan Boyle, for example, defines soft law as non-legally binding instruments used by States and international organisations<sup>549</sup>. If an instrument is binding, it means that the parties to the agreement have to adhere to the obligations expressed in the instrument and any non-compliance with these obligations can lead to enforceable sanctions. If an instrument is binding in this sense, then it is hard law. Soft law instruments are usually non-binding; it can be difficult to distinguish between what is binding and what is not. It depends on the content of the instrument as well as the context in which the instrument is adopted. According to the ECJ Case, *French Republic v Commission of the European Communities*, it is the intention of the parties that determines whether or not an instrument is binding<sup>550</sup>. The International Court of Justice does not share this understanding, as we saw in the case *Qatar v Bahrain*<sup>551</sup>.

As we saw previously, Fabien Terpan uses the notion of *bindingness* to define hard law (fully binding norm), non-law (fully non-binding or non-binding without any legal relevance) and soft law (binding with a soft dimension or non-binding but with legal

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<sup>546</sup> Linda Senden (n531) 23-24; Daniel Thürer, 'The Role of Soft Law in the Actual Process of European Integration' 131 in Olivier Jacot-Guillarmod (eds), *L'Avenir du Libre-Echange en Europe: vers un Espace Economique Européen?* (Schultess Polygraphischer Verlag, Zürich 1990) 132; Gustaaf Borchardt and Karel Wellens, 'Soft Law in European Community law' (1989) 14(5) *Eur L Rev* 267, 285; Francis Snyder, 'Soft Law and Institutional Practice in the European Community' 198 in Stephen Martin (ed), *The Construction of Europe* (Springer 1994) 198.

<sup>547</sup> Linda Senden (n531) 23; Snyder (n546) 198.

<sup>548</sup> Borchardt and Wellens (n546) 285.

<sup>549</sup> Alan Boyle, 'Soft Law in International Law-Making' 118 in Malcolm D. Evans (ed), *International Law*, (Oxford University Press 2005) 141-157.

<sup>550</sup> Case C-233/02 *French Republic v Commission of the European Communities* [2004] I-02759 para 42.

<sup>551</sup> Case *Qatar v Bahrain* [1994] ICJ Rep 112.

relevance)<sup>552</sup>. In other words, soft law can cover binding and non-binding instruments according to him. However, he does not use *bindingness* as a criterion as such but uses bindingness in relation to the criterion *obligation*. He gives the examples of the Open Method of Coordination and the declarations and strategic documents of the Common Foreign and Security Policy (CFSP)<sup>553</sup>. He further remarks that if the instrument is non-binding there must be “an incentive to act in a specific way”<sup>554</sup>. He differentiates between *bindingness* and justiciability and takes the example of the instruments adopted in the fields of Justice and Home Affairs and of the Common Foreign and Security Policy. The policies adopted here aim to be considered as binding, but, since they are not conveyed by “hard law” instruments, they cannot be brought in front of the ECJ (or any other court). In this case, soft law instruments include binding norms which create only soft *obligations*.

This criterion does not distinguish soft law from hard law because hard law is always binding but soft law instruments can be binding too, depending on their content or the intention of the parties for example. Moreover, it does not distinguish soft law from non-law as non-law is non-binding like most of soft law instruments.

### *Delegation*

Kenneth Abbott and several other authors use the criteria of *delegation* to identify soft law<sup>555</sup>. To exist, hard law must combine at least a high level of *obligation* and *delegation*. Without *delegation* there is no hard law according to Kenneth Abbott and others Abbott and others also argue that in the case of soft law, there is no need for delegation, but delegation can define soft law as long as it is not combined with a hard obligation. Abbott’s *delegation* is a broad term that does not presuppose the *enforcement* of the rule. According to Oana Stefan, “[d]elegation means that the implementation, interpretation, application of the rules and conflict resolution is to be entrusted to third parties”<sup>556</sup>. Under *delegation*, third parties may be qualified to explain

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<sup>552</sup> Fabien Terpan (n353) 71.

<sup>553</sup> Ibid 77.

<sup>554</sup> Ibid.

<sup>555</sup> Kenneth Abbott and others (n506) 406.

<sup>556</sup> Oana Andrea Stefan, ‘Soft Law and Enforcement of EU Law’ 200 in Andras Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) 212.

and apply rules and find solutions to disagreements<sup>557</sup>. This criterion does not consider the content of the instrument as such, but rather the way disputes are settled in case of non-compliance to a norm or a set of norms. If there is no delegation and no other of the three criteria presented by Abbott and others, then there is no law.

The criterion of *delegation* was replaced, by Fabien Terpan for example, by *enforcement*.

### *Enforcement*

Hard law is directly *enforceable* in front of a court, whereas soft law and non-law are not. Usually, the *enforcement* mechanism in case of non-compliance with an obligation is foreseen in the instrument itself. This is, for example, the case of the UN Convention on the Law of the Sea that provides a specific dispute-settlement procedure<sup>558</sup>. According to Fabien Terpan, *enforcement* encompasses monitoring as well as more forceful instruments, such as judicial review and sanctions<sup>559</sup>. He distinguishes between “hard enforcement, soft enforcement and the absence of any enforcement mechanism”<sup>560</sup>. Hard enforcement covers cases where rules are under judicial review or under non-judicial control by international organisations (such as the World Trade Organisation for example) using a monitoring mechanism and specific conflict resolution procedures<sup>561</sup>. Soft enforcement concerns methods intended to guarantee conformity with the engagement taken without using pressure or coercion. This means that non-compliance will not be sanctioned by a court but rather could be brought before specialised committees such as the Human Rights Committee for non-compliance with human rights treaties. No enforcement covers the cases where the compliance only depends on the will of the parties. According to Fabien Terpan, *obligation* and *enforcement* must be analysed jointly. If both criteria are present then it is hard law, if none of the criteria is present then it is non-law, and if some level of *obligation* and/or *enforcement* exists then it is soft law<sup>562</sup>. On the other hand, Anthony

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<sup>557</sup> Daniel Sokol, ‘International Antitrust Institutions’ 187 in Andrew T. Guzmán, *Cooperation, Comity, and Competition Policy* (Oxford University Press 2011) 196-197.

<sup>558</sup> Alan Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’ (1997) 46 *ICLQ* 37, 38.

<sup>559</sup> Fabien Terpan (n353) 73.

<sup>560</sup> *Ibid* 73-74.

<sup>561</sup> *Ibid* 74.

<sup>562</sup> *Ibid*.

D'Amato argues that soft law is not enforceable and that: "A soft law system will allow an infraction to be cost-effective: that is, a violator of a norm of soft law may suffer a reputational loss, but reputational damage may be well worth the benefits that are derived from non-compliance with the norm"<sup>563</sup>.

The absence of *enforcement* does not distinguish soft law from non-law and the notion of *enforcement* is directly linked to the criteria of *bindingness* and *obligation* that characterize hard law.

### *Precision*

*Precision* refers to the way provisions are written in a given document. For example, they can be vague and ambiguous, in which case it is usually agreed that there cannot be an *obligation* resulting from them but only objectives, and therefore they are soft law and not hard law<sup>564</sup>. Applied to the hard law/soft law/non-law distinction, it is usually agreed that if an instrument is not precise then it is soft law<sup>565</sup>. For example, Michele Olivier defines soft law as an instrument with a "vague content" and an "imprecise scope"<sup>566</sup>. Soft law provisions are often imprecise to allow for interpretation and flexibility, but this is not always the case and some soft law instruments can be precise, such as for example, the decisions of the UN Human Rights Committee. Andrew Guzman and Timothy Meyer argue that the decisions of the UN Human Rights Committee are impacting States because they are drafted in a precise manner<sup>567</sup>. These instruments are soft law instruments even though they are *precise* in their wording. Moreover, *precision* is not a feature of all the provisions of hard law instruments<sup>568</sup> and all hard law provisions are open to interpretation by a court. Richard Baxter gave a broad definition of soft law, including legal acts having no real obligations due to the lack of precision of their content<sup>569</sup>. Other authors, such as Fabien Terpan, do not make any use of the *precision* criterion<sup>570</sup>.

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<sup>563</sup> Anthony D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials, A Reply to Jean d'Aspremont' (2009) 20 *EJIL* 897, 902.

<sup>564</sup> Jay Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2011) 25(2) *LJIL* 313, 317.

<sup>565</sup> Richard Baxter (n497); Jean d'Aspremont (n493) 1075; Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *ICLQ* 901, 906.

<sup>566</sup> Michele Olivier (n494) 294.

<sup>567</sup> Andrew Guzman and Timothy Meyer (n519) 172.

<sup>568</sup> For example, the use of the term "good faith" in hard law instruments which is a vague term.

<sup>569</sup> Richard Baxter (n497) 549.

<sup>570</sup> Fabien Terpan (n353) 73.

Lack of *precision* can be found in soft law instruments, but also in non-law and hard law instruments in some cases, consequently, this criterion does not help to differentiate soft law instruments from hard or non-law.

Ulrika Mörth's argues that the criteria of *obligation*, *precision*, *delegation* and *enforcement* cannot be used to understand soft law because they only work in combination with each other and the combinations are too numerous<sup>571</sup>. We argue that the criteria are of some use even if they must be combined in order to determine whether an instrument is soft law or not. Additionally, as put forth by Martha Finnemore and Stephen Toope, these criteria fail to capture the way "a sense of obligation might be generated"<sup>572</sup>. The next two criteria will try to grasp this concept.

### *Voluntary compliance*

Usually, hard law implies the compliance to an obligation and the non-compliance to this obligation can be sanctioned. The difference between soft law and hard law is the notion of "*voluntary*". In hard law, the compliance is not voluntary, and the non-compliance is sanctioned while in soft law parties abide by the rules because they want to. In the facts though, *voluntary compliance* is a feature of many international treaties, for example in the fields of human rights or environments<sup>573</sup>. These treaties are usually considered to be hard law. This criterion does not always clearly differentiate hard law from soft law.

Daniel Thürer considers that soft law concerns commitments which are more than policy statements but less than hard law<sup>574</sup>. Commitments imply a notion of *voluntary compliance* to the instrument. The status of a political declaration is not always well defined and can lead to debates as was the case of the second Strategic Arms Limitations Treaty (SALT II) between the United States and the Soviet Union, of 1979. Even though the treaty had not been ratified, then President of the United States,

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<sup>571</sup> Ulrika Mörth, *Soft Law In Governance and Regulation: An interdisciplinary Analysis* (Cheltenham: Edward Elgar Publishing 2004) 6.

<sup>572</sup> Martha Finnemore and Stephen Toope, 'Alternative to "legislation": Richer Views of Law and Politics' (2001) 55 *Int Organ* 743, 748.

<sup>573</sup> Beth Simmons and Richard H. Steinberg, *International Law and International Relations: An International Organization Reader* (Cambridge University Press 2007) 192.

<sup>574</sup> Daniel Thürer (n546) 132.

Ronald Reagan, declared that “the United States would voluntarily abide by SALT II as long as the Soviet Union did”<sup>575</sup>. Both countries *voluntarily complied* with the SALT II Treaty even though it was non-binding and non-enforceable as it was never ratified. The only reason they complied was that of their own will to do so. Fabien Terpan links *voluntary compliance* to soft *enforcement*. He gives the example of the General Agreement on Tariffs and Trade, of 1947, which was followed on a fully voluntary basis for many decades but where no action could be taken against a State that would not comply with the terms of the agreement<sup>576</sup>.

But on the other hand, voluntary compliance is also common for non-law, such as moral rules and rules of etiquette<sup>577</sup>. Rules of conduct can also be an example, as parties commit to abide by the rules in the absence of an enforcement mechanism. Even though there are no enforcement mechanisms there can be other types of moral enforcement pushing parties to follow a specific set of rules. The difference between soft law and hard law is the notion of “*voluntary*”. In hard law, the compliance is not voluntary, and the non-compliance is sanctioned while in soft law parties abide by the rules because they want to. In the case of soft law and non-law the criterion seems to fail to distinguish between the two as in both cases the parties chose to obey freely.

### *Aim of the authors*

If the *aim of the authors* is to have a non-binding soft law instrument, it usually will be. As indicated previously, in the case *French Republic v Commission of the European Communities*, the Court of Justice of the European Union declared that it is the intention of the parties that determines whether a soft law instrument is binding or not<sup>578</sup>. It is not always easy to determine what the intention of the authors was. In the case *The Netherlands v Council and Commission of 1996*<sup>579</sup>, the ECJ addressed an issue raised *a propos* the Code of Conduct adopted by the Council concerning public access to Council documents. The Netherlands argued that the Code of Conduct was merely a political instrument. The Court agreed, holding that the Code of Conduct was

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<sup>575</sup> Andrew Guzman and Timothy Meyer (n519) 173.

<sup>576</sup> Fabien Terpan (n353) 73.

<sup>577</sup> Gunther Siegmund Stent, *Paradoxes of Free Will* (American Philosophical Society 2002) 179-180.

<sup>578</sup> Case C-327/91 *French Republic v Commission of the European Communities* [1994] ECR I-03641 para 42.

<sup>579</sup> Case C-58/94 *The Netherlands v Council and Commission* [1996] ECR I-2169, para 24, 27 and 38.

“simply the expression of purely voluntary coordination”, designed to prevent differences between the Council and the Commission on the public access to Council and Commission documents. Therefore, the court agrees that the Code of Conduct should not be annulled as it cannot have legal effects.

The aim of the authors when adopting a hard law instrument is clearly to be legally binding which distinguishes it from soft law instruments that aim at being non-binding. The distinction between soft law and non-law according to this criterion can be a bit more difficult to draw as both can be aimed at being non-binding. The difference lays in the *will of the authors* to create a change. It is the creation of a goal which is reached through the implementation of the instrument that differentiates it from a purely informative (non-law) instrument, for example. The combination of the creation of this “soft goal” and the voluntary compliance to reach the goal creates what Martha Finnemore and Stephen Toope, call “a sense of obligation”<sup>580</sup>.

#### 1.3.4.2.3. Applying the criteria to Mobility Partnerships

As mentioned when discussing the structure of Mobility Partnerships, the text of the Joint Declaration stipulates that “the provisions of this joint declaration and its Annex are not designed to create legal rights or *obligations* under international law”<sup>581</sup>. However, the fact that parties decide to be part and implement or not a Mobility Partnership can be linked to the existence of a *soft obligation*. This *soft obligation* will then depend on the will of the parties to comply (*voluntary compliance* criteria).

The Commission has always presented Mobility Partnerships as *non-binding* political declarations<sup>582</sup>. To date, neither the Commission nor any State party have been forced to implement a project proposed in the Annex. According to officials from DG Home<sup>583</sup> as well as of the EEAS<sup>584</sup>, it would not be possible or even suitable to legally *enforce* the implementation of Mobility Partnerships projects, since Mobility Partnerships are

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<sup>580</sup> Martha Finnemore and Stephen Toope (n572) 748.

<sup>581</sup> Council of the European Union, ‘Joint Declaration Establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States’ 6139/13 ADD 1 REV 1, Brussels, 12 April 2013 1, 12; Council of the European Union, ‘Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde’ 9460/08 ADD2, Brussels, 21 May 2008 1, 7.

<sup>582</sup> Commission of the European Communities (n305) 4.

<sup>583</sup> Interview 3 (n454).

<sup>584</sup> Interview 2 EEAS, Brussels (by phone), 15 October 2015.

soft law instruments and would be inadmissible in front of a court. According to Carrera and Hernández I Sagrera, it seems that neither the ECJ nor Member States' courts are competent to control and *enforce* the implementation of Mobility Partnerships<sup>585</sup>. The provisions included at the end of the instrument withdraw the possibility of punishing "breaches of commitments"<sup>586</sup>. However, as argued in the previous section, if Mobility Partnerships are found to have legal effects the ECJ could be competent. It is the act of implementation that gives the starting point to an eventual legal or practical effect of the project. As long as the project is not implemented nothing happens, it is only a *non-binding*, declarative, proposition. Once a project is being implemented, through the actions taken for its implementation legal effects can occur. In this case, once a project has been implemented, and if there is a direct legal effect resulting from it, then the ECJ could be competent.

Arguably, there can still be "*soft*" *enforcement*<sup>587</sup>, such as political or financial pressure that can be put on the different parties. As stated by Anthony D'Amato, a consequence of the non-compliance with the Mobility Partnership, or the non-implementation of projects, could be reputational damages on the non-complying party<sup>588</sup>. If we take, for example, the case of a Member State that proposed a project opening legal migration possibilities for the third country but which, because of the start of the economic crisis, eventually abandoned the project, the "reputational damage", if it exists, will be minimal compared to the burden of having to accept a certain number of immigrants in a disfavourable context. Financial pressure also do not seem to be efficient to push Member States to act in one way or the other. For example, the EU decided to allocate funding to projects proposed jointly by several countries<sup>589</sup> to enhance cooperation between different countries but most of the projects in the Annexes to the Joint Declarations are still bilateral. Financial pressures were not sufficient to convince Member States to cooperate. "*Soft*" *enforcement* applied to Member States is not working, but it could be more efficient when applied to the third country.

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<sup>585</sup> Sergio Carrera and Raül Hernández I Sagrera (2011) (n2) 106.

<sup>586</sup> Natasha Ward (n380) 146.

<sup>587</sup> Fabien Terpan (n355) 74.

<sup>588</sup> Anthony D'Amato (n563).

<sup>589</sup> Interview 2 (n584).



The main tool of “*soft*” *enforcement* with third countries lays in conditionality mechanisms. Conditionality is not a new tool used by the EU. Since the early 1990’s, the EU uses the “standard” conditionality in its relations with third countries<sup>590</sup>. In this case, the EU can use conditionality (even sometimes negative conditionality) to push third countries to follow and implement policies that are favourable to the EU and which often include the fight against irregular migration<sup>591</sup>. Sandra Lavenex and Nicole Wichmann argue that the negotiation of Mobility Partnerships is based on conditionality and the existence of effective incentives for the third country<sup>592</sup>. Carrera and Hernández I Sagrera add that conditionality puts a much higher pressure on the third country than on Member States’ participation<sup>593</sup>. A new “more for more” strategy was presented in 2011, based on three main components: institution building, greater involvement of citizens and civil society, and higher growth and sustainable and inclusive economic development<sup>594</sup>. The “more for more” conditionality was included later in Mobility Partnerships, after the Arab Spring uprisings, as the EU realised that they would need to propose more positive incentives to third countries in order to increase cooperation on migration<sup>595</sup>. As this cooperation is important for the EU it is willing to pursue a more positive approach to conditionality<sup>596</sup>. The new “more for more” conditionality strategy included financial and technical assistance, trade and mobility incentives<sup>597</sup>.

The criterion of *delegation* seems more appropriate in the case of Mobility Partnerships than *enforcement*. DG Home is coordinating the general implementation of the Mobility Partnerships. It is also in charge of keeping the partnership dynamic. The EU Delegation based in the third country works in close cooperation with the offices of DG Home in Brussels and with all the implementing partners in the field. DG Home makes the link between the third country and the Member States. We can argue that in case of disputes or failure to implement projects the officials of DG Home will arguably be in charge to find solutions or to find ways to incentivize Member States to be more active.

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<sup>590</sup> Standard conditionality refers to aid conditionality. See: Elena Fierro, *European Union’s Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 94-95; Katharina Tomasevski, *Between Sanctions and Elections: Aid Donors and their Human Rights Performance* (London Pinter 1997) 9-10.

<sup>591</sup> Rosa Balfour, ‘EU Conditionality after the Arab Spring’ (2012) European Institute of the Mediterranean; European Commission (n264) 15.

<sup>592</sup> Sandra Lavenex and Nicole Wichmann (n240) 93.

<sup>593</sup> Sergio Carrera and Raúl Hernández I Sagrera (2009) (n2) 2.

<sup>594</sup> Macarena Nuño (n64) 15.

<sup>595</sup> Rosa Balfour (n591) 21.

<sup>596</sup> *Ibid* 22.

<sup>597</sup> *Ibid* 21.

Mobility Partnerships' Joint Declarations are meant to be a "living document", which means that they change and therefore cannot be *precise*. Parties join Mobility Partnerships on a voluntary basis and therefore arguably propose initiatives that they consider of interest. It is to be expected that a country that chooses to participate will commit to it. Moreover, the flexibility of the tool allows countries to adjust their participation to their policy priorities. Most Mobility Partnerships have led to the implementation of projects which can be seen as additional proof of voluntary compliance as no enforcement mechanism exists. In the case of the Mobility Partnerships with Cape Verde and with Morocco, projects have been implemented and new projects proposed after their conclusion. The fact that all parties continue to work towards achieving at least some of the goals set in the Joint Declarations over a time span of several years is arguably proof of their commitment and of their *voluntary compliance* to the Mobility Partnership. The *aim of the authors* to have a soft law instrument is clear and the analysis of the content of the Joint Declarations goes in this direction. There is no doubt that the intention of the parties leans in favour of a *non-binding* instrument. The analysis of the wording of the Joint Declarations, the mention that "the provisions of this joint declaration and its Annex are not designed to create legal rights or *obligations* under international law" clearly demonstrates that point.

Mobility Partnerships are *non-binding*, in accordance to the *aim of the authors*, so they do not create *obligations* for the parties to the agreement and are therefore not *enforceable*. Even without being *enforceable*, we can argue that DG Home plays a role in *delegation*. The parties decided voluntarily to conclude a Mobility Partnership presumably because the objectives of the instrument coincided with their policy orientations. Parties are also *voluntarily complying* with the instrument and, although no action can be taken against a State, or the EU, unwilling or incapable of complying, the fact is that projects are being implemented and new initiatives proposed. Cape Verde and Moldova, the pilot Partnerships, illustrate this *voluntary compliance* since 2008.

### 1.3.4.3. The legal and policy relevance of Mobility Partnerships

Many authors distinguish between legally binding instruments and instruments susceptible to produce legal effects. As noted by Linda Senden, soft law instruments can potentially have legal effects<sup>598</sup>. This means that an instrument does not need to be legally binding in order to produce legal effects. Snyder also argues that legal effects are not linked to the fact that an instrument is legally binding<sup>599</sup>. Filippa Chatzistavrou made the distinction between the non-legally binding criteria and the possible effects of soft law<sup>600</sup>. The recognition of the potential legal effects of soft law is not new, since already in 1971, the ECJ held, in *ERTA*, that instruments that are not legally binding can still have legally binding force or legal effects<sup>601</sup>.

Legal effects usually entail the ability to develop rights and obligations<sup>602</sup>. Snyder proposed a complete list of the legal effects that soft law instruments may have<sup>603</sup>. According to this list, soft law can be used in and outside of a court of law. In a court of law, soft law can either interpret hard law (its most common function), be used in litigation, provide bases for judicial review or be itself the object of judicial review and be annulled. A soft law instrument can be annulled if it was concluded to replace a law and was intended to have legal effects. In the Case *France v Commission*, of 1990<sup>604</sup>, the ECJ ruled that soft law instruments that create new obligations lack a legal basis and are therefore to be annulled. The Commission, for its part, acknowledged the “Guidance document” on Article 6(4) of Directive 92/43/EEC, of May 1992 (“Habitats Directive”) that legal action may be taken against a non-binding instrument (such as an opinion) in case of non-conformity with EU law<sup>605</sup>. Moreover, soft law instruments can also have legal effects outside of a court. They can, for example, provide the normative framework for future hard law negotiations, bring legal certainty to existing hard law and influence rights and obligations of third parties to an agreement.

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<sup>598</sup> Linda Senden (n531) 23.

<sup>599</sup> Francis Snyder, ‘Interinstitutional Agreements: Forms and Constitutional Limitations’ 453 in Gerd Winter (ed), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos, Baden-Baden 1996) 461-463.

<sup>600</sup> Filippa Chatzistavrou (n527) 7.

<sup>601</sup> Case 22/70 *ERTA* [1971] ECR 263.

<sup>602</sup> Trevor Hartley (n340).

<sup>603</sup> Francis Snyder (n599) 463.

<sup>604</sup> Case C-366/88 *France v Commission* [1990] ECR I-03571.

<sup>605</sup> Guidance document on Article 6(4) of the “Habitats Directive” 92/43/EEC, January 2007 1, 24.

It has also been argued that soft law instruments can have effects on policy or “practical effects”, which are extra-legal. The practical effects of soft law are usually associated in the literature with the changes that soft law may engender in the behaviour and practices of the Member States, varying from policy changes to more subtle changes at the level of discourse, implementation of policies or existing laws<sup>606</sup>. Snyder defines soft law as: “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects”<sup>607</sup>. According to Linda Senden, soft law instruments are “[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect - legal effects, and that are aimed at and may produce practical effects”<sup>608</sup>. Several other authors also recognise the potential practical effects of soft law<sup>609</sup>. For example, it has been argued that the Open Method of Coordination can have effects on social policy<sup>610</sup>. Another area where soft law instruments can have practical effects is, according to Snyder, the area of European integration<sup>611</sup>. In this thesis, we are discussing the legal and policy relevance of Mobility Partnerships. This includes the development of new laws, new policies as well as changes in official discourses, behaviours and implementation of existing laws.

*Legal and policy relevance* is the terminology adopted in this thesis. The term *relevance* implies some “reasonable connection” with something. In the Oxford dictionary, relevance is defined as “[t]he quality or state of being closely connected or appropriate”. According to the Cambridge dictionary, relevance is “the degree to which something is related or useful to what is happening or being talked about”. In this thesis we are discussing to what extent the implementation of Mobility Partnership projects are linked to the legal and policy developments occurring in a third country. Legal relevance includes potential legal effects of Mobility Partnerships, but also some practical effects. Practical effects can in other cases be equated to policy relevance. There could be policy relevance if Mobility Partnerships are used by the third country as a tool to support a domestic political agenda.

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<sup>606</sup> Kerstin Jacobsson, ‘Between Deliberation and Discipline: Soft Governance in the EU Employment Policy’ 81 in Ulrika Mörth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham: Edward Elgar Publishing 2004) 89.

<sup>607</sup> Francis Snyder (n546) 198.

<sup>608</sup> Linda Senden (n531) 23.

<sup>609</sup> Ulrika Mörth (n571) 4; Gustaaf Borchartd and Karel Wellens (n546) 285.

<sup>610</sup> David Trubek and Louise Trubek, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination’ (2005) 11(3) *ELJ* 343, 343.

<sup>611</sup> Francis Snyder (n546) 198.

According to Oana Andrea Stefan, practical effects “were generally linked in the literature with the transformations that soft law may generate in the behaviour and practices of the Member States ranging from policy changes to subtler changes at the level of discourse, understanding and policy principles”<sup>612</sup>. This type of practical relevance is comprised under policy relevance. Practical effects can also include the way the law is being implemented and, in this case, it is included under legal relevance. The term legal relevance is often related to the notion of evidence in the American system, but this is not the understanding that we have of the notion of *legal relevance* here<sup>613</sup>. The term *legal relevance* has previously been used in relation to soft law. Fabien Terpan for example, uses the expression “*legal relevance*” in order to distinguish soft law from hard law or no law at all<sup>614</sup>. The understanding of Fabien Terpan of the notion of legal relevance is narrower than the one that we have of the term in this thesis. According to Fabien Terpan, legal relevance equals direct legal effects that soft law can have when used in court. Our definition of *legal relevance* includes such direct legal effects but is broader than that.

Despite its non-binding nature, several authors have observed that Mobility Partnerships can have concrete legal implications especially regarding visa facilitation and readmission<sup>615</sup>. The logic behind this is that Mobility Partnerships often combine interests from both the EU (e.g.: an effective readmission policy of third countries) and third countries (e.g.: access for its nationals to the territory of the EU through visa facilitation). These could be considered as direct intended effects. The projects designed to achieve these specific goals are the exception. The vast majority of projects has potential indirect effects as they do not directly aim at creating hard law or a specific policy but may lead to its creation indirectly. Despite the absence of enforcement mechanisms of these partnerships, their *quid-pro-quo* nature may ensure sufficient political will on the part of the partner third country to implement the required legal changes in its domestic legal orders.

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<sup>612</sup> Oana Andrea Stefan (n357) 879, 881.

<sup>613</sup> Rosemary Pattenden, ‘The Discretionary Exclusion of Relevant Evidence in English Civil Proceedings’ (1996) 1 *Int’l J Evidence & Proof* 361; John Woods and Dov Gabbay, ‘Relevance in the Law: a Logical Perspective’ 261 in Dov Gabbay and others, (eds) *Approaches to Legal Rationality* (Dordrecht: Springer 2010).

<sup>614</sup> Fabien Terpan (n353) 71.

<sup>615</sup> Sergio Carrera and others, ‘Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020’ (2011) Policy Brief No 240, CEPS 1, 6.

As previously noted, the parties to the Mobility Partnerships did not aim at creating rights and obligations. Even though Mobility Partnerships are not expected to create rights, their implementation can have direct/indirect legal and policy relevance with repercussions for the way in which migrants are granted rights and/or can exercise their rights. Because the Annex to the Joint Declarations is a living document, Mobility Partnerships change over time as well as their consequences. Legal and policy relevance can be consequences of Mobility Partnerships. Hussein Kassim and Patrick Le Galès argue that not only the consequences can change but also the power structure between the different parties<sup>616</sup>. They add that the “adoption of instruments is likely to produce indirect unintended consequences”<sup>617</sup>. Sarah Wolff adds that migration policy instruments “do not always respond to the original intended effect and can escape the objectives assigned to them”<sup>618</sup>. Even though Mobility Partnerships are not designed to create rights and obligations, due to their evolving structure, they can become relevant. The negotiation of Mobility Partnerships means that political priorities are translated into projects, to which resources are allocated and which aim at creating results.

The *external effects* relate to legal effects on the legal orders of partner third countries<sup>619</sup>. The *external effects* of EU law have been discussed from different perspectives. A first example is “territorial extension” where the EU tries to impose EU law on activities that are happening abroad<sup>620</sup>. Secondly, Anu Bradford discusses the normative power of the EU at the global level, also called “The Brussels Effect”<sup>621</sup>. Thirdly, third countries can voluntarily decide to adopt EU’s institutional model<sup>622</sup>. But on the contrary, the EU can also actively try to impose its norms to third countries<sup>623</sup>. Sandra Lavenex has also observed the existence of external effects for Eastern Countries related to European integration<sup>624</sup>. The enlargement had direct consequences for these countries, since it required reforms to their border regime, for

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<sup>616</sup> Hussein Kassim and Patrick Le Galès, ‘Exploring Governance in a Multi-Level Polity: A Policy Instruments Approach’ (2010) 33(1) *West Eur Politics* 1, 8.

<sup>617</sup> *Ibid* 13.

<sup>618</sup> Sarah Wolff, ‘The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey’ (2014) 16 *EJML* 69, 94.

<sup>619</sup> Bart Van Vooren (n2) 181.

<sup>620</sup> Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2013) 62(1) *Am J. Comp Law* 87.

<sup>621</sup> Anu Bradford, ‘The Brussels Effect’ (2012) 107(1) *Northwest University Law Rev* 1.

<sup>622</sup> Anja Jetschke and Philomena Murray, ‘Diffusing Regional Integration: the EU and Southeast Asia’ (2012) 35(1) *West Eur Politics* 174.

<sup>623</sup> Tobias Lenz, ‘Spurred Emulation: The EU and Regional Integration in Mercosur and SADC’ (2012) 35(1) *West Eur Politics* 155.

<sup>624</sup> Sandra Lavenex (n209) 89.

example. When looking at the external effects of Mobility Partnerships we look at the effects these instruments have on the policy or legal framework of the third country party to the agreement. This is a critical issue as it touches directly on the sovereignty of a third country. What we discuss is whether Mobility Partnerships can be relevant for the development of the legal framework of a third country through the implementation of the projects listed in the Annex to the Joint Declarations.

Sandra Lavenex and Emek Uçarer use the term “externalities” when referring to effects of EU policies on third countries<sup>625</sup>. They argue that these external effects can result from EU intended policy transfer or be the unintended result of policy diffusion or policy learning. The effects can be intended or unintended results of the common asylum and migration policies, particularly the result of stricter border controls or the fight against irregular migrants, which are bound to lead to changes in migration routes and/or the rise in the number of migrants and asylum seekers who settle in third countries<sup>626</sup>. According to Sandra Lavenex and Emek Uçarer, the effects of EU policies on third countries can happen voluntarily, through opportune conditionality, or under pressure from the EU through inopportune conditionality. External effects can result from firm action from the EU and the Member States to implement their migration policy in the third country. The authors note, that, although in some cases third countries are put under pressure to adapt to EU policies, this does not mean that such adaptation is always opposite to the domestic priorities of the third country<sup>627</sup>. When applying these distinctions to Mobility Partnerships we can consider that there can be a “differentiated relevance” of Mobility Partnerships. Differentiated relevance means that in some cases legal and policy changes can be imposed by the EU but in other cases the EU can support them according to the will of the third country. The level of influence of the EU in the legal and policy developments as well as in the content of the new legal acts or policies can be differentiated depending on external factors.

Sandra Lavenex and Emek Uçarer underline conditionality as a main factor influencing the existence of external effects<sup>628</sup>. Sandra Lavenex and Frank Schimmelfennig add that three factors can lead to external effects of EU migration policy: “institutions,

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<sup>625</sup> Sandra Lavenex and Emek Uçarer, *Migration and the Externalities of European Integration* (Lexington books 2003) 8.

<sup>626</sup> Ibid.

<sup>627</sup> Ibid 11.

<sup>628</sup> Sandra Lavenex and Emek Uçarer (n240) 424-425.

power, and domestic structure”<sup>629</sup>. “Institutions” relates to the fact that the EU gained in competences over migration issues, “power” includes issues of conditionality and geopolitics and “domestic structures” includes the administrative capacity of a third country. They add that unintended external effects can be explained by factors such as the promotion of economic development, education and frequent contacts between the EU, Member States and a third country<sup>630</sup>. Several other factors have been observed in the literature which can potentially influence the externalisation of EU immigration policy. Christina Boswell identifies three factors: the potential to meet migration goals, the institutional structures and the electoral pressures<sup>631</sup>. Jean-Pierre Cassarino argues that cooperation with third countries on migration issues<sup>632</sup> can depend on four factors, which are often combined: “geographic proximity”, “the level of migration salience” which relates to the postcolonial ties between an EU member State and a third country, “incentives and conditionality” and “the positions of relative power certain non-EU states” has<sup>633</sup>. This last factor relates to the power of negotiation of a third country linked to its geopolitical importance for the EU.

Stefan Brocza and Katharina Paulhart argue that it is impossible to solely link developments in the third country to the implementation of the Mobility Partnership and that “surrounding factors” can influence these developments<sup>634</sup>. However, they do not give details on what these “surrounding factors” could be. Meng-Hsuan Chou presents the contextual factors that have led to the decision to conclude Mobility Partnerships<sup>635</sup>. The first factor underlined by Meng-Hsuan Chou is also the institutional factor, presented by Sandra Lavenex and Frank Schimmelfennig, but she puts it in parallel with the interests of Member States particularly on legal migration issues. The second factor is linked to the need to propose incentives to third countries in exchange of their cooperation in the readmission of irregular migration. This can be achieved through conditionality. Daniel Wunderlich argues that implementation dynamics, in the field of EU external migration policy, are related to the understanding of a problem and the way it can be influenced by other organisations, called “distributional factors”, the

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<sup>629</sup> Sandra Lavenex and Frank Schimmelfennig, ‘EU Rules Beyond EU Borders: Theorizing External Governance in European Politics’ (2009) 16(6) *J Eur Public Policy* 791, 792.

<sup>630</sup> *Ibid* 891-892.

<sup>631</sup> Christina Boswell (n197) 620.

<sup>632</sup> Jean-Pierre Cassarino takes the case of readmission agreements.

<sup>633</sup> Jean-Pierre Cassarino, ‘A Reappraisal of the EU’s Expanding Readmission System’ (2014) 49(4) *The International Spectator* 130, 135.

<sup>634</sup> Stefan Brocza and Katharina Paulhart (n432) 4.

<sup>635</sup> Meng-Hsuan Chou (n395).



political context and organisational factors including administrative capacity<sup>636</sup>. Daniel Wunderlich adds that the organisational factor is the predominant one in influencing the implementation dynamics<sup>637</sup>. Natasja Reslow gives a list of factors potentially influencing the implementation of Mobility Partnerships<sup>638</sup>. These factors are the following: tractability of the problem, nature of change required, clarity of policy objectives, financial and organisational resources for implementation, relationship between implementing agencies, disposition of implementing officials and the implementation context<sup>639</sup>.

We can see that several factors can be combined either because they overlap or because different denominations refer to similar notions. This is the case for example of conditionality and power of negotiation, or for example, “migration salience” and frequent contacts between the EU, Member States and a third country which can be included under the state of relations between Member States and a third country. In this thesis the focus will be put on the three factors considered as being the most influential. These three factors are the state of relations between third countries and EU Member States, the power of negotiation and the administrative capacity of third countries. After testing whether Mobility Partnerships, albeit soft law, can be relevant for legal and policy developments in the partner third countries, we will test whether the three factors that we propose can condition that relevance.

### *State of relations between third countries and EU Member States*

Several of EU Member States are former colonial empires which keep privileged relations with their former colonies, through cultural, political and economic cooperation. It is often argued in the literature that the cooperation between the EU and third countries which are former colonies is strongly influenced by the existence of postcolonial ties that they have with specific Member States<sup>640</sup>. Meng-Hsuan Chou and Marie Gibert argue that postcolonial ties are the key of entry for third countries to the

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<sup>636</sup> Daniel Wunderlich, ‘The Limits of External Governance: Implementing EU External Migration Policy’ (2012) 19(9) *J Eur Public Policy* 1414.

<sup>637</sup> *Ibid* 1419.

<sup>638</sup> Natasja Reslow (n455) 122.

<sup>639</sup> *Ibid*.

<sup>640</sup> Marie Gibert, ‘The New European Security Architecture: An Example of “Messy Multilateralism”?’ 179 in Tony Chafer and Gordon Cumming (eds), *From Rivalry to Partnership? New Approaches to the Challenges of Africa* (Aldershot Ashgate 2011); James Mayall, ‘The Shadow of Empire: The EU and the Former Colonial World’ 292 in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press 2005).

EU policy discussions, increasing the likelihood of third countries being in line with the specific Member State's objectives<sup>641</sup>. To a considerable extent, the relations between the EU and Africa were built on these postcolonial ties between its Member States and their former African colonies. The existence of historical relations with individual Member States can impede the adoption of agreements at the EU level if these EU agreements are not favourable to the existing, postcolonial, bilateral relations. This can be explained by the fact that Member States have different interests linked to their historical past. For example, Meng-Hsuan Chou and Marie Gibert wonder if the unsuccessful conclusion of the Mobility Partnership with Senegal could be related to the reluctance of France to conclude the partnership<sup>642</sup>. Senegal, a former French colony, had a close relationship with France at the time of the negotiation of the Mobility Partnership. Not only was it France's largest recipient of development aid and its third major trade partner in West Africa<sup>643</sup> but they also have good diplomatic relations and the French Embassy in Dakar is one of the largest in the world.

Additionally, Agnieszka Weinar argues that, before the launch of the GAM, the EU had not started discussions with Africa on migration issues, as this was undertaken "by a few Member States, mostly with colonial past"<sup>644</sup>. The negotiations in the framework of the GAM suggest that cooperation with Africa is mostly of interest to former colonial powers and the Mediterranean Member States<sup>645</sup>, and that EU's cooperation on migration issues is impeded by its "weak position" towards third countries that prefer negotiating through existing bilateral relations with the Member States and particularly with their former colonial powers<sup>646</sup>. Meng-Hsuan Chou and Marie Gibert concur with the claim that third countries prefer discussing migration issues at the bilateral level rather than the EU level<sup>647</sup>. However, they put forth the argument that bilateral cooperation is not always conducted between a Member State and a former colony; bilateral cooperation can exist outside of bilateral ties<sup>648</sup>. James Hampshire argues that it is the multiplicity of Member States' interests on migration issues rather than

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<sup>641</sup> Meng-Hsuan Chou and Marie Gibert (n368) 415.

<sup>642</sup> *Ibid* 415.

<sup>643</sup> 'France/Africa: Remaking an Old Relationship' (2009) *Africa Confidential* 50(18).

<sup>644</sup> Agnieszka Weinar, 'Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges: Learning from experiences', EU-US Immigration Systems 2011/02, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2011 1, 5.

<sup>645</sup> *Ibid* 6.

<sup>646</sup> *Ibid* 14.

<sup>647</sup> Meng-Hsuan Chou and Marie Gibert (n368) 418.

<sup>648</sup> *Ibid* 419.

postcolonial ties that gives the EU a difficult position in cooperating with third countries on these questions<sup>649</sup>.

As it has been pointed out in the literature, countries that have recently gained their independence from colonial powers have comparable migration models<sup>650</sup>. Heinz Fassmann and Rainer Munz argue that migration is influenced by “cultural and political affinities rooted in history”<sup>651</sup>. Due to a shared cultural and linguistic background as well as administrative, education and trade systems built on the same model, special links exist between the former colonies and the former colonial powers which make migration flows particularly likely between them<sup>652</sup>. The enduring relevance of postcolonial ties has been questioned in the literature. Simona Vezzoli argues that time can affect the relevance of postcolonial ties<sup>653</sup>. She believes that when the former colony goes through reforms such as the change of the national language for example<sup>654</sup>, it can lead to looser ties. The former colony can then decide to have closer links with another country which can also impact the strength of postcolonial ties<sup>655</sup>. Geographical location also explains a strong interest of Southern European countries for Northern Africa and the Mediterranean region<sup>656</sup>.

The concept of “migration salience” characterizes postcolonial relations between a Member State and a third country where a consequent group of immigrants reside in the territory of the former colonial power and where movements of people between the former colony and the Member State are frequent<sup>657</sup>. This is the case of France and Morocco as well as Portugal and Cape Verde. Jean-Pierre Cassarino argues that “migration salience” can hinder the cooperation between a Member State and its former colony on migration issues<sup>658</sup>. Cassarino argues more specifically that the

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<sup>649</sup> James Hampshire, ‘Speaking with One Voice? The European Union’s Global Approach to Migration and Mobility and the Limits of International Migration Cooperation’ (2016) 42(4) *J Ethn Migr Stud* 571, 576.

<sup>650</sup> Heinz Fassmann and Rainer Munz, ‘Patterns and Trends of International Migration in Western Europe’ (1992) 18(3) *Popul Dev Rev* 457; Marc Hooghe and others, ‘Migration to European Countries: A Structural Explanation of Patterns’, 1980–2004 [2008] *Int Mig. Rev* 476; Douglas Massey and others, *Worlds in Motion: Understanding International Migration at the End of the Millennium* (Oxford: Clarendon Press 1998).

<sup>651</sup> Fassmann and Munz (n654) 464.

<sup>652</sup> Douglas Massey and others, ‘Theories of International Migration: a Review and Appraisal’ [1993] *Popul Dev Rev* 431, 447-448.

<sup>653</sup> Simona Vezzoli, ‘The Role of the State in International Migration: Exploring the Transition from Colony to Independence’ (2014) IMI Working Papers Series (102) 1, 13.

<sup>654</sup> For example, in Morocco the official language now is Arabic and not French anymore.

<sup>655</sup> Simona Vezzoli (n653) 13.

<sup>656</sup> James Hampshire (n649) 576; Jean-Pierre Cassarino, ‘Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications’ 1 in Jean-Pierre Cassarino (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010) 14.

<sup>657</sup> Jean-Pierre Cassarino (n656) 15.

<sup>658</sup> *Ibid.*

conclusion of readmission agreements can be hindered by “migration salience” and illustrates his point as follows: France has signed several readmission agreements with Latin America, but Spain was not able to conclude readmission agreements with this part of the world<sup>659</sup>.

We can distinguish four different patterns in which postcolonial ties could influence the conclusion and implementation of Mobility Partnerships. In the first case, if the former colonial power is interested in the conclusion of a Mobility Partnership, it is likely that the third country will follow its will and conclude the partnership. On the other hand, if the former colonial power is not in favour of the conclusion of the Mobility Partnership the negotiations have high chances to fail. The other patterns are related to the proposition of projects in the framework of the Mobility Partnership and its implementation. We saw that usually bilateral relation between Member States and a third country is favoured over the relation between the EU and the third country. This would mean that most of the projects proposed will be bilateral Member State-third country projects rather than EU-third country or joint projects. The third pattern is that bilateral relations are not always preferred by countries with postcolonial ties therefore former colonies could prefer concluding agreements with Member States with which they do not have postcolonial ties. This can have an impact on which country will be the most active in proposing and implementing Mobility Partnerships projects. The last pattern was that postcolonial ties could impede the conclusion of bilateral agreements.

The last point to underline concerning the influence of the *state of relations between third countries and EU Member States* is that postcolonial ties have strongly influenced the political system of their former colonies<sup>660</sup>. Joy Asongazoh Alemazung argues that the influence of some European States (and the West in general) on the political system of their former colonies led to a form of “dependence in political processes” from the former colony towards the former colonial power<sup>661</sup>. This means that not only can postcolonial ties influence the level of administrative capacity of a third country but also influence policies that are being developed and implemented in these countries.

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<sup>659</sup> Ibid 17-18.

<sup>660</sup> Joy Asongazoh Alemazung, ‘Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development’ (2010) 3(10) *JPAS* 62; Rollin Tusalem, ‘The Colonial Foundations of State Fragility and Failure’ (2016) 48(4) *Polity* 445.

<sup>661</sup> Joy Asongazoh Alemazung (n664) 64.

This aspect of the factor of the *State of relations between third countries and EU Member States* can be combined with the factor of the *level of administrative capacity* because Member States, and particularly former colonial powers, can influence the content of new laws and policies through development aid funding but also through the intervention of national expert to support these developments<sup>662</sup>. We will see at the end of this section, when presenting the *administrative capacity* factor, that more the former colony is dependent on the influence of a Member State higher the risk of legal transplant exists.

### *Power of negotiation*

It may be said that there are two opposite scenarios for the position of third countries vis-à-vis the EU: either the third country has a high geopolitical importance for the EU's migration policy, which gives it a strong negotiating position, or it has low geopolitical importance placing it in a weak negotiating position<sup>663</sup>. The question raised is that of knowing when is a third country considered to have geopolitical importance for the EU? For over a decade, the EU has adopted the practice of externalising some of its migration control to neighbouring third countries to fight the entry of irregular migrants in its territory, converting these third countries into EU's "gate-keepers"<sup>664</sup>. The externalisation of migration control is not a new phenomenon. Sandra Lavenex argues that the "external dimension" of EU asylum and immigration policies has always existed involving non-European countries to "share the burden of migration control"<sup>665</sup>. Being a "gate-keeper" means that a third country on the other side of an EU border is able to prevent migrants from entering the EU irregularly, which gives it a high geopolitical importance for the EU. Michael Teitelbaum observed since several decades that third countries can use migration as a threat in their negotiations<sup>666</sup>. Kelly Greenhill builds on Teitelbaum's work and argues that countries may use the argument of outflows of migration (real or threatened) "as a foreign policy tool, to induce (or prevent) changes in political behaviour and/or extract side-payments from the target(s)"<sup>667</sup>. On the other hand, if a third country has low migration fluxes towards the EU or is not located on a

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<sup>662</sup> Jean-Claude Berthelemy, 'Bilateral Donors' Interest vs Recipients' Development Motives in Aid Allocation: Do All Donors Behave the Same?' [2005] *Cahiers de la Maison des Sciences Economiques* 1; Sarah Wolff (n262); Sarah Wolff (n618) 69.

<sup>663</sup> Frank Pfetsch, 'Power in International Negotiations: Symmetry and Asymmetry' [2011/2] *Négociations* 16, 39.

<sup>664</sup> Sandra Lavenex (n209) 94.

<sup>665</sup> *Ibid* 335.

<sup>666</sup> Michael Teitelbaum, 'Immigration, Refugees, and Foreign Policy' (1984) 38(3) *Int Organ* 429.

<sup>667</sup> Kelly Greenhill, 'Strategic Engineered Migration as a Weapon of War' (2008) 10(1) *Civil Wars* 6, 8-10.

major migration route, it will have low geopolitical importance for the EU. This third country will therefore have a low level of negotiation power with the EU. It should be noted that the power of negotiation is not static and depend on the geopolitical situation at a specific moment. This means that, as the Mobility Partnership and particularly the Annex to the Joint Declaration is a living document, new projects can be proposed, and their implementation can be influenced according to the geopolitical importance and power of negotiation of a third country at a specific moment in time.

It may be assumed that, with a third country with low level of negotiation power, the Mobility Partnership will be mainly used as a tool by the EU and the Member States to impose their interests on the third country which may only “take it or leave it”<sup>668</sup>. Reslow highlights the “take it or leave it” approach taken in the cases of Moldova, Cape Verde and Senegal, where the same Mobility Partnership text was unilaterally proposed by the EU to these third countries with little room for negotiation<sup>669</sup>. If the third country agrees to conclude a Mobility Partnership under these terms, the content of the Mobility Partnership will presumably be mainly influenced by the EU and the Member States. One can envisage that the power (in)balance would stay the same during the implementation of the Mobility Partnership, so long as the EU’s interest in the third country in question remains the same. In this case, the projects that would be implemented would also be largely influenced by the EU and the Member States, including projects having a relevance for the development of the legal framework of the partner third country. It is not excluded that the power dynamics evolves, as these dynamics are influenced by several external factors (e.g. political priorities or economic situation).

Conditionality is a key concept of Mobility Partnerships. Frank Schimmelfenning and Ulrich Sedelmeier note that the use of conditionality by the EU in its relations with third countries is a way to disseminate its norms and stimulate third countries to adopt new laws or different behaviour on specific issues<sup>670</sup>. Political conditionality is defined by Karen Smith as “perceived benefits for another state (such as aid, [trade concessions, cooperation agreements, political contacts, or international organisation membership]),

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<sup>668</sup> Natasja Reslow (n425) 395.

<sup>669</sup> Ibid.

<sup>670</sup> Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe’ (2004) 11(4) *J Eur Public Policy* 661, 661.

to the fulfilment of conditions relating to the protection of human rights and the advancement of democratic principles”<sup>671</sup>. Smith adds that, to be efficient, conditionality should not be contradictory in the many (and overlapping) instruments used by the EU in its migration policy with third countries<sup>672</sup>. Attaching strings to financial assistance and aid was primarily done by international financial institutions in the 1980s. By the 1990s, donors, including the EU, had adopted the practice of binding financial assistance and aid to political conditions, as they thought that an effective use of aid required the rule of law and the administrative capacity to implement it<sup>673</sup>. Judith Kelley defines conditionality as the “existence of incentives”<sup>674</sup>. Conditionality can be positive or negative. Positive conditionality rewards the compliance of third countries with given goals by, for example, increasing funding whereas negative conditionality is designed to “punish” third countries by denying them access to funding that they used to receive. Positive conditionality is understood in the literature as the fact that conditionality can enhance wilful compliance and mechanisms of “reinforcement by reward”<sup>675</sup>. On the contrary, negative conditionality is seen as a mean of coercion<sup>676</sup>. The use of negative conditionality is not always well accepted. For example, in 1992, Morocco was sanctioned for its human rights abuses in Western Sahara and with political prisoners<sup>677</sup>. Consequently, EU’s budget for Morocco was frozen, which was strongly contested by Spain and other EU Member States<sup>678</sup>. This response by Spain and other Member States has been used to show that applying “negative” conditionality can have a detrimental outcome on relations with third countries as well as on EU governments that have strong ties with them<sup>679</sup>.

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<sup>671</sup> Karen Smith, ‘The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?’ (1998) 3 *European Foreign Affairs Review* 253, 256.

<sup>672</sup> *Ibid* 254.

<sup>673</sup> Rosa Balfour (n591) 15.

<sup>674</sup> Judith Kelley, ‘New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy’ (2006) 44(1) *JCMS* 29, 36.

<sup>675</sup> Frank Schimmelfennig, Stefan Engert and Heiko Knobel, ‘Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality in Latvia, Slovakia and Turkey’ (2003) 41(3) *JCMS* 495.

<sup>676</sup> Frank Dobbin, Beth Simmons and Geoffrey Garrett, ‘The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?’ (2007) 33 *Annu Rev Sociol* 449.

<sup>677</sup> Elena Baracani, ‘The European Neighbourhood Policy and Political Conditionality: Double Standards in EU Democracy Promotion?’ 133 in Thierry Balzacq, *The External Dimension of EU Justice and Home Affairs Governance, Neighbours, Security* (Palgrave macmillan 2009) 137-138.

<sup>678</sup> *Ibid* 138.

<sup>679</sup> Said Haddadi, ‘Two Cheers for Whom? The European Union and Democratization in Morocco’ (2002) 9 *Democratization* 149, 161.

Conditionality used to be related mainly to democratic progress in third countries<sup>680</sup>. In the Southern Mediterranean region, the EU collaborated for a long time with undemocratic regimes, on areas such as the fight against terrorism, the fight against irregular migration, and peace and stability in the region, without much talk of conditionality<sup>681</sup>. Quite to the contrary, the EU gave economic incentives to these regimes<sup>682</sup>. After the Arab Spring, political cooperation between the EU and southern Mediterranean countries gained significant political appeal and conditionality was redefined<sup>683</sup>. The power of conditionality has been questioned in the literature. Several authors argue that, since southern Mediterranean countries have no possibility of accessing EU membership, the EU lacks a strong enough incentive to offer<sup>684</sup>. Even if southern Mediterranean countries are aware that they cannot gain access to the EU, they still try to bargain with the EU on other issues of interest, such as increased mobility, funding, political support or a closer relation status with the EU. In practice, the application of conditionality by the EU has been limited regarding southern Mediterranean countries<sup>685</sup>. This can be explained by the importance of migration control in the region as well as, other strategic and security priorities which make it difficult for the EU to adopt a strong position towards countries with which strategic cooperation is needed<sup>686</sup>.

The new “more for more” conditionality includes financial and technical assistance, trade and mobility incentives<sup>687</sup>. It is interesting to note that in practice the Mobility Partnership can be used as a tool to materialise conditionality<sup>688</sup>. Mobility Partnerships are presented by the EU as a way to enhance mobility for third country nationals, so they include mobility incentives, but they also draw financial means for specific projects and many capacity building initiatives which are financial and technical incentives<sup>689</sup>.

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<sup>680</sup> Sandra Lavenex and Frank Schimmelfennig (n629); Frank Schimmelfennig, Stefan Engert and Heiko Knobel (n679); Aurelia Dercaci, 'European Neighbourhood Policy: New Models of External Governance' 287 in Beatriz Pérez de las Heras, *Democratic Legitimacy in the European Union and Global Governance: Building a European Demos* (Springer 2016).

<sup>681</sup> Sandra Lavenex and Frank Schimmelfennig (n629) 899; Assem Dandashly, 'The EU Response to Regime Change in the Wake of the Arab Revolt: Differential Implementation' (2014) 37(1) *J Eur Integr* 37, 38.

<sup>682</sup> Assem Dandashly (n685) 38.

<sup>683</sup> *Ibid.*

<sup>684</sup> Rosa Balfour (n591) 19; Rachel Epstein and Ulrich Sedelmeier, 'Beyond Conditionality: International Institutions in Postcommunist Europe after Enlargement' (2008) 15(6) *J Eur Public Policy* 795, 803; Tanja Börzel and Bidzina Lebadidze, "The Transformative Power of Europe" beyond Enlargement: the EU's Performance in Promoting Democracy in its Neighbourhood' 52(17) 33(1) *East European Politics* 17, 20; Vera van Hüllen, *EU Democracy Promotion and the Arab Spring: International Cooperation and Authoritarianism: Governance and Limited Statehood* (Palgrave Macmillan 2015).

<sup>685</sup> Rosa Balfour (n591) 16.

<sup>686</sup> Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42(2) *The International Spectator* 179, 191-192.

<sup>687</sup> Rosa Balfour (n591) 21.

<sup>688</sup> *Ibid.* 22.

<sup>689</sup> *Ibid.* 21-22.



For example, the SPRING programme (Support for the Partnership, Reforms and Inclusive Growth) can finance specific projects included in a Mobility Partnership aiming at supporting concrete reforms in the third country<sup>690</sup>. Another incentive offered to third countries under the “more for more” approach is the Deep and Comprehensive Free Trade Agreement. The Deep and Comprehensive Free Trade Agreement will be proposed only to countries that comply with EU’s democracy standards<sup>691</sup>.

It is generally agreed in the literature that Mobility Partnerships are one-sided and put more pressure on the third country than on participating Member States<sup>692</sup>. However, for the Governments of third countries, cooperating with the EU can also be a source of political leverage. Third countries may strategically exploit what they can offer the EU in terms of the objectives of the EU’s external migration policy, such as the conclusion of an EURA. Since 1999, the EU has strived to conclude EURAs with third countries including the obligation to readmit third country nationals. The conclusion of these agreements has subsequently been a political priority for the EU<sup>693</sup>. The conclusion of a Mobility Partnership suggests the willingness on the part of the partner third country to negotiate a EURA, even though there is no obligation to conclude one. Mobility Partnerships can be seen as tools to provide leverage to the EU for the negotiations of EURAs with third countries by proposing a whole set of initiatives. Given that the EU prioritises the control of migration, third countries which cooperate with this control agenda gain a more strategic position to negotiate their own conditions. In concrete terms, the negotiation of a readmission agreement can be a strong bargaining chip for a third country and allows it to negotiate a broader spectrum of positive incentives through the Mobility Partnership. Such a situation where the third country takes over the bargaining initiative and demands financial and political support in return for cooperation with the EU can be seen as “reversed conditionality”<sup>694</sup>. Cassarino illustrates his argument with the refusal of Morocco, as far as 2017, to sign an EURA if the EU does not conclude further EURAs with other countries in Africa<sup>695</sup>. This power can be used by the third country as a bargaining chip to gain more leverage in

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<sup>690</sup> Ibid 21.

<sup>691</sup> Ibid 21.

<sup>692</sup> Sergio Carrera and Raúl Hernández I Sagrera (n2); Sergio Carrera and Raúl Hernández I Sagrera (n2); Agnieszka Weinar (n440); Mohammed Limam and Raffaella Del Sarto (n433).

<sup>693</sup> Florian Trauner and Imke Kruse, ‘EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood’ (2008) CEPS Working Document No. 290.

<sup>694</sup> Jean-Pierre Cassarino (n686) 192; Fanny Tittel-Mosser (n434).

<sup>695</sup> Jean-Pierre Cassarino (n686) 192.

negotiations. The hypothesis follows that the Mobility Partnership is used not only by the EU but also by the partner third countries to achieve their objectives. In this configuration, the third country can also influence the content of the Mobility Partnership. For example, the third country can push for the creation and implementation of specific projects benefitting its own interests. Projects related to the development of the partner third country's domestic legal framework will probably be influenced not only by the EU and/or its Member States, but also directly by the partner third country. The use of "reversed conditionality" thus provides third countries with a possibility to put forth their own interests and the ability to counterbalance the disadvantages linked to their cooperation with the EU leading to more dynamic relations between the EU and a third country than what is often pictured. Certainly, the increased reliance of the EU on third countries to fight irregular migration and to cooperate on border control has a price. The introduction of the "more for more" conditionality, together with the increased interdependence between the EU and the partner third countries on border management and the fight against irregular migration, have shifted power relations. Third countries are gaining a strategic position giving them the possibility to impose their own conditions to the EU and the Member States. Syrian neighbouring countries are using migration as a bargaining chip in their relations with the EU since the outbreak of the migration crisis (Turkey being a blatant example)<sup>696</sup>. Zeynep Özler argues that Turkey was using "reversed conditionality" in its negotiation of a EURA with the EU affirming that they would only conclude it if the EU would offer them visa liberation in exchange<sup>697</sup>. Additionally, a report by the Advisory Committee on Migration Affairs shows that "reversed conditionality" is the main reason countries of origin do not cooperate on forced return<sup>698</sup>.

The power of negotiation of a third country is not only related to its importance for the EU, but also to the state of its relations with the EU Member States. As seen previously, Member States have different interests, sometimes linked to their historical past, such as strong bilateral relations with former colonies<sup>699</sup>. A third country which is strongly dependent on a Member State (e.g.: former colonial power) has higher risks of being

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<sup>696</sup> Zeynep Özler, 'Breaking the Vicious Circle in EU-Turkey Relations: Visa Negotiations' (2012) 11(1) *TPQ* 121.

<sup>697</sup> *Ibid* 128.

<sup>698</sup> ACVZ, 'The Strategic Country Approach to Migration', Advisory Report Addressed to the Minister for Foreign Trade and Development Cooperation and the State Secretary of Security and Justice (2015) 1, 25-26.

<sup>699</sup> Sarah Wolff (n262) 16; James Hampshire (n649) 576.

influenced by it in its legal and policy developments. The same reasoning supports this argument than the “take it or leave it” approach taken by the EU in terms of proposition and implementation of projects. When presenting the *state of relations between third countries and EU Member States* factor we saw that former colonies are usually likely to be in line with specific Member State’s objectives. When a third country has a power of negotiation towards the EU but is also dependent on a specific Member State the implementation of the Mobility Partnership can be influenced by both factors at the same time. These factors can be conflicting and depending on the situation one can be more influential than the other. This could mean that in some cases a Member State refuses to implement projects that the third country, former colony, pushes forth because it goes against its own interests, but the EU could support the initiative because the third country has the power to convince the EU to do so.

### *Administrative capacity*

There is no commonly accepted definition of administrative capacity and it is often assumed that measuring it is extremely complex<sup>700</sup>, but, for the purposes of this study, it suffices to say that administrative capacity refers to the capacity of a state to define and implement policies and to legislate and enforce the law. Administrative capacity can comprise human and financial resources, the possibility to provide training and capacity building to staff, the awareness of a specific issue (migration), the existence of a legislative framework and the effective application of laws. Jonathan Miller argues that developing countries are usually lacking administrative capacity<sup>701</sup>. Anna Triandafyllidou doubts the capacity of third countries to implement simultaneously legal migration and border control policies if they have low administrative capacity and argues that Mobility Partnerships should have a strong capacity building component<sup>702</sup>. The notion of administrative capacity is directly linked to capacity building. Again, the term “capacity building” does not have a unanimous definition<sup>703</sup>. Peter May argues

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<sup>700</sup> Helen Addison, 'Is Administrative Capacity a Useful Concept? Review of the Application, Meaning and Observation of Administrative Capacity in Political Science Literature' (2009) LSE Research Paper 1, 4.

<sup>701</sup> Jonathan Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplants Process' (2003) 51(4) *Am J Comp L* 839, 857.

<sup>702</sup> Anna Triandafyllidou (n331) 11.

<sup>703</sup> See for example the definition given by the United Nations: United Nations Economic and Social Council, 'Definition of Basic Concepts and Terminologies in Governance and Public Administration' E/C.16/2006/4, New York, 27-31 March 2006, 7-8; Or the definition given by the OECD: OECD, 'The Challenge of Capacity Development: Working Towards Good Practices' (2006) 1, 44.

that capacity building is a tool facilitating policy implementation<sup>704</sup>. Certainly, it can be argued that the advancement of the functioning of a country's institutions and bureaucracy leads to a more efficient implementation of policies and that it is in the interest of the EU to fund capacity building projects, since a third country with low administrative capacity can be difficult to cooperate with (as it will not be able to effectively implement agreements for example).

Capacity building can be provided to third countries by development aid. It is common that aid programs are assisting both with drafting legislation and with the development of administrative capacity and African countries are among the main beneficiaries of such aid programs. This is, for example, the case of the Migration EU eXpertise (MIEUX) facility, funded by the European Commission and implemented by the International Centre for Migration Policy Development (ICMPD)<sup>705</sup>. It facilitates capacity building and peer-to-peer knowledge sharing. The main goal of this initiative is to strengthen “the migration governance capacities of governments in Africa, Asia, the Middle East, and Latin America by mobilising experts from EU Member States and other countries”. It is widespread practice in aid programs that foreign experts assist the governments and parliaments of the beneficiaries. These foreign experts can, consciously or not, replicate laws or policies that are in force in their country of origin when providing capacity building in a third country. According to Iann Manners, EU norms can be transferred to third countries through aid and technical assistance, or “transference”<sup>706</sup>. He also argues that “overt diffusion” arise from “the physical presence of the EU in third states” such as the EU Delegation and Member States’ embassies<sup>707</sup>. Third countries’ governments can increasingly become open to such influence as they become used to working with foreign advisors or because of strong relations with the Member States which provided them with “legislative support”. This factor interplays with the *state relations* factor, as often, for linguistic reasons, the foreign experts originate from the former colonial powers in Europe. This situation can open the ground for legal transplants or policy transplant.

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<sup>704</sup> Peter May, 'Policy Design and Implementation' 223 in B. Guy Peters and Jon Pierre, *Handbook of Public Administration* (London: Sage Publication 2003).

<sup>705</sup> For more information see: <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/> 'Accessed 18 January 2018'.

<sup>706</sup> Iann Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *JCMS* 235, 245.

<sup>707</sup> *Ibid* 245.

Alan Watson coined the concept of legal transplants and defined it as “the moving of a rule or a system of law from one country to another, or from one people to another”<sup>708</sup>. He explains the occurrence of legal transplants by the fact that they are cost-saving as it “saves time and effort” to the receiving society or by the “prestige” of the foreign model that gives legitimacy and legal authority to the transplanted law<sup>709</sup>. Jonathan Miller points out that third countries lacking financial or human resources can be interested in adopting laws based on pre-existing laws<sup>710</sup>. Moreover, according to Rodolfo Sacco, strong societies are inclined to impose and disseminate their own values and institutions to weaker societies<sup>711</sup>. Similarly, Linda Hantrais discussed the possibility to “transplant” policies<sup>712</sup> and several authors examined the capacity of the EU in framing migration and asylum policies in third countries<sup>713</sup>.

Several situations in which “transplant policies” can occur have been selected in the literature (besides those mentioned earlier in the text such as overt diffusion) as they might apply to the case of Mobility Partnerships. Iann Manners suggests that the EU can diffuse its norms to third countries by different means. For example, it can be through *contagion*, which is unintended. In this case, the EU does not really decide to transfer its norms, but third countries adopt them because they seem efficient or a “model”. It can also be through the strategic communication about new policies. The *procedural* diffusion can be the consequence of the institutionalisation of a relationship through for example cooperation agreements. Mobility Partnerships aiming at institutionalising dialogue and cooperation between the EU and third countries can subsequently also be subject to procedural diffusion<sup>714</sup>. Whether these are situations leading to policy transfer in the implementation of Mobility Partnerships with Morocco and Cape Verde will be discussed further in the thesis.

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<sup>708</sup> Alan Watson, *Legal Transplants: An Approach in Comparative Law* (Edinburgh: Scottish Academic Press 1974) 21.

<sup>709</sup> Ibid; Alan Watson, ‘Aspects of Reception of Law’ (1996) 44 *Am J Comp L* 335.

<sup>710</sup> Jonathan Miller (n701) 845-846.

<sup>711</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ (1991) 39 *Am J Comp L* 343, 398.

<sup>712</sup> Linda Hantrais, *International Comparative Research: Theory, Methods and Practice* (Palgrave Macmillan 2009) 45.

<sup>713</sup> Sergo Mananashvili, ‘The Diffusion of the EU Asylum Acquis in the Eastern Neighbourhood: A Test for the EU’s Normative Power’ (2015) 20(2) *EFAR* 187, 187; Laure Delcour, ‘The EU: Shaping Migration Patterns in Its Neighbourhood and Beyond’ 261 in Dimitri Kochenov and Fabian Amtenbrink *The European Union’s Shaping of the International Legal Order* (Cambridge University Press 2013).

<sup>714</sup> Iann Manners (n706) 244.

## 1.4. Conclusion

This Chapter was undertaken to describe the complex legal and policy framework on migration issues at the EU level to position the main object of this research, Mobility Partnerships within this plethora of instruments. First, a chronology of the evolution of the legal and policy framework on migration, both at the internal and external level, was presented. This chronology aimed at presenting the growing importance of migration issues for the Member States and the EU. At the internal level, the slow evolution from the intergovernmental level towards the communitarisation of migration issues and the stride to conclude a real common migration policy has been exposed. Discussions about migration in the EU are not new and have existed since the 1970's at the interministerial level. Member States have long been reluctant to lose their sovereignty on these issues as they are of a highly political nature. Therefore, the communitarisation of migration issues was slow and happened in various stages through the successive Treaties building the European Union. With the Maastricht Treaty, Justice and Home Affairs (including migration and asylum policy) were still not included in the European Community and therefore stayed at the intergovernmental level. Even though a series of instruments were concluded they were mostly left to the good will of Member States to be applied. It is only with the Amsterdam treaty that the communitarisation of migration started. The Amsterdam Treaty becoming one of the basis of a "common policy on migration and asylum". The Amsterdam Treaty and the Tampere Programme marked a turning point in the way migration and asylum issues were being addressed and for the first time, a multi-annual programme determining the priorities of the Justice and Home Affairs area had been concluded by the European Council. Since 2001 a set of secondary legislation on asylum, migration and human trafficking have been adopted but the necessity to use soft law to ensure flexibility within the EU as a complement to hard law has been underlined in the Commission's White Paper on Governance of 2001. Even though the need for an efficient common migration and asylum policy has been shown early, its creation is still questionable today. The communitarisation of migration and asylum policies is anything but an achieved process. The "migration crisis" clearly showed the incapacity of Member States to fully let go of their attaches to national sovereignty on these issues. On the external level, the analysis of the various tools used to implement EU's migration policy

was conducted in parallel to the presentation of the GAM/GAMM which is the predominant framework for the external dimension of the migration and asylum policy. A chronological overview of the progressive development of the EU migration and asylum policies was concluded giving an overview of the plethora of instruments used by the EU in its relations with third countries. One of these instruments is the Mobility Partnership.

In the second part of the Chapter, an overview of the Mobility Partnership tool was given, first exposing its genesis and the way it has been presented and portrayed by the EU. It then provided more details into its structure, content and monitoring mechanisms. Mobility Partnerships were inaugurated in 2007 by the EU Commission and presented as the most innovative and sophisticated tool of the GAM. Mobility Partnerships are non-binding instruments concluded between the EU, interested Member States and a third country. They are Joint Declarations in which the objectives of the Mobility Partnership are set following the objectives of the GAM/GAMM. Additionally, Mobility Partnerships are composed of an Annex which is a list of projects aiming at implementing the Mobility Partnership. This Annex is a living document and projects can be added and deleted through time. The number of projects and the number of Member States participating in a Mobility Partnership varies. The fact that Mobility Partnerships are non-binding means that the parties do not have the obligation to implement the proposed projects. A monitoring mechanism in the form of a scoreboard exists to follow the implementation of each Mobility Partnership. Apart from the Mobility Partnership with Moldova, these scoreboards are not public and their content and the assiduity in their updating depends widely from one partnership to the other. It is also interesting to note that despite the high interest the EU seems to have for the Mobility Partnership tool, no thorough evaluation of their implementation has officially been conducted since 2009.

An assessment of the advantages to conclude non-binding instruments has been conducted and three main factors have been highlighted. First, non-binding instruments offer a safe way to deal with uncertainty as they are flexible, which means that these instruments can be adapted to changes in policy priorities and circumstances. In the EU context, flexibility is an important feature and becomes increasingly so as the EU grows, and the legislative process becomes more

burdensome. Secondly, non-binding instruments are a “tool of compromise”. It is easier to negotiate a non-binding agreement than a legally binding one. Thirdly, non-binding instruments allow fast agreements and shorten the adoption process which is one of the main reasons why the Commission prefers this type of instruments. It also helps to circumvent long and difficult national ratification procedures, which can lower sovereignty costs. This raises the question of competence and the application of the principle of subsidiarity.

Additionally, the legal nature of Mobility Partnerships has been scrutinised. Mobility Partnerships have been widely considered as soft law in the literature, but several questions remain concerning the type of instrument Mobility Partnerships are and how they fit in the EU legal architecture. The suggestion resulting from our analysis is that Mobility Partnerships are non-traditional EU instruments, which are non-binding but may, however, have legal relevance. In the case of Mobility Partnerships having legal relevance, the ECJ could be competent on Mobility Partnership related issues. This contradicts the view that Mobility Partnerships escape juridical control. Mobility Partnerships might escape democratic and juridical control, but they do not escape financial accountability.

A short analysis of the literature on soft law has been conducted, highlighting the main criteria that can help distinguish soft law from hard law and non-law. These criteria are obligation, bindingness, delegation, enforcement, precision, voluntary compliance and the aim of the author. These criteria have been applied to Mobility Partnerships. Mobility Partnerships are non-binding and do not create obligations for the parties to the agreement, therefore they are not enforceable. The parties, which are here identified as the authors, decided voluntarily to conclude a Mobility Partnership because the objectives of the instrument coincided with their policy orientations. Parties are also voluntarily complying with the instrument and though no action can be taken against a State that would not comply, projects are being implemented, new initiatives proposed, and discussions held over several consecutive years.

Several authors argue that even though a soft law instrument is non-binding it does not mean that it cannot have legal effects (or relevance). The hypotheses that we are going to test throughout this thesis are as follows. First, Mobility Partnerships are non-



binding soft law instruments, but they can be relevant for the development of the legal and policy framework of the third country party of the partnership. The relevance can take different forms, it can be direct or indirect. Direct would imply that the Mobility Partnership aims directly at concluding hard law. It also means that the development is a clear objective of the Mobility Partnership that one or more party wanted to achieve. This could be the case of the conclusion of Readmission Agreements or Visa Facilitation Agreements. The relevance can be indirect which means that the legal or policy framework of a third country are developed through the implementation of Mobility Partnership projects not directly aiming at modifying the law or policy. It also means that the legal and policy developments can be a side effect of the implementation of a project or the result of changes in policy priorities that were not foreseen.

The second hypothesis is that three main factors can influence the relevance of Mobility Partnerships. These factors are the state of relations between third countries and EU Member States, the power of negotiation of a third country and its administrative capacity. These three factors can facilitate or impede the relevance of Mobility Partnerships on the legal and policy frameworks of third countries by favouring or not the proposition and implementation of legally or policy relevant projects. They can also influence the content of the new laws and policies adopted in the third country. The EU influence could take several forms including legal transplant and policy transfer.

The theoretical framework presented in this Chapter will be the basis of the analysis of the potential relevance of Mobility Partnerships conducted throughout this thesis. The analysis of the nature of Mobility Partnerships was essential in setting the framework for the analysis of the first hypothesis. Finally, the three factors identified in the last sub-section will be used as an analytical framework in Chapter 5.



## Chapter 2: Methodology

### 2.1. Purpose of the study and hypothesis

The aim of this research is to determine whether EU Mobility Partnerships have relevance on the political and legal developments in third countries and if so, to understand what factors may condition the way Mobility Partnerships are relevant for legal and policy developments in Cape Verde and Morocco. This research is premised on two hypotheses.

The first hypothesis is that Mobility Partnerships, while being soft law instruments, are not without relevance for the development of the legal and political frameworks in Morocco and Cape Verde. Mobility Partnerships are widely presented in the literature as soft law instruments or defined as being of “soft legal nature” or of “non-legal nature”<sup>1</sup>. Some accounts are less straightforward and refer to Mobility Partnerships as having a “complex legal nature”<sup>2</sup>. We first analyse the legal nature of Mobility Partnerships and from there we seek to ascertain whether Mobility Partnerships have legal and political relevance or not, focusing on their potential external relevance. External relevance is to be understood as the potential relevance that a Mobility Partnership can have for the legal and political order of a third country, Morocco and Cape Verde.

The second hypothesis is that a) the state of relations between third countries and EU Member States, b) the power of negotiation of a third country and c) its level of administrative capacity condition the way Mobility Partnerships are relevant for third countries. These factors can be favourable or not to the legal and political relevance of Mobility Partnerships. When looking at the state of relations between third countries and EU Member States, pre-existing ties (such as postcolonial ties) are key because

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<sup>1</sup> Sergio Carrera and Raúl Hernández I Sagrera, ‘The Externalisation of the EU’s Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?’ (2009) CEPS Working Document 321 1, 28; Sergio Carrera and Raúl Hernández I Sagrera, ‘Mobility Partnerships: “Insecurity Partnerships” for Policy Coherence and Migrant Workers human Rights in the EU’ 97 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance: The Promise of Partnership* (London, New York: Routledge 2011) 97; Panos Koutrakos, *European Foreign Policy: Legal and Political Perspectives* (2011 Edward Elgar Publishing) 164-165; Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London New York: Routledge 2012) 209-210.

<sup>2</sup> Commission of the European Communities, ‘Circular Migration and Mobility Partnerships between the European Union and Third Countries’ COM(2007) 248 final, Brussels, 15 May 2007 1, 3.

cooperation is usually high between a Member State and its former colony. This factor can help to assess whether projects proposed and implemented in the Mobility Partnership have an added value. We can assess whether the projects are proposing something different from the pre-existing cooperation as well as whether the main actors involved in a Mobility Partnership are different or similar than those already involved in the cooperation on similar issues with the particular third country. The level of power of negotiation and administrative capacity also seem to be pertinent factors as they can help to determine if the third country plays a passive or active role in the negotiation and implementation of Mobility Partnerships. These criteria are also indicative of the third country's capacity to implement the Mobility Partnership and the different needs, such as capacity building, they might have.

We investigate whether these three factors can be instrumental for the relevance of Mobility Partnerships in two different ways. First, we discuss whether the three factors influence positively or negatively the legal and policy relevance of Mobility Partnerships as such. In other words, do they favour or not legal and political developments through the Mobility Partnership in Morocco and Cape Verde? Secondly, if these legal and policy developments occur, we look at the influence that the EU and the Member States can have in the proposition of legally and politically relevant projects and in the newly developed policy and legal content itself. We discuss whether the EU and the Member States, through the implementation of a Mobility Partnership, influence the content of the laws and policies being developed and use it to push their own migration policy agenda. In our analysis we also consider the type of relevance Mobility Partnerships can have. Indeed, Mobility Partnerships could either be a) directly relevant, when an implemented project aims at creating a new law or policy or conclude an international agreement; or b) indirectly relevant, when a new law or policy is being developed as a side-effect of the implementation of one or several projects.

These two hypotheses are discussed while analysing the context in which the Mobility Partnerships with Morocco and Cape Verde were agreed upon, the current state of implementation of the projects, the changes in the legal framework, the changes in policies and the observations of policy makers and other stakeholders within EU institutions and in Morocco and Cape Verde. The term "policy makers" generally designates either the EU or the Member States or third countries' authorities having

the capacity to create a new policy. The term “stakeholders” represents everyone that can affect or be affected by the implementation of the Mobility Partnership, in other words, all parties directly or indirectly linked to the implementation. This comprises the EU (including its Delegations based in third countries), Member States (embassies), the third countries (different ministries), the organisations in charge of the implementation of projects (for example IOM, GIZ, Expertise France, etc.) and migrants’ representatives (emigrants originating from the third country or immigrants staying in the third country).

The main focus of this thesis thus raises both legal and empirical questions: If Mobility Partnerships are soft law instruments can they be legally relevant? Can they be policy relevant? What types of legal and policy relevance can Mobility Partnerships have? And under which circumstances? What factors favour the conclusion of Mobility Partnerships and/or the suggestion or implementation of projects? Do postcolonial ties (or other strong bilateral ties) enhance the collaboration of the Member States and third countries in the framework of the Mobility Partnerships? Do postcolonial ties (or other strong bilateral ties), the power of negotiation and/or the level of administrative capacity influence the proposition and implementation of projects? Did any changes occur in the legal frameworks of Morocco or Cape Verde after their conclusion of the Mobility Partnership and can these changes be related to the implementation of Mobility Partnerships’ projects? Are there perceptible changes in the way the previously existing law is being enforced? Do the three factors mentioned previously influence the content of the laws and policies developed through the Mobility Partnership?

## **2.2. Appropriateness of the research design**

In this section, we explain why Cape Verde and Morocco have been chosen as case studies and we describe the two main phases of the research: the legal analysis and the empirical analysis.

### 2.2.1. The choice of the case studies

The geographical focus of this thesis is Africa and the research specifically focuses on the case studies of Morocco and Cape Verde. This section explains why these two countries have been selected. The first Mobility Partnerships were signed in 2008 with Moldova and Cape Verde. Georgia (2009), Armenia (2011), Azerbaijan (2013), Morocco (2013), Tunisia (2014), Jordan (2014) and Belarus (2016) subsequently followed. To be able to investigate the way in which existing historical ties may condition relations between the EU and third countries, it was important in the case selection to choose third countries that had strong historical ties to EU Member States through former colonial relations. In order to make the analysis of the influence of postcolonial ties more complete we decided to choose third countries that had different colonial powers, as the relations could differ depending on the former colonial power. Out of these countries, Cape Verde, Morocco and Tunisia have postcolonial ties with an EU Member State. Cape Verde is a former Portuguese colony. After several hundreds of years, in 1951, Portugal granted Cape Verde the status of overseas province<sup>3</sup> to lastly cede the country its independence in 1975<sup>4</sup>. Morocco was occupied by France since 1830 and became a French Protectorate in 1912 until its independence in 1956<sup>5</sup>. Spain invaded Morocco in 1860 and in 1884 created a Protectorate in the North of Morocco and claimed the Western Sahara<sup>6</sup>. The Spanish Protectorate on Western Sahara, as well as part of the North of Morocco, was recognised by France in 1912<sup>7</sup>. Tunisia was a French protectorate between 1881 and 1956<sup>8</sup>. Both France and Portugal are participating in the Mobility Partnerships with these three countries. Cape Verde has been selected as it is the only third country that concluded a Mobility Partnership and has postcolonial ties with Portugal. Moreover, Cape Verde has no postcolonial ties with France, though France is involved in the Mobility Partnership with Cape Verde. A choice had to be made between Morocco and Tunisia, both having postcolonial ties with France but not with Portugal, though

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<sup>3</sup> John Paxton, *The Statesman's Year-Book 1974-75: The Encyclopaedia for the Businessman-of-the-World* (Springer 2016) 1258.

<sup>4</sup> Douglas Wheeler and Walter Opello Jr, *Historical Dictionary of Portugal* (Scarecrow Press 2010) 70.

<sup>5</sup> Iann Brownlie and Ian Burns, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (C. Hurst and Co 1979) 55; C. R. Pennell, *Morocco since 1830: A History* (New York: New York University Press 2000) 40.

<sup>6</sup> Hollis Michael Tarver and Emily Slape, *The Spanish Empire: A Historical Encyclopedia* (ABC-CLIO 2016) 8.

<sup>7</sup> Palgrave Macmillan Staff, *The Statesman's Yearbook 2012: The Politics, Cultures and Economies of the World* (Springer 2011) 878.

<sup>8</sup> Ryo Ikeda, *The Imperialism of French Decolonisation: French Policy and the Anglo-American Response in Tunisia and Morocco* (Palgrave Macmillan 2015) 13.

Portugal is involved in both Mobility Partnerships. According to a report from the INSEE (the French Institute for Statistics) published in 2012, there are three times more Moroccans immigrants in France than Tunisians<sup>9</sup>. In 2014, in Portugal, there were 1731 Moroccans and only 171 Tunisians<sup>10</sup>. As Moroccans represent a larger group of migrants in France and Portugal than Tunisians, the second case study chosen was Morocco as it would be more relevant for each countries' migration policy. Moreover, Morocco concluded its Mobility Partnership in 2013, whereas Tunisia only concluded it in 2014, leaving less time for the implementation process, which subsequently makes it more challenging to evaluate that process. .

Moreover, these two countries are interesting case studies in order to test the two other factors that may influence the relevance of Mobility Partnerships (power of negotiation and administrative capacity). Cape Verde was considered as being the “best student” in the region because of its existing cooperation on migration and security issues. The latter played a significant role in the choice of the country as a Mobility Partnership beneficiary<sup>11</sup>. The reasons why Cape Verde was chosen as a pilot Mobility Partnership are its geographic location, its small population, the fact that it is not a big threat for migration flows and that it is culturally close to the EU because of its historical ties with Portugal<sup>12</sup>. In 2015, there were 108 721 Cape Verdeans in Europe most of them located in Portugal (57 636), France (22 292) and The Netherlands (11 997). These numbers have changed minimally since the conclusion of the Mobility Partnership<sup>13</sup>. In 2005, there were 53 008 Cape Verdeans in Portugal, 18 180 in France, 11 532 in the Netherlands.

According to a Commission's communication, Cape Verde had clear aspirations when it came to the content of the Mobility Partnership reckoning that the main concerns of the Cape Verdean government were security and mobility<sup>14</sup>. Interviews with Cape Verdean officials revealed otherwise. Several respondents underlined the fact that the officials participating in the negotiations on the content of the Mobility Partnership were

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<sup>9</sup> In 2012 there are 692 923 Moroccan migrants and 251 220 Tunisian migrants. Insee, Recensement de la Population, Exploitation Principale, see: [http://www.insee.fr/fr/themes/tableau.asp?reg\\_id=0&ref\\_id=immigrespaysnais](http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=immigrespaysnais) 'Accessed 29 November 2016'.

<sup>10</sup> Serviço de Estrangeiros e Fronteiras, Relatório de Imigração, Fronteiras e Asilo (2014) 52-53.

<sup>11</sup> Carrera and Hernandez (2009) (n1) 21.

<sup>12</sup> Interview 39, EU Delegation, Praia, 25 February 2016.

<sup>13</sup> United Nations, DESA, Population Division: International Migrant Stock 2005 and 2015, see: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml> 'Accessed 26 October 2016'.

<sup>14</sup> European Commission, 'Mobility Partnerships as a Tool of the Global Approach to Migration' SEC(2009) 1240 final, Brussels, 18 September 2009 1, 3.

not sufficiently prepared and did not adequately assess their needs and priorities<sup>15</sup>. Their lack of preparation and clear expectations did not put them in a position where they could have negotiated the content in a suitable manner. Additionally, Lisa Akesson discusses the fact that Cape Verde was dependent on the EU funding received under the Special Partnership and as such did not leave much room to object to the conclusion of the Mobility Partnership as both partnerships went hand in hand<sup>16</sup>.

By contrast, Morocco has been considered by the EU as a “gate-keeper” for over a decade in the externalisation of its migration control to neighbouring third countries<sup>17</sup>. Comparatively to Cape Verde, the population of Moroccans in Europe is vast. In 2015, there were 2 507 560 Moroccans in Europe mainly in France (926 466), Spain (699 800) and Italy (425 238). Until 2008, the relations between the EU and Morocco were chiefly focused on irregular migration. The pressure of irregular migration put the negotiation of the readmission agreement with Morocco at the centre of their relations<sup>18</sup>. With the Arab Spring uprisings in Southern Mediterranean countries in 2011, the EU had to adapt its migration policy to take into account the increasing migration flows coming from the region as well as the potential security threats that could arise from the political unrest. As an answer, the EU launched the dialogue for migration, mobility and security with the southern Mediterranean countries in 2011<sup>19</sup>. The end goal of this dialogue was the conclusion of Mobility Partnerships with Southern Mediterranean countries. The Mobility Partnership with Morocco was negotiated in depth<sup>20</sup>. It is interesting because it shows that Morocco had some leverage that prior countries concluding a Mobility Partnership did not have. These two countries are clearly different in terms of geopolitical importance for the EU. Therefore, Morocco is used as a case study as the country having a high negotiating power and Cape Verde as the country having a low negotiating power.

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<sup>15</sup> Interview 33 Direção Geral das Comunidades, Praia, 23 February 2016 and Interview 45 Ex-Secretário de Estado dos Negócios Estrangeiros/Former Ambassador, Praia, 16 November 2016.

<sup>16</sup> Lisa Akesson, 'Under the Cover of Partnership' (2011) NAI Annual Report 16, 16.

<sup>17</sup> Sandra Lavenex, 'Justice and Home Affairs and the EU's New Neighbours: Governance beyond Membership?' 89 in Karen Henderson (ed), *The Area of Freedom, Security and Justice in the Enlarged Europe* (Palgrave Macmillan UK 2004) 94.

<sup>18</sup> Interview 29 DG Home Affairs, Brussels, 26 October 2016.

<sup>19</sup> European Commission, 'A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries' COM(2011) 292 final, Brussels, 24 May 2011.

<sup>20</sup> Interviews 6 and 7 EU Delegation, Rabat, 13 January 2016; Interview 10 Expertise France, Rabat, 15 January 2016; Interview 13 Moroccan Ministry of Labour, Rabat, 19 January 2016; Interview 14 GilZ, Rabat, 20 January 2016; Interview 17 Spanish Embassy, Rabat, 22 January 2016.



Moreover, Miller argues that developing countries are usually lacking administrative capacity<sup>21</sup>. Following Miller's argumentation as both Morocco and Cape Verde are developing countries, we can argue that they are lacking administrative capacity<sup>22</sup>. Morocco is a bigger country than Cape Verde with more financial and human resources and is generally considered as having a higher level of institutional development than Cape Verde. In terms of immigration, both countries were lacking administrative capacity when they concluded their respective Mobility Partnerships. For example, they did not have a specific national institution designated to discuss immigration related issues and cooperation between different institutions on this question was scarce, to say the least. Migration was not a priority issue for the Moroccan and Cape Verdean governments explaining the lack of resource allocation and institutionalisation of the issue. Moreover, civil society was not trained and meagerly aware of immigration issues<sup>23</sup>. Additionally, the legal framework on migration was inadequate in both countries. Even though they had adopted laws regulating entry and stay in their territory these laws were hardly applied and migrants' lacked protection. We discuss this point in further detail in Chapter 4. It should however be noted that even though both country have a low administrative capacity, the degree of administrative capacity between Morocco and Cape Verde is still different as Morocco has a more developed administrative apparatus than Cape Verde with more financial and human capacities.

### 2.2.2. The different phases of the research

The research is divided into two main phases: the legal analysis followed by the empirical analysis of the implementation of the Mobility Partnerships, which is done, first, by looking at legal and policy developments in both countries since the conclusion of their Mobility Partnership and, second, the practical implementation of Mobility Partnerships' projects.

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<sup>21</sup> Jonathan Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplants Process (2003) 51(4) *Am J Com L* 839, 857.

<sup>22</sup> *Ibid.*

<sup>23</sup> Laura Feliu Martinez, 'Les Migrations en Transit au Maroc: Attitudes et Comportement de la Société Civile Face au Phénomène' (2009) *L'année du Maghreb* <https://anneemaghreb.revues.org/611> 'Accessed 3 February 2018'.

### **2.2.2.1. The analysis of legal framework**

This part of the research consists of a literature review and of the analysis of primary sources. Primary sources used in this research are mainly legal and policy documents. They consist of the national Constitutions, laws and decrees, multilateral and bilateral agreements and other legal documents at the national level. A large number of sources has been consulted and compiled in order to make sure that all aspects of the legal framework are covered<sup>24</sup>. Primary sources help to provide a global picture of the existing legal framework at a certain moment in time, which allows for a clear before and after analysis. Concerning policy documents, the analysis takes into account the type of document, the nature of the author and the intended audience. Several contextual factors have also been considered such as pre-existing historical or geographical links between countries or the political climate during the conclusion and implementation phases of the different policies. Indeed, understanding the broader context reduces the risk of misinterpretation. The access to the preparatory documents, mainly white papers or accounts of parliamentary debates was difficult. These documents would have helped to better understand the reasons behind the specific changes. Only a few reports on the development and implementation of the laws or the different initiatives that the new laws aimed at supporting were available. The information that helped in understanding the causality between the policy and legal changes and the Mobility Partnerships was gathered through other means such as articles in political newspapers, secondary sources and interviews with the policy makers as well as with migrants in order to have their perspectives on the implementation of the laws. Secondary sources are mainly articles and books authored by legal scholars interpreting the meaning of the legislative acts as well as reports from civil society actors. This thesis aims at completing the existing gap in the literature on the implementation of the Mobility Partnerships and their potential legal relevance. Undertaking a systematic review of the relevant legislation in the field of migration in Morocco and Cape Verde is essential for the mapping of the legal framework and its evolution since the conclusion of the Mobility Partnership in each country (developments before/after 2008 in Cape Verde and developments before/after 2013 in Morocco). In parallel, the development of new policies is also analysed. The moment

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<sup>24</sup> Cameron Thies, 'A Pragmatic Guide to Qualitative Historical Analysis in the Study of International Relations (2002) 3(4) *Int Stud Perspect* 351, 357.

of the conclusion of the Mobility Partnership has been chosen as a time reference because the thesis aims at observing whether new legal developments occurred through the implementation of Mobility Partnerships.

The first round of interviews, as well as the analysis of the legal framework, helped to identify the primary areas of the legal framework to be included in the mapping. They comprise the conditions set for access to the territory and remain, the integration through naturalisation or access to citizenship, the access to economic, social and political rights (i.e.: health, education, work and housing, right to vote), rights of migrants abroad as well as readmission and rights of returning migrants (i.e.: social benefits and pensions). These areas of the legal framework have been linked to the objectives of the four pillars of the Global Approach to Migration and Mobility, namely, legal migration, irregular migration, migration and development and international protection and the external dimension of asylum policy<sup>25</sup>. The information collected is subject to a comparative analysis, with recourse to methodological tools specific to comparative legal studies.

It is also discussed whether some migrants from former colonies that shared the same colonial power benefit from distinct rights in the country of destination compared to other third country nationals. This is the case of migrants from the Community of Portuguese Speaking Countries or the Economic Community of West African States in Cape Verde or migrants from other former French colonies such as Senegal or Côte d'Ivoire in Morocco. When analysing the legal framework of Cape Verde and Morocco, we investigate the legal status of these countries' emigrants and immigrants. An important focus is put on the assessment of the relevance of Mobility Partnerships and of EU migration policies in general on the development and implementation of national legal frameworks and policies. It is also interesting to discuss whether Mobility Partnerships can be considered to have any added value compared to the already existing bilateral agreements between some EU Member States and Cape Verde or Morocco.

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<sup>25</sup> European Commission, 'The Global Approach to Migration and Mobility' COM(2011) 743 final, Brussels 18 November 2011.

### 2.2.2.2. The empirical analysis: the practical implementation of Mobility Partnerships

The second phase of the research consists of analysing the projects included in the Annexes to the Joint Declarations with Morocco and Cape Verde<sup>26</sup> as well as the projects listed in the scoreboards used to monitor the stage of implementation of Mobility Partnerships. A scoreboard for each country has been provided by DG Home and in the case of Morocco two other scoreboards have been provided; one by the German Interior Ministry and one by the EU Delegation in Morocco. Scoreboards are Excel documents listing projects included in a particular Mobility Partnership; there is a separate scoreboard for each Mobility Partnership. Scoreboards are not published<sup>27</sup> and the information they contain is not always detailed or complete. It is even possible that scoreboards relative to the same Mobility Partnership, but updated by different partners, do not include the same amount of information<sup>28</sup>. Usually, all projects that have been included in the Annex to a Joint Declaration should be listed in the scoreboard in order to allow for an assessment of their implementation stage, but this is not always the case. The scoreboards also list new projects that have been proposed after the conclusion of the Mobility Partnership agreement, whether these are already being implemented or simply at the conceptual stage. The information included in the scoreboard mainly relates to the description of the project and the stage of implementation (*concluded, ongoing, deleted, in preparation*) but sometimes information about the amount and sources of funding, project duration and the responsible partners and contact person can be found. This is not the case for all projects and depends on the level of detail in which the scoreboard has been filled out.

In order to assess the stage of implementation of a Mobility Partnership, information included in the scoreboards has been checked against information received from some Member States through the exchange of emails and phone calls with the different Ministries involved in the implementation of Mobility Partnerships. A preliminary meeting<sup>29</sup> with an official from DG Home, held in Brussels on the 27 June 2015, helped

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<sup>26</sup> The lists of projects can be found in Annexes II and III of the thesis.

<sup>27</sup> It is possible to access a public version when making a formal request on the DG Home website. This procedure is recent and at the early stage of this study DG Home had no obligation to communicate the scoreboards.

<sup>28</sup> This was the case of the scoreboards for Morocco that were shared by DG Home Affairs and the German Federal Ministry of the Interior in June 2015. A more recent scoreboard was shared by the EU Delegation in Morocco in 2016.

<sup>29</sup> This appears as Interview 0 in the list of interviews in Annex I of the thesis.

to provide a general overview of the key evolution of the projects in the Mobility Partnership with Morocco. Concerning the Mobility Partnership with Cape Verde, as it is less recent, public information about projects was more readily accessible. EU and national documents have also been used to further supplement the analysis and better understand the context of the projects' implementation. Moreover, information available on the websites of different actors involved in the implementation of projects has been included. The first round of interviews in Morocco and Cape Verde enabled completing the overview of the stage of implementation of Mobility Partnerships. This is further detailed in the next section on interviews.

The scoreboards' analysis classifies projects in different categories according to their stage of implementation as follows: *concluded, ongoing, in preparation and deleted/not implemented*. The categorisation depends on the stage mentioned in the scoreboard but can also be different if other information indicates that the project has reached another stage. There is also a distinction between *pre-existing, new* and *concomitant projects*. In Chapter 3 these distinct categories will be explained in detail and applied to the Mobility Partnerships with Morocco and Cape Verde. This analysis is crucial to understand the implementation dynamics and to identify the most relevant projects to be studied in further detail. The general overview of the projects' implementation is conducted in Chapter 3. Subsequently, specific projects have been identified because of their direct link with either the development of a new legal framework or policy on migration and/or migrants' rights or specific bilateral agreements.

The second part of the empirical analysis introduces a mixed methodology, combining research tools that are characteristic of legal research with qualitative social science research tools. To determine whether EU Mobility Partnerships have any relevance on the development and implementation of the third countries' policy or legal frameworks and in particular on migrants' rights, it is not enough to map legal change at a normative or theoretical level. There can be many reasons behind modifications in the legal framework and its implementation. In order to ascertain the extent to which Mobility Partnerships played a role in those variations, it is essential to understand the narratives behind them.

Qualitative research methods are introduced as they answer the “what is”, “why” and “how” questions of the study<sup>30</sup>, which gives a more in depth understanding of the phenomena than quantitative research would do as it typically answers the questions “who”, “when”, “how many” and “where”<sup>31</sup>. In this thesis, the researcher hypothesises that certain factors are relevant when investigating the implementation of Mobility Partnerships and examines in which way these factors matter in the two case studies, Morocco and Cape Verde. These factors were presented earlier. They are: a) the state of relations between third countries and EU Member States, b) the power of negotiation of a third country and c) its level of administrative capacity.

It was not known at the time of the interviews if the Mobility Partnerships were relevant for the development of policies or legal frameworks related to migration law, and if they did, under which circumstances. An in-depth analysis of the outcomes of the projects and of migrants’ experiences generated hypotheses. These hypotheses are that Mobility Partnerships have legal relevance on the development of policy and legal frameworks on migration and migrants’ rights in both Member States and third countries and that several factors can condition this relevance. Interviews have been conducted following this approach and open-ended questions have been asked in order to approach the research question deductively and make an empirical inventory of the implementation, and its consequences, of the two Mobility Partnerships. The answers obtained in the interviews lead to the identification of some common patterns that are helpful in guiding the analysis. This approach helps to grasp the local perspectives and the motivations of stakeholders when deciding whether or not to implement a project or to propose new projects, for example. It is also used to acquire further information such as the opinions and perceptions of the parties involved<sup>32</sup>. The analysis of the legal frameworks coupled with the interviews allow for a critical assessment of the implementation and outcomes of the projects and their relevance (or lack thereof) for developments in the policy and legal frameworks and in the ways the existing legal frameworks are applied in practice. We discuss in detail the interview process in the next section.

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<sup>30</sup> Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 4.

<sup>31</sup> Carrie Williams, ‘Research Methods’ (2007) 5(3) *JBER* 65, 65.

<sup>32</sup> Vera Toepoel, *Doing Surveys Online* (SAGE 2015) 2; Natasha Mack and others, ‘Qualitative Research Methods: A Data Collector’s Field Guide’ (USAID 2005) 42; Ritchie and Lewis (n30) 36.

## 2.3. Setting and participants: the interviews

In this section, we discuss the different aspects of the methodology used to conduct interviews. The first point concerns the choice of respondents, the second point discusses the chronology of the interview and finally, we present the structure of the interviews.

### 2.3.1. Location and choice of respondents

The interviews were held in France, Portugal, Belgium, Morocco and Cape Verde and involved policy makers, EU officials, EU Member States' representatives, the staff of national and international organisations involved in the implementation of the Mobility Partnerships, as well as migrants' representatives (Cape Verdean and Moroccan emigrants in Europe and immigrants in Morocco and Cape Verde). A list of the interviews conducted including the number of people interviewed per organisation, the location and date of interview can be found in Annex I of this thesis. There is no commonly agreed on guideline with reference to the suitable size of a sample. Kathy Charmaz suggests 25 participants<sup>33</sup>, Judith Green and Nicki Thorogood propose around 20 participants<sup>34</sup> and Anton Kuzel recommends six to eight interviews for a homogeneous sample and twelve to twenty interviews "when looking for disconfirming evidence or trying to achieve maximum variation"<sup>35</sup>. Considering the homogeneity of our target group as well as time and practical constraints linked to the PhD research, we decided to limit our sample to six to 12 participants for the category of migrants' representatives. Given the focus of the thesis most interviews were held in Cape Verde and Morocco but in order to understand the full context of the implementation of Mobility Partnerships, interviews were also made with stakeholders and policy makers in Europe (Belgium, France and Portugal).

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<sup>33</sup> Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Thousand Oaks, CA: Sage 2006) 114.

<sup>34</sup> Judith Green and Nicki Thorogood, *Qualitative Methods for Health Research* (Thousand Oaks, CA: Sage 2009) 120.

<sup>35</sup> Anton Kuzel, 'Sampling in Qualitative Inquiry' 33 in Benjamin Crabtree and William Miller (Eds), *Doing Qualitative Research* (Newbury Park, CA: Sage 1992) 43.

A list of migrants' organisations in Cape Verde, Morocco, France and Portugal was compiled. These lists could be found on other migration NGO related websites or through national institutions working with immigrant organisations' such as the National Commission for Human Rights (*Comissão Nacional de Direitos Humanos* [CNDH]) and the *Camara municipal* (town hall) in Cape Verde. The most relevant organisations were selected, and their representatives contacted for an interview. In parallel to the contacts found on these lists, the snowballing method was used, via contacts given by the policy makers, other migrants' organisations or migrants met in informal settings. It is important to use varied types of informants in order to ensure the diversity of the sample. The interviews with migrants' representatives are directed at ascertaining the extent to which migrants are aware of the changes in the legal framework and policies and, more generally, how migrants perceive the evolution in migration practices by State authorities in the period covered by the research. It is important to note here that this is an illustrative investigation and that it is by no means exhaustive. To avoid the risk of bias in the selection of the migrants' organisations in Morocco and Cape Verde, the researcher contacted organisations representing different categories of migrants (geographically and socio-professionally) with the goal of creating a representative sample of the main migrants' groups in the third country. This type of categorisation was not appropriate for the interviews held in France and Portugal as the targeted groups there are either Moroccans or Cape Verdeans.

Lists of Cape Verdean organisations in France and Moroccan organisations in France could be found through the same method than in Cape Verde and Morocco. The embassy websites also had information about the existence of these organisations, mainly in the case of Cape Verde. As many organisations exist, not all representatives were met and only a selection of the organisations considered as the most relevant for the research have been contacted. Many email addresses were not valid anymore, which made it difficult to reach the organisation and one person contacted refused to participate. The other people contacted either never answered or were not available for an interview after first agreeing to participate. Six Cape Verdean representatives living in France were interviewed as well as three Moroccan representatives. The goal was to reach six Cape Verdean and six Moroccan representatives living in France and Portugal but due to time constraint and the difficult access to Moroccan representatives, only three out of six could be interviewed. In Portugal, four Moroccan



representatives were interviewed. These were representatives of the two main Moroccan organisations in Portugal, one in Porto and one in Lisbon. Moroccan organisations in Portugal are not numerous due to the limited number of Moroccans living in Portugal. Additionally, five representatives of Cape Verdean organisations were interviewed.

One of the main challenges was to know how representative these representatives were. In order to have an idea of how representative a respondent is it can be useful to learn more about his or her activities and the ones of the organisation in question and to try to understand how different types of stakeholders perceive them locally. It is not easy to grasp all this information in a short period of time and even if interviews are well prepared it cannot be guaranteed that the respondent is the best representative for a given group. This factor is taken into consideration during the data analysis. The representative is part of the geographical or socio-economic group, which we consider he represents but is considered as having a broader understanding and knowledge of the issues of interest in this study than individual migrants, often beneficiaries of the services provided by the organisation. Migrants' representatives are supposed to have a better knowledge of the policy context and the legal framework in relation to migrants' rights, because they are providing support in these fields to other members of their community, which supposedly have less knowledge and therefore need help. Moreover, by interviewing migrants' representatives we aimed at being able to gather a more general overview of the situation combining several individual experiences from members of the group or organisation chosen by the representative.

The sample concerning authorities, policy makers and implementing staff was larger. All policy makers and members of organisations in charge of the implementation of Mobility Partnerships' projects identified through the scoreboards were contacted for an interview. The latter was necessary in order to have a complete overview of the state of implementation of all projects included in the Mobility Partnerships with Morocco and Cape Verde. Not all of the targeted respondents answered positively to our demand for an interview and the final list of interviewees includes every representative willing to participate in an interview within the time frame of the thesis. The balanced share between EU, Member States, implementing organisation and third country representatives assure that the perspectives of all parties are being taken into

account. In the case of Morocco, 20 policy makers and members of organisations in charge of the implementation of projects were interviewed. In some cases, interviews were held with more than one person from the same organisation. In Cape Verde, 14 policy makers, EU representatives and members of organisations in charge of the implementation of projects were interviewed. Additionally, eleven policy makers and officials have been interviewed in Brussels and Strasbourg.

In order to identify relevant interviewees that were not listed in the scoreboards, the snowballing method was used<sup>36</sup>. This means that respondents were asked at the end of the interview to refer another person working on the same issue, or who might be relevant for the research. Even if a person was not working on a project anymore at the time of the fieldwork, it was possible to have access to the identity of the right person through other staff members and former colleagues<sup>37</sup>. The variety of informants in this group is key to accessing the widest possible set of information. Staff members of organisations working directly on the implementation of the Mobility Partnership were able to provide different insights from those provided by policy makers or officials based in Brussels, for example, whose views might be influenced by the fact that they are further away from the “concrete” implementation.

Other factors can have an influence on the access to policy makers. For example, during the field work in Morocco, the relations between the EU and Morocco were tenuous following a decision by the General Court of the European Union that ordered the annulment of an agreement between Morocco and the EU because it included provisions on Western Sahara<sup>38</sup>. The tense relations between the EU and Morocco lead to some difficulties in meeting with policy makers in order to discuss the Mobility Partnership, as it became a sensitive topic. One EU official and a member of an implementing organisation argued that the reason why it was not possible to interview anyone from the Ministry of Interior was linked to the unfavourable relations between Morocco and the EU at the time of the fieldwork<sup>39</sup>. After explaining that this research

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<sup>36</sup> Paul Vogt, *Dictionary of Statistics and Methodology: A Nontechnical Guide for the Social Science* (Thousand Oaks, Sage 2005) 300.

<sup>37</sup> A similar observation was made in Natasja Reslow, *Partnering for Mobility?: Three-Level Games in EU External Migration Policy* (Maastricht: Datawyse / Universitaire Pers Maastricht 2013) 109.

<sup>38</sup> GC Case T-512/12, *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union*.

<sup>39</sup> Interviews 6 and 10 (n20).

is independent, most of the policy makers agreed to meet. In some cases, it was necessary to insist on the fact that the funding of the PhD research project by the EU does not condition the results and that the research was conducted purely for academic purposes. This information had already been provided in the informative documents sent to the interviewees but in a few cases, it had to be reiterated and interviewees needed to be reassured, either by email or verbally before the interview started.

Another important consideration is the clear presentation of the researcher and the topic of the study. A balance must be found between giving sufficient information in order not to alter the perception of the interviewees and presenting the research in a way that would not discourage potential informants<sup>40</sup>. It is important to keep a good relationship with the group of informants and at the same time to be credible and to be seen as someone who can be trusted. All interviewees are informed about the nature of the research. The research is presented as broadly related to the implementation of Mobility Partnerships and migrants' status and access to rights, including return migration. In the case of interviews with migrants' representatives, the implementation of the Mobility Partnership is not addressed. The reason is that migrants' representatives are generally not included in the implementation process but can discuss the evolution of the situation of migrants in general.

### 2.3.2. The chronology of the interviews

The interviews were conducted in four different phases. The first phase can be designed as "the preparatory period" and consists of exchanges of emails, phone interviews and some in person interviews with EU officials in Brussels and Strasbourg. This includes officials from the EU Commission and different Directorates-General as well as relevant Ministry representatives<sup>41</sup> from the EU Member States involved in the Mobility Partnerships with Morocco and Cape Verde. These interviews and exchanges aim at providing a broader understanding of the Mobility Partnerships and their implementation dynamics and involve precise questions regarding, for example, a particular project and its implementation status. This first period of interviews was held

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<sup>40</sup> Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (Routledge 2007) 210.

<sup>41</sup> In the lists of projects in the Annex to the Joint Declarations as well as in the scoreboards, the ministry in charge of a specific project is generally indicated.

in parallel with the analysis of documents such as the Annexes and the scoreboards in order to map the stage of implementation of the different projects.

The second period of interviews involved field visits to Morocco and Cape Verde. The field visits were designed to obtain first-hand knowledge of the social dynamics in the third countries covered by the research and to make some preliminary contacts with migrants' representatives. In practice, these first field visits consisted of meeting with policy makers, officials and members of organisations in charge of the implementation of projects. During these first visits, the mapping of the stage of implementation of projects was completed and further information gathered on projects that were identified as having legal or practical relevance. Contacts with migrants' representatives were postponed to the third phase of interviews. The identification of policy makers, officials and staff involved in the implementation of the projects was not random. A list of policy makers, officials and staff of implementing organisations involved in the implementation of the projects was made through the scoreboards, recommendations from EU representatives interviewed in the preparatory period or through internet searches. At least one representative of each organisation/Ministry was meant to be interviewed; this was usually but not always possible as some policy makers refused the invitation to meet<sup>42</sup> or were simply unavailable during the field research.

The third period of interviews was held in Morocco and Cape Verde three to nine months after the first visits. The aim of this second round of visits was to interview policy makers who had been identified in the first study visit but had not been available for an interview at the time as well as to interview migrants' representatives, selected based on their roles as leaders of migrants' organisations. These organisations represented migrants, either Moroccan or Cape Verdean emigrants' organisations or immigrants' organisations working with the immigrant population, mainly sub-Saharan migrants in Morocco and migrants from ECOWAS countries in Cape Verde. These immigrants are the first target population of some of the projects implemented in the framework of the Mobility Partnerships. Mainly the projects related to the development

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<sup>42</sup> This happened a few times only, as policy makers in Morocco and Cape Verde were usually cooperative.

and implementation of new migration policies and strategies, which include the integration of immigrants in the third country.

The last round of interviews was held in France and Portugal and consisted of interviewing migrants' representatives of Moroccan and Cape Verdean diaspora organisations.

### 2.3.3. The structure of the interviews

The interview questions are different depending on which group (policy makers, officials and staff of implementing organisations or migrants' representatives) is interviewed. All interviews are semi-structured, as we believe that it is the most appropriate interview method for this research. As Beth Leech argues, a semi-structured interview "provides detail, depth, and an insider's perspective, while at the same time allowing hypothesis testing"<sup>43</sup>. Conversely, an unstructured interview is more appropriate for long term research, people observation or gathering life stories<sup>44</sup>. On the other hand, a structured interview, where the exact same questions are asked to every respondent<sup>45</sup>, for example in the form of a questionnaire, is not appropriate as additional information can be given during the interviews that should be used to delve further if the point seems interesting. Not everything can be planned and some flexibility and adaptability to the conversation is needed. As Jeffrey Berry has pointed out, "[o]pen-ended questions have the virtue of allowing the subjects to tell the interviewer what's relevant and what's important rather than being restricted by the researcher's preconceived notions about what is important"<sup>46</sup>. The questions asked to policy makers and organisations in charge of the implementation of projects were covering three main different issues. First, they were asked questions in relation to the role of their organisation in the implementation of the Mobility Partnership, precise questions in relation to the project they oversee and the stage of implementation. The two first field visits aimed at asking precise questions to policy makers and other stakeholders directly in charge of one or more projects to complete the mapping of the implementation of the Mobility Partnerships. For example, stakeholders have been

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<sup>43</sup> Beth Leech, 'Asking Questions: Techniques for Semi-Structured Interviews' (2002) 35(4) *PS Political Sci Politics* 665, 665.

<sup>44</sup> Gary Ferraro, *Cultural Anthropology: An Applied Perspective* (Cengage learning 2007) 111.

<sup>45</sup> *Ibid.*

<sup>46</sup> Jeffrey Berry, 'Validity and Reliability Issues in Elite Interviewing' (2002) 35(4) *PS Political Sci Politics* 679, 681.

asked if and how some projects influence directly or indirectly the development of new laws or policies related to migrants' rights in order to have a better understanding of the potential legal and political relevance of Mobility Partnerships.

Then, the complementarity between the Mobility Partnership projects and the broader range of activities or bilateral cooperation is analysed in the case of interviews with representatives of Member States. The potential changes in migrants' access to rights related either to a change in the legislation or a change in the way the legislation is implemented are discussed. In the case of the interviews with migrants' representatives, the perception of migrants' situation is analysed. No direct questions related to the Mobility Partnership are asked. The question related to the access of migrants to a set of rights, such as education, health, housing but also questions about their access to the labour market asking if they benefited from specific programmes that have been implemented by the Mobility Partnership. Other questions concerned for example their perception of the evolution of the general climate in the country and the perception local authorities have of this particular group of people, the consequences of the regularisation of an important group of immigrants, their perspectives to settle in the third country or their determination to migrate somewhere else.

The triangulation of first and secondary literature sources with the interview data gives a solid and broad perspective of the issue and a valid argumentation to support the conclusive results of the study. Taking the interviews' outcomes without triangulation of the results could falsify the results as interviewees might be bound by their own agenda, mainly for policy makers but that could also be the case for migrants' organisations' representatives.

## **2.4. Ethical considerations**

Angelica Orb, Laurel Eisenhauer and Dianne Wynaden argue that "ethical issues are present in any kind of research"<sup>47</sup>. Several authors defined the term "ethics" as being considerations on virtuous behaviour or means to establish what constitutes such a

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<sup>47</sup> Angelica Orb, Laurel Eisenhauer and Dianne Wynaden, Ethics in Qualitative Research' (2000) 33(1) *JNS* 93, 93.

behaviour<sup>48</sup>. Angelica Orb, Laurel Eisenhauer and Dianne Wynaden make the distinction between the features of ethical considerations in qualitative and quantitative research<sup>49</sup>. Alex Broom describes the implication of being ethical in a research project and he identifies the main basic ethical concerns every researcher should have. These concerns relate to information, consent and voluntary participation as well as the confidentiality of the data collected and anonymity of the respondents<sup>50</sup>. Mary Ramos added to this list “the relationship between the researcher and the participants, the researcher’s subjective interpretations of data, and the design of the research in itself”<sup>51</sup>. This last section addresses these concerns and discusses how the different ethical risks were taken into consideration for this research.

To avoid the risks linked to confidentiality and anonymity different precautions have been taken. Confidentiality of data was maintained at all times, and identification of participants is not available during or after the study. Interview transcripts were given a numerical code. All personal information of the participants, including name and contact details, were stored in a list in a different location on the computer. This list has no reference to the numerical codes and can therefore not be traced back to the transcripts. A list that links names to numerical codes is stored in a different place, which is not to be found on the device. All the data are anonymous and will not be used for another purpose than this thesis. The data are safely stored in a password protected storage device.

When contacting potential interviewees, an invitation email to participate was systematically sent. To every email a consent form was attached as well as an informative brochure, in the adequate language (English, French or Portuguese)<sup>52</sup>. According to Leanne Stunkel and others, consent forms can be kept short. A participant does not understand better the purpose of a research when overly detailed consent forms are used in comparison to short ones<sup>53</sup>. The interviewees confirmed their participation by email, setting the date, time and place of the meeting. This email

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<sup>48</sup> Jennifer Trusted, *Moral Principles and Social Values* (Routledge & Kegan Paul 1987); Maxime Birch and others, ‘Introduction’ 1 in Melanie Mauthner and others, *Ethics in Qualitative Research* (Sage 2003) 1-13.

<sup>49</sup> Angelica Orb (n47) 93.

<sup>50</sup> Alex Broom, ‘Ethical Issues in Social Research’ (2006) 14(2) *Complement Ther Med* 151, 152.

<sup>51</sup> Mary Carol Ramos, ‘Some Ethical Implications of Qualitative Research’ (1989) 12(1) *RNH* 57, 58.

<sup>52</sup> These documents are available upon request.

<sup>53</sup> Leanne Stunkel and others, ‘Comprehension and Informed Consent: Assessing the Effect of a Short Consent Form’ (2010) 32(4) *IRB* 1, 5.

confirmation constitutes the agreement of the interviewee to participate in the interview under the terms expressed in the consent form. Only two migrants' representatives in Morocco have confirmed their participation by phone and therefore have not sent back the email of confirmation. In the case of Cape Verde, France and Portugal this also happened a few times and in a few cases contact was only done by phone, therefore no document could be sent prior to the meeting. All the rights of the respondents were explained to them before the interview. The informed consent form has never been signed by the interviewees. The terms of the interviews have been reiterated at the beginning of each interview underlining the free participation of the interviewee and the freedom that he has to stop or withdraw his participation at any time. The signature of the consent form was not requested on the day of the interview in order to preserve an atmosphere of mutual trust and free speech. According to Leech, it is important that the respondents feel comfortable<sup>54</sup>. Moreover, Kenneth Goldstein underlines that a good atmosphere is necessary for respondents to be willing to recommend other potential respondents during the interviews<sup>55</sup>, therefore enabling the use of the snowballing method.

No interviews were recorded. In Morocco, in the first phase of interviews with policy makers and members of organisations in charge of the implementation of projects, it was not possible to record the interviews as no recording device or mobile phone (or any other electronic devices) were allowed in the offices where the interviews were held. In the rare cases in which it was possible to enter with such a device, a decision was made not to use it due to the existing tense situation between the EU and Moroccan authorities at the time. In the case of the interviews with migrants' representatives in Morocco, interviews were not recorded in order for the interviewees to feel they could speak more openly, in a more natural setting. Moreover, migrants' representatives were sometimes reluctant to speak, as their activities were not always seen positively by the authorities. The absence of recording of the interviews helped to create an atmosphere of mutual trust. Following the positive experience gained in Morocco, the decision not to record the interviews held in Cape Verde, France and Portugal was taken to create the same atmosphere of trust and open dialogue.

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<sup>54</sup> Beth Leech (n43) 666.

<sup>55</sup> Kenneth Goldstein, 'Getting in the Door: Sampling and Completing Elite Interviews' (2002) 35(4) *PS Political Sci Politics* 669, 671.



Moreover, in Cape Verde, Portugal and in Morocco some interviewees would have refused to participate in the interview if it was recorded. Notes were taken during the interviews to transcribe the answers of the interviewees. The transcription includes some rewriting to clarify the speech of the interviewees and make the flow of their discourse easier to follow. This does not mean that the thoughts were revised to follow one particular direction; it is only the form that was impacted and not the content of the discourse. A failure to transcribe faithfully the content of the interviews would go against all standards of research ethics as well as the intellectual integrity of the researcher. No coding software was used.

Finally, a last ethical consideration to take into account is the “researcher’s subjective interpretations of data”. Denzin Lincoln argues that “behind all research stands the biography of the gendered researcher, who speaks from a particular class, racial, cultural and ethnic community perspective”<sup>56</sup>. He means that the researcher tends to analyse and perceive the data in a specific manner according to his own personal background. The researcher was particularly sensitive to the risk of unconscious bias that the questions, interactions and understanding of the issues could raise. It was crucial to be self-reflective in order to avoid falling into this bias and take sufficient distance vis-à-vis the issue to be able to see it with an objective and external perspective. This was also important to position oneself and not be perceived by interviewees as biased even though their own perception of the researcher due to her position and personal background could also be biased and might have influenced their answers.

## **2.5. Conclusion**

In this Chapter, we discussed the methodology used to complete the thesis as well as the ethical concerns faced by the researcher.

In the first part of this Chapter we exposed the purpose of the study. The first hypothesis is that Mobility Partnerships, while being soft law instruments, are not without relevance for the development of the legal and political frameworks in Morocco

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<sup>56</sup> Norman Denzin and Yvonna Lincoln, *Handbook of Qualitative Research* (London: Sage 2000) 21.

and Cape Verde. We first analysed the legal nature of Mobility Partnerships and from there we sought to ascertain whether Mobility Partnerships have legal and policy relevance or not, focusing on their potential external relevance. In other words, the potential legal and policy relevance that a Mobility Partnership can have for the legal and political order of a third country, Morocco and Cape Verde. The second hypothesis is that three main factors condition the way Mobility Partnerships can be relevant for Morocco and Cape Verde. The three factors potentially conditioning the relevance of Mobility Partnerships for third countries are the state of relations between third countries and EU Member States, the power of negotiation of a third country and its level of administrative capacity. These factors can be favourable or not, to the legal and political relevance of Mobility Partnerships.

In the second part of this Chapter we explained the choice of Morocco and Cape Verde as case studies and the structure of the research. Morocco and Cape Verde were chosen as case studies due to several reasons. In order to be able to analyse how postcolonial ties possibly influence the way Mobility Partnerships are relevant, the third countries studied had to be former colonies. Then, to see how the power of negotiation factor can influence the relevance of Mobility Partnerships one of the case study had to have a high power of negotiation and the other a low power of negotiation.

The research has a legal and an empirical focus. This is linked to the different steps followed to discuss the two hypotheses presented at the outset of this Chapter. The research follows a logical sequence of two steps: first the analysis of the legal framework, then the empirical analysis was conducted which explored the practical implementation of Mobility Partnerships. Several methods were used including empirical and legal research and qualitative research in the form of interviews.

The third part of this Chapter focused on the interview process. First a presentation of the selection of the participants' sample was made, followed by a description of the various stages of the field research and the structure of the interviews themselves were discussed. The methods used for participants' selection in order to avoid bias are described.

The last part of this Chapter was to scrutinise the ethical concerns, as well as taking these into account and dealing with them in a responsible and transparent manner. All precautions have been taken to ensure participants' free and informed consent and anonymity, and the confidentiality of the data gathered. Moreover, self-reflection, in order to avoid one's own bias, as well as distance and objectivity towards the research, have been applied.



## **Chapter 3 EU Mobility Partnerships with Cape Verde and Morocco: context of adoption, content and stage of implementation**

### **3.1. Introduction**

The aim of this chapter is to better understand how Mobility Partnerships work, from their conclusion to their implementation, via the cases of Morocco and Cape Verde. This chapter is key in the general analysis of the thesis, as without an examination of the implementation of Mobility Partnerships discussion of their potential legal and policy relevance is not possible. In order for a Mobility Partnership to be able to have legal and policy relevance, its projects have to be effectively implemented. It is only through the action of implementation that a project included in a Mobility Partnership can have legal relevance for a third country. If no project is in the process of being implemented the Mobility Partnership is only an empty political document.

The first section of this chapter discusses the context in which the Mobility Partnerships with Cape Verde and Morocco were concluded. First, the general policy orientation at the EU level at the time of the adoption of both Mobility Partnerships is explained. Then, the analysis of the specific context, in Cape Verde and Morocco, is conducted. The Mobility Partnership with Cape Verde was concluded in 2008, whereas Morocco's Mobility Partnership was concluded in 2013, five years later, in a context of crisis that required a political shift of position from the EU. The context and scale of the Mobility Partnerships concluded with both countries differed vastly. Cape Verde is a small country with limited migration flows towards Europe, whereas Morocco has significantly more emigration towards Europe and plays a more strategic position as an entry point towards Europe. However, some similarities exist between both cases, such as the role of the former colonial power. France and Portugal play a prominent role in the selection of the third country but also in the proposition of projects shaping the content of the Mobility Partnerships and determining their implementation.

In the second section, we examine the content of both Mobility Partnerships. This section explores the relation between the Mobility Partnership tool and the broader EU policy related to migration, notably the implementation of the GAM and GAMM. The three pillars of the GAM and four pillars of the GAMM are reflected in the structure of the Mobility Partnerships. The Mobility Partnership is the instrument of predilection for the EU to implement the principles of the GAM/GAMM, therefore it substantially influences the structure of the partnerships. It is also interesting to discuss the different topics included in the Mobility Partnerships and the actual projects proposed. The content of the projects under each topic is discussed. The number of projects proposed under each of the topics also helps to understand the political interests at stake. Moreover, the existence of a balanced partnership can be discussed looking at the type of projects proposed and who is proposing them.

The last section provides an overview of the implementation of both Mobility Partnerships. First, we consider the scoreboards (Excel documents listing the projects related to Mobility Partnerships and their stage of implementation), as they are the tool used to “monitor” the implementation of the Mobility Partnerships. This tool as such is problematic and several shortfalls are underlined. It is important to discuss the problems linked to the scoreboards, as they are the central instrument providing information on the stage of implementation of the projects in the different existing Mobility Partnerships. We will also look at the different actors and their roles in the implementation of the projects. The actors involved in the implementation of Mobility Partnerships are numerous and come from all three levels of governance, namely, the EU and different Directorate Generals, the EU Member States signatories of a specific Mobility Partnership and the actors in charge of the implementation of projects in practice such as third country officials, international organisations or implementation agencies related to a specific Member State. Finally, we will present a general overview of the implementation of both Mobility Partnerships, including distinct stages of implementation: *in preparation, ongoing, concluded and deleted/ not implemented*. Projects are also divided in three different typologies: *preexistent, concomitant and new*. Moreover, an overview of the content of the different projects will be given and particular attention will be paid to new projects to see whether they can be related to new interests and policy priorities either from the EU and member States but potentially also from the third country.

### **3.2. Context of adoption of the Mobility Partnerships with Cape Verde and Morocco**

In order for a third country to be selected to conclude a Mobility Partnership it has to comply with criteria set by the Commission. The Communication on Circular Migration and Mobility Partnerships between the European Union and Third Countries indicates a non-exhaustive list of criteria<sup>1</sup>. The main criteria are the geographical balance between the South and East of Europe, the willingness to cooperate on irregular migration and border control, the engagement to negotiate a readmission agreement and the weight of migration flows from the third country to Europe. We can argue that it is not mandatory to fulfil all criteria as Cape Verde was not a country with an important migration flow towards Europe. Moreover, Morocco is known for not willing to commit to a readmission agreement including third country nationals. In addition to the criteria mentioned, the Commission also advises to take into account broader economic, political and security factors<sup>2</sup>. In practice, Member States substantially influence the choice of the third country to which a Mobility Partnership is proposed<sup>3</sup>. The main reason why the Commission has to accept Member States' preferences lays in the nature of Mobility Partnerships itself; the Member States are free to participate or not. In order to have enough Member States participating in a Mobility Partnership and proposing and implementing projects, the Commission has to give priority to Member States' preferences<sup>4</sup>. Carrera and Hernández I Sagrera argue that national migration policies are at the heart of Mobility Partnerships<sup>5</sup>. In other words, a Member State would agree to participate only if it furthers its national policy.

Potential initiatives enhancing mobility towards Europe through Mobility Partnerships would not affect EU Member States' sovereignty in this regard as they have the last word when it comes to project implementation.

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<sup>1</sup> Commission of the European Communities, 'on Circular Migration and Mobility Partnerships between the European Union and Third Countries' COM(2007) 248 final, Brussels, 16 May 2007 1.

<sup>2</sup> European Commission, 'on the Global Approach to Migration and Mobility' COM(2011) 743 final, Brussels, 18 November 2011 1, 10.

<sup>3</sup> Natasja Reslow, 'Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships' (2012) 34(3) *JEI* 223, 230.

<sup>4</sup> Interview 29 DG Home Affairs, Brussels, 26 October 2016.

<sup>5</sup> Sergio Carrera and Raúl Hernández I Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?' (2009) CEPS Working Document 321 1, 31.

### 3.2.1. The conclusion of the Mobility Partnership with Cape Verde

The relation between the EU and Cape Verde is uncommon compared to usual relations between the EU and African countries<sup>6</sup>. Cape Verde was uninhabited when it was discovered by Portugal in 1462 and was a Portuguese colony for over 500 years, until 1975. During the colonial period, Cape Verde already had a singular position compared to other African colonies. Cape Verdeans worked as part of the Portuguese administration in other colonies such as Guinea-Bissau and Angola giving Cape Verdeans a special status in the colonial structure. Cape Verde is also a mixed society with most of its population being of mixed African and European origins. After its independence Cape Verde was totally reliant on foreign aid<sup>7</sup>. Peter Meyns explains that “the new leaders of Cape Verde faced the dual challenges of ‘viability’ and ‘vulnerability’, common to island countries. Structurally unable to achieve self-sufficiency in food production and with only limited export potential, Cape Verde needed donor support to survive”<sup>8</sup>. Cape Verde has struggled with its lack of resources since its independence and has understood since early on that having close relations with the major aid donor, the EU, could be beneficial<sup>9</sup>. EU’s financial support (even if not the only provider) has been a key influence for the improvement of the poverty level and the consolidation of democratic institutions<sup>10</sup>.

Since 2005, Portugal and Cape Verde have been working together in order to help the archipelago build even closer ties with the EU<sup>11</sup>. As a result from their colonial past, both countries have strong bilateral ties and Cape Verde was prompted to go beyond the Cotonou Agreement in its cooperation with the EU<sup>12</sup>. In March 2005, Mário Soares, a former President of the Portuguese Republic, Diogo Freitas do Amaral, at the time Portugal’s Foreign Minister, and Adriano Moreira, a former Portuguese Minister of the

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<sup>6</sup> Jairzinho Lopes Pereira, ‘Theorizing the EU Conditionality Policy and its Application in West African Countries: the Case of Cape Verde’ [2014] *ESJ Special Edition* 389, 401.

<sup>7</sup> Armelle Enders, *Histoire de l’Afrique Lusophone* (Chand Eigen 2013) 133.

<sup>8</sup> Peter Meyns, ‘Cape Verde: an African Exception’ (2002) 13(3) *JoD* 153, 157.

<sup>9</sup> Jairzinho Lopes Pereira (n6) 390.

<sup>10</sup> *Ibid.*

<sup>11</sup> Alena Vysotskaya Guedes Vieira and Laura Ferreira-Pereira, ‘The European Union-Cape Verde Special Partnership: the Role of Portugal’ (2009) 42(1) *PJIA* 42, 44.

<sup>12</sup> Natasja Reslow, ‘The Role of Third Countries in EU Migration Policy: the Mobility Partnership’ [2012] *EJML* 393, 400.



Overseas Territories, supported Cape Verde's candidacy to become an EU Member State<sup>13</sup>. Cape Verdean authorities did however not submit an official membership application. The idea of Cape Verde becoming an EU Member State has also never been formally rejected.

Chou and Gibert argue that pre-existing postcolonial ties are determinant factors in the cooperation between the EU and third countries and regions<sup>14</sup>. It is usually agreed that EU Member States keep strong relationships with former colonies as illustrated by the relationship between Cape Verde and Portugal. Chou and Gibert believe that third countries and a Member State that have postcolonial ties will tend to adopt a common position when negotiating with the EU as they will favour the existence of the postcolonial link versus the relationship with the EU. This means that third countries would only agree to conclude a Mobility Partnership if the former colonial power is favourable to it. It could also mean that the former colonial power will be more involved than the EU in the proposition and implementation of projects. This is particularly true when the Mobility Partnership has little or no "added value" in comparison to the pre-existing cooperation with the former colony<sup>15</sup>.

In January 2007, a Task Force aiming at creating a Special Partnership for Cape Verde was created. In the second semester of 2007, the Council was presided by Portuguese Prime Minister José Socrates and the Commission was chaired by José Manuel Durão Barroso, a former Portuguese Prime Minister. Both officials wanted the EU to focus more on Africa and were sensitive to the aspirations of Cape-Verdeans' having a closer status with the EU. The perfect configuration for the conclusion of the Special Partnership with Cape Verde was in place<sup>16</sup>. In December 2007, the EU and Cape Verde concluded a Special Partnership<sup>17</sup>. Hitherto, the cooperation on migration issues between Cape Verde and the EU was essentially conducted by Portugal alone<sup>18</sup>. The Special Partnership has been described as a means for the EU to diminish alleged

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<sup>13</sup> Jairzinho Lopes Pereira (n6) 391; Petition Urging EU Membership for Cape Verde Launched in Portugal, [https://web.archive.org/web/20050623165034/http://www.eubusiness.com/External\\_Relations/050317090821.tnkf9k7j/](https://web.archive.org/web/20050623165034/http://www.eubusiness.com/External_Relations/050317090821.tnkf9k7j/), 'Accessed 24 November 2017'.

<sup>14</sup> Meng-Hsuan Chou and Marie Gibert, 'The EU-Senegal Mobility Partnership: from Launch to Suspension and Negotiation Failure' (2012) 8(4) *JCER* 408, 414-415.

<sup>15</sup> *Ibid* 415.

<sup>16</sup> Alena Vysotskaya Guedes Vieira and Laura Ferreira-Pereira (n11) 42, 46.

<sup>17</sup> Commission of the European Communities, 'on the Future of Relations between the European Union and the Republic of Cape Verde' COM(2007) 641 final, Brussels, 24 October 2007.

<sup>18</sup> Sergio Carrera and Raúl Hernández I Sagrera (n5) 21-22.

security threats coming from West Africa, specifically drug trafficking, terrorist activities and irregular migration<sup>19</sup>.

The Special Partnership is based on six pillars: good governance, security and stability, regional integration, the convergence of technology and standards policies in the areas covered by the action plan, knowledge-based society and the fight against poverty<sup>20</sup>. The Special Partnership encompasses the issues of immigrants' integration and the management of migration flows under the pillars of good governance and security and stability, but there is no pillar that specifically focuses on migration. The focus on migration and mobility is done through the Mobility Partnership<sup>21</sup>. The Special Partnership and the Mobility Partnership are connected. Even though the Mobility Partnership, has some degree of autonomy, although it is not independent of the Special Partnership<sup>22</sup>. According to a Cape Verdean official, the existence of the Special Partnership shaped the content of the Mobility Partnership<sup>23</sup>. The Council Presidency saw in the conclusion of this Mobility Partnership a way to "improve the political profile of Cape Verde"<sup>24</sup>.

It was in the favourable climate of the negotiation of the Special Partnership that discussions about the Mobility Partnership started. Spain and Portugal were enthusiastic supporters of Cape Verde being chosen as a pilot country for the conclusion of a Mobility Partnership. Both countries have significant economic interests in the country. Portugal and Spain were Cape Verde's main trade partners at the time of the negotiations, and still are today. In 2007, Spain (44,2%) and Portugal (21,7%) were Cape Verde's main exports partners and part of its top three main imports partners (Portugal 41,1%, Netherlands 10,6% and Spain 6,5%)<sup>25</sup>. Moreover, a fisheries agreement<sup>26</sup> was concluded between the European Economic Community and Cape Verde in 1990 allowing Portugal, Spain and France to fish in the waters of Cape Verde.

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<sup>19</sup> Jairzinho Lopes Pereira (n6) 397.

<sup>20</sup> Commission of the European Communities (n1) 4-6.

<sup>21</sup> Interview 36, MIREX, Praia, 23 February 2016.

<sup>22</sup> Commission of the European Communities (n1) 4-6.

<sup>23</sup> Interview 36 (n21)

<sup>24</sup> Alena Vysotskaya Guedes Vieira and Laura Ferreira-Pereira (n11) 48.

<sup>25</sup> Cape Verde Business Mission Fact Sheet NABC.pdf 'Accessed 27 November 2017'.  
[http://www.conscv.nl/images/documentos/Cape\\_Verde\\_Business\\_Mission\\_Fact\\_Sheet\\_NABC.pdf](http://www.conscv.nl/images/documentos/Cape_Verde_Business_Mission_Fact_Sheet_NABC.pdf)

<sup>26</sup> Acordo entre a Comunidade Económica Europeia e a República de Cabo Verde relativo à pesca ao largo de Cabo Verde - Protocolo que fixa as possibilidades de pesca e a compensação financeira previstas no Acordo entre a Comunidade Económica Europeia e o Governo da República de Cabo Verde relativo à pesca ao largo de Cabo Verde OJ L 212, 9.8.1990.

Portugal strongly supported the conclusion of the Mobility Partnership with Cape Verde leading multiple meetings with different EU Member States, to raise awareness on the case of Cape Verde in order to promote the Special Partnership as well as the Mobility Partnership linked to it<sup>27</sup>. The Cape Verdean ambassador in Brussels was responsible for the negotiations of the Mobility Partnership. Cape Verde was also proactive in its attempts to be selected as a pilot country for the Mobility Partnership. The Cape Verdean ambassador in Lisbon approached Portuguese officials and the Cape Verdean ambassador in Brussels discussed a potential Mobility Partnership with the Permanent Representation of Luxembourg<sup>28</sup>. The Cape Verdean government did however not submit a formal written expression of interest to the Commission or Council<sup>29</sup>.

EU officials based in Brussels and Praia agree on the fact that Cape Verde had been chosen as a pilot country due to its willingness to cooperate and its good relations with the EU, therefore preventing the risks of failure. Moreover, it is a small country with a manageable migration flow, it is isolated, it is a stable country, democratic, and culturally close to the EU due to its colonial past<sup>30</sup>. It had all the “ingredients” to be a successful partnership and a “quick win”. Jairzinho Lopes Pereira argues that “[t]he EU has Cape Verde in high regard because the country is an example of stability and good governance and makes good use of the European funds”<sup>31</sup>. Due to its high level of governance the Commission hopes that Cape Verde can be a model for other ACP countries to follow. Cape Verde can be seen as a success story of decolonisation in Africa. It is a stable and democratic country and has been included by the United Nations in the group of middle-income countries, in 2007<sup>32</sup>. Moreover, Cape Verde was considered as being the “best student” in the region because of its existing cooperation on migration and security issues which played a significant role in being chosen as a Mobility Partnership beneficiary<sup>33</sup>. Migration was not the primary reason to conclude

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<sup>27</sup> Alena Vysotskaya Guedes Vieira and Laura Ferreira-Pereira (n11) 47.

<sup>28</sup> Natasja Reslow, *Partnering for Mobility?: Three-Level Games in EU External Migration Policy* (2013 Datawyse / Universitaire Pers Maastricht) 191.

<sup>29</sup> European Commission, ‘on Mobility Partnerships as a Tool of the Global Approach to Migration’ SEC(2009) 1240 final, Brussels, 18 September 2009 1, 3.

<sup>30</sup> Interview 29 (n4); Interview 32 ICMPD, Brussels, 28 October 2016; Interview 39 EU Delegation, Praia, 25 February 2016.

<sup>31</sup> Jairzinho Lopes Pereira (n6) 390.

<sup>32</sup> Committee for Development Policy Expert Group Meeting, ‘Review of the List of Least Developed Countries, Monitoring the Progress of Graduated Countries: Cape Verde’, New York, 16-17 January 2011 1, 1.

<sup>33</sup> Interview 36 (n21).

the Mobility Partnership but rather the motivation of Cape Verde to cooperate on security issues such as the fight against transnational organised crime.

The reasons for Member States to participate in the Mobility partnership were various. In 2005, there were 53,008 Cape Verdeans in Portugal, 18,180 in France, 11,532 in the Netherlands, 3,243 in Spain and 1,234 in Luxembourg<sup>34</sup>. These are the main destinations for Cape Verdean migrants towards Europe<sup>35</sup>. These are also the countries that participate in the Mobility Partnership with Cape Verde. The flux towards the other Member States being so insignificant or even inexistent, they had no reason to participate in the Mobility Partnership. Moreover, in the case of Spain, Portugal and France, trade and the fisheries agreement also played a role as it increased the interests of these countries in collaborating with Cape Verde. In addition, Portugal has strong bilateral ties with Cape Verde due to their postcolonial ties. But the fact that Cape Verde became a middle-income country in 2007 also played a role. Indeed, leaving the group of least developed countries meant higher economic pressures on the country. The country lost the possibility to access the EU market without quotas and will now have to pay taxes on the products they sell in the EU<sup>36</sup>. Cape Verde being economically dependent on the EU had to find a new way to access funding. Moreover, this new classification led to the loss of aid funding from several Member States. The fact that Cape Verde became a middle-income country was a reason for The Netherlands to participate in the Mobility Partnership. Indeed, as a result of Cape Verde entering the category of middle-income countries, it ceased to be a priority of the Dutch national aid programme<sup>37</sup>. That meant funding cuts for development projects in Cape Verde by The Netherlands. The Netherlands saw the Mobility Partnership as a new possibility to keep development cooperation programmes with Cape Verde going, allowing for the allocation of funding for Mobility Partnerships projects that could no longer be funded directly through their national aid programme. The Netherlands would join the Mobility Partnership at a later stage, as at first they did not consider the Mobility Partnership with Cape Verde sufficiently relevant, even though they were the third recipient country of Cape Verdean immigrants in Europe at the time<sup>38</sup>.

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<sup>34</sup> United Nations, DESA, Population Division: international Migrant Stock 2005, see: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml> 'Accessed 26 October 2016'.

<sup>35</sup> The United States is the first country of destination of Cape Verdean migrants.

<sup>36</sup> Ministério dos Negócios Estrangeiros, *Balanço da Presidência Portuguesa do Conselho da União Europeia*, 1 de Julho a 31 de Dezembro de 2007 1, 150.

<sup>37</sup> Ibid. 234.

<sup>38</sup> Natasja Reslow (n3) 232.

In December 2007, in parallel to the conclusion of the Special Partnership, the EU Council for Justice and Home Affairs adopted the Decision to start a dialogue on Mobility Partnership with Cape Verde<sup>39</sup>. Following the adoption of this decision, the Commission approached Cape Verdean officials. However, Cape Verdean officials, after some success in being chosen as a pilot country, were less able to negotiate the text of the Mobility Partnership. Meng-Hsuan Chou<sup>40</sup> argues that third countries have no authority over the content of EU migration policy. According to the Commission's communication, Cape Verde had clear aspirations when it came to the content of the Mobility Partnership reckoning that the main concerns of the Cape Verdean government were security and mobility<sup>41</sup>. Interviews with Cape Verdean officials stressed however some of their shortcomings in the negotiations. Several respondents underlined the fact that the officials on the Cape Verdean side participating in the negotiations on the content of the Mobility Partnership were not sufficiently prepared and did not adequately assess their needs and priorities<sup>42</sup>. Their lack of preparation and clear expectations put them in a position where they could not have negotiated the content in a suitable way. One official declared that it is the Cape Verdeans' fault for not being prepared<sup>43</sup>. Several officials also underlined the inexperience of Cape Verdean officials in these types of negotiations and the fact that EU officials were well prepared and used to the negotiation process<sup>44</sup>. It seems that there was no power balance and Cape Verdean authorities did not have much choice but to accept the content proposed by the EU. Additionally, Lisa Akesson discusses the fact that Cape Verde was dependent on the EU funding received under the Special Partnership and as such did not have much room to object to the conclusion of the Mobility Partnership as both partnerships went hand in hand<sup>45</sup>.

At the time of the negotiations, Cape Verdean officials saw in the Mobility Partnership an opportunity to enhance the mobility perspectives of Cape Verdean citizens. Cape

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<sup>39</sup> Council of the European Union, 'Draft Council Conclusions on Mobility Partnerships and Circular Migration in the Framework of the Global Approach to Migration' 16283/07 Brussels, 7 December 2007.

<sup>40</sup> Meng-Hsuan Chou, 'EU and the Migration-Development Nexus: What Prospects for EU-Wide Policies?' (2006) Working Paper 37 Oxford: Center on Migration, Policy and Society.

<sup>41</sup> Commission of the European Communities (n1) 3.

<sup>42</sup> Interview 33, Direção Geral das Comunidades, Praia, 23 February 2016; Interview 45, Ex-Secretário de Estado dos Negócios Estrangeiros/Former Ambassador, Praia, 16 November 2016.

<sup>43</sup> Interview 33 (n42).

<sup>44</sup> Interviews 33 and 45 (n42).

<sup>45</sup> Lisa Akesson, 'Under the Cover of Partnership' [2011] NAI Annual Report 16, 16.

Verde is a country that highly depends on remittances from its nationals abroad<sup>46</sup>. With more possibilities to legally travel and work abroad, more Cape Verdeans could be sending remittances, a positive for the national economy. It should also be considered that at the time of the conclusion of this pilot Mobility Partnership the economic crisis had not yet hit the European economy and several labour mobility schemes were envisaged<sup>47</sup>. It is likely that the inclusion of Cape Verde in the Macaronesia combined with the talks envisaging the discussions about Cape Verde becoming an EU Member State, may have misled Cape Verdean authorities<sup>48</sup>. Moreover, at an early stage of the negotiation of the Mobility Partnership, the idea of granting a visa exemption status to Cape Verde was presented, but because of the start of economic and migration crises in Europe, it did not gain further traction. As Reslow puts it, Mobility Partnerships are “being implemented in un-favourable circumstances, as these socio-economic conditions are not conducive to the creation of new channels of immigration from non-EU countries”<sup>49</sup>.

The Mobility Partnership between Cape Verde, the European Community and Spain, France, Luxembourg and Portugal, was concluded on 21 May 2008<sup>50</sup>. Cape Verde was the first pilot Mobility Partnership to be concluded in parallel with the Mobility Partnership with Moldova. Cape Verde is the only country outside of the EU neighbourhood that benefitted of a Mobility Partnership instead of a CAMM.

### 3.2.2. The conclusion of the Mobility Partnership with Morocco

Since its independence, immigration from Morocco has always been mainly directed towards Europe. The conclusion of various labour migration agreements with European countries accentuated this trend<sup>51</sup>. The large Moroccan diaspora in Europe

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<sup>46</sup> Jørgen Carling and Lisa Akesson, ‘Mobility at the Heart of a Nation: Patterns and Meanings of Cape Verdean Migration’ (2009) 47(3) *Int Migr* 123; IOM, ‘Migração em Cabo Verde: Perfil Nacional’ (2009).

<sup>47</sup> For example, between France and Cape Verde a bilateral agreement has been concluded in November 2008 opening the French labour market for Cape Verdeans working in specific types of positions. Accord entre le Gouvernement de la République Française et le Gouvernement de la République du Cap-Vert Relatif à la Gestion Concertée des Flux Migratoires et au Développement Solidaire 20080297 24 November 2008.

<sup>48</sup> World Markets Analysis, ‘Government to Request EU Membership for Cape Verde’, 9 May 2005; Interviews 33 (n42) and 36 (n21).

<sup>49</sup> Natasja Reslow, ‘EU “Mobility” Partnerships: An Initial Assessment of Implementation Dynamics’ 2015) 3(2) *PaG* 117, 125.

<sup>50</sup> Council of the European Union, ‘Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde’ (2008) 9460/08 ADD 2.

<sup>51</sup> Myriam Cherti and Michael Collyer, ‘Immigration and Pensé e d’Etat: Moroccan Migration Policy Changes as Transformation of “Geopolitical Culture”’ (2015) 20(4) *The Journal of North African Studies* 590, 600; Hein de Haas, ‘Migration, Remittances and

plays a key role in the relations between the EU and Morocco<sup>52</sup>. Morocco, since early on has chosen to have a close relationship with the EU<sup>53</sup>. The Moroccan candidacy to become an EU Member State presented in 1987 illustrates this point. Morocco's candidacy was rejected by the Council which argued that Morocco is not a European country<sup>54</sup>. Moreover, Morocco is a reliable partner in the area of border control to fight against irregular migration flows toward Europe<sup>55</sup>. Morocco works closely with Spain in order to secure the border between both countries. Additionally, between 2006 and 2008, Morocco and Spain implemented a project on the management of seasonal Moroccan migration workers going to Spain. The project aimed to prevent irregular migration by creating legal migration channels for temporary workers<sup>56</sup>. Morocco is considered by the EU as the "good student" in the region, which is why it has been granted an "advanced status" in 2008<sup>57</sup>. With the "advanced status", Morocco can benefit from favourable policies related to maritime transport and better access to EU funding<sup>58</sup>. Economically, Morocco is heavily dependent on the EU<sup>59</sup>. The EU is the main market for Morocco to sell its goods and the tourism industry in Morocco is also dependent on European tourists. However, from the European perspective, Morocco is also an important trade partner and over half of Moroccan importations are coming from the EU. Under the Association Agreement concluded between the EU and Morocco (since 2000) a Free Trade Area (FTA)<sup>60</sup> liberalising two-way trade in goods was established. An agreement on trade in agricultural, agro-food and fisheries products<sup>61</sup> was added to the FTA later on. Furthermore, remittances are almost exclusively being sent from European countries. For Morocco, remittances constitute

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Regional Development in Southern Morocco' (2006) 37 *Geoforum* 565; Mohamed Khachani, 'La Migration Circulaire: Cas du Maroc' (2008) CARIM Analytic and Synthetic Notes 2008/07.

<sup>52</sup> Michael Collyer and others, 'Migration and Development: The Euro-Moroccan Experience' (2009) 35(10) *J Ethn Migr Stud* 1555.

<sup>53</sup> Berramdane Abdelkaleq, 'Le Maroc et l'Europe, un Destin Commun' 39 in *Annuaire de l'Afrique du Nord 1990, vol. XXIX* (1992 CNRS Éditions).

<sup>54</sup> Herman Lelieveldt and Sebastiaan Princen, *The Politics of the European Union* (Cambridge University Press 2015) 284.

<sup>55</sup> Paula García Andrade and Iván Martín, 'EU Cooperation with Third Countries in the Field of Migration', Study, DG for Internal Policies, Policy Department C, European Parliament, PE 536.469, 2015 available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL\\_STU\(2015\)536469\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf) 'Accessed 01 February 2018' 1, 95.

<sup>56</sup> Commission of the European Communities (n1) 19.

<sup>57</sup> Abdelwahab Biad, 'La Construction du Maghreb au Défi du Partenariat Euro-Méditerranéen de l'Union Européenne' in *L'Année du Maghreb* [En ligne], IX | 2013, <http://anneemaghreb.revues.org/1866> 'Accessed 23 Novembre 2017'.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> European Union, 'Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part' OJ L70/2 18.3.2000.

<sup>61</sup> Council Decision of 2 December 2010 on the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning Reciprocal Liberalisation Measures on Agricultural Products, Processed Agricultural Products, Fish and Fishery Products, the replacement of Protocols 1, 2 and 3 and their Annexes and Amendments to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part 2012/496/EU OJ L 241, 7.9.2012.

a major source of additional income for families of the diaspora. Morocco is the third largest recipient of remittance in the Middle East and North Africa (MENA) region, estimated by the World Bank at over USD 6.5 billion in 2012, which accounts for almost 7.5% of Morocco's Gross domestic product<sup>62</sup>. The need for financial support from the EU can explain why Morocco is eager to keep its position as "the best student" in the Southern Mediterranean area and its distinct status within the EU<sup>63</sup>. Between 2007 and 2010 the EU spent EUR 67.6 million in budget support to Morocco in order to strengthen its border control, turning Morocco into a "gate-keeper"<sup>64</sup>. Being a gate-keeper means that a third country on the other side of an EU border would prevent migrants from entering the EU irregularly.

The number of Moroccans residing abroad in 2012 is 2,8 million out of which 87% live in Europe<sup>65</sup>. The top five European countries of emigration for Moroccans are France (31%), Spain (25%), Italy (12%), Belgium (7%), the Netherlands (5%), Germany (3%) and the United Kingdom (1%). All these countries are part of the Mobility Partnership with Morocco in addition to Portugal and Sweden. Migration fluxes are among one of the reasons as to why Morocco has decided to cooperate on a Mobility Partnership, but the cases of Sweden and Portugal hint to the fact that there are other factors. Indeed, several other reasons can explain why Member States have decided to participate in the Mobility Partnership with Morocco. One of them is that Morocco has strong bilateral ties with Spain and France with which it has postcolonial ties. Spain and France are well-known examples of Member States pushing forth their own national priorities at the EU level<sup>66</sup>. An EU official declared that Spain and France exploited the Mobility Partnership to promote and implement their own national policies<sup>67</sup>. Both have a long history with Morocco and firmly established interests in the country. They also share main concerns; the fight against irregular migration and internal security threats. It is interesting to see that the main countries pushing for the Mobility Partnership with Morocco were Spain, Portugal and Belgium<sup>68</sup>. Spain is not a surprise as it has strong bilateral ties with Morocco and is the recipient of the second

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<sup>62</sup> World Bank, Migration and Development Brief 21 (2013) Washington, DC: The World Bank.

<sup>63</sup> Interview 29 (n4)

<sup>64</sup> Paula García Andrade and Iván Martín (n55) 95.

<sup>65</sup> Fraçoise de Bel-Air, 'Migration Profile: Morocco' (2016) MPI Policy Brief 2016/05 1, 3.

<sup>66</sup> Sarah Wolff, 'The Politics of Negotiating the EU Readmission Agreements: Insights from Morocco and Turkey' [2014] *EJML* 69, 93.

<sup>67</sup> Interview 29 (n4).

<sup>68</sup> Interviews 29 (n4); Interview 28, DG Home Affairs, Brussels, 20 October 2016.



largest population of Moroccans in Europe after France<sup>69</sup>. Moreover, having a shared border with Morocco, Spain is willing to have a good cooperation with Morocco. Furthermore, Moroccans are the first group of non-European immigrants in Belgium, also explaining its strong interest in participating in the Mobility Partnership. More surprisingly, Portugal with only 1,736 Moroccans<sup>70</sup> in its territory was a major supporter of the Partnership. EU officials explained that this Portuguese support was due to the fact that Portuguese migration policy goes hand in hand with the Spanish migration policy<sup>71</sup>. The participation of Sweden is somewhat unexpected as migration flows from Morocco to Sweden are not high. Sweden has only had limited trade exchanges with Morocco, no postcolonial ties and is geographically far away.

With the Arab Spring uprisings in Southern Mediterranean countries in 2011, the EU had to adapt its migration policy to consider the increasing migration flows coming from the region as well as the potential security threats that could arise from the political unrest. The EU needed to find a quick solution in order to guarantee stability in its neighbouring countries. As an answer, the EU launched the dialogue for migration, mobility and security with the southern Mediterranean countries in 2011<sup>72</sup>. The end goal of this dialogue was the conclusion of Mobility Partnerships with Southern Mediterranean countries. The Commission proposed to start dialogues with Tunisia, Morocco and Egypt<sup>73</sup>. According to EU officials in Brussels, Tunisia was the first country of choice for the conclusion of a Mobility Partnership. The reason being that it was politically important for the EU to show that they were supporting a democratic regime in Tunisia as they sought to avoid an analogous situation to the one in Libya following the fall of Muammar Gaddafi<sup>74</sup>.

The degradation of the political situation in Tunisia made the EU further reconsider Morocco. In 2011, the February 20 Movement<sup>75</sup> called for the drafting of a new

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<sup>69</sup> In 2010, France had 856,493 Moroccan immigrants, Spain 763,735, Belgium 81, 535 and Portugal 1,736. See United Nations (n34).

<sup>70</sup> Serviço de Estrangeiros e Fronteiras, Relatório de Imigração, Fronteiras e Asilo (2014) 1, 52-53.

<sup>71</sup> Interviews 28 (n68) and 29 (n4).

<sup>72</sup> European Commission, 'on a Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries' COM(2011) 292 final, Brussels, 24 May 2011.

<sup>73</sup> Ibid. 1, 12.

<sup>74</sup> Interview 29 (n4).

<sup>75</sup> The February 20 Movement was organizing the protests in Morocco in 2011-2012.

Constitution and better representation of the people<sup>76</sup>. In response, the King declared that “comprehensive constitutional reforms” would take place<sup>77</sup> and a new Constitution was adopted in July 2011. In the meantime, structural changes were made, such as the creation of an economic and social committee and the National Council for Human Rights. These different measures taken by the Moroccan government and the King were received positively by the EU<sup>78</sup>. An EU official affirmed that with the Arab spring the way of thinking EU-Moroccan relations started to change and the EU (along with the Member States) had to give a strong signal to Morocco<sup>79</sup>. Nonetheless, EU support came at a price. The condition was for Morocco to put its promises into practice or it would lose EU’s financial and political support<sup>80</sup>.

The Member States that concluded the Mobility Partnership with Morocco on 3 June 2013<sup>81</sup> were Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. With the strengthening of the border and strong border cooperation between Morocco and Spain, migration flows were already being better contained from Morocco and the conclusion of the Mobility Partnership was perceived to be “like a cherry on the top of the cake”<sup>82</sup>.

According to Mohamed Limam and Raffaella Del Sarto, the EU took advantage of the vulnerability of Morocco following the Arab uprising<sup>83</sup>. They argue that the EU concealed its genuine interests behind a supposedly reshaped policy aiming at supporting democracy in the region<sup>84</sup>. They saw the unrest in Morocco as the reason “a largely uneven Mobility Partnership” was concluded<sup>85</sup>. According to Sergio Carrera and others, Southern Mediterranean countries, including Morocco, perceive the Mobility Partnership as a “strong insecurity- and control-oriented approach while

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<sup>76</sup> Mounia Bennani-Chraïbi and Mohamed Jeghlaly, ‘La Dynamique Protestataire du Mouvement du 20 février à Casablanca’ (2012) 62(5) *RFSP* 867 <https://www.cairn.info/revue-francaise-de-science-politique-2012-5-page-867.htm> ‘Accessed 10 September 2017’.

<sup>77</sup> Annonce des Réformes Constitutionnelles: Texte Intégral du Discours Adressé par SM le Roi à la Nation <http://www.maroc.ma/fr/discours-royaux/annonce-des-r%C3%A9formes-constitutionnelles-texte-int%C3%A9gral-du-discours-adress%C3%A9-par-sm-le> ‘Accessed 10 September 2017’.

<sup>78</sup> *Ibid.*

<sup>79</sup> Interview 29 (n4).

<sup>80</sup> European Commission, ‘Joint statement by EU High Representative Catherine Ashton and Commissioner Štefan Füle on Morocco’s Future Constitutional Reform’, MEMO/11/155, Brussels, 10 March 2011; Mohamed Limam and Raffaella A. Del Sarto, ‘Periphery under Pressure: Morocco, Tunisia and the European Union’s Mobility Partnership on Migration’ (2015) EUI Working Paper RSCAS 2015/75 1, 11.

<sup>81</sup> Council of the European Union, ‘Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States’ 6139/13 ADD 1 REV 3, Brussels, 3 June 2013.

<sup>82</sup> Interview 29 (n4).

<sup>83</sup> Mohamed Limam and Raffaella A. Del Sarto (n80) 1, 1.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* 3.

allowing only restricted, temporary, and highly selective forms of immigration into the Union”<sup>86</sup>. However, the argument that the Mobility Partnership with Morocco is unbalanced in the favour of the EU can be debated. Van Criekinge argues that certain third countries are increasingly able to reposition their dialogue with the EU to more closely reflect their own interests<sup>87</sup> and Morocco seems to be one of these countries. The Mobility Partnership with Morocco is often perceived as a turning point in the way negotiations are conducted. EU officials declared that unlike Eastern European countries that tend to accept “in block” everything proposed by the EU, this was not the case with Southern countries<sup>88</sup>. The pivotal reason appears to be that Eastern European countries have the prospect of joining the EU while countries in the South do not.

According to officials from the EU Delegation but also from Morocco and several Member States, the Mobility Partnership with Morocco was negotiated in depth with Morocco requesting that Member States delete some of the proposed initiatives because they were not in Morocco’s interest<sup>89</sup>. This is interesting because it shows that Morocco had some leverage that countries concluding prior Mobility Partnerships did not have. This leverage could be the recognition by Morocco to negotiate a readmission agreement with the EU including third country nationals. Indeed, one of the preconditions to conclude a Mobility Partnership is the commitment of the third country to negotiate a readmission agreement. It is without surprise that Sergio Carrera and others, argue that this topic was the main bone of contention between the EU and Morocco<sup>90</sup>. For the EU, the conclusion of the partnership was giving new leverage to the negotiation of a readmission agreement. The position of Morocco is however not novel in its relations with the EU. As early as 1999, Morocco rejected an Action Plan proposed by the EU requesting the conclusion of a readmission agreement including nationals of other third countries<sup>91</sup>. At the time Moroccan officials already criticised the EU for imposing this Action Plan without prior concertation with Moroccan authorities

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<sup>86</sup> Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘EU Migration Policy in the Wake of the Arab Spring What Prospects for EU-Southern Mediterranean Relations?’ (2012) MEDPRO Technical Report 15 1, 14.

<sup>87</sup> Tine Van Criekinge, ‘The EU-Africa Migration Partnership: a Case Study of the EU’s Migration Dialogue with Ghana and Senegal’ in: *EU Migration Working Group*, March 2010, European University Institute, Florence, Italy.

<sup>88</sup> Interview 28 (n68).

<sup>89</sup> Interview 17, Spanish Embassy, Rabat, 22 January 2016; Interview 7, EU Delegation, Rabat, 13 January 2016; Interview 10, Expertise France, Rabat, 15 January 2016; Interview 13 Moroccan Ministry of Labour, Rabat, 19 January 2016; Interview 14, GiZ, Rabat, 20 January 2016.

<sup>90</sup> Sergio Carrera, Leonhard den Hertog and Joanna Parking 1, 14 (n86).

<sup>91</sup> Council of the European Union, ‘Action Plan for Morocco’ 11426/99 LIMITE JAI 75 AG 30, Brussels, 30 September 1999 1, 15.

and used EU's interest for cooperation on irregular migration to increase their own geopolitical influence<sup>92</sup>. Since 2000, the Commission has had a mandate from the Council to negotiate a readmission agreement with Morocco, but the negotiations never came to a successful conclusion. By concluding a Mobility Partnership with Morocco, the EU revitalised the negotiations that had been stalled since 2010<sup>93</sup>. An EU official emphasised that the EU realised that they needed a more balanced approach in order to give the readmission agreement a chance to succeed. On the other hand, Member States did not want to give any positive incentive as long as Morocco had not accepted to resume the negotiations of the readmission agreement, while inversely, Morocco did not want to accept a restart to the negotiations as long as no positive incentives were given by the Member States<sup>94</sup>. The Mobility Partnership provided the EU and member States with the opportunity to give the negotiations of the readmission agreement a more balanced perspective<sup>95</sup>.

### 3.3. Content of the Mobility Partnerships with Cape Verde and Morocco

The Mobility Partnership with Cape Verde is composed of an Annex including 31<sup>96</sup> projects. The Mobility Partnership with Morocco includes 105 projects, which is over three times the size of the Mobility Partnership with Cape Verde. The Annex for Morocco provides clear information, for example, the identity of the Ministry in charge

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<sup>92</sup> Katharina Natter, 'The Formation of Morocco's Policy Towards Irregular Migration (2000–2007): Political Rationale and Policy Processes' (2013) 52(5) *Int Migr* 15, 18.

<sup>93</sup> Sarah Wolff (n66) 77.

<sup>94</sup> Interview 29 (n4).

<sup>95</sup> *Idem*.

<sup>96</sup> In the Annex there are 29 projects listed but two projects have been divided into several projects. This is the case of the project in Annex: (Project 1) Proposal by the Kingdom of Spain to launch, for the benefit of Cape Verde, a schools/workshops programme aimed at facilitating the integration of apprentices, particularly through training actions tailored to the Cape Verdean labour market, to meet labour needs identified by that country. Other interested Member States and the European Community could join the programme if they so wished. The Kingdom of Spain also proposes to support the development of business initiatives by women (Project 2). It is also the case of: (Project 1) Proposal by Cape Verde and the participating Member States to foster cooperation and partnerships between their hospital and research institutions, particularly with a view to strengthening the capacities of the Cape Verdean institutions, reducing the effects of the lack of qualified staff in the field of health in Cape Verde and encouraging exchanges of staff. In this context, a proposal by the Kingdom of Spain to launch a programme to strengthen the capacities of the Cape Verdean national health system (Project 2), and a proposal by the Portuguese Republic to support the Cape Verdean national health system in the fields of haemodialysis and oncology (Project 3). Finally, one project was divided into two in the annex but is analysed as one: Proposal by the French Republic to develop, within the framework of a bilateral agreement on concerted management of migratory flows, a co-development programme for the benefit of Cape Verde under which Cape Verdean migrants legally established in France and French citizens of Cape Verdean origin could contribute, through transfers of money, skills or other resources, to the development of Cape Verde and carry on economic activities there on the basis of experience already acquired in other countries. The programme would have five parts:

- Promoting the reduction of the cost of money transfers;
- Promoting productive investment;
- Mobilising the skills of elites within the diaspora;
- Support for local development projects;
- Support for young people's initiatives.

(in the Member States) of the proposed projects. This information is not included in the Annex in the case of Cape Verde.

### 3.3.1. The structure of the Mobility Partnerships

The Mobility Partnerships with Cape Verde and Morocco follow similar structures. First, they comprise a list of objectives based on the four pillars of the GAMM. Second, their Annexes list the different projects proposed by the EU, Member States and the third country. If the list of objectives is similar in both Mobility Partnerships the list of projects in the Annex is not, as we will see in detail throughout this Chapter. It is not surprising that the phrasing of the objectives shows the influence of the dominant political discourse at the time of the conclusion of the respective Mobility Partnership. Under each objective directly linked to the different pillars of the GAM/GAMM, each Mobility Partnership identifies a set of topics. The topics in the case of Morocco are more numerous than those for Cape Verde (37 for Morocco and only 13 for Cape Verde).

First, the list of topics in the case of Morocco is much longer and more detailed than in the case of Cape Verde. We can notice that all topics introduced in the Mobility Partnership with Cape Verde are also included in the Mobility Partnership with Morocco with the exception of the conclusion of a working agreement with FRONTEX. Similar topics are for example “visa facilitation for short-stay visa”, “voluntary return and reintegration of returning migrants” or “information on the risks of irregular immigration and human trafficking”. The Moroccan list of topics includes issues related to asylum which is a topic that was not included in the Mobility Partnership with Cape Verde at the time of its conclusion, as it only became the fourth pillar of the GAMM in 2011. The fact that the list of topics from the Cape Verdean Mobility Partnership can be found almost entirely in the Mobility Partnership with Morocco could suggest that both partnerships were built following the same set of priorities, the GAM/GAMM. This argument could support the claim that they are not really being negotiated by all parties but rather “imposed” via a general model applied to all. However, this argument has limitations. Topics are directly linked to the pillars of the GAMM (GAM in the case of Cape Verde) that Mobility Partnerships aim at implementing. The fact that the Mobility Partnership with Morocco includes topics related to asylum, and the one with Cape

Verde does not, illustrates this point. It is therefore not surprising that topics following the main objectives of the GAM(M) are quite similar across Mobility Partnership declarations. This arguably does not mean that the partnership has not been negotiated. The projects proposed in the Annex and later on in the scoreboard are the ones being negotiated and tailored to the specific country concluding the Mobility Partnership. On this question, we will first observe the distribution by GAM(M) pillars of projects proposed in both Mobility Partnerships and then we will discuss their implementation.

### 3.3.2. The distribution of projects by GAM(M) pillars

The first pillar of the GAMM<sup>97</sup> covers mobility, legal migration and integration. The objective corresponding to this pillar in the Mobility Partnership with Cape Verde puts forwards “circular and temporary migration” as the main way to achieve legal migration. At the time of the conclusion of the Mobility Partnership with Cape Verde, circular migration was a popular topic and had a positive connotation as it was considered as an effective way to manage labour migration. In the Mobility Partnership with Morocco, the term circular migration is missing even though the idea of managing “the movement of persons for short periods” remained. At the time of the conclusion of the Mobility Partnership with Morocco, circular migration had already been widely criticised. As seen in Chapter 1, the argument according to which circular migration is beneficial for sending countries or migrants has been contested in the literature. The prevailing view seems to be that circular migration rather reinforced the power of receiving countries to fight against irregular migration and did not propose different options for legal migration from the pre-existing bilateral agreements<sup>98</sup>. In the case of the Mobility Partnership with Morocco, the emphasis was put on the capacity of absorption of “the labour market of the signatories”. The Mobility Partnership with Morocco was concluded after the economic crisis that struck the EU, resulting in Member States’ labour markets being more constrained.

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<sup>97</sup> European Commission (n2).

<sup>98</sup> Sandra Lavenex, ‘Multilayered Migration Governance: The Partnership Approach in the EU and Beyond, Regional Governance of Migration and Socio-Political Rights – Institutions’, Actors and Processes 14-15 January 2013, Geneva, Switzerland 1, 12.

The second pillar of the GAMM encompasses “[p]reventing and reducing irregular migration and trafficking in human beings”. Both Mobility Partnerships make a direct reference to “the promotion of an effective readmission and return policy” stressing their will to negotiate in the future on a readmission agreement. This is interesting in the case of Morocco, as the country is notoriously reluctant to conclude such an agreement. The clear mention of the effective readmission policy shows the crucial importance readmission agreements take in the Mobility Partnerships. In the case of Cape Verde, the conclusion of a readmission agreement was also foreseen in the Mobility Partnership, but Article 13 of the Cotonou Agreement already foresees a readmission obligation. This can be seen as an overlap between Article 13 of the Cotonou Agreement and the Mobility Partnership project. However, there are two main reasons to include a separate readmission agreement in the Mobility Partnership with Cape Verde. The first one is that Article 13 only includes the readmission of citizens of the country that is bound by the agreement, whereas the readmission agreement included in the Mobility Partnership includes migrants that only crossed the third country concluding the agreement but that are not citizens of this country. The second reason lays in the poor operational implementation of Article 13 which is not enforceable<sup>99</sup>. Additionally, Article 13 foresees the negotiation of bilateral readmission agreements including nationals of third countries other than the one concluding the agreement. By all means, the conclusion of the readmission agreement between the EU and Cape Verde is legally relevant for Cape Verde.

The third pillar, “[p]romoting international protection and enhancing the external dimension of asylum policy”, is only included in the Mobility Partnership with Morocco because at the time of the conclusion of the Mobility Partnership with Cape Verde only the GAM existed, comprising three pillars. The pillar on international protection was added when the GAM evolved into a more strategic approach to migration management in 2011; the Global Approach to Migration and Mobility<sup>100</sup>. Finally, the fourth pillar encompasses “maximising the development impact of migration and mobility, migrant rights and the empowerment of migrants”. In the case of Cape Verde, migration and development did not take the significant role one would expect. Especially from a country that is highly dependent on its diaspora and counts a higher

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<sup>99</sup> European Commission, ‘Evaluation of the Cotonou Partnership Agreement’ SWD(2016) 250 final, Brussels, 15 July 2016 1, 41.

<sup>100</sup> European Commission (n2).

number of nationals abroad than living in the country itself. Relegating migration and development to a second role can be explained by the fact that the priorities of the EU and Member States are security oriented, favouring the fight against irregular migration. According to an interview with a Cape Verdean official, the hope among Cape Verdeans is that migration and development becomes the new priority of the second phase of implementation of the Mobility Partnership<sup>101</sup>. The Mobility Partnership with Moldova is a good illustration. At first, the Mobility Partnership with Moldova was dedicated to the fight against irregular migration. But, with the conclusion of the first wave of projects, the focus shifted towards migration and development<sup>102</sup>. In the case of Morocco, the idea that migration and development can be an added value for Europe is raised. Developing the regions predominantly sending migrants towards Europe by supporting the development of the labour market in the third country is considered as a way to mitigate the immigration fluxes. This idea is now at the center of the new Migration Partnership Framework (2016). One of the long-term measures of the MPF is to “address the root causes of irregular migration and force displacement by supporting partner countries in their political, social and economic development”<sup>103</sup>.

Under the first pillar, Cape Verde has 14 projects, almost half of the total of projects proposed. This is in line with Cape Verdeans’ interests in favouring the mobility of its people and creating new channels of legal labour migration. In fact, 11 out of the 14 projects are related to “employment, management and facilitation of legal migration and integration”. These projects aim at meeting the following two aspirations: develop better legal migration opportunities for Cape Verdeans and inform potential migrants of possibilities and risks related to migration. A major project called “*Centro de Apoio ao Migrante no Pais do Origem*”<sup>104</sup> (Centre for Migrant Support in the Country of Origin: CAMPO) has been proposed by Portugal and aims at providing information to prospective migrants about possibilities to work in the participating Member States, the risks of irregular migration and assistance to Cape Verdeans willing to return to Cape Verde. Additionally, it is interesting to note that Portugal and France have proposed to promote the admission of distinct groups of workers under particular legal schemes. In

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<sup>101</sup> Interview 36 (n21).

<sup>102</sup> Interview 32 (n30).

<sup>103</sup> European Commission, ‘Fact sheet: Migration Partnership Framework A New Approach To Better Manage Migration’ [https://eeas.europa.eu/sites/eeas/files/factsheet\\_ec\\_format\\_migration\\_partnership\\_framework\\_update\\_2.pdf](https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf) ‘Accessed 28 November 2017’.

<sup>104</sup> For more information: <http://www.instituto-camoes.pt/activity/o-que-fazemos/cooperacao/cooperacao-na-pratica/projetos-historico/14856-campo-centro-de-apoio-ao-migrante-no-pais-de-origem> ‘Accessed 26 November 2017’.



the case of Portugal, one project consists of “the signing of a new Protocol on migration [extending] the scope of the Protocol on temporary migration of Cape Verdean workers to work in Portugal”<sup>105</sup>. France proposes to conclude a bilateral agreement on concerted management of migratory flows with Cape Verde including opening up the French labour market for specific activities<sup>106</sup>. Both projects have potential legal relevance, as will be discussed below. An additional project having potential legal relevance concerns the negotiation of a visa facilitation agreement<sup>107</sup> for the issuance of short-stay visas. In parallel, Portugal proposes the creation of a Common Visa Application Centre in Praia<sup>108</sup> to facilitate Cape Verdeans’ visa process. Finally, a specific project is proposed in order to help Cape Verde identify its needs and develop adequate migration policies<sup>109</sup>.

The Mobility Partnership with Morocco accounts for only 15 projects under the first pillar, out of 105. Similarly, to the Mobility Partnership with Cape Verde, a project proposed by the EU relates to the negotiation of a visa facilitation agreement. This project was proposed hand in hand with the negotiation of the readmission agreement. It is the first time that the EU proposed a visa facilitation agreement with a Southern Mediterranean country<sup>110</sup>. It is interesting to see that projects that aim to inform about legal and irregular migration are not only directed to prospective migrants but also to Moroccan civil servants. Italy proposed a project aimed at training Moroccan civil servants to better manage migration flows to Italy. This training could influence Moroccan civil servants’ behaviours and their interactions with migrants, resulting in potential political effects. A striking fact is that most of the information initiatives proposed to prospective migrants aim at showing the risks of irregular immigration and therefore trying to deter Moroccans to immigrate irregularly. Finally, the most notable point is that no project aims at developing new legal migration opportunities towards

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<sup>105</sup> Council of the European Union, ‘Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde’ 9460/08 ADD2, Brussels, 21 May 2008. The project is included in the Annex to the Mobility Partnership with Cape Verde; Serviço de Estrangeiros e Fronteiras, ‘Temporary and Circular Migration in Portugal: Facts, Policies and Strategies’, European Migration network 2010 1, 23.

<sup>106</sup> Accord France – Cap-Vert relatif à la Gestion Concertée des Flux Migratoires et au Développement Solidaire signé à Paris, le 24 novembre 2008.

<sup>107</sup> Agreement between the European Union and the Republic of Cape Verde on Facilitating the Issue of Short-Stay Visas to Citizens of the Republic of Cape Verde and of the European Union OJ L 282, 24.10.2013.

<sup>108</sup> For more information: <https://www.eurovisaccv.eu/> ‘Accessed 26 November 2017’.

<sup>109</sup> For more information: <https://publications.iom.int/books/migracao-em-cabo-verde-perfil-nacional-2009> ‘Accessed 28 November 2017’.

<sup>110</sup> Sarah Wolff (n66) 72.

Europe unlike in the Mobility Partnership with Cape Verde. Most of the proposed initiatives are capacity building and information projects.

The Annex to the Joint Declaration with Morocco has a particularity. The list of projects in the Annex is divided into two parts: new projects as of 25 March 2013 and projects in progress as of 25 March 2013. This means that a whole list of projects pre-existing the conclusion of the Mobility Partnership have been added in the Annex. The reason is political. The negotiation of the Mobility Partnership was difficult, and the EU wanted to show successful initiatives already being implemented by the Member States in Morocco to give the impression of a balanced partnership<sup>111</sup>. The list of pre-existing projects included under the first pillar is an interesting illustration. Indeed, 20 pre-existing projects aiming at facilitating mobility and legal migration have been listed; more than the number of new projects under the same pillar. Most of these projects are proposed either by France or Spain, showing their strong former bilateral cooperation on migration matters. These projects touch upon the easier access to short-stay visas for Moroccans travelling to France and Spain. In the case of France, the French Minister of the Interior, Manuel Valls, declared that the French government was thinking about a scheme to ease the access for Moroccans to short-term visas<sup>112</sup> preceding the conclusion of the Mobility Partnership. Projects also deal with the information about legal migration through web portals such as “Make it in Germany”<sup>113</sup> or “The EU immigration portal”<sup>114</sup>. However, it is important to note that these platforms are not directed only towards Moroccans but at everyone willing to immigrate to Germany or other EU Member States. Similarly, France lists a project aiming at authorising Moroccan citizens who studied in France to stay a year in France in order to find their first job. However, in practice, this possibility is open to all non-EU citizens (excluding exceptional cases such as Algerians) and not only to Moroccans<sup>115</sup>. Proposing general projects in the Annex adds to the feeling that it is a catch-all document aimed at convincing Morocco to collaborate, but it does not, in fact, provide much added value.

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<sup>111</sup> Interviews 28 (n68) and 32 (n30).

<sup>112</sup> Benjamin Roger, ‘Manuel Valls à Rabat : la France Souhaite Faciliter l’Obtention de Visas pour les Marocains’ *Jeune Afrique* (26 Juillet 2012) <http://www.jeuneafrique.com/175018/politique/manuel-valls-rabat-la-france-souhaite-faciliter-l-obtention-de-visas-pour-les-marocains/> ‘Accessed 17 October 2016’.

<sup>113</sup> For more information: <http://www.make-it-in-germany.com/en> ‘Accessed 28 November 2017’.

<sup>114</sup> For more information: <http://ec.europa.eu/immigration/> ‘Accessed 28 November 2017’.

<sup>115</sup> Code de l’entrée et du séjour des étrangers et du droit d’asile : articles L311-10 à L311-12.

Under the second pillar, the EU and Member States aim at involving Morocco and Cape Verde in the cooperation on border management, the fight against irregular migration and trafficking in human beings (people-smuggling). This includes the improvement of the security of travel documents, identity documents and residence permits. The Mobility Partnership with Cape Verde includes 10 projects under this pillar and the Mobility Partnership with Morocco 38 (11 are pre-existing). The idea of better border management and document security was already a priority for Cape Verde in the Special Partnership and was transposed to the Mobility Partnership. A project proposed<sup>116</sup> in the Annex relates to the effective implementation by Cape Verde of the United Nations Convention against Transnational Organised Crimes and its Protocols on smuggling of migrants and trafficking in persons as well as its obligations to rescue at sea. The implementation of this Convention is relevant for Cape Verde as authorities will have at the least to modify their practices in this field and might also have to modify their legal framework in order to support the effective implementation of the Convention. Additionally, the project aiming at concluding an operational arrangement between Cape Verde and FRONTEX on border management will have a direct influence on the behaviour of authorities and modify the effective border management practices in the country. These are key initiatives that have the potential to deeply reshape Cape Verde's border management policy. A parallel project proposed by FRONTEX and Cape Verde is a good illustration of the potential impact of the operational agreement on the Cape Verdean National Police's work, including the securitisation of travel documents. Moreover, Portugal, Spain and France proposed the implementation of several training sessions designed for Cape Verdean authorities on border management and document controls as well as maritime security. On this last issue, Spain is also proposing to extend the Seahorse Atlantic Network project which have included Cape Verde, Senegal and Mauritania since 2006. In 2007 the Seahorse Atlantic Network included three more countries, Morocco, Gambia and Guinea Bissau. It is a framework of regional cooperation aimed at preventing irregular migration and cross-border crime by establishing regional networks which cooperate and share information<sup>117</sup>.

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<sup>116</sup> There is no information in the Annex or scoreboard about who proposed this project.

<sup>117</sup> Maribel Casas-Cortes, Sebastian Cobarrubias and John Pickles, "Good Neighbours Make Good Fences": Seahorse Operations, Border Externalization and Extra-Territoriality' (2016) 23(3) *Eur Urban Reg Stud* 231; For more information about the Seahorse and the Seahorse Atlantic Network projects: <http://51.255.195.60/En/En/image.php?id=125> 'Accessed 26 November 2017'.

In the case of Morocco, three projects under the second pillar are related to the negotiation and conclusion of the readmission agreement showing the importance of this issue in the Mobility Partnership. Similarly, to Cape Verde, the conclusion of a working agreement with FRONTEX<sup>118</sup> is also proposed in two different projects but Morocco never concluded such an agreement<sup>119</sup>. A significant initiative proposed by the Netherlands aims at providing guidance on the formulation of a legal framework on irregular immigration and human trafficking. Two other projects are related to the support for the Moroccan legal framework on human trafficking issues only<sup>120</sup>. These three projects are intended to be directly legally relevant for Morocco. Finally, four of the projects cover the issue of voluntary return including for migrant children. It should be noted that the vast majority of projects aim at implementing training courses or capacity building initiatives for Moroccan officials on questions of border control, fraudulent documentation or the fight against irregular migration. It is interesting to note that over two third of the projects proposed under this pillar regarding Morocco are new. This might be explained by the fact that for the purpose of negotiations with Morocco it was not in the interest of the EU to concentrate on the fight against irregular migration but rather on mobility perspectives. The pre-existing projects include initiatives about the cooperation between Moroccan and Member States' authorities in airports (three projects), four projects on return and reintegration including unaccompanied children and two projects preventing the irregular immigration of unaccompanied children. The remaining projects propose training courses and capacity building for Moroccan authorities on the fight against irregular migration and human trafficking.

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<sup>118</sup> As noted earlier, the conclusion of a working agreement with FRONTEX was not a topic in the Joint Declaration with Morocco. This does not mean that such a working agreement cannot be proposed as a project in the Annex.

<sup>119</sup> For more information about working agreements/ arrangements with FRONTEX: <http://frontex.europa.eu/partners/third-countries/> 'Accessed 28 November 2017'.

<sup>120</sup> One of the projects listed is a MIEUX project. More information: <https://www.mieux-initiative.eu/en/actions/178-morocco-trafficking-in-human-beings> 'Accessed 28 November 2017'.

**Table 3.1: Distribution of projects in Annex by pillars and countries**

	Cape Verde	Morocco	
	N° of projects	N° of concomitant projects	N° of pre-existing projects
Mobility, legal migration and integration	14	15	20
Border management, the fight against irregular migration and trafficking in human beings	10	27	11
Migration and development	5	7	13
International protection	2	6	0
Horizontal initiatives <sup>121</sup>	/	5	1
<b>TOTAL</b>	<b>31</b>	<b>60</b>	<b>45</b>

This table shows the distribution of the projects in the Annexes of the Joint Declarations with Cape Verde and Morocco according to the four pillars of the GAMM. E.g.: In the Mobility Partnership with Morocco 27 projects related to border management, the fight against irregular migration and trafficking in human beings have been included in the Annex. These projects were not pre-existent on the 25 March 2013.

The third pillar comprises the projects on migration and development. In the case of Cape Verde only five projects have been proposed under this category. This is surprising seeing how important remittances are for the development of Cape Verde<sup>122</sup> and the fact that a larger number of Cape Verdeans live outside of Cape Verde than in the country. This might be attributed to the lack of negotiation leverage on the Cape Verdean side and a “take it or leave it” approach taken by the EU<sup>123</sup>. The projects

<sup>121</sup> Horizontal initiatives are not directly linked to a pillar of the GAMM.

<sup>122</sup> André Corsino Tolentino, Carlos Manuém Rocha and Nancy Curado Tolentino, 'A Importancia e o Impacto das Remessas dos Imigrantes em Portugal no Desenvolvimento de Cabo Verde', Observatório Da Imigração, Abril 2008.

<sup>123</sup> Natasja Reslow (n12) 395.

included under this pillar comprise a circular migration initiative proposed by Portugal and a project proposed by France. The purpose of the latter project was to enhance the possibilities of transfer of competences and money from the Cape Verdean diaspora living in France towards their country of origin. Out of the four projects proposed, one is a Cape Verdean proposal to enhance cooperation with Portuguese and Spanish hospitals in order to strengthen the Cape Verdean health system.

In the case of Morocco, it is also clear that “migration and development” is not a key priority as only seven new projects out of 105 are part of this category. Interestingly, 13 pre-existing projects<sup>124</sup> have been included under migration and development, suggesting, as previously argued, that the EU wanted to use positive initiatives as bargaining chips to conclude the Mobility Partnership with Morocco and provide a sufficiently balanced package in order for Morocco to re-open the readmission agreement negotiations. The bulk of the projects under this pillar focuses on ways for Moroccans abroad to participate in the development of their country of origin financially or through their expertise. To favour migration and development financially, projects aiming at developing businesses and productive investments are proposed. In addition, projects aiming at the transfer of competencies are suggested including an interesting initiative that aims at using the competencies of the Moroccan community abroad to plan and implement the national development policy. This last project could have particular relevance for Morocco. Finally, Italy proposes technical training courses for migrants and potential migrants in order to develop specifically needed working skills. Pre-existing projects cover similar initiatives such as transfer of competencies through, for example, temporary return schemes or by offering facilitated procedures and training for migrants willing to start a business in the country of origin or wishing to invest. Most of the projects were proposed by the Member States and were part of their national bilateral activities in the field of migration and development. Similarly, the EU supports business and job creation in Morocco through a broader project directed at the whole of the Maghreb. Even though this project is not country specific, it is added in the Annex to the Joint Declaration with Morocco. The EU also included former funded initiatives aimed at developing the main regions of origin of migrants in order to provide new economic opportunities to young people, therefore

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<sup>124</sup> The list of projects can be found in the Annex to the Mobility Partnership.

limiting their migration towards Europe. An initiative also aimed at supporting Moroccan migrants' organisations in Germany, in their work assisting the development of Morocco. Germany also proposed a project aiming at facilitating circular migration, by allowing Moroccans to leave Germany for two years without losing their permanent residence permits. Finally, three return and reintegration projects are included under migration and development even though they are generally directed at fighting irregular migration. In practice, these projects are aimed at unsuccessful asylum seekers, irregular migrants, victims of trafficking or other vulnerable groups.

In the case of Cape Verde, the Mobility Partnership was still concluded under the GAM, and therefore asylum was not included in the topics in the declaration. However, interestingly, the Mobility Partnership comprises two projects on asylum and immigration. Both projects can be legally relevant for Cape Verde. The first project proposes the ratification and implementation by Cape Verde of the 1951 United Convention on the Status of Refugees and its Protocol from 1967. The second project relates to the establishment of an asylum system in Cape Verde with the assistance of Portugal. Both these projects would have direct effects on the situation of asylum seekers in Cape Verde if implemented. The Mobility Partnership with Morocco includes six projects on international protection. Several of the projects proposed can have legal relevance for Morocco. These projects include support in the drafting of legislation in the fields of "immigration, residency law, international protection and asylum" as well as the development of a national asylum system and legal framework. The projects directly aim at the development of new laws and policies which means that the legal framework and (it is to be expected) the practices of authorities would be modified following the implementation of these projects. It is interesting to underline these initiatives as they have the potential to really modify the situation in the country. The remaining projects cover training courses on asylum issues. It is also noticeable that no pre-existing projects on this issue have been included in the Mobility Partnership.

Finally, in the Annex to the Joint Declaration with Morocco, there are some "horizontal initiatives". Horizontal initiatives are projects that cover more than one pillar of the GAMM. There is one pre-existing project which enters this category which relates to the support by the EU of a Joint European Master's in International Migration and

Social Cohesion<sup>125</sup>. Five new initiatives have been proposed in the Annex. Interestingly, one of these new projects aims at reproducing a project proposed in the Mobility Partnership with Cape Verde. The project relates to the development of a data collection centre on migration issues that would help set priorities in migration policies. This project can have policy relevance for Morocco. Additionally, under these horizontal initiatives, the EU proposes “possible courses of action” or broader initiatives that could potentially be of interest to Morocco and fully open to negotiation. The latter cannot really be considered as projects because of their wide and open scope. The next section covers some projects added to the Mobility Partnership later on based on these “possible courses of action”.

### **3.4. The stage of implementation of the Mobility Partnerships with Cape Verde and Morocco**

Nine years have passed since the conclusion of the Mobility Partnership with Cape Verde and four years in the case of Morocco. In this section, we will discuss the implementation of the Mobility Partnerships with Morocco and Cape Verde and analyse the evolution of their content since their conclusion. Additionally, several issues raised during the mapping of the stage of implementation of the Mobility Partnerships will be pointed out.

#### **3.4.1. The analysis of the scoreboards**

The analysis of the implementation of the Mobility Partnerships is based on the scoreboards. Scoreboards are Excel documents listing the projects related to Mobility Partnerships and their stage of implementation. Other information can be included, depending on the level of detail provided, such as the timeframe of the project, the actor in charge of its implementation or the amount and origin of its funding. The scoreboards for Morocco have been provided by DG Home, the EU Delegation in Morocco and the German Interior Ministry, with the latest version being from September 2015. The scoreboard for Cape Verde was provided by DG Home with the

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<sup>125</sup> For more information: <http://www.misoco.org/> 'Accessed 12 December 2017'.



last update dated September 2014. It was relatively difficult to access information for several reasons. First, there seemed to be little coordination between the different Ministries in a given Member State. Several Ministries did not have a global picture of all initiatives proposed and implemented by their country<sup>126</sup>. It often happened that an official from one ministry could not give information concerning a project proposed by another ministry. Scoreboards are not available to the public and are not easy to obtain. Moreover, the information presented in the scoreboards is not consistent. For example, in the case of Morocco, three different scoreboards were obtained but the content of these scoreboards was not exactly the same. Some projects were included in one scoreboard but not in the other, while some scoreboards were more detailed than others. For example, in the case of Cape Verde, the scoreboard is merely a list of projects with little additional information, even on their stage of implementation. However, the scoreboards for Morocco are even more detailed and included information about the time frame of the projects, the implementing organization and the organization in charge of the project, even including in some cases the budget allocated. Concerning the Mobility Partnership with Cape Verde, as it is less recent, public information about projects was more readily accessible. However, the information is scattered and provides no overview of the implementation since 2008. Finally, information available on the websites of different actors involved in the implementation of projects has also been considered. It should be noted that in order to create an overview of the implementation of the Mobility Partnerships a set of information has been compiled that goes further than the information available in the scoreboard itself, in order to provide the most accurate picture possible. These results, therefore, need to be interpreted with caution. This has been done, to mitigate some problems regarding the updating of the scoreboards, as a project can be indicated as being in the course of implementation when it has already been concluded, for example.

Another problem lays in the fact that there is no unanimous acceptance of what projects should be included in the scoreboard because there is no clear definition of what a “Mobility Partnership project” is. There are three different approaches to the use of the scoreboard and the projects that should figure in it<sup>127</sup>. The first approach,

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<sup>126</sup> Observation made during emails exchanges with German and French officials from different ministries.

<sup>127</sup> Interview 32 (n30).

according to the EU Delegation in Morocco, is that all projects created after the signature of the Mobility Partnership and funded by EU funds should be included in the scoreboard<sup>128</sup>. The EU official argues that Mobility Partnerships are framework agreements with the third country and that new projects exist because this cooperation framework exists. It is because the Mobility Partnership exists that Morocco became an even higher priority country and that an increased amount of funds was unlocked in order to implement the new projects, which are therefore linked to the Mobility Partnership. However, this understanding is already problematic as such because the scoreboard also includes projects that have been concluded prior to the conclusion of the Mobility Partnership and, according to the Member States, some new projects would have existed anyway<sup>129</sup>. According to an interviewee, at first, the Annex was more of a political tool and aimed at promoting existing projects in the framework of the negotiations with Morocco, but now the scoreboard is a coordination and cooperation tool. According to EU officials, the objective is to keep the coherence of the action and to avoid reproducing projects that exist already, which explains why there are many projects in the scoreboard<sup>130</sup>. Therefore, many pre-existing projects were included in the Annex to the Joint Declaration with Morocco. It also explains why some projects were deleted from the scoreboard if they were not destined to be implemented further. In the case of Cape Verde, the EU Delegation takes a different line of thinking and does not seem to believe that the scoreboard should gather all bilateral activities implemented in Cape Verde<sup>131</sup>. Some Member States agree with the definition of the Moroccan EU Delegation and consider the Mobility Partnership as the framework for cooperation, but this view is not accepted by all. The second approach is the one adopted by the Member States with strong bilateral ties with the third country according to which all bilateral projects should not be included in the scoreboard. Member States with strong bilateral ties with the third country, such as Spain and France with Morocco, prefer to give visibility to their bilateral cooperation rather than including projects in the scoreboards<sup>132</sup>. According to a respondent in Brussels, these countries disregard the Mobility Partnership as a tool of cooperation<sup>133</sup>. Finally, the third understanding is the one third countries have of the scoreboard. They sometimes

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<sup>128</sup> Interview 7 (n89).

<sup>129</sup> Interview 8 French Embassy, Rabat, 14 January 2016; Interviews 14 (n89) and 17 (n89).

<sup>130</sup> Interview 2, EEAS, Brussels (by phone), 15 October 2015; Interview 3, DG Home Affairs, Brussels, 18 November 2015.

<sup>131</sup> Interview 39 (n30).

<sup>132</sup> Interviews 32 (n30), 17 (n89) and 8 (n121).

<sup>133</sup> Interview 32(n30).

include projects linked to migration even though they are not EU related and are financed by other donors, such as the UN. The aim of this chapter is not to argue which approach is the most accurate. In this thesis we will however consider that all projects included in the Annex and/or the scoreboard, projects that have been deleted and new projects added at a later stage are Mobility Partnership projects.

Before proceeding to examine the implementation of the Mobility Partnerships, it is important to determine what implementation means. The projects that are defined as *implemented* refer to those in which foreseen activities have already been fully or partially executed. It includes ongoing projects and projects that are already completed. The term implementation is understood in its *stricto sensu* meaning. It is also through the implementation, the first concrete action, that potential legal or policy relevance occurs. This differs from the idea that the implementation includes everything that comes after the conclusion of the Mobility Partnership itself, including the negotiation of new projects to be included in the scoreboard at a later stage. Therefore, concrete activities need to be undertaken for a project to be defined as *implemented*. In this section, the various stages of implementation of the projects are identified. This analysis catalogues projects in the following categories according to their stage of implementation: *concluded*, *ongoing*, *in preparation* and *deleted/not implemented*. The categorisation depends of course on the stage mentioned in the scoreboard but can be different if other sources of information indicate that the project has reached another stage (“other sources of information” are: interviews, projects documents or email exchanges).

The distinction between *pre-existing*, *new* and *concomitant* projects is also highlighted. *Pre-existing* projects are projects which have been introduced in the Annex to the Joint Declaration at the time of its conclusion but that were previously proposed in the framework of a bilateral agreement or another programme. The implementation of these projects had already started at the time of the conclusion of the Mobility Partnership. *Concomitant* projects are projects that have been introduced in the Annex at the time of the conclusion of the agreement and that were not *pre-existent*. These projects have been proposed for the first time in the framework of the Mobility Partnership. *New* projects are those that have been proposed after the conclusion of the Mobility Partnership whether they are already *ongoing* or not. The composition of

the Mobility Partnerships will be analysed including the number of projects that have been *implemented, concluded* or *cancelled*. The number of projects that were *pre-existing* or have been included at a later stage (referred to as “*new*”) and their stage of implementation will also be examined.

The scale of both Mobility Partnerships is different. Not only because of the number of Member States signatories but because of the number of projects proposed. In the Annex to the Joint Declaration with Cape Verde, there are 31 projects compared to 105 for Morocco. The list of the projects covered by the Mobility Partnership of Cape Verde has evolved subsequently and the scoreboard from September 2014 counts 43 projects. The 2014 scoreboard for Cape Verde was difficult to decipher. Little information was provided and only few details about the country in charge of the projects’ implementation or the timeframe were given. The projects are either *concluded* or *ongoing*, but no information is given on projects that are still *in preparation* or even on those not being considered as relevant anymore. The lack of clarity and information of the document does not favour exchanges of information between the different signatory countries. According to an interviewee in Brussels, the fact that the scoreboard has not been updated since 2014 shows the lack of interest from the Member States regarding this Mobility Partnership<sup>134</sup>. The EU official added that as no new activities have been implemented since 2014 there is no point in updating the scoreboard<sup>135</sup>. However, he adds that no-one wants to see a Mobility Partnership fading so the EU will by one means or another try to keep it active. On the other hand, the scoreboard of the Mobility Partnership with Morocco is much more detailed. This suggests a stronger interest in the implementation of the Mobility Partnership. An official from DG Home pointed out that there is a good dialogue between all parties to this Mobility Partnership including Morocco<sup>136</sup>. However, in 2016 during the fieldwork in Morocco, the relations between Morocco and the EU were tense following the Court of Justice of the European Union ruling of 2015<sup>137</sup> annulling a Council Decision on trade liberalisation between Morocco and the EU including goods issued from the Western Sahara territory. Morocco suspended its diplomatic relations with the EU

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<sup>134</sup> Idem. It should however be noted that a new scoreboard exists since end of 2016/ early 2017. Its adoption was posterior to the last interviews with officials in Cape Verde and Brussels. Despite several attempts to obtain the scoreboard from DG Home and ICMPD, it has not been made available.

<sup>135</sup> Idem.

<sup>136</sup> Interview 28 (n68).

<sup>137</sup> CJEU, Judgment of the General Court, Case T-512/12, *Front Polisario v Council*, 10.12.2015.

following the ruling and relations are not entirely back at their initial level as of the time of writing.

### 3.4.2. The role of the different actors

The implementation of the Mobility Partnerships includes a wide variety of actors at various levels. In this section, a brief overview of these actors will be given introducing the relationship between the actors and the different funding possibilities linked to specific actors. However, by no means does this section give a complete overview of the funding landscape. Such an overview has been completed in the past<sup>138</sup>.

In the third country, there are several actors that directly implement the projects which have preliminarily been accepted and financed. Daniel Wunderlich underlines that implementation of EU external migration policy depends on third countries<sup>139</sup>, therefore their role has to be considered in order to grasp a complete understanding of the implementation process. The main actors are local authorities in the third country, international organizations acting as implementation organisations such as the International Organisation for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) or the International Center for Migration Policy Development and technical agencies from a Member State such as the *Gesellschaft für Internationale Zusammenarbeit* (GIZ) for Germany, Expertise France for France or LuxDev for Luxembourg. The detailed information provided by one of the scoreboards for Morocco was helpful in having a good idea of who was in charge of which project. However, in the case of Cape Verde, this exercise has been arduous due to the scarce information provided by the scoreboard.

In Cape Verde and Morocco, the main organisations that implement projects are ICMPD and IOM. ICMPD implements projects under the MIEUX programme in both countries. MIEUX is a facility funded by the European Commission and implemented by ICMPD<sup>140</sup>. It aims at facilitating capacity building and peer to peer knowledge

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<sup>138</sup> Leonhard den Hertog, 'Money Talks: Mapping the Funding for EU External Migration Policy' (2016) CEPS Paper in Liberty & Security in Europe, N° 95/ November 2016.

<sup>139</sup> Daniel Wunderlich, 'Implementing EU External Migration Policy: Security-Driven by Default?' (2013) 11(4) *Comp Eur Politics* 406, 409.

<sup>140</sup> More information: <https://www.mieux-initiative.eu/en/> 'Accessed 28 November 2017'.

sharing. There is supposed to be full local ownership as it is up to the third country officials to approach ICMPD. ICMPD also works with DG Justice and Home affairs, the Directorate-General for International Cooperation and Development (DG Devco) and the EEAS, among others. The activities are designed between the third country and ICMPD. Of course, it is also in the interest of the EU, as ICMPD follows the global agenda for change and the GAMM on behalf of the EU itself<sup>141</sup>. If the project proposed by the third country is not following the priorities of the EU, it will not be funded. It is mainly the EU Delegation, DG Devco and the EEAS which decide if a project is accepted or not. In both cases these projects aimed at supporting the national strategies for immigration that were being developed at the national level, as well as the development of new laws related to these strategies. The IOM is implementing several projects in both countries mainly relating to the creation of a migration profile and the voluntary return of migrants. However, other types of projects have also been implemented by the organization. In Cape Verde, “DIAS de Cabo Verde” was a project that ran from 2008 to 2010<sup>142</sup>. It was created and administered by IOM, with funding from the EU and the Portuguese development cooperation. It promoted and reinforced the ties between members of the diaspora and the public and private sectors, both in Cape Verde and Europe, and contributed to the strengthening of transnational linkages of the Cape Verdean diaspora in Portugal, Italy and the Netherlands. In Morocco, the IOM implemented a project called “E-BOSLA” aiming at favouring the integration of Moroccan migrants towards Italy, by providing pre-departure language courses and information about Italy<sup>143</sup>.

Member States have a key role in the implementation of Mobility Partnerships. First, they are the ones which propose most of the projects to be implemented. As we can see in the Annexes and the scoreboards, the vast majority of projects are bilateral initiatives. Member States have to secure funding for the projects that they want to implement. Some funding is national, but most of the projects are funded through EU funding. In the Annex to the Joint Declaration with Cape Verde, out of 31 projects, 20 have been proposed bilaterally by either Portugal (8 projects), Spain (6 projects), France or Luxembourg (3 projects each). Three projects are joint initiatives between

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<sup>141</sup> Interview 31 ICMPD, Brussels, 27 October 2016.

<sup>142</sup> Serviço de Estrangeiros e Fronteiras (n105) 23.

<sup>143</sup> For more information: <http://www.italy.iom.int/en/news/il-programma-e-bosla-avviato-lunedì-scorso-roma> 'Accessed 28 November 2017'.

several Member States and six projects have been proposed by the European Commission and two by FRONTEX. Without surprise, the Member State proposing the largest number of projects is Portugal, with which Cape Verde has strong postcolonial ties and which strongly supported the Cape Verdean candidacy. Three projects are also proposed by Cape Verde in Partnership with the EU and FRONTEX. The Annex of the Joint Declaration with Morocco is slightly different. Even though 66 projects are bilateral initiatives proposed by the Member States and only 39 are proposed by the EU or jointly with a Member State, a large disparity between Member States exists. It might be surprising that the country which proposed the largest number of projects was The Netherlands (with 16 projects) as this is not a country having strong historical ties with Morocco. This might be explained by the fact that The Netherlands did not have existing bilateral corridors to propose these projects and that countries with strong bilateral ties were reluctant to include all of their projects with Morocco in the Annex<sup>144</sup>. Yet, we can see that the country that proposed the largest number of pre-existing projects was France (eight projects). This can be explained by the fact that France has a long-standing cooperation with Morocco. Lastly, it is noticeable that Sweden, Portugal and the United Kingdom did not propose any pre-existing project and proposed few projects in general. Again, the link could be made with the lack of previous ties with the third country.

Finally, at the EU level, several Directorates General are playing important political, coordination and financial roles. DG Home is coordinating the general implementation of the Mobility Partnerships. DG Home is in charge of guaranteeing the effective implementation of projects by monitoring the implementation of the Mobility Partnerships, updating and gathering of the scoreboards<sup>145</sup>. DG Home is also in charge of keeping the partnership dynamic. The EU Delegation based in the third country works in close cooperation with the offices of DG Home in Brussels and with all the implementing partners in the field. DG Home makes the link between the third country and the Member States. DG Devco, the development Directorate General, coordinates development related projects. According to the Annexes and scoreboards, these projects are proposed and implemented by the EU. Several funding instruments are available. The Migration and Asylum thematic programme can fund related projects

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<sup>144</sup> Interviews 8 (n129) and 17 (n89).

<sup>145</sup> Interview 3 (n130).

included in the Mobility Partnerships. Moreover, the Development and Cooperation Instrument can fund projects outside of the EU related to development issues. Projects from the Mobility Partnerships that are related to migration and development can be funded by this instrument. For example, the scoreboard with Morocco includes projects that are under the coordination of DG Devco and financed by the migration and asylum thematic programme that is implemented by the Organisation for Economic Co-operation and Development or the United Nations Development Programme (UNDP). Finally, the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) plays a more political and financial role than the two previously described Directorates-Generals. DG NEAR does not coordinate individual initiatives but works closely with the European External Action Service. DG NEAR is in charge of the implementation of the financial aid for the Maghreb, which includes Morocco (but not Cape Verde). The EEAS has a political role that DG NEAR supports financially. They also link between the EEAS and the other General Directorates and the EU Delegations. Additionally, since 2016 DG NEAR is drafting the new orientations for the European Neighborhood Policy that are negotiated with third countries, such as Morocco. Their role is much broader than the Mobility Partnership itself, but through funding and policy orientation it impacts implementation and creation of new projects. Finally, other agencies such as FRONTEX, EASO or the European Training Foundation are also involved and propose and implement specific projects<sup>146</sup>.

### 3.4.3. Overview of implemented projects

To provide a full overview of the implementation of Mobility Partnerships this analysis includes projects that were proposed in the Annex but which are no longer in the scoreboard, as well as all projects included in the scoreboard. This analysis covers *preexistent*, *concomitant* and *new* projects.

#### 3.4.3.1. The projects not included in the scoreboard

Three projects included in the Annex to the Joint Declaration with Cape Verde no longer appear in the scoreboard. The first project relates to a proposal by Portugal to

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<sup>146</sup> Idem.



develop a bilateral cooperation instrument between the Portuguese Institute for Employment and Vocational Training and its Cape Verdean counterpart, with the aim of simplifying and boosting the efficiency of worker migration procedures. This project was implemented bilaterally and struck out of the scoreboard. Simultaneously, while implementing the Mobility Partnership, a bilateral cooperation instrument was signed between the Portuguese Institute for Employment and Vocational Training and its counterpart in Cape Verde, with a view to simplifying and reinforcing the efficacy of the procedures for labour migration. Secondly, Luxembourg proposed to offer a twinning project between partner universities. In February 2009, the Universities of Luxembourg and Cape Verde signed a Framework Agreement setting the basis for cooperation between both universities<sup>147</sup>. The agreement was valid for a period of five years but has not been renewed. Thirdly, Spain proposed to reinforce the capacity of the Ministry of Defence in respect to new information and communication technologies. It was not possible to ascertain further details concerning this project. In 2008, Spain and Cape Verde concluded an agreement for joint Maritime surveillance. However, limited information is available to conclude that these two initiatives are linked.

In the case of Morocco, twelve projects proposed in the Annex were no longer in the scoreboard. Several reasons have been put forth by the different partners. One project aimed at supporting the Joint Master in International Migration and Social Cohesion, but in January 2014 its Erasmus+ funding was not renewed which marked the end of the project<sup>148</sup>. This project was not included in the scoreboard. One project proposed by France, relating to police capacity building on issues such as human trafficking and false identification documents, is still ongoing but was no longer included in the scoreboard. When enquiring about it, a French official answered that it might just have been forgotten<sup>149</sup>. This illustrates the problem linked to the updating of the scoreboard. Generally, partners are required to update all information on short notice, before a meeting through emails exchanges as there is no real organ in charge of monitoring Mobility Partnership projects. The level of details and precision varies with the amount of time available to complete this task<sup>150</sup>. A project proposed by the Netherlands is still ongoing but not included as such in the scoreboard, as it is now linked to the voluntary

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<sup>147</sup> European Migration Network, 'Circular and Temporary Migration', National Contact Point Luxembourg, September 2011 1, 94.

<sup>148</sup> For more information: <http://www.misoco.org/about-misoco/about-misoco.html> 'Accessed 28 November 2017'.

<sup>149</sup> Interview 8 (n129).

<sup>150</sup> Interview 7 (n89).

return and reintegration project implemented by IOM<sup>151</sup>. Finally, a Spanish official indicated that the projects proposed in the Annex by Spain were not being implemented if they were not included in the joint *Sharaka* project<sup>152</sup>. Some projects have been included in the joint initiative and others have been mostly excluded from the scoreboard. This does however not mean that the projects have not been implemented. One project on irregular migrant children was implemented as a bilateral activity. This illustrates the fact that Spain prefers not to include all their bilateral activity with Morocco in the scoreboard in order to have some visibility on key initiatives<sup>153</sup>.

Out of these twelve projects, five have been cancelled. An EU official declared that the fact that these cancelled projects are no longer mentioned anymore in the scoreboard is a problem, as it results in a loss of memory on the evolution of the Mobility Partnership<sup>154</sup>. For now, no tool exists which keeps all the information centralised, thus making it difficult to conduct an evaluation of the implementation<sup>155</sup>. A project proposed by the European Training Foundation has also been cancelled. This project was not aimed directly at Morocco and had already been implemented in Moldova and Georgia however it did not seem sufficiently relevant for Morocco. Portugal also cancelled a project that they proposed. According to a Portuguese official interviewed in Rabat, no projects proposed by Portugal have been implemented so far<sup>156</sup>. He added that the cooperation between Portugal and Morocco is good but not of prime importance, which can explain the lack of action. The lack of available funding on the Portuguese side is another explanation. The latter official made a further remark that Portugal concluded the Mobility Partnership with Morocco for political reasons, rather than, for the concrete implementation of projects. This is in line with the argument in which Portugal's migration policy goes hand in hand with the Spanish migration policy. As the Mobility Partnership with Morocco is of high importance for Spain, Portugal supported its conclusion. Moreover, he suggested that the project proposals were not received with enthusiasm by Morocco. The Portuguese representative argued that if Morocco decided to take the initiative, the projects could be implemented at a bilateral level. The Netherlands also cancelled two projects. According to a Dutch official, the activities

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<sup>151</sup> For more information: <https://www.iom.int/assisted-voluntary-return-and-reintegration> 'Accessed 29 November 2017'.

<sup>152</sup> For more information: <http://www.sharaka.ma/> 'Accessed 29 November 2017'.

<sup>153</sup> Interview 17 (n89).

<sup>154</sup> Interview 3 (n130).

<sup>155</sup> ICMPD is currently (in 2017) creating a centralized database of all the scoreboards in order to facilitate the access to the information and avoid the different pitfalls illustrated in this thesis.

<sup>156</sup> Interview 11, Portuguese Embassy, Rabats, 18, January 2016.

that were proposed by the Immigration and Naturalisation Service (INS) in the framework of the Mobility Partnership have not yet started. As of the time of writing, it is not clear when exactly the implementation will take place, due to matters of finance. The INS is in regular contact with the Ministry of Security and Justice of the Netherlands and with the EU, regarding funding possibilities and the timing of the activities mentioned. Most of the cancelled and not implemented projects are the result of a lack of funding from the Member States. Nonetheless, when looking at the content of the mentioned projects, there is some evidence that the projects may have affected the content of the two main joint projects included in the Mobility Partnership at a later stage. Namely, the *Sharaka* project and the project “*promouvoir l'intégration des Migrants au Maroc*” (Promoting the integration of migrants in Morocco)<sup>157</sup>.

A surprising finding is the transformation of four general initiatives proposed by the EU in major joint Mobility Partnership projects. The initiatives are aimed at supporting the implementation of the Mobility Partnership itself, as well as developments in Moroccan policy. The first project aimed at fighting human trafficking and included activities relating to the elaboration of the legal framework, the training of Moroccan officials and information campaigns for the sensitisation of public opinion and the protection of victims. The second project supports the implementation in Morocco of a national asylum system and its related legal framework. The third project comprises a set of possible axes of intervention to be discussed with Moroccan authorities, such as the support to the implementation of the Mobility Partnership and support to the implementation of a migration policy. Finally, the objective of the fourth project is to reinforce the capacities of the National Agency for the Promotion of Employment and Skills [*Agence Nationale pour la Promotion de l'Emploi et des Competences* (ANAPEC)], the Moroccan employment agency, to enhance employment possibility in Morocco. The three first propositions by the EU have been translated into a key project, introduced into the Mobility Partnership in 2015 and benefiting from EUR 10 Million<sup>158</sup> in EU funding: “Promoting integration of migrants in Morocco”. It aims at supporting the implementation of the new National Strategy for Immigration and Asylum (NSIA)<sup>159</sup>

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<sup>157</sup> For more information: <http://www.migration4development.org/fr/content/lancement-projet-%C2%AB-promouvoir-l%E2%80%99int%C3%A9gration-migrants-maroc-%C2%BB-cadre-partenariat-mobilit%C3%A9-ue-m> 'Accessed 29 November 2017'.

<sup>158</sup> Interview 28 (n68).

<sup>159</sup> No official legal document is open to the public for now. For more information see: <http://www.marocainsdumonde.gov.ma/fr/le-minist%C3%A8re/affaires-de-la-migration/strat%C3%A9gie-nationale-dimmigration-et-dasile> 'Accessed 29 November 2017'.

adopted in 2014. In chapter five, we will discuss in depth the links between the initiatives proposed by the EU in the Annex to the Joint Declaration, the creation and implementation of the NSIA and the inclusion of new projects in the scoreboard. Special attention will be given to this project, because of its potential legal and political relevance. The strategy covers several aspects such as access to health care, the right to legal housing and the fight against human trafficking. Another initiative financed by the project “Promoting integration of migrants in Morocco”, is included as a new initiative in the scoreboard and was started in 2014. It aims at drafting a strategy for the reception and integration of refugees, asylum seekers and their families, directly relating to the NSIA.

Finally, in the Annex to the Joint Declaration with Morocco, the EU suggested several “possible axes of intervention to be identified in collaboration with the Moroccan government” which became three out of the four pillars of the *Sharaka* project<sup>160</sup>: capacity building of the ANAPEC in the field of labor migration, the creation of a migratory profile of Moroccans living abroad and the mobilisation of their competences and migration and development. In the framework of this third pillar, the EU offers a new project on financial education and money transfers. Concerning the last pillar, return and reintegration, the EU previously proposed two projects aiming at social and educative reintegration of Moroccans that have returned to Morocco and promoting the mobility of people and competencies. This shows the will for better and clearer communication between partners. It also illustrates the evolution of the working cooperation between all partners. It is an interesting case study for cooperation between different partners in the framework of the Moroccan Mobility Partnership. When proposing activities during the drafting of the Annexes to the Joint Declarations, Member States tend to propose bilateral initiatives that they either had developed already or were planning to develop. Through the *Sharaka* project, seven<sup>161</sup> Member States decided to collaborate on joint initiatives. This initiative had a considerable effect on the reshaping of proposed projects. For instance, the Italian Ministry of Labor and social policies decided to delete the projects that they proposed at the time of the conclusion of the Mobility Partnership<sup>162</sup>. This was due to the fact, that they were not

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<sup>160</sup> For more information see : <http://www.expertisefrance.fr/fre/Domaines-d-activite/Gouvernance-et-Droits-humains/Migrations-projet-SHARAKA-au-Maroc> 'Accessed 15 February 2018'.

<sup>161</sup> Germany, Belgium, Spain, France, Italy, The Netherlands and Sweden.

<sup>162</sup> Informal email exchanges with the Italian Ministry of Labour, May 2015.

considered by Morocco as responding sufficiently to their needs and therefore were not included in the *Sharaka* project. Out of three projects, two appear as deleted in the scoreboard and one as concluded because Italy realised previous activities in 2013, 2014 and in January 2015. Moreover, the Ministry of Labor and Social Policy proposed a new bilateral project which was implemented from February to August 2015, relating to circular migration for young workers in fields such as tourism and agriculture. Spain is also an important partner in the *Sharaka* project; the Ministry of Employment and Social Security<sup>163</sup> decided not to implement their proposed initiatives as bilateral projects but to propose them all through *Sharaka*. Out of six projects, four have been included in *Sharaka*. In the scoreboard, the other two initiatives are still defined as being in preparation, showing that Spain has not completely abandoned the idea of implementing these projects bilaterally. There is one proposed project in the Annex that does not appear in the scoreboard but has been added to *Sharaka*, as a component of the technical assistance to return. However, the scoreboard also shows that the Spanish Ministry of Employment and Social Security proposed new bilateral initiatives. It includes a project about cross-border workers in the cities of Ceuta and Melilla gaining an easier extension of work permits and rights to unemployment benefits for Moroccan workers and a project on business-related migration. The only project proposed by Sweden has been included in *Sharaka*. France is an interesting case as it proposed to delete four projects in order for the scoreboard to reflect as satisfactorily as possible the initiatives that are effectively implemented through the Mobility Partnership. This includes two initiatives that have not been accepted as being part of *Sharaka* concerning students' residency permits and an information programme on the French labour market. The *Sharaka* project is one of the two projects that aims at supporting the Mobility Partnership<sup>164</sup>. According to an EU official, it also aims at showing Morocco that the Member States are working to avoid overlapping projects<sup>165</sup>. This project is a way to reward the conclusion of the Mobility Partnership as it foresees ways for Moroccans to access the EU labour market<sup>166</sup>. In practice and as of the time of writing this aspect of the project has still not been launched. Furthermore, the project had more unintended consequences on the access of sub-Saharan migrants to the

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<sup>163</sup> Informal email exchanges with the Spanish Ministry of Employment and Social Security May 2015.

<sup>164</sup> Interview 3 (n130).

<sup>165</sup> Idem.

<sup>166</sup> Idem.

Moroccan labour market than intended consequences for Moroccans. This will be discussed further in Chapter 5.

#### 3.4.3.2. Overview of the projects included in the scoreboards

The scoreboard for Morocco is composed of 116 projects out of which 22 are new. This denotes that 22 projects have been proposed in the framework of the Mobility Partnership at a later stage than its conclusion in June 2013. In Cape Verde, out of 41 projects, 13 were *pre-existing* and five are *new*. Some projects that were presented as one project in the Annex became two different projects in the scoreboard, as the activities were at various stages of implementation. This explains the difference between the total number of projects in the Annex and the number of projects in the scoreboard (including *new* projects). The scoreboard was not detailed, explaining why only three stages of implementation were used: *ongoing*, *concluded* and *not implemented*. Analysing this scoreboard is challenging because of the severe lack of information as well as the vagueness of the projects proposed. Two projects, one concerning police cooperation and one on the creation of a monetary fund to be used by the ECOWAS Member States, shall not be analyzed because even though it appears in the Annex and in the scoreboard, no information can be found. Therefore, the total number of projects in the table below is 41 and not 43. As two third of the projects have already been concluded, we can see that the Mobility Partnership with Cape Verde entered a different implementation phase than the Mobility Partnership with Morocco. What is even more striking is that all *new* projects have already been concluded, whereas more than a third of *pre-existing* projects are still ongoing. It should be noted that *ongoing* projects are sometimes so vague that it is difficult to know if it can be considered as concluded or still ongoing. One such example: “job creation in Cape Verde”, is broad enough to be a general and long-lasting aim of cooperation between Cape Verde and the Member States.

Several central projects have been implemented satisfactorily. First, a Common Visa Application Center has been running since 2010, processing approximately 9000<sup>167</sup> visa applications a year. In addition, different bilateral initiatives related to labour

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<sup>167</sup> Information available in the Scoreboard.

migration are ongoing. Two of the main initiatives were the CAMPO project<sup>168</sup> and the project DIAS de Cabo Verde<sup>169</sup>, which have already been concluded. These two projects aimed at promoting legal mobility between Cape Verde and Europe, circular labour migration and return and reintegration of migrant workers. Once the initial CAMPO project ended it was incorporated into the Cape Verdean administration (in the Ministry of Communities). Finally, a visa facilitation agreement for short term visas and a readmission agreement were concluded respectively in October 2012 and in April 2013 and both are currently in force. The negotiations of a readmission agreement have been taking place even though Cape Verde neither signed the Geneva Convention of 1951 on the status of refugees nor has the capacity to receive returned migrants. A proposed project related to the ratification by Cape Verde of the Geneva Convention has never been implemented and Cape Verde is still only part of the 1967 Protocol. Moreover, according to several Cape Verdean and EU officials, Cape Verde does not have the capacity to receive returned migrants. They do not have the practical facilities, nor do they even have any clear idea of how to create such facilities<sup>170</sup>. The fact that Cape Verde is divided into different islands, with different airports, creates complex circumstances and would also require high financial means to replicate the same facilities on several islands<sup>171</sup>.

Subsequently, some attention should be paid to *new* projects, as it is interesting to note that all of them have been concluded thus far. New projects tend to be more cooperative. Projects that have been proposed after the conclusion of the Mobility Partnership with Cape Verde were directly answering the needs and interests of all parties. As mentioned during several interviews with EU and Cape Verdean officials, projects implemented in the framework of the Mobility Partnerships were used to identify specific needs for Cape Verde and develop new projects aiming at addressing the recognised shortcomings<sup>172</sup>. As was in the case of the project “Strengthening capacities of Cape Verde in migration management” which supported the development of a policy to address irregular migration. The new projects also tend to be more cooperative. One of them is coordinated by Portugal but includes France, The

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<sup>168</sup> For more information about this project see: <http://www.campo.com.cv/> 'Accessed 12 December 2017'.

<sup>169</sup> For more information: <https://gfmf.org/pfp/ppd/3> 'Accessed 12 December 2017'.

<sup>170</sup> Interview 38, IOM, Praia, 24 February 2016.

<sup>171</sup> *Idem*.

<sup>172</sup> Interviews 33 (n42), 39 (n30) and 45 (n42).

Netherlands and Luxembourg<sup>173</sup>. One project is a collaboration between the Netherlands and Cape Verde on the implementation of a needs assessment in order to chart Cape Verde’s problems and needs in relation to asylum and migration<sup>174</sup>. It was also the case of a project implemented under the MIEUX Programme aiming at developing the National Migration Strategy and Action Plan in order to reduce irregular migration and improve legal mobility<sup>175</sup>. These projects have a high policy relevance for Cape Verde as they support the drafting and implementation of Cape Verde’s new migration strategy. We will come across the same circumstances in the case of Morocco as follows.

**Table 3.2: Stage of implementation by typology of projects.**

	Morocco			Cape Verde		
	Preexisting	Concomitant	New	Preexisting	Concomitant	New
In preparation	0	26	10	No information available		
Ongoing	29	22	11	5	6	0
Concluded	8	2	0	8	14	5
Deleted/ Not implemented	5	2	0	0	3	0
TOTAL	42	52	22	13	23	5

This table indicates the number of projects at each stage of implementation divided according to their typology. E.g.: 29 pre-existing projects are currently ongoing in Morocco and 14 concomitant projects in Cape Verde are concluded. Source: Author base on the Annexes to the Joint Declarations with Cape Verde and Morocco and their scoreboards.

It is not surprising that most *concluded* and *cancelled* projects, in the case of Morocco, are *pre-existing* the conclusion of the Mobility Partnership. There is a direct correlation between the fact that a project has started its implementation before the conclusion of the Mobility Partnership and the fact that it was already concluded four years later (in 2017). Projects usually have short time frames following EU financial programming and action planning. Concurrently, the fact that most of the *cancelled* projects were *pre-*

<sup>173</sup> The project is called “Strengthening of Cabo Verde’s capacities in migration management” For more information: [https://ec.europa.eu/europeaid/case-studies/strengthening-cape-verdes-capacities-migration-management\\_en](https://ec.europa.eu/europeaid/case-studies/strengthening-cape-verdes-capacities-migration-management_en) ‘Accessed 12 December 2017’.  
<sup>174</sup> The project has been carried out by ICMPD. More information can be found here: ICMPD, Cape Verde – Needs Assessment in the Field of Asylum and Migration (2009).  
<sup>175</sup> For more information about MIEUX: <https://www.mieux-initiative.eu/en/> ‘Accessed 12 December 2017’.



*existing* shows that the priorities of the different parties have evolved, and some *pre-existing* initiatives were not of sufficient interest to be maintained. It is not surprising that no *new* projects have been *cancelled* as the *new* initiatives proposed are in line with the latest political orientations of the parties. One of the *cancelled* project related to the creation of a specific visa facilitation scheme between Morocco and France but due to the ongoing negotiation of an EU visa facilitation agreement this project became redundant. Four *pre-existing* projects were proposed to be included in the joint *Sharaka* initiative but were not welcomed by Morocco, therefore France asked to withdraw them from the scoreboard. Furthermore, no *pre-existing* projects are in preparation as they were already being implemented before the conclusion of the Mobility Partnership. The two remaining projects that were *cancelled* were proposed by Italy at the time of the conclusion of the Mobility Partnership. But, as they were not selected by Morocco for inclusion in the “*Sharaka*” project, Italy faced insufficient funding and failed to implement them bilaterally<sup>176</sup>.

It is interesting to note the contents of the *new* projects. One initiative included in the scoreboard following the adoption of a Directive in 2014 on seasonal workers<sup>177</sup>, aimed at using the flexibilities offered by this Directive, in order to favour seasonal work and circular migration. Additionally, a short project on the theme of circular migration was proposed by Italy for implementation in 2015. However, this was a bilateral initiative that was not solely directed towards Morocco. The EU proposes most new projects. Another new initiative called “*Droit des migrants en action*”<sup>178</sup>, aims at enhancing migrants’ rights, however, it is not only directed towards Morocco. Finally, three *new* initiatives aim at directly supporting one or several pillars of the “*Sharaka*” project.

In each Mobility Partnership, projects are divided into topics. These topics are not always the same from one Mobility Partnership to the other and the categorization can evolve between the Annex and the scoreboard. The policy context and priorities have an impact on the projects proposed and implemented. This correlation is observed more in depth thanks to three indicators, the number of projects included in the Annex

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<sup>176</sup> Informal email exchanges with the Italian Ministry of Labour, May 2015.

<sup>177</sup> Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, 26 February 2014, L 94/375.

<sup>178</sup> For more information: <http://www.ifrc.org/fr/introduction/migration/les-droits-des-migrants-en-action/about-the-project/> 'Accessed 29 November 2017'.

by topics, those that have been implemented and the number of new projects in each topic. The next table shows the evolution of the distribution of projects by topics in the Annex to the Joint Declaration with Cape Verde and in the scoreboard. We can see that the topics do not differ much from the pillars of the GAMM. It is also interesting to notice that “Mobility and short stay visas” are separated from the topic on legal migration while they are part of the same pillar.

**Table 3.3: Evolution of the distribution of projects by topics for Cape Verde.**

Topics	N° of projects in the Annex	N° of projects in the Scoreboard
Legal migration, integration, mobility and short stay visas	13	7
Links between migration and development, diasporas, money transfers	5	15
Asylum and immigration	2	2
Cooperation on border management, identity and travel documents, and the fights against irregular migration and trafficking in human beings	10	12
Monitoring and awareness of migration flows/ horizontal initiatives	1	5
TOTAL	31	41

This table shows the evolution of the distribution of projects by topics in the Annex to the Joint Declaration with Cape Verde and in the scoreboard. E.g.: Projects related to legal migration and mobility went from 13 in the Annex to 7 in the scoreboard indicating a decrease in this type of projects.

We can see that even though the share of projects related to border management and irregular migration were plentiful in the Annex, it nonetheless increased over the years. On the other hand, the number of projects related to legal migration became less numerous and no direct reference to labour migration are further made. This could be seen as an argument supporting the existing assertion<sup>179</sup> that the Mobility Partnership

<sup>179</sup> Meng-Hsuan Chou, ‘European Union Migration Strategy Towards West Africa: the Origin and Outlook of “Mobility Partnerships” with Cape Verde and Senegal’ (2009) EUSA Working Paper 1, 20-22.

is used by the EU as a migration management tool aiming at increasing the difficulty for third country nationals to accede to Europe. The table below shows the distribution of projects by topics in the scoreboard for Cape Verde. The reason why there is a total of 45 projects and not 43 projects is because two projects have been divided into two different projects in the scoreboard but analysed jointly. In Cape Verde, only three projects were not implemented but were included in the scoreboard. The first one was included under the topic *migration and development* and corresponds to a project linked to temporary circular migration. The second project is on the topic of *asylum and migration* and is relative to the proposal that Cape Verde ratifies and fully implements the 1951 United Nations Convention on the Status of Refugees. Finally, the last project related to *border management, identity and travel documents, fight against irregular migration and trafficking in human beings* corresponds to Cape Verde's compliance with its international obligations in relation to rescue at sea.

In Cape Verde, the *new* projects that have already been implemented have been proposed in the areas of *legal migration, migration and development* and *horizontal issues*. Two of the horizontal projects consist in the development of the National Immigration Strategy and Action Plan and the drafting of the new Migration Framework Legislation. These projects illustrate the policy and legal relevance Mobility Partnerships can have. The increase in the number of projects under the topic *Migration and Development* can be linked to the adoption of the National Emigration Strategy for Development<sup>180</sup> in 2014, as it includes a significant migration and development component<sup>181</sup>. It also includes projects that were previously categorised under different topics. This is the case of the first topic of the Annex, *Monitoring and awareness of migration flows*, that is now presented under a *horizontal initiative*. Finally, the National Emigration Strategy for Development includes projects that were previously falling under *employment*, such as the conclusion of bilateral working agreements, or a new project implemented by LuxDev aimed at the development of the labour market in Cape Verde.

Regarding Morocco, border management, irregular migration and human trafficking/smuggling are also a primary source for projects but unlike Cape Verde,

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<sup>180</sup> Resolução do Conselho de Ministros n.º 33/2014 de 9 Janeiro (Estratégia Nacional de Emigração para o Desenvolvimento).

<sup>181</sup> ICMPD and IOM, 'A Survey on Migration Policies in West Africa' (2015) 1, 124.

mobility and legal migration is given more weight than migration and development. It is also interesting to notice that the highest number of *pre-existing* projects for a category (20), was concentrated on mobility and legal migration. However, the highest number of *concomitant* projects (27) was centred on combatting irregular migration and border management. This illustrates the initiative of Member States to include in the Annex all positive initiatives that have already been implemented in Morocco to give more weight to their negotiations. As such, Member States benefit from a better negotiating position to impose more constraining projects, for instance, the conclusion of a much-criticised readmission agreement. The topic that has the best *ratio* of implementation is *Migration and Development* and particularly projects on the mobilisation of Moroccans' competencies. While the topic with the lowest implementation *ratio* pertains to *Mobility, legal immigration and integration*. The focus of these topics indicates policy orientations which are substantiated by the EU funding priorities for migration related issues.

**Table 3.4: Evolution of the distribution of projects by topics for Morocco.**

Topics	N° of projects in the Annex	N° of projects in the Scoreboard
Mobility, legal immigration and integration	35	43
Preventing and combatting irregular immigration, people-smuggling, border management	38	36
Migration and development	20	24
International protection	6	6
Horizontal Initiatives	6	7
TOTAL	105	116

This table shows the evolution of the distribution of projects by topics in the Annex to the Joint Declaration with Morocco and in the scoreboard. E.g.: Projects related to legal migration and mobility went from 35 in the Annex to 43 in the scoreboard indicating an increase in this type of projects.

Unlike the case of Cape Verde, the scoreboard for Morocco is very detailed and classifies projects under several *objectives* rather than general topics. The *objective* that includes the biggest number of new projects is *integration*, which belongs under

the topic *mobility, legal immigration and integration*. This objective is not homogeneous and includes diverse types of projects related to migrants' rights, to asylum or also to business-related migration. The number of projects in the scoreboard does not exactly coincide with the actual number of projects as some projects are separated under different topics. Therefore, they seem to be slightly more numerous.

### **3.5. Conclusion**

The aim of the present Chapter was to examine the Mobility Partnerships with Cape Verde and Morocco from their conclusion to their implementation. We first analysed the context of the adoption of both Mobility Partnerships underlining the main factors that lead to the conclusion of the partnerships. Then we examined the content of the Mobility Partnerships drawing a parallel with the different pillars of the GAM(M). We detailed the main topics of the projects as well as their evolution from the Annex to the Joint Declaration to the related scoreboard. We then analysed the implementation of the Mobility Partnerships, presenting the role of the different actors and the distinct stages of implementation: in *preparation, ongoing, concluded* or *deleted/not implemented*. The distinct types of projects were also introduced: *pre-existing, concomitant and new*.

The analysis revealed that Mobility Partnerships are a complex tool that comprises many different actors, having separate roles and interests. We discerned that an imbrication of factors led to the choice of Cape Verde and Morocco as beneficiaries of the Mobility Partnerships and these factors highly differed in each case. The national context and the ties between the third country and EU Member States play a key role in the selection of the third country. The different interest of the EU, the Member States and the third country can be found in the different projects proposed and their implementation.

Taken together, these results suggest that EU Member States play a key role in the conclusion and implementation of Mobility Partnerships. First, EU Member States have the last say in the selection of the third country. For Mobility Partnerships to be effectively implemented a sufficient number of Member States have to be interested in

a third country. Member States only participate because they have an interest in the Mobility Partnership or the third country in question. Three main reasons can explain Member States' interests: the preexistence of postcolonial ties, geographical proximity or the number of immigrants living in a Member State. This same logic is found in the list of projects proposed in the Annexes and scoreboards. The vast majority of projects are bilateral activities proposed by EU Member States. These projects are the reflection of their own national interest. EU officials allow the inclusion of this type of projects because it is the condition for an effective implementation of the Mobility Partnerships. However, the conflict of interests between different Member States can lead to some implementation issues such as the overlapping of projects or the lack of will to cooperate in joint projects.

The contribution of this Chapter has been to give a thorough overview of the stage of implementation to date of the Mobility Partnerships with Cape Verde and Morocco, as no such exercise has been conducted previously. A previous analysis of the projects proposed in the Mobility Partnership with Cape Verde was concluded in 2013 by Natasja Reslow, but as her thesis dealt with decision-making rather than implementation no in depth analysis of the stage of implementation of the Mobility Partnership with Cape Verde was conducted<sup>182</sup>. In the case of Morocco, such an analysis was so far inexistent. It is impossible to assess the potential relevance of the Mobility Partnership tool without having a clear overview of the content of the partnerships and their stage of implementation. Furthermore, identifying projects with potential legal and political relevance is a necessary basis for the overall thesis.

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<sup>182</sup> Natasja Reslow (n28) 70.

## **Chapter 4: Legal and policy developments in Morocco and Cape Verde**

### **4.1. Introduction**

The aim of this Chapter is to provide an overview of the legal and policy developments that have occurred in Morocco and Cape Verde since the conclusion of their respective Mobility Partnerships. In the first part of the Chapter, we analyse the existing legal framework in relation to migration, asylum, human trafficking and migrants' rights in force at the time of the conclusion of the Mobility Partnerships in Cape Verde and in Morocco. This means giving a description of the effective laws in Cape Verde in 2008 and in Morocco in 2013. The second part of the Chapter will present the legal framework as it is today.

The legal framework related to migration covers specific issues. First, the laws being presented are related to the entry, stay and exit. In other words, who can enter a country, who can stay in the country for a longer period and under which conditions? Several reasons for entry and stay can be foreseen such as employment, studies, family reunification or tourism. We will see in the presentation of the legal frameworks that these reasons are not always straightforward and that the laws do not always clearly foresee them. We look at the exit as in some cases it can be prohibited or subject to specific conditions. Moreover, exit can be voluntary, but it can also be forced as in the case of expulsions.

The rights to entry and stay in a country can vary depending on the status and categories of people such as migrants, migrant workers, asylum seekers and refugees or victims of human trafficking. This Chapter presents the legal frameworks not only from their purely administrative content but also from the perspective of the rights that they can confer to these distinct categories of "migrants". It also takes into consideration various groups that can have specific rights in a third country due to their particular historical and geographical proximity but also because of the existence of sub-regional organisations granting exceptional rights to its members. This is, for example, the case of the Economic Community of West African States Member States

(Benin, Burkina Faso, Cape Verde, Ivory Coast, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo) or Portuguese-speaking African countries (Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Equatorial Guinea).

However, the analysis of the legal framework in relation to migration will not only focus on immigration and asylum laws. Several other fields of law include specific provisions which regulate migrants' access to rights or obligations. This is for example the case of labour law or criminal law. In this Chapter the conditions to access the labour market are presented and the notions of equal treatment or "national preference" are also discussed. In parallel to the right to work, the right to social security is also presented, providing a brief overview of the national social security laws as well as specific bilateral agreements between Cape Verde or Morocco and other countries. The parallel can be made with the basic rights that foreigners can expect to enjoy when staying in a country. These rights encompass basic human rights such as education, health and housing. Moreover, certain political rights will be analysed such as the right to vote, the right to be part of an association or a trade-union or the right to strike.

The next step in the presentation of the legal framework is to look outside the national territory and present the rights of nationals while abroad. This includes the right to vote, the right to be represented and the right to be protected. Moreover, specific institutions which deal with emigration are presented including their roles in creating the link between the emigrant and his or her country of origin. Some of these emigrants can decide to return home after some time abroad leading to a new area of the legal framework on migration which is return and reintegration. The return can be voluntary or not. In the case of a voluntary return either the emigrant organizes himself alone or uses existing voluntary return schemes. In other cases, the return can be involuntary as in the cases when emigrants are being deported and sent back to their country of origin.

Besides the different areas of the legal framework which will be presented in this Chapter, it is important to answer the question of which laws shall be presented and analysed. The focus of the Chapter is on the national laws of Cape Verde and Morocco starting from the Constitution and covering several aspects such as migration law,



asylum law, criminal law, labour law, laws related to education, health, housing, social security, civil law and nationality law. Besides the national laws, the different international instruments that both countries are party too will also be used as a basis to grant rights but also to discuss whether the national law is in conformity with the country's international obligations or not. The international instruments will mainly be comprised of the Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the African Charter on Human and Peoples' Rights. However, this list is not exhaustive. Finally, multilateral agreements, such as the Protocol of Free Movement concluded by Cape Verde in 1982 and bilateral agreements will be presented. Bilateral agreements can cover different issues such as visa waivers, readmission agreements, social security agreements or labour agreements.

## **4.2. Legal framework for migrants' rights in Morocco and Cape Verde before the conclusion of the Mobility Partnerships**

This section presents the legal framework related to migration in Cape Verde and Morocco before the conclusion of the Mobility Partnerships. Accordingly, the legal framework for Cape Verde is presented as it existed in 2008 and the legal framework for Morocco as it existed in 2013.

### **4.2.1. Entry, stay and exit rights**

This section will be divided into three parts: immigration and emigration, asylum and human trafficking.

#### 4.2.1.1. Immigration and emigration

In Cape Verde Decree 6/97 of 5 May 1997<sup>1</sup> regulated the legal status of foreigners and the rights and guarantees of the regime of entry, stay, expulsion and extradition. Decree 6/97 proposed to adapt and conform the text of the law in force<sup>2</sup> to the rules of international law, constitutional provisions and international conventions and agreements on foreigners binding on the State of Cape Verde<sup>3</sup>. One of the change brought by the Decree 6/97 are the provisions introduced in Chapter I on general disposition. Article 2 introduces a definition of *extrangeiro* (foreigner) and *residente* (resident). These same definitions can be found in Article 1 and 2 of the Portuguese Decree 59/93<sup>4</sup> which establishes the new regime of entry, stay, exit and expulsion of foreigners from Portugal. Other similarities between Decree 6/97 and Decree 59/93 can be found suggesting the proximity of both legal systems such as conditioning the entry into the territory to the existence of sufficient economic means (Article 14 Decree 6/97 and Article 7 Decree 59/93).

Decree 6/97 does not specifically mention the rights of migrant workers to family reunification who fall into the general conditions foreseen by the law. This is different from Portugal which recognizes family reunification as a way to obtain a residency visa (Article 28 of Decree 59/93). The entry of foreigners into national territory follows four different regimes: one for Cape Verdean nationals which are exempt from entry visas, one for visas-exempt entities, one for visas-exempt individuals and one for those who require an entry visa. There are no special statuses for students, researchers or others who are subject to general treatment in accordance with the law. This marks a difference with the Portuguese system which offers specific visas for workers (Article 18 of Decree 59/93) and students (Article 22 of Decree 59/93). However, Law 36/V/97, of 25 August 1997<sup>5</sup>, defines the special legal status enjoyed by foreigners originating from Portuguese speaking countries (*Estatuto do Cidadão Lusófono*). In relation to the entry into Cape Verde, Portuguese-speaking citizens qualify for a multiple-entry and

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<sup>1</sup> Decreto-Legislativo 6/97 de 5 de Maio, que Regula a Situação Jurídica do Estrangeiro no Território Nacional, Estabelecendo os Direitos, Garantias e Deveres, o Regime de Entrada, Permanência e Saída, a Expulsão e a Extradicação, bem como as Taxas, as Infrações e Sanções BOCV, I Série, n°17.

<sup>2</sup> In 1990, Decree-Law 93/III/90 of 27 October was adopted to regulate the legal situation of foreigners in the country and repeal Decrees 17/76, 46/76 and 47/76.

<sup>3</sup> Ibid Preamble para 3.

<sup>4</sup> Decreto-lei 59/93, de 3 de Março, Estabelece o Novo Regime de Entrada, Permanência, Saída e Expulsão de Estrangeiros do Território Nacional, Diário da República n° 52/1993, Série I-A de 1993-03-03.

<sup>5</sup> Lei 36/V/97, de 25 de Agosto, que define o estatuto do cidadão lusófono BOCV, I Série, n°14.

long-stay visa and may also be exempted from a visa by a decision of the Government<sup>6</sup>. Businessmen, scientists, researchers and artists are exempted from visas for stays under 30 days if accredited or recommended by their government or a national NGO (Article 6 of Law 36/V/97).

It should be noted that visa exemption does not exempt the foreigner from other restrictions to entry such as the proof of “sufficient economic means”. Article 14(1) of Decree 6/97 conditions the entry into Cape Verde to the possession of the required documentation, visa, “sufficient economic means” and not being subject to prohibitions of entry. Decree 10/99, of 9 August, regulates the nature and quantity of “sufficient economic means” required to enter Cape Verde<sup>7</sup> as foreseen in Article 14(4) of Decree 6/97. Article 19 of Law 6/97 foresees exceptional cases in which the border police authorities may authorise entry, transit or stay to foreigners without documentation but without clarification regarding what could be considered as an exceptional case. To apply for a transit visa (Article 36), for a temporary visa (Article 40), for a residency visa (Article 47) or for a tourist visa (Article 56) the foreigner must prove the existence of sufficient economic means. The criminalisation of irregular exit does not exist in Cape Verde. Freedom of movement was incorporated into the Cape Verdean Constitution by Article 50, entitled “freedom of movement and emigration” and worded as follows: “[e]very citizen has the right to leave and enter freely into national territory, as well as to emigrate”. This provision takes up Article 13(2) of the Universal Declaration of Human Rights.

Moreover, Article 64 of Decree 6/97 forbids the collective expulsion of foreigners, therefore, at least in theory, Cape Verde is abiding by the principle of *non-refoulement*. In practice this principle was not always followed<sup>8</sup>. The fact that from 2006 to 2010 Cape Verde participated in the Seahorse project in cooperation with Mauritania,

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<sup>6</sup> Acordo sobre a Supressão de Vistos em Passaportes Diplomáticos, Especiais e de Serviço entre os Governos Membros dos Países de Língua Oficial Portuguesa (Maputo, 17 de Julho de 2000), Aprovado pelo Decreto 3/2001, de 30 de Julho, BOCV, I Série, n°23; Acordo sobre a Concessão de Vistos de Múltipla Entrada para Determinadas Categorias de Pessoas, Aprovado pelo Decreto 12/2003, de 22 de Dezembro, BOCV, I Série; Acordo sobre a Concessão de Visto Temporário para Tratamento Médico a Cidadãos da Comunidade dos Países de Língua Portuguesa (Brasília, 30 de Julho de 2002), Aprovado pelo Decreto n° 15/2003, de 22 de Dezembro, BOCV, I Série, n°43.

<sup>7</sup> Decree-Law 10/99 of 9 August Regulates the Nature and Quantity of the “Sufficient Economic Means” for Entry and Temporary Stay of the Foreigner, the Cases of Dismissals and the Proof of their Possession, BOCV, I Série, n°28, Supplement, 9 August 1999.

<sup>8</sup> Kees Wouters and Maarten Den Heijer, ‘The Marine I Case: A Comment’ (2010) 22 *IJRL* 1; Efthymios Papastavridis, ‘Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas’ (2010) 25 *IJMCL* 569; Guy Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement’ (2011) 23(3) *IJRL* 443, 450.

Senegal, Spain and FRONTEX lead to situations where boats of migrants were intercepted and returned to their ports of departure. This practice can be related to *refoulement* as migrants were not able to launch an asylum claim in Cape Verde, if they wanted to, and groups were sent back without considering individual cases. Cape Verdean officials were participating in the decision regarding the sending back of boats<sup>9</sup>. According to Decree 6/97, expulsion of foreigners towards countries where the foreigner can be persecuted for political, religious or opinion-related reasons and in cases where punishments are considered as inhuman or degrading is prohibited (Article 65). The deterrence of migrants' vessels can be seen as a breach of this provision as the people who were returned without the chance to launch an asylum claim in Cape Verde could have been at risk of facing persecution for political, religious or opinion-related reasons.

The law also foresaw administrative and judicial expulsion (Articles 68 and 72). According to Article 36(2) of the Cape Verdean Constitution of 1999<sup>10</sup>, "a foreigner or stateless person who has been authorized to reside in the country or has applied for asylum can only be expelled by a judicial decision in accordance with the law". Additionally, Article 22(1) of the ICRMW as well as Article 12(5) of the African Charter on Human and Peoples' Rights forbid "collective" or "mass" expulsion of third country nationals. In Cape Verde, between 2003 and 2008, 852 individuals were expelled at an average of 146 persons per year<sup>11</sup>. The phenomenon in Cape Verde is clearly less intensive than in Morocco, as will be detailed later in this section. The ECOWAS region represent the significant and almost unique origin among the deportees<sup>12</sup>.

The Report of the Interministerial Commission for the Study and Proposition of the Bases of Immigration Policy pinpoints that the legal framework is acceptable for an efficient management of migration flows<sup>13</sup>. Acceptable does not mean flawless. There are contradictions and voids in the legislation as well as overlaps between Decree 6/97 and the Labor Code<sup>14</sup> (Article 280) in respect to the regularization of migrants. This

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<sup>9</sup> Guy Goodwin-Gill (n8) 450.

<sup>10</sup> Lei Constitucional 1/V/99, Revê a Constituição da República de Cabo Verde. Suplemento ao BOCV n°43, I Série, de 23 de Novembro de 1999.

<sup>11</sup> IOM, 'Migração em Cabo Verde: Perfil Nacional' (2009) 1, 44.

<sup>12</sup> IOM, 'Perfil Migratório de Cabo Verde' (2017 Draft) 1, 53.

<sup>13</sup> EFG Consulting, 'Imigração em Cabo Verde: Subsídios para a Política Nacional de Imigração Relatório Final da Comissão Interministerial para Estudo e Proposição das Bases da Política de Imigração', Outubro 2010 1, 53.

<sup>14</sup> Decreto-Legislativo n°5/2007 Aprova o Código Laboral Cabo-verdiano BOCV I Série n.37 16 de Outubro de 2007.

situation concerns migrants who exceed 90 days of stay without obtaining an authorization of residence. The latter is problematic, because they need a work contract to have a residency permit and a residency permit to work, therefore they end up becoming irregular migrants as they are unable to regularize their situation. Moreover, the report also underlines the shortcomings in administrative capacity of the services involved (shortage of financial, human, technical and material resources) explaining, in part, the failures in supervision and control in the application of the law in force<sup>15</sup>.

It is important to note that, in 1982, within the framework of the ECOWAS, Cape Verde signed a Protocol of Free Movement of people and rights to residence and establishment<sup>16</sup>. Article 2 of the Protocol allows all citizens from the ECOWAS countries to enter and stay in another ECOWAS country which has led to significant mobility within the region. According to the Protocol, citizens from the sub region do not need an entry visa but must submit a request for a residency permit if they decide to remain in the country. Indeed, the Protocol does not provide for a right to permanent residence, which is regulated by national law<sup>17</sup>. Cape Verde has not ratified Additional Protocol A/SP.1/7/86<sup>18</sup> on the second phase (right of residence) of the Protocol of Free Movement. The Supplementary Protocol of 1986 regulates the right of citizens of the community to seek and perform paid work. In practice Cape Verde has abolished the entry visa for 90-day stays but has not yet adopted the ECOWAS travel certificate<sup>19</sup>, the ECOWAS passport<sup>20</sup>, nor has it harmonized the immigration and emigration form for the ECOWAS Member States<sup>21</sup>. Since Cape Verde became a country of immigration, the authorities thought that maintaining the application of the Protocol on Free Movement of Persons would make it impossible to properly manage internal migratory flows and it would risk an “invasion of foreigners”<sup>22</sup>.

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<sup>15</sup> EFG Consulting (n13) 54.

<sup>16</sup> Protocolo sobre a Livre Circulação de Pessoas, o Direito de Residência e de Estabelecimento, Aprovado pela Lei n°18/II/82, de 30 de Março, BOCV, Suplemento, 7 de Maio de 1982.

<sup>17</sup> José Pina-Delgado, 'O Cruzamento entre a Política Migratória Cabo-Verdiana para a Europa e a Política Migratória Cabo-Verdiana para a África Ocidental' 523 in Suzano Costa and Cristina Sarmiento, *Entre África e a Europa: Nação, Estado e Democracia em Cabo Verde* (Almedina, 2013) 553.

<sup>18</sup> Protocolo suplementar A/SP.1/7/86 sobre a segunda fase (direito de residência) do protocolo de Livre Circulação de Pessoas, Direito de Residência e Estabelecimento.

<sup>19</sup> Decisão A/DEC.2/7/85 sobre o estabelecimento de um certificado de viagem para os Estados-Membros da CEDEAO.

<sup>20</sup> Decisão C/DEC.1/5/2000, assinada em Abuja em 2000, sobre a adopção de um passaporte da CEDEAO.

<sup>21</sup> Decisão C/DEC.3/12/92 sobre a introdução de um formulário harmonizado de emigração e imigração nos Estados-Membros da CEDEAO.

<sup>22</sup> José Pina-Delgado (n17) 555.

Cape Verde has concluded specific international agreements on free movement or on the abolition of entry visas with Senegal, Cuba and Hong Kong<sup>23</sup>. Moreover, Cape Verde concluded joint border control agreements and facilitation schemes for regular emigration with Portugal and Spain<sup>24</sup>. The agreement with Portugal allows Cape Verdeans to work in Portugal for a maximum of three years, on the condition that they have an employment contract<sup>25</sup>. These two agreements include a readmission clause for Cape Verdean nationals. Additionally, Cape Verde is part of the African, Caribbean and Pacific countries and party to the Cotonou Agreement which includes Article 13 stipulating a return and readmission obligation<sup>26</sup>. To overcome some of the gaps faced by the country's development challenges, Decree 3/2005, of 1 August<sup>27</sup>, amended Decree 6/97 in its Articles 30, 31, 54 and 12, to facilitate the entry of tourists and the provisions of paragraph e) of article 30(1) were revoked. Tourists who visit Cape Verde as part of an organized trip aboard a cruise ship are therefore exempted from paying a fee for the acquisition of their entry visas.

In Morocco, Law 02-03<sup>28</sup>, of 11 November 2003, regulates the entry and stay of foreigners as well as the exit of foreigners and nationals. It was adopted in a climate of fear following the terrorist attacks in Casablanca on 16 May 2003 that resulted in 41 people losing their lives. The Law was presented to the Parliament at the same time as Law 03-03 on anti-terrorism which amalgamated migrants and terrorists<sup>29</sup>. The Law

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<sup>23</sup> Convenção Sobre a Livre Circulação e Fixação de Pessoas e Bens, celebrado entre Governo da República de Cabo Verde e o Governo da República do Senegal, assinada na cidade da Praia (Cabo Verde), no dia 6 de Agosto de 1999, aprovada para ratificação pela Resolução 151/V/99, de 28 de Dezembro de 1999, BOCV, I Série, n°47; Acordo sobre a supressão de vistos, celebrado entre o Governo da República de Cuba e o Governo da República de Cabo verde, assinado em Havana (Cuba), no dia 3 de Junho de 1982, aprovado pelo Decreto 79/82, de 28 de Agosto, BOCV, n°35; Acordo relativo à supressão de vistos entre o Governo da República de Cabo Verde e o Governo de Hong-Kong, assinado em Havana em Hong Kong no dia 27 de Abril de 1998, aprovado pelo Decreto 11/98, de 16 de Novembro, BOCV, I Série, n°42.

<sup>24</sup> Tratado celebrado entre a República de Cabo Verde e a República Portuguesa no domínio da Fiscalização Conjunta de Espaços Marítimos sob a Soberania ou Jurisdição da República de Cabo Verde, assinado na cidade do Mindelo (Cabo Verde), no dia 16 de Setembro de 2006, Aprovado para ratificação pela Resolução 6/VII/2007, de 2 de Janeiro, BOCV, I Série, n°1, 2 de Janeiro de 2007; Protocolo entre a República de Cabo Verde e a República Portuguesa sobre a Emigração Temporária de Trabalhadores Cabo-Verdianos para a Prestação de Trabalho em Portugal (assinado na Praia, 18 de Fevereiro de 1997), Aprovado pelo Decreto n7/97, de 14 de Abril, BOCV, I Série, n°14; Acordo entre o Reino da Espanha e a República de Cabo Verde sobre a Vigilância Conjunta dos Espaços Marítimos sob Soberania ou Jurisdição de Cabo Verde, aprovado para ratificação pela Resolução 74/VII/2008, de 14 de Julho, BOCV, I Série, n°26, 14 de Julho de 2008; Acordo Quadro de Imigração entre a República de Cabo Verde e o Reino da Espanha (Madrid, 20 de Março de 2007), Aprovado pelo Decreto 9/2007, de 20 de Agosto, BOCV, I Série, n°31, 20 de Agosto de 2007; Acuerdo Marco de cooperación en materia de inmigración entre el Reino de España y la República de Cabo Verde, hecho «ad referendum» en Madrid el 20 de marzo de 2007 BOE 39 14 febrero 2008 8028.

<sup>25</sup> Protocol on Temporary Emigration of Cape Verdean Workers to Work in Portugal, concluded between Portugal and Cape Verde on 18 February 1997.

<sup>26</sup> Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

<sup>27</sup> Decreto-Legislativo 3/2005, de 1 de Agosto, que altera os artigos 30, 31, 54 e 112 do Decreto-Legislativo 6/97, de 5 de Maio, que Regula a Situação Jurídica do Estrangeiro no Território Nacional, Incluindo o Regime de Entrada, Permanência e Saída.

<sup>28</sup> Dahir n°1-03-196 du 16 ramadam 1424 (11 novembre 2003) portant promulgation de la Loi n° 02-03 Relative à l'Entrée et au Séjour des Etrangers au Royaume du Maroc, à l'Emigration et à l'Immigration Irrégulières.

<sup>29</sup> Abdelkrim Belguendouz, 'Immigration et Emigration: la Nouvelle Loi Marocaine' 11-15 in Driss El Yazami (ed), *Un Siècle de Migration Marocaines (Migrance n° 24 2005)*11 ; Abdeljabbar Arrach, 'The Moroccan New Immigration Policy and the Constitutional Protection of Fundamental Human Rights of Migrants' 1, 6 <https://www.jus.uio.no/english/research/news-and->

has often been criticized<sup>30</sup>. Abdelkrim Belguendouz, for example, condemns the exclusively security and repressive approach taken in Law 02-03<sup>31</sup>. Additionally, the Euro-Mediterranean Human Rights Network argues that Law 02-03 “led to a hardening of Morocco’s migration policy and [is] partly responsible for exacerbating the country’s xenophobic climate”<sup>32</sup>. Indeed, as Katharina Natter underlines it, before the adoption of Law 02-03, Moroccan authorities overlooked irregular migration and rejected the idea to address the issue politically<sup>33</sup>. The adoption of Law 02-03 constituted a drastic change in the way Morocco deals with irregular migration. Abdelkrim Belguendouz welcomes the new law as a much needed “decolonization” of the law<sup>34</sup>. The law replaced by Law 02-03 was from the Protectorate era and referred to outdated colonial institutions and even to the “zone française de l’Empire chérifien” (French zone of the Sherifian Empire)<sup>35</sup>. However, this “decolonization” is still only partial and several authors, including Belguendouz consider the law to be a by-product of European texts, especially French texts in the field of migration<sup>36</sup>. On the other hand, Katharina Natter argues that the decision of Morocco to adopt this new restrictive law was not in “response to public demand” but because Morocco was interested in gaining more geopolitical power<sup>37</sup>. Even though there is an influence of the EU and Member States, such as France, in the development and content of the law the agency of Morocco to act according to its own interests should not be overlooked. This argument still stands when looking at more recent developments.

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[events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-arrach.pdf](http://events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-arrach.pdf) 'Accessed 9 February 2018'; GADEM, 'Rapport sur l'Application au Maroc de la Convention Internationale sur la Protection des Droits de tous les Travailleurs Migrants et des Membres de leur Famille' (2013) 1, 6. This report is a joint report written under the coordination of the GADEM. The following NGOs were involved in the joint report: Association lumière sur l'émigration clandestine au Maghreb (ALECMA), l'Association des ressortissants sénégalais au Maroc – 28 (ARESMA-28), Caminando Fronteras, Chabaka – Le réseau des associations du nord du Maroc pour le développement et la solidarité, le Collectif des communautés subsahariennes au Maroc (CCSM), le Conseil des migrants subsahariens au Maroc (CMSM), le Groupe antiraciste d'accompagnement et de défense des étrangers et migrants (GADEM), l'Organisation démocratique du travail – Travailleurs immigrés (ODT-IT) et Pateras de la vida.

<sup>30</sup> Myriam Cherti and Michael Collyer, 'Immigration and Pensée d'Etat: Moroccan Migration Policy Changes as Transformation of "Geopolitical Culture"' (2015) 20(4) *The Journal of North African Studies* 590, 590-591.

<sup>31</sup> Abdelkrim Belguendouz (n29) 13.

<sup>32</sup> Euro-Mediterranean Human Rights Network, 'Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and nine Member States on 7 June 2013', February 2014 1, 6.

<sup>33</sup> Katharina Natter, 'The Formation of Morocco's Policy Towards Irregular Migration (2000–2007): Political Rationale and Policy Processes' (2014) 52(5) *Int Migr* 15, 16.

<sup>34</sup> Abdelkrim Belguendouz (n29) 11-12.

<sup>35</sup> See for example : Dahir du 15 novembre 1934 (7 chaâbane 1353) Réglementant l'Immigration en Zone Française de l'Empire Chérifien, signé le 17 novembre 1934 pour promulgation et mise à exécution par le Commissaire Résident Général, Henri Ponsot.

<sup>36</sup> Abdelkrim Belguendouz, *Le Maroc Non Africain, Gendarme de l'Europe ? Alerte au Projet de Loi n°02-03 Relative à l'Entrée et au Séjour des Etrangers au Maroc, à l'Emigration et l'Immigration Irrégulière* (Imprimerie Beni Snassen, Sale 2003); Abdelkrim Belguendouz, 'Le Maroc et la Migration Irrégulière – une Analyse Sociopolitique' (2009) CARIM – module socio-politique 1, 38; Mehdi Lahlou, 'Le Maghreb dans son Environnement Régional et International : Un Schéma Migratoire Reconfiguré, dans les Faits et dans l'Approche Politique' (2011) Ifri-Programme Migrations, identités, citoyenneté, Paris; Mohamed Khachani, 'La Migration Irrégulière au Maroc : un Etat des Lieux' 43 in Haut-Commissariat du Plan (Ed), *Les Cahiers du Plan* (2010) n°29.

<sup>37</sup> Katharina Natter (n33) 17.

Article 2 of Law 02-03 stipulates that people having a diplomatic status, subject to reciprocity, are not covered by the law. Diplomatic and consular relations are organized by the Vienna Conventions of 1961 and 1964<sup>38</sup>. Article 3 stipulates that any foreigner wishing to enter Morocco should have a valid passport or any other document recognized by Morocco as a valid travel document. Article 4 details the modalities of border control and specifies the conditions to refuse entry. Indent 1 states that during the passport control additional information concerning the reasons as for the stay in Morocco and the proof of sufficient means of subsistence can be required. Indent 2 stipulates that entry can be denied to any foreigner that could be a “threat to the public order”. However, there is no definition of what qualifies as such a treat in the law which can lead to arbitrary decisions<sup>39</sup>.

In the *Farouk Ben Mustafa Izzat Case* of 2005<sup>40</sup>, the “threat to public order” is defined as something of “effective danger” such as murder, drug trafficking or robbery with assault. This means that the danger must be sufficiently severe and real at the time when the decision is taken. Abdelkrim Belguendouz remarks that Law 02-03 is unbalanced due to an excessive use of the notion of “threat to the public order” to justify many repressive provisions<sup>41</sup>. Articles 14 and 17 refer to “threat to the public order” to deny a residency permit and Article 21 to order a deportation. Articles 25 and 27 refer to the notion of “threat to the public order” as a reason for expulsion. Article 40 sets the “threat to public order” as a reason to cancel a visa. The “threat to the public order” allows the deportation and expulsion of certain categories of people that are normally protected against it, such as pregnant woman and children<sup>42</sup>.

In some cases, in addition to a passport, a visa will be required. A visa can be for short or long term and, in some cases, a transit visa which will be required if the final destination is not Morocco. For example, there is no visa requirement for a European citizen to enter Morocco but someone who only has an Indian passport would need a visa. If a foreigner wants to stay longer than three months or the duration of the validity of his visa he has the obligation to ask the Moroccan administration for authorization

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<sup>38</sup> Vienna Convention on Diplomatic Relations, 18 April 1961 ; Vienna Convention on Consular Relations, 24 April 1963.

<sup>39</sup> GADEM (n29) 19.

<sup>40</sup> Arrêt n°382 du 03 mars 2005, dossier N°81/03, Affaire Farouk Ben Mustafa Izzat.

<sup>41</sup> Abdelkrim Belguendouz (n29) 14.

<sup>42</sup> Gadem (n29) 19.



or he will be in an irregular situation. According to Article 5, there are two distinct types of residency permits: the *carte d'immatriculation* (registration card) and the *carte de residence* (residency card). Articles 6 to 18 establish the conditions to receive such cards and who can benefit from them. The registration card is given to foreigners that stay in Morocco for more than three months. There are three types of registration cards (Article 13): for visitors, for students and for working migrants. In the last case, specific employment must be mentioned on the card. It is noticeable that there is no possibility to obtain a registration card through "family reunification" or "long-term care". However, Article 44(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>43</sup> imposes the possibility for family reunification for migrants' workers. Morocco has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>44</sup> which grants special protection to migrant workers and their family. Law 02-03 is not in accordance with this provision.

According to Article 15, to obtain a registration card, it could be required that the foreigner have previously obtained a long-term visa, but no further information is given. The card is valid for a period between one and ten years and can be renewed (Article 10). Article 11 states that if a registration card is not granted or is withdrawn, the migrant has 15 days to leave the country. However, in practice, this delay is not respected, and migrants can be immediately deported<sup>45</sup>. Article 17 gives the list of categories of foreigners that may be granted a residency card. The residency card is given to foreigners who have resided in Morocco uninterruptedly for more than four years, to the spouse of a Moroccan citizen and to the spouse and minor children of a foreigner who has been granted a residency card. Article 19 specifies the reasons not to grant or renew such cards.

The decree regulating the implementation of Law 02-03 was only adopted seven years after the adoption of the law, on 1 April 2010<sup>46</sup>. The late adoption of this decree was a problem for a harmonized and efficient application of Law 02-03 as several articles

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<sup>43</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990.

<sup>44</sup> Ibid.

<sup>45</sup> Gadem (n29) 18.

<sup>46</sup> Décret n°2-09-607 du 15 rabii 1431 (1<sup>er</sup> avril 2010) pris pour l'Application de la Loi n° 02-03 Relative à l'Entrée et au Séjour au Maroc, à l'Emigration et l'Immigration Irrégulières.

refer to a regulatory decree for precisions. For example, Article 8 on the issuance of a *carte d'immatriculation* refers to the regulatory decree concerning the conditions under which such a card can be requested by the foreigner. Article 10 adds that if the foreigner changes his address he will need to inform the Moroccan authorities according to the time frame and modalities included in the regulatory decree. The same phrasing is used by the legislator in Article 18 for residency card holders. Another striking implementation problem lays in Article 19 regarding the refusal of delivery or renewal of a residency permit. The article says that a residency permit can be withdrawn if the foreigner does not provide the documents and evidence foreseen in the regulatory decree. This means that in the absence of such a regulatory decree, there are no clear rules regarding what documents or evidence are required for foreigners to be able to keep their residency permit, putting them in a precarious situation. In the absence of a regulatory decree determining the place in which the detention of irregular migrants should take place, Article 34 allows Moroccan authorities to detain foreigners in a place that is not regulated by the law before deporting them<sup>47</sup>. According to the Euro-Mediterranean Human Rights Network, Moroccan authorities are implementing these measures arbitrarily and without granting migrants and refugees the right to an interpreter, lawyer and appeal<sup>48</sup>.

According to the Anti-Racist Group for the Support and Defence of Foreigners and Migrants [*Groupe Antiraciste de Défense et d'Accompagnement des Etrangers et Migrants* (GADEM)], foreigners that are not allowed to enter Morocco from the Casablanca Airport are not put in administrative custody such as foreseen by Article 34 nor in waiting zones foreseen by Article 38<sup>49</sup>. They are blocked in transit zones outside of any legal framework for undetermined periods and they do not benefit from the protections of Articles 35, 36 and 38. According to Article 37, the transport company used to travel by the foreigner who is denied entry in Morocco should cover the costs of his return. In practice, the unsuccessful migrant must pay for these costs himself<sup>50</sup>.

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<sup>47</sup> Alecmo, CCSM, GADEM and Mission catholique de Nouadhibou, *Situation des Migrants dans le Sud du Maroc : Mission d'observation conjointe*, September 2014 1, 12-13.

<sup>48</sup> Euro-Mediterranean Human Rights Network (n32) 7.

<sup>49</sup> Gadem (n29) 53.

<sup>50</sup> Ibid 68.

The Decree of 1 April 2010 also corrected some discrepancies of Law 02-03. For example, as previously noted, it was not possible to obtain a registration card for family reunification or long-term care purposes. Articles 15 to 17 of Decree 2-09-607 now allow for these possibilities. However, the Decree now also requires foreigners to enter Morocco with a long-term visa. The category of long-term visa (family reunification, work, student for example) has to remain the same as per the registration card. For example, a foreigner will need a long-term visa with the mention “family reunification” to apply for a registration card under family reunification. But a foreigner that entered Morocco with a visitor visa cannot ask a registration card for family reunification. According to Nadia Khrouz, this procedure could toughen the conditions of entry and stay in Morocco<sup>51</sup>. Indeed, a report indicates that this condition is impossible to fulfil as Moroccan consulates in sub-Saharan countries refuse to deliver such visas<sup>52</sup>. Getting documents from the country of origin can be an obstacle in several cases besides family reunification. For example, migrants encounter problems when they have to provide certain documents such as a marriage certificates, birth certificates or criminal records. In practice, this process is exorbitant and complicated, and migrants rarely know the details about the process to obtain them<sup>53</sup>. Additionally, Article 16 of Decree of 1 April 2010 sets that, to benefit from family reunification, the foreigner must prove his family situation and have sufficient means of subsistence. In practice, the authorities require further conditions that are not required by law<sup>54</sup>. For example, in some cases a residency card was required instead of a registration card. In another example, it was forbidden for a woman to launch the process of family reunification for her husband under the argument that family reunification only works from a husband to his wife but not vice-versa.

Nine years after the adoption of Law 02-03 and two years after the adoption of the Decree regulating the implementation of the said law, the Ministry of the Interior issued

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<sup>51</sup> Nadia Khrouz, ‘De la Respécification de la Notion de Transit 103 in Nadia Khrouz and Nazarena Lanza (eds), *Migrants au Maroc : Cosmopolitisme, présence d'étrangers et transformations sociales* (Rabat : Centre Jacques-Berque 2015).

<sup>52</sup> Alecmo and others (n47) 9.

<sup>53</sup> Gadem (n29) 92.

<sup>54</sup> Ibid 129.

eight ministerial orders, on 13 February 2012<sup>55</sup>. A ministerial order<sup>56</sup> was adopted that sets the exact list of documents that must be shown to Moroccan authorities to benefit from Article 17. Another ministerial order<sup>57</sup> was adopted setting the list of documents that must be joined to an application for the acquisition or renewal of a residency permit. These two ministerial orders added two new documents to be presented to the Moroccan authorities: a criminal record and a medical certificate.

Article 42 of Law 02-03 criminalizes the irregular entry (or attempt to enter) and stay of migrants in Morocco and Article 50 criminalizes irregular exit from Morocco as well as entry into Moroccan territory outside of a port of entry. There is an overlap of both articles which both criminalize the entry into Moroccan territory outside of a port of entry. Irregular entry and exit include the use of falsified travel documents, the usurpation of identity, the non-presentation of travel documents through fraudulent manners or the entry/exit of the territory at other locations than an official port of entry/exit. What is striking is that Article 50 does not only apply to irregular foreigners but also to Moroccan nationals trying to leave the country irregularly. This is against Article 12(2) of the ICCPR and Article 8 of the ICRMW which state that everyone (or Migrant workers and members of their families) shall be free to leave any country, including their own. According to a Moroccan representative in France, one of the reasons for the criminalization of the exit of Moroccan nationals can be that Morocco does not want to show that they cannot meet the needs of young people in terms of employment, for example<sup>58</sup>. Article 50 of Law 02-03 is in breach of Article 8 of the ICRMW.

After the Arab Spring in 2011, Morocco started to shift its position towards sub-Saharan migrants guaranteeing them new rights in the Preamble of the new Constitution of 2011. In the Preamble, Morocco commits itself to combat all types of discrimination including discrimination based on colour, beliefs or regional origin. In the Constitution's Preamble, Morocco also underlines the preeminence of international conventions over

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<sup>55</sup> Arrêté n°498-12 Fixant la Forme et le Contenu de l'Imprimé de Demande d'Obtention des Titres de Séjour ; Arrêté n°499-12 Fixant la Forme et le Contenu du Récépissé du Dépôt de la Demande d'Obtention des Titres de Séjour ; Arrêté n°500-12 relatif à l'Autorisation Exceptionnelle de Séjour ; Arrêté n°501-12 Fixant les Documents devant être Jointes à la Demande d'Obtention ou de Renouvellement des Titres de Séjour ; Arrêté n° 502-12 Relatif au Document de Circulation ; Arrêté n°503-12 fixant les Mentions de la Carte d'Immatriculation ; Arrêté n°504-12 Fixant les Mentions de la Carte de Résidence; Arrêté n°505-12 Fixant les Documents devant être Produits pour Bénéficiaire des Provisions de l'Article 17 de la loi n°02-03 Relative à l'Entrée et au Séjour des Etrangers au Royaume du Maroc, à l'Emigration et l'Immigration Irrégulières.

<sup>56</sup> Arrêté du ministre de l'intérieur n° 505-12.

<sup>57</sup> Arrêté du ministre de l'intérieur n° 501-12.

<sup>58</sup> Interview 62 ATMF, Strasbourg, 2 June 2017.

national laws. This means that national laws cannot breach the ICCPR or the ICRMW, for example. In 2011, Morocco also created the National Council for Human Rights [*Conseil National des Droits de l'Homme (CNDH)*]<sup>59</sup>, which replaces the National Human Rights Council (*Conseil Consultatif des Droits de l'Homme*). The CNDH aims at promoting and protecting human rights in Morocco. It has only a consultative power and its recommendations have no binding effects for the Moroccan government.

The new Constitution<sup>60</sup> of Morocco of 2011 in theory repealed the provisions of Law 02-03 criminalizing irregular exit. Article 24 of the Constitution sets the guarantee to all persons to the right to leave the territory, re-enter and settle according to the law. The provisions of Law 02-03 have however not yet been modified and in practice criminalization of irregular exit and re-entry of the territory is still valid. This concretely means that if a Moroccan citizen who leaves Morocco irregularly is sent back to Morocco he can be sentenced to a fee or prison for irregular emigration. Moreover, Article 39 of Law 02-03 limits the rights of migrants to leave Morocco. Migrants in irregular situation will need an authorization of exit to leave Morocco, in some cases, an authorization has to be given by the Moroccan authorities. If the migrant who wants to leave Morocco is in an irregular situation he will have to pay a fee to the authorities. If the migrant in an irregular situation has not asked for this authorization he can be deported to the border with Algeria or be expelled, be fined or even jailed for irregular stay (Articles 43 and 44). If a migrant does not have a valid passport he will have to ask for a laissez-passer at the consulate of his country of origin. In this case, it is the consulate that asks Moroccan authorities directly for the authorization of exit. The Report of the UN Special Rapporteur on Torture, Juan Mendes, following his visit to Morocco in September 2012 recounts the increase of violence against migrants at Morocco's Northern border<sup>61</sup>. The report was particularly virulent against Moroccan practices towards migrants describing practices of torture, sexual aggression, humiliation, and constant abuses conducted by Moroccan authorities. Doctors Without Borders (*Médecins Sans Frontières*) underlined the flagrant breaches by Morocco of

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<sup>59</sup> Dahir n°1-11-19 du 1 mars 2011 en Matière de Protection et de Promotion des Droits de l'Homme, publié au Bulletin Officiel n°5922 du 3 mars 2011.

<sup>60</sup> Constitution du Maroc, 11 Juillet 2011, Bulletin officiel du Royaume du Maroc, Édition de traduction officielle, le 17 juin 2011, n°5952 bis, 1765-1794.

<sup>61</sup> Nations Unies, 'Rapport du Rapporteur Spécial sur la Torture et autres Peines ou Traitements Cruels, Inhumains ou Déggradants sur sa Mission au Maroc', 15-22 septembre 2012, A/HRC/22/53/Add.2, para 24 1, 8.

its obligations relating to international conventions and its human rights abuses<sup>62</sup>. The report also underlines the disrespect for the principle of *non-refoulement* and practices of collective deportation. Law 02-03 has been strongly criticized as it does not grant sufficient protection for immigrants and refugees, criminalizes emigration and is unjustly applied in practice<sup>63</sup>. Several officials and scholars called for the creation of a new legal framework for entry, stay and exit in Morocco considering the increasing irregular migration flows from sub-Saharan Africa<sup>64</sup>.

Law 02-03 does not foresee collective expulsion and Article 22(1) of the ICRMW forbids collective deportation for migrant workers and their families. Additionally, Article 12(5) of the African Charter on Human and Peoples' Rights states that “mass expulsion” of third country nationals are forbidden. This means that all cases must be decided on an individual basis. However, the GADEM and other NGOs in Morocco, reported various cases of collective deportation of migrants<sup>65</sup>. After the adoption of the Constitution, the situation towards sub-Saharan migrants even worsened. *Médecins Sans Frontières* published a report observing an increase in violence towards sub-Saharan migrants conducted by Moroccan and Spanish security forces in 2012 and expulsions to the border of refugees, children, pregnant woman and injured or sick people<sup>66</sup> even though according to Article 29 of Law 02-03, expulsion and *refoulement* to the border are not allowed for most vulnerable people.

Finally, Morocco concluded readmission agreements with Germany (1998), France (1993, 2001), Portugal (1999), Italy (1998, 1999) and Spain (1992, 2003, 2013)<sup>67</sup>. The

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<sup>62</sup> Médecins Sans Frontières, 'Violences, Vulnérabilité et Migration : Bloqués aux Portes de l'Europe', 13 March 2013, <http://www.msf.fr/actualite/publications/violences-vulnerabilite-et-migration-bloques-aux-portes-europe> 'Accessed 6 February 2016' 1, 16-21.

<sup>63</sup> For exemple : GADEM (n29).

<sup>64</sup> Conseil Consultatif des Droits de l'Homme, 'La Protection Des Refugies Au Maroc', Table Ronde 14 février 2008, Rabat-Maroc, Série « Séminaires » 1, 14 ; Belguendouz (n29) 14.

<sup>65</sup> Gadem (n29).

<sup>66</sup> Médecins Sans Frontières (n62) 16-21.

<sup>67</sup> Bilaterale Rückübernahmeabkommen Deutschlands, BGBl, II 1998, Nr°23, S. 1148, 22.04.1998 ; Accord sous forme d'Echange de Lettres entre le Gouvernement de la République Française et le Gouvernement du Royaume du Maroc portant Modification de l'Accord du 10 novembre 1983 relatif à la Circulation des Personnes; Signature d'un Accord en Forme d'Echange de Lettres entre le Gouvernement de la République Française et le Gouvernement du Royaume du Maroc relatif à la Circulation des Personnes; Décret n°2001-374 du 25 avril 2001 portant publication de l'Accord entre le Gouvernement de la République Française et le Gouvernement du Royaume du Maroc relatif à la Coopération en Matière de Sécurité (ensemble un échange de notes), signé à Paris le 30 mai 2000 JORF n°101 du 29 avril 2001, 6841 texte n°18 ; Acordo de Cooperação entre o Governo da República Portuguesa e o Governo de Reino de Marrocos relativo ao Controlo de Fronteiras e de Fluxos Migratórios (Tânger, 7 de Setembro de 1999), Aprovado pelo Decreto n° 35/2004, publicado no Diário da República, 1ª Série-A, n° 261, de 6 de Novembro de 2004. The agreement entered in vigor on 16 November 2004, Aviso n°307/2005, DR I-A, de 19 de Agosto de 2005; Testi e documenti sulla politica estera dell'Italia, 1998 1, 89; Conclusion d'un Accord entre le Gouvernement de la République Italienne et le Gouvernement du Royaume du Maroc sur la Reconduite aux Frontières des Ressortissants des deux Pays et sur le Transit pour l'Eloignement, Rabat, le 27 juillet 1998 (not in vigor) <http://gnosis.aisi.gov.it/sito%5CRivista12.nsf/servnavig/18> (not original text) 'Accessed 11 September 2017'; Protocole Additionnel à l'Accord du 27 Juillet 1998 Rome, le 18 juin 1999; Acuerdo entre el Reino

readmission agreement signed between Morocco and Spain was never considered as valid by Morocco which cooperates on readmission on a case-by-case basis<sup>68</sup>. According to Blanca Garcés-Mascareñas, “from 1999 to 2004, the Moroccan government rejected all 6420 requests from the Spanish government for readmission of citizens from third countries”<sup>69</sup>. The readmission agreement with Spain included third country nationals but most of the other agreements included the readmission of nationals only.

#### 4.2.1.2. Asylum

The Cape Verdean Constitution of 1999 recognizes the right to asylum in Article 38<sup>70</sup>. It outlines that foreign nationals or stateless persons persecuted for political reasons or who are seriously threatened with persecution because of their activity in favour of national liberation, democracy or respect for human rights, have the right to asylum in Cape Verde. The Constitution foresees that the law defines the status of political refugee, which is done in Law 99/V/99.

Law 99/V/99, of 19 April<sup>71</sup>, regulates the legal status of refugees and asylum seekers in Cape Verde. However, the Cape Verdean asylum system is not operative because this law has not been regulated<sup>72</sup>. The only exception being Article 10 on the residency permit for humanitarian reasons. This permit is valid for a maximum period of six months and renewable only after analysing the evolution of the situation in the country of origin. It should be noted that Cape Verde is not part of the Geneva Convention.

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de España y el Reino de Marruecos relativo a la Circulación de Personas, el Tránsito y la Readmisión de Extranjeros Entrados Ilegalmente, 25 abril 1992, BOE n°100, 139; Entrada en vigor del Acuerdo entre el Reino de España y el Reino de Marruecos relativo a la Circulación de Personas, el Tránsito y la Readmisión de Extranjeros Entrados Ilegalmente, hecho en Madrid el 13 de Febrero de 1992, 26 de Diciembre de 2012, Boletín Oficial de la Guardia Civil n°54 Sección I, 11857; Memorandum de Entendimiento sobre Repatriación Asistida de Menores no Acompañados, Madrid el 23 de Diciembre de 2003; Acuerdo entre el Reino de España y el Reino de Marruecos sobre cooperación en el ámbito de la Prevención de la Emigración Ilegal de Menores no Acompañados, 22 de marzo de 2013, BOE n°70 Sec. I, 22750.

<sup>68</sup> Maribel Casas, Sebastian Cobarrubias and John Pickles, ‘Stretching Borders Beyond Sovereign Territories? Mapping EU and Spain’s Border Externalization Policies’ (2011) 2(1) *Geopolítica(s), Revista de estudios sobre espacio y poder* 71; Maribel Casas, Sebastian Cobarrubias and John Pickles, ‘“Good Neighbours Make Good Fences”: Seahorse Operations, Border Externalization and Extra-Territoriality’ (2016) 23(3) *Eur Urban Reg Stud* 231; Nora El Qadim, *Le Gouvernement Asymétrique des Migrations: Maroc/Union Européenne* (Paris: Dalloz, 2015); Xavier Ferrer-Gallardo, ‘The Spanish Moroccan Border Complex: Processes of Geopolitical, Functional and Symbolic Rebordering’ (2008) 27(3) *Political Geogr* 301.

<sup>69</sup> Blanca Garcés-Mascareñas, *Labour Migration in Malaysia and Spain: Markets, Citizenship and Rights* (IMISCOE Research Amsterdam University Press 2012) 170.

<sup>70</sup> Lei Constitucional 1/V/99 (n10).

<sup>71</sup> Lei 99/V/99, de 19 de Abril, Lei do Asilo, BOCV, I Série, n°12, 19 de Abril de 1999.

<sup>72</sup> José Pina-Delgado, ‘La Regulación Internacional de los Flujos Migratorios entre Cabo Verde y la Unión Europea (en especial hacia España)’ (2011) 28 *Revista de derecho migratorio y extranjería* 121, 135; Constança Urbano de Sousa and José Pina-Delgado, ‘Estudo sobre o Quadro Legislativo da Política de Migração e Asilo na Republica de Cabo Verde’ (2013) MIEUX/ICMPD 1, 29.

However, since the 1967 New York Protocol binds Vape Verde, it must nevertheless apply Articles 2 to 34 of the Convention. Law 99/V/99 defines a refugee as:

“[e]very person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Or any person who, by virtue of an aggression, an external occupation, civil war, foreign domination or events which seriously disturb public order, in some or all of his country of origin or country of nationality, is obliged to leave their habitual residence to seek refuge in another country”.

The definition of refugee in Law 99/V/99 is identical to the definition of refugee used in the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>73</sup> (Article 1(2)) ratified both by Cape Verde and Morocco. The first part of the definition is also identical to the definition of refugee given in Article 1 of the Geneva Convention<sup>74</sup> but the second part of the definition in Law 99/V/99 extends this definition to more cases. It seems that in its legal definition of refugee Cape Verde is just replicating the definitions of refugee included in these two International Conventions. Foreigners who seek asylum may, in accordance with these international instruments, apply for asylum and Cape Verde has the duty to consider the possibility of granting them refugee status. There is no official data from the Cape Verdean authorities on asylum seekers or refugees in Cape Verde<sup>75</sup>.

The Cape Verdean Asylum Law clarifies who has the right to apply for asylum but does not establish clear procedures for the application process itself. A foreigner who has applied for asylum can be granted refugee status (Article 4), which can be extended to their spouse and underage, adopted or incapacitated children if the applicant so

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<sup>73</sup> Convenção da Organização de Unidade Africana sobre os Aspectos Próprios dos Problemas dos Refugiados em África, aprovada para adesão pela Lei nº 42/III/88, de 27 de Dezembro, BOCV, nº52, Suplemento.

<sup>74</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations 189 Treaty Series, 1, 137. The Convention defines a refugee as “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion”.

<sup>75</sup> IOM (n11) 35.



requests (Article 6). From the point of view of rights, the Asylum Law merely establishes that "a refugee enjoys the rights and is subject to the duties of foreigners residing in Cape Verde" and recognizes their "right to have a title attesting their quality" (Article 8). The problem lays in the fact that there are no clear procedures for applying for asylum in Cape Verde<sup>76</sup>. The reception of asylum seekers is provided for in Article 15 of the Law on Asylum and Law 106/V/99<sup>77</sup>, of August 2, establishing the legal regime for the reception of foreigners or stateless persons, for humanitarian or security reasons, in temporary accommodation centres. The total lack of implementation of this law is associated with the non-construction of centres foreseen by it<sup>78</sup>. Moreover, José Piña Delgado argues that the Cape Verdean asylum and maritime safety system is not properly implemented. Further arguing that the country does not have the material conditions to exercise sovereignty rights in the maritime areas subject to its responsibility, thus hindering its efforts to combat practices that disproportionately put at risk the life and physical integrity of persons<sup>79</sup>.

In the case of Morocco, it should be noted that in accordance to the law and following the Convention Relating to the Status of Refugees<sup>80</sup>, Morocco directly grants a residency card to the foreigner who has been granted refugee status as well as his spouse and underage children (Law 02-03 Article 17(5)). There is no limit to the validity of the residency card. However, Article 17(5) is in contradiction with the Geneva Convention as it conditions the acquisition of a residency card for refugees to a regular entry in Morocco. The Geneva Convention sets that States "shall not impose penalties, on account of [the] illegal entry or presence" of refugees (Article 31(1)). Penalty can be understood as any needless restriction to the full enjoyment of rights granted to refugees under the law. An example could be an arbitrary or discriminatory limitation of rights foreseen under international law.

Decree 2-57-1256, of 29 August 1957, sets the modalities of application of the Convention<sup>81</sup>. However, there is no specific legislation on asylum matters in Morocco.

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<sup>76</sup> José Pina-Delgado (n72) 135; Constança Urbano de Sousa and José Pina-Delgado (n72) 29.

<sup>77</sup> Lei 106/V/99, de 2 de Agosto, Lei do Acolhimento por Razões Humanitárias ou de Segurança, BOCV, I Série, n°27, 2 de Agosto de 1999.

<sup>78</sup> Constança Urbano de Sousa and José Pina-Delgado (n72) 29.

<sup>79</sup> José Pina-Delgado (n72) 135.

<sup>80</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, 137.

<sup>81</sup> Décret N°2-57-1256 du 2 safar 1377 (29 août 1957) Fixant les Modalités d'Application de la Convention Relative au Statut des Réfugiés signée à Genève le 28 juillet 1951, 6 Septembre 1957.

According to Article 1 of Decree 2-57-1256, the Office for Refugees and the Stateless [*Bureau des réfugiés et apatrides (BRA)*], under the authority of the Ministry of Foreign Affairs, ensures the judicial and administrative protection of those covered by the Convention. Article 2 adds that the BRA recognizes the quality of refugee to those responding to the definitions of Article 1 of the Convention. However, in practice, the Decree remains empty as the BRA has not been operational since 2004 and does not receive any asylum requests. It is only the UNHCR that determines who is granted the status of refugee<sup>82</sup>. Law 02-03 does not grant refugees the protection foreseen in the Convention. Several issues can be raised. First, if an asylum seeker entered regularly in Morocco but the process of his asylum application is longer than 90 days, the asylum seeker would need to renew his entry visa otherwise he will have an irregular status. As Decree 2-57-1256 is not applied, no refugee obtains a refugee status in the application of its provisions and therefore cannot gain access to a residency card on this ground. The law does not foresee the granting of a residency card for refugees that are solely recognized by the UNHCR. One of the fundamental issues linked to the recognition of the status of refugee by the UNHCR and not the BRA is that refugees cannot access rights that are included in the Moroccan legislation<sup>83</sup>. According to an EU official in Rabat, as long as no asylum status and process exist in Morocco, the UNHCR continues examining and granting refugee cards but without granting the full protections recognized in the Convention Relating to the Status of Refugees<sup>84</sup>.

#### **4.2.1.3. Human trafficking**

Article 7 of the Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, of which Cape Verde is a party, states that "[e]ach State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases ". Decree 6/97 is silent on this matter, with no obligation or procedure for granting special treatment to victims of trafficking in human

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<sup>82</sup> Dahir 1-08-90 du 20 octobre 2008 portant promulgation de la Loi 37-07 portant Approbation, quant au principe, de la Ratification du Royaume du Maroc de l'Accord de Coopération fait à Genève le 20 juillet 2007 entre le Gouvernement du Royaume du Maroc et le Haut-commissariat des Nations-Unies pour les Réfugiés, publié en français au Bulletin officiel n°5692 du 18 décembre 2008.

<sup>83</sup> Conseil Consultatif des Droits de l'Homme (n63) 11.

<sup>84</sup> Interview 6 EU Delegation, Rabat, 13 January 2016.

beings. Human trafficking was not specifically criminalized by the Cape Verdean Penal Code before the conclusion of the Mobility Partnership<sup>85</sup>.

Human trafficking issues only appeared in Moroccan law in 2007 when the Penal Code was amended. A law related to money laundering<sup>86</sup> introduced Article 574-2 of the Penal Code, which includes in its definition of money laundering, (given in Article 574-1) human trafficking and immigrants trafficking. Moreover, none of these notions are defined in the law which makes it difficult if not impossible to sanction. The UN Special Rapporteur on trafficking, in June 2013, underlined the insufficient recognition of human trafficking and the need for Moroccan authorities to enhance the protection offered to victims of human trafficking<sup>87</sup>. Following this visit, the Minister of the Interior announced that a new law on the trafficking of migrants and asylum seekers was in preparation even though it seems that the legislators do not see the utility of such a new law, mostly when the existing Law 02-03 is not properly applied<sup>88</sup>.

#### 4.2.2. Access to socio economic and political rights and to citizenship<sup>89</sup>

Cape Verde and Morocco have ratified most of the international legal instruments for the protection of human rights. It should be noted that neither Cape Verde nor Morocco have ratified the 1954 and 1961 Conventions on Statelessness. The following table includes the main instruments:

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<sup>85</sup> Código Penal aprovado pelo Decreto Legislativo n°4/2003 de 18 de Novembro de 2003.

<sup>86</sup> Dahir n°1-07-09 du 28 rabii I 1428 (17 avril 2007) portant Promulgation de la Loi n°43-05 Relative à la Lutte contre le Blanchiment de Capitaux

<sup>87</sup> United Nations Human Rights Office of the High Commissioner, 'Declaration by Joy Ngozi Ezeilo after her visit in Morocco', Rabat, 21 June 2013, <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13481&LangID=F> 'Accessed 6 February 2017'. A full report followed this visit: Nations Unies, 'Rapport de la Rapporteuse Spéciale sur la Traite des Etres Humains, en Particulier les Femmes et les Enfants, Joy Ngozi Ezeilo', 1 April 2014, A/HRC/26/37/Add.3.

<sup>88</sup> Hassan Bentaleb, 'Un Nouveau Texte de Loi contre les Migrations Irrégulières' *Liberation* (27 juin 2013) [http://www.libe.ma/Un-nouveau-texte-de-loi-contre-les-migrations-irregulieres\\_a39598.html](http://www.libe.ma/Un-nouveau-texte-de-loi-contre-les-migrations-irregulieres_a39598.html) 'Accessed 6 February 2016'.

<sup>89</sup> The term citizenship will be used when referring to the status of a person and the term Nationality Act will refer to the legislation which sets the modes for attribution and acquisition of citizenship. The terms will be used accordingly throughout this report.

**Table 4.1 Main international legal instruments for the protection of human rights ratified by Morocco and Cape Verde.**

Instrument	Adoption	Ratification
International Covenant on Civil and Political Rights	Morocco: 1977 Cape Verde: NA	Morocco: 1979 Cape Verde: 1993
International Covenant on Economic, Social and Cultural Rights	Morocco: 1977 Cape Verde: NA	Morocco: 1979 Cape Verde: 1993
International Convention on the Elimination of All Forms of Racial Discrimination	Morocco: 1967 Cape Verde: NA	Morocco: 1970 Cape Verde: 1979
Convention on the Elimination of All Forms of Discrimination against Women	Morocco: NA Cape Verde: NA	Morocco: 1993 Cape Verde: 1980
United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Morocco: 1986 Cape Verde: NA	Morocco: 1993 Cape Verde: 1992
Convention on the Rights of the Child	Morocco: 1990 Cape Verde: NA	Morocco: 1993 Cape Verde: 1992
Convention on the Rights of Persons with Disabilities and the Optional Protocol	Morocco: 2007 Cape Verde: 2007	Morocco: 2009 Cape Verde 2011
International Convention for the Protection of All Persons against Enforced Disappearances	Morocco: 2007 Cape Verde: 2007	Morocco: 2013 Cape Verde: not ratified
African Charter on Human and Peoples' Rights	Cape Verde: 1986	Cape Verde: 1987

Specifically, in the area of migration, Cape Verde and Morocco have ratified the following Conventions:

**Table 4.2: International legal instruments in the area of migration ratified by Morocco and Cape Verde.**

Instrument	Adoption	Ratification
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Morocco: 1991 Cape Verde: NA	Morocco: 1993 Cape Verde: 1997
The United Nations Convention against Transnational Organized Crime and the additional protocols <sup>90</sup>	Morocco: 2000 (Convention) Cape Verde: 2000 (Convention)	Morocco: 2002 (Convention) Cape Verde: 2004 (Convention)
Convention concerning Freedom of Association and Protection of the Right to Organise	NA	Cape Verde: 1999
Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively	NA	Morocco: 1957 Cape Verde: 1979
Convention concerning Forced or Compulsory Labour	NA	Morocco: 1957 Cape Verde: 1979
Convention concerning the Abolition of Forced Labour	NA	Morocco: 1966 Cape Verde: 1979
Equal Remuneration Convention	NA	Morocco: 1979 Cape Verde: 1979
Convention concerning Discrimination in Respect	NA	Morocco: 1963 Cape Verde: 1979

<sup>90</sup> Morocco only accessed to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime in 2011. Cape Verde signed this protocol in 2000 and ratified it in 2004. Morocco is not part of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime but Cape Verde signed it in 2000 and ratified it in 2004. Both Cape Verde (in 2004) and Morocco (in 2009) only access the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.

of Employment and Occupation		
Convention concerning Minimum Age for Admission to Employment	NA	Morocco: 2000 Cape Verde: 2011
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	NA	Morocco: 2001 Cape Verde: 2001
Multilateral cooperation agreement against child trafficking in West Africa	NA	Cape Verde: 2006

Political rights include for example, the right to vote, the right to liberty and security, and the freedom of assembly and reunion as foreseen in the ICCPR. The ICESCR<sup>91</sup> grants rights including labour rights, the right to health, the right to education and the right to an adequate standard of living which covers the right to decent housing. Article 8 also covers some political rights such as the freedom of association, the right to be part of a union and the right to strike.

Morocco was one of the first countries to ratify the ICRMW, on 21 June 1993. However, the Convention was only published in the *Bulletin Officiel* in February 2012, almost 20 years later<sup>92</sup>. This means that even though Morocco had ratified the Convention in 1993 it only became part of the national legal system in 2012. In Morocco, following the French model, the integration of an international convention in the national legal system is not automatic and requires publication<sup>93</sup>. In the case of France an international convention even though it has entered into force internationally lacks domestic legal force until it is published or promulgated domestically<sup>94</sup>. Article 55 of the French Constitution<sup>95</sup> states that international conventions, once published, have

<sup>91</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993, 3.

<sup>92</sup> Dahir n°1-93-517 du 2 août 2011 portant Promulgation de la Convention Internationale sur la Protection des Droits de tous les Travailleurs Migrants et des Membres de leur Famille, publié Bulletin Officiel n°6018 du 2 Février 2012.

<sup>93</sup> Nora Seddiki, 'Place du Droit International dans le Système Juridique des Etats' (2013) *Revue Maroco-Espagnole de Droit International et Relations Internationales* 153, 159.

<sup>94</sup> Pierre Michel Eisemann and Raphaële Rivier, 'National Treaty Law and Practice: France' 253 in Duncan Hollis, Merritt Blakeslee and Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden, Boston 2005) 265–67.

<sup>95</sup> Constitution de la République Française du 4 octobre 1958.

primacy over French national law. The Moroccan Constitution of 2011 announces similar provisions in Article 6(3), which introduces the principles of constitutionality, hierarchy and publicity. This means that a ratified international convention has primacy on Moroccan law, once the international convention is officially published by Morocco<sup>96</sup>, and therefore Moroccan law will have to be modified accordingly. The publication requirement in Moroccan law was not clearly stated in previous Constitutions but was directly included as a provision in legal acts. This is for example the case of Article 1(2) of the Moroccan Nationality Act of 1958 which states that “[t]he provisions of ratified and *published* international treaties or agreements take precedence over those of domestic law” (emphasis added).

The ICRMW encourages countries that ratified it to respect fundamental rights of all migrant workers. It also broadens equal treatment between all legally residing migrant workers and national workers. It guarantees equal chances and treatment in employment matters as well as on social security, union rights and cultural rights for migrant workers and the members of the family living in the country that ratified it. Morocco is in breach of the ICRMW<sup>97</sup> in several aspects. First, the obligation of non-discrimination set in Article 1 of the Convention is not respected as a clear discrimination towards sub-Saharan Africans is conducted. A report from the GADEM and several other organizations working on migrants’ rights issues states that Europeans that are irregularly staying in Morocco are tolerated by Moroccan authorities whereas sub-Saharan Africans are victims of repeated roundups and police checks based on their skin colour<sup>98</sup>. This “hunt for foreigners”<sup>99</sup> leads sub-Saharan migrants to hide. As they hide they cannot access public services such as education, health or justice<sup>100</sup>. Migrants’ representatives in Morocco argue that it is difficult to find accommodation<sup>101</sup>. In Cape Verde, such practices are not heard of. Even though some

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<sup>96</sup> The Preamble to the Moroccan Constitution of 2011 states the necessity for the act to be published.

<sup>97</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990.

<sup>98</sup> Gadem (n29) 9-10.

<sup>99</sup> Migreurop, ‘In Morocco, the Hunt for Foreigners Kills, and While this is Going On, the EU Negotiates and Keeps Quiet’, Press release (2 August 2013) <http://www.migreurop.org/article2272.html?lang=fr> ‘Accessed 8 March 2017’.

<sup>100</sup> Gadem (n29) 12.

<sup>101</sup> Interview 21, CCSM, Rabat, 15 April 2016; Interview 22, FASED, Rabat, 19 April 2016; Interview 23, CNDH, Rabat, 21 April 2016; Interview 24, Red Chabaka, Tanger, 22 April 2016; Interview, 26, CEI, Rabat, 25 April 2016.

cases of discrimination are present, according to migrants' representatives in Cape Verde<sup>102</sup>, the scale is not at all equivalent to the situation in Morocco.

The Cape Verdean Constitution of 1999 stipulates in its Article 7 that foreigners living permanently or temporarily in Cape Verde, or in transit through the national territory, are guaranteed treatment compatible with the international standards relating to human rights and the exercise of rights which are not constitutionally or legally reserved to Cape Verdean citizens. Article 24 adds that, with the exception of political rights and constitutional rights and duties reserved legally to nationals, foreigners and stateless persons residing in Cape Verde enjoy the same rights, freedoms and are subject to the same duties as Cape Verdean citizens. This provision is also included in Article 14(1) of the Civil Code of 1997. However, agreements on the Statutes of Persons and Goods have been concluded with several Portuguese-speaking countries, namely with Portugal, Angola, São Tomé and Príncipe and Guinea-Bissau granting special rights to their nationals residing in Cape Verde and special statuses<sup>103</sup>.

Morocco adopted a new Constitution in 2011 consecrating economic, social and cultural rights for all. According to Article 30(1) of the Constitution all Moroccan citizens enjoy their civil and political rights, are electors and eligible to office. Article 30(3) adds that foreigners (legally staying in Morocco) enjoy fundamental freedoms recognized to Moroccan citizens, in accordance with the law. Article 30(4) foresees the possibility for legal migrants to participate in local elections and Article 30(5) stipulates that the conditions of extradition and of granting of the right of asylum are defined by the law. Moreover, Article 161 of the Constitution establishes the CNDH. In collaboration with the government and civil society, the CNDH has been monitoring human rights in Morocco and has played an important role in the development of the new national migration policy. Furthermore, the new Constitution recognizing the primacy of international conventions over national law lead to the reformation of the penal code

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<sup>102</sup> Interview 44, Associação dos Filhos e Amigos para o Desenvolvimento Integrado da Região de Bafatá, Praia, 16 November 2016; Interview 47, Associação dos Estudantes e investigadores Guineenses, Praia, 17 November 2016; Interview 51, Association des senegalais, Boa Vista, 29 November 2016; Interview 53, Associação Esperança Africana, Praia, 2 December 2016.

<sup>103</sup> Acordo Especial entre a República de Cabo Verde e a República Portuguesa Regulador do Estatuto de Pessoas e Regime dos seus Bens, aprovado pela Decisão com Força de Lei 11/76, de 23 de Junho, BOCV, n°25; Acordo sobre o Estatuto de Pessoas e Bens entre o Governo da República de Cabo Verde e o Governo da República Popular de Angola, aprovado para ratificação pela Resolução 68/V/97, de 31 de Dezembro, BOCV, I Série, n°50, Suplemento; Acordo sobre o Estatuto de Pessoas e Bens entre o Governo da República de Cabo Verde e o Governo da República de São Tomé e Príncipe assinado na Praia a 20 de Junho de 2001, aprovado para ratificação pela Resolução 37/VI/2002, de 22 de Abril, BOCV, I Série, n°11; Acordo sobre o Estatuto de Pessoas e Bens entre o Governo da República da Guiné Bissau e o Governo da República de Cabo Verde, aprovado para ratificação pela Resolução 71/VI/2003, de 21 de Abril, BOCV, I Série, n°13.



including new provisions criminalizing human trafficking. However, Article 70 expressly states that the citizenship and status of foreigners, the relations of work and social security and access to health care are of the domain of the law only. The new Constitution does not bring direct changes on these issues.

Finally, it should be noted that the recognition of certain categories of human rights is gradual, dependent on economic and financial resources and therefore subject to compression stemming from the limited budgetary conditions of countries such as Cape Verde and Morocco. This is the case with the right to education, health, social security or housing. This idea is grounded on Article 2(1) of the ICESCR. Article 2(3) of the same convention allows developing countries to differentiate between citizens and foreigners in their enjoyment of economic, social and cultural rights.

#### **4.2.2.1. Employment and Social Security**

Articles 6 and 7 of the ICESCR recognize the rights to work and to freely choose employment as well as the right to fair and equal remuneration for equal work and safe working conditions. Article 24 of the ICRMW underlines the right to treatment no less favourable than those of nationals in regard to pay and working conditions. Additionally, Article 15 of the African Charter on Human and Peoples' Rights stipulates that “[e]very individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work”.

In Cape Verde, the applicable regime regulating the access to the labour market for migrant workers is to be found in the Labour Code of 2007, still in force, which requires that migrant workers submit an authorization, in the form of a visa, to be allowed to work (Article 283). Article 280 stipulates that only migrants residing regularly in the country may work. However, in practice, this is not applied<sup>104</sup>. The problem with this provision is that it is conflicting with Decree 6/97 which requires a labour contract in order to have a residency permit. Moreover, many migrants speak of the difficulty to obtain and present the required documents as per implementation decree 11/99 of 9 August 99<sup>105</sup>. The consequence is that often contracts are either inexistent or not

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<sup>104</sup> Constança Urbano de Sousa and José Pina-Delgado (n72) 13.

<sup>105</sup> EFG Consulting (n13) 53-54.

complying with the visa obligation required in the Labour Code. An observation of the working relations of migrant workers shows that illegality and impunity are generalized<sup>106</sup>. Most migrant workers do not have a written contract or a visa from the *Direção-Geral do Trabalho* (DGT), the Labour General Directory. This situation favours the disrespect of migrant workers' fundamental rights by the employers<sup>107</sup>. An interministerial report adds that there is an apparent lack of knowledge, lack of means and inattention by the institutions responsible for the management and monitoring of labour relations. Moreover, that the application of relevant national laws (Labour Code and Decree-Law 6/97) and international conventions signed and ratified by Cape Verde, are accentuating immigrants' vulnerability<sup>108</sup>. Furthermore, Article 284 of the Labour Code ends by saying that: "[t]he execution of the employment contract whose visa has been refused amounts to a lack of authorization to work in national territory and constitutes an order punishable in terms of this Code and other applicable legislation".

In Cape Verde there is no regime of national preference. The Labor Code prohibits discrimination in access to employment, and the Penal Code contains provisions criminalizing this type of discrimination. Article 15-2 grants equal rights to migrant workers vis-à-vis national workers. Only a few government positions are for Cape Verdean nationals only. This is in accordance with Article 24(2) of the Constitution of 1999 that stipulates that foreigners and stateless persons may carry out predominantly technical public functions, under the terms of the law. The national labour law does not define specific provisions on the employment situation for ECOWAS citizens, thus applying the common regime for immigrants. Furthermore, Article 10 of Law 36/V/97 gives any foreigner domiciled in Cape Verde who is a citizen of a Portuguese-speaking country the right to access any private economic or professional activity, on the same basis as a national. Article 24(3) of the Constitution of 1999 stipulates that citizens of Portuguese-speaking countries may be granted more rights than foreigners and stateless persons, except for the access to bodies that exercise sovereign power, service in the Armed Forces and diplomatic careers. Moreover, access to vocational training is free, subject to age and accessible to irregular migrants<sup>109</sup>. There is nothing

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<sup>106</sup> Ibid 53.

<sup>107</sup> Ibid 53.

<sup>108</sup> Ibid 66.

<sup>109</sup> Constança Urbano de Sousa and José Pina-Delgado (n72) 35.

in the law that establishes the general legal regime of professional training<sup>110</sup> nor in the associated legislation such as the Statute of the Trainee<sup>111</sup>. Cape Verde is complying with the provisions of Article 43 of the Convention on migrant workers giving the right to equality of access to employment, vocational guidance and vocational training.

According to Article 9 of the ILO Convention n°143 on Migrants Workers, migrant workers should benefit for himself and his family of equal treatment concerning rights resulting from previous work with regards to remuneration, social security, unemployment benefits and other advantages. However, an interministerial report underlines the failure of employers to comply with their obligations in terms of respect for workers' fundamental social rights such as the right to social security<sup>112</sup>.

In Morocco, The Labour Code (adopted by Law 65-99)<sup>113</sup> regulates the conditions of foreigner workers (Articles 516 to 519), including access to labour for foreigners requiring a working visa. Article 516 requires that every employer who wants to recruit a foreign employee must receive an authorization from the Moroccan authorities, it is the system of “national preference”. Before being allowed to hire a foreigner, a job advertisement must be published in two newspapers printing more than 10 000 copies, in French and in Arabic<sup>114</sup>. The applications are sent to the newspapers which then transfer them to the ANAPEC, the Moroccan Employment Agency. After reviewing the applications, the ANAPEC writes a report in which it indicates if there is a suitable Moroccan profile for the position or not. If there is no suitable Moroccan candidate, the authorization is given in the form of a visa appended to the work contract<sup>115</sup>. However, this obligation does not apply to citizens from Senegal, Algeria and Tunisia who can directly apply for a registration card with the “labour” mention if they can prove the existence of a labour contract in the three months of their entry in Morocco. An establishment agreement has been concluded with each of these three countries

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<sup>110</sup> Decreto-Lei 37/2003, de 6 de Outubro sobre o Regime Jurídico Geral da Formação Profissional.

<sup>111</sup> Decreto-Regulamentar 16/2005, de 26 de Dezembro, Aprova o Estatuto do Formando dos cursos e acções de Formação Profissional, BOCV, I Série, n°52, de 26 de dezembro de 2005.

<sup>112</sup> EFG Consulting (n13) 66.

<sup>113</sup> Dahir n°1-03-194 du 11 septembre 2003 portant promulgation de la Loi n°65-99 relative au Code du Travail, publié au Bulletin officiel n°5210 du 6 mai 2004.

<sup>114</sup> Clair Escoffier, *Droits Economiques et Sociaux des Migrants et des Réfugiés dans la Région Euromed : Accès aux Soins de Santé et au Marché du Travail* (Euro-Mediterranean Human Rights Network, 2008) 100.

<sup>115</sup> Ministère de l'Emploi et de la Formation Professionnelle, *Gestion des flux migratoires légaux des salariés par le département de l'Emploi : Rapport d'activité 2004/2008*, MEFP/DE/DI/SEM/01/09.

giving their nationals the same rights as Moroccan citizens in terms of employment<sup>116</sup>. Similarly, the spouse and underage children of a French citizen holding a residency card and a working visa are exempted from this obligation<sup>117</sup>. The Annex to the Decree of 9 February 2005 by the Ministry of Labour and Vocational Training exempts some other categories of workers<sup>118</sup>. For example, are exempted: Moroccan spouses, Morocco born foreign citizens residing in Morocco since at least six months, company managers, CEO's or general Directors or seconded staff for a limited period, technical experts staying for a duration inferior to six months, football players and artists staying less than three months. Political refugees are also included in this list, but nothing defines what a "political refugee" is. Article 521 of the labour code punishes a fine for employers that employ foreign workers without obtaining or requesting the authorization or that employ a migrant worker without a contract as foreseen by Article 517. It should be noted that refugees and asylum seekers are not exempt from the obligation which means for the majority of them that they will not be able to access work through the legal process as they do not possess the necessary documents to launch it<sup>119</sup>. It is interesting to note that "foreigners" can only have access to fixed-term contracts that are directly linked to their work visa. In their case even if the fixed-term contract is renewed several times it does not become a permanent contract. This excludes the possibility for them to claim any financial compensation even after several years of work for the same employer. Moreover, migrants (regular or not) have no access to the services provided by the ANAPEC and therefore cannot benefit from professional training for example, which is only provided to Moroccan citizens.

In Morocco, if a person has a declared work activity then he or she benefits from the National Social Security Fund (*Caisse Nationale de Sécurité Sociale*). According to the Royal Decree n°1.72.184, of 27 July 1972, migrant workers working in Morocco are benefitting from the social security regime under the same conditions as Moroccan workers. Moreover, the Labour Code does not exclude foreigners in an irregular

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<sup>116</sup> Convention d'Etablissement entre le Royaume du Maroc et la République du Sénégal signée à Dakar le 27 mars 1964 et ratifiée par le décret royal n°108-65 du 17 chaabane 1385 (11 décembre 1965), publiée au Bulletin officiel n°2773 du 22 Décembre 1965 ; Convention d'Etablissement entre le Maroc et la Tunisie, signée à Tunis le 9 décembre 1964 et ratifiée par le décret royal n°208-66 du 14 safar 1386 (3 juin 1966), publiée au Bulletin officiel n°2808 du 24 Août 1966 ; Convention d'Etablissement entre le Maroc et l'Algérie, signée le 15 mars 1963 et ratifiée par le dahir n°1-69-114 du 26 moharrem 1389 (14 avril 1969), publiée au Bulletin officiel n°2945 bis du 15 Avril 1969.

<sup>117</sup> Dahir n°1-95-227 du 2 août 2011 portant publication de l'Accord en matière de Séjour et de l'Emploi fait à Rabat le 9 octobre 1987 entre le Royaume du Maroc et la République Française, publié en français au Bulletin Officiel n°6080 du 6 septembre 2012.

<sup>118</sup> Arrêté du Département de l'Emploi n°05.350 du 29 Di El Hijja 1425 (09 février 2005) et son annexe n°1395.05 du 22 Chaoual 1426 (25 novembre 2005).

<sup>119</sup> Clair Escoffier (n114) 102.

situation to benefit from rights that are granted to legal workers but concretely it is difficult for an irregular migrant to have these rights recognized and respected. Additionally, the Moroccan Law on Social Security from 22 December 1959 grants to some refugees the same rights than to Moroccan citizens.

#### **4.2.2.2. Education**

Articles 13 and 15 of the ICESCR states the right to quality education and training which fully respects people's cultural identity. Additionally, Article 30 of the ICRMW guarantees the right to access to education to the children of all migrant workers and lastly Article 17 of the African Charter on Human and Peoples' Rights recognizes the right to education for all.

Cape Verde has guaranteed the right to education (in the case of children) of foreigners in an irregular situation. Everyone is entitled to an education, no one can be denied access to education, regardless of their financial situation or status. The Basic Law of the Educational System<sup>120</sup> guarantees free universal education for up to eight years. Law 6/97 recognizes the right to education to foreigners legally residing in Cape Verde in its Article 9. In some cases, children who do not speak Portuguese or who are suffering from handicaps may be unable to access school, but this is perceived by officials from the CNDH in Praia to be more a matter of lack of means and of adapted structures than a denial of access to rights<sup>121</sup>.

In accordance with Moroccan law, all migrant children, even if their status is irregular, have the right to attend school in a public or private school. In practice, access to education is not a problem for migrants in a regular situation as they generally have the required supporting documents such as a birth certificate, the proof of residence, the parents' proof of employment and an attestation of schooling or a certificate of equivalence if the child already attended school in another country. The same documents are required for Moroccan children. However, migrants in an irregular situation generally do not have the required supporting documents which makes it

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<sup>120</sup> Lei 103/III/90 de 29 de Dezembro, Lei de Bases do sistema educativo.

<sup>121</sup> Interview 42, CNDH, Praia, 26 February 2016.

difficult to register their children at schools<sup>122</sup>. These marginalized children are supported by NGOs but Myriam Cherti and Michael Collyer appropriately argue that the Moroccan government has to tackle this issue in order to avoid to have a growing group of “permanently disenfranchised sub-Saharan Moroccans”<sup>123</sup>.

A huge obstacle however in accessing school for migrants’ children is the fact that proficiency in Arabic is a precondition to the registration in public schools. Moreover, Morocco has not put into place any courses in Arabic to help migrant children to integrate into the public scholar system<sup>124</sup>. Furthermore, a child whose parents are not Muslim will still have to follow religious classes in public school as it is part of the national curriculum. In primary school, religious classes represent the highest hourly amount. This is not in conformity with Article 18(4) of the International ICCPR which foresees that the State has to respect the right of parents to choose “the religious and moral education of their children in conformity with their own convictions”. This is an issue for many families that do not want their children to follow these classes. Their only choice would be to register their children in a private school but if they do not have the means to pay for it they can decide not to send their children to school at all. Finally, the GADEM underlines the lack of protection for migrant children against racism at school<sup>125</sup>.

#### **4.2.2.3. Health**

Article 12(1) of the ICESCR states that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. Additionally, the ICRMW in its Article 28 recognizes:

“the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused to them by reason of any irregularity with regard to stay or employment”.

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<sup>122</sup> Myriam Cherti and Michael Collyer (n30) 596.

<sup>123</sup> Ibid.

<sup>124</sup> Gadem (n29) 103.

<sup>125</sup> Ibid 90; Alecmo and others (n47).

Article 43 adds that:

“migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to access to social and health services, provided that the requirements for participation in the respective schemes are met”.

Article 45 grants the same right to the members of the family of the migrant worker. Besides, the African Charter on Human and Peoples' Rights recognizes that State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick (Article 16(2)).

In Cape Verde, Article 70(1) of the Constitution is similar to Article 64(1) of the Portuguese Constitution of 1976 and recognizes universal access to health. Everyone is entitled access to healthcare, no one can be denied it, regardless of their financial situation or status, even if they are in an irregular situation. In theory, health care is guaranteed, and there should not be cases of denial of health care<sup>126</sup>. In practice, access to health care is difficult but mostly because the system is underdeveloped and lacks funding. According to Cape Verdean migrants' representatives in Portugal, Cape Verde lacks the financial means to have a more efficient health system, it lacks infrastructures and the access to health is more or less difficult depending on the specific island. Inhabitants of isolated island such as Brava and Santo Antão have extremely scarce access to health infrastructures or even drugs<sup>127</sup>. A migrant representative from Guinea Bissau also argues that there is discrimination in the access to health, but the discrimination is not that much a discrimination on the basis of origins but a discrimination on the basis of wealth<sup>128</sup>. This practice is in contradiction with Article 70(1) of the Cape Verdean Constitution.

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<sup>126</sup> Comissão Nacional para os Direitos Humanos e a Cidadania e o PNUD, 'I Relatório Nacional De Direitos Humanos' (Praia 2010) 1, 62.

<sup>127</sup> Interview 51 (n102); Interview 66, Associação Girassol Solidario, Lisbon, 4 November 2017; Interview 68 Associação dos Antigos Alunos do Ensino Secundario de Cabo Verde, Lisbon, 4 November 2017.

<sup>128</sup> Interview 43 Associação dos Guineenses Residentes em Cabo Verde, Praia, 14 November 2011.

Social health protection in Morocco is based on a system of basic health-care coverage leaning on two pillars: a compulsory basic health coverage for students, workers and retired people and a medical assistance scheme, the *Régime d'assistance médicale* (RAMED) for the poorest. Law 65-00 of the code of basic healthcare coverage defines beneficiaries in general terms and does not make any distinction of citizenship or administrative situation<sup>129</sup>. The law includes all workers, Moroccans or migrants. Law 02-03 does also not exclude migrant workers from basic healthcare. This means that migrant workers in a regular or irregular situation should all benefit from basic healthcare either under the compulsory basic health coverage or under the RAMED depending on their situation. But in practice migrants are excluded from the RAMED. According to the report of the GADEM, a representative of the National Health Insurance Agency confirmed that the RAMED only concerns Moroccan citizens<sup>130</sup>. In practice, the access to health for migrant workers and the poorest migrants became more difficult since the generalization of the RAMED in 2012. It was possible for migrants to access hospitals by showing a *certificat d'indigence* (certificate of indigence) and a declaration of need before the generalization of the RAMED, now it is requested that all patients present a beneficiary card excluding *de facto* irregular migrants from accessing hospitals. However, immigrants can benefit from primary and emergency health care and migrants' children have free access to health checks and vaccinations<sup>131</sup>. Migrants staying irregularly in Morocco cannot benefit from the RAMED and migrants working irregularly cannot benefit from the National Social Security Fund. Hicham El Moussaoui is critical of the RAMED in general and sees it as a quick response to the Arab Spring claims without real political and financial support explaining the dysfunction of the system as a whole<sup>132</sup>. Finally, Morocco and France have concluded a first social security agreement on 9 July 1965 that was replaced by a general convention on the 22 October 2007<sup>133</sup>. This agreement targets French or Moroccan nationals employed in one of the two countries. It grants the right

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<sup>129</sup> Loi n°65-00 portant Code de la Couverture Médicale de Base, publiée au Bulletin officiel n°5058 du 21 novembre 2002. This Law has been completed by Dahir n°1-14-141 du 25 chaoual 1435 (22 août 2014) portant promulgation de la Loi n°120-13 modifiant et complétant la loi n° 65-00 portant Code de la Couverture Médicale de Base, publié au Bulletin Officiel n°6292 du 18 Septembre 2014.

<sup>130</sup> Gadem (n29) 76.

<sup>131</sup> Jihane Gattioui, 'Politique Migratoire Marocaine : Quid de l'Intégration Socio-Economique des Migrants ?' *LesEcho.ma* (23 août 2016) <http://www.leseco.ma/decryptages/grand-angle/49044-politique-migratoire-marocaine-quoi-de-l-integration-socio-economique-des-migrants.html> 'Accessed 9 February 2018'.

<sup>132</sup> Hicham El Moussaoui, 'Maroc - Carte RAMED : Couverture Médicale Gratuite ou Chèque en Bois?' *Libre Afrique* (8 February 2016) <http://www.librefrique.org/ElMoussaoui-RAMED-maroc-080216> 'Accessed 22 March 2017'.

<sup>133</sup> Convention Générale de Sécurité Sociale du 22 octobre 2007 entre le Gouvernement de la République Française et le Gouvernement du Royaume du Maroc, entrée en vigueur le 1er juin 2011, Décret n° 2011-567 du 24 mai 2011, JORF n°0122 du 26 mai 2011.



to healthcare, invalidity, retirement pension, workplace accident and family allocations to Moroccans living in France, French citizens living in Morocco and the portability of these rights in case of return.

#### 4.2.2.4. Housing

Article 11 of the ICESCR recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 43 of the ICRMW recognizes the right to equal access to housing.

Article 72 of the Constitution of Cape Verde recognizes the right to housing. However, it should be noted that in Cape Verde a housing policy that fully meets the needs of the population is not yet a reality<sup>134</sup>. The case of the “*Barracas*” (slums) in Boa Vista is an extreme example of the lack of access to decent housing. Irregular migrants started to gather in illegal housing on the outskirts of the main city of the island, Sal-Rei<sup>135</sup>. According to some migrants’ representatives, these “*Barracas*” have been built because the locals did not want to rent out their properties to immigrants from other African countries<sup>136</sup>. With the increase of tourism on the island, more and more immigrants came to work and went to live in the “*Barracas*”. An official of the Town Hall of Boa Vista and migrants’ representatives living in the “*Barracas*” revealed that the “*Barracas*” are not connected to the electricity, water or sewage services provided by the city and even though today poor Cape Verdeans also live there, this situation has remained in a state of limbo for over a decade<sup>137</sup>.

In Morocco, Article 52 of Law 02-03 establishes a “*délit de solidarité*” (a “crime of solidarity”) which punishes everyone that helps an irregular migrant to enter or leave the territory. Some landlords use this excuse in order not to deliver a proof of residency to sub-Saharan migrants<sup>138</sup>. Without this document, it is difficult for the migrant in an irregular situation to have access to basic rights. In some cases, landlords, openly do

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<sup>134</sup> UN Habitat, ‘Conferência das Nações Unidas sobre a Habitação e o Desenvolvimento Urbano - Habitat III Relatório de Cabo Verde’ 1, 37.

<sup>135</sup> Interview 49, Câmara Municipal, Boa Vista, 25 November 2016; Interview 50, Plataforma das Comunidades Africanas Residentes em Cabo Verde, Boa Vista, 29 November 2016; Interview 51 (n102).

<sup>136</sup> Interviews 50 (n135) and 51 (n102).

<sup>137</sup> Interviews 49 (n135) 50 (n135) 51 (n102).

<sup>138</sup> Gadem (n29) 14.

not rent apartments out to sub-Saharan migrants<sup>139</sup>. For example, in Casablanca in 2013 landlords put out posters forbidding renting apartments to “Africans” in several buildings from areas known to be the residence of many sub-Saharan students<sup>140</sup>. The right to housing does not exist in Moroccan law<sup>141</sup>. Morocco is a country where usually family members take care of those in need, it is called “family solidarity” and until recently homelessness was a marginal phenomenon.

#### 4.2.2.5. Political rights

Political rights (voting, holding public office, engaging in political parties) are a traditional prerogative of citizens. Article 25 of the International ICCPR states that

“[e]very citizen shall have the right and the opportunity: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country”.

These rights can be extended to non-citizens. According to Article 24(4) of the Cape Verdean Constitution of 1999, foreign nationals and stateless persons residing in the national territory may have active and passive electoral capacity for the elections of the heads of the organs of the local authorities. Article 11(2) of Law 6/97 recognizes the right to vote in local elections for foreigners legally residing on the territory. According to Article 30 of the Moroccan Constitution, migrants have the same fundamental liberties than those recognized to Moroccan citizens. This includes the right to vote at local elections “according to the law, international conventions or reciprocity”. For now, in practice, the law does not specifically foresee it and international conventions only recognize the right to vote for citizens. A new law

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<sup>139</sup> Ibid 13.

<sup>140</sup> *France24*, ‘A Casablanca, des Propriétaires Tentent d’Interdire la Location aux Africains’ (18 July 2013) <http://observers.france24.com/fr/20130718-casablanca-propietaires-interdire-location-africains-discrimination-raciale> ‘Accessed 10 March 2017’.

<sup>141</sup> CNDH, ‘Secteur De l’Habitat et le Droit au Logement’, <http://www.cndh.org.ma/fr/bulletin-d-information/secteur-de-lhabitat-et-le-droit-au-logement> ‘Accessed 12 September 2017’; CCDH - PNUD, ‘Le Droit au Développement au Maroc : Entre Pacte International relatif aux Droits Economiques, Sociaux et Culturels et Objectifs du Millénaire pour le Développement’ Juillet 2010 1, 6.

allowing it or an international agreement on the issue would have to be concluded. France does not allow Moroccan migrants to vote therefore French residents in Morocco cannot vote either. In 2011 Spain decided to open the right to vote to Moroccan citizens in local elections following the introduction of reciprocity in Article 30 of the Moroccan Constitution of 2011<sup>142</sup>. However, this measure was never completed, and no convention of reciprocity has ever been signed between the two countries<sup>143</sup>. So far, even though it is foreseen by the Constitution, foreigners are still not able to vote in Morocco in practice.

Article 22 of the International ICCPR declares that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. The ICRMW in its Article 26 provides migrant workers and members of their families the right to:

“take part in meetings and activities of trade unions and of any other associations established in accordance with the law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; to join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned and to seek the aid and assistance of any trade union and of any such association as aforesaid”.

Additionally, Article 40(1) adds that: “[m]igrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests”. ILO Convention 87 generally provides for freedom of association, providing for the right of association of workers and employers. Cape Verde is bound by this Convention since 1999. Additionally, the African Charter on Human and Peoples' Rights in its Article 10(1) is more laconic and declares that “[e]very individual shall have the right to free association provided that he abides by the law”.

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<sup>142</sup> CCME, 'Les Marocains Résidant à l'Etranger pourront Voter aux Elections Municipales en Espagne' (05 July 2011) <https://www.ccme.org.ma/fr/medias-et-migration/9060> 'Accessed 4 December 2017'.

<sup>143</sup> Hervé Andrès, 'Réciprocité et Droit de Vote des Etrangers en Espagne et au Portugal', *P@ges Europe* (La Documentation française, DILA 4 mars 2013).

In Cape Verde, Article 28(2) of the Constitution recognizes the right of association, Article 51 recognizes the freedom of association and Article 63 recognizes the right to create and be part of a professional association and trade-union. None of these articles makes a distinction between Cape Verdeans and foreigners. Laws 25/VI/2003<sup>144</sup>, 26/VI/2003<sup>145</sup> and the Labour Code also foresee the freedom of association and the right to create and join a trade union and a professional association. Law 6/97 recognizes the right to assembly and demonstration (Article 8) and the rights to join a trade union, register in a professional order and go on strike (Article 10). However, these rights are only recognized to foreigners legally residing in Cape Verde, therefore excluding migrants in an irregular situation.

In Morocco things are different. Associations of foreigners are under a derogation system that is close to a regime of prior authorisation as the government can forbid their creation or the modification of their status or of the composition of their board with a delay of three months<sup>146</sup>. The association cannot operate during this period of time<sup>147</sup>. This has not stopped sub-Saharan migrants from creating organisations to advocate for their own rights such as the *Conseil des Migrants sub-Sahariens au Maroc* (Council of sub-Saharan Migrants in Morocco) or the *Collectif des Communautés Subsahariennes au Maroc* (Collective of sub-Saharan Communities in Morocco). In addition, Article 416 of the Labour Code foresees that members in charge of the administration and direction of a trade union must be of Moroccan citizenship and enjoy their civil and political rights. However, according to Article 398 of the same code, all employees can freely join a trade union without making any distinction between Moroccans and foreigners.

Finally, conversion to Islam is a condition to conclude a marriage with a Moroccan woman. Article 39 indent 4 of the *Moudawana* forbids the conclusion of a marriage between a Muslim woman and a non-Muslim man or between a Muslim man and a non-Muslim woman unless she is Jewish or Christian. Non-Muslim men must convert

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<sup>144</sup> Lei 25/VI/2003 de 21 de Julho de 2003 Define o Regime Jurídico Geral da Constituição de Associações de Fim Não Lucrativo BOCV, I Série, n°22 de 21 de Julho de 2003.

<sup>145</sup> Lei 26/VI/2003 de 21 de Julho de 2003, Define o Estatuto das Associações Juvenis BOCV, I Série, n°22 de 21 de Julho de 2003.

<sup>146</sup> Dahir n°1-58-376 du 15 novembre 1958 modifié Réglementant le Droit d'Association, publié au Bulletin officiel n°2404 bis du 27/11/1958 (27 novembre 1958), Article 24.

<sup>147</sup> Ibid Article 25.

to Islam in order to be allowed to conclude a marriage with a Moroccan woman. Jeroen Temperman argues that this provision violates the rights of women to freely choose a husband, as the spouse has to be Muslim or willing to convert<sup>148</sup>. The Human Rights Committee has condemned this practice arguing that it was contrary to Articles 3, 23 and 26 of the International ICCPR<sup>149</sup>. Moreover, the Human Rights Committee argued that the forced conversion of a non-Muslim man in order to get married to a Muslim woman is in violation of the right to freedom of religion recognized by Article 18 of the ICCPR<sup>150</sup>. As similar provisions exist in Article 18 ICCPR and Article 12 of the ICRMW we can argue that the obligation to convert is also in breach of these articles. Moreover, this is in breach of Article 31 of the ICRMW that recognizes the right to cultural identity. In Cape Verde nationals and foreigners are protected by the law in this regard. The Constitution, with respect to the freedom to form a family, makes explicit in Article 47 that "[e]veryone has the right to marry, in a civil or religious way" and, later, in a provision that guarantees that "[e]veryone has the right to form a family" (Article 81).

#### **4.2.2.6. Citizenship**

In Cape Verde, there are several possibilities to acquire citizenship. The Nationality Act, Law 80/III/90<sup>151</sup> of 29 June (amended by Laws 41/IV/92 of 6 April and 64/IV/92 of 30 December 1992) stipulates in Article 7 that a foreigner is Cape Verdean by birth when he is born in Cape Verdean territory and either has no other citizenship or has parents residing in Cape Verde who are stateless or of unknown citizenship. For Cape Verdeans residing abroad, the attribution of citizenship is not automatic, requiring a formal request, proof of descent from Cape Verdean father, mother, grandfather or grandmother (Article 8a). Citizenship is also by choice for foreigners born in Cape Verde to foreign parents if they have been habitually resident in Cape Verde for at least five years and none of them is employed by the government of their country (Article 8b). Cape Verdean citizenship can also be acquired through marriage (Article 9). The minimum length of marriage is not stipulated in the law.

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<sup>148</sup> Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill 2010) 176.

<sup>149</sup> United Nations, 'Report of the Human Rights Committee' A/60/40 Volume I (2004) 35 para 84(27).

<sup>150</sup> UN Human Rights Committee (HRC), 'CCPR General Comment N°28: Article 3 (The Equality of Rights between Men and Women)', 29 March 2000, CCPR/C/21/Rev1/Add10 para 24.

<sup>151</sup> Lei 80/III/90, de 29 de Junho, Lei da nacionalidade, BOCV, n°25, Suplemento, 29 de Junho de 1990 alterada pelas leis 41/IV/92 de 6 de Abril, BOCV, n°14, Suplemento, 6 de Abril de 1991 e 64/IV/92 de 30 de Dezembro, BOCV, I Série, Suplemento, 30 de Dezembro de 1992.

Article 12 stipulates the conditions to acquire the Cape Verdean citizenship by naturalisation. The citizenship by naturalisation might be granted to a foreigner who has been habitually residing in Cape Verdean territory for at least five years. The foreigner must be considered an adult or emancipated, have good moral and civil character and have legal capacity. Law 41/IV/92 adds that the foreigner should have sufficient means of subsistence. Cape Verdean citizenship can also be granted to foreigners who participate in investment programs, contributing and making investments that unequivocally increase employment opportunities and contribute significantly to the development of the country. Knowledge of the institutions and public values of the nation, its history and identity, is not required by the law. Articles 10 and 11 also foresee the right to acquire Cape Verdean citizenship for children or adopted children from a father or mother who acquired the citizenship or who was adopted by a Cape Verdean national. The last Nationality Law reform, which dates from 13 September 2004, Law 51/VI/2004 states that Cape Verdean citizenship can be attributed to holders of a birth certificate issued under Administrative Rule 5/76<sup>152</sup> of 28 February, who declare that they want to be awarded citizenship<sup>153</sup>. Under this new law, Cape Verdean citizenship is also attributed to the children and grandchildren of these birthright holders.

An interesting point can be deduced from reading Article 15 of the Cape Verdean Nationality Act, regarding the loss of Cape Verdean citizenship. A national of another State must declare that he does not wish to be a Cape Verdean anymore. This means that there are no other foreseen cases of loss of Cape Verdean citizenship than that of the holder's own renunciation, with no concrete situations of loss of citizenship<sup>154</sup>. This solution is the same as the one adopted in Article 8 of the Portuguese Nationality Act<sup>155</sup>.

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<sup>152</sup> Portaria 5/76 de 28 de Fevereiro.

<sup>153</sup> Lei 51/VI/2004 de 13 de Setembro, Atribui a Nacionalidade Cabo-verdiana aos Titulares dos Assentos de Nascimento Lavrados ao Abrigo da Portaria 5/76, de 28 de Fevereiro BOCV I Série, n.º27 de 13 de setembro de 2004.

<sup>154</sup> Comissão Nacional para os Direitos Humanos e a Cidadania e o PNUD (n126) 48.

<sup>155</sup> Lei n.º37/81, de 03 de Outubro, Lei Da Nacionalidade.

Acquiring Moroccan citizenship is more difficult due to restrictive provisions. The Moroccan Citizenship Code of 1958<sup>156</sup>, completed by Law 1-60-132 of 1960<sup>157</sup> and partially modified by Law 1-07-80 of 2007<sup>158</sup>, regulates the process of citizenship acquisition and sets the criteria to access Moroccan citizenship: religion, language, familial life and birth in Morocco. The Moroccan Citizenship Code lists the different situations in which one is or can become Moroccan. A Moroccan is someone who is born from a Moroccan father or mother (Article 6)<sup>159</sup> or born in Morocco from unknown parents (Article 7). However, Delphine Perrin notes that this is not a guarantee against statelessness as a child born from two stateless parents is not considered as Moroccan<sup>160</sup>. This is against the provisions of Article 23(3) of the ICCPR which guarantees the right to every child to acquire a citizenship. Additionally, a child born and residing in Morocco can become Moroccan by law if his or her foreign parents are also born in Morocco, (Article 9(1)), this sets the rule of double jus soli. A minor whose foreign father is born in Morocco, or if the father comes from a country that mainly speaks Arabic and whose religion is Islam (Article 9(2)) and minors who ask for Moroccan citizenship in the two years before adulthood can also become Moroccan. It is also possible to become Moroccan by *Kafala* (Article 9(3)), or if a foreign woman is married to a Moroccan man for five years (Article 10). *Kafala* in Morocco should be understood as custody or guardianship rather than full adoption which is prohibited in order for the child to “keep his or her lineage”. Being considered as an institution of religious inspiration, it finds its first source in the Koran, but it is also regulated in Moroccan law by Law 15-01<sup>161</sup> of 13 June 2002 on the care of abandoned children. Moreover, it is important to note that a foreign man cannot acquire Moroccan citizenship through marriage with a Moroccan woman. However, citizenship could be granted to a foreigner who marries a Moroccan woman. The Ministry of Justice and Liberties has amended Article 10 through Bill 19-13<sup>162</sup>. The draft law amending Article

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<sup>156</sup> Dahir n°1-58-250 du 21 safar 1378 (6 septembre 1958) portant Code de la Nationalité Marocaine.

<sup>157</sup> Dahir n°1-60-132 du 16 safar 1380 (10 août 1960) complétant le dahir n°1-58-250 du 21 safar 1378 (6 septembre 1958) portant Code de la Nationalité Marocaine, Bulletin Officiel n°2495 du 19 août 1960.

<sup>158</sup> Dahir n°1-07-80 du 3 rabii I 1428 (23 mars 2007) portant Promulgation de la Loi n° 62-06 Modifiant et Complétant le dahir n°1-58-250 du 21 safar 1378 (6 septembre 1958) portant Code de la Nationalité Marocaine, Bulletin Officiel n°5514 du 10 rabii I 1428 (5 Avril 2007).

<sup>159</sup> Since 2 April 2007, Article 6 allows Moroccan mothers to transfer their Moroccan nationality to their child conceived with their non-Moroccan husband. Before that only Moroccan men could transfer their nationality.

<sup>160</sup> Delphine Perrin, ‘Country Report: Morocco’ RSCAS/EUDO-CIT-CR 2011/42 October 2011 1, 14.

<sup>161</sup> Dahir n°1-02-172 du 1er rabii II 1423 (13 juin 2002) portant promulgation de la Loi n°15-01 relative à la Prise en Charge (la kafala) des Enfants Abandonnés, Bulletin Officiel n°5036 du 27 jourmada II 1423 (5 septembre 2002).

<sup>162</sup> MCMREAM, Politique nationale d’immigration et d’asile : 2013-2016, Septembre 2016, 107.

10 was deposited with the General Secretariat of the Government on 8 March 2013 and has yet to be adopted.

Article 11 of the Citizenship Code sets the conditions to acquire citizenship through naturalisation. However, naturalisation cases are extremely rare<sup>163</sup>. The new law of 2007 makes naturalisation even stricter for sub-Saharan migrants as it deters migrants in an irregular situation from acceding to citizenship<sup>164</sup>. Article 12 sets a derogation system for the foreigner whose disability or illness has been contracted at the service or in the interest of Morocco and for the foreigner who rendered Morocco exceptional services or whose naturalization represents an exceptional interest for Morocco. Article 17 underlines that there is a probationary period of five years for the naturalised migrant during which he is not allowed to practice a public function or to be elected or to be a registered voting citizen. Article 22 adds that for ten years those who obtained Moroccan citizenship through marriage, *jus soli* and naturalisation can lose their citizenship for several reasons such as evading military obligations or being sentenced for an act of terrorism or a crime leading to more than five years seclusion for example.

In Morocco, migrants face further problems. For example, they have difficulties to obtain a birth certificate<sup>165</sup>. According to the law,<sup>166</sup> the doctor or midwife delivers a birth certificate only once the delivery costs are paid. In practice, refusals to issue a birth certificate in hospitals are fairly widespread against migrants, especially those who do not possess any identity document<sup>167</sup>. Moreover, this rule makes it impossible for poor women or women that gave birth at home to acquire this document and a *fortiori* the birth certificate. This problem is also faced by Moroccan women, but irregular migrant women that are staying in the Gourougou forest in the North of Morocco are particularly exposed to this risk<sup>168</sup>. Similarly, migrants have difficulties to register their new born children to the register of births<sup>169</sup>. Registering a child on the register of birth is an obligation for the parents as well as for the State and is also a right of the child to an identity. Article 3 of the civil status law sets that all Moroccans

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<sup>163</sup> Delphine Perrin, 'Immigration and Citizenship Law in the Maghreb: Turning Aliens into Citizens', EUI Working Paper RSCAS 2011/40 June 2011 1, 13.

<sup>164</sup> Delphine Perrin (n160) 16.

<sup>165</sup> Gadem (n29) 107-108.

<sup>166</sup> Décret n°2-99-665 du 2 chaabane 1423 (9 octobre 2002) pris en Application de la Loi n°37-99 relative à l'Etat Civil, article 2.

<sup>167</sup> Gadem (n29) 108.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid 107.



are imperatively subject to the civil status regime. The same regime is also applied to foreigners concerning birth and death happening on the Moroccan territory. In practice, however, it is impossible to register a child if one or both of his parents are in an irregular situation<sup>170</sup>. This is against one of the most important human rights of children under the Convention on the Rights of the Child, the right to register and the right to a name which ends up constituting the starting point for the existence and enjoyment of other rights (Article 7(1)). These same rights are recognized in Article 24(2) of the ICCPR. It is also in breach of Article 29 of the ICRMW which stipulates that “[e]ach child of a migrant worker shall have the right to a name, to the registration of birth and to a nationality”.

Finally, Patrícia Jerónimo and Maarten Vink argue that acquiring citizenship in the State of residence contributes for the integration of immigrant populations, insofar as it provides them with security of access to the territory, facilitates their integration into the labor market and makes it possible for them to participate politically at national level<sup>171</sup>. In other words, citizenship grants migrants access to the full set of economic and political rights foreseen by international conventions.

#### 4.2.3. Rights for nationals abroad

Article 23 of the ICRMW recognises the right to diplomatic protection and assistance. The migrant worker and his or her household shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of the State representing the interests of their country in case of violation of their rights. Consular assistance is defined as help and advice provided by the diplomatic agents of a country to citizens of that country who are living or travelling overseas. It can comprise, for example, the issuance of travel documents, the registering of citizens’ births abroad, facilitating the overseas payment of social welfare benefits or legal advice. For example, in the case of family reunification abroad, the Cape Verdean Embassy advises its nationals to consult their diplomatic or consular representation to be provided with the necessary information. The "*Casa do cidadão*"

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<sup>170</sup> Ibid.

<sup>171</sup> Patrícia Jerónimo and Maarten Vink, 'Os Múltiplos de Cidadania e os seus Direitos' 23 in Marina Costa Lobo, *Portugal e a Europa: Novas Cidadanias* (Fundação Francisco Manuel dos Santos e União Europeia 2013).

(the citizen's house) is essentially a place where users, citizen or companies, find the main administrative services that they usually need. It was created in 2006 and is available in several Cape Verdean consulates and embassies to support Cape Verdeans abroad in their administrative procedures. The mission of the “Citizen's house” is to facilitate administrative procedures for Cape Verdean living abroad, such as receiving a birth certificate from Cape Verde or renewing a passport for example. Diplomatic protection, on the other hand, is a right of a State to take diplomatic and other action against another State on behalf of its citizen whose rights and interests have been injured. For example, in the event of an expulsion, the person concerned shall be informed immediately of this right. In this case, Cape Verdeans are asked to contact or ask to be contacted by the Embassy or Consulate of Cape Verde in their country of residency. In Cape Verde, the Institute of Communities [*Instituto das Comunidades* (IC)] was created by Resolution of the Council of Ministers 64/2001 of 3 September 2001<sup>172</sup>. According to an official from the *Instituto das Comunidades*, its objective is the promotion and execution of government policy for the diaspora and to work on issues of identity, culture, and links with the Diaspora<sup>173</sup>. Article 78 of the Constitution states that “the State shall support the diffusion of Cape Verdean culture, especially within Cape Verdean communities throughout the world”. However, even though embassies try to put cultural events in place and support Cape Verdean organizations in their cultural activities, these initiatives are only punctual. Cape Verdeans living abroad agree that there is little support from the State for Cape Verdeans abroad, as Cape Verde lacks the financial means to do so, and little is done by the State for prospective returnees<sup>174</sup>.

In 1990 the Ministry for Moroccans residing abroad (*Ministère des Marocains résidents à l'étranger*) was created alongside the Hassan II Foundation for Moroccans Residing Abroad (*Fondation Hassan II pour les Marocains Résident à l'étranger*) to strengthen the links between Moroccans abroad and Morocco. The Foundation supports and informs Moroccans abroad, or on holiday in Morocco, on different topics such as investment opportunities in Morocco. Every year, the *Marhaba* is organized to support Moroccans coming “home” for the summer holidays and several cultural activities are

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<sup>172</sup> Resolução 64/2001, Cria o Instituto das Comunidades, BOCV, I Série, n°28 de 3 Setembro de 2001.

<sup>173</sup> Interview 33 Direção Geral das Comunidades, Praia, 23 February 2016.

<sup>174</sup> Interview 55, Association avenir école Cape – Vert, Paris, 18 December 2016 ; Interview 56, Association Cap – Vert Amiens, Amiens, 19 December 2016 ; Interview 60 Association des femmes d'Asnieres, 20 December, 2016.

organized such as summer camps or summer schools for Moroccan children living abroad. Additionally, Morocco finances Arabic teachers abroad to teach the language to Moroccan children. Accordingly, Morocco is supporting initiatives implemented by associations or mosques abroad to teach Arabic<sup>175</sup>. In 2007 the Council for the Moroccan Community Abroad [*Conseil de la Communauté Marocaine à l'Étranger* (CCME)] was created. This Council is composed of Moroccan emigrants and aims at advising the Moroccan government on how to protect Moroccan interests abroad and encourage the development of the country of origin<sup>176</sup>. Article 16 of the Constitution of 2011 mentions that the Moroccan government will work for the protection of the rights of Moroccan citizens abroad. The new Constitution guarantees clearly a broader protection of the rights of Moroccans abroad than the Constitution of 1996 which did not even refer to them<sup>177</sup>. The Constitution of 2011 puts forth several priorities in line with the goal to consolidate the ties with the Diaspora. It states that Morocco will work towards preserving rights, interests and national identity of Moroccans abroad, reinforce their contribution to the development of Morocco and strengthen ties between governments and the societies of the countries where they reside (Article 16). Article 163 includes the role of the Council of the Moroccan Community Abroad into the Constitution.

The International ICCPR declares in Article 25(2) that every citizen should have the right to “vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”. Moreover, Article 41 of the ICRMW sets that “Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation”. Moroccans were allowed to vote from abroad for a brief period in the past (in 1996), but this right was withdrawn as well as the right to be a candidate for the elections. The question of the right to vote for Moroccans living abroad has been debated for many years without reaching any real consensus<sup>178</sup>.

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<sup>175</sup> Macarena Nuño et Farida Souiah, 'Les Politiques Mises en Place par le Maroc Envers ses Ressortissants' (2013) 1303 *Hommes et migrations* 147 <http://hommesmigrations.revues.org/2574> 'Accessed 2 January 2017'.

<sup>176</sup> Hein de Haas, 'Morocco: Setting the Stage for Becoming a Migration Transition Country?', Migration Policy Institute, 19 March 2014 <http://www.migrationpolicy.org/article/morocco-setting-stage-becoming-migration-transition-country> 'Accessed 24 March 2017'.

<sup>177</sup> Abdeljabbar Arrach (n29) 7.

<sup>178</sup> Conseil de la communauté marocaine à l'étranger, *La Question de la Participation et de la Représentation Politique des Marocains du Monde* (Ed La croisée des chemins, Casablanca 2013) ; Abdelkrim Belguendouz, 'Réponse au Livre Plaidoyer du

Since the mid 2000's several promises going in that direction have been made but not kept. The New Constitution of 2011 in its Article 17 states that Moroccans residing abroad enjoy all the rights given by citizenship including the right to vote and to be elected. But it adds that the law should determine the conditions for the effective exercise of these rights from the country of residence. The new Electoral Code only allowed the vote by proxy in its Article 69 in 2011<sup>179</sup>. The Organic Law 27/11 is reducing the scope of Article 17 of the Constitution as it only allows Moroccan immigrants to be candidates for the election from Morocco and not from abroad. With the exception of one organization in Portugal<sup>180</sup>, the entire group of Moroccan representatives interviewed and an official from the CCME argued the right to vote directly from abroad (not through proxy) will not be granted soon<sup>181</sup>. During the elections of 2016, Moroccans living abroad still could not be candidates for a Moroccan election and the only way to vote from abroad was to vote by proxy which was still unsatisfying for the Moroccan diaspora<sup>182</sup>. This point was also underlined by a Moroccan representative in France. He pointed out that in the last elections of 2016, the Moroccan Minister of the Interior announced that it would not be possible to vote remotely (other than through proxy) for "technical reasons"<sup>183</sup>. A Moroccan representative in France goes further and says that not granting the right to vote directly to the Moroccan diaspora is the "proof that they count for nothing". Moreover, he argues that Moroccans will not return to Morocco to express their vote, especially since they "already know the results"<sup>184</sup>.

According to the Constitution of 1999 (Article 22(2)), Cape Verdean citizens residing or staying abroad enjoy the rights, freedoms and guarantees and are subject to the obligations enshrined in the Constitution which are not incompatible with their absence from national territory. This phrasing is inspired by Article 14 of the Portuguese Constitution. Article 108 declares that the President of the Republic is elected by universal suffrage, direct and secret, by citizen voters registered in the national territory and abroad, according to the law. Cape Verdeans living abroad have the right to vote

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CCME contre la Question de la Participation et de la Représentation Politique des Marocains du Monde', [https://issuu.com/wakeupmre/docs/belquendouz\\_reponse\\_au\\_livre\\_du\\_ccm](https://issuu.com/wakeupmre/docs/belquendouz_reponse_au_livre_du_ccm) 'Accessed 8 January 2017'.

<sup>179</sup> Antoine Dumont, 'Les migrants au Parlement !' (2013) *Hommes et migrations*, 1303, 113 <http://hommesmigrations.revues.org/2567> 'Accessed 8 January 2017'.

<sup>180</sup> Interview 67, Associação da Comunidade Marroquina em Portugal, Lisbon, 4 November 2017.

<sup>181</sup> Interview 61, Calima, Strasbourg, 1 June 2017 ; Interview 62 (n58); Interview 63, Conseil de la communauté marocaine à l'étranger, Rabat (by phone), 12 June 2017.

<sup>182</sup> Reda Zaireg, 'MRE : Pas de Vote Direct ni de Représentation Parlementaire cette Année' *HuffPost Maroc* (11 April 2016) [http://www.huffpostmaghreb.com/2016/04/11/mre-vote-maroc- n\\_9658110.html](http://www.huffpostmaghreb.com/2016/04/11/mre-vote-maroc- n_9658110.html) 'Access 7 February 2018'.

<sup>183</sup> Interview 62 (n58).

<sup>184</sup> Idem.

in Cape Verdean elections. However, Article 112 underlines an interesting point; if the sum of the votes of the voters registered abroad exceeds one fifth of the votes obtained in the national territory, it is converted into a number equal to this limit and the set of votes obtained by each candidate are also converted to the same proportion. This system of weighting of votes can be explained by the fact that Cape Verdeans living abroad are more numerous than Cape Verdeans living in the territory. The weighting system is a solution which seeks not to compromise national independence<sup>185</sup>. If the vote of Cape Verdeans abroad had the same weight as the vote of Cape Verdeans living in the country, citizens' resident abroad could have elected a president in contradiction with the choice of the citizens residing in the national territory. A Cape Verdean scholar and representative in Portugal declares that even though this quota exists, two former presidents, Pedro de Verona Rodrigues Pires and António Mascarenhas Monteiro have been elected by the diaspora<sup>186</sup>.

Finally, Morocco and Cape Verde have concluded several tax agreements in order to avoid the double taxation of their residents living abroad. Morocco concluded such an agreement with 47 countries<sup>187</sup>, the first one was concluded with France in 1970. The only taxation agreement that Cape Verde concluded before the conclusion of the Mobility Partnership was with Portugal<sup>188</sup>. The reasons for the conclusion of this agreement can be diverse. The agreements with Portugal can be explained by the determination of Portugal to strengthen economic relations with other Lusophone countries. Additionally, with the financial crisis in Europe, Portuguese entrepreneurs turned to the internationalization of companies and African markets have been preferred by Portuguese entrepreneurs, Cape Verde being one of the preferred markets<sup>189</sup>.

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<sup>185</sup> Nuias Silva and Arlinda Chantre, 'Cape Verde: a Large Diaspora and Low Turnout by External Voters' 200 in International IDEA and IFE, *Voting from Abroad: The International IDEA Handbook* (2007) 201.

<sup>186</sup> Interview 69, Congresso dos Quadros Cabo-Verdianos da Diaspora/ Universidade do Minho, Braga, 5 December 2017.

<sup>187</sup> The full list of countries and the text of the conventions can be found here: <https://www.tax.gov.ma/wps/portal/DGI/Documentation-fiscale/Conventions-internationales> 'Accessed 12 September 2017'.

<sup>188</sup> Convenção entre a República Portuguesa e a República de Cabo Verde para Evitar a Dupla Tributação em Matéria de Impostos sobre o Rendimento e Prevenir a Evasão Fiscal e respectivo Protocolo, assinados na Praia em 22 de Março de 1999, *Diário da República I Série A* n°159, 12 de Julho de 2000 3115.

<sup>189</sup> Liza Helena Vaz, 'O Acordo para Evitar a Dupla Tributação entre Portugal e Cabo Verde - Um Cabo das Tormentas?' *Jornal de Negócios* [http://www.jornaldenegocios.pt/opiniaodetalhe/o\\_acordo\\_para\\_evitar\\_a\\_dupla\\_tributaccedilatildeo\\_entre\\_portugal\\_e\\_cabo\\_verde\\_de\\_um\\_cabo\\_das\\_tormentas](http://www.jornaldenegocios.pt/opiniaodetalhe/o_acordo_para_evitar_a_dupla_tributaccedilatildeo_entre_portugal_e_cabo_verde_de_um_cabo_das_tormentas) 'Accessed 05 December 2017'.

#### 4.2.4. Return, Reintegration and rights of returning migrants

“Returning migrant” is a term that usually refers to a person who returns to his country of citizenship after having been an international migrant (within a short or extended period of time) in a foreign country and intends to remain in his country of origin for more than one year<sup>190</sup>. “Return” means going back to one’s country of origin permanently or temporarily, after having lived in a foreign country and “reintegration” is the process related to the returnee's ability to participate successfully in social, cultural, economic and political development activities. It is interesting to note that, even though Cape Verde and Morocco have a long history of emigration, the support providing to nationals when they decide to return seem limited. The main rights granted to returning migrants are related to the exemption of customs taxes on their personal assets<sup>191</sup>. The question of the reintegration of nationals who have been deported has not been regulated and is generally an additional burden for the third country that does not have the financial means to properly reintegrate these nationals. Between 1992 and 2009 there were 986 cases of Cape Verdean citizens deported from abroad. This data indicated that most deportees came from the USA (about 50%), followed by Portugal (about 35%)<sup>192</sup>.

A program for the voluntary return of irregular or vulnerable migrants is established within the framework of cooperation with IOM. In the case of the voluntary return, the migrant is provided with some financial support to cover his flight back home and his “reintegration” in the country of origin. According to IOM officials in Rabat, this financial aid is generally not sufficient to allow a returnee to create his own profession or to effectively “reintegrate” in the country of origin. Thus, from 2007 to 2012, 262 Moroccan migrants benefited from assistance for voluntary return and reintegration activities in

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<sup>190</sup> United Nations Department of Economic and Social Affairs, 'Recommendations on Statistics on International Migration Revision' 1 Statistical Paper Series M, n°58, Rev 1, United Nations, New York, 1998.

<sup>191</sup> O Decreto-lei n° 139/91 (BO n° 40/91) - acorda a exoneração dos direitos e da taxa de consumo aos bens pessoais (incluindo uma viatura privada) e os equipamentos importados pelos não residentes de regresso definitivo (NRRD). Modificado pela Lei n° 14/VI/2002 de 19 de Setembro; Code des Douanes et Impôts Indirects approuvé par le dahir portant loi n° 1-77-339 du 25 Chaoual 1397 (9 octobre 1977) tel que modifié et complété notamment par la loi n° 02-99 promulguée par le Dahir n° 1-00-222 du 2 rabii I 1421 (5 juin 2000), Article 20 octies, mise à la Consommation des véhicules; Circulaire n°4158 du 16/05/1991, Mise à la consommation de véhicules automobiles - Régime de vieillissement accordé aux marocains ayant exercé une activité lucrative à l'étranger pendant au moins 24 mois pour le dédouanement de leur véhicule importé dans les six mois qui suivent la date de changement de résidence.

<sup>192</sup> IOM (n12) 61.

Morocco<sup>193</sup>. In Cape Verde, between 2005 and 2010, 1557 people have voluntarily returned. There is no data available on the profile of these returning migrants. The number of voluntary returning Cape Verdeans benefiting from the IOM voluntary return program between 2014 and 2016 was marginal with only 17 people being assisted in total over the three years<sup>194</sup> while it increased in Morocco from 157 people in 2014, to 245 people in 2015 and to 490 people in 2016<sup>195</sup>. According to two Cape Verdean representatives in Portugal, Cape Verdeans rather move to another country than return when they are unsuccessful in their immigration experience because they consider return as a failure and something shameful<sup>196</sup>.

Returned Cape Verdeans, when enrolled in the social security systems of both the foreign country where they used to live and Cape Verde, are entitled to sickness and maternity benefits, retirement pension, disability pension, survivor's pension and family allowances under the same conditions as a Cape Verdean who never left the country. Moreover, Cape Verde is not part of the Inter-African Social Security Convention<sup>197</sup> (CIPRES Convention) but has signed a Multilateral Social Security Convention of the Community of Portuguese Speaking Countries<sup>198</sup> together with Brazil, Mozambique, Portugal and São Tomé and Príncipe and is also part of the ECOWAS General Convention on Social Security<sup>199</sup>. Social Security agreements have been concluded with countries with a significant presence of Cape Verdean migrants: Portugal, France, The Netherlands, Luxembourg, Italy, Brazil, Senegal and Sweden<sup>200</sup>.

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<sup>193</sup> Interview 15 IOM, Rabat, 20 January 2016.

<sup>194</sup> IOM (n12).

<sup>195</sup> OIM, 'Maroc, Bilan 2016', Edition 31, Janvier-Décembre 2016.

<sup>196</sup> Interview 65, Associação Cabo-Verdiana de Setúbal, Setúbal, 3 November 2017 ; Interview 66 (n127).

<sup>197</sup> Conférence interafricaine de la Prévoyance Sociale (C.I.PRE.S), Abidjan, 14 February 2014.

<sup>198</sup> Convenção Multilateral de Segurança Social da CPLP, 2015.

<sup>199</sup> ECOWAS General Convention on Social Security, 7 December 2012.

<sup>200</sup> Convenção com vista à substituição da Convenção sobre Segurança Social de 1985, celebrada entre o Governo de Cabo Verde e o Governo da República Portuguesa, assinada na cidade da Praia (Cabo Verde), no dia 10 de Abril de 2001, Aprovada pelo Decreto 5/2001, de 6 de Agosto, BOCV, I Série, n°24, 6 de Agosto de 2001, pp. 329-337; Decreto 9/2017 de 22 de Março, Acordo de Revisão da Convenção sobre Segurança Social entre a República Portuguesa e a República de Cabo Verde de 10 de abril de 2001, Diário da República n°58/2017, Série I de 2017-03-22; Constituição da Convenção Geral sobre Segurança Social celebrada entre o Governo da República de Cabo Verde e o Governo da República Francesa (Praia, 15 de Janeiro de 1980), Aprovada pelo Decreto 45/A/82, de 12 de Maio, BOCV, n°19, Suplemento, 12 de Maio de 1982; Convenção sobre Segurança Social celebrada entre a República de Cabo Verde e o Reino dos Países Baixos, assinado em Haia (Holanda – Países Baixos), no dia 18 de Novembro de 1981, Aprovada pelo Decreto n° 98/84, de 10 de Outubro, BOCV, n°40, Suplemento, 10 de Outubro de 1984; Convenção sobre a Segurança Social entre a República de Cabo Verde e o Grão Ducado do Luxemburgo, concluída em Luxemburgo (Luxemburgo), no dia 24 de Maio de 1989, Aprovado pelo Decreto 147/90, de 22 de Dezembro, BOCV, n°51, Suplemento, 22 de Dezembro de 1990; Convenção Geral sobre Segurança Social celebrado entre o Governo da República de Cabo Verde e o Governo da República Italiana (Praia, 18 de Dezembro de 1980), Aprovada pelo Decreto 43/82, de 3 de Maio, BOCV, I Série, n°18, 3 de Maio de 1980; Acordo, por troca de notas, entre o Brasil e Cabo Verde, estendendo aos nacionais cabo-verdianos, residentes no Brasil, as disposições previstas na Convenção de Previdência Social e Ajustes Complementares assinados entre a República Federativa do Brasil e a República Portuguesa 7 de fevereiro de 1979 DAF-II/DAI/DIE/ 3 / 615(B46) (A4); Convention enerale d Seurité Sciaeeentre e gouveremen de la République du Cap-Vert et le gouvernement de la République du Sénégal, Dakar, 12 mars 1998; Convenção sobre Segurança Social, celebrado entre a República de Cabo Verde e o Reino da Suécia, concluída em Estocolmo (Suécia), no dia 9 de Fevereiro de 1988, e modificada em 21 de Setembro de 1989, Aprovada pelo Decreto 150/90, de 22 de Dezembro, BOCV, I Série, n°51, Suplemento, 22 de Dezembro de 1990.

Concerning Moroccans residing abroad [*Marocains Résidents à l'Étranger* (MRE)], the National Social Security Fund manages international social security conventions with countries of immigration of Moroccan nationals. Morocco has signed social security agreements with 17 countries (Algeria, Egypt, France, Belgium, the Netherlands, Spain, Germany, Portugal, Denmark, Sweden, Romania, Tunisia, Libya, Mauritania, Canada, Quebec and Luxembourg)<sup>201</sup>. The objective of these agreements is based on the following principles: the principle of equal treatment of nationals of the contracting countries regarding the social security legislation in force; the principle of reciprocity and the principle of the transfer of rights. These agreements allow MREs who have transferred their place of residence to Morocco (provisionally or permanently) to benefit from the pension schemes of the host country and even from the Moroccan protection regime if they have worked in Morocco and have contributed to the National Social Security Fund. Moreover, thanks to the social security Convention between France and Morocco from 22 October 2007, a French or Moroccan citizen, or an EU citizen, benefitting from retirement benefits from the French social security regime, can benefit from health care coverage in Morocco if he has no rights to the Moroccan regime under

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<sup>201</sup> Dahir n° 1-13-78 du 18 ramadan 1434 (27 juillet 2013) portant publication de la Convention générale relative à la sécurité sociale, faite à Alger le (23 février 1991) entre le Royaume du Maroc et la République algérienne démocratique et populaire; Dahir n° 1-09-309 du 18 ramadan 1434 (27 juillet 2013) portant publication de la Convention générale pour la sécurité sociale, faite à Marrakech le (12 mai 2006) entre le gouvernement du Royaume du Maroc et le gouvernement de la République arabe d'Egypte; Dahir n° 1-09-307 du 1er ramadan 1432 (2 août 2011) portant publication de la Convention de sécurité sociale et du Protocole annexe à la Convention de sécurité sociale relatif au libre transfert des cotisations à la Caisse des français de l'étranger, faits à Marrakech le (22 octobre 2007) entre le Royaume du Maroc et la République française; Dahir n° 1-15-28 du 29 rabii II 1436 (19 février 2015) portant promulgation de la loi n° 42-14 portant approbation de la Convention de sécurité sociale faite à Bruxelles le (18 février 2014) entre le Royaume du Maroc et le Royaume de Belgique; Dahir n° 1-02-333 du 8 safar 1428 (26 février 2007) portant publication de la Convention faite à Rabat le 24 juin 2002 portant révision de la Convention générale de sécurité sociale entre le Royaume du Maroc et le Royaume des Pays-Bas signée à Rabat le 14 février 1972 telle que révisée et signée le 30 septembre 1996 et de l'Arrangement administratif fait à Rabat le 24 juin 2002 portant révision de l'Arrangement administratif du 3 novembre 1972 relatif aux modalités d'application de la Convention générale de sécurité sociale entre le Royaume du Maroc et le Royaume des Pays-Bas, signée à Rabat le 14 février 1972, telle que révisée et signée le 30 septembre 1996, tel que révisé par les arrangements administratifs signés à Rabat le 30 septembre 1996 et le 22 juin 2000; Dahir n° 1-99-245 du 27 chaabane 1422 (13 novembre 2001) portant publication du protocole annexe entre le Royaume du Maroc et le Royaume d'Espagne modifiant la convention de sécurité sociale maroco-espagnole, faite à Madrid le 8 novembre 1979; Dahir n° 1-90-101 du 21 kaada 1421 (15 février 2001) portant publication de la Convention faite à Rabat le 25 mars 1981 entre le Royaume du Maroc et la République Fédérale d'Allemagne relative à la sécurité sociale et de l'arrangement fait à Rabat le 19 avril 1984 relatif aux modalités d'application de ladite convention; Dahir du 7 Novembre 2000, portant publication de la convention de sécurité sociale, faite à Evora le 14 novembre 1998 entre le gouvernement du Royaume du Maroc et le gouvernement de la République du Portugal; Dahir n° 1-90-74 du 1er ramadan 1432 (2 août 2011) portant publication de la Convention de sécurité sociale et du Protocole y annexé faits à Copenhague le (26 avril 1982) et de l'Avenant à ladite Convention fait à Marrakech le (15 février 1988) entre le gouvernement du Royaume du Maroc et le gouvernement du Royaume du Danemark; Convention de sécurité sociale entre le Maroc et la Suède, signée le 4 janvier 1980 à Rabat, Svensk Författningssamling, 1982, No 249; Convention de sécurité sociale entre le Maroc et la Roumanie, signée à Rabat le 27 juillet 1983, Buletinul Oficial, 1984-06-29, n° 51; Convention de sécurité sociale entre les Etats de l'Union du Maghreb arabe, signée à Ras Lanouf (Libye) les 9 et 10 mars 1991 journal officiel, 1992-03-04, no 17 (Algerie, Libye, Tunisie, Mauritanie et Maroc); Dahir n° 1-97-43 du 29 hija 1419 (16 avril 1999) portant publication de la convention de sécurité sociale faite à Rabat le 6 jourmada II 1407 (5 février 1987) entre le Royaume du Maroc, et la République tunisienne; Dahir n° 1-00-214 du 2 jourmada II 1421 (1 septembre 2000) portant publication de la convention de sécurité sociale faite à Rabat le 1er juillet 1998 entre le gouvernement du Royaume du Maroc et le gouvernement du Canada; Dahir n° 1-02-139 du 1er ramadan 1432 (2 août 2011) portant publication de l'Entente en matière de sécurité sociale faite à Rabat le (25 mai 2000) entre le Royaume du Maroc et le Québec; Dahir n° 1-09-308 du 19 rabii I 1434 (31 janvier 2013) portant publication de la Convention de sécurité sociale faite au Luxembourg le (2 octobre 2006) entre le gouvernement du Royaume du Maroc et le gouvernement du Grand-Duché de Luxembourg.



the condition that the person declares his tax residence in Morocco. It should be noted that the agreement with The Netherlands was renegotiated in 2016. At the last moment, Morocco tried to insert a provision extending the agreement's provisions to the Western Sahara, but The Netherlands does not recognize Morocco's sovereignty over the Western Sahara and disagreed with the new provision. The addition of this provision on Western Sahara led to diplomatic issues and The Netherlands threatened to terminate the agreement if Morocco did not withdraw the provision<sup>202</sup>. The provision was withdrawn in the revised version of the agreement<sup>203</sup>.

### **4.3. Legal framework for migrants' rights in Morocco and Cape Verde after the conclusion of the Mobility Partnership**

This section will discuss the legal changes that occurred in the respective legal systems after the conclusion of the Mobility Partnership with Cape Verde in 2008 and with Morocco in 2013. Due to the time difference between the conclusion of the Mobility Partnerships in Cape Verde and Morocco, the range of developments in Morocco can be expected to be less significant than in Cape Verde as the Mobility Partnership with Morocco was only concluded four years ago in opposition to the Mobility Partnership with Cape Verde which was concluded nine years ago. The legislative process takes time, this difference is normal. The first section will introduce major policy changes in both countries which are related to the legal developments.

#### **4.3.1. Overview of the national strategies on immigration and emigration**

On 28 June 2013 different Moroccan associations (ALECMA, GADEM, FMAS and AMDH)<sup>204</sup> launched a campaign to raise awareness among the public on the

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<sup>202</sup> Interview 13 Moroccan Ministry of Labour, Rabat, 19 January 2016; Interview 63 (n181).

<sup>203</sup> Projet de Loi n° 47-16 portant Approbation du Protocole fait à Rabat le 4 juin 2016 portant Révision de la Convention Générale de Sécurité Sociale entre le Royaume du Maroc et le Royaume des Pays-Bas, signée à Rabat le 14 février 1972, telle que révisée et signée le 30 septembre 1996 et le 24 juin 2002, et l'avenant fait à Rabat le 4 juin 2016 portant révision de l'arrangement administratif du 3 novembre 1972 relatif aux modalités d'application de la convention générale de sécurité sociale entre le Royaume de Maroc et le Royaume des Pays-Bas, tel que révisé par les arrangements administratifs signés à Rabat le 30 septembre 1996, le 22 juin 2000 et le 24 juin 2002.

<sup>204</sup> Association lumière sur l'émigration clandestine au Maghreb (ALECMA), Groupe Antiraciste de Défense et d'Accompagnement des Etrangers et Migrants (GADEM), Forum des Alternatives Maroc FMAS, Association marocaine des droits humains AMDH.

resurgence of violence against migrants at Morocco's Northern border which led to several deaths<sup>205</sup>. In July 2013, the CNDH, the Interministerial Delegation for Human Rights and IOM in Rabat, published a critical paper on the state of migrants' rights in Morocco<sup>206</sup>. On 30 July a migrant died at the hospital in Nador after being pushed out of a moving bus by a policeman during a collective expulsion operation<sup>207</sup>. During this period, there was a strong international mobilisation on the issue of the mistreatments of Sub-Saharan migrants in Morocco, relayed by several reports from civil society and international organizations and through documentaries<sup>208</sup>. Morocco was accused of severe breaches of human rights and mistreatments of migrants. In response, the CNDH published a report putting forth measures to improve the situation of refugees and asylum seekers, of irregular migrants and the fight against human trafficking<sup>209</sup>. The conclusions of this report were presented to the King Mohammed VI, on 9 September 2013, and the next day the King announced a series of "High Orientations". On September 17 the government created four sub-commissions: 1) on the regularisation of irregular migrants; 2) on asylum; 3) on the development of the legal framework in relation to immigration, asylum and human trafficking; 4) on regional and international cooperation on migration issues. In October, the Ministry for Moroccan Residents Abroad and Migration Affairs [*Ministère chargé des MRE et des affaires de la Migration* (MCMREAM)]<sup>210</sup> was created as the first national institution addressing immigration issues. The MCMREAM is officially in charge of the coordination, planification, implementation and evaluation of the new immigration policy. On 6 November, the King called for a new global policy on immigration and asylum and recognised Morocco, for the first time, as a country of immigration declaring that there was a need to review the migration and asylum policy<sup>211</sup>.

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<sup>205</sup> Gadem (n29) 22.

<sup>206</sup> Délégation interministérielle aux droits de l'Homme, Conseil national des droits de l'Homme, Bureau de l'Organisation Internationale pour les Migrations, 'Argumentaire du Séminaire Régional "Gouvernance des Migrations et Droits de l'Homme"', Rabat, 15 juillet 2013.

<sup>207</sup> Gadem (n29) 22.

<sup>208</sup> For example: 'Number 9 - Stop violence at the borders!', <https://www.youtube.com/watch?v=w67k5MkUEWQ> 'Accessed 6 February 2016'. Movie realized from images recorded on 16 March 2013 by the realization Sara Creta accompanying the association ALECOMA in one of its mission with the support of the GADEM following the 11 March 2013 massive attempt to cross the border between Morocco and Spain.

<sup>209</sup> CNDH, 'Foreigners and Human Rights in Morocco for a Radically New Asylum and Migration Policy' (2013) Rabat 1, 8-11.

<sup>210</sup> The MCMREAM is the new name of the pre-existing Ministry for Moroccan Residents Abroad following the addition in 2013 of the new migration component to the Ministry. The MCMREAM is now not only in charge of the diaspora but of migration issues in general, including immigration to Morocco.

<sup>211</sup> Discours de SM Le Roi À L'occasion Du 38ème Anniversaire de La Marche Verte | Maroc.ma <http://www.maroc.ma/fr/discours-royaux/discours-de-sm-le-roi-loccasion-du-38eme-anniversaire-de-la-marche-verte> 'Accessed on 25 July 2016'.

The first step following the King announcing a series of “High Orientations” in September was the reopening of the BRA on 25 September 2013. The regularisation of asylum seekers in November 2013, as well as the launch of the regularisation campaign held from January to December 2014 and the second regularisation campaign held December 2016 to December 2017, are direct results of this new policy. It is in the framework of this new policy that the National Strategy for Immigration and Asylum (NSIA) was launched in December 2014. This strategy is to be supported by three new laws, on migration, human trafficking and asylum. Law 27-14 on human trafficking has already been adopted. Bill 26-14 on asylum is ready but since December 2015 its discussion in Parliament has been postponed. Bill 95-14 on migration aiming at revoking Law 02-03 on migration is the least developed. The NSIA has been divided into 27 specific objectives and 81 actions that have been defined in eleven programmes<sup>212</sup>. A significant component of the NSIA is the integration of the newly regularised migrants and refugees. The component includes measures concerning the access to the labour market, to the basic health system and access to education and it is directly linked to the legal developments that we will see in the following sections. It is the first time that a country in the region launches such an immigration and asylum policy and strategy.

In Cape Verde, before the launch of the National Immigration Policy (NIP) in 2012<sup>213</sup>, there were nearly no policies related to migrants’ integration and the few initiatives by the different institutions involved lacked consistency<sup>214</sup>. The National Immigration Strategy (NIS) is tasked with translating the objectives and principles of the NIP. The approval of the NIP and the NIS was a considerable step forward from the previous situation of absence of a policy on the matter, providing political guidance on the various aspects of immigration. Both the Government's 2011-2016 program<sup>215</sup> and the Poverty Strategy and Growth and Poverty Reduction Paper for the period 2012-2016<sup>216</sup> explicitly mention the immigration dimension as an axis of government action.

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<sup>212</sup> Stratégie Nationale d'Immigration et d'Asile, 2014, <http://www.marocainsdumonde.gov.ma/fr/le-minist%C3%A8re/affaires-de-la-migration/strat%C3%A9gie-nationale-dimmigration-et-dasile> 'Accessed 13 August 2016'.

<sup>213</sup> UCI, 'Plano de Acção 2013 – 2016 da Estratégia Nacional de Imigração' (2013).

<sup>214</sup> UCI/OFII, 'Estudio Diagnostico: Identificação das Necessidades dos Imigrantes no Processo de Integração Social em Cabo Verde' (2014) 1, 29.

<sup>215</sup> Governo de Cabo Verde, 'Programa do Governo para A VIII Legislatura 2011 – 2016' (2011).

<sup>216</sup> Governo de Cabo Verde, 'Estratégia de Crescimento e de Redução da Pobreza III 2012 – 2016' (2012).

The main axis of the strategy are data and research; dialogue, solidarity and partnership; investment and economic activity; migrants' integration and coherent national policies on migration<sup>217</sup> impacting several areas of migration law and shaping Cape Verdean policy towards immigration and emigration. The first strategic axis of the NIS provides for the legal development of matters such as the asylum of foreign citizens, trafficking in persons and illicit trafficking of immigrants<sup>218</sup>. As we will see in the following sections, bills have been developed on the above matters, but these have yet to be presented to the Council of Ministers because of the legislative agenda. The primary areas impacted by the implementation of the NIS focused on increasing immigration control and improving the protection of migrants' rights including for migrant workers and victims of trafficking<sup>219</sup>. The NIS explicitly mentions that it is expected to reinforce and sustain cooperation between agencies and regional cooperation with the aim to better fight irregular immigration<sup>220</sup>. In addition to the NIS, and through Decree-Law 19/2011 of 28 February 2011, the Immigration Coordination Unit (*Unidade de Coordenação da Imigração*) was created as a coordination and integration tool for immigration policies and policies with implication in the entry, stay and exit of foreigners from the national territory. In October 2014, by Decree-Law 57/2014 of 24 October 2014, the Directorate-General of Immigration (DGI) was created replacing the Immigration Coordination Unit. The DGI is a central mechanism for coordinating, integrating, monitoring, regulating and evaluating immigration policies. The NIP and NIS were the starting point for practical intervention in the management of immigration and the actions to be taken were included in an action plan for 2013-2016<sup>221</sup>.

It is important to understand the causality between the Mobility Partnerships and the national immigration strategies as well as the sequential order of developments. In the case of Morocco, the Mobility Partnership was concluded first. Shortly after, the King launched a series of new policies on immigration and asylum that would later be materialised under the NSIA. Even though, according to an official of the EU Delegation in Morocco, the EU had been pushing in this direction for several years<sup>222</sup>, it was

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<sup>217</sup> UCI/OFII (n213) 30.

<sup>218</sup> DGI, 'Balanço e Avaliação da Implementação do Plano de Acção da ENI de 2013 a 2015' (2016) 1, 45.

<sup>219</sup> ICMPD and IOM, 'A Survey on Migration Policies in West Africa' (2015) 1, 119-120.

<sup>220</sup> UCI (n212) 29.

<sup>221</sup> UCI (n212).

<sup>222</sup> Interview 6 (n84).

globally accepted by all the interviewees that the Mobility Partnership did not influence the new policy orientations. The launch of the NSIA seemingly implies a complete reversal of the position of Morocco during the negotiations of the Mobility Partnership. The understanding that the EU takes a reactive position, by supporting its implementation *a posteriori*, rather than a proactive role, is shared both by the EU and Moroccan officials and academics<sup>223</sup>.

In the case of Cape Verde, the situation is different, and the EU clearly took a more *proactive* approach. The development of the NIS is the fruit of distinct phases in which the EU had been involved with since the conclusion of the Mobility Partnership. A representative of the Direção Geral das Comunidades argued that at the time of the conclusion of the Mobility Partnership, Cape Verdean migration policy was inexistent<sup>224</sup>. From March to April 2009 The Netherlands conducted a “needs assessment in order to chart Cape Verde’s problems and needs in relation to asylum and migration”<sup>225</sup>. This corresponds to the first diagnostic report leading to the NIP. Then, in 2010, another report was presented containing proposals for the NIP. The ICMPD implemented a project under the MIEUX facility aimed at “developing the Cape Verdean national comprehensive migration policies with a view to reducing irregular migration and maximizing migration benefits”. With this project, the NIS and Action Plan were developed. Finally, in 2014, a joint study conducted by Portugal, France, Luxembourg and the Netherlands was completed to identify immigrants’ needs for integration<sup>226</sup>. The approval of the NIP and NIS was a turning point in the management of immigration in Cape Verde. In fact, these two instruments created political, strategic and action targets for the numerous services and actors involved<sup>227</sup>.

In addition, both Morocco and Cape Verde have developed emigration strategies that received much less attention and that were poorly implemented in practice. The Emigration strategy in Cape Verde was launched in 2014 and aimed at defining the objectives of the relationship with the Diaspora; establishing a coherent framework for

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<sup>223</sup> Interview 5, AMERM, University Mohammed V, Rabat, 12 January 2016; Interview 6 (n84); Interview 7, EU Delegation, Rabat, 13 January 2016; Interview 13 (n202), Interview 16, MCMREAM, Rabat, 21 January 2016; Interview 17, Spanish Embassy, Rabat, 22 January 2016.

<sup>224</sup> Interview 33 (n173).

<sup>225</sup> This example as well as the following used in this section will be taken from the scoreboard of Cape Verde from September 2014 and the scoreboard of Morocco from September 2015.

<sup>226</sup> UCI (n212).

<sup>227</sup> *ibid* 10.

emigration and development; building a broader consensus on emigration policy; discussing the benefits of migration and development; and guiding the dialogue within the national public administration and with the donors<sup>228</sup>. The axes of intervention of the Emigration Strategy are 1) facilitating and preparing departure; 2) supporting the integration of Cape Verdeans abroad; 3) gaining knowledge about diaspora and migration dynamics; 4) strengthening the links and dialogue with the diaspora; 5) facilitating and attracting remittances; 6) promoting Investment and international trade to the diaspora; and 7) mobilizing the competencies of the diaspora. The emigration strategy had no real momentum. The Ministry for Communities Abroad (*Ministério das Comunidades*) is the central institution for the emigration strategy. Each of the ministries that are a part of the emigration strategy are grouped under the National Committee for Emigration and Development (*Comité Nacional de Emigração e Desenvolvimento*). According to an official of the *Ministério das Comunidades*, the Emigration strategy was presented in a document valid for two years drafted by IOM and it was designed to evolve once the government had sufficient expertise on these different issues to create a public policy<sup>229</sup>. It seems that for now the Emigration strategy has not been further developed. The emigration strategy is not supported, nor instigated, by the Mobility Partnership and no project is related to it.

In Morocco, in parallel to the NSIA, the government launched in 2015 the National Strategy for the Moroccans living abroad (their emigration strategy)<sup>230</sup>. It is Council of Government of 18 December 2014 which adopted the emigration strategy, in the framework of the New Migration Policy, initiated in September 2013 by King Mohammed VI. The New Migration Policy, nor the emigration strategy, are the result of the Mobility Partnership. The Mobility Partnership is also not supporting the implementation of the emigration strategy. This strategy emphasizes several areas of interest to MREs, such as cultural, educational, social and economic, while taking into account the emergence of new needs and expectations of the MREs, particularly among young people and the most vulnerable groups<sup>231</sup>. The development of this strategy is linked to the introduction in the Constitution of 2011 of the protection of the rights and interests of the MREs. The strategy is divided into three strategic objectives:

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<sup>228</sup> IOM, 'Estrategia Nacional de Emigração e Desenvolvimento' (2014) 1, 9.

<sup>229</sup> Interview 33 (n173).

<sup>230</sup> MCMREAM, 'Guide des Marocains Résidant à l'Etranger' (2015).

<sup>231</sup> MCMREAM, 'Stratégie Nationale pour les Marocains Résidant à l'Etranger, Bilan 2013-2016' (2016) 10.

the preservation of the identity of the Moroccan diaspora, the protection of their rights and interests and their contribution to the development of Morocco. These three strategic objectives are divided into ten specific objectives, themselves divided into eight programs, 39 projects and 104 actions. According to a representative from the CCME, the emigration strategy is not new and was put into place because there was a demand for more cooperation<sup>232</sup>. Abdelkrim Belguendouz, a researcher on migration issues at the University of Rabat goes further and argues that concretely the strategy does only exist on the paper<sup>233</sup>. This argument is corroborated by Moroccan representatives interviewed in France<sup>234</sup>. Effectively, few changes occurred in terms of emigration policy.

It is striking to see how much emphasis is put on the development and implementation of the NSIA and NIS in comparison with the emigration strategies in Morocco and Cape Verde. Both Morocco and Cape Verde have a large population of emigrants living in Europe whereas the percentage of immigrants living in these two countries is still very low. It represents, in 2014, 0,25% in Morocco and 3,2% in Cape Verde<sup>235</sup>. Remarkably, the different steps leading to the conclusion of the immigration strategy in Cape Verde and the support to the NSIA in Morocco have been linked to Mobility Partnership projects when on the other hand, no projects aiming at developing or implementing the emigration strategies have been introduced as such in the Mobility Partnership. This can hint towards a low interest of the EU and Member States for these issues at least in comparison to immigration questions.

#### 4.3.2. Entry, exit and re-entry rights

This section will be divided into three parts: immigration and emigration, asylum and human trafficking.

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<sup>232</sup> Interview 63 (n181).

<sup>233</sup> Abdelkrim Belguendouz, '« Stratégie National pour les Marocains Résidant à l'Etranger », une « Fake news »' (6 February 2018) <http://www.wakeupinfo.fr/2018/02/strategie-nationale-pour-les-marocains.html> 'Accessed 8 February 2018'.

<sup>234</sup> Interviews 61 (n181), 62 (n58) and 63 (n181).

<sup>235</sup> For Morocco: Haut-Commissariat au Plan, 'Les Résidents Étrangers au Maroc (selon RGPH 2014)' 18 December 2017 1, 4; For Cape Verde: 'Instituto Nacional de Estatística, Inquérito Multi-objectivo Contínuo 2014 Estatísticas das Migrações' (2015) 1, 14.

#### 4.3.2.1. Immigration and Emigration

In Cape Verde, on 6 November 2014, a new law, Law 66/VIII/2014<sup>236</sup> on entry, stay, exit and expulsion of foreigners and their legal status, was adopted replacing Law 6/97<sup>237</sup>. Decree-law 2/2015 clarifies the rules of the Law's implementation<sup>238</sup>. A MIEUX project was implemented in 2012-2013 aiming at reviewing and developing the national migration legal framework. This MIEUX project is part of the Mobility Partnership with Cape Verde. In this project, the experts (one Portuguese and one Cape Verdean) reviewed the current legislative framework and assessed its consistency with the NIS and other instruments. In the second part of the report the two experts gave an overview of European legal standards and experience on legal and irregular migration, asylum and human trafficking matters. They provided support and coordinated the legislative proposal drafting process, prepared and reviewed a final proposal for the main legislation to replace Law 6/97 and all related legislative documents. In other words, this project led to the development of Law 66/VIII/2014 on entry, stay and expulsion of foreigners, considering best practices of relevant legislation in the EU.

Law 66/VIII/2014 is applied to everyone who enters and wants to stay in Cape Verde (Articles 3 and 4). It does not cover refugees (who are covered by the asylum law) nor diplomats and their families. During the preparation of the New Legislative Framework for Immigration and Asylum, organized in partnership with the European Union (through the MIEUX project cited above), Marisa Morais, the Cape Verdean Minister of Internal Affairs (*Ministra da Administração Interna*) stressed that this is not a simple revision of the legislation but the drafting and approval of a "totally new" legal framework. It covers not only the issue of entry and exit but also the permanence, the legal status of immigrants, issues related to administrative and judicial expulsion. It can be noted that the current legal regime is similar to that of Portugal. Law 66/VIII/2014 is

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<sup>236</sup> Lei n°66/VIII/2014 de 17 de Julho (Define o regime jurídico de entrada, permanência, saída e expulsão de estrangeiros do território caboverdiano, bem como a sua situação jurídica) BO IS n° 43 de 17 de Julho de 2014; Law 80/VIII/2015 aterates Articles 29, 47, 52, 89, 97 and 103 of Law 66/VIII/2014 of 17 of July, who defines the legal status of entry, stay, exit and expulsion of foreigners from the Cape Verdean territory, according to their legal status BO IS n°2 de 7 de Janeiro de 2015.

<sup>237</sup> Decreto-Legislativo n° 6/97 de 5 de Maio (regula a situação jurídica do estrangeiro no território nacional, estabelecendo os direitos, garantias e deveres, o regime de entrada, permanência e saída, a expulsão e a extradição, bem como as taxas, as infracções e sanções) BOCV, I Série, n°17.

<sup>238</sup> Decreto-Lei n°2/2015 (Regulamenta o regime jurídico de entrada, permanência, saída e expulsão de estrangeiros do território caboverdiano, aprovado pela Lei n° 66/VIII/2014 de 17 de Julho) BO IS n° 1 de 6 de Janeiro 2015.



influenced by Portuguese Law 23/2007<sup>239</sup>. The conditions of entry into the Portuguese and Cape Verdean territory for a foreigner are similar in both countries. A visa, travel documents and the proof of sufficient means of subsistence are required (Article 6 of Law 66/VIII/2014 and Articles 10 and 11 of Law 23/2007). The type of entry visas in Cape Verde and Portugal are almost identical. Law 66/VIII/2014 foresees several cases in which an entry visa can be granted to access the territory (Chapter IV). Visas foreseen by the law are transit visa, official, diplomatic or courtesy visas, tourist visas, temporary visas (for stays over 90 days but shorter than one year) and residency visas. According to Portuguese law (Article 45) five types of visas are recognized a) layover visa; b) transit visa<sup>240</sup>; c) short-stay visa (which can be put into parallel with the tourism visa in Cape Verde); d) temporary stay visa; e) residence visa. Moreover, the Council of Ministers in Cape Verde approved, in May 2017, the decree amending the law that will initiate the process of exemption of visas for the citizens of the European Union<sup>241</sup>. The visa waiver for European citizens is due to enter into force in Cape Verde in January 2018 and will allow a maximum stay of 30 days. This measure has been taken in order to increase tourism to Cape Verde<sup>242</sup>. In relation to foreigners entering Cape Verde, there is no existing computerized and common database on visas both from the diplomatic representatives' abroad and from national authorities in Cape Verde. The fact that the procedure for issuing and managing residency permits is not yet computerized means that it is not yet possible to precisely know how many foreigners are residing regularly in Cape Verde and for what purpose<sup>243</sup>.

The entry into force of Law 66/VIII/2014 substantially improved the legal framework regarding the entry, stay, exit and expulsion of foreigners from Cape Verdean territory. Indeed, there are positive changes vis-à-vis the previous legislative framework. The first is the introduction of administrative deadlines for the issuance of visas and authorization of residency permits. Article 44 foresees the delay in responding to a request for a residency permit to be a maximum of 90 days and in case of renewal of a residency permit the answer has to be given by the administration within 45 days.

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<sup>239</sup> Lei 23/2007 sobre o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional, Diário da República, 1.ª série, n.º 127, 4 de Julho de 2007.

<sup>240</sup> This type of visa has been revoked by: Lei n.º 29/2012, de 09 de Agosto 2012.

<sup>241</sup> *Inforpress*, 'Isenção de Vistos aos Cidadãos da União Europeia e Reino Unido vai ser Discutida na Sessão Parlamentar de Junho' (18 May 2017) <http://www.inforpress.publ.cv/isencao-de-vistos-aos-cidadaos-da-uniao-europeia-e-reino-unido-vai-ser-discutida-na-sessao-parlamentar-de-junho/> 'Accessed 6 December 2017'.

<sup>242</sup> *Observador*, 'Cabo Verde: Isenção de Vistos para a UE' (5 May 2017) <http://observador.pt/2017/05/05/cabo-verde-isencao-de-vistos-para-a-ue/> 'Accessed 7 December 2017'.

<sup>243</sup> IOM (n12) 11.

But all ambiguity has not been eliminated<sup>244</sup>. There are still complaints from the immigrant population about the slowness of the proceedings, as well as the irregular and the relatively opaque way the procedures are applied<sup>245</sup>. Only one Senegalese migrant representative thinks that the new law makes the process easier<sup>246</sup>. The procedure to renew residency documents requires more documents, and the price of the procedure is higher leading to many people not renewing their papers<sup>247</sup>. A migrant representative from Sierra Leone underlines an interesting fact. Since the renewal of the residency permit is more difficult, more foreigners are asking for the Cape Verdean citizenship because it “makes their stay easier”<sup>248</sup>. With citizenship, not only will immigrants be able to enter, stay and exit Cape Verde without needing a visa (or any other authorization), proving sufficient economic means or having to renew their residency permit. Through citizenship they would also have access to the full range of political and economic rights that are foreseen only for citizens such as full political participation or access to positions reserved for Cape Verdean citizens. The increasing difficulty to renew residency permits, with the idea arguably to deter immigrants from staying in Cape Verde, seems to have an unintended consequence as immigrants might ask for citizenship instead. This does not mean that asking for citizenship is an effortless process, but it can be seen as a better solution than having to repeat every year the heavy process to renew the residency document.

According to migrants’ representatives in Cape Verde, the major constraints to obtaining a residency permit for foreigners in Cape Verde are related to obtaining their criminal record in the country of origin, the absence of a work contract because employers generally do not sign contracts as well as the absence of a rent contract because they live in houses that are sometimes illegal or in situations in which landlords do not intend to declare their income<sup>249</sup>. A representative of the *Câmara Municipal* (Town Hall) in Boa Vista said that a special document is accepted by the authorities which is a declaration of housing that the migrants living in the “*Barracas*” can use when registering or renewing their documents<sup>250</sup>. As these “*Barracas*” are

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<sup>244</sup> DGI (n217) 67.

<sup>245</sup> Interviews 43 (n128) and 44 (n102); Interview 46, Associação dos Serraleoneses Residentes em Cabo Verde, Praia, 17 November 2016; Interview 48, Associação de Guineenses, Boa Vista, 24 November 2016; Interviews 49 (n135), 51 (n102) and 53 (n102); Interview 54, Association des senegalais, Praia, 2 December 2016.

<sup>246</sup> Interview 52, Associação dos Emigrantes Senegaleses Residentes em Cabo Verde, Praia, 2 December 2016.

<sup>247</sup> Interviews 43 (n128), 44 (n102), 46 (n243), 47 (n102), 48 (n244), Interviews 49 (n135), 50 (n135), 51 (n102) and 54 (n244).

<sup>248</sup> Interview 46 (n244).

<sup>249</sup> Interviews 44 (n102), 46 (n244) and 47 (n102).

<sup>250</sup> Interview 49 (n135).

illegal it would be impossible to prove that migrants live there. She adds that the processes last longer because they are far from Praia and the communication is difficult between the immigrants in Boa Vista and the authorities in Praia. However, a migrant representative living in the “*Barracas*” pointed out that the special document was not recognized anymore by the border authorities making it impossible for immigrants staying in this area to regularize their situation<sup>251</sup>.

Law 66/VIII/2014 also introduces a definition of the right to family reunification. This definition is more elaborate than in the Portuguese Law 23/2007 (Article 64) and can also be found in the status of Lusophone citizens (Article 7). Subsection III covers the right to residency for family reunification purposes. Article 54 defines the right to family reunification and Article 55 clarifies the necessary conditions to benefit from this right. Furthermore, Article 49(2) allows, exceptionally, on the initiative of the member of the Government responsible for the area of internal affairs, to grant residency permits for the exercise of subordinate professional activity. This special residency permit does not oblige the foreigner to have a residence visa, provided that the foreigner has an employment contract or a duly proven employment relationship, that he has entered the territory legally and remains legally and lastly, that his situation before social security is regularized.

According to migrants’ representatives, the reasons for refusal of entry are mainly due to the lack of sufficient means of subsistence, more rarely there are cases of absence of passports or presentation of false documents<sup>252</sup>. Given that most foreigners who are denied entry to Cape Verde are citizens of an ECOWAS Member State, it can be concluded that the country is not entirely complying with the Protocol of Free Movement of Persons and Goods in ECOWAS. Law 66/VIII/2014 had consequences on the application of the ECOWAS Protocol of Free Movement. Law 66/VIII/2014 requires the presentation of a passport and proof of sufficient financial means which is to some extent interfering with ECOWAS citizens’ freedom of movement<sup>253</sup>. As noted previously in this section, the conditions of entry into the Cape Verdean territory has

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<sup>251</sup> Interview 51 (n102).

<sup>252</sup> Interviews 50 (n135), 51 (n102) and 54 (n245).

<sup>253</sup> Article 4 of the Free Movement Protocol: Notwithstanding the provisions of Article 3 above, Member States have the right to refuse entry into their territories to any citizen of the Community entering the category of immigrants ineligible under their laws and regulations.

been inspired by Portuguese law, which can explain why these provisions are in contradiction with the provisions of the ECOWAS Treaty (to which Portugal is not part of). A visa, travel documents and the proof of sufficient means of subsistence are required (Article 6 of Law 66/VIII/2014 and Articles 10 and 11 of Law 23/2007). If a citizen of an ECOWAS country cannot prove sufficient financial means he will be denied entry into Cape Verde even though according to the Free Movement Protocol, he should be able to enter and stay in Cape Verde for a period of up to 90 days. Moreover, requesting a passport for all entries is contrary to the clause of the Free Movement Protocol that provides the right to an ECOWAS citizen to enter Cape Verde with only a national identity card. The different contradictions between Cape Verdean laws and the ECOWAS Protocol of Free Movement have been raised on several occasions. The most recent example being the criticism of the President of the ECOWAS Parliament about entry and stay of Senegalese nationals in Cape Verde<sup>254</sup>. These criticisms are in line with several stories gathered from immigrants in Cape Verde underlining the non-respect of the Free Movement protocol and the obligation for ECOWAS citizens to prove their sufficient means of living, a return ticket and a passport (instead of an ECOWAS recognized ID)<sup>255</sup>. In some cases, it has been argued by migrants' representatives that the ECOWAS is letting Cape Verde infringe the Free Movement Protocol because it is a small country that cannot economically provide for a large population of immigrants<sup>256</sup>. The Minister of Foreign Affairs, Luís Filipe Tavares answered the criticisms of the President of the ECOWAS Parliament by guaranteeing that Cape Verde is applying the Free Movement Protocol but agreeing that the country is facing some problems in its implementation, in particular, with the delivery of residency permits by the Immigration and Borders Services<sup>257</sup>. Cape Verde has also concluded two new specific international agreements on free movement and the abolition of entry visas with Angola and Singapore<sup>258</sup>. Moreover, Cape Verde concluded a joint border control agreement with FRONTEX<sup>259</sup> to prevent irregular

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<sup>254</sup> André Amaral, 'Governo está a estudar situação dos senegaleses em Cabo Verde', *Expresso das Ilhas* (13 May 2017), <http://www.expressodasilhas.sapo.cv/politica/item/53189-governo-esta-a-estudar-situacao-dos-senegaleses-em-cabo-verde> (Accessed 7 December 2017).

<sup>255</sup> Interviews 50 (n135), 51 (n102), 52 (n245) and 54 (n245).

<sup>256</sup> Interviews 52 (n245) and 54 (n245).

<sup>257</sup> *Expresso das Ilhas* (n254).

<sup>258</sup> Acordo entre o Governo da República de Cabo Verde e o Governo da República de Angola sobre Facilitação de Vistos em Passaportes Ordinários, aprovado para ratificação pelo Decreto nº 4/2012, de 4 de Julho, BOCV, I Série, nº38; Resolução 71/2012, de 25 de Outubro (concede aos cidadãos Singapurenses isenção de vistos de entrada, e estadia por 30 (trinta) dias, em Cabo Verde, independentemente do motivo da viagem), BOCV, I Série, nº59, 25 de Outubro de 2012.

<sup>259</sup> Acordo de Trabalho estabelecendo uma Cooperação Internacional entre a Frontex e a Polícia Nacional de Cabo Verde, 2011.

immigrants from entering by sea in the territory of the European Union<sup>260</sup>. The joint border control agreement with FRONTEX gives to Cape Verdean border authorities better means to effectively apply Law 66/VIII/2014 by developing border procedures, training border guards, sharing best practices and introducing technical equipment to support border guard's work<sup>261</sup>. These developments can be related to the implementation of the Mobility Partnership. Indeed, a project aims at implementing the "FRONTEX Common Core Curriculum for Border Guard basic training" and an other initiative lead to the conclusion of a working agreement between FRONTEX and Cape Verde.

Furthermore, Cape Verde is part of the African, Caribbean and Pacific countries and party to the Cotonou Agreement which includes Article 13 stipulating a return and readmission obligation (of nationals only)<sup>262</sup>. Moreover, France and Cape Verde concluded a facilitation scheme for regular migration shortly after the conclusion of the Mobility Partnership also including a readmission clause of nationals only (Article 4). A project was included in the Annex to the Joint Declaration foreseeing the conclusion of a "bilateral agreement on concerted management of migratory flows". Besides the readmission clause, the agreement with France includes simplified access to 40 designated professions, police cooperation, the reintegration of migrants returning to Cape Verde and co-development with the diaspora in France<sup>263</sup>. This provision was already foreseen in the Annex to the Joint Declaration<sup>264</sup>. Only around 700 Cape Verdeans each year receive a residency permit, most of them for family reunification<sup>265</sup>. Labour migration is low between Cape Verde and France with approximately 100 people per year between 2004 and 2008<sup>266</sup>. Nathalie Kotok argues that following the ratification of this agreement, Cape Verde obtained many more residency permits for

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<sup>260</sup> Sergio Carrera, 'The EU Border Management Strategy: Frontex and the Challenge of Irregular Migration to the Canary Islands' (2007) CEPS Working Document 261; Ruben Anderson, 'Frontex y la Creación de la Frontera Euroafricana: Golpeando la Valla Ilusoria', *Revista de Derecho Migratorio y Extranjería* (2011) (9)28 177.

<sup>261</sup> Statewatch, 'Frontex: Cooperation with Non-EU States', Briefing (March 2017) 1, 18.

<sup>262</sup> Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

<sup>263</sup> Décret no 2011-403 du 14 avril 2011 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Cap-Vert relatif à la gestion concertée des flux migratoires et au développement solidaire (ensemble trois annexes), signé à Paris le 24 novembre 2008.

<sup>264</sup> Project 1: "Proposal by the French Republic to open a certain number of professional activities to Cape Verdean migrants and no longer to maintain objections based on the employment situation in the sectors concerned [...]". Project 2: "Proposal by the French Republic to develop, within the framework of a bilateral agreement on concerted management of migratory flows, a co-development programme for the benefit of Cape Verde under which Cape Verdean migrants legally established in France [...]".

<sup>265</sup> Nathalie Kotlok, 'Le "Développement Solidaire" : une Politique Migratoire au Service du Développement des Pays Africains?' [2010] *Hommes et migrations* 268, 275-276.

<sup>266</sup> *Ibid.*

its nationals than previously<sup>267</sup>. She does however not give numbers to illustrate her argument. When looking at the numbers of the French Ministry of Interior for 2014, it seems that Kotlok's claim should be taken with precaution. The number of residency permits for family reasons seems to have increased to 784 in 2014, although only 41 Cape Verdeans received a work permit and 19 came to pursue their studies<sup>268</sup>. This agreement does not seem to have led to better access to the French labour market for Cape Verdean citizens. Additionally, Luxembourg concluded an agreement on circular migration with the Cape Verde in October 2015<sup>269</sup>. The agreement should simplify the mobility and enhance temporary circular labour migration. It also aims at fighting irregular immigration and facilitating the reintegration of migrants into their countries of origin<sup>270</sup>. The Annex to the Joint Declaration already foresaw the introduction of "an initiative on temporary circular migration with Cape Verde".

Additionally, Cape Verde concluded a Memorandum of Understanding (MoU) with the United States in January 2017 regulating the deportation of citizens of the two countries<sup>271</sup>. This MoU came as a response to the the inclusion of Cape Verde on the "RCI – Uncooperative List" by the American Department of Homeland Security due to the fact that Cape Verde nearly suspended the issuance of travel documents for citizens with a final deportation order<sup>272</sup>. Deportation of Cape Verdean citizens from the USA are causing numerous problems in Cape Verde. The Cape Verdeans being deported have usually little links with Cape Verde, little or no family and often do not speak *Crioulo* (the Cape Verdean language). Cape Verde had no structures in place to facilitate their integration leading the deportees to turn to drug trafficking and crime, putting the security of the archipelago at risks<sup>273</sup>. This MoU aims at facilitating the reintegration of these deportees into Cape Verdean society but it also comes in parallel

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<sup>267</sup> Ibid 276.

<sup>268</sup> Ministère de l'Intérieur, 'L'Admission au Séjour : Les Titres de Séjour (statistiques)' <https://www.immigration.interieur.gouv.fr/Immigration/L-admission-au-sejour-Les-titres-de-sejour-statistiques> 'Accessed 7 December 2017'.

<sup>269</sup> *Gouvernement.lu*, '7e Réunion de Dialogue Politique entre le Cabo Verde et l'UE au Niveau Ministériel et Signature d'un Accord Bilatéral entre le Luxembourg et le Cabo Verde en Matière de Migration', Press release (14 October 2015) <http://www.gouvernement.lu/5329991/13-dialogue-politique> 'Accessed 9 February 2018'.

<sup>270</sup> European Migration Network, '2016 Annual Report on Migration and Asylum 25th April 2017 – Final Version' 1, 58.

<sup>271</sup> This Memorandum of Understanding has not been published in the BOCV but the Cape Verdean Embassy in the United States published an informative note on the Memorandum of Understanding on their website: <http://www.embcv-usa.gov.cv/index.php/rss/186-nota-informativa-sobre-o-memorando-de-entendimento-entre-o-governo-de-cabo-verde-e-o-dos-estados-unidos> 'Accessed 10 August 2017'.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid; *Cabo Verde Network*, 'USA to Deport 400 Immigrants to Cabo Verde' (26 January 2017) <http://cvnetworktv.com/u-s-a-to-deport-400-immigrants-to-cabo-verde/> 'Accessed 07 December 2017'; *Expresso das Ilhas*, 'Cabo Verde e EUA Assinam Memorando que Regula Deportação de Cidadãos' (24 January 2017) <http://www.expressodasilhas.sapo.cv/politica/item/51790-cabo-verde-e-eua-assinam-memorando-que-regula-deportacao-de-cidadaos> 'Accessed 07 December 2017'.

to the foreseen deportation of over 400 Cape Verdeans from the USA to Cape Verde<sup>274</sup>.

Cape Verde concluded a visa facilitation agreement for short term visas<sup>275</sup> and an EU Readmission Agreement<sup>276</sup> respectively in October 2012 and in April 2013 and both entered into force simultaneously. Both agreements work in parallel and no visa facilitation agreement is concluded without the conclusion of an EURA. It is the first time that an African country concludes a visa facilitation agreement. The visa facilitation agreement does not apply to everyone (Article 4). There is a visa exemption for diplomats and there is visa facilitation for specific categories of people that allows for longer visas and multiple entry visas for those who meet the criteria and who have already been in good standing with the visas they have received previously. For example, simplified conditions for the issue of multiple-entry visas valid for five years are foreseen for members of governments or permanent members of official delegations, and for one year for scientists, journalists and students. The acquisition of a visa also became cheaper (Article 5). According to a Portuguese official in Cape Verde, the visa rules that have been set in the agreement are in fact the rules of the bilateral agreement with Portugal<sup>277</sup>.

The EURA and visa facilitation agreement are clearly the result of the Mobility Partnership. One of the preconditions to conclude a Mobility Partnership is the commitment of the third country to negotiate an EURA. The negotiations of a readmission agreement have taken place even though Cape Verde did not possess the logistical capacity to receive returned migrants. According to an IOM official in Cape Verde, the country does not have the facilities and the government does not seem to have a clear idea on how to create such facilities<sup>278</sup>. She adds that, the fact that Cape Verde is divided into different islands, with different airports, creates complex circumstances and would require high financial means to replicate the same facilities everywhere<sup>279</sup>. Following the conclusion of the Visa Facilitation and Readmission

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<sup>274</sup> Cabo Verde Network (n272).

<sup>275</sup> Resolução 106/VIII/2014 de 23 de Maio, aprova, para ratificação, o Acordo de Cooperação entre a União Europeia e a República de Cabo Verde sobre a Facilitação da Emissão de Vistos de Curta Duração para cidadãos da República de Cabo Verde e da União Europeia, BO SI 35 de 23 de Maio.

<sup>276</sup> Resolução 107/VIII/2014, de 23 de Maio, aprova, para ratificação, o Acordo entre a União Europeia e a República de Cabo Verde relativo à Readmissão de Pessoas que Residem sem Autorização, BO SI 35 de 23 de Maio.

<sup>277</sup> Interview 34 Centro Comum de Vistos/ Portuguese Consulate, Praia, 23 February 2016.

<sup>278</sup> Interview 38, IOM, Praia, 24 February 2016.

<sup>279</sup> Idem.

Agreements, the National Committee on the management of the Visa Facilitation Agreement and the National Committee on Readmission have been created<sup>280</sup>. According to a Portuguese and an IOM official in Cape Verde, so far, there has not been any case of readmission registered since the entry into force of the EURA<sup>281</sup>. However, with the conclusion of the EURA, Cape Verde is committing itself to working on strengthening the control of irregular immigration towards Europe<sup>282</sup>. Consequently, since the adoption of the EURA in 2012, Cape Verde has tried renegotiating the ECOWAS Protocol and implementing it in a more “flexible” way<sup>283</sup>.

In addition, to achieve some of its objectives related to the management of migratory flows with the European Union, maintaining the sub-regional scheme of regional integration can be detrimental. Even if there is no obligation to receive foreigners with a right of entry, the fact that Cape Verde could be used as a stopover point due to facilitated circulation into Cape Verde under the ECOWAS Protocol provides a sufficient basis for creating some problems according to José Pina-Delgado<sup>284</sup>. Indeed, the ECOWAS region is considered as the main reserve of immigrants from all of Africa<sup>285</sup>. Even though the Visa Facilitation Agreement does only apply to certain categories of citizen, according to a migrant representative and the official of the *Câmara Municipal* of Boa Vista, it can be used as an easier and safer way to reach Europe by ECOWAS citizens<sup>286</sup> after they succeed in acquiring Cape Verdean nationality. The Cape Verdean authorities are planning to revise the ECOWAS protocols, including entry regulations, arguing that the specific situation of the country (an island State) justifies the possibility of the country derogating to a certain extent from the principle of free movement among the States of ECOWAS.

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<sup>280</sup> Resolução 70/2015, Constitui o Comité Nacional de Gestão de Acordo de Facilitação de Vistos BO SI 47 de 7 de Agosto de 2015 ; Resolução 71/2015, Constitui o Comité Nacional de Readmissão BO SI 47 de 7 de Agosto de 2015.

<sup>281</sup> Interviews 34 (n276) and 38 (n277).

<sup>282</sup> Odair Varela, 'Readmitidos e/ou Repatriados? Uma Re-leitura do Acordo de Readmissão de Cabo Verde com a União Europeia, 61 in Iolanda Evora, *Diaspora Cabo-Verdiana: Temas em Debate* (2016) Centro de Estudos sobre Africa, Asia e America Latina, E-book available at [https://issuu.com/comunicacao\\_cesa/docs/livro\\_diaspora-cabo-verde\\_final](https://issuu.com/comunicacao_cesa/docs/livro_diaspora-cabo-verde_final) Accessed 16 April 2017. Accessed 16 April 2017' 69.

<sup>283</sup> *ibid.*; *Rádio Televisão Caboverdiana*, 'Cabo Verde Defende Aplicação Flexível dos Protocolos de Livre Circulação na CEDEAO' (21 May 2012) [http://rtc.cv/index.php?paginas=21&id\\_cod=4221](http://rtc.cv/index.php?paginas=21&id_cod=4221) 'Accessed 16 April 2017'; Odaír Santos, 'A Livre Circulação de Pessoas e Bens na CEDEAO está em Debate em Cabo Verde' *RFI Português* (24 May 2010) <http://pt.rfi.fr/africa/20100524-livre-circulacao-de-pessoas-e-bens-na-cedeao-esta-em-debate-em-cabo-verde> 'Accessed 16 April 2017'.

<sup>284</sup> José Pina-Delgado (n17) 552-553.

<sup>285</sup> EFG Consulting (n13) 42.

<sup>286</sup> Interviews 49 (n135) and 52 (n245).



There are several studies that point to the high number of immigrants residing in Cape Verde in an irregular situation. It is believed that the majority enter regularly into the country but extend their permanence in the archipelago beyond the legal deadlines. The report by the ICMPD pointed to 14,373 immigrants in Cape Verde in 2010<sup>287</sup>. In 2010, the Interministerial Commission for the Study and Proposition of the Bases of the Immigration Policy's (*Comissão Interministerial para o Estudo e Proposição das Bases da Política de Imigração*) report estimated that more than half of the foreigners residing in Cape Verde were in an irregular situation, corresponding to approximately 8,373 people<sup>288</sup>. At present, according to the DGI study, the Directorate of Aliens and Borders of the National Police [*Direcção de Estrangeiros e Fronteiras da Polícia Nacional* (DEF)] estimates that the number of these cases is about 6000<sup>289</sup>. The decline in the number of undocumented migrants can be attributed to three main factors: a) more effective action by the DEF in terms of border management, b) the promulgation in 2014 of the new legal regime for entry, stay, exit and expulsion of foreigners from the Cape Verdean territory and c) the subsequent extraordinary regularization process that took place between January and April 2015. According to data provided by DEF, 1524 applications for regularization were received of which 616 have been accepted, giving rise to the issuance of the respective residency permits<sup>290</sup>.

In Morocco, Bill 95-14 on migration aims at revoking Law 02-03 on migration and is in the legislative phase at the General Secretariat of the Government before its introduction into the legislative process<sup>291</sup>. The draft Bill is not available in a language other than Arabic which made it impossible to analyse its content. It seems however that the Bill follows the aim of the NSIA in that it focuses, according to the press, on the integration of regular migrants<sup>292</sup>. In September 2013, the CNDH published a report "Foreigners and Human Rights in Morocco", paving the way for the preparation of draft laws on immigration, asylum and trafficking in human beings. The CNDH's main recommendations for the Bill 95-14 were responding to the criticisms made by the GADEM and other major NGOs representing sub-Saharan migrants in a joint report<sup>293</sup>.

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<sup>287</sup> Constança Urbano de Sousa and José Pina-Delgado (n72) 12.

<sup>288</sup> EFG Consulting (n13).

<sup>289</sup> DGI (n217).

<sup>290</sup> Ibid.

<sup>291</sup> MCMREAM (n162) 104.

<sup>292</sup> *La Vie éco*, 'Politique Migratoire : Adapter les Lois, un Passage Obligé' <http://lavieeco.com/news/politique/politique-migratoire-adapter-les-lois-un-passage-oblige.html#FbphJsl5ubaZY25Q.99> 'Accessed 8 December 2017'.

<sup>293</sup> GADEM (n29).

The CNDH underlines the need to guarantee migrants (including irregular migrants), an effective access to justice, security against exploitative employers, the ban of all forms of violence and an easier access to the registration of births and deaths<sup>294</sup>. The scoreboard of the Mobility Partnership with Morocco foresees several projects aiming at supporting Morocco in the development of the new law on immigration (as well as on the laws on asylum and human trafficking). For example, the project “*Promouvoir l’intégration des Migrants au Maroc*” which supports the development and implementation of the NSIA includes activities to support the development of the three new laws.

Regarding the EURA with Morocco there was only one negotiating session in January 2015. Morocco, has refused to sign an EURA since 2006 due to a refusal by the EU to conclude further EURAs with other countries in Africa. Morocco is known for its reluctance to conclude an EURA with the EU<sup>295</sup>. Mobility Partnerships can be seen as tools to provide leverage to the negotiations of EURAs with third countries. They can propose a full set of initiatives including migration and development and legal migration possibilities, to counter-balance the burden of an EURA including third country nationals. It is the first time that the EU proposed a visa facilitation agreement to a Southern Mediterranean country<sup>296</sup>, going hand in hand with the conclusion of the EURA. However, for several reasons such as, for example, Morocco’s position with sub-Saharan Africa it is unlikely for Morocco to sign it as is. Having good relations with Africa is a new priority for Morocco<sup>297</sup>, which wants, according to officials from Expertise France and the Council of Europe in Rabat, to be a major interlocutor on African issues and strengthen its economic relations with the African continent<sup>298</sup>. This is in line with Morocco’s “Politique Africaine”<sup>299</sup>. According to a Moroccan scholar and an official of the EU Delegation in Rabat, improving relations with African countries of origin was one of the main reasons for the adoption of the NSIA in the first place<sup>300</sup>. This point will be further detailed in Chapter 5.

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<sup>294</sup> CNDH, ‘Conclusions et Recommandations du Rapport : « Etrangers et Droits de l’Homme au Maroc : pour une Politique d’Asile et d’Immigration Radicalement Nouvelle »’ (2013) 5-6.

<sup>295</sup> Sergio Carrera and others, ‘EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?’ (2016) CEPS Papers in Liberty and Security in Europe 1, 5-7; Sarah Wolff, ‘The Politics of Negotiating the EU Readmission Agreements: Insights from Morocco and Turkey’ (2014) 16 *EJML* 69.

<sup>296</sup> Sarah Wolff (n294) 72.

<sup>297</sup> Ayah Aman, ‘Why Morocco Really Wants Back in the African Union’ (27 July 2016) <http://www.al-monitor.com/pulse/originals/2016/07/morocco-join-african-union-western-sahara-dispute-egypt.html> ‘Accessed 13 August 2016’.

<sup>298</sup> Interview 10, Expertise France, Rabat, 15 January 2016; Interview 12, Council of Europe, Rabat, 19 January 2016.

<sup>299</sup> Royal Institute for Strategic Studies, ‘La Politique Africaine du Maroc’ 26 Octobre 2015.

<sup>300</sup> Interviews 5 (n222) and 6 (n82).

#### 4.3.2.2. Asylum

Cape Verdean Law 66/VIII/2014 is more specific about the status of refugees than Law 6/97. Article 13(4) specifies who is competent to deliver a travel document to refugees and Article 15 introduces the single travel document for refugees. The Portuguese Asylum Act does not foresee a similar document<sup>301</sup>. However, the absence of comprehensive and consistent asylum and refugee integration policies have not been filled to date<sup>302</sup>. The idea of cooperation for the revision of the asylum system in Cape Verde has been included in the Mobility Partnership, which could be an opportunity to improve the country's response in this field. A project has been proposed to develop an asylum system but to date this has not been translated into legal developments. As a result of the MIEUX project presented above, a new law on asylum was proposed at the same time as Law 66/VIII/2014, but it has not been adopted<sup>303</sup>. The adoption of a new law on asylum is foreseen by the NIS. This means that the Mobility Partnership project that helped to develop the NIS foresaw the development of a new law on asylum. However, even though the creation of a national asylum system has been foreseen since 2012<sup>304</sup>, no new law specifically on asylum has yet been adopted.

The exact number of asylum applications is unknown as there is no systematic procedure in place to register and process these applications. Since UNHCR has no established presence in the country, asylum seekers seeking protection and assistance are referred by the International Organization for Migration to the UNHCR regional representation for West Africa in Dakar, Senegal, which is responsible for the determination of refugee status. In fact, there are few asylum applications made in Cape Verde (UNHCR reported only two cases in total in 2011 and 2012) but the definite number of asylum seekers is unknown, as there is no efficient procedure to register and process asylum claims<sup>305</sup>. Because Cape Verdean's Law forbids expulsion of

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<sup>301</sup> Lei n°27/2008, de 30 de Junho Estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária, transpondo para a ordem jurídica interna as Directivas n.os 2004/83/CE, do Conselho, de 29 de Abril, e 2005/85/CE, do Conselho, de 1 de Dezembro.

<sup>302</sup> Comissão Nacional para os Direitos Humanos e a Cidadania e o PNUD (n126) 50.

<sup>303</sup> Interview 38 (n277); Interview 40, Institute of Social and Legal Sciences of Cape Verde, Praia, 26 February 2016; Interview 42 (n121).

<sup>304</sup> Estratégia Nacional de Imigração, Aprovada pela Resolução do Conselho de Ministros n° 3/2012, de 23 de Janeiro, BOCV, I Série, n°3, 23 de Janeiro de 2012.

<sup>305</sup> US Department of State, Bureau of Democracy, Human Rights, And Labor, 'Country Reports on Human Rights Practices, Cape Verde Report 2012', 19 April 2013 <https://www.state.gov/j/drl/rls/hrrpt/2012/af/204100.htm> 'Accessed 8 December 2017'; IOM (n12) 35.

foreigners towards countries where the foreigner can be persecuted (Article 75(1) Law 66/VIII/2014) the UNHCR is authorized by Cape Verde to evaluate the asylum claims. Additionally, the law on migration provides against the collective expulsion of foreign nationals (article 74), in accordance with international law, and complies with the international principle of *non-refoulement*, prohibiting expulsion to a country where the foreigner may be persecuted for political, religious, racial, philosophical conviction, or for the purpose of death or imprisonment or other measures involving the perpetration of perpetual or perpetrator's liberty or of indefinite duration or may be subjected to torture, inhuman or degrading treatment.

Following the discourse of the King Mohamed VI<sup>306</sup>, Morocco reopened the BRA on 25 September 2013. Since then, the BRA has been validating individuals that have been granted refugee status by the Office of the United Nations High Commissioner for Refugees. This has important consequences for asylum seekers, as being recognised by the Moroccan government as refugees gives them access to a residency permit. A residency permit will allow refugees to legally work in Morocco as well as allowing access to public services and access to legal housing. The Euro-Mediterranean Human Rights Network adds that several difficulties are stopping refugees from applying for asylum with the UNHCR in Morocco such as the fact that asylum seekers who are refused entry to Morocco at an airport are not able to apply for asylum<sup>307</sup>. Indeed, the only place an asylum claim can be launched is at the UNHCR office in Rabat<sup>308</sup>. A Mobility Partnership project concerns the support of the drafting of a strategy for the reception and integration of refugees. In the framework of this project, the ICMPD works with the CNDH and the MCMREAM in the mapping of the integration of refugees and the creation of a refugee profile.

Bill 26-14 on asylum is ready to be examined by the Governing Council and to begin its legislative adoption process, but since December 2015, its discussion in Parliament has been postponed. The reason for this rescheduling, according to a UNHCR official, is a disagreement between the different ministries on the content of the law<sup>309</sup>. The definition of refugee used by Morocco in Article 2 of Bill 26-14 is the definition included

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<sup>306</sup> Discours de SM Le Roi À L'occasion Du 38ème Anniversaire de La Marche Verte (n210).

<sup>307</sup> Euro-Mediterranean Human Rights Network (n32) 12.

<sup>308</sup> UNHCR, 'Rapport de fin d'année 2016' (2017) 1, 4.

<sup>309</sup> Interview 9, UNHCR, Rabat, 15 January 2016.

in the Geneva Convention. Several improvements are included in this new Bill<sup>310</sup>. This includes the creation of a national authority for refugees and stateless persons, “the Moroccan office in charge of refugee affairs” [*bureau marocain chargé des affaires des réfugiés (BRA)*] (Article 35). This office is under the authority of the Ministry of Foreign Affairs and it aims at replacing the BRA (Article 37). Furthermore, Article 20 recognises refugees' rights under the Geneva Convention including the right to family reunification. Additionally, Article 24 foresees the possibility to be granted subsidiary protection for unsuccessful asylum seekers. The last point that should be noted is that if Bill 26-14 is adopted it will repeal the provision of Article 17(5) of Law 02-03 according to which a refugee had to enter Morocco legally in order to be granted a residency card, which is in contradiction with the Geneva Convention. The Bill includes provisions that are in line with the suggestions put forth by the report of the CNDH<sup>311</sup> such as the possibility to launch a request for asylum directly at a port of entry (Article 7) and therefore comply with the obligation of *non-refoulement*. In the Annex to the Joint Declaration, several projects aim at supporting “the strengthening of the Moroccan legislative and institutional framework for asylum”. These projects are mostly capacity building and advisory initiative to support the development of the new law on asylum and its future implementation. The largest project aiming at supporting the development of the asylum law is the project “*Promouvoir l'intégration des Migrants au Maroc*” introduced earlier.

#### **4.3.2.3. Human trafficking**

A project aimed at supporting Cape Verde in the implementation of the Palermo Convention and its Protocols in relation to human trafficking. It has been translated into the legal framework through the development of new provisions in the revised Penal Code and the new Law 66/VIII/2014. The change brought by Law 66/VIII/2014, in Cape Verde, is the introduction of mechanisms to protect victims of human trafficking with the possibility of granting residency permits to the victims. In June 2015, a new Penal Code was adopted to address this issue<sup>312</sup>. The Government argued for a criminalization, invoking international standards and commitments, and the Parliament

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<sup>310</sup> Projet de loi n°26-14 relative au droit d'asile et aux conditions de son octroi.

<sup>311</sup> CNDH (n293) 4-5.

<sup>312</sup> Decreto-legislativo n°4/2015 (Altera o Código Penal, aprovado pelo Decreto-legislativo n.º 4/2003, de 18 de novembro) BO I Série n°69 11 de Novembro de 2015.

responded to these arguments and authorized the government to legislate accordingly. Law 94/VIII/2015 Article 3-2(3) and 3-3(12) gave the government authorization to include the crime of human trafficking in the new Penal Code. The new immigration law of 2014 has also included a specific provision on human trafficking (absent in the previous act). Subsection IV regulates the granting of residency permits for victims of human trafficking. Article 58 recognizes a right of residence to victims even if they entered the country irregularly and do not fulfil the legal requirements for a residency permit. Additionally, Article 58-6 guarantees victims with insufficient means of subsistence with minimal means as well as access to urgent medical care. Article 97-3 sets that employers who hire victims of human trafficking can face imprisonment. Because of the recent introduction of this crime in the Cape Verdean legal system, official data on trafficking in persons are still residual, which does not allow to size or characterize the phenomenon. There are no records prior to December 2015 and, as of this date, this is the information provided by the Attorney General's Office. It should be noted that there are still no convicted traffickers and no child victims of identified trafficking<sup>313</sup>.

Pursuant to its 2013 National Strategy, Morocco adopted a law specifically dealing with human trafficking<sup>314</sup>. Law 27-14 on human trafficking influenced the modification of the new Penal Code that was adopted in June 2016. Indeed, it added a new section specifically on human trafficking in the Penal Code, introducing 14 new articles. Before its adoption, the CNDH issued a series of recommendations on the Bill. One of the recommendation was regarding the wording of the definition of human trafficking. The definition proposed by the CNDH has been included in Article 448.1 of the Penal Code. The same Article also defines the notion of exploitation in accordance to the suggestions of the CNDH. Still in accordance with the CNDH report, cases that involve minors are more severely punished (Article 448.10). However, all the recommendations have not been considered. For example, concerning Article 1 of Law 27-14, the CNDH recommended adding a first indent to define specific terms related to human trafficking such as vulnerability, slavery or secondary victimisation of the

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<sup>313</sup> IOM (n12).

<sup>314</sup> Dahir n° 1-16-127 du 21 kaada 1437 (25 août 2016) portant promulgation de la loi n°27-14 relative à la lutte contre la traite des êtres humains.

victims<sup>315</sup>. Secondary victimisation does not result directly from a criminal act but from the way the authorities or individuals react to the victim. Law 27-14 does not define terms related to human trafficking contrary to what is proposed by the CNDH and foreseen in a Model Law created by the United Nations Office on Drugs and Crime<sup>316</sup>.

The CNDH in 2016 issued a critical opinion on the content of Law 27-14 where it criticised the provisions foreseen in Article 448.1 as it requires the victim of human trafficking to prove that they were trafficked against their own will. The CNDH proposed to include a mention saying that the consent of the victim is irrelevant in the case of offenses constituting trafficking<sup>317</sup>. Article 448.14 also puts the victim of human trafficking in a position to prove that they were trafficked against their will and under the existence of a threat<sup>318</sup>. These provisions put the victim of human trafficking in a vulnerable position as they could be considered guilty of criminal activities until they can prove the lack of will and the existence of a threat. The CNDH argues that victims of human trafficking should be exempted from criminal charges for prostitution, irregular immigration or other infractions related to the trafficking<sup>319</sup>. This suggestion seems fair as victims should be considered as such and be protected rather than prosecuted, adding to the already existing suffering. Moreover, the CNDH rightly indicates that Article 448.2 does not allow an individualisation of criminal charges according to the importance of the infraction committed. The term “*quiconque*” (whoever), does not consider the offender's personality and the consequences of the gravity of the offense. A clearer formulation of Article 448.2 should be proposed where a specific infraction and the related charges are stated. Next, the proposition by the CNDH to delete the second indent of Article 448.7 has also not been taken into consideration and does not reflect that people other than the ones included in the Law can be threatened<sup>320</sup>. We agree with this proposal because witnesses of human trafficking, other than direct relatives, can also be threatened. For human trafficking offenses to be exposed, witnesses play an important role and should feel sufficiently protected to expose these crimes, in a broader scope than what is currently foreseen by Article 446.7. The CNDH also advised the inclusion of an article that would provide

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<sup>315</sup> CNDH, 'Avis du Conseil National des Droits de l'Homme sur le Projet de Loi n° 27.14 relatif à la Lutte contre la Traite des Personnes', Rabat (2016) 1, 6.

<sup>316</sup> Ibid.; CNDH (n293) 6.

<sup>317</sup> CNDH (n314) 7.

<sup>318</sup> Ibid. 9.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid. 8.

social security protection to victims working in the sector of traditional handicrafts<sup>321</sup> but it has not been added to the law. Additionally, the CNDH encouraged the attribution of residency documents to victims of human trafficking awaiting their trial and to allow the victims to benefit from the basic health care system<sup>322</sup>. Besides the project “*Promouvoir l’intégration des Migrants au Maroc*” which supports the drafting of the new law on human trafficking, a MIEUX project on human trafficking was included in the Mobility Partnership but has been interrupted since 2014. According to an ICMPD official, the aim of the project was to support the drafting of a Protocol on human trafficking, but the new law on human trafficking had to be adopted first<sup>323</sup>. Now that the new law has been adopted, the MIEUX project could be restarted, but it is unclear if it has been<sup>324</sup>.

Finally, it should be noted that the discussions on the law on human trafficking started in Morocco before the launch of the NSIA and conclusion of the Mobility Partnership. The Council of Europe<sup>325</sup> was already involved in discussions since 2012. Moreover, ICMPD launched a MIEUX project in May 2013 (before the conclusion of the Mobility Partnership and Immigration Policy/NSIA), aiming at supporting the Moroccan authorities in elaborating a new protocol on the identification of and assistance to victims of human trafficking, and designing guidelines for field implementation<sup>326</sup>. The Mobility Partnership projects aiming at supporting the implementation of the NSIA and the development of the new law on human trafficking are proposed and implemented a posteriori and support financially and technically the drafting and later the implementation of the law.

#### 4.3.3. Access to socio economic and political rights and to citizenship

In Cape Verde, Law 66/VIII/2014 ends the limitations on the right to education, association, demonstration and strike, as well as trade union rights of migrants in an

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<sup>321</sup> Ibid 9-10.

<sup>322</sup> Ibid. 11-12.

<sup>323</sup> Interview 18, ICMPD, Brussels, 13 May 2016.

<sup>324</sup> According to the draft scoreboard of November 2017 the project is still ongoing with no further information.

<sup>325</sup> Interview 4, Council of Europe, Strasbourg, 21 December 2015; Interview 12 (n297).

<sup>326</sup> For more information about this project: <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/middle-east-north-africa/#c7410> 'Accessed 22 December 2017'.



irregular situation, which constituted a violation of Cape Verde's international obligations. According to the national authorities, in practice, and despite existing legal provisions, migrants in an irregular situation already benefited from these rights. Moreover, the Decree 1-16-115 of 10 August 2016 promulgated Law 01-16 authorizing Morocco to ratify Convention n°143 on Migrant Workers<sup>327</sup>. The ratification of this Convention was one of the objectives of the NSIA<sup>328</sup>, but the Convention has not been ratified so far. The NSIA also foresees the signature and ratification of Convention n°118 on equal treatment (social security) as well as the signature and ratification of the Conventions on statelessness (1954, 1961). No steps forward have been undertaken in this field yet. The project "*Promoting the integration of migrants in Morocco*" is key and has clear political effects for immigrants and refugees in Morocco as it aims at supporting the MCMREAM with the implementation of the NSIA. It includes activities directly aimed at supporting the implementation of the NSIA, on several aspects such as access to health care for regularized migrants and the access for migrants' children to public education.

#### **4.3.3.1. Employment and social security**

Law 66/VIII/2014 introduces the imposition of fines on anyone who irregularly employs a foreigner who has not been granted a residency permit or who authorizes the pursuit of a subordinate professional activity. The Labour Code was modified in 2010 and 2016<sup>329</sup> but the provisions about migrant workers have yet not been amended. It should be noted that the precariousness of the labour market is a reality in Cape Verde for foreigners and for Cape Verdeans. Both nationals and foreigners work mainly without any employment contract. Indeed, informal work is one of the central features of the labour market in Cape Verde. About 70% of foreigners are without a work contract, and this figure is even more prominent among women<sup>330</sup>. According to several migrants' representatives, the main issue related to work is the absence of labour contract<sup>331</sup>. Moreover, a provision that was aimed at protecting migrant workers has unintended effects. According to several migrants' representatives in Cape Verde, it is

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<sup>327</sup> Bulletin Officiel n°6500 du 15 Septembre 2016, 1408.

<sup>328</sup> MCMREAM (n162).

<sup>329</sup> Decreto-Legislativo n°5/2010 (Altera o Código Laboral) BO I Série n°22 de Junho de 2010; Decreto-Regulamentar n°1/2016 (Altera o Código Laboral) BO I Série n°6.

<sup>330</sup> IOM (n12) 29.

<sup>331</sup> Interviews 43 (n128), 44 (n102) and 47 (n102).

now more difficult to find a job if you are an irregular migrant, mostly in the tourist industry and the new measure is seen as a way to fight irregular migration rather than to protect migrant workers' rights<sup>332</sup>.

Since 2015, the process to access the labour market for foreigners (not regularized immigrants) has been eased in Morocco for some high-level profiles and specific positions, as well as for the renewal of an authorization for the same position with the same employer<sup>333</sup>. In this case, the vacancy will not have to be published in the newspapers and the authorization can be given in 48 hours. Additionally, regularized migrants, may since 2015 also work legally without requiring a prior attestation from the ANAPEC and have access to education and training programmes offered by the ANAPEC<sup>334</sup>. One of the goal of the *Sharaka* project is to support the ANAPEC in the integration of regularized migrants in the Moroccan labour market. However, in practice, some migrant representatives are still arguing that access to labour for sub-Saharan migrants is blocked and that only few get employed through the ANAPEC process<sup>335</sup>. Two representatives of an organization working to support immigrants' rights in Morocco added that it is impossible for a sub-Saharan migrant in Tangier to find legal employment because of racism and discrimination<sup>336</sup>. Some respondents, however, noted the slow improvement in the matter<sup>337</sup> and mainly, underlined the new possibility for sub-Saharan migrants to benefit from vocational training as an important step forward<sup>338</sup>. Other major changes have been made such as the extension to non-Moroccans of laws relating to the exercise of certain regulated professions. For example, the implementation of the new Law 112(12) on cooperatives<sup>339</sup> has simplified the procedures for the creation of cooperatives and applied them to foreigners under the same conditions as Moroccans. Additionally, the revision of Laws 43-13<sup>340</sup> and 44-13<sup>341</sup> concerning the professions of nursing and midwifery introduces for the first time

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<sup>332</sup> Interview 44 (n102), 46 (n244), 47 (n102), 48 (n244) and 51 (n102).

<sup>333</sup> Note conjointe (Intérieur-Emploi-Industrie-DGSN-ANAPEC-AMDI) relative à la mise en place d'une Procédure Spécifique d'Octroi de Titre de Séjour pour les Investisseurs Etrangers et Compétences Rares (septembre 2015).

<sup>334</sup> Ministère de l'Emploi et des Affaires Sociales, Stratégie Nationale pour l'Emploi, Comité de pilotage de la SNE du 24 février 2015 1, 62.

<sup>335</sup> Interviews 21 (n101) and 26 (n101).

<sup>336</sup> Interview 24 (n101).

<sup>337</sup> Interview 20, CEI, Rabat, 15 April 2016; Interview 22 (n101); Interview 27, Collectif des travailleurs migrants au maroc, Rabat, 25 April, 2016.

<sup>338</sup> Interviews 21 (n101) and 22 (n101).

<sup>339</sup> Loi 112-12 promulguée par le dahir n°1-14-189 du 21 novembre 2014, publiée au Bulletin Officiel n° 6318 du 18 Décembre 2014.

<sup>340</sup> Dahir n°1-16-82 du 16 ramadan 1437 (22 juin 2016) portant promulgation de la loi n°43-13 relative à l'Exercice des Professions Infirmières, publié au Bulletin Officiel n°6500 du 13 hija 1437 (15 Septembre 2016).

<sup>341</sup> Loi n°44-13 relative à l'Exercice de la Profession de Sage-Femme, publiée au Bulletin Officiel n°6500 du 13 hija 1437 (15 Septembre 2016).

the possibility of exercising these professions in Morocco to the non-Moroccans. It is important to note that all the changes related to access to labour in Morocco are related to the implementation of the NSIA which is supported by the Mobility Partnership.

#### **4.3.3.2. Education**

In Cape Verde, the Decree-Law 2/2010 of 7 May 2010 refers to the conditions of free education<sup>342</sup>. There are no records or data of situations of discrimination of access to education based on gender, age, colour, religious denomination. The major problems that now arise are related to the issue of fairness and real equality of opportunity, not in universal and compulsory education, but at the level of pre-school education, and in secondary and higher education<sup>343</sup>. Concerning the observance of the right to education, it is particularly important to note that in some public education establishments the composition of classes is interwoven with the interests of parents and teachers, and that the distribution of pupils per class obeys to socio-economic criteria, in flagrant violation of the Constitution of the Republic and of the Basic Law of the Educational System. In that regard, Article 4(1) of Decree 2/2010 states that Cape Verde progressively promotes equal access for all citizens to varying degrees of education and equal opportunities in school success. In addition, in its article 6, it is determined that the educational system is addressed to all individuals regardless of age, sex, socioeconomic, intellectual or cultural level, religious belief or philosophical conviction. For the unanimity of migrant's representatives, there is no issue for migrants' children, even if they are in an irregular situation to access education and go to school. The CNDH also provides alphabetization classes with the support of the DGI<sup>344</sup>. The NIS foresees the improvement of the educational system in order to favour the integration of immigrants<sup>345</sup>.

In Morocco, a new Circular 13-487<sup>346</sup> of the Ministry of National Education and Vocational Training of 9 October 2013 authorizes immigrant and refugee children to access public and private schools and non-formal education ("second chance school")

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<sup>342</sup> Decreto-Legislativo 2/2010, de 7 de Maio, Bases do sistema educativo, BOCV, I Série n°17 de 7 de Maio de 2010, suplemento. Repealing tacitly Lei 103/III/90, de 29 de Dezembro, na redacção dada pela Lei 113/V/99, de 18 de Outubro.

<sup>343</sup> Comissão Nacional para os Direitos Humanos e a Cidadania e o PNUD (n126) 66.

<sup>344</sup> Interview 35, DGI, Praia, 23 February 2026; Interview 42 (n121).

<sup>345</sup> EFG Consulting (n13) 55.

<sup>346</sup> La circulaire n°13-487 du Ministère de l'Éducation Nationale et de la Formation Professionnelle du 9 Octobre 2013.

regardless of their administrative situation. Moreover, the registration has been simplified. A campaign aiming at registering children to attend school benefitted to 30,174 children for the year 2014-2015<sup>347</sup>. New programmes are being implemented aiming at promoting cultural diversity and the learning of Moroccan languages and cultures to allow migrants to communicate and understand the habits and values of Moroccan society. The beneficiaries of non-formal education in 2013-2014 were 110 and increased to 362 in 2015-2016 and 688 migrant children have benefitted from courses of Moroccan languages and cultures<sup>348</sup>. Except the migrant representative based in Tangier, all have recognized a vast improvement in the access to education even for children in an irregular situation<sup>349</sup>. The project “*Promouvoir l’intégration des Migrants au Maroc*” provides EUR 3 Million to provide migrant children access to public formal or non-formal education.

#### 4.3.3.3. Health

In Morocco, access to the RAMED now depends on the access to the regularisation process which is only open during specific periods<sup>350</sup>. Refugees benefit from access to the RAMED since 2015<sup>351</sup>. It is requested that everyone (migrants and refugees) present a beneficiary card when going to the hospital excluding *de facto* irregular migrants from accessing hospitals<sup>352</sup>. Most respondents underlined that the RAMED is still not applied to immigrants and as the paper work has to be fully filled out in Arabic it represents another barrier to immigrants that try to make requests in order to access it<sup>353</sup>. However, two respondents argue that the access to health is easier since the regularization period, even though they cannot access the RAMED, because they do not fear being arrested and deported anymore<sup>354</sup>. They add that because of the fear of the police, many irregular migrants were not going to a hospital and therefore totally lacked access to health. The project “*Promouvoir l’intégration des Migrants au Maroc*” provides EUR 3 Million to provide regularized migrants access to the RAMED.

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<sup>347</sup> MCMREAM (n162) 33.

<sup>348</sup> Ibid 37.

<sup>349</sup> Interview 25, APIMA, Rabat, 23 April 2016; Interviews 27, Collectif des travailleurs migrants au Maroc, Rabat, 25 April, 2016 ; Interviews 22 (n101), 23 (n101), 24 (n101) and 26 (n101).

<sup>350</sup> Myriam Cherti and Michael Collyer (n30) 595.

<sup>351</sup> MCMREAM (n162) 74.

<sup>352</sup> Arrêté du Ministère de la Santé 456-11 du 2 Rajeb 1431 (6 juillet 2010) portant règlement Intérieur des Hôpitaux, publié au Bulletin Officiel n. 5926 du 12 rabii II 1432 (17 maris 2011), Article 57.

<sup>353</sup> Interviews 21 (n101) 22 (n101), 23 (n101); Interview 25, APIMA (n348) Interview 26 (n101).

<sup>354</sup> Interviews 20 (n336) and 25 (n348).

No specific developments occurred in Cape Verde in relation to health. According to migrants' representatives and a former Cape Verdean government official, access to health can be a problem because of a lack of money, mainly because medicine costs are not reimbursed and there is a lack of specialists<sup>355</sup>. A Mobility Partnership project illustrates the problem of the lack of funding in the health sector. A project proposed by Portugal was implemented in Cape Verde. This project aimed at building a hemodialysis unit in Cape Verde. This is due to the fact that Cape Verdeans usually go to Portugal in order to be hemodialyzed and have to stay indefinitely in Portugal as they are unable to be treated in Cape Verde. According to a Cape Verdean representative in Portugal, the treatments undertaken in Portugal are financed by Portugal and not Cape Verde<sup>356</sup>. The hemodialysis unit was created in Cape Verde, but it is not functional. According to a migrant representative working on this particular issue, the Cape Verdean government prefers Cape Verdeans to go abroad to be treated because the unit would be exorbitant to run and would require a large amount of clean water which is a scarce commodity in Cape Verde<sup>357</sup>. Moreover, according to the same Cape Verdean representative, Cape Verdeans themselves prefer to be treated in Portugal because being hemodialyzed in Cape Verde would leave them *de facto* out of donor lists<sup>358</sup>. The NIS foresees the improvement of the health system in order to favour the integration of immigrants<sup>359</sup>.

#### 4.3.3.4. Housing

Migrants with low incomes and refugees are now included in social housing programmes in Morocco and can benefit from housing loans more easily<sup>360</sup>. The Moroccan budget for 2015 foresees migrants benefiting from social housing and housing of low property value. The aim of this action is to provide immigrants and refugees with access to property within the framework of the social housing programs subsidized by the State. It amends the conditions of access defined in the legislation governing social housing to allow immigrants who meet defined criteria (duration of

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<sup>355</sup> Interviews 43 (n128) and 44 (n102); Interview 45, Ex-Secretário de Estado dos Negócios Estrangeiros/Former Ambassador, Praia, 16 November 2016; Interviews 46 (n244), 47 (n102), 52 (n245).

<sup>356</sup> Interview 66 (n127).

<sup>357</sup> Idem.

<sup>358</sup> Idem.

<sup>359</sup> EFG Consulting (n13) 55.

<sup>360</sup> Dahir n° 1-14-195 du 1er rabii I 1436 (24 décembre 2014) portant promulgation de la Loi de Finances 100-14 pour l'année budgétaire 2015, publié au Bulletin Officiel n.6320 bis du 2 rabii I 1436 (25 décembre 2014), Article 247.

residence, level of income, professional status), to be eligible for the acquisition of social housing under the same conditions as Moroccans. Moreover, 26 partnerships have been concluded with associations and a framework agreement has been concluded with the Red Crescent which includes housing issues. Housing is an area that did not see much improvement according to migrants' representatives. According to two migrants' representatives, there are still issues to obtain a renting contract<sup>361</sup>. Moreover, the rent asked from migrants is higher than the one asked from Moroccans for the same place and racism and discrimination are still high<sup>362</sup>. Homelessness is not common in Morocco, in 2017 the High Commission for Planning (HCP) said that there are 7226 homeless people in Morocco but according to an NGO (called Jood) helping homeless people, there are over 10000 homeless<sup>363</sup>. Most homeless people are Moroccans but according to the HCP 8,2% are sub-Saharan migrants. The homeless are mainly supported by NGOs or by neighbours but do not benefit of any state support<sup>364</sup>.

No specific developments occurred in Cape Verde in relation to housing. Regular migrants have access to social housing programmes<sup>365</sup>. It was however noted by migrants' representatives and the official of the *Câmara Municipal* in Boa Vista, that it is much easier to find "decent" housing in Praia than on other islands, Boa Vista being the worst-case scenario for immigrants (regular or not) and even Cape Verdeans coming from other islands<sup>366</sup>. Migrants in Praia are not talking about issues linked to housing, nor about discrimination coming from landlords or segregation. The lack of financial means, is the reason that came out of an interview with a migrants' representative when discussing the issue of access to housing<sup>367</sup>. The NIS foresees the improvement of the housing system in order to favour the integration of immigrants<sup>368</sup>.

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<sup>361</sup> Interviews 23 (n101), 26 (n101).

<sup>362</sup> Idem.

<sup>363</sup> Anaïs Lefebure, 'Qui sont les Sans-Abris au Maroc ?' *HuffPost Maroc* (2 October 2017) [http://www.huffpostmaghreb.com/2017/10/02/qui-sont-les-sans-abris-au-maroc\\_n\\_18161064.html](http://www.huffpostmaghreb.com/2017/10/02/qui-sont-les-sans-abris-au-maroc_n_18161064.html) 'Accessed 03 December 2017'.

<sup>364</sup> Aziza Belouas, 'Casablanca : 2 500 à 3 000 personnes vivent dans la rue !' *La Vie écho* (19 January 2017) <http://lavieeco.com/news/societe/casablanca-2-500-a-3-000-personnes-vivent-dans-la-rue.html> 'Accessed 03 December 2017'.

<sup>365</sup> UCI/OFIL (n213) 37.

<sup>366</sup> Interviews 44 (n100), 49 (n135), 52 (n245) and 54 (n244).

<sup>367</sup> Interview 54 (n244).

<sup>368</sup> EFG Consulting (n13) 55.

#### **4.3.3.5. Regularization of irregular migrants and access to citizenship**

The fifth axis of the NIS provides for the updating of the nationality law. The strategy refers to the national interest in allowing foreigners residing in Cape Verde, under certain conditions, to become nationals of the country<sup>369</sup>. In the period under analysis, a draft proposal for the nationality law was developed, which after being discussed and approved by the Council of Ministers, ended up being rejected in the national parliament. There has been no further progress since then.

In 2010, Cape Verde opted for a gradual approach to the process of regularization of irregular immigrants, initially choosing the citizens of a single country and

"[t]aking into account the reasons of a historical, linguistic and cultural nature and aware of the positive contribution that immigrants in general and Guineans, in particular, have been giving in all sectors of the labor market in the country, the Government has decided to take, on an experimental basis, the process of special legalization in favor of the citizens of Guinea-Bissau "<sup>370</sup>.

In 2015, Decree-Law 1/2015<sup>371</sup> on the extraordinary regularization of irregular migrants was adopted. Following the adoption of this law, irregular migrants who had entered Cape Verde before 17 November 2011 and were in an irregular situation had 90 days to apply for a residency permit. If at the end of this period, the immigrant was still in an irregular situation, he could face expulsion from the territory. Several migrants criticized the difficulty of the regularization process saying that many migrants were not able to regularize due to a lack of access to the necessary documents<sup>372</sup>. However, it should be noted that it is largely agreed on that even though foreigners are in an irregular situation this was not a reason for expulsion. Migrants' representatives argue that the only situation when an irregular migrant was deported is when he was convicted of a

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<sup>369</sup> UCI (n212) 46-47.

<sup>370</sup> Decreto-Lei 13/2010, de 26 de Abril (Estabelece um processo especial de regularização dos cidadãos originários da Guiné-Bissau que se encontrem no território cabo-verdiano sem autorização legal de permanência), BOCV, I Série, n°16, 26 de Abril de 2010.

<sup>371</sup> Decreto-Lei 1/2015 Estabelece as disposições necessárias á regularização extraordinária de cidadãos estrangeiros que se encontrem em situação irregular no território nacional BO IS n°1 de 6 de Janeiro de 2015.

<sup>372</sup> Interviews 43 (n128), 48 (n244), 49 (n135), 50 (n135) and 51 (n102).

crime<sup>373</sup>. A new Bill<sup>374</sup> on citizenship was proposed in 2013 but it has yet not been adopted by the Parliament and therefore the Nationality Act has not been modified since 1992. The Bill proposed to raise the requirements for naturalization on grounds of marriage, by requiring five instead of three years of marriage prior to the application (Article 10 of the citizenship Bill). Another change foreseen by the Bill was the fact that only the “regular” residency time spent in Cape Verde would count towards the required years of residency in the naturalization process.

In Morocco, the regularisation of asylum seekers in November 2013, as well as the launch of the regularisation campaign held from January to December 2014 were direct consequences of the NSIA. Following its launch, two main developments occurred: the UNHCR in Morocco started examining asylum claims and issuing refugee cards to successful applicants<sup>375</sup> and a regularisation campaign for migrants was introduced. The categories of migrants affected by the regularisation procedure were set in a Circular of 16 December 2013<sup>376</sup> and are the following: foreigners married to a Moroccan citizen, foreigners married to a foreigner in a regular situation, the children of the above-mentioned couples, migrant workers able to prove the existence of their work contract, foreigners living in Morocco for at least five years and foreigners with serious diseases. Several issues have been highlighted in relation to the documents necessary to prove one’s situation. For example, for migrant workers working mainly in the informal sector utilizing a working visa as a proof and a declaration from the employer, when received, was not accepted as a sufficient proof<sup>377</sup>. A report from the GADEM and FIDH also highlights that in some cases the requirements were higher than Law 02-03 itself. For example, two years of cohabitation were required from married couples when the law did not require any minimum period of living jointly to deliver a residency permit<sup>378</sup>. By the end of the regularisation period in December 2014, 17,916 out of 27,332 migrants had been regularised, at first for a year<sup>379</sup> and 643 out

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<sup>373</sup> Interviews 42 (n121) 44 (n102), 46 (n244) and 50 (n135).

<sup>374</sup> Proposta de Lei que define as condições de atribuição, aquisição, perda e reatuação da nacionalidade cabo-verdiana de abril 2013.

<sup>375</sup> Interview 9 (n308).

<sup>376</sup> Circulaire conjointe du Ministre de l’Intérieur et du Ministre Chargé des Marocains Résidant à l’Étranger et des Affaires de la Migration n°8303 du 16 décembre 2013 régissant l’opération exceptionnelle de régularisation de la situation de séjour des étrangers.

<sup>377</sup> Alecmo and others (n47) 38.

<sup>378</sup> FIDH and GADEM, ‘Maroc: Entre Rafles et Régularisations, Bilan d’une Politique Migratoire Indécise’ (2012) 19.

<sup>379</sup> Sakina Abushi and Hicham Arroud, ‘A Migration Bubble? Reading the New European Neighbourhood Policy in the Moroccan Context’ (2016) Heinrich Böll Stiftung <https://eu.boell.org/en/2016/06/15/migration-bubble-reading-new-european-neighbourhood-policy-moroccan-context> ‘Accessed 13 August 2016’.



of 2937 asylum seekers had been granted refugee cards by the UNHCR<sup>380</sup>. Based on the statistics provided by 2 August 2016, 5471 refugees and asylum-seekers were registered with the UNHCR representative, 2,949 Syrian nationals, 949 of whom were interviewed by the ad hoc committee, and 2522 asylum-seekers of different nationalities. The number of refugees recognized by the BRA on the recommendation of the ad hoc commission reached 687 of various nationalities, including 165 minors and 8 new-borns, children of refugee women. Thirty-Four refugees were resettled by the UNHCR<sup>381</sup>.

Nadia Khrouz underlines that since its launch, this operation of regularisation is regularly presented as concerning irregular sub-Saharan migrants but no other irregular migrants such as Europeans<sup>382</sup>. A second regularisation period for migrants was launched by the King on 15 December 2016 and is based on the same criteria than the first regularisation period. It should be noted that the existence of these regularisation periods does not mean the end of the arrest and detention of irregular migrants. The FIDH and GADEM give the example of a large campaign of arrest in the northern forest of Gourougou, known for its large population of irregular sub-Saharan migrants, occurring shortly after the end of the regularisation period<sup>383</sup>. It seems that this new campaign of regularisation aims at keeping Morocco's good image following the massive deportation of sub-Saharan migrants that occurred in Algeria 11-12 December 2016<sup>384</sup>. One key reason for the launch of the first regularisation period was already the improvement of Morocco's image following an uprising of violence towards sub-Saharan migrants largely criticised by civil society and the media. Finally, it should be noted that the Moroccan Citizenship Code has remained unmodified since the regularization periods making it almost impossible for regularized migrants to be granted citizenship. Accordingly, an official from Expertise France noted that the problem is that there is a lack of vision regarding why migrants are being integrated as it is almost impossible for them to acquire Moroccan citizenship which should be the

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<sup>380</sup> UNHCR, 'Morocco Factsheet', 1 April 2015.

<sup>381</sup> MCMREAM (n162) 112-113.

<sup>382</sup> Nadia Khrouz (n50) 5-6.

<sup>383</sup> FIDH and GADEM (n377) 20.

<sup>384</sup> *Telquel.ma*, 'Campagne de Régularisation des Migrants : ce qu'il faut savoir' (13 December 2016), [http://telquel.ma/2016/12/13/campagne-regularisation-migrants-ce-quil-faut-savoir\\_1527188](http://telquel.ma/2016/12/13/campagne-regularisation-migrants-ce-quil-faut-savoir_1527188) 'Accessed 8 February 2017'; *h24info.ma*, 'Une Nouvelle Opération de Régularisation de Migrants au Maroc' (13 December 2016) <http://www.h24info.ma/maroc/une-nouvelle-operation-de-regularisation-de-migrants-au-maroc/49045> 'Accessed 8 February 2017'.

final aim of integration<sup>385</sup>. A Bill has been under discussion since 2014 to change this provision and give Moroccan women the same rights as Moroccan men; the acquisition of citizenship through their spouse<sup>386</sup>. In November 2017 a Bill has been proposed to the Parliament in order to modify the discriminatory provisions of Article 10 and give the right to foreign men married to Moroccan women to acquire nationality after five years of legal residency in Morocco<sup>387</sup>.

#### 4.3.4. Rights for nationals abroad

In 2013 the inter-ministerial comity of the Moroccans living abroad was created coordinating the new strategy for emigration. Each Moroccan representative interviewed in France considered that these initiatives are only “communication” and “*façades*” and that they concretely do not bring anything to the Moroccan diaspora. According to them, Morocco is only interested in the diaspora’s money in the form of remittances and money spent during their holidays “back home”. One Moroccan representative interviewed in Portugal was however supportive of the actions put in place by the CCME and Hassan II Foundation<sup>388</sup>. The Moroccan organization in Portugal benefits from the help of these two bodies in their activities related to providing Arabic language courses to Moroccan citizens in Portugal as they offer books in Arabic and the services of Arabic teachers<sup>389</sup>.

Françoise de Bel-Air argues that since 2015 transformations in the relations between Morocco and its population living abroad started including bettering consular services and making some administrative procedures easier<sup>390</sup>. A new online portal aims at better informing emigrants about their rights and is centralizing information and services on administrative issues. In 2015 the Moroccan government issued a guide for Moroccans living abroad<sup>391</sup>. This guide explains the priorities of the Moroccan government towards the diaspora. Social programmes for Moroccans abroad are

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<sup>385</sup> Interview 10 (n297).

<sup>386</sup> *bladi.net*, ‘Projet de Loi : les Marocaines Pourront Transmettre la Nationalité à leurs Conjoints Etrangers’ (29 December 2014) [http://www.bladi.net/marocaines-nationalite-conjoints-etranagers\\_40882.html](http://www.bladi.net/marocaines-nationalite-conjoints-etranagers_40882.html) ‘Accessed 27 March 2017’.

<sup>387</sup> Proposition de Loi modifiant et complétant l'Article 10 du dahir n°1.58.250 du 21 safar 1378 (6 septembre 1958) portant Code de la Nationalité Marocaine.

<sup>388</sup> Interview 67 Associação da Comunidade Marroquina em Portugal, Lisbon, 4 November 2017.

<sup>389</sup> Idem.

<sup>390</sup> Françoise De Bel-Air, ‘Migration Profile : Morocco’ (2016) Migration Policy Centre, Policy Briefs, 2016/05 1, 2.

<sup>391</sup> MCMREAM (n229).

foreseen including professional training, mainly for Moroccans living in other Arab or African countries, as well as financial help to allow Moroccan children living in Côte d'Ivoire or Algeria to attend school, university bursaries and repatriation of corpses<sup>392</sup>. Morocco also provides legal assistance to citizens abroad since 2014<sup>393</sup>. Moreover, Macarena Nuno and Farida Souiah argue that keeping economic links with Moroccans abroad is one of the objectives of the Moroccan emigration policy<sup>394</sup>. However, another of the recent priorities presented in the 2015 Guide for Moroccans living abroad is linked to their right to vote. Electronic voting directly from abroad is foreseen as well as specific seats in the Parliament specifically reserved for Moroccan emigrants. However, the law excludes all MRE candidates who have already held official positions or who have already voted in their host countries<sup>395</sup>.

Morocco conducted two more tax agreements after the conclusion of the Mobility Partnership, with Spain and Mali<sup>396</sup>. These tax agreements are not related to the implementation of the Mobility Partnership.

In Cape Verde, the Bill on the establishment of the *Conselho das Comunidades* (Council of the Communities) was adopted in 2013<sup>397</sup>. The new priority consists in the *Conselho das Comunidades* being implemented as soon as possible in consulates and embassies. The latter being an important consultative body for policy adjustment and support for integration of Cape Verdean communities abroad, which includes issues related to their integration in the host countries and their relationship with Cape Verde. The Law initially foresees the implementation of two pilot experiments, one in Europe (the Netherlands) and the other in Africa (Senegal), and then gradually extending to the remaining communities. In this context, the Ministry has been working on the formation of the Consultative Groups, in agreement with the diplomatic and consular representations. The *Ministerio das Comunidades* was closed in 2017 following the last parliamentary and presidential elections of 2016<sup>398</sup>. This has put at least a

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<sup>392</sup> Ibid 32-35.

<sup>393</sup> Ibid 47 ; Circulaire n°430 du 9 juin 2014.

<sup>394</sup> Macarena Nuno et Farida Souiah (n175) 148.

<sup>395</sup> MCMREAM (n229) 23.

<sup>396</sup> The full list of countries and the text of the conventions can be found here: <https://www.tax.gov.ma/wps/portal/DGI/Documentation-fiscale/Conventions-internationales> 'Accessed 12 September 2017'.

<sup>397</sup> Lei 56/VIII/2014, publicada no Boletim Oficial n°7, I Série, de 3 de Fevereiro de 2014, que alterou a Lei 32/VIII/2013, de 2 de Julho.

<sup>398</sup> Interview 69 (n186).

momentary stop to the emigration strategy that was supported and implemented by this ministry.

After the conclusion of the Mobility Partnership, Cape Verde concluded further tax agreements with Macau, Guinea Bissau, Senegal, Spain, and Mauritius<sup>399</sup>. The conclusion of these agreements is not a direct result of the Mobility Partnership as no project specifically foresees the conclusion of such agreements. The reasons for the conclusion of these agreements can be diverse. For example, the agreements with Macau can be explained by Macau's will to strengthen economic relations with other Lusophone countries. Macau is interested in Cape Verde because of its geographical proximity to Europe and West Africa<sup>400</sup>. In this case we can say that indirectly, the existence of a Mobility Partnership arguably could have contributed to the conclusion of the agreement as Macau saw Cape Verde as a country closely cooperating with the EU. In 2003 China created the Forum for Economic and Trade Cooperation between China and Portuguese-Speaking Countries, in Macau. One year before the conclusion of the agreement (in 2010) a Chinese official declared that "Macao plays a unique and constructive role in promoting economic and trade cooperation between the Chinese mainland and Portuguese-speaking countries"<sup>401</sup>. China sees the Portuguese speaking country as a way to enter the European market (through Portugal), the South American market through Brazil, ECOWAS through Cape Verde and Guinea Bissau and the African market in general with Angola and Mozambique<sup>402</sup>. Timor-Leste could also be a point of entry into the Association of Southeast Asian Nations In the case of Spain for example, the three main reasons to conclude such an agreement with Cape Verde are the geographical proximity, Cape Verde's membership in Macaronesia which also includes the Canary Islands (as well as Madeira and the Azores). The third

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<sup>399</sup> Convenção entre o Governo da Região Administrativa Especial de Macau da República Popular da China e o Governo da República de Cabo Verde para Evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos Sobre o Rendimento, Assinada em Macau, aos 15 de Novembro de 2010 BO nº37, I Série, de 2011/09/12, Pág 1793-1811; Aprovado, para ratificação, o Acordo entre a República de Cabo Verde e a República de Senegal relativo à entrada, à estadia, ao estabelecimento e à protecção de bens das pessoas e sua transferência, assinado em Dakar a 4 de Setembro de 2015; Resolução nº 153/VIII/2015 Aprovada, para ratificação, a Convenção entre a República de Cabo Verde e a República da Guiné-Bissau para evitar a dupla tributação e prevenir a evasão fiscal em matéria de impostos sobre o Rendimento, assinada em Bissau, aos 19 dias do mês de Julho de 2015; Convenio entre el Reino de España y la República de Cabo Verde para evitar la doble imposición y prevenir la evasión fiscal en materia de impuestos sobre la renta, y de su Protocolo 2 June 2017; Convenção para evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos sobre o Rendimento, entre o Governo da República de Cabo Verde e o Governo da República das Maurícias, assinada em Washington DC, aos 13 dias de abril de 2017.

<sup>400</sup> Fernanda Ilhéu, The Role of China in the Portuguese Speaking African Countries: The Case of Mozambique, Centro de Estudos sobre África e do Desenvolvimento Instituto Superior de Economia e Gestão da Universidade Técnica de Lisboa, Documentos de Trabalho nº 84 (2010) 1, 16.

<sup>401</sup> Ibid 17.

<sup>402</sup> Ibid 16; Aicep Portugal Global, 'Macau: uma Ponte na Relação Económica entre a China e os Países de Língua Portuguesa' 95 (fevereiro 2017) 1, 5.

point raised was the existence of the Special Partnership (and potentially the related Mobility Partnership) and the determination of Spain to deepen cooperation in this framework, including on trade issues<sup>403</sup>. Cape Verde's goal is now to continue to extend its double taxation convention network, "especially in the countries that are the largest emitters of capital for Cape Verde", but also in Lusophone countries and the sub region<sup>404</sup>.

#### 4.3.4.1. Return, Reintegration and rights of returning migrants

It should be noted that few provisions concerning return and reintegration are included in national laws. Most of the existing programmes are either put in place by IOM or in some cases the EU and the Member States but these projects do not aim at creating laws or policies in the field and do not provide specific rights to the returning migrants either.

Cape Verde concluded an additional Social Security Agreement with Spain<sup>405</sup>. The Mobility Partnership foresees in its main topics the improvement of the social protection of legal migrants, but no specific projects have been proposed in this field. Concerning reintegration, according to a Portuguese official, the numbers are low in Cape Verde as it is not usually used as a transit country anymore<sup>406</sup>. According to two migrant representatives in France, many Cape Verdeans hesitate to return to Cape Verde because of the bad health system in the country and the difficult access to a hospital or specialized services<sup>407</sup>. Moreover, returning to Cape Verde in case of an unsuccessful migration experience is seen as a failure and is rarely the option chosen by Cape Verdean migrants<sup>408</sup>.

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<sup>403</sup> Governo de cabo Verde, 'Cabo Verde e Reino de Espanha Assinam Acordo para Evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos sobre Rendimento' (18 June 2017) <https://governo.cv/index.php/destaques/7856-cabo-verde-e-reino-espanha-assinam-acordo-para-evitar-a-dupla-tributacao-e-prevenir-a-evasao-fiscal-em-materia-de-impostos-sobre-rendimento> 'Accessed 5 December 2017'.

<sup>404</sup> Sara Almeida, 'Cabo Verde expande rede de Convenções Sobre Dupla Tributação', *Expresso das Ilhas* (17 junho 2017) <http://www.expressodasilhas.sapo.cv/politica/item/53624-cabo-verde-expande-rede-de-convencoes-sobre-dupla-tributacao> 'Accessed 5 December 2017'.

<sup>405</sup> Convenio de Seguridad Social entre el Reino de España y la República de Cabo Verde y Acuerdo Administrativo para su aplicación, hechos en Praia el 23 de noviembre de 2012, BOE n°255, de 24 de octubre de 2013, páginas 86186 a 86205.

<sup>406</sup> Interview 34 (n276).

<sup>407</sup> Interviews 54 (n244) and 60 (n174).

<sup>408</sup> Interviews 65 (n196) and 66 (n127).

Morocco is, according to all Moroccan migrants' representatives interviewed (except one representative in Portugal), interested in big investments but not in supporting returning diaspora trying to create small businesses<sup>409</sup>. On the contrary, these migrants' representatives argue that Morocco will try to discourage them to do so<sup>410</sup>.

#### **4.4. Conclusion**

This Chapter is an analysis of the legal and policy frameworks related to migration both in Morocco and Cape Verde and their further developments after the conclusion of the respective Mobility Partnerships. The link between the policy and legal developments and specific Mobility Partnership projects were highlighted where appropriate.

The legal and practical frameworks related to migration can be broad and do not only comprise migration law *per se*. The areas presented in this Chapter cover migration law with the regulation of the entry, stay and exit from the national territory, as well as asylum law and criminal law. Diverse categories of foreigners are regulated differently (migrants, migrant workers, asylum seekers, refugees and victims of human trafficking). The findings of this research provide insights for the analysis of the relevance of the Mobility Partnerships on the development of legal frameworks in Morocco and Cape Verde. By looking at a before and after “picture” of the legal frameworks of both countries, this Chapter highlighted the different legal developments that occurred since the conclusion of the Mobility Partnerships in 2008 in Cape Verde and 2013 in Morocco. In the cases of Morocco and Cape Verde the Mobility Partnership has clearly influenced the development of laws related to the entry and stay of foreigners, human trafficking and asylum.

In Cape Verde, a MIEUX project included in the Mobility Partnership lead to the development of Law 66/VIII/2014 on entry, stay and expulsion of foreigners. The same project lead to the drafting of a new law on Asylum but the law was finally not adopted. Another change brought by Law 66/VIII/2014, in Cape Verde, was the introduction of mechanisms to protect victims of human trafficking with the possibility of granting

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<sup>409</sup> Interviews 61 (n181), 62 (n58) and 63 (n181).

<sup>410</sup> Interviews 61(n181) and 62 (n58).

residency permits to the victims. Another project aimed at supporting Cape Verde in the implementation of the Palermo Convention and its Protocols in relation to human trafficking. It has been translated into the legal framework through the development of new provisions in the revised Penal Code and the new Law 66/VIII/2014. Moreover, a joint border control agreement with FRONTEX was concluded giving the Cape Verdean border authorities better means to effectively apply Law 66/VIII/2014 by developing border procedures, training border guards, sharing best practices and introducing technical equipment to support border guards' work<sup>411</sup>. The conclusion of such an agreement was foreseen by two projects in the Annex to the Joint Declaration. Additionally, France and Cape Verde concluded a "bilateral agreement on concerted management of migratory flows" including a readmission clause, the simplified access to 40 designated professions, police cooperation, the reintegration of migrants returning to Cape Verde and co-development with the diaspora in France. The conclusion of this bilateral agreement was proposed in a Mobility Partnership project. Additionally, Luxembourg concluded an agreement on circular migration with the Cape Verde in October 2015<sup>412</sup>. The Annex to the Joint Declaration already foresaw the introduction of "an initiative on temporary circular migration with Cape Verde". Furthermore, the conclusion by Cape Verde of an EURA and a visa facilitation agreement are clearly the result of the Mobility Partnership as one of the preconditions to conclude a Mobility Partnership is the commitment of the third country to negotiate an EURA.

The scoreboard of the Mobility Partnership with Morocco foresees several projects aimed at supporting Morocco in the development of new laws on immigration, asylum and human trafficking. The conclusion of the Law on Human Trafficking is a consequence of these projects. The project "*Promouvoir l'intégration des Migrants au Maroc*" is a key initiative which supports the development and implementation of the NSIA and supports the development of the three new laws. This project as well as several others aim at supporting "the strengthening of the Moroccan legislative and institutional framework for asylum". These projects are mostly capacity building and advisory initiatives to support the development of the new law on asylum and its future implementation. Besides the project "*Promouvoir l'intégration des Migrants au Maroc*"

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<sup>411</sup> Statewatch (n260) 18.

<sup>412</sup> *Gouvernement.lu* (n268).

which supported the drafting of the new law on human trafficking, a MIEUX project aiming at supporting the drafting of a Protocol on human trafficking was included in the Mobility Partnership.

Both Mobility Partnerships have also influenced the implementation of National Strategies in relation to the integration of immigrants providing further rights to migrants in Cape Verde and Morocco. Both National Strategies on Immigration (and asylum in the case of Morocco) foresee the development of new laws on human trafficking, asylum and migration. These two strategies also include measures to favour the integration of immigrants by opening regularization periods and striving to enhance their access to a set of rights, including the right to healthcare, to education, to better access the labour market as well as political rights such as the right to vote, the right of association and the right to strike. In Morocco the law was revised to include specific provisions for foreigners but in Cape Verde the law usually makes no differentiation between nationals and immigrants (except for some specific political rights).

In the case of Morocco, the EU acted *a posteriori*, supporting Morocco's existing national priorities through various projects, the main ones being "*Promouvoir l'intégration des Migrants au Maroc*" and "*Sharaka*". It is important to note that all the changes related to access to labour, education, health and housing in Morocco are related to the implementation of the NSIA which is supported by the Mobility Partnership. In the opposite case of Cape Verde, the EU has had a *proactive* role, heavily influencing the development of the legal and policy framework of Cape Verde in a more asymmetrical way through several projects included in the scoreboard. In Cape Verde the development of the NIP and NIS is the fruit of distinct phases in which the EU had been involved with since the conclusion of the Mobility Partnership. A first diagnostic report conducted by The Netherlands lead to the NIP. Then the ICMPD implemented a MIEUX project developing the NIS and Action Plan. Concerning migrants' access to rights, the NIS foresees the improvement of the education, health and housing system in order to favour the integration of immigrants. It is interesting to note here that it is the national systems that are being improved as regular migrants benefit from the same rights as Cape Verdean citizens. We believe that when the law does not differentiate between immigrants and nationals for the access to rights it can



show a higher level of integration than a country implementing differentiated laws for nationals and immigrants.

The NIS and NSIA also led to several policy changes that influenced the access to rights for refugees. This is for example the case of the regularization periods or the reopening of the BRA in Morocco that started to deliver refugee cards granting refugees access to rights related to their status. Another Mobility Partnership project also concerns the support to the drafting of a strategy for the reception and integration of refugees. In the framework of this project, the ICMPD works with the CNDH and the MCMREAM in the mapping of the integration of refugees and the creation of a refugee profile.

Moreover, through this analysis the question of the relevance of the legal changes for migrants' rights can also be answered. By looking at the evolution of the legal framework we can analyze whether an immigrant has had access to more rights within the new legal developments or if his situation is worsening. We can see in the case of Morocco that the rights granted to migrants improved in several areas such as the access to labour, to education and housing but rights relative to health have diminished. It is also interesting to note that in the case of Cape Verde some laws are also restricting the rights of migrants such as the new law on entry, stay and exit, which makes it more difficult for a migrant to regularize his situation as more documents are required. Another example is the case of the bill on citizenship that proposed to harden the conditions of access to naturalization. This bill has not been adopted. In both countries the situation of refugees and victims of human trafficking has improved as they now have access to a specific status.

In the next Chapter, we will analyse how and to what extent the legal and policy relevance of the Mobility Partnerships were conditioned by external factors such as the relation between Member States and the third country, the power of negotiation of the third country or its level of administrative capacity.



## **Chapter 5 Contextualisation of the legal and policy developments in Morocco and Cape Verde**

### **5.1. Introduction**

Mobility Partnerships have emerged as important platforms for cooperation on migration issues between the EU and the Member States on the one side and a third country on the other. Throughout this thesis, we have presented the Mobility Partnership tool, analysed its implementation and looked at the legal and policy developments that occurred in Morocco and Cape Verde since the conclusion of their respective Mobility Partnerships. In this Chapter, we will make the links between the projects being developed and implemented in the framework of the Mobility Partnerships and the legal and policy developments that occurred in both countries.

Recently, researchers have shown an increased interest in the consequences of the implementation of Mobility Partnerships. This last Chapter “connects the dots” of our analysis of the implementation of the Mobility Partnerships with Morocco and Cape Verde by providing a detailed overview of the complexity and interaction of various factors and actors. Identifying the relevance of Mobility Partnerships is difficult and therefore we should contextualise it. The chapter, aims at providing a comprehensive picture of how the implementation of Mobility Partnerships’ projects can lead to legal and policy developments.

Mobility Partnerships are soft law instruments and as such are generally considered as not having legal relevance. The main argument in this thesis is that even though Mobility Partnerships are soft law and non-binding agreements they can be relevant for policy and legal developments in third countries through the projects that are implemented. A related argument is that three main factors can condition the legal and policy relevance of Mobility Partnerships: the state of relations between third countries and EU Member States, including postcolonial ties, the power of negotiation of a third country and the administrative capacity of a third country. We will discuss the legal and policy relevance of Mobility Partnerships in Morocco and Cape Verde according to

these three criteria. Evidence suggests that the power of negotiation is among the principal factors conditioning the relevance of Mobility Partnerships and in fact the three factors are usually combined. The way that these three factors condition the relevance of Mobility Partnerships is twofold: they condition the development and implementation of legally or politically relevant projects and they condition the extent to which the EU and the Member States influence the content of new policies or laws being developed in the framework of the Mobility Partnership.

A key aspect of the analysis regarding the importance of the relations between third countries and EU Member States is the role played by bilateral negotiations in the Mobility Partnership and the added value of projects proposed bilaterally by one Member State in the framework of the Mobility Partnership. The importance of postcolonial ties will be assessed in the first section and we will also analyse which country tends to propose and implement the most projects in general and with policy and legal relevance in particular. Member States' cooperation preferences will also be considered as they can explain their behaviour when participating in a Mobility Partnership.

In Section 2, we will explain why the concepts of negotiation power and conditionality are central to analysing the relevance of the Mobility Partnership. This Section will be divided into three parts with each of the sections coinciding with a type of conditionality and a level of power of negotiation. First, the "standard" conditionality used by the EU Commission in its relations with third countries will be described showing that the Commission can use conditionality (even sometimes negative conditionality) to push third countries to follow and implement policies that are favourable to the Commission and which often include the fight against irregular migration. This type of conditionality is used with countries that have a low negotiation power, due to their low geopolitical importance, and which are dependent on EU's development cooperation, such as Cape Verde. The second part discusses the "more for more" conditionality included in Mobility Partnerships, as the Commission realised that it needed to propose more positive incentives to third countries in order to increase cooperation on migration after the Arab Spring uprisings. The third type of conditionality introduced in the last part of this section is "reversed conditionality". "Reversed conditionality" can be used by third countries that have gained an important level of negotiation power because they are

of key geopolitical importance for the Commission in terms of migration control. This is the case of Morocco, which, through its role of “gate-keeper” and close cooperation on border control, became an extremely valuable ally of the Commission in the fight against irregular migration. With “reversed conditionality” a third country can use the conditionality mechanism to its advantage by pushing the Commission to cooperate on issues of the third country’s interest.

Finally, in the last section we will discuss how the administrative capacity of the third country has been instrumental in our understanding of the relevance of Mobility Partnerships, mainly in the development of the content of new policies and laws through Mobility Partnership projects. This last section shows how development aid and capacity building can influence the legal and policy developments in Morocco and Cape Verde. As well as, how the level of administrative capacity may be detrimental to an effective implementation of the developed instruments and other EU priorities such as border control. The power of negotiation influences the way the Member States and the EU can influence the content of policies and laws in third countries. The last part of the Section shows that in some cases the development of administrative capacities in a third country can enhance its power of negotiation.

## **5.2. State of relations between third countries and EU Member States**

In this Section, we will discuss to what extent strong bilateral relations or pre-existing postcolonial ties between the EU Member States and Morocco or Cape Verde have influenced the relevance of the Mobility Partnership they concluded.

### 5.2.1. Influence of the relation between Member States and the third country on the conclusion and the negotiation of the content of Mobility Partnerships

As described in Chapter 1, EU's external migration policy is materialised by a variety of different instruments. Even though Mobility Partnerships are the main tool of implementation of the GAM/GAMM, Mobility Partnerships are expected to remain complementary to existing instruments. Brocza argues that existing relations between the EU and a third country play a significant role when developing the content of the Mobility Partnerships<sup>1</sup>. Moreover, Member States conduct a substantial volume of their external policy goals through EU instruments and cooperation<sup>2</sup>. This does not, however, imply that they give up on their national priorities or preferential relationships with specific third countries. Accordingly, Carrera and Hernandez I Sagrera argue that national migration policies are at the heart of Mobility Partnerships<sup>3</sup>. This argument has been confirmed by several interviewees on the Member States' and third countries' side<sup>4</sup>. In other words, a Member State would agree to participate only if it furthers its national policy.

It is important to understand that without a solid commitment of the Member States partaking in Mobility Partnerships (not only those with postcolonial ties but all Member States that are a part of a Mobility Partnership), they will not be successful as no projects would be proposed or implemented. The main reason why the Commission must accept Member States' preferences when it comes to the conclusion, negotiation and implementation of Mobility Partnerships lies in the nature of Mobility Partnerships itself. Member States are free or not to participate and their inaction cannot be sanctioned. In order to have enough Member States participating in a Mobility Partnership, proposing and implementing projects, the Commission must give priority to Member States' preferences as put forth by an official of DG Home<sup>5</sup>. A reason for

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<sup>1</sup> Stefan Brocza and Katharina Paulhart, 'EU Mobility Partnerships: a Mmart Instrument of the Externalisation of Migration Control' (2015) 3(15) *Eur J Futures Res* 1, 2.

<sup>2</sup> Natasja Reslow, 'EU "Mobility" Partnerships: An initial Assessment of Implementation Dynamics' (2015) 3(2) *Politics and Governance* 117, 123.

<sup>3</sup> Sergio Carrera and Raul Hernández I Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?' (2009) CEPS Working Document 321/October 1, 31.

<sup>4</sup> Interview 8, French Embassy, Rabat, 14 January 2016; Interview 10, Expertise France, Rabat, 15 January 2016; Interview 13, Moroccan Ministry of Labour, Rabat, 19 January 2016; Interview 14, GiZ, Rabat, 20 January 2016; Interview 16, MCMREAM, Rabat, 21 January 2016; Interview 17, Spanish Embassy, Rabat, 22 January 2016.

<sup>5</sup> Interview 29, DG Home Affairs, Brussels, 26 October 2016.

this is the fact that the Member States must secure funding for the projects that they want to implement or at least participate in the funding of multilateral activities. Another official from DG Home underlined that, Mobility Partnerships do not have a specific financial envelope<sup>6</sup>.

The analysis on the content and implementation of Mobility Partnerships conducted in Chapter 3 suggest that EU Member States play a key role in the conclusion and implementation of Mobility Partnerships. First, EU Member States have the last say in the selection of the third country. For Mobility Partnerships to be effectively implemented a sufficient number of Member States have to be interested in a third country. Portugal strongly supported the Cape Verdean candidacy but in the case of Morocco, although France is participating in the Mobility Partnership it is not a firm advocate of its conclusion. In Chapter 1 we saw that third countries usually prefer negotiating on migration issues through existing bilateral relations with Member States and particularly with their former colonial powers. In this case if the former colonial power is not in favour of the conclusion of a Mobility Partnership, the negotiation to conclude such an agreement usually fails. Natasja Reslow already illustrated this point when discussing the case of the negotiations of the Mobility Partnership with Senegal<sup>7</sup>. As presented in Chapter 3, postcolonial ties are of significant importance in determining the cooperation between the EU and third countries and regions and therefore the choice of a country with which to conclude a Mobility Partnership. Meng-Hsuan Chou and Marie Gibert believe that third countries and a Member State which have postcolonial ties will tend to adopt a common position when negotiating with the EU as they will favour the existence of the postcolonial link versus the relationship with the EU<sup>8</sup>. This means that third countries, will usually only agree to conclude a Mobility Partnership if the former colonial power is favourable to it. Both Portugal and France were in favour of the conclusion of the Mobility Partnership with their respective colony, even though the degree of support provided by the former colonial powers were not the same.

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<sup>6</sup> Interview 3, DG Home Affairs, Brussels, 18 November 2015.

<sup>7</sup> Natasja Reslow, 'The Role of Third Countries in EU Migration Policy: The Mobility Partnerships' (2012) 14(4) *EJML* 393.

<sup>8</sup> Meng-Hsuan Chou and Marie Gibert, 'The EU-Senegal Mobility Partnership: from Launch to Suspension and Negotiation Failure' (2012) 8(4) *JCER* 408.

The role taken by Portugal and France in the negotiation of the conclusion of the partnerships is different. Portugal was proactive to a greater extent than France and strongly advocated in favour of Cape Verde's candidacy, while France took less of a leading role. The explanation is multifaceted. As we have seen in Chapter 3, the political circumstances were favourable to Portugal when supporting Cape Verde's candidacy as Portugal held the EU presidency and was interested in deepening ties between Europe and Africa and with Cape Verde in particular. Indeed, Portugal wanted to provide Cape Verde the opportunity to strengthen its links and position towards Europe. Moreover, Mobility Partnerships can be seen as a way to attract funding and projects to a third country. With Cape Verde being highly dependent on external aid, Portugal could see the Mobility Partnership as an added value in this regard, attracting the interests of a broader range of Member States. In the case of France and Morocco, Morocco was already playing a key role of "gate-keeper" conferring it a special position towards the EU. In the case of Senegal, we saw how highly France values its bilateral relations with its former colonies. France being more inclined towards bilateral relations with its former colonies did not play the role of a fervent supporter of the Mobility Partnership as it did not consider it as having an added value. The Cape Verdean and Moroccan governments also give high importance to their relationship with the EU which played in favour of their candidacy. As discussed previously in the thesis, both countries like to be seen as the "best student" in their respective region of influence<sup>9</sup>. Keeping a positive image and close ties with the EU is considered as a priority for both countries. This contradicts the argument according to which the preference for bilateral cooperation weakens the position of the EU<sup>10</sup>.

The country that proposed the largest number of pre-existing projects in the Annex to the Joint Declaration establishing a Mobility Partnership with Morocco was France. According to a Moroccan academic, bilateral relations between France and Morocco as a result of the postcolonial ties play an important role<sup>11</sup>. Spanish officials pointed out that Spain has also had a long history of cooperation with Morocco on migration issues, notably with their common border in Ceuta and Melilla, and that Spain had a

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<sup>9</sup> Chapter 3 pages 6 and 10.

<sup>10</sup> Agnieszka Weinar, 'Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges: Learning from Experiences', EU-US Immigration Systems 2011/02, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole (FI): European University Institute (2011) 5, 14.

<sup>11</sup> Interview 5, AMERM, University Mohammed V, Rabat, 12 January 2016.



strong interest in the conclusion of the Mobility Partnership<sup>12</sup>. Both France and Spain have long histories with Morocco and firmly established interests within the country. According to a Moroccan migrant in France, France no longer plays a key role in Morocco's relations with the EU and the links with Spain are much stronger now<sup>13</sup>. France and Spain also share main concerns; the fight against irregular migration and internal security threats. Rather than the pre-existing cooperation between France or Spain and Morocco, national interests can explain the different approaches taken by these two countries. Spanish official held that they saw the Mobility Partnership as a way to attract increased funding from the EU for their bilateral cooperation with Morocco<sup>14</sup>. An EU official explained that Member States that have concluded a Mobility Partnership have prior access to EU funding for projects implemented with the third country in question<sup>15</sup>, even bilateral projects that they would have implemented anyway.

The vast majority of projects are bilateral activities proposed by EU member States. Bilateral ties are more important than what is proposed in the Mobility Partnerships according to a Moroccan official<sup>16</sup>. These projects are the reflection of their own national interest. EU officials allow the inclusion of these type of projects because it is the condition for an effective implementation of the Mobility Partnerships. An EU official declared that Spain and France exploited the Mobility Partnership with Morocco to promote and implement their own national policies<sup>17</sup>. Member States with strong bilateral ties with the third country play a prominent role in the proposition of projects shaping the content of the Mobility Partnerships. In the case of Cape Verde, it is Portugal, with whom it has postcolonial ties, which proposed the largest number of projects. A Cape Verdean official and academic believes that postcolonial ties favour cooperation because sensitivities between countries are closer<sup>18</sup>. The case of Morocco is different as it is the Netherlands, which has no postcolonial ties with Morocco, which proposed the largest number of projects. The difference between Cape Verde and Morocco could be explained by the fact that decolonisation happened earlier in

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<sup>12</sup> Interview 17 (n4).

<sup>13</sup> Interview 61, Calima, Strasbourg, 1 June 2017.

<sup>14</sup> Interview 17 (n4).

<sup>15</sup> Interview 3 (n6).

<sup>16</sup> Interview 13 (n4).

<sup>17</sup> Interview 29 (n5).

<sup>18</sup> Interview 40, Institute of Social and Legal Sciences of Cape Verde, Praia, 26 February 2016.

Morocco than in Cape Verde. Time can affect the relevance of postcolonial ties<sup>19</sup>. It can also be explained by the preference of Spain and France towards bilateral relations rather than cooperation in the framework of the Mobility Partnership. Representatives of both countries admitted to not including all their bilateral activities in the scoreboard as they wanted their activities to be seen as projects of bilateral national cooperation and not projects linked to the Mobility Partnership which could undermine the national “prestige”<sup>20</sup>. This could be a reason as to why The Netherlands is the country proposing the largest number of projects rather than France or Spain. Another reason could be the fact that The Netherlands has a large immigrant community of Moroccan origin. We can argue that not only do Member States want to keep control of Mobility Partnerships by proposing overwhelmingly bilateral projects, but they also do not want to lose any existing special dynamics with third countries to EU’s influence. Accordingly, Parkes argued that the Member States “wrangle” among themselves to guarantee that third countries with which they have a strong relationship are treated with favouritism<sup>21</sup>. The interest of Member States is however not limited to those with pre-existing historical ties. Cape Verde, for example, cooperates bilaterally with EU Member States on migration issues, primarily with Portugal, but also closely with Spain and France with which it does not share historical ties.

### 5.2.2. Bilateral cooperation vs. cooperation in the framework of the Mobility Partnership: is there an added value?

A Mobility Partnership is generally presented as an “umbrella”, centralising the various bilateral and multilateral projects that are being implemented in a third country (on migration issues). However, we saw in Chapter 3 that not all parties had the same understanding of what should or should not be considered as a Mobility Partnership project. We also saw that not all Member States were willing to include their bilateral activities under the Mobility Partnership “umbrella”. According to French, Spanish and Belgian officials as well as an ICMPD representative from Brussels, the majority of projects being proposed and implemented are bilateral initiatives that in most cases

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<sup>19</sup> Simona Vezzoli, ‘The Role of the State in International Migration: Exploring the Transition from Colony to Independence’ (2014) IMI Working Papers Series 102 1, 13.

<sup>20</sup> Interviews 8 and 17 (n4).

<sup>21</sup> Roderick Parkes, ‘EU Mobility Partnerships: A Model of Policy Coordination?’ (2009) 11(4) *EJML* 327, 343.

would have existed without the Mobility Partnership<sup>22</sup>. When proposing activities during the drafting of the Annex, Member States tended to propose bilateral initiatives that they either had already developed or were planning to develop. For example, France implemented numerous projects related to migration and development and return and reintegration of Moroccans, but they were not included in the scoreboard as France was conducting them independently of the existence of the Mobility Partnership<sup>23</sup>.

If the bilateral projects would have existed anyways the question of the added value could clearly be raised. For example, we discussed in Chapter 3 that projects that were included in the Annex to the Joint declaration but did not further appear in the scoreboard had still been implemented bilaterally. This contributes to the idea that some Member States prefer implementing bilateral initiatives outside of the framework of the Mobility Partnership either for visibility reasons or because their pre-existing links with the third country are strong, such as Portugal with Cape Verde or France and Spain with Morocco. Additionally, we saw that in many cases the projects proposed and implemented were not new and the Member States simply reshape pre-existing initiatives. We argue that if the only way for the Member States to agree to commit to Mobility Partnerships is by including bilateral activities that would have existed anyway or even already ongoing activities, then Mobility Partnerships bring no added value to the proposals made to third countries. Marie Martin argues that Mobility Partnerships' implementation depends on the conclusion of bilateral agreements<sup>24</sup>. However, EU officials prefer cooperative projects among several Member States over bilateral initiatives because they can be of added value. To push for its preference, the funding allocated to Mobility Partnerships projects was partially conditional on the collaboration between member states, funding joint projects in priority. The analysis of the different scoreboards shows that these financial incentives proposed to the Member States were not sufficient to alter their preference for bilateral activities.

Agnieszka Weinar argues that added value projects could be proposed by two actors: a group of Member States or by the EU<sup>25</sup>. Several important new projects were

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<sup>22</sup> Interviews 8 and 17 (n4); Interview 18, ICMPD, Brussels, 13 May 2016; Interview 19, Belgian Embassy, Rabat, 12 April 2016.

<sup>23</sup> Interview 8 (n4).

<sup>24</sup> Marie Martin, 'Extension of Mobility Partnerships with Euro-Mediterranean Partners' [2012] *Panorama, culture and society* 279, 280.

<sup>25</sup> Agnieszka Weinar (n10).

proposed by the EU or jointly by the Member States. The “*Sharaka*” project is an example of cooperation between different partners in order to avoid overlapping of activities. Through the “*Sharaka*” project, seven Member States<sup>26</sup> decided to collaborate on joint initiatives. This “umbrella” project revolves around four different axes: migration and development, mobilization of Moroccans living in Europe, capacity building of the ANAPEC to integrate migrants in the labour market in Morocco and placement of Moroccans in the labour market abroad and return and reintegration. An official from the Ministry of Labour in Morocco argues that there is a lack of funding to implement the projects from ANAPEC and more financial support from the EU is needed<sup>27</sup>. Remarkably, the project “*Promouvoir l’integration des Migrants au Maroc*” for example, was introduced later in the Mobility Partnership with Morocco and benefitted from the largest funding allocated to a Mobility Partnership project in Morocco (at the time), EUR 10 million. It is indicated in the scoreboard that this project aims at supporting the implementation and coordination of Morocco’s National Strategy for Migration and Asylum. The project also seeks to give migrants in Morocco access to basic health care, education for children and labour. When discussing the implementation of this project with an EU official from DG NEAR, he underlined that Mobility Partnerships are a mean of dialogue with third countries and even though the results of the implementation of the NSIA are not major, it is necessary for the EU to keep on supporting the strategy because of the signal that it conveys<sup>28</sup>. According to the official of DG NEAR, having overlaps with projects is not a problem because he considers Mobility Partnerships as a tool aimed at “creating ambitions”, or in other words increasing cooperation with the third country by proposing new initiatives and means of dialogue. According to this official, the role of the Mobility Partnership is financial. The existence of a Mobility Partnership as such confers the third country priority in access to funding<sup>29</sup>. The same official argues that even though the reforms in Morocco are not as advanced as expected by the EU they are significantly more advanced than their neighbouring countries which should be taken into overall account.

When looking at specific topics of projects that could have an added value in the framework of Mobility Partnership we will highlight legal migration and the conclusion

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<sup>26</sup> Germany, Belgium, Spain, France, Italy, The Netherlands and Sweden.

<sup>27</sup> Interview 13 (n4).

<sup>28</sup> Interview 30, DG Near, Brussels, 27 October 2016.

<sup>29</sup> Idem.

of an EU Readmission Agreement (EURA). Legal migration was presented as one of the novelties of the Mobility Partnership. Agnieszka Weinar argues that a Member State modifying its legal order to open new legal migration channels would be a “clear value added of a Mobility Partnership”<sup>30</sup>. However, we saw in Chapter 3 and Chapter 4 that in practice, few projects were implemented which aimed at developing legal migration channels for third country nationals. In Chapter 3, we found that the topic with the lowest implementation *ratio* pertains to *Mobility, legal immigration and integration*. The negotiations of the first Mobility Partnerships, including the one with Cape Verde, were influenced by the idea of a triple win approach using circular migration. Mobility Partnerships were seen as a tool favouring circular migration and therefore enhancing legal migration options for third country nationals in the limits and (temporary) conditions set by the Member States. In the Mobility Partnership with Cape Verde, projects were included favouring the implementation of circular migration schemes with France, Portugal and Luxembourg. Labour migration agreements were concluded with both Portugal and France. In 1997, Portugal concluded an agreement with Cape Verde on Temporary Emigration of Cape Verdean Workers to Work in Portugal<sup>31</sup>. A Mobility Partnership project aimed

“to continue to promote the admission of certain categories of Cape Verdean workers, particularly on a temporary basis and with a focus on circular migration, through the signing of a new protocol on migration questions with the government of Cape Verde extending the scope of the Protocol on the temporary migration of Cape Verdean workers to work in Portugal, signed by the two parties on 18 February 1997”.

In addition, France concluded a new bilateral agreement with Cape Verde several months after the conclusion of the Mobility Partnership. Additionally, Luxembourg concluded an agreement on circular migration with Cape Verde in October 2015<sup>32</sup>. The agreement should simplify mobility and enhance temporary circular labour migration.

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<sup>30</sup> Agnieszka Weinar, ‘Mobility Partnerships – What Impact do they have on Legal Migration and Mobility?’ <http://www.migrationpolicycenter.eu/publication/mobility-partnerships-what-impact-do-they-have-on-legal-migration-and-mobility/> ‘Accessed 25 August 2017’.

<sup>31</sup> Protocolo entre a República de Cabo Verde e a República Portuguesa sobre a Emigração Temporária de Trabalhadores Cabo-Verdianos para a Prestação de Trabalho em Portugal (assinado na Praia, 18 de Fevereiro de 1997), Aprovado pelo Decreto n7/97, de 14 de Abril, BOCV, I Série, n°14.

<sup>32</sup> *Gouvernement.lu*, ‘7e Réunion de Dialogue Politique entre le Cabo Verde et l’UE au Niveau Ministériel et Signature d’un Accord Bilatéral entre le Luxembourg et le Cabo Verde en Matière de Migration’, Press release (14 October 2015) <http://www.gouvernement.lu/5329991/13-dialogue-politique> ‘Accessed 9 February 2018’.

It also aims at fighting irregular immigration and facilitating the reintegration of migrants into their countries of origin<sup>33</sup>. The Annex to the Joint Declaration already foresaw the introduction of “an initiative on temporary circular migration with Cape Verde”.

However, even though the agreements with Portugal and France are signed and ratified by both parties, it remains dubious whether Cape Verdeans have benefitted from this scheme due to the economic crisis in Europe as well as the lack of information provided by the Cape Verdean authorities. The labour migration scheme with France concluded on 24 November 2008 is included in the “Agreement on the joint management of migratory flows concluded between France and Cape Verde”<sup>34</sup>. According to Cape Verdean migrants living in France, the Cape Verdean population does not know this scheme exists and they are not aware of anyone who benefitted from it<sup>35</sup>. We saw in Chapter 4 that the number of Cape Verdeans benefitting from this scheme was limited. The scheme with Portugal has not been utilised much either, partially because of the trouble of securing employment contracts but also owing to an absence of information about the scheme<sup>36</sup>. Similar projects do not exist in the Mobility Partnership with Morocco as, at the time of conclusion, circular migration was considered an inadequate option and no other concrete legal migration options were proposed in place of these schemes.

The economic crisis that struck Europe starting in 2008 had a negative impact on the implementation of Mobility Partnerships in terms of legal migration opportunities. Natasja Reslow has noted that Mobility Partnerships are being implemented in “unfavourable circumstances” resulting in the absence of creation of legal migration opportunities for third country nationals<sup>37</sup>. A representative from the German development agency (GIZ) commented towards this respect, arguing that the question of legal migration and mobility is always pushed to the side. According to this representative, Germany often made proposals to DG Home and DG Devco to

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<sup>33</sup> European Migration Network, ‘2016 Annual Report on Migration and Asylum 25th April 2017 – Final Version’ 1, 58.

<sup>34</sup> Décret no 2011-403 du 14 avril 2011 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Cap-Vert relatif à la gestion concertée des flux migratoires et au développement solidaire (ensemble trois annexes), signé à Paris le 24 novembre 2008.

<sup>35</sup> Interviews 56, Association Cap – Vert Amiens, Amiens, 19 December 2016 (1); Interview 57, Association Cap – Vert Amiens, Amiens, 19 December 2016 (2); Interview 59, Section des femmes du Secteur France du Parti africain pour l'indépendance du Cap Vert (PAICV), Paris, 20 December 2016.

<sup>36</sup> Jorgen Carling, ‘Migration in the Age of Involuntary Immobility: Theoretical Reflections and Cape Verdean Experiences’ (2002) 28(1) *J Ethn Migr Stud* 5, 28; Interview 37, CAMPO, Praia, 24 February 2016.

<sup>37</sup> Natasja Reslow (n2) 125.

implement labour migration projects, but they were rejected because EU officials from these DGs believe that legal migration had to be dealt with at the European level rather than through bilateral agreements with Germany<sup>38</sup>. When Member States made their immigration policy more restrictive and focused on the fight against irregular migration and return<sup>39</sup> it was startling that a Member State was willing to open its labour market while not being supported by the EU, even though it would help materialize the main (official) goal of Mobility Partnerships: legal migration. Moreover, a Moroccan official added that during the negotiations of the Mobility Partnership the question of opening the EU labour market to Moroccans as well as the portability of social rights was crucial<sup>40</sup>. Though, on the Moroccan side, some incoherence on the issue of legal migration can also be found. For example, the project E-BOSLA was stopped even though it favoured access to the Italian labour market for Moroccans. IOM officials declared that the project did not lead to the conclusion of a protocol of understanding with Italy because Morocco was unwilling to continue to train Moroccan migrants to learn Italian, when they were leaving Morocco<sup>41</sup>.

For Cape Verde, the crisis had an even more severe toll, as visa exemption first put forth during the negotiation of the Mobility Partnership, were then replaced in the official Joint Declaration by the term “visa facilitation”. We explained in Chapter 3 that during the talks concerning the conclusion of the Mobility Partnership with Cape Verde, the idea of granting visa exemption to Cape Verde was put forth. The Portuguese official in charge of the visa facilitation center argued that the center would exist until full visa exemption would be put into place “in 5 or 10 years”<sup>42</sup>. Whereas an official of the EU Delegation in Praia declared that visa exemption for Cape Verdeans was not in question and would probably not be for a long-time, due to the economic and “migrant” crisis currently occurring in Europe<sup>43</sup>.

As not all Member States are part of a Mobility Partnership the legal migration schemes can only be bilateral; all Member States would have to agree to such schemes for them

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<sup>38</sup> Interview 14 (n4).

<sup>39</sup> IOM, ‘Migration and the Economic Crisis in the European Union: Implications for Policy’ (2010) <http://www.labourmigration.eu/research/report/12-migration-and-the-economic-crisis-implications-for-policy-in-the-european-union> ‘Accessed 28 August 2017’; Christiane Kuptsch, ‘The Economic Crisis and Labour Migration Policy in European Countries’ (2012) 37(1-2) *Comparative Population Studies* 15.

<sup>40</sup> Interview 13 (n4).

<sup>41</sup> Interview 15, IOM, Rabat, 20 January 2016.

<sup>42</sup> Interview 34, Centro Comum de Vistos/ Portuguese Consulate, Praia, 23 February 2016.

<sup>43</sup> Interview 39, EU Delegation, Praia, 25 February 2016.

to be effective at the EU level. Indeed, Member States independently decide on the total number of migrants that can be admitted into the country to search for work (Article 79(5)). Therefore, legal migration schemes are proposed bilaterally. To have an added value, the Member States that would not have proposed such schemes outside of the scope of the Mobility Partnership should also be proposing legal migration schemes. The analysis of the implementation of Mobility Partnerships showed that countries that proposed such schemes did not all have strong bilateral or postcolonial ties with the third country (e.g.: France and Cape Verde). The conclusion of the scheme between France and Cape Verde can be seen as an added value of the Mobility Partnership. Moreover, Weinar argues that “to give the [Mobility Partnerships] more value added, the legal migration and mobility should go beyond bilateral relations<sup>44</sup>. Participating Member States should think about multilateral initiatives, which bring a real EU dividend”<sup>45</sup>. Several joint projects have been implemented satisfactorily under the legal mobility header. The first project led to the creation of a Common Visa Application Center which has been running since 2010 and which has processed approximately 9000<sup>46</sup> visa applications a year. This project is seen as an important success by the representatives of the EU Delegation in Cape Verde and the Portuguese representative in charge of the Common Visa Application Center<sup>47</sup>. It is characterized by the aforementioned officials as an initiative facilitating the mobility of Cape Verdeans. The Common Visa Application Center has been used since 2013 to process the visas in the framework of the visa facilitation agreement. The main initiative implemented in the framework of the Mobility Partnership in relation to legal migration was the conclusion of a visa facilitation agreement<sup>48</sup> between Cape Verde and the EU in 2013 in parallel to the conclusion of a readmission agreement. Even though visa facilitation is only aimed at a small section of the Cape Verdean population, a representative of the EU Delegation in Praia as well as a Cape Verdean official see the initiative as positive and efficiently enhancing mobility<sup>49</sup>. According to the Portuguese official in charge of it, the Common Visa Application Center is the fruit of the Mobility Partnership<sup>50</sup>. It should be noted that even though it started as a joint

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<sup>44</sup> Agnieszka Weinar (n30).

<sup>45</sup> Ibid.

<sup>46</sup> This example as well as the following used in this section will be taken from the scoreboard of Cape Verde from September 2014 and the scoreboard of Morocco from September 2015.

<sup>47</sup> Interviews 34 (n42) and 39 (n43).

<sup>48</sup> Agreement between the European Union and the Republic of Cape Verde on Facilitating the Issue of Short-Stay Visas to Citizens of the Republic of Cape Verde and of the European Union OJ L 282, 24.10.2013.

<sup>49</sup> Interview 39 (n43); Interview 36, MIREX, Praia, 23 February 2016.

<sup>50</sup> Interview 34 (n42).



initiative between Portugal, Belgium and Luxembourg, since 2014 Portugal is the only Member State to finance the center (without EU funding) even though it now manages visa applications for 14 countries. Thanks to the creation of the Common Visa Application Center it is considerably easier for Cape Verdeans, fulfilling the conditions for visa facilitation, to be granted a visa or to request it. One official of the Ministry of Foreign Affairs pointed out that before the existence of this center, Cape Verdeans had to travel to Dakar to apply for a visa<sup>51</sup>. A second example of a project considered as a “success story” is the CAMPO project. The project aimed to support legal migration and to fight irregular migration of Cape Verdeans towards Portugal and Spain. The Portuguese and Spanish governments and IOM first implemented the project, but it has since been incorporated in the Cape Verdean institutions which formed a part of the *Ministério das Comunidades*. Following the elections of 2016, the project was suspended. According to a Cape Verdean official working on the CAMPO project, in practice the activities proposed were mostly focused on providing information about departure such as facts about the country of destination, including information on weather condition, appropriate clothing to wear in a specific country, and existing study abroad opportunities<sup>52</sup>. However, they did not intervene in supporting Cape Verdeans in finding employment abroad as legal migration was outside of their power. The same official indicated that without the conclusion of a bilateral agreement with a Member State, it would not be possible for Cape Verdeans to find a job and even in cases where such an agreement did exist, like with Portugal, only a few Cape Verdeans could benefit from it<sup>53</sup>. Without the Member States engaging themselves through labour agreements the project remains inoperative as it cannot support the access of Cape Verdeans to Member States labour markets. Moreover, Cape Verdean representatives added that few people inquired about migration at CAMPO because the vast majority were migrating on a tourist visa aiming to overstay irregularly in Europe<sup>54</sup>. In this case, they could not ask the support of CAMPO without raising suspicion from the authorities. Those requiring assistance from CAMPO had already managed to secure a work contract abroad. Finally, the information provided to returnees included the possibilities to study or to find a job in Cape Verde, which was a positive development. However, it was sometimes considered as insufficient according to the official involved in the

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<sup>51</sup> Interview 36 (n49).

<sup>52</sup> Interview 37 (n36).

<sup>53</sup> Idem.

<sup>54</sup> Interview 37 (n36); Interview 49, Camara Municipal, Boa Vista, 25 November 2016.

CAMPO project as usually no concrete opportunities could be offered to returnees due to a lack of existing prospects<sup>55</sup>.

Concerning the conclusion of EU Readmission Agreements, the added value compared to existing bilateral readmission agreements seemed to be the inclusion of a third country national clause that the Member States were not able to negotiate at the bilateral level<sup>56</sup>. However, the conclusion of an EURA would only have a real added value if it was implemented and as we saw in Chapter 4 bilateral readmission agreements are not always effectively implemented (i.e.: the case of Morocco and Spain)<sup>57</sup>. If there is no way to enforce the implementation of the EURA, the third country could be willing to conclude it even though it has no intention to implement it as the cost of concluding the agreement is low. According to a migrant representative from Guinea Bissau, Cape Verde's immigration policy is more "permissible" because Cape Verde itself has a large diaspora<sup>58</sup>. Having this large diaspora gives Cape Verde a better understanding of the difficulties linked to the integration of migrants but also of the burden that readmission can sometimes put on the third country. The migrant representative from Guinea Bissau argues that the existence of this large Cape Verdean diaspora also leads Cape Verde to be reluctant to apply the readmission agreement to third country nationals<sup>59</sup>. Therefore, the conclusion of such an EURA would not be creating real added value. Carrera et. al argue however that EURAs should not be seen as a goal within itself<sup>60</sup>. Indeed, taking into account the example of Cape Verde, the conclusion of the EURA was considered as a way to "dynamise the special relationship with the European Union"<sup>61</sup>. Even though the conclusion of an EURA can be seen as a burden for Cape Verde, the Cape Verdean government believes that any additional cooperation with the EU is beneficial for the country as the basis of Cape Verdean's external relations is its good relationship with the EU. This case exemplifies Carrera and others' argument as it suggests that EURAs can be seen as a way to contribute to strong relations, rather than only a readmission agreement

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<sup>55</sup> Interview 37 (n36).

<sup>56</sup> Sergio Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?' (2016) CEPS civil liberties 87 / January 1, 5.

<sup>57</sup> Lorenzo Gabrielli, 'Corridor Report on Spain: the Case of Ecuadorian and Moroccan Immigrants' (2015) Interact Research Report 2015/15, 1, 14.

<sup>58</sup> Interview 43, Associação dos Guineenses Residentes em Cabo Verde, Praia, 14 November 2011.

<sup>59</sup> Idem.

<sup>60</sup> Sergio Carrera and others (n56) 13.

<sup>61</sup> República de Cabo Verde, 'Programa do Governo, IX Legislature' (2016) [http://www.governo.cv/images/Programa do Governo da IX Legislatura 2016- 2021.pdf](http://www.governo.cv/images/Programa_do_Governo_da_IX_Legislatura_2016-2021.pdf) 'Accessed 11 February 2018' 1, 31.

which disadvantages the third countries concluding them. The use of Mobility Partnerships as a framework for discussion and cooperation can already be seen as an added value as such. It does not only push the parties to discuss issues related to the Mobility Partnership during the different meetings aimed at monitoring and evaluating its progress; according to an IOM official in Rabat, an official of DG NEAR and a former Cape Verdean Ambassador, Mobility Partnerships give strong political signals<sup>62</sup>. An official from DG NEAR added that moving points forwards on an agenda is already important for the Commission<sup>63</sup>. A former high representative from Cape Verde declared that even though Mobility Partnerships are not balanced agreements they are used to create a perspective of equality and possibilities. He added that the Mobility Partnership is a «permanent publicity» tool that creates a favourable diplomatic atmosphere, although, in reality, only the bilateral relations are important<sup>64</sup>.

A point that has yet not been presented is the added value Mobility Partnerships can have if they lead to developments in third countries' legal frameworks. If these developments would not have occurred without the existence of the Mobility Partnership, then there is a clear added value. Even though a direct correlation can be difficult to make between the Mobility Partnership and the potential legal developments, we will seek to draw some causality links in the next section. If a potential connection between the implementation of the Mobility Partnership and legal developments in Morocco and Cape Verde can be identified they can be considered as an added value of the Mobility Partnership, even if the partnership is only indirectly relevant. In the next sub-section, we discuss the potential influence of Member States on the policy and legal developments in Morocco and Cape Verde.

### 5.2.3. Influence on the policy and legal developments

It has been observed in the literature and presented in an interview that the EU is primarily driven by the Member States and mainly under the conditions of the strongest

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<sup>62</sup> Interviews 30 (n28) and 15 (n41); Interview 45, Ex-Secretário de Estado dos Negócios Estrangeiros/Former Ambassador, Praia, 16 November 2016.

<sup>63</sup> Interview 30 (n28).

<sup>64</sup> Interview 45 (n62).

Member States<sup>65</sup>. The literature as well as a Cape Verdean scholar during an interview pointed out that EU's migration policy is dictated by a maximum of five Member States including France and Germany but excluding southern European countries such as Portugal<sup>66</sup>. Therefore, it can be argued that the strongest Member States are making the decisions for the European asylum and migration policy. When we speak about the EU's aim and goals it should not be forgotten that the Member States are behind them. We have discussed earlier that Member States play a prominent role in the proposition of projects, shaping the content of the Mobility Partnerships to their own interests. They propose projects either bilaterally or jointly. However, this does not mean that cooperation on migration issues at the EU level should be dismissed. Member States do face difficulties in the implementation of their national migration policies<sup>67</sup>. Third countries are becoming less willing to cooperate with the Member States as too little is given to third countries in exchange for their support in the fight against irregular migration<sup>68</sup>. The EU and the Member States both share common goals; they want to avoid irregular immigrants and asylum seekers from reaching their territory. Even though bilateral cooperation between Member States and third countries is key, Member States sometimes need to propose incentives that consider third countries' interests. Such incentives include mobility facilitation and migration and development projects. The Mobility Partnership gives a framework to the Member States to offer higher incentives to third countries than what is offered to them at the bilateral level (e.g.: better access to funding or EU visa facilitation). This does not weaken the relation between Member States and third countries, nor the position of Member States within the EU on migration issues but offers a larger variety of tools to be exploited.

The first interest Member States share with the EU lies in the conclusion of an EURA with Morocco including third country nationals who are not Moroccan nationals. Member States are playing a prominent role in the negotiations. Morocco has rejected

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<sup>65</sup> Rosa Balfour and Kristi Raik, *The European External Action Service and National Diplomacies* (2013) EPC Issue Paper, n°73; Patrick Müller, 'EU Foreign Policy: No Major Breakthrough Despite Multiple Crises' (2016) 38(3) *JEI* 359; Sarah Wolff, 'The Politics of Negotiating the EU Readmission Agreements: Insights from Morocco and Turkey' (2014) 16 *EJML* 69, 93; Natasja Reslow, 'Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships' [2012] 34(3) *JEI* 223; Interview 40 (n18).

<sup>66</sup> Stefan Lehne, 'The Big Three in EU Foreign Policy' (2012) Carnegie Europe <http://carnegieeurope.eu/2012/07/05/big-three-in-eu-foreign-policy-pub-48759> 'Accessed 27 December 2017'; Stewart Patrick, 'The EU's Migration Crisis: When Solidarity and Sovereignty Collide' (2015) Council on Foreign Relations <https://www.cfr.org/blog/eus-migration-crisis-when-solidarity-and-sovereignty-collide> 'Accessed 27 December 2017'; Interview 40 (n18).

<sup>67</sup> Steffen Angenendt, 'EU Mobility Partnerships: the "Most Innovative and Sophisticated Tool" of European migration policy?', (2014) migration strategy group policy brief 1, 5.

<sup>68</sup> Ibid.

such an agreement for almost two decades<sup>69</sup>. Mobility Partnerships can be seen as a tool to provide leverage to the negotiations of EURAs with third countries. They can be used to propose a full set of initiatives including migration and development and legal migration possibilities, to counter-balance the burden of an EURA which includes third country nationals. An EU official emphasised that the EU realised that they needed a more balanced approach to allow the EURA a chance to work. Member States did not want to give any positive incentive if Morocco had not accepted to resume the negotiations of the EURA. While inversely, Morocco did not want to restart the negotiations, if no positive incentive were given from the Member States<sup>70</sup>. The Mobility Partnerships provided the EU and Member States the opportunity to give the EURA negotiations a more balanced perspective, as the EURAs and visa facilitation agreements negotiations go hand in hand in the Mobility Partnership. It is the first time that the EU proposed a visa facilitation agreement with a Southern Mediterranean country<sup>71</sup>, in parallel with the conclusion of the EURA. The proposal of a visa facilitation agreement with Morocco is deemed to be “revolutionary” according to an official from the EU Delegation in Rabat<sup>72</sup>. However, Member States also concluded bilateral readmission agreements with Morocco, outside (and even before) the Mobility Partnership. These bilateral readmission agreements did not usually include a third country national clause which made them easier to conclude<sup>73</sup>. A Belgian representative declares that they are frustrated because negotiations are not moving forward for an EURA which explains the fact that there are more and more contacts between the Member States and Morocco to negotiate bilaterally<sup>74</sup>. For example, Belgium concluded a MoU on irregular migration with Morocco to facilitate their readmission.

Additionally, France discussed bilateral visa facilitation with Morocco in 2012<sup>75</sup>. These discussions did not go further as the Mobility Partnership was concluded a year later and included a visa facilitation agreement. In this case, the interests of Member States

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<sup>69</sup> Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘EU Migration Policy in the Wake of the Arab Spring What Prospects for EU-Southern Mediterranean Relations?’ (2012) MEDPRO Technical Report 15 1, 14.

<sup>70</sup> Interview 29 (n5).

<sup>71</sup> Sarah Wolff, *The Mediterranean Dimension of the European Union’s International Security* (Palgrave Macmillan UK 2012) 72.

<sup>72</sup> Interview 6, EU Delegation, Rabat, 13 January 2016.

<sup>73</sup> The Readmission Agreement concluded in 1992 between Morocco and Spain included a third country national clause but readmissions have only been applied on a case by case basis by Morocco.

<sup>74</sup> Interview 19 (n22).

<sup>75</sup> Vincent Duhem, ‘Maroc-Espagne, une Relation qui s’Intensifie’ *Jeune Afrique* (3 October 2012) <http://www.jeuneafrique.com/174027/politique/maroc-espagne-une-relation-qui-s-intensifie/> ‘Accessed 4 January 2018’.

can conflict with EU's interest and impede the conclusion of agreements at EU level. If visa facilitation agreements are concluded with the Member States bilaterally offering an EU visa facilitation agreement can lose its value for third countries and therefore make the "negotiation package" for a readmission agreement less attractive. We can also argue that in this case, the conclusion of the Mobility Partnership would lead to a less favourable perspective in terms of mobility. As the EU visa facilitation agreement is linked to the EURA, it would be highly unlikely for Morocco to conclude such an agreement. Whereas, concluding a visa facilitation agreement with France would have been more likely. This argument is supported by a Moroccan academic and an EU official who believe that the EURA will not be concluded through the Mobility Partnership<sup>76</sup> as no negotiations on the EURA have taken place since January 2015<sup>77</sup>.

A key aspect of the Moroccan NSIA is the regularization of immigrants and the improvement of their access to work and basic rights such as minimum healthcare, access to the labour market and education. This was an unintended consequence of the implementation of the Mobility Partnership as the NSIA was launched only after the conclusion of the Mobility Partnership. The relevance of the Mobility Partnership in the legal and political developments in relation to the NSIA is therefore unintended and a combination of direct and indirect relevance. Mobility Partnerships are directly relevant when the new projects proposed clearly aim at supporting the drafting of a new law. It is indirectly relevant when projects support the general implementation of the NSIA with the policy or legal change being a "side-effect" of the implementation. The relevance is more direct in the case of Cape Verde. Through the projects proposed, Member States can also lead to the development of policies and laws in the third country. For example, the Mobility Partnership with Cape Verde included several diagnosis studies to help the local administration develop their inexistent immigration policy and legal framework. From March to April 2009, The Netherlands conducted a "needs assessment in order to chart Cape Verde's problems and needs in relation to asylum and migration". This corresponds to the first diagnosis report leading to the National Immigration Policy.

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<sup>76</sup> Interviews 5 (n11) and 6 (n72).

<sup>77</sup> Interview 6 (n72).

Strong bilateral ties, mainly postcolonial ties, are one of the factors influencing the content of Mobility Partnerships and therefore the projects being proposed and implemented. This means that they can influence whether Mobility Partnerships are politically or legally relevant for the third country by proposing and implementing relevant projects. This factor is however not necessary for the Mobility Partnerships to be legally and policy relevant. Even though postcolonial ties still play a significant role in relations with both third countries we can see that other Member States can also take an influential role. For example, the Netherlands which has no postcolonial ties with Cape Verde implemented an important policy relevant project setting the foundation of Cape Verdean's immigration policy. We will see that the Member States can impact the way Mobility Partnerships are relevant by influencing the content of legal changes by for example, providing development aid and capacity building. We argue that this influence can be mitigated by the level of power of negotiation of a third country as we will discuss in the following section.

### **5.3. Power of negotiation**

According to a Moroccan academic, everything is related to the interests of the parties and their power of negotiation<sup>78</sup>. Moreover, although the EU is seen as the main negotiator in the Mobility Partnership, the Member States also have a strong negotiation power. For a third country to be a partner, there must be an interest on both sides and a geopolitical and geostrategic equilibrium<sup>79</sup>. In this section, we will see how the distinct types of conditionality can affect the development and implementation of Mobility Partnership and how the power of negotiation can influence the way conditionality is being used.

#### **5.3.1. The use of “classical” conditionality by the EU towards Morocco and Cape Verde**

As presented in Chapter 1, conditionality refers to the relations between political demands and diverse types of incentives such as economic, technical or political. For

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<sup>78</sup> interview 5 (n11).

<sup>79</sup> Interview 13 (n4).

conditionality to work it must be sufficiently attractive to the third country while negative conditionality has to be credible. In Chapter 1 we saw that historically, conditionality was linked to the improvement of the rule of law and democracy in third countries but since the development of EU's external migration policy, conditionality is also used to push third countries to cooperate on migration issues. Chou defines conditionality on migration matters as the use of "development aid or related incentives in exchange for third countries' cooperation in achieving EU migration objectives, such as the tackling of irregular migration"<sup>80</sup>. Conditionality and the instrumentalisation of development aid supports EU's migration policy goals. In order to say that conditionality is effective, policy changes have to occur that would not have happened without the pressure made by the donor<sup>81</sup>. The EU and Member States increasingly use development aid to support their geopolitical interests, including the fight against irregular migration. Meanwhile, third countries' goal to fight irregular migration has not only become a condition for benefitting from EU development aid but also from technical assistance and equipment<sup>82</sup>. Though, at the Member States level, the approach towards conditionality differs. Portugal, for example, usually does not make use of conditionality and its bilateral aid programmes focus mainly on its former colonies disregarding their level of democracy or human rights promotion<sup>83</sup>. Hence, Portugal was not in favour of the EU's conditionality approach but endorsed it because they did not want to "stay out"<sup>84</sup>.

Different tools are utilized in order to implement conditionality and Mobility Partnerships are one of them. According to Natasja Reslow and Maarten Vink, Mobility Partnerships are used to "compensate third countries for their cooperation"<sup>85</sup>. They are presented as "packages" including potential legal migration opportunities and migration and development projects. When Mobility Partnerships are proposed and discussed the accent is put on these aspects rather than on the strengthening of borders or fighting against irregular migration. When analysing the projects proposed as well as the

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<sup>80</sup> Meng-Hsuan Chou, 'EU and the Migration-Development Nexus: What Prospects for EU-Wide Policies?' (2006) Center on Migration, Policy and Society, University of Oxford, Working Paper 37.

<sup>81</sup> Georg Sorensen, *Political Conditionality* (Routledge 2013) 68.

<sup>82</sup> Mohamed Limam and Raffaella A. Del Sarto, 'Periphery under Pressure: Morocco, Tunisia and the European Union's Mobility Partnership on Migration' RSCAS 2015/75 Robert Schuman Center for Advanced Studies Borderlands Project 1, 7.

<sup>83</sup> António Raimundo, 'Mapping the Agency of a Small, Former Colonial Power: Portugal and EU Political Conditionality in Sub-Saharan Africa' (2014) 15(4) *Perspectives on European Politics and Society* 589, 591.

<sup>84</sup> *Ibid* 599.

<sup>85</sup> Natasja Reslow and Maarten Vink, 'Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa' (2015) 53(4) *JCMS* 857, 863.



political discourse, it seems that Mobility Partnerships are not much more than a pleasant way to present an old policy orientation: the fight against irregular migration. When jointly analysing the different Commission Communications' introducing the Mobility Partnership tool between 2007 and 2009 with the actual content of the Mobility Partnerships it can be argued that the main reason to have included positive incentives was to ensure the cooperation of third countries where conditionality might not have been sufficiently efficient. Being evolving instruments, Mobility Partnerships would, in the long run have to include projects not solely focused on the fight against irregular migration in order to keep a satisfying level of incentives for the third country. Therefore, projects that would have been implemented anyway by the Member States should, according to the EU Delegation in Morocco, be included in the scoreboard<sup>86</sup>. According to an IOM representative, it is in the interest of the EU to add all projects in the scoreboard<sup>87</sup>. It is interesting to see that the EU Delegation in Cape Verde<sup>88</sup> does not have the same approach as it does not hold the view that bilateral projects should be included in the Mobility Partnership in each case. This might mean that at the time of the interviews (2016) the continuity of the Mobility Partnership with Cape Verde was no longer a priority. We can say that EU's priorities have been met because all security related projects have been implemented. According to a Portuguese official, the efficiency of the Cape Verdean border control improved<sup>89</sup> as the border officers benefitted from capacity building training such as requesting foreigners to present biometric passports and the updating of their law on migration in order to have a clear and uniform procedure to follow when letting foreigners into the territory. Moreover, the strengthening of the border control capacity also helped the fight against irregular migration and human trafficking. According to a Senegalese migrants' representative in Cape Verde, the cases of irregular migration and human trafficking have entirely stopped since the implementation of the Mobility partnership because it became too difficult to organise irregular embarkations and it became "bad for business"<sup>90</sup>. Moreover, Cape Verde included new articles in the Penal Code in order to criminalise human trafficking. The Mobility Partnership with Cape Verde was legally and politically relevant for Cape Verde via the implementation of the projects related to capacity

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<sup>86</sup> Interview 6 (n72); Interview 7, EU Delegation, Rabat, 13 January 2016.

<sup>87</sup> Interview 15 (n41).

<sup>88</sup> Idem.

<sup>89</sup> Interview 34 (n42).

<sup>90</sup> Interview 54, Association des Senegalais, Praia, 2 December 2016.

building and support of border guards as well as the support towards the development of Cape Verde's legal framework.

When looking at the scoreboard, no new project was implemented since 2014 and the main projects proposed in the framework of the Mobility Partnerships ended by 2014<sup>91</sup>. 2014 is also the date of the entry into force of the EURA between the EU and Cape Verde. According to a Portuguese official, the conclusion of a Readmission Agreement and a Visa Facilitation Agreement was at the heart of the Mobility Partnership with Cape Verde<sup>92</sup>. Now that they are concluded, evidence suggests that the Mobility Partnership is dying. Other factors also show the lack of interest on behalf of some Member States towards Cape Verde. This is the case of France. Until 2014, France was particularly active in the framework of the Mobility Partnership and implemented the largest joint project of the Partnership «*Renforcement des Capacités du Cap-Vert dans la Gestion des Migrations*». After the conclusion of this project, France did not implement any other initiative, nor did it propose any new project. During the fieldwork conducted in Cape Verde in 2016, the size of the French Embassy was being drastically reduced and no interview was granted because according to an official from the French Embassy in Cape Verde, contacted via phone, "France is not having any project in the framework of the Mobility Partnership anymore" and will not propose new ones in the future.

On the Cape Verdean side, the Mobility Partnership is also considered to be dead by the Cape Verdean official who worked on the CAMPO project<sup>93</sup>. While the representative of the Cape Verdean Foreign Affairs Ministry had a more positive perspective and hoped that after the implementation of the security-oriented projects pushed by the EU a new phase including more migration and development initiatives could start<sup>94</sup>. At the time of writing this new phase seems to not have started even though an EU official explained that no one wants to see a Mobility Partnership die and therefore the Member States will always be pushed to propose and fund new initiatives<sup>95</sup>. An EU official said that in the case of Mobility Partnerships that do not

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<sup>91</sup> Except the Common Visa Application Center and the CAMPO project. The latter was included in the Cape Verdean Ministerio das Comunidades and was shut down in 2016.

<sup>92</sup> Interview 34 (n42).

<sup>93</sup> Interview 37 (n36).

<sup>94</sup> Interview 36 (n49).

<sup>95</sup> Interview 3 (n6).

work well, or which are losing the interest of Member States after some years (like Cape Verde), meetings are organised by DG Home in order to keep the parties included in the process. He adds that Mobility Partnerships are used to show the parties' will to work in the long term and that they should normally be consistent and not show any separate phases<sup>96</sup>. However, Cape Verde, as well as Moldova, show otherwise. In both cases we can identify a first phase focused on the fight against irregular migration and border control and a second phase trying to focus on migration and development issues with varying degrees of success. The separate phases do not seem to affect the Mobility Partnership with Morocco in the same way, but this can be due to the fact that cooperation on irregular migration is already well established with Morocco since before the conclusion of the Mobility Partnership. The EU official points out that even though the Member States have political obligations to propose and implement projects and that the EU can put some pressure on them to do so, Mobility Partnerships do not guarantee rights for third country nationals<sup>97</sup>. The EU has little possibility to put pressure on the Member States, which are the central actors of the Mobility Partnership. Financial incentives are not conclusive as we saw regarding the preferred funding offered to the Member States that would propose cooperative projects. Moreover, as the breach of political obligations cannot be sanctioned, Mobility Partnerships' success depends greatly on the will of the parties to comply.

An assumption is that, when a third country has a low level of negotiation power, a Mobility Partnership is mainly used as a tool by the EU and the Member States to impose their interests upon the third country which may only "take it or leave it". Reslow highlights the "take it or leave it" approach taken in the cases of Moldova, Cape Verde and Senegal, where the same Mobility Partnership text was unilaterally proposed by the EU to these third countries with little room for negotiation<sup>98</sup>. If the third country decides to conclude a Mobility Partnership in this configuration its content will presumably be mainly influenced by the EU and the Member States. One can envisage that the power structure would stay the same during the implementation of the Mobility Partnership as long as the EU's interest in the third country in question remains the same. In this case, the projects that would be implemented would also largely be

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<sup>96</sup> Idem.

<sup>97</sup> Idem.

<sup>98</sup> Natasja Reslow (n7) 395.

influenced by the EU and the Member States, including projects having a relevance for the development of the legal framework of the third country. Cape Verde was considered as the “best student” in the region because of its existing cooperation on migration and security issues which played a significant role in Cape Verde becoming a “pilot” Mobility Partnership<sup>99</sup>. The Mobility Partnership being included in the Special Partnership between the EU and Cape Verde, is considered by Meng-Hsuan Chou and Marie Gibert as a symbolic instrument corroborating the determination of Cape Verde to have closer ties with the EU<sup>100</sup>. Additionally, Cape Verde is a small country of half a million inhabitants, that is located 3000km away from European land borders; migration flows from Cape Verde are not a big threat for Europe as Cape Verde is not located on a major migration route towards Europe. In 2015, there were 108 721 Cape Verdeans in Europe most of them located in Portugal (57 636), France (22 292) and The Netherlands (11 997), these numbers have changed minimally since the conclusion of the Mobility Partnership<sup>101</sup>. Furthermore, Cape Verde is highly dependent on foreign, and particularly European, development aid and trade relations. For all these reasons, we argue that Cape Verde has a low level of negotiation power with the EU.

We argue that countries with low negotiating power will be more influenced in the development of their legal and policy frameworks than a country with a high power of negotiation. We do not speak here about the influence on the content of the new laws or policies; in the next section we will see that this type of influence is related to the administrative capacity. What we are discussing here is the influence on the creation of a new law or policy as such; for example, on the decision to launch a new strategy on immigration or to replace an existing law on migration by a new law (but not on the content of this new strategy or new law). In the case of Cape Verde, the development of the NIP and NIS are clearly influenced by the EU and the Member States at each step of the process. Related laws on migration and human trafficking are also clearly influenced by EU and the Member States. Moreover, the high dependence of Cape Verde towards the EU also played a decisive role in its decision to sign the EURA<sup>102</sup>.

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<sup>99</sup> Sergio Carrera and Raul Hernández I Sagrera (n3) 21.

<sup>100</sup> Meng-Hsuan Chou and Marie Gibert (n8) 418.

<sup>101</sup> United Nations, DESA, Population Division, ‘International Migrant Stock 2005 and 2015’ see: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml> ‘Accessed 26 October 2016’.

<sup>102</sup> Linde-Kee van Stokkum, ‘More Mobility for Development! Policy Coherence for Development in Practice: Making the EU Mobility Partnership a Tool for Development in Cape Verde’ (2015) Foundation Max van der Stoel 47.

The Mobility Partnership with Cape Verde included several diagnosis studies to help the local administration develop their immigration policy and legal framework. As we have seen previously, from March to April 2009, The Netherlands conducted a “needs assessment in order to chart Cape Verde’s problems and needs in relation to asylum and migration”. This corresponds to the first diagnosis report leading to the National Immigration Policy. Then, the ICMPD implemented a project under the MIEUX facility aimed at “developing the Cape Verdean national comprehensive migration policies with a view to reducing irregular migration and maximizing migration benefits”. With this project, the NIS and Action Plan were developed. Experts from the Cape Verdean, Dutch, Finnish and French national administrations were involved<sup>103</sup>. An ICMPD representative adds that the initiative of the Strategy comes from Cape Verde with the support of specialists<sup>104</sup>. A second MIEUX project was implemented reviewing and developing the national immigration legal framework. In this project, law academics from Cape Verde and Portugal reviewed the current legislative framework and assessed its consistency with the NIS and other instruments. They provided support and coordinated the legislative proposal drafting process and prepared and reviewed a final proposal for the main legislation to replace Law 6/97 and all related legislative documents. In other words, this project led to the development of Law 66/VIII/2014. Another project aimed at supporting Cape Verde in the implementation of the Palermo Convention and its Protocols in relation to human trafficking. It was translated into the legal framework through the development of new provisions in the revised Penal Code and the new Law 66/VIII/2014.

Before the Arab Spring, Morocco already enjoyed an ever-increasing amount of financial support from the EU in exchange for the implementation of a restrictive migration policy and cooperation on its shared border with the EU. The EU rewarded Morocco’s “gate-keeper” position disregarding its human rights violations towards sub-Saharan migrants and the need to improve its democratic system (e.g.: lack of independence of the justice, blurred separation of powers)<sup>105</sup>. This shows that Morocco’s cooperation in the fight against irregular migration was more valued than its

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<sup>103</sup> ICMPD, <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/sub-saharan-africa/#c7363> 'Accessed 28 December 2017'.

<sup>104</sup> Interview 32, ICMPD, Brussels, 28 October 2016.

<sup>105</sup> Mohamed Limam and Raffaella A. Del Sarto (n82) 8.

respect of human rights and democracy. It should however not be dismissed that Morocco had its own interests in cooperating with the EU on the fight against irregular migration and it might not have only been financial. According to a DG Home official, as a result of the Arab Spring the way of thinking about EU-Moroccan relations started to shift and the EU and the Member States had to give a strong signal showing their support to the Moroccan regime<sup>106</sup>. Closer cooperation through the conclusion of the Mobility Partnership embodied such a sign. Nonetheless, EU support came at a price. The condition was for Morocco to put its promises to deepen its democracy through political reforms into practice or else it would lose EU's financial and political support<sup>107</sup>. We will see in the next section that the attempt to impose conditionality on Morocco was not successful.

The Court of Justice ruling of 2015<sup>108</sup> annulling a Council Decision on trade liberalisation between Morocco and the EU including goods issued from the Western Sahara territory had an important impact on Morocco-EU relations and the consequences are still visible. Morocco suspended its diplomatic relations with the EU following the ruling and relations have not returned to their initial level at the time of writing. Two EU officials argue that the court ruling is an issue of high importance for Moroccan-EU relations and are wondering how the relationship will evolve. They hope that cooperation will resume after being blocked for some time<sup>109</sup>. An official of DG NEAR explained that the ruling had an impact on their work because it put the cooperation on “stand-by” at the political level. DG NEAR officials were not able to discuss the new orientations of the ENP for 2018-2020 and at the time of the interview (November 2016) DG NEAR officials were waiting to see if the programming work could resume. At the time, cooperation was mainly technical and financial<sup>110</sup>. Additionally, Myriam Cherti and Michael Collyer argue that one of the reasons for Morocco's rapprochement with sub-Saharan African countries was the need to get support on the issue of Western Sahara<sup>111</sup>. This point should not be overlooked when analysing the interests of Morocco in the implementation of the NSIA.

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<sup>106</sup> Interview 29 (n5).

<sup>107</sup> European Commission, 'Joint Statement by EU High Representative Catherine Ashton and Commissioner Štefan Füle on Morocco's Future Constitutional Reform' MEMO/11/155, Brussels, 10 March 2011; Mohammed Limam and Raffaella Del Sarto (n82) 11.

<sup>108</sup> CJEU, Judgment of the General Court, Case T-512/12 *Front Polisario v Council*, 10.12.2015.

<sup>109</sup> Interviews 29 (n5) and 30 (n28).

<sup>110</sup> Interview 30 (n28).

<sup>111</sup> Myriam Cherti and Michael Collyer, 'Immigration and Pensée d'Etat: Moroccan Migration Policy Changes as Transformation of "Geopolitical Culture"' (2015) 20(4) *The Journal of North African Studies* 590, 601.

Since the Arab Spring cooperation with Mediterranean countries, including Morocco, on migration management changed. Mohamed Limam and Raffaella Del Sarto argue that the EU increased its pressure on Morocco (and other southern Mediterranean countries) and used the unstable situation to put in place policies following their own interests<sup>112</sup>. This argument can be contested because it does not seem that the EU has the capacity to increase pressure on a country that plays a strategic role in its migration management. Morocco has been considered by the EU as a “gate-keeper” for over a decade in the externalisation of its migration control to neighbouring third countries. Moreover, the population of Moroccans in Europe is important. In 2015, there were 2 507 560 Moroccans in Europe mainly in France (926 466), Spain (699 800) and Italy (425 238). Until 2008, the relations between the EU and Morocco were chiefly focused on irregular migration. An EU official pointed out that the pressure of irregular migration put the negotiation of the readmission agreement with Morocco at the center of the relations<sup>113</sup>. With the Arab Spring uprisings in Southern Mediterranean countries in 2011, the EU had to adapt its migration policy by considering the increasing migration flows coming from the region as well as the potential security threats that could arise from the political unrest. As an answer, the EU launched the dialogue for migration, mobility and security with the southern Mediterranean countries in 2011. The end goal of this dialogue was the conclusion of Mobility Partnerships with Southern Mediterranean countries. For the first time, a Mobility Partnership was negotiated with the third country in order to create a “balanced” proposal. Several officials, from Morocco, Member States and the EU Commission agreed that the Mobility Partnership with Morocco was negotiated in depth<sup>114</sup> showing that Morocco had some leverage that prior countries concluding a Mobility Partnership did not have. An EU official declared that the Annex to the Joint Declaration was not negotiated with Morocco and was only proposed by the Commission and the Member States but this particular Annex was rejected by Morocco and led to a fully renegotiated document (the first scoreboard) to which projects related to the NSIA were added and projects

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<sup>112</sup> Mohamed Limam and Raffaella A. Del Sarto (n82) 1.

<sup>113</sup> Interview 29 (n5).

<sup>114</sup> Interviews 6 (n69), 13 (n4), 14 (n4), 17 (n4), 7 (n86); Interview 9, UNHCR, Rabat, 15 January 2016; Interview 28, DG Home Affairs, Brussels, 20 October 2016.

that were not in Morocco's interests were deleted<sup>115</sup>. Certainly, due to its strategic geopolitical position, Morocco has a high negotiation power with the EU.

### 5.3.2. The “more for more” approach

The difference regarding conditionality linked to the Arab Spring uprising was the inclusion of a “more for more” approach. The Communication on a Partnership for Democracy and Shared Prosperity of 2011 stated the justification behind this move, emphasizing that a “radically changing political landscape in the Southern Mediterranean requires a change in the EU's approach to the region”<sup>116</sup>. Two subsequent EU Communications further clarified the “more for more” approach<sup>117</sup>. With the “more for more” approach, the third country must show its willingness to cooperate with the EU on its migration objectives in order to get EU's support tailored to its needs<sup>118</sup>. This new conditionality approach can partially explain the supportive role taken by the EU in the case of the Mobility Partnership with Morocco and particularly in the development and implementation of Morocco's NSIA.

It is crucial to understand the causality between the Mobility Partnership and the NSIA as well as the sequential order of developments. The Mobility Partnership was concluded first. Shortly after, the Moroccan King launched a series of new policies on immigration and asylum that would later be materialised under the NSIA. Most of the officials interviewed agreed that the NSIA was first related to Morocco's political strategy and the will of the King<sup>119</sup>. This does not dismiss EU's influence, through the implementation of the Mobility Partnership, on the development of the NSIA<sup>120</sup>. One Moroccan official added that because officials and experts drafting the different reports studied mostly in Europe they shared European values and ways of thinking and therefore the EU had an indirect influence<sup>121</sup>. According to a Moroccan official, the Mobility Partnership is supporting the King's will by substantiating it through the

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<sup>115</sup> Interview 7 (n86).

<sup>116</sup> European Commission, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean' COM(2011) 200 final, Brussels, 8 March 2011 1, 3.

<sup>117</sup> European Commission, 'A New Response to a Changing Neighbourhood' COM(2011) 303, Brussels, 25 May 2011; European Commission, 'Delivering on a New European Neighbourhood Policy' JOIN(2012) 14 final, Brussels, 15 May 2012.

<sup>118</sup> European Commission (n117) 3.

<sup>119</sup> Interviews 5 (n11), 6 (n72), 7 (n86), 9 (n114), 13 (n4), 14 (n4) and 16 (n4).

<sup>120</sup> Interviews 5 (n11), 9 (n114) and 13 (n4).

<sup>121</sup> Interview 13 (n4).



development of new laws<sup>122</sup>. According to the same representative the EU has to act in financial and technical support. Even though an official from the EU Delegation in Morocco argues that the EU had pushed for this direction for several years<sup>123</sup>, EU officials argue that the launch of the strategy was a surprise<sup>124</sup>. According to an official from the Council of Europe, the issue of human trafficking, for example, was not a priority of Morocco in 2012-2013 but it considerably gained in importance and was included in the NSIA<sup>125</sup>. One EU official adds that during the negotiation of the Mobility Partnership, the reference to the Geneva Convention was a problem because Morocco did not agree on its provisions in relation to migrants' rights or asylum rights<sup>126</sup>. Moreover, according to an EU official, even though Morocco disregarded the work of civil society organisations, it was this same work of bringing forth and vocalizing the Moroccan authorities' mistreatments and abuses of the rights of sub-Saharan migrants that pushed the King to take measures to improve Morocco's image towards the EU and Africa. The pressure of the civil society compelled the King to act and was one of the factors leading to the launch of the immigration policy and later the NSIA<sup>127</sup>.

The launch of the NSIA seemingly implies a complete reversal of the position of Morocco during the negotiations of the Mobility Partnership. According to an EU official, had they known about the NSIA at the time of the negotiation of the declaration, the joint declaration would have been drafted in a different way<sup>128</sup>. The strategy covers several aspects such as access to health care, the right to legal housing and the fight against human trafficking. Another initiative financed by the project "*Promoting integration of migrants in Morocco*", was included as a new project in the scoreboard and started in 2014. It aimed at drafting a strategy for the reception and integration of refugees, asylum seekers and their families, directly relating to the NSIA. The understanding that the EU takes a reactive position, by supporting the NSIA's implementation *a posteriori* rather than a proactive role is shared both by the EU and Moroccan interviewees, officials and academics<sup>129</sup>. Morocco set its policy orientations and indicated its needs to effectively implement the NSIA. This is in line with Mohamed

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<sup>122</sup> Interview 13 (n4).

<sup>123</sup> Interview 6 (n72).

<sup>124</sup> Interviews 6 (n72) and 7 (n86).

<sup>125</sup> Interview 4, Council of Europe, Strasbourg, 21 December 2015.

<sup>126</sup> Interview 7 (n86).

<sup>127</sup> Idem.

<sup>128</sup> Idem.

<sup>129</sup> Interviews 5 (n11), 6 (n69), 7 (n86), 13 (n4), 16 (n4) and 17 (n4).

Berriane, Hein de Haas and Katharina Natter's argument that Morocco's officials "play an active role in shaping the country's migration policy" taking into account its own interests and needs in terms of immigration policy and geopolitical positioning<sup>130</sup>. We concur with Berriane, de Haas and Natter arguing that Morocco's agency is often overlooked, with the country being inaccurately portrayed as a "passive recipient" of EU migration policy<sup>131</sup>.

As seen previously, the Mobility Partnership is a flexible instrument and the Annex and scoreboard are living documents. The Annex was reviewed following the launch of the NSIA. Four new projects were added to the Mobility Partnership directly supporting the implementation of the NSIA. Moreover, one pre-existing project on human trafficking now supports the NSIA. These projects are in accordance with Moroccan needs. They were first proposed by the EU and the Member States to Morocco, considering Morocco's new policy orientations. Then, an EU official declared that they were discussed with Morocco that accepted them<sup>132</sup>. In the case of Morocco, the new laws supported by the Mobility Partnership are part of the NSIA and are in line with the policy and strategy put forth by the King.

The Moroccan NSIA is based on the adoption of three laws on migration, asylum and human trafficking. Only the law on human trafficking has been adopted so far. Two MIEUX projects are included in the Mobility Partnership and aim at strengthening the capacities of the Moroccan authorities in the implementation of the NSIA. The first project concerns support for the drafting of a strategy for the reception and integration of refugees. The ICMPD works with the CNDH and the MCMREAM in the mapping of the integration of refugees and the creation of a refugee profile. Experts from the Belgian, Portuguese and Dutch national administrations are involved in this project as well as representatives from NGOs<sup>133</sup>. The second MIEUX project on human trafficking has been interrupted since 2014 according to a source from the Council of Europe<sup>134</sup>. The aim of the project is to support the drafting of a Protocol on human trafficking, but the new law on human trafficking had to be adopted first according to an ICMPD staff

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<sup>130</sup> Mohamed Berriane, Hein de Haas and Katharina Natter, 'Introduction: Revisiting Moroccan Migrations' (2015) 20(4) *The Journal of North African Studies* 503, 517.

<sup>131</sup> Ibid.

<sup>132</sup> Interview 7 (n86).

<sup>133</sup> ICMPD, <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/middle-east-north-africa/#c7410> 'Accessed 28 December 2017'.

<sup>134</sup> Interview 4 (125).

member<sup>135</sup>. In this project French and Belgian experts were involved<sup>136</sup>. Now that the new law is adopted the MIEUX project could be restarted, but it is unclear whether it has. The project “*Promoting the integration of migrants in Morocco*” is key and has clear policy relevance for immigrants and refugees in Morocco as it aims at supporting the MCMREAM with the implementation of the NSIA. Additionally, the “*Sharaka*” project influenced the lifting of the authorization requirements for accessing the labour market for migrant workers.

According to the EU Commission, “those that go further and faster with reforms will be able to count on greater support from the EU. Support will be reallocated or refocused for those who stall or retrench on agreed reform plans”<sup>137</sup>. According to this logic, if the EU supported the implementation of the NSIA it is because it fulfilled its expectations. According to a Moroccan official, it seems that the EU is only primarily interested by the NSIA but not by the questions of labour and mobility<sup>138</sup>. The SPRING programme unlocked EUR 10 Million, specifically for one new project to support the implementation of the strategy. It appears that there are three main benefits for the EU in the development and implementation of the NSIA. First, the EU wants to avoid irregular immigrants or asylum seekers from reaching EU’s territory. To achieve this goal, the EU uses its policy of externalisation of immigrants and refugees’ reception. Since over a decade, the EU externalised some of its migration control to neighbouring third countries to fight the entry of irregular migrants in its territory, converting them into EU’s “gate-keepers”<sup>139</sup>. The implementation of the Regional Protection Programme, in line with the European strategy of externalisation of refugees’ reception, aims at involving third countries in the procedure of reception of asylum seekers<sup>140</sup>. As noted by Lavenex and Wichmann, the RPP is a manner for the EU to share the “burden” of asylum seekers and refugees with neighbouring third countries such as Morocco<sup>141</sup>. Boswell puts it plainly and declares that the EU supports “refugee protection in countries or regions of origin, so that they would not be obliged to seek asylum in Europe”<sup>142</sup>.

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<sup>135</sup> Interview 18 (n22).

<sup>136</sup> ICMPCD, <https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/middle-east-north-africa/#c7410> Accessed 28 December 2017.

<sup>137</sup> European Commission (n116) 5.

<sup>138</sup> Interview 13 (n4).

<sup>139</sup> Sandra Lavenex, ‘Justice and Home Affairs and the EU’s New Neighbours: Governance beyond Membership?’ 89 in Karen Henderson (ed), *The Area of Freedom, Security and Justice in the Enlarged Europe* (Palgrave Macmillan UK 2004) 94.

<sup>140</sup> European Commission, ‘Regional Protection Programmes’ COM(2005) 388 final, Brussels 1 September 2005.

<sup>141</sup> Sandra Lavenex and Nicole Wichmann, ‘The External Governance of EU Internal Security’ (2009) 31(1) *JEI* 83, 91.

<sup>142</sup> Christina Boswell, ‘The “External Dimension” of EU Immigration and Asylum Policy’ (2003) 73 *In. Aff* 619, 624.

Mobility Partnerships have been criticised for achieving EU's "disguised" externalisation of migration control<sup>143</sup>. Stefan Brocza and Katharina Paulhart agree with this argument and describe Mobility Partnerships' first interests as expanding EU's migration scope of influence and externalise its borders<sup>144</sup>. In addition, The Regional Development and Protection Programme for North Africa was aimed to be included in the Mobility Partnership in order to support migration management and asylum with third countries<sup>145</sup>. The RDPP "aims at improving protection of refugees and migrants and providing alternatives to irregular migration by enhancing dignified living conditions and opportunities"<sup>146</sup>. The Italian interior ministry is coordinating the RDPP. There are additional capacity building projects and border management projects that aim at avoiding irregular migrants crossing the Mediterranean Sea. An UNHCR official declared that DG Home coordinates the project<sup>147</sup>. According to a Moroccan migrant representative in France as well as a Moroccan working in an NGO supporting migrants' rights in Morocco, the EU uses Morocco to do its "dirty job"<sup>148</sup>.

EU's support for Morocco's new NSIA can be seen as a way for the EU to externalise its migration and refugees' reception, keeping Morocco in its usual role of "gate-keeper". Accordingly, Spanish representatives in Rabat argue that as the NSIA was not foreseen, all the projects proposed in the framework of the Mobility Partnership had to be changed because Spain had a high interest in this strategy, as it avoided migrants from coming to Europe<sup>149</sup>. The Moroccan strategy, by regularizing immigrants and improving their access to work and basic rights such as minimum healthcare, access to the labour market and education, is a sign that Morocco recognises its role as a country of settlement<sup>150</sup> and it could influence migrants to settle in Morocco<sup>151</sup>. These

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<sup>143</sup> Euromed Rights, 'EU-Morocco Mobility Partnership: Border Control at the Expense of Human Lives?' (2014) <http://www.euromedrights.org/publication/eu-morocco-mobility-partnership-border-control-at-the-expense-of-human-lives/> 'Accessed 20 August 2017'.

<sup>144</sup> Stefan Brocza and Katharina Paulhart (n1) 6.

<sup>145</sup> According to the draft scoreboard of November 2017 this project has been included in the scoreboard.

<sup>146</sup> RDPP General Info Sheet 27.12.2016 <https://tunisia.iom.int/activities/projet-rdpp-d%C3%A9veloppement> 'Accessed 5 September 2017'.

<sup>147</sup> Interview 9 (n114).

<sup>148</sup> Interviews 24, Red Chabaka, Tanger, 22 April 2016; Interview 61 (n13).

<sup>149</sup> Interview 17 (n4).

<sup>150</sup> Hein de Haas, 'Morocco: Setting the Stage for Becoming a Migration Transition Country?' (2014) MPI <https://www.migrationpolicy.org/article/morocco-setting-stage-becoming-migration-transition-country> 'Accessed 27 December 2017'; Mohamed Berriane, Hein de Haas and Katharina Natter, 'Introduction: Revisiting Moroccan Migrations' (2015) 20(4) *The Journal of North African Studies* 503, 517.

<sup>151</sup> On the argument that migrants move because of their need for secure livelihood opportunities: Prakash Adikhari, 'Conflict-Induced Displacement, Understanding the Causes of Flight' (2013) 57(1) *Am J Polit Sci* 82; Hein de Haas, 'Mediterranean Migration Futures: Patterns, Drivers and Scenarios' (2011) 21(1) *Glob Environ Change* S59; Karen Duke, Rosemary Sales and Jeanne Gregory, 'Refugee Resettlement in Europe' 105 in Alice Bloch and Carl Levy, *Refugees, Citizenship and Social Policy in*

migrants may have initially only transited through Morocco in the hopes of entering Europe. According to the literature as well as a migrants' representative in Morocco, the strengthening of borders combined with an improvement in immigrants' situation and rights, may transform the transit situation into a more permanent settlement<sup>152</sup>. The main Member States joint project, "*Sharaka*", aims at supporting the labour related component of the NSIA. Moreover, Member States participate in numerous initiatives relevant to the implementation of the NSIA and the enhancement of the capacity of Moroccan authorities in order for them to be fully able to effectively implement the new strategy. The sub-section on capacity building will discuss this point in detail.

The second interest of the EU lies in the conclusion of an EURA with Morocco including third country nationals. Morocco has rejected such an agreement for almost two decades<sup>153</sup>. Mobility Partnerships can be seen as tools to provide leverage in the negotiations of EURAs with third countries. Indeed, they can propose a full set of initiatives including migration and development and legal migration possibilities, to counter-balance the burden of an EURA including third country nationals. An EU official emphasises that the EU realised that they needed a more balanced approach to give the EURA a chance to work. He added that Member States did not want to give any positive incentive if Morocco had not accepted to resume the negotiations of the EURA. While inversely, Morocco did not want to restart the negotiations, if no positive incentive were given from the Member States<sup>154</sup>. The Mobility Partnerships provided them with the opportunity to give the negotiations of the EURA a more balanced perspective.

Moreover, the EU had been criticized for striving to conclude an EURA with a country that does not respect migrants' rights, nor has a proper procedure to receive asylum claims in place. The European Parliament highlighted the fact that EURAs in some cases do not conform with human rights obligations<sup>155</sup>. The NSIA can contribute to having a well-functioning asylum system recognising the status of asylum seekers and refugees and recognising their rights. The new law on asylum will help materialise the

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*Europe* (Basingstoke Palgrave Macmillan 1999) 106 on the importance of the access to the labour market in the decision to settle; Interview 26, CEI, Rabat, 25 April 2016; Interview 27, Collectif des travailleurs migrants au Maroc, Rabat, 25 April, 2016.

<sup>152</sup> Myriam Cherti and Michael Collyer (n111) 597-598; Interview 26 (n141).

<sup>153</sup> Sergio Carrera, Leonhard den Hertog and Joanna Parkin (n69) 14.

<sup>154</sup> Interview 29 (n5).

<sup>155</sup> Paula García Andrade and Iván Martín, EU Cooperation with Third Countries in the field of Migration, Study, DG for Internal Policies, Policy Department C, European Parliament, PE 536.469, 2015 available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL\\_STU\(2015\)536469\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf) 'Accessed 01 February 2018'.

strategy. This explains why the EU has an interest in supporting the NSIA as it will enhance its legitimacy to negotiate such an agreement. The development of the new Moroccan law on asylum can be influenced by the support provided through the Mobility Partnership as a specific project aims at supporting the three laws foreseen by the NSIA including the one on asylum.

Sergio Carrera, Leonhard den Hertog and Joanna Parkin underlined that the use of the “more for more” conditionality approach might not be the most efficient way to conclude an EURA. The EU has attempted to conclude such an agreement for over a decade without success. It is doubtful that putting constant pressure on Morocco will favour cooperation. Moreover, the visa facilitation agreement does not seem a sufficient bargaining chip as not everyone can benefit from it. For the time being it does not seem that the package that constitutes all the different Mobility Partnership projects would be sufficient for Morocco to accept to sign such an agreement. Moreover, as the EU failed to conclude EURAs with Cotonou countries (except Cape Verde) Morocco is afraid of becoming the country of return by substitution for African countries declining to re-accept their nationals<sup>156</sup>. Moreover, the importance for the EU of the inclusion of a clause in EURAs obliging third countries to accept returnees that only transited through their territory to reach Europe seems inconsistent with the actual number of returns<sup>157</sup> and might not be worth it.

A new programme of EUR 35 Million aiming at supporting Morocco’s migration policy and the NSIA was accepted in December 2016<sup>158</sup>. Part of the funding of this project is conditioned by the EU to the adoption of the three new laws on migration, asylum and human trafficking. The condition was for Morocco to put its promises into practice or else it would lose EU’s financial and political support<sup>159</sup>. Yet, as an EU official pointed out, since the EU was not able to make a credible threat due to limited political support, the conditionality mechanism was weak and ineffective<sup>160</sup>. The EUR 35 Million were allocated to Morocco even though only one law out of three had been adopted. This contradicts Thomas Feige, the head of the Maghreb division at DG Devco, who argued

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<sup>156</sup> Niels Coleman, ‘European Readmission Policy: Third Country Interests and Refugee Rights’ (Leiden: Brill 2009).

<sup>157</sup> European Commission, ‘Evaluation of EU Readmission Agreements’ COM(2011) 76 final, 23 February 2011.

<sup>158</sup> European Commission, ‘Décision d’Exécution de la Commission du 15.12.2016 relative au Programme d’Action Annuel 2016- Partie 3 en Faveur du Maroc à Financer sur le Budget Général de l’Union’ C(2016)8836 final, Brussels, 1 December 2016.

<sup>159</sup> European Commission (n107); Mohamed Limam and Raffaella A. Del Sarto (n82) 11.

<sup>160</sup> Interview 29 (n5).

that “funds will no longer be granted ... (and) ... will be injected only depending on the results of reforms”<sup>161</sup>. This raises the question of the existence of a hierarchy of issues in which conditionality can be applied or not.

EU financial support to judicial reforms have been frozen before<sup>162</sup>. Additionally, Limam and Del Sarto argued that the address made by the EU Ambassador to Morocco saying that “[t]he more a country will make efforts to deepen its democratic quality in the future, the easier it will be for it to receive political and financial support from Europe. This also means that whoever made the least effort will receive less”, had a clear impact on the conclusion of the Mobility Partnership with Morocco<sup>163</sup>. This would mean that not only is the Mobility Partnership a “leg” of the “more for more” approach, but the conclusion of the Mobility Partnership has been pushed by the fear of losing financial and political support from the EU. The main weakness of this argument is that usually conditionality was not applied to Morocco on immigration issues as it has an important geopolitical position for the EU. Therefore, Morocco probably did not fear sanctions so long as it would keep cooperating on migration issues.

### 5.3.3. The use of reversed conditionality by Morocco

The analysis conducted in this Chapter until now was fairly Eurocentric and showed different methods used by the EU to impose policy changes or cooperation on irregular migration to third countries. In this subsection, we look at the other side of the coin and discuss how Morocco, a country with a high power of negotiation, can also push the EU to cooperate on its own interests. Michael Teitelbaum has for nearly three decades argued that countries of emigration could pressure destination countries by using migration as a threat in foreign policy talks<sup>164</sup>. Several other authors have argued that third countries can use consultations on migration issues to their benefit<sup>165</sup>. Jean-Pierre Cassarino explains how negotiations on the EURA can empower third countries and

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<sup>161</sup> Mohamed Limam and Raffaella A. Del Sarto (n82) 11.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Michael Teitelbaum, ‘Immigration, Refugees, and Foreign Policy’ (1984) 38(3) *International Organization* 429.

<sup>165</sup> Jean-Pierre Cassarino, ‘Informalising Readmission Agreements in the EU Neighbourhood’ (2007) 42(2) *The International Spectator* 179; Nora El Qadim, ‘La Politique Migratoire Européenne Vue du Maroc: Contraintes et Opportunités’ [2010] *Politique Européenne* n°31; Ahmet İçduygu and Damla Aksel, ‘Two-to-Tango in Migration Diplomacy: Negotiating Readmission Agreement between the EU and Turkey’ (2014) 16 *EJML* 337; Sarah Wolff (n65).

give them the opportunity to use “reversed conditionality” and Emanuela Paoletti uses the term “migration of power”<sup>166</sup>.

It should be remembered that for the externalisation of migration and asylum reception to work efficiently, Morocco must be willing to cooperate with the EU, which means that good relations with the country must be kept. As such, accepting Morocco’s “reversed conditionality” is the price to pay. Morocco knows that it has a high negotiation power with the EU because of its “gate-keeper” role but also because it is a key trading partner and a country that cooperates on terrorism issues. In practice, Morocco’s “reversed conditionality” might even be stronger than EU’s conditionality. According to two EU officials<sup>167</sup>, the new programme of EUR 35 Million, previously mentioned, should have been launched following the adoption of the three new laws (on migration, asylum and human trafficking) because the aim of the programme is to financially support their implementation. However, the project was launched without this EU condition ever being met. According to an EU official, Mobility Partnerships are a mean of dialogue with third countries and even though the results of the implementation of the NSIA are not major, it is necessary for the EU to keep on supporting the strategy because of the signal that it conveys<sup>168</sup>. Another EU official also underlines the high importance of the political dialogue with Morocco<sup>169</sup>. Moreover, the EUR 35 Million project has been unlocked in a tense climate between the EU and Morocco still resulting from the *Polisario* ruling. It seems that the funds have been allocated in order to show the “good will” of the EU to keep solid relations with Morocco.

Since 2013, Morocco shifted its migration policy towards a more “humanist” and less repressive approach, following harsh critics on their human rights abuses of sub-Saharan migrants<sup>170</sup>. The NSIA concluded in 2014 materialises this new policy orientation. Morocco has several interests in the development and implementation of the NSIA. First, a Moroccan academic and a member of Expertise France put forth that

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<sup>166</sup> Jean-Pierre Cassarino, ‘Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications’ 1 in Jean-Pierre Cassarino (ed) *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Special edition, Middle East Institute Viewpoints (2010) Washington DC; Emanuela Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya* (Palgrave Macmillan 2010).

<sup>167</sup> Interviews 6 (n69) and 7 (n82).

<sup>168</sup> Interview 30 (n28).

<sup>169</sup> Interview 2, EEAS, Brussels (by phone), 15 October 2015.

<sup>170</sup> Mehdi Alioua, ‘Régularisations des Etrangers au Maroc : Analyse d’une Décision Historique mais surtout Stratégique’ *Yabiladi* (15 November 2013) <https://www.yabiladi.com/articles/details/20944/regularisation-ettrangers-maroc-analyse-d-une.html> ‘Accessed 12 January 2018’.



the NSIA improves Morocco's image<sup>171</sup>. According to a Moroccan migrants' representative living in France, for Morocco its image is crucial<sup>172</sup>. The literature corroborates this argument and Sakina Abushi and Hicham Arroud argue that the Moroccan policy shift was a way to gain a better image internationally and show sub-Saharan countries that it improved the treatment of sub-Saharan migrants<sup>173</sup>. An EU official declared that 2013 was a dreadful year for sub-Saharan migrants and, as we saw in Chapter 4, many reports criticized the way Morocco was treating them, notably in the North of the country<sup>174</sup>. There was a strong international mobilization on the issue of the mistreatment of sub-Saharan migrants in Morocco, relayed by several reports from civil society and international organizations and through documentaries. Members of Expertise France and the Council of Europe in Rabat pointed out that having good relations with Africa is a new priority for Morocco, which wants to be a major interlocutor on African issues and strengthen its economic relations with the African continent<sup>175</sup>. In 2014, only a few months after the launch of the new immigration policy, Morocco concluded 17 economic agreements with sub-Saharan countries<sup>176</sup>. Moreover, sub-Saharan Africa represented in 2014 6,4% of Moroccan international trade compared to 4,4% ten years ago<sup>177</sup>. This is in line with Morocco's "Politique Africaine"<sup>178</sup> also materialised by the fact that Morocco once again joined the African Union in 2017. According to a Moroccan academic and an EU official, improving relations with African countries of origin was one of the main reasons for the adoption of such a strategy in the first place<sup>179</sup>. Myriam Cherti and Michael Collyer also recognise Morocco's sudden policy turn as a more proactive policy that echoes Morocco's own political interests for Africa<sup>180</sup>.

Morocco is using "reversed conditionality" to benefit from important amounts of EU and Member States funding, for the implementation of the NSIA. Morocco is taking advantage of the interest of the EU towards the implementation of the NSIA by

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<sup>171</sup> Interview 5 (n11) and 10 (n4).

<sup>172</sup> Interview 61 (n13).

<sup>173</sup> Sakina Abushi and Hicham Arroud, 'A Migration Bubble? Reading the New European Neighbourhood Policy in the Moroccan Context' (2016) Heinrich Böll Stiftung, <https://eu.boell.org/en/2016/06/15/migration-bubble-reading-new-european-neighbourhood-policy-moroccan-context> 'Accessed 13 August 2016'.

<sup>174</sup> Interview 6 (n72).

<sup>175</sup> Interviews 10 (n4); Interview 12, Council of Europe, Rabat, 19 January 2016.

<sup>176</sup> Myriam Cherti and Michael Collyer (n111) 601.

<sup>177</sup> Ministère de l'Economie et des Finances, 'Relations Maroc-Afrique : l'Ambition d'une Nouvelle Frontière' (2014) 1, 10.

<sup>178</sup> Royal Institute for Strategic Studies, 'La Politique Africaine du Maroc', 26 Octobre 2015.

<sup>179</sup> Interviews 5 (n11) and 6 (n72).

<sup>180</sup> Myriam Cherti and Michael Collyer (n111).

influencing the EU and the Member States to propose projects that would financially or technically support the NSIA as a condition to effectively implement the strategy. They are also requesting funds in exchange for making progress in the implementation of the strategy. The CNDH, from the beginning, is highlighting the necessity of financial aid from the EU and adds that this should be a priority of the Mobility Partnership<sup>181</sup>. Since the launch of the NSIA, funding has increased extensively as immigration issues have become more policy relevant but also because Morocco was in a better position to ask for funding.

One side of Morocco's aspirations in its relations with the EU on migration matters is often overlooked. Nora El Qadim exposes the fact that not only economic interests or an improved "image" explain the shift in Moroccan migration policy towards a less security-oriented approach; "dignity and (self-) respect" features are often presented as a central aspiration<sup>182</sup>. This argument is interesting when used in the context of Morocco's negotiation with the EU notably on visa issues. Nora El Qadim explains that Moroccans were pushing the EU to negotiate a visa facilitation agreement because the process to apply for a visa to enter Europe is considered humiliating by Moroccans<sup>183</sup>. Some Moroccan officials talked about the lack of "dignity and respect" in relation to the procedure to obtain a visa to Europe<sup>184</sup>. The Moroccan population and officials see the freedom of circulation as a "symbol of economic and social privilege"<sup>185</sup>. Additionally, Moroccan officials find it unfair that EU citizens can enter Morocco without a visa when Moroccans do not have the same right when it comes to entering Europe<sup>186</sup>. A Moroccan official argued that since Moroccans need to have a visa to travel to Europe, they tend to settle in Europe rather than travel back and forth according to European labour needs<sup>187</sup>. A representative of the MCMREAM added that, because Moroccan migration is becoming increasingly long term, the requests for family reunification increased. Moreover, Moroccan authorities would like the visa facilitation agreement to be non-conditional on the conclusion of an EURA<sup>188</sup>. The EU

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<sup>181</sup> CNDH, 'Foreigners and Human Rights in Morocco for a Radically New Asylum and Migration Policy' (2013) Rabat 1, 9.

<sup>182</sup> Nora El Qadim, 'De-Europanising European Borders: EU-Morocco Negotiations on Migrations and the Decentering Agenda in EU Studies' 134 in Marc Woons and Sebastian Weier (eds), *Critical Epistemologies of Global Politics* (E-International Relations Publishing 2017) 143.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid 145.

<sup>186</sup> Interview 13 and 16 (n4).

<sup>187</sup> Interview 16 (n4).

<sup>188</sup> Idem.

seeing the visa facilitation agreement as a bargaining chip to conclude an EURA with Morocco is not likely to accept this proposition. This scenario shows the dynamism in the power relationship between Morocco and the EU as both sides use the conclusion of an agreement (EURAs or visa facilitation) as a bargaining chip in its relation to the other.

#### **5.4. Administrative capacity of third countries**

The last Section will present how the level of administrative capacity of a third country can explain the degree of legal and policy relevance of Mobility Partnerships. We will discuss how countries with a low administrative capacity can be influenced not only in the development of legal and policy-relevant projects but also in the content of the policies and laws themselves.

##### **5.4.1. Third countries as recipients of development aid**

Development aid is mainly constituted of financial support from donors towards a third country called “in development”<sup>189</sup>. Jean-Claude Berthelemy argues that development aid is classically given to countries with which the donor has stronger ties or similar political orientations<sup>190</sup>. Capacity building is tightly related to development aid and will be analysed in the next sub-section. Development aid can cover many different areas such as education, health, labour market development and is also closely linked to migration. The GAM/GAMM as a global approach links development aid to migration management. First, as a tool to prevent migration, as it is believed that by developing the country of origin fewer migrants would seek to come to Europe<sup>191</sup> but also as a bargaining tool in order to push third countries to cooperate on restrictive migration policies in exchange for development aid. Cape Verde has been historically dependent on development aid as the country is not self-sustainable. One of the reasons for Cape

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<sup>189</sup> Moosa Elayah, ‘Lack of Foreign Aid Effectiveness in Developing Countries between a Hammer and an Anvil’ (2016) 9(1) *Contemporary Arab Affairs* 82, 83.

<sup>190</sup> Jean-Claude Berthelemy, ‘Bilateral Donors’ Interest vs Recipients’ Development Motives in Aid Allocation: Do All Donors Behave the Same?’ [2005] *Cahiers de la Maison des Sciences Economiques* 1, 9-10.

<sup>191</sup> The argument according to which the development of third countries will lead to less migration towards Europe has been debunked, for example, in: Stephen Castles, Hein de Haas and Mark Miller, *The Age of Migration: International Population Movements in the Modern World* (fifth edition Palgrave Macmillan 2014) 25-29. Further information on this point can be found in Chapter 1.

Verde to seek closer ties with the EU lays in the fact that the EU is the biggest aid donor and that it would help Cape Verde to secure funding. Mobility Partnerships are seen not only by both Morocco and Cape Verde's officials, but also by Spanish representatives as a tool to attract more funding for projects<sup>192</sup>.

First, it should be noted that the EU is not the only development aid donor in Cape Verde and Morocco. Other important international donors such as the UN and USAID for example, fund activities in these countries. Besides that, some EU Member States have particular bilateral development aid programmes such as for example Portugal and Luxembourg with Cape Verde or Spain, France and Germany with Morocco. As we can see, postcolonial ties are not always the reason for a Member State to develop a strong bilateral development aid scheme. Moreover, as we previously saw (in Chapter 3) there is a multitude of actors involved in the implementation of Mobility Partnerships, including international organisations such as UNDP, IOM or ICMPD. These international organisations, similarly to the Member States, cooperate in the framework of the Mobility Partnership as well as outside of that framework with Morocco and Cape Verde.

When analysing the projects proposed in the Mobility Partnerships with Morocco and Cape Verde under migration and development topic we can notice that they are not the most common initiatives. In the case of Morocco most of the migration and development projects are pre-existing projects. However, some initiatives are worth a closer look. In Cape Verde, it is mainly Portugal and Spain that propose these types of projects. France also proposed one project and the other Member States party to the Mobility Partnership did not propose any at the time of its conclusion. An interesting point to raise concerns a project proposed by Cape Verde to foster cooperation between hospitals in Member States and Cape Verde. As a response to the Cape Verdean demand, Portugal launched a project to support the Cape Verdean national health system in the fields of haemodialysis and oncology. This development project had unintended consequences on migration. Before the creation of an hemodialyzer unit at the Hospital Agostino Neto in Praia, people needed to be evacuated, mainly to Portugal, in order to be treated. Since the creation of the unit, the Ministry of Health

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<sup>192</sup> Interviews 13 (n4), 17 (n4), 34 (n42) and 39 (n43); Interview 33, Direção Geral das Comunidades, Praia, 23 February 2016.

noted that the number of people that needed to receive health treatment in Portugal dropped. This example shows that appropriate development projects can have a “positive impact” on migration issues. According to a Cape Verdean representative in Lisbon, working for an NGO dealing specifically with issues related to haemodialysis the impact is more tenuous<sup>193</sup>. According to him, the haemodialysis unit has been created in Cape Verde, but it is not functional. He argues that the Cape Verdean government prefers Cape Verdeans to go abroad to be treated because the treatments undertaken in Portugal are financed by Portugal and not Cape Verde. In addition, the unit itself would be exorbitant to run and would require a large amount of clean water which is a scarce commodity in Cape Verde. Moreover, Cape Verdeans themselves prefer to be treated in Portugal because being haemodialyzed in Cape Verde would leave them *de facto* out of the donors’ lists, according to the same migrant representative. In Cape Verde, projects related to migration and development are mainly conducted at a bilateral and sometimes multilateral, Member States, level. When we look at the Annex to the Joint Declaration with Morocco, new migration and development projects are mainly proposed by France and include initiatives on skill development or auto entrepreneurship. It seems that most of the bilateral projects on migration and development have not been included in the Mobility Partnership.

In Cape Verde, the EU and the Member States are not the only donors supporting migration initiatives. The UN, for example, supported the Migration and Development Working Group included in the Ministry of Foreign Affairs<sup>194</sup>. The One UN Programme also supported children victims of irregular migration and helped to strengthen the capacity of the government on children protection issues<sup>195</sup>. The project "Migration House" of Cape Verde consists of migration data research and analysis to develop capacities of the government in addressing the key problems associated with migration. It aims at enabling Cape Verde's Government to answer to the challenges posed by the new migration trends on the islands. The "Migration House" of Cape Verde is an IOM programme in cooperation with the United Nations Development Programme and the United Nations Population Fund. These projects are usually not

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<sup>193</sup> Interview 66, Associação Girassol Solidario, Lisbon, 4 November 2017.

<sup>194</sup> United Nations, 'Cape Verde an Emerging Nation' (2010) 1, 27.

<sup>195</sup> *Ibid* 39.

included in the scoreboard. We can argue that this is normal as these projects are not Mobility Partnership related projects (not involving the EU or a Member State).

When looking at Morocco, we can take the example of the NSIA to try to better understand the role of all parties and the extent of development aid. 14 out of the 27 specific objectives of the NSIA are supported by European projects<sup>196</sup>. Through the Mobility Partnership, the SPRING programme unlocked EUR 10 Million, specifically for one new project to support the implementation of the strategy. According to an official of DG Devco, DG NEAR is coordinating this project<sup>197</sup>. This EUR 10 Million project was divided into two sub-projects. The first one is a budget support programme that aims at financing two primary areas of intervention of the NSIA: education and health. With this budget, migrants' children should be integrated into the Moroccan education system and a special health care programme for migrants should be implemented. The situation of migrants' children's access school has been improved and more children can access formal or non-formal education. However, in terms of health care, we saw that only regularised migrants can theoretically access the RAMED but that in practice only Moroccan citizens can benefit from the health care system. These achievements were presented in Chapter 4. The second sub-project included under the SPRING programme is a project to promote migrants' integration in Morocco. It covers special capacity building provided to the newly developed MCMREAM (we will discuss this project in more detail in the next sub-section as it is related to capacity building) as well as an initiative called "*Parcours vers l'insertion*" (Path to insertion) and the "*Tamkine-Migrants*" initiative. The "*Parcours vers l'insertion*" initiative is organised in collaboration with the Office of Vocational Training and Work Promotion (*Office de la Formation Professionnelle et de la Promotion du Travail*) and aims at training at least 1500 migrants on labour and market access issues. This project is part of the broader "*Sharaka*" project that aims at supporting the development of the Moroccan employment agencies and the access to the labour markets in Morocco as well as in Europe. According to a representative of Expertise France, the agency in charge of the "*Sharaka*" project, the part of the "*Sharaka*" project that aims at supporting the access of Moroccans to the French labour market does not work because the border is closed

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<sup>196</sup> MCMREAM, 'Stratégie Nationale pour les Marocains Résidant à l'Etranger, Bilan 2013-2016' (2016) 1, 91.

<sup>197</sup> Interview 1, DG Devco, Brussels, 28 October 2015.

and with the migration crisis it is no longer a priority<sup>198</sup>. This project is a problematic one as it exemplifies overlaps of initiatives and maladministration of funding as the GIZ, the German development agency, conducted similar training courses in parallel to the ones organised by the Office of Vocational Training and Work Promotion under “*Sharaka*” as no common ground between the different parties involved could be found. According to a member of Expertise France, the result was that every person in the projects’ target group could benefit from such a programme twice, leading to unnecessary spending<sup>199</sup>. The coordination between the Member States is poor. According to a representative of an implementing organization, Sweden, France and Belgium cooperate but other Member States do not and rather conduct bilateral activities in “secret”<sup>200</sup>. According to the same representative, Spain used the “*Sharaka*” funding to finance bilateral activities with Morocco without informing the other “*Sharaka*” partners. As an ICMPD officer mentioned, “Mobility Partnerships aid creative accounting”<sup>201</sup>. A member from Expertise France adds that there is no real will of Member States to act jointly under the “*Sharaka*” project<sup>202</sup>. A GIZ representative explains Germany’s lack of cooperation by the fact that Germany already funds many initiatives at the EU level and it does not aspire to also “fund the whole Mobility Partnership”<sup>203</sup>. Representatives of the GIZ believe that Mobility Partnerships are a framework that provide many opportunities, but the Mobility Partnership with Morocco is not exploited to its full potential because of a lack of sufficient financial contributions from Member States<sup>204</sup>. The Spanish representatives think that “*Sharaka*” is not a useful project because it only hires French experts. They also argue that the cooperation is Eurocentric and that the projects proposed are not adapted to Morocco because they are too large<sup>205</sup>. A Belgian official in Rabat argued that Belgium is not financing “*Sharaka*” (even though officially they are part of the fourth pillar) because they think that the project does not bring anything helpful to Morocco as there are a lot of overlaps and the projects are not new<sup>206</sup>.

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<sup>198</sup> Interview 10 (n4).

<sup>199</sup> Idem.

<sup>200</sup> Idem.

<sup>201</sup> Interview 31, ICMPD, Brussels, 27 October 2016.

<sup>202</sup> Interview 10 (n4).

<sup>203</sup> Interview 14 (n4).

<sup>204</sup> Idem.

<sup>205</sup> Interview 17 (n4).

<sup>206</sup> Interview 19 (n22).

“*Sharaka*” is the key project related to migration and development even if it focuses mainly on access to the labour market. DG Devco, the development Directorate-General, is in charge of coordinating “*Sharaka*” and it is one of the only initiatives in which DG Devco takes part, since the negotiation of the Mobility Partnership<sup>207</sup>. One of the activities of the project was to map all pre-existing activities related to migration and development and see if the most successful ones could be replicated. This shows that migration and development initiatives proposed in the framework of the Mobility Partnership rely on past initiatives at the bilateral level. The “*Sharaka*” project also has a strong capacity building component towards Moroccan institutions in charge of migration issues<sup>208</sup>. Then the project “*Tamkine-Migrants*” aims at supporting access to health care for migrant women. This project is not new and has existed prior to the Mobility Partnership.

Moreover, as presented already, a new programme of EUR 35 Million budget support aiming at supporting Morocco’s migration policy and the NSIA was accepted in December 2016. The novelty is that for the first time this project is of institutional support. EU officials declared that until 2016 the support was given only to civil society because there was no real institutional interlocutor on migration issues<sup>209</sup>. This EUR 35 Million project has been included in the draft scoreboard of November 2017 and is the continuation of the SPRING project (project “*Promouvoir l’integration des Migrants au Maroc*”) that was listed in the previous scoreboard<sup>210</sup>. According to an EU official this project supports activities outside of the Mobility Partnership<sup>211</sup>. This argument is questionable because the reinforcement of capacity of Moroccan authorities in relation to the implementation of the NSIA is in line with the objectives pursued in the Mobility Partnership. It is surely an unintended consequence of the Mobility Partnership as this strategy was only presented by Morocco after the conclusion of the Mobility Partnership. But the numerous new projects added to the scoreboard and aimed directly or indirectly at supporting the implementation of the NSIA shows not only the interest of the EU for the implementation of the strategy but also the relevance of the Mobility Partnership in its implementation.

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<sup>207</sup> Interview 1 (n197).

<sup>208</sup> MCMREAM (n196).

<sup>209</sup> Interviews 7 (n86) and 30 (n28).

<sup>210</sup> Interview 30 (n28).

<sup>211</sup> Interview 2 (n169).



Besides the Mobility Partnership, other actors have also intervened in the NSIA. IOM, for example, intervened in 12 specific objectives of the NSIA. IOM's main initiative is the "integration of Migration in national development strategies" in partnership with UNDP but it is not only aimed at Morocco<sup>212</sup>. Another initiative relates to the fight against human trafficking and IOM was consulted by the MCMREAM for the drafting of the asylum law<sup>213</sup>. IOM in collaboration with other UN agencies such as UNDP, UNHCR and UNESCO have developed a support programme for the implementation of the NSIA including capacity building on migration matters for Moroccan authorities<sup>214</sup>.

In addition, several Member States implement bilateral cooperation. For example, the Belgian Development Cooperation participates in the capacity building of Moroccan authorities and NGOs on issues related to immigration, asylum and human trafficking, which are the themes of the three new laws that must be developed under the NSIA<sup>215</sup>. The German cooperation is dynamic. In relation to the NSIA, Germany has developed two projects. The first one aims at strengthening the capacities of territorial communities on migration issues and the second project relates to asylum and refugee protection. A key initiative of this second project is the training of Moroccan authorities in asylum law, including the staff in charge of asylum claims at the BRA. Non-EU Member States are also implementing relevant initiatives at the bilateral level. For example, Switzerland is promoting the right of sub-Saharan migrants or sensitising its partners to asylum law and the United States support employability of young Moroccans as well as primary education with the aim of countering terrorism<sup>216</sup>.

Many of the projects listed above, implemented in support of the NSIA have capacity building components. Let us now discuss how the different actors and mainly the EU and the Member States support the development of administrative capacity in Cape Verde and Morocco.

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<sup>212</sup> MCMREAM (n196).

<sup>213</sup> Interview 15 (n41).

<sup>214</sup> MCMREAM (n196) 92.

<sup>215</sup> Ibid 93.

<sup>216</sup> US Department of State, 'U.S. Relations with Morocco', Bureau of Near Eastern Affairs, Fact Sheet, 20 January 2017 <https://www.state.gov/r/pa/ei/bgn/5431.htm> Accessed 4 December 2017.

#### 5.4.2. The influence of capacity building on the legal developments in Morocco and Cape Verde

As previously discussed, many development aid initiatives include capacity building components. This is because development aid and capacity development are strongly interconnected.

Morocco has long since taken the opportunity to modernise its own equipment and benefit from foreign expertise when cooperating with the EU or individual Member States, particularly on border management<sup>217</sup>. Through the Mobility Partnership, in addition to pre-existing capacity building on border management (this type of capacity building is still provided through the Mobility Partnership), Moroccan staff working in relevant ministries or civil services, can benefit from training and capacity building financed by the EU on issues such as international law, refugee rights, and capacity building to give them the tools to implement the three new laws following their adoption. The legal capacity building is mainly focused on human trafficking and asylum law. The law on immigration is not related to a project included in the Mobility Partnership but rather capacity building aimed towards the development of institutions dealing with immigration and the enhancement of cooperation between the institutions mainly focused towards the capacity building of the MCMREAM.

Several actors are included in the legal capacity building provided to Moroccan authorities in order to help them develop and implement the three new laws which are the cornerstone of the NSIA. Interestingly, the Council of Europe (CoE) is one of these actors, even though the CoE is not officially part of the Mobility Partnership<sup>218</sup> and it is never mentioned in the Annex nor in the scoreboard. The activities of the CoE in the field of human trafficking is complementary to the activities conducted by ICMPD under the MIEUX programme, activities that are included in the scoreboard. Moreover, the MIEUX programme, as well as the CoE activities on human trafficking, are financed by the EU<sup>219</sup> so nothing explains why one project figures in the Mobility Partnership and the other does not. An official from the Council of Europe in Strasbourg argues that as

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<sup>217</sup> Wolff (n71) 138-139.

<sup>218</sup> Interview 4 (n125).

<sup>219</sup> Interview 2 (n169).

the CoE and ICMPD work on the same issue some coordination is required<sup>220</sup>. Members of ICMPD and the Council of Europe clarified that ICMPD participates to the drafting of the Protocol on Human Trafficking and the CoE works on the harmonization of the legislation and legal developments<sup>221</sup>. The ICMPD team is composed of French and Belgian experts. The project conducted by the CoE as well as the MIEUX project are both at the initiative of Morocco. A representative of the MCMREAM agrees that there is a lot of work to be done on this issue and that the Ministry of Justice and the Ministry of the Interior need support. Consequently, the development of the Law on Human Trafficking has been supported by the CoE, IOM, UNHCR and some Member States are also involved in the legal development<sup>222</sup>. An EU official declares that the CoE supports Morocco in the development of their law on human trafficking<sup>223</sup>. The representative of the CoE in Morocco clarifies that even though the CoE has been active on the issue of human trafficking since several years in Morocco they have not been consulted on the draft of the new law on human trafficking; only IOM has been consulted<sup>224</sup>. The Council of Europe has worked on human trafficking in Morocco since 2012 (before the conclusion of the Mobility Partnership)<sup>225</sup>. The Moroccan CoE representative explains that the process of drafting the law was faster than with the other two laws because they had already shared good practices with Morocco since 2012<sup>226</sup>.

Concerning the law on asylum, the projects with Belgium, France and Germany are being implemented individually by each Member State<sup>227</sup>. There is an important cooperation with France on the new asylum law and the institutional support will be intensified once the law is adopted<sup>228</sup>. Germany will support Moroccan authorities once the law on asylum is concluded and they already cooperate with the UNHCR on international law training provided to Moroccan officials<sup>229</sup>. Germany will support the Moroccan government in the implementation of the asylum law. Belgium is also supporting the strategy in its asylum component on the demand of the MCMREAM.

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<sup>220</sup> Interview 4 (n125).

<sup>221</sup> Interviews 4 (n125) and 18 (n22).

<sup>222</sup> Interview 16 (n4).

<sup>223</sup> Interview 2 (n169).

<sup>224</sup> Interview 12 (n175).

<sup>225</sup> Interview 4 (n125).

<sup>226</sup> Interview 12 (n175).

<sup>227</sup> Interviews 16 (n4), 19 (n22) and 8 (n4).

<sup>228</sup> Interview 8 (n4).

<sup>229</sup> Interview 14 (n4).

They provide training for regularized migrants and refugees on access to self-employment opportunities. They also provide training on the three new laws and their implementation for ministries, local authorities and NGOs<sup>230</sup>. Belgium also participated in a brainstorming session during the conception of the law on asylum. Similarly, UNHCR, even though it is not directly a party to the Mobility Partnership, plays a significant role providing training on asylum and international law to Moroccan authorities in order to support the implementation of the new law on asylum once it is adopted<sup>231</sup>. A MoU has been conducted in 2015 between the MCMREAM and several UN agencies including the UNHCR and IOM, the former asking the latter for help in the implementation of the NSIA whereas the EU nor France for example were invited to provide support<sup>232</sup>. The UNHCR also made informal comments on the law on asylum<sup>233</sup>. As well, Spain worked on the development of the three laws and the development of the NSIA<sup>234</sup>.

The EU said that Morocco has a limited capacity of absorption because they are small teams and many projects are already being financed<sup>235</sup>. According to members of two implementing organisations, there is a lack of coordination between ministries and inside the MCMREAM itself<sup>236</sup>. The MCMREAM is requesting a lot of funding but it is questionable whether they have the capacity to act on all other ministries<sup>237</sup>. According to the staff of a technical organization, the MCMREAM has difficulties using the technical assistance provided because it lacks vision and it does not always accept the adjustments proposed regarding the capacity building provided to reorganise the ministry<sup>238</sup>.

It should not be overlooked that civil society in Morocco was rather active to denounce human rights abuses which lead to starting the process towards the new migration policy<sup>239</sup>. The CNDH works with civil society on asylum issues. For example, they drafted a document to remind Morocco of its obligations relative to the new migration

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<sup>230</sup> Interview 19 (n22).

<sup>231</sup> Interview 9 (n114).

<sup>232</sup> Interviews 16 (n4) and 9 (n114).

<sup>233</sup> Interview 9 (n114).

<sup>234</sup> Interview 17 (n4).

<sup>235</sup> Interview 7 (n86).

<sup>236</sup> Interviews 10 (n4) and 15 (n41).

<sup>237</sup> Interview 15 (n41).

<sup>238</sup> Interview 10 (n4).

<sup>239</sup> Interview 21, CCSM, Rabat, 15 April 2016.

policy and the NSIA<sup>240</sup>. Migrants' organization representatives criticise the EU because they did not involve grass root organisations that have the experience to support migrants in Morocco<sup>241</sup>. Instead, the EU keeps on funding the same influential NGOs even though their results are questionable<sup>242</sup>. Moreover, a CNDH official declares that the EU needs to do much more for the implementation of the strategy and they need to unlock more funding in the long term in the form of budget support rather than project-based funding. It seems that this demand was heard with the allocation of the EUR 35 Million budget support funding that aims at supporting the implementation of the NSIA. Several NGOs agree with the necessity for the EU to give more funds to Morocco because they believe that even if it has the political will to apply the strategy Morocco does not have sufficient funds to do so<sup>243</sup>.

As discussed previously, since the launch of the NSIA, funding has increased extensively as immigration issues became more policy relevant but also because Morocco was in a better position to ask for funding. As stated earlier, Morocco is a country with a high power of negotiation currently developing and implementing a strategy on immigration and asylum which is of high importance for the EU and the Member States for several reasons previously explained. This puts Morocco in a situation in which it has a real weight in the negotiations with the EU on the content and amount of capacity building provided to them. Moroccan officials have more leverage to negotiate funding and capacity building in their areas of interests and needs and on issues that they consider relevant, not only on issues relevant for the EU (even though both still seem to be going in the same direction). Using "reversed conditionality" Morocco can argue that without the EU funding its projects it could not implement the NSIA which is not in the interest of the EU and therefore puts pressure on them. Morocco is able to ask for increased funding for capacity building projects because the interest in the implementation of the NSIA and the continuous cooperation of Morocco on migration issues are key political interests in the EU and the Member States. This does however not exclude the influence of foreign experts in its legal and policy developments, through advice given on draft bills or training provided on related issues for example.

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<sup>240</sup> Interview 22 FASED, Rabat, 19 April 2016.

<sup>241</sup> Interviews 22 (n240) and 27 (n151).

<sup>242</sup> Interview 22 (n240).

<sup>243</sup> Interviews 22 (n240) and 27 (n151).

In Cape Verde, fewer actors are involved in the legal capacity development than in Morocco and the “capacity building” provided is more direct than in Morocco. *More direct* in the sense that rather than providing training for Cape Verdeans authorities to be better able to draft new legislations and then give advice on the legal drafts, like in Morocco, in Cape Verde new laws are usually fully drafted by the donor. For example, the new law on immigration as well as the asylum law were fully drafted by a Cape Verdean and Portuguese expert in two MIEUX project even though this law has yet to be adopted. ICMPD experts are also drafting the implementing decrees of the new law on immigration<sup>244</sup>. An ICMPD representative agrees that in Cape Verde there is less training and capacity building and more “full drafting” of the legal instruments and as the capacities of Cape Verde are limited they are highly influenced by EU experts<sup>245</sup>. According to an EU official, the MIEUX projects were crucial in the implementation of the immigration policy and in the creation of the legal framework<sup>246</sup>. The Mobility Partnership is still considered as being positive because the Ministry of the Communities has been able to develop its competencies in order to better identify its own interests. It is because it has gained this knowledge that it has been able to implement new policies<sup>247</sup>. An official from the Ministry of the Communities declares that the reports made through the Mobility Partnership support government policies helping them to identify issues that they could not have put forward without assistance<sup>248</sup>.

An EU official argues that the visa facilitation and readmission agreements gave a boost to the Mobility Partnership<sup>249</sup>. Representative on all sides (EU and Cape Verde officials and ECOWAS migrants) argue that the readmission agreement was advantageous to Cape Verde because it helped it in managing migration flows coming from ECOWAS that Cape Verde could not have managed in the long term<sup>250</sup>. The EU proposed technical assistance for the creation of a readmission facility following the conclusion of the EURA but according to an official of the EU Delegation, Cape Verde

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<sup>244</sup> Interview 18 (n22).

<sup>245</sup> Idem.

<sup>246</sup> Interview 39 (n43).

<sup>247</sup> Interview 33 (n178).

<sup>248</sup> Idem.

<sup>249</sup> Interview 39 (n43).

<sup>250</sup> Interviews 39 (n43) and 45 (n59); Interview 52, Associação dos Emigrantes Senegaleses Residentes em Cabo Verde, Praia, 2 December 2016.

did not ask for help until two years after the conclusion of the EURA<sup>251</sup>. The same representative declares that the lack of government resources makes everything proceed slowly. According to her, Cape Verde is not reactive which explains why not much is done. She adds that sometimes the EU Delegation just needs a request in order to proceed but Cape Verde does not ask for their help<sup>252</sup>. An unintended effect raised from the conclusion of the visa facilitation agreement. Several migrants' representatives in Cape Verde and representatives of Cape Verdeans in France declared that it became easier to enter Europe coming from Cape Verde rather than from another African country, leading several ECOWAS migrants to travel to Cape Verde and stay until they can acquire (somewhat easily compared to neighbouring countries) Cape Verdean citizenship which would help them profit from the visa facilitation agreement<sup>253</sup>. The visa facilitation is not a way for everyone to get a visa to Europe but if the individuals do fulfil the conditions, the access to visa facilitation would allow them to enter Europe, for most of them with the idea to settle, unless they know that they can easily circulate between the EU and Cape Verde, as pointed out by a Cape Verdean migrants' representative in Paris<sup>254</sup>. A Senegalese representative argued that Europe is no longer an attractive destination and that now ECOWAS migrants prefer staying in Cape Verde<sup>255</sup>.

In a context where a third country has a low administrative capacity and low power of negotiation, the EU can impose the type of capacity building the third country receives and can adapt the capacity building it delivers to its own interests. Cape Verde is a country of low geopolitical interest for the EU and therefore does not have a real power of negotiation when it comes to requesting capacity building in areas of their interests. For example, as the prime interest of the EU is to avoid irregular migration coming to the EU it will be tempted to provide capacity building primarily on border control in the third country. In Cape Verde, a high number of proposed projects are linked to capacity building mainly relating to border control and the fight against irregular migration. This could indicate that the capacity building provided to Cape Verde is influenced by the EU's priorities and not by the primary needs of Cape Verde. Border control is an issue

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<sup>251</sup> Interview 39 (n43).

<sup>252</sup> Idem.

<sup>253</sup> Interviews 49 (n52), 52 (n235), 54 (n86) and 59 (n33).

<sup>254</sup> Interview 59 (n33).

<sup>255</sup> Interview 54 (n86).

highly relevant to the EU and the Member States but it happened to be important for Cape Verde too as it was shifting towards a more restrictive migration policy. According to a Portuguese official, the Mobility Partnership allowed the funding of material for better border control in Cape Verde. The Mobility Partnership facilitated the cooperation between the Member States, the EU and Cape Verde and without this framework, it would not have been possible to implement projects that important. He agrees that the Mobility Partnership was beneficial for Portugal as it helped to fight against irregular migration. According to the Portuguese official in Cape Verde it was beneficial for Cape Verde because enhancing the border control capacity was actually needed by Cape Verde as it was becoming a transit country, with an increasing arrival of immigrants which they had no capacity to manage,<sup>256</sup>. Besides capacity building on border issues, Cape Verde needs capacity building in various other areas including in their capacity to develop a sound legal framework on migration, asylum and human trafficking issues. By implementing projects that aim at drafting full legislations rather than providing training, like in Morocco, the EU and the Member States do not allow Cape Verdean officials to build the necessary knowledge to draft these laws on their own. If no capacity building is provided to them, it can be argued that the relevant institutions can also not properly implement these laws. Finally, as Cape Verde is not able to attract the required capacity building and funds to enhance their capacities in areas that need improvement they stay in a constant stage of dependence towards the EU and the Member States and are therefore more prone to be influenced by the EU and the Member States in their policy and legal developments.

#### 5.4.3. The foreign influence on policy and legal developments

Mohamed Limam and Raffaella Del Sarto argue that the EU “has been transferring its rules and practices to third countries through various cooperation and capacity building programmes”<sup>257</sup>. Jairzinho Lopes Pereira adds that the EU considers itself as a normative power able to lead chief organisational changes in a third country<sup>258</sup>. We presented in Chapter 1 the possibility for the EU to influence the content of policy and

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<sup>256</sup> Interview 34 (n42).

<sup>257</sup> Mohamed Limam and Raffaella A. Del Sarto (n82) 2.

<sup>258</sup> Jairzinho Lopes Pereira, Theorizing the EU conditionality policy and its application in West African countries: the case of Cape Verde [2014] *European Scientific Journal*, Special Edition 389, 395.



legal developments in third countries through numerous ways. In this subsection, we will see how this can be applied to the cases of Morocco and Cape Verde. First, we could argue that both countries, being developing countries, are somehow lacking administrative capacity compared to the EU. However, saying that the policy and legal developments in Morocco and Cape Verde are the sole fruit of either the EU and the Member States or the third country is simplistic. The reality is more complex and is based on the geopolitics between all actors involved. The situation in both Morocco and Cape Verde differs according to their negotiation potential.

According to a Cape Verdean official, the NIS started to be developed in 2008 (the year of the conclusion of the Mobility Partnership). At the time of conclusion of the Mobility Partnership the interest in immigration questions in Cape Verde just started<sup>259</sup>. A resolution was made by the government in order to design a new immigration policy. In this resolution, the government underlines the augmentation of migration fluxes towards Cape Verde which influenced the content of the new policy as being more restrictive towards immigration<sup>260</sup>. An official of the DGI argues that, even though the Mobility Partnership has supported the creation of the new policy, it does not mean that it is because of the Mobility Partnership that the policy exists<sup>261</sup>. However, the DGI official consents to the fact that the Mobility Partnership oriented the policy as the policy was defined by the reports developed in the framework of the Mobility Partnership by Member States' experts<sup>262</sup>. A Cape Verdean official argues that, in general, they accepted the projects that the EU and the Member States proposed but they always tried to turn them around in a way that would also be beneficial for Cape Verde<sup>263</sup>. Once Cape Verde built its knowledge on migration issues through the different Mobility Partnership projects, new projects established on the recently acquired knowledge were proposed. According to a Cape Verdean official, the NIS is supported by the EU and the Member States in various ways; financially, as the Mobility Partnership finances the projects developing and implementing the strategy but also technically by the expertise provided in the projects<sup>264</sup>. Accordingly, everything that leads to better

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<sup>259</sup> Interview 38, IOM, Praia, 24 February 2016.

<sup>260</sup> Interview 35, DGI, Praia, 23 February 2016.

<sup>261</sup> Idem.

<sup>262</sup> Idem.

<sup>263</sup> Interview 33 (n178).

<sup>264</sup> Idem.

administrative capacity and a better management of immigration will be financed by the EU.

We argue that the enhancement of technical capacities has not been provided outside of border control. For example, according to an ICMPD official, Mobility Partnerships usually help to improve national coordination on migration matters which is a great achievement, but this was not really the case in Cape Verde<sup>265</sup>. There were no capacity building projects proposed aimed at strengthening the capacity of the DGI or the coordination between the different ministries, when the scattered migration competencies could have benefitted from such initiatives. This is also the case regarding legal capacity building which would have given more autonomy on legislative matters to Cape Verdean authorities. The reason not to provide this type of capacity building is multifaceted. It can be explained by the interest, or rather disinterest, of the EU and the Member States towards Cape Verde several years after the conclusion of the Mobility Partnership, and once projects aiming at securing its borders were completed. It can also be linked to the fact that the administrative capacity of Cape Verde at the launch of the Mobility Partnership was lower than the administrative capacity of Morocco, therefore needing more time to reach a level of administrative capacity in which they could effectively benefit from the same type of capacity building than Morocco.

Moreover, a Portuguese representative in Cape Verde supports the argument that the Mobility Partnership financed and provided capacity building to the development and implementation of both the emigration and immigration strategies<sup>266</sup>. A Cape Verdean official argues however that Cape Verde does not have the means to have a real emigration policy<sup>267</sup>. He adds that the emigration strategy did not change anything in practice because it was developed by IOM without discussing it with the government and without including the different perspectives which existed on the different islands. According to his declarations, the immigration strategy has never really been implemented and is “somewhere in a drawer”.

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<sup>265</sup> Interview 32 (n98).

<sup>266</sup> Interview 34 (n42).

<sup>267</sup> Interview 45 (n62).

According to a Cape Verdean academic, who acted as an expert for MIEUX, the legal developments in Cape Verde are defined by the Mobility Partnership and the EU and the Member States that implement the related projects<sup>268</sup>. He adds that the MIEUX project aimed at revising the existing migration and asylum laws. Moreover, it is agreed by a Portuguese official in Cape Verde that Portuguese laws have highly influenced the content of new legal acts<sup>269</sup>. A former Cape Verdean Secretary of State for Foreign Affairs argues that legal developments are highly influenced by Portugal because Cape Verdeans are used to be transferred legal instruments and want to stay in this dependence<sup>270</sup>. According to a Cape Verdean academic from the diaspora, Cape Verdeans think that it is normal to use pre-existing laws, mainly from Portugal, because they have always seen this as common practice. They only gradually realize that this is not normal. He argues that the problem is that they have not yet been “decolonized in their heads”<sup>271</sup>. He argues that the transposition of existing laws from Portugal to Cape Verde is an issue because they cannot be applied to Cape Verde because the context is not the same. He points out that institutions are created when there are no trained staff to operate them and no need for such institutions in Cape Verde, as for example the creation of the Constitutional Court in 2015<sup>272</sup>. If this last statement is true, then the lack of legal capacity building can also be linked to the fact that Cape Verdean authorities do not see the necessity to enhance their capacities in this area as they prefer staying in a state of dependency. External experts played a key role in the development of the legal framework in Cape Verde and the influence of Portuguese law is notable. When comparing Law 66/VIII/2014 and Portuguese Law 23/2007<sup>273</sup> it is undeniable that the content is similar. According to a representative of a migrant organisation in Cape Verde, most of the time Cape Verdean policies are strongly influenced by Portugal even though they are not applicable to the situation of the country<sup>274</sup>. It is clear in the case of Cape Verde that the postcolonial ties have an important influence on the content of the laws. The familiarity of Portuguese experts with the legal framework in Cape Verde (similar to the one in Portugal), as well as the sharing of a common language, makes them the most suitable to work on projects,

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<sup>268</sup> Interview 40 (n18).

<sup>269</sup> Interview 34 (n42).

<sup>270</sup> Interview 45 (n62); Interview 69, Congresso dos Quadros Cabo-Verdianos da Diaspora/ Universidade do Minho, Braga, 5 December 2017.

<sup>271</sup> Interview 69 (n270).

<sup>272</sup> Idem.

<sup>273</sup> Lei 23/2007 de 4 de Julho Aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional, Diário da República, 1 a série — N°127 — 4 de Julho de 2007, 4290.

<sup>274</sup> Interview 46, Associação dos Serraleoneses Residentes em Cabo Verde, Praia, 17 November 2016.

such as the MIEUX project, that aim at fully drafting new laws. Portuguese experts are however not the only ones involved in MIEUX projects as we saw earlier in this Chapter. The risk of legal transplant is high due to the combination of different factors: a low power of negotiation which does not give Cape Verdean officials the possibility to negotiate adequate capacity building nor to influence much on the projects proposed in the framework of the Mobility Partnership; a low administrative capacity which makes them highly influential and makes legal transplant attractive because they are fast and cost efficient (which is an additional perk for a poor country); lastly it has strong bilateral ties with Portugal and is used to legal transplants from Portugal<sup>275</sup>.

We argue that when a third country has a low level of administrative capacity the level of legal transplants is high because it is less costly to adopt but also because the third country has less opportunity to develop its capacities in order to be able to draft the laws independently. This is consequently less true for a country that has a low administrative capacity but a high power of negotiation as it can benefit from the necessary capacity building and financial support to develop its legal framework. Being less true does however not make the assumption false as we will see that even in this case, the content of the legal and policy developments can be influenced by the EU and the Member States.

Let us now consider the case of Morocco. The NSIA significantly impacts the Moroccan policy and legal framework on migration and asylum issues. Legally, because it aims at developing and adopting three new laws on migration, asylum and human trafficking, and practically through the modification of policy and behaviour of Moroccan authorities towards immigrants and refugees. However, it is usually agreed that the adoption of these new laws is a crucial step forwards. As we saw previously only the law on human trafficking has been adopted so far. Some interviewees argue that the reason for not adopting all the laws yet, is due to important legislative activity in Morocco, in particular regarding the adoption of several organic laws before the elections of 2016<sup>276</sup>. On the other hand, the reasons behind the slow process are attributed to the fact that concretely the government does not know how the laws will be implemented or if the government will have the means to apply them with a larger

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<sup>275</sup> Interview 45 (n62); Interview 69 (n270).

<sup>276</sup> Interviews 9 (n114), 4 (n125), 6 (n72) and 14 (n4).

number of immigrants<sup>277</sup>. It should be noted that usually European interviewees are more optimistic than Moroccan ones. It is commonly agreed that if the King wants the adoption of these laws, it will occur. The representative from the CoE in Strasbourg explained that the problem with the development of the new Law on Human Trafficking, for example, came from the fact that it was not clear in Morocco who would manage the new policy on immigration launched in 2013<sup>278</sup>, that later led to the conclusion of the NSIA. He argues that the EU backtracked on the issue because the person in charge of the project left and the new official in charge had other priorities. This is interesting when discussing the interests of the parties because it shows that not only Member States have different interests but even a single official. The representative from the CoE in Strasbourg agrees that the EU put some pressure on Morocco to adopt the new laws<sup>279</sup>. According to a French official and a member of Expertise France, Morocco backtracked from the NSIA in 2015<sup>280</sup>. There is a slowdown of the dynamic around the NSIA. A French official argues that it is not because of a lack of will but rather the recognition that the situation in Morocco is more difficult than it was in 2013 because of the European migrants' crisis and the security context<sup>281</sup>. For the most pessimistic respondent, a UNHCR official, most of the NSIA is only on paper<sup>282</sup>.

When looking at the content of the law on human trafficking we cannot argue that one country in particular has influenced it. Yet, it does not mean that it has not at all been influenced by foreign experts. As we saw previously, several Member States, as well as International Organisations, have been included in the brainstorming, drafting and commenting on the law on human trafficking but also on the Bill on Asylum. The multitude of actors makes it less likely to be influenced by only one of them. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children also inspired the new law, supplementing the United Nations Convention against Transnational Organized Crime. For example, the definition of human trafficking is similar in the new law and in the Protocol. Moreover, Morocco benefited from many different training courses in relevant subjects such as international law and asylum law giving the authorities the knowledge to propose a legislative act that would

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<sup>277</sup> Interviews 4 (n125), 5 (n11), 7 (n86) and 8 (n4).

<sup>278</sup> Interview 4 (n125).

<sup>279</sup> Idem.

<sup>280</sup> Interview 8 (n4) and 10 (n4).

<sup>281</sup> Interview 8 (n4).

<sup>282</sup> Interview 9 (114).

include their own realities and interests rather than being the recipients of already drafted laws. It is also interesting to note however that the postcolonial relations between France and Morocco and Portugal and Cape Verde are different. First, the decolonisation happened earlier in Morocco which could lead to distended ties between the two countries and Morocco seeking support and alliances with other countries. In Chapter 1 we saw that Simona Vezzoli argues that time can affect the relevance of postcolonial ties<sup>283</sup>. Then, the interference of France in legislative matters in Morocco is probably less welcome than the interference of Portugal in Cape Verde. With the law on immigration of 2003, the “decolonisation” of the law was already saluted. The question of the “prestige” of the foreign model that gives legitimacy and legal authority to the transplanted law is also more present in Cape Verde than in Morocco which always tries to distance itself from the former colonial power in this regard. This can be explained by the phenomenon of “migration salience” put forth by Jean-Pierre Cassarino and presented in Chapter 1, where the cooperation between a Member State and its former colony on migration issues can be hindered.

The last point of this sub-section will provide an overview of other forms through which Morocco and Cape Verde can be influenced by the EU and the Member States in their legal and policy developments, even though it is more indirect. In Chapter 1 we introduced the concept of “overt diffusion” which arises from “the physical presence of the EU in third states” such as with the EU Delegation and Member States’ embassies<sup>284</sup>. Third countries’ governments can increasingly become open to such influence as they grow used to working with foreign advisors or because of strong relations with the Member States which provided them with “legislative support”. This situation can open the ground for legal transplants or transplant policies. In both countries, several EU and Member States actors are present and regularly interacting with the local authorities. For example, Member States embassies, the EU Delegation, Member States development agencies or technical cooperation agencies etc. are all present in the territory of the third country and the cooperation and exchanges between them and the local authorities have been enhanced through the Mobility Partnership. The Mobility Partnership is a framework for cooperation and dialogue bringing all parties together through the implementation of projects but also through different

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<sup>283</sup> Simona Vezzoli (n19) 13.

<sup>284</sup> Iann Manners, ‘Normative Power Europe: A contradiction in Terms?’ (2002) 40(2) *JCMS* 235, 245.

monitoring meetings or specific negotiations. Third countries being accustomed to these foreign actors, because they interact with them recurrently, can be more open to foreign suggestions and direct or indirect policy orientation pushes.

Several other situations in which “transplant policies” can occur have been selected in the literature as they might apply to the case of Mobility Partnerships. The EU can diffuse its norms to third countries by different means. For example, it can be through *contagion*, which is unintended. In this case, the EU does not really decide to transfer its norms, but third countries adopt them because they seem efficient or a “model”. This seems to be more the case in Cape Verde with Portugal than in Morocco with France as the bilateral ties of the first duo are stronger. However, we argue that in both cases the EU could play the role of the “model” as both countries strive to have a good and close relationship with the EU and to keep their position of “best student”. Then, procedural diffusion can be the consequence of the institutionalisation of a relationship through for example cooperation agreements. Mobility Partnerships aiming at institutionalising dialogue and cooperation between the EU and third countries can subsequently also be subject to procedural diffusion<sup>285</sup>. It is not possible to identify only one type of influence Member States and the EU have in third countries as several types can be combined and several reasons lead to more or less policy and/or legal transplant. Moreover, the influence can be linked to the existence of the Mobility Partnership but can also be related to pre-existing conditions such as the existence of postcolonial ties. A Cape Verdean academic pointed out two last points that are often overlooked. The first one is that besides Portuguese experts, the Cape Verdean diaspora has also a lot of influence regarding the content of the laws in Cape Verde. They are engaged in discussions and provide advice to Cape Verdean legislators and the government. For example, the Cape Verdean Constitution was drafted by a member of the diaspora living in Portugal, Wladimir Augusto Correia Brito<sup>286</sup>. The second point that the Cape Verdean academic put forth is that the influence does not always go from the EU towards third countries, but the legal framework in Portugal can also be influenced by provisions existing in Cape Verde<sup>287</sup>.

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<sup>285</sup> Ibid 244.

<sup>286</sup> Interview 69 (n270).

<sup>287</sup> Idem.

#### 5.4.4. The consequences of administrative capacity development

Carmen Barros from the DGI argues that:

“some of the concrete results of the Mobility Partnership contributed to Cape Verde in the sense the country now has more knowledge about immigration. However, these results can also have contributed to the EU: a properly functioning immigration policy contributes to the objective of fighting against irregular migration, as well as a proper implementation of the readmission agreement”<sup>288</sup>.

This sums up the situation. The consequences of administrative capacity development are double: it is beneficial for the EU because the third country will be able to more efficiently implement policies or other initiatives that are in the interest of the UE (such as border control for example); and it is beneficial for the third country because it acquires knowledge and competencies but also because it might give it a more strategic position towards the EU. We can argue that the administrative capacity of both Morocco and Cape Verde improved to a certain extent with the implementation of the Mobility Partnership.

In this last sub-section, we will try to determine whether there is a causal link between Morocco and Cape Verde’s administrative capacity and the implementation of the Mobility Partnerships. We saw that the EU and the Member States intervened through different methods in the development of the third country’s administrative capacity: development aid in general and capacity building in particular. For example, institutions that oversee migration issues are financed and/or created by the EU and the Member States. In the case of Morocco, the MCMREAM was created by the new Policy on Immigration as the first Moroccan institution to work specifically on immigration issues (previously only emigration issues were targeted). Before the creation of the MCMREAM, there was no specific interlocutor in Morocco treating with this issue. Since its creation, the MCMREAM is substantially funded by the EU through the

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<sup>288</sup> Iann Manners (n284) 244.



Mobility Partnership. It is of the interest of the EU to have a functioning institution working on migration as it will ensure a proper implementation of the Moroccan migration policy and NSIA which is of high importance to the EU. Looking at Cape Verde, it is interesting to come back to one statement made by an EU official<sup>289</sup> that said that the EU Delegation was in favour of providing support and assistance to Cape Verde for the creation of a readmission facility. Since the conclusion of the EURA between the EU and Cape Verde, its implementation has been problematic because, as an IOM official and Cape Verdean representative pointed out, Cape Verde does not have existing readmission facilities and did not know how these readmission facilities should look like nor if they even have the means to create such a facility on every (or even several) island(s)<sup>290</sup>. The fact that despite the loss of interest for the Mobility Partnership following the conclusion of this agreement, the EU was pushing to support the creation of such facilities could be explained by the necessity of Cape Verde to have the capacity to readmit irregular migrants that would be sent back by the EU.

The second example is the funding and co-development of policies on migration. Coming back to Morocco, the example of the funding and support for the NSIA seems adequate. We saw previously that the EU is heavily funding this strategy because it is of high relevance for the EU and the Member States, in line with the policy of externalisation of migrants and refugees' reception. Even though the NSIA was not created by the EU it supports its implementation and development by funding and proposing new projects of "mutual" interest. However, it should be noted that in this case, the development of Morocco's capacities in receiving immigrants' and asylum seekers enhances their position towards the EU, becoming even more geopolitically important and therefore increasingly able to require funding and tailored capacity building. In the case of Cape Verde various proposed projects which were implemented directly through the Mobility Partnership aimed at developing and funding the implementation of the NIP and NIS. Through these initiatives, the Mobility Partnership raised awareness on immigration issues in Cape Verde, supported and directed the creation and development of an immigration policy and ensured that the strategy would set the ground to effectively implement this policy. In this case, a sufficient level of administrative capacity had to be reached in order to be able to implement restrictive

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<sup>289</sup> Interview 39 (n43).

<sup>290</sup> Interview 45 (n62) and 38 (n259).

immigration policies, but the geopolitical importance of Cape Verde seems to have decreased. Indeed, we saw that since the conclusion of the EURA the interest of the EU and the Member States faded. We argue that the development of administrative capacity does not always lead to a better geopolitical position, nor increases the potential negotiation power of a country. This argument also counts for the support of the EU towards border control. We saw that in both Mobility Partnerships the funding and capacity building delivered related to border control was important. Border control is one of the first tools to fight against irregular migration, so this is not a surprise. However, the cases of Morocco and Cape Verde are again different due to their geopolitical situation. The border of Morocco with the Spanish enclave is a key point for the EU as it leads to direct entry into EU's territory. The capacity of Morocco to guard this border is therefore key. But in the same time the motivation of Morocco to be the "gate-keeper" provides it with a high negotiation power not only to attract more funding and capacity building for border control but also on different issues of interest for Morocco. On the contrary in Cape Verde, once the EU considered that the capacity of Cape Verde to efficiently guard its borders was reached the EU did not feel the need to reward Cape Verde by supporting other areas of its interests.

As the Mobility Partnership is mainly implemented by the EU and the Member States rather than by the third country, the importance of the administrative capacity for the implementation of the Mobility Partnership is only partial. It is important to ensure that the policies and laws pushed, or supported, by the EU and Member States are effectively and efficiently implemented in order to reach the "positive" result foreseen by the EU. The improvement of the administrative capacity is also necessary to ensure that the goals of the Mobility Partnership are being implemented sustainably. This means at least that the capacity of the third country's authority on border issues is satisfactory as the first aim of the Mobility Partnership is to provide the tools to the third country to efficiently fight against irregular migration towards Europe. If, like the NSIA, the projects aim at creating circumstances for immigrants to want to permanently settle in the third country because they have access to enhanced rights and given the possibility for decent living conditions it is a positive, though unintended, consequence that must be supported.

## 5.5. Conclusion

The main goal of the current Chapter was to determine whether Mobility Partnerships have legal and policy relevance for Morocco and Cape Verde and to what extent three main factors can condition this relevance: the existence of strong, postcolonial, bilateral ties, the power of negotiation of the third country and the level of administrative capacity of the third country.

This study has found that all three factors can influence the relevance of Mobility Partnerships. It is generally a combination of all three factors that affects the development and implementation of legal and policy relevant projects as well as their content. First, we can clearly see that the bilateral relations between a Member State and Morocco or Cape Verde are vastly preferred as a model of cooperation versus multilateral cooperation or cooperation directly with the EU. Even though the Mobility Partnership is an interesting framework of dialogue and somewhat of cooperation, it never managed to surpass the preference for bilateral cooperation. We see that postcolonial ties still play an important role as generally former colonial powers implement a large number of initiatives through the Mobility Partnership and as in the case of Portugal, they are influential in the legal and policy developments in the former colony. However, the importance of postcolonial ties is different in the case of Morocco and Cape Verde. The relations between Portugal and Cape Verde are much stronger and Portugal, not only funds and implements several important projects, it is also actively involved in the drafting of new legal instruments. Cape Verdean legal instruments are usually similar to Portuguese legal instruments, as the latter are often transplanted into the Cape Verdean legal framework. This fact is not only related to the existence of postcolonial ties, but also to the low level of administrative capacity and financial means of Cape Verde, making legal transplant an easy and cost-effective way to develop their legal framework. In the case of Morocco, things are different. Morocco still has strong bilateral ties with France and Spain, but it also developed strong bilateral ties with other Member States with which they do not share this type of ties with. For example, The Netherland is the country that proposed most of the new projects in the Mobility Partnership with Morocco. This can show that postcolonial ties play a lesser role in Morocco's bilateral relations. However, it should also be kept in

mind that often, France and Spain do not want to include all their bilateral activities in the scoreboard due to visibility questions<sup>291</sup>.

The second major finding is that the negotiation power a third country can retrieve from its geopolitical situation can have a key impact on the type and content of projects implemented through the Mobility Partnership and also on the influence these projects can have on the content of the policies and laws developed in the framework of the Mobility Partnership. The study shows that the negotiation power of a third country is also related to the type of conditionality used by the EU to push a third country to implement some policies in the interest of the EU. Starting with the case of Cape Verde, we found that it has a low power of negotiation because it is not geopolitically important for the EU, and this importance even seems to have diminished since the conclusion of the EURA. Cape Verde is a small country, with a low migration flow towards the EU. Moreover, it is a country that is usually prone to cooperate with the EU on security issues. Through the capacity building that has been provided to Cape Verde in terms of border control, Cape Verde has been able to strengthen its borders and more efficiently fight against irregular migration. The irregular migration route that started from Cape Verde towards the Canary Islands has stopped since the implementation of the Mobility Partnership as the tougher border controls made it more difficult and it “became bad for business”. Once the borders became better controlled and the EURA was concluded, the EU and the Member States seem to have lost their interests in the Mobility Partnership with Cape Verde, which is unsuccessfully trying to start a new phase more focused on migration and development, hence, Cape Verdean’s interests. In fact, it seems that the Mobility Partnership is dying. From this analysis, we can conclude that a country with a low power of negotiation will not have much choice but accept the projects proposed by the EU and will not be able to negotiate projects that are of their interests. This also goes for the development of capacity building. Moreover, as Cape Verde has to accept projects that are proposed in the framework of the Mobility Partnership, the Member States and the EU can easily use this mean in order to shape the policy and legal framework of the third country.

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<sup>291</sup> Interview 17 (n4) et 8 (n4).

Several projects proposed and implemented through the Mobility Partnership have direct and intended policy and legal relevance and we can say that the EU took a proactive position in these developments. This is the case of the project that led to the development of the first immigration policy in Cape Verde followed by projects under the MIEUX programme resulting in the creation of the NIS, which aimed at implementing the new immigration policy as well as drafting the new laws on immigration and asylum (even if the second law has not been adopted). The strong influence of the EU and the Member States does not mean that Cape Verde has no agency at all. It could, for example, reject the adoption of the laws drafted through the Mobility Partnership and therefore not develop their legal framework at all. It did reject one of the two laws drafted by Portuguese experts. However, the adoption of the policy, strategy and then legal developments were also to some extent in the interest of Cape Verde that started to face increasing immigration flows from ECOWAS countries that it would presumably not be able to sustain. Additionally, it should not be overlooked that other factors could lead a third country to cooperate. For example, Cape Verde continuously seeks a special relationship with the EU because it is highly dependent on its development aid (and not only in the framework of the Mobility Partnership) but also because it hopes to get a visa exemption in the future. When a country has a low negotiation power, the EU can still use its traditional conditionality approach as the third country being dependent on EU's aid and support, will not have much choice but to follow the EU's directions.

On the contrary, Morocco has a strong negotiation power which puts it in a privileged position. First, the Mobility Partnership with Morocco was the first to be negotiated in depth. The EU already changed its conditionality approach to a "more for more" approach that would propose a more "balanced" partnership. Morocco is the first country that refused the list of projects in the Annex to the Joint Declaration because it was not negotiated with them but simply imposed. Then, throughout the development of the Mobility Partnership in Morocco we can see that the EU takes mainly a supportive role and provides funding and capacity building in relation to Morocco's interests. With the launch of the NSIA, the list of projects proposed by the EU and the Member States were considerably modified in order to support the Moroccan strategy. Moreover, projects proposed in the framework of the Mobility Partnership with Morocco have a different nature than the ones in Cape Verde as they are more focused on

capacity building and training than on drafting full policies or legislations. Though such projects are not excluded and a MIEUX project, for example, aims at drafting the protocol of implementation of the law on human trafficking. We could also argue that the development of the NSIA increased Morocco's negotiation power because it is seen as a way to externalise EU's migrants and refugees' reception. Additionally, in order to ensure the effective implementation of the NSIA, Morocco has another key bargaining chip with the EU, the conclusion of an EURA. Morocco does not want to conclude such an agreement even though the Mobility Partnership gave a new push to long pre-existing negotiations. For the EU, the negotiation of an EURA with Morocco is still high on the agenda even though it might have lost some momentum within the Member States. Because Morocco has a strong power of negotiation with the EU, we argue that they are using "reversed conditionality" in order to attract more funding and develop projects according to their own interests.

The level of administrative capacity conditions mostly the influence on the content of legal and policy developments. First, a country with low administrative capacity will have more tendency to be prone to legal and policy transplants. Moreover, if a country like Cape Verde, has a low administrative capacity and low financial capacity it can be interested in a quick and cost-effective way of developing its legal framework. Additionally, its strong postcolonial ties and familiarity with transplanting Portuguese legislation explain why the new laws developed in the framework of the Mobility Partnership are highly influenced by Portuguese law. The power of negotiation also plays a key role here. A country like Cape Verde that has a low negotiation power will not have the possibility to negotiate capacity building in areas of its interests and as we saw will not benefit from the required capacity building to develop its own legal framework, facing the imposition of projects which draft the policies and laws directly. On the contrary, Morocco with its high negotiation power can attract projects supporting its capacity building in relevant areas such as international law and asylum law. Moreover, including various stakeholders in the capacity building and development of new laws makes Morocco less prone to be influenced by one country in particular. When it is normal that legal or policy developments are somehow influenced by other countries the problem lays in the full transposition of legal acts from one legal system to another, as it usually does not fit a particular context. Finally, the EU is aware that a certain level of capacity building is necessary to be able to effectively implement

policies that are in favour of the EU or for example to properly manage external borders and will, therefore, provide the required capacity building. A country like Cape Verde is not able to negotiate capacity building in other areas than border control because it is not in the EU's interest and therefore it will not increase its power of negotiation. On the other hand, Morocco can gain even more negotiating power as it gets more capable to effectively implement restrictive policies.





## Conclusion

In the preceding Chapters, we examined the legal and policy relevance of Mobility Partnerships for the development and implementation of migration policies and laws in third countries and analysed what factors could influence this relevance. The three main factors that we looked at were: the state of relations between third countries and EU Member States, the power of negotiation of a third country and its level of administrative capacity. The thesis combined a comparative legal analysis of the development of the legal frameworks in Morocco and Cape Verde with an empirical study of the implementation of Mobility Partnerships' projects in relation to national migration strategies. The empirical findings in this study provide a new understanding of the implementation of Mobility Partnerships. Indeed, this thesis makes a considerable contribution to the understanding of the stage of implementation<sup>1</sup> of both Mobility Partnerships, the interests of all parties in its implementation and the expectation of the actors for the future of these Mobility Partnerships<sup>2</sup>.

The main questions that were addressed in this thesis are the following: Are Mobility Partnerships relevant for the development or implementation of national legal and policy frameworks in third countries? Do Mobility Partnerships enhance migrants' access to rights? What are the factors conditioning Mobility Partnerships' relevance? In this Chapter we will answer these three questions by summarizing the main findings of the thesis and ending this conclusion by a discussion.

Before looking at the relevance of Mobility Partnerships, it was essential to know what Mobility Partnerships had managed to deliver so far. In Chapter 3 we first looked at the factors leading to the conclusion of the Mobility Partnerships with Cape Verde and Morocco. Then we conducted a thorough analysis of their implementation. With this analysis we gained interesting insights about the type of projects being implemented, the main policy areas covered by projects and importantly for this research, we highlighted projects with potential legal or policy relevance. The analysis of the implementation of Mobility Partnerships also raised some criticism about the efficiency

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<sup>1</sup> Chapter 3.

<sup>2</sup> Chapter 5.

of the monitoring tool, the scoreboard. We argue that not only are these scoreboards insufficient to properly evaluate the implementation of the projects, but they are inadequate to present the dynamics in place. Since 2017, ICMPD has been in charge of creating a centralized scoreboard database with the aim of standardizing the format of the scoreboards. ICMPD is also developing a common methodology for the use of these scoreboards to improve their decipherability and to have a collective understanding of what projects should be included or not in the scoreboards<sup>3</sup>. During the evaluation of the implementation of both Mobility Partnerships we also noticed projects' overlaps as well as lack of cooperation between different actors. The Court of Auditors in its Special Report in 2016 pointed out similar pitfalls and suggested a continuous evaluation of Mobility Partnerships<sup>4</sup>.

Once the overview of the implementation of Mobility Partnerships was completed, we looked at their relevance. In Chapter 4, the comparative legal analysis of the legal and policy frameworks in Morocco and Cape Verde was conducted. A comparison of the legal and policy frameworks before and after the conclusion of the Mobility Partnerships contributed to highlighting the legal and policy developments that occurred since the conclusion of the Mobility Partnerships. We then examined whether these changes could be attributable to the implementation of the respective Mobility Partnership.

According to the EU, Mobility Partnerships “will necessarily have a complex legal nature”<sup>5</sup>. Mobility Partnerships are usually presented as non-binding instruments, soft law instruments or as having a soft legal nature<sup>6</sup>. In Chapter 1 we examined the legal nature of Mobility Partnerships. We looked at how Mobility Partnerships fit in the EU legal architecture and what it meant for Mobility Partnerships to be a soft law instrument, in terms of relevance. Few studies have analysed the actual legal and

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<sup>3</sup> Interview 32, ICMPD, Brussels, 28 October 2016.

<sup>4</sup> European Court of Auditors, 'EU External Migration Spending in Southern Mediterranean and Eastern Neighbourhood Countries until 2014', Special Report N°9/2016, Luxembourg, 2016.

<sup>5</sup> Commission of the European Communities, 'Circular Migration and Mobility Partnerships between the European Union and Third Countries' COM(2007) 248 final, Brussels, 15 May 2007 1, 3.

<sup>6</sup> Sergio Carrera and Raúl Hernández I Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?' (2009) CEPS Working Document 321 1, 28; Sergio Carrera and Raúl Hernández I Sagrera, 'Mobility Partnerships: "Insecurity Partnerships" for Policy Coherence and Migrant Workers Human Rights in the EU' 97 in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance: The Promise of Partnership* (London, New York: Routledge 2011) 97. Panos Koutrakos, *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011) 164-165; Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London New York: Routledge 2012) 209-210.

policy implications of soft law instruments. The suggestion resulting from our analysis is that Mobility Partnerships are non-traditional EU instruments, which are non-binding<sup>7</sup>. In Chapter 4 we analysed whether or not Mobility Partnerships, while being soft law instruments, have relevance for the development of the legal and policy frameworks in Morocco and Cape Verde. We argue that Mobility Partnerships, despite their non-binding character, have legal and policy relevance for third countries regarding the regulation of migration, asylum, human trafficking and even labour law<sup>8</sup>. The first key finding of this thesis is that Mobility Partnerships are soft law instruments with potential legal and policy relevance for third countries. Mobility Partnerships may not be the only reason for the changes, but they clearly play a role. Moreover, one of the main reasons why the EU preferred Mobility Partnerships to be soft law instruments was its flexibility. The Annex is a living document that can easily be modified by all partners. In this thesis we found that Mobility Partnerships are flexible instruments that can be adapted to new political priorities<sup>9</sup>. This can be illustrated by the drastic change in policy orientations which occurred in Morocco between the conclusion of the Mobility Partnership and the launch of the NPI a few months later. Therefore, they can play a role in continuing discussions between the EU and third countries. However, the soft law nature of Mobility Partnerships did not come without setbacks. The soft law nature of Mobility Partnerships has been criticised as being non-democratic because it excludes the European Parliament from the process and can be used as a tool to circumvent the legislative process<sup>10</sup>.

The legal framework on migration was inadequate in both countries before the conclusion of the Mobility Partnerships and their migration related policies were either focused quasi exclusively on emigration, in the case of Morocco, or almost inexistent, in the case of Cape Verde<sup>11</sup>. Chapter 5 exposed how the administrative capacity of the third country has been instrumental in our understanding of the relevance of Mobility Partnerships, mainly in the development of the content of new policies and laws developed through Mobility Partnership projects. This last Chapter shows how development aid and capacity building can influence the legal and policy developments

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<sup>7</sup> Chapter 1.

<sup>8</sup> Chapters 4 and 5.

<sup>9</sup> *Idem*.

<sup>10</sup> Chapter 1, 34.

<sup>11</sup> Chapter 4.

in Morocco and Cape Verde. As well as, how the level of administrative capacity is detrimental to an effective implementation of the developed instruments and other EU priorities such as border control. We saw that the power of negotiation of the third country plays a key role as it defines the level of capacity building and development aid that a third country can receive. We argue that in terms of immigration, both countries were lacking administrative capacity when they concluded their respective Mobility Partnerships. This means that there was a need from both countries to develop their legal and policy framework on immigration as they were facing a growing number of immigrants remaining on their territory rather than transiting through it. This is a critical point to be stressed. Even if the legal and policy developments seem to be pushed forth by the EU, they are occurring because third country officials are accepting to cooperate with the EU on these issues. While the Mobility Partnerships without a doubt played a role in both countries' legal and policy developments, arguing that the changes occurred only because of the projects implemented by the EU and Member States disregards Cape Verde and Morocco's autonomy as political actors. Additionally, it does not consider the complex geopolitical framework in which the authorities of both countries developed their policy. Mohamed Berriane, Hein de Haas and Katharina Natter rightfully urge academics to study migration in a more holistic way<sup>12</sup>. We followed this approach in this thesis, taking into account the interests and geopolitical position of Morocco and Cape Verde.

In the cases of Morocco and Cape Verde the Mobility Partnership has influenced the development of laws related to the entry and stay of foreigners, human trafficking and to some extent asylum<sup>13</sup>. Both Mobility Partnerships have also influenced the implementation of National Strategies in relation to migration (and asylum in the case of Morocco) and more precisely to the integration of immigrants (and refugees). These strategies all lead to the opening of exceptional periods of regularization for migrants as well as improvements in the access to labour and labour rights for regular migrants in addition to other socio-economic rights<sup>14</sup>. The analysis illustrates how in the Moroccan case the Mobility Partnership provided important external support for the development and implementation of a new national strategy on immigration and

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<sup>12</sup> Mohamed Berriane, Hein de Haas and Katharina Natter, 'Introduction: Revisiting Moroccan Migrations' (2015) 20(4) *The Journal of North African Studies* 503, 517.

<sup>13</sup> Chapter 4.

<sup>14</sup> *Idem*.

asylum. The EU takes a reactive position, by supporting its implementation *a posteriori*, rather than a proactive role<sup>15</sup>. In the case of Cape Verde, the situation is very different, and the EU clearly took a more proactive approach<sup>16</sup>. The development of the National Immigration Strategy<sup>17</sup> (NIS) is the fruit of distinct phases in which the EU had been involved since the conclusion of the Mobility Partnerships. As a matter of fact, these different steps have been linked to Mobility Partnership projects.

In Chapter 5, we examined to what extent and how the three factors: the state of relations between third countries and EU Member States, the power of negotiation of a third country and its level of administrative capacity influence the relevance of Mobility Partnerships for Morocco and Cape Verde. The three factors are usually combined. Our conclusion is that Mobility Partnerships have a “differentiated relevance”. Differentiated relevance means that in some cases legal and policy changes can be imposed by the EU, while in other cases the EU can support them according to the interests of the third country. The level of influence of the EU and Member States in the legal and policy developments as well as in the content of the new legal acts or policies can be differentiated depending on external factors. In the cases of Cape Verde and Morocco the EU and Member States play a very different role in the legal and policy developments because the three factors are combined in different manners. In the case of Cape Verde: a) strong postcolonial ties are connecting Cape Verde and Portugal, b) Cape Verde has a low power of negotiation and c) Cape Verde has a low level of administrative capacity (lower than Morocco). Consequently, the EU and Member States played a proactive role in the development and implementation of legally and policy relevant projects, “building” Cape Verdean’s NIS and drafting full legislations such as for example Law 66/VIII/2014 on entry, stay, exit and expulsion of foreigners. This is because Cape Verde has a low power of negotiation and is in a position where it has to “take or leave” the projects proposed by the EU and Member States rather than a position where they can negotiate projects which are of their own interests (b). Moreover, Portugal played an important role not only in proposing new legally and policy relevant projects but also influencing the content of the legal and policy developments (a). In this configuration, the Mobility

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<sup>15</sup> Chapter 5.

<sup>16</sup> Chapters 4 and 5

<sup>17</sup> Estratégia Nacional de Imigração, Aprovada pela Resolução do Conselho de Ministros nº 3/2012, de 23 de Janeiro, BOCV, I Série, nº3, 23 de Janeiro de 2012.

Partnerships' projects are influenced by the EU and Member States and so is the content of the new laws and policies. Because Cape Verde has a low level of administrative capacity and a low level of power of negotiation, it can not negotiate adequate capacity building projects to improve its level of administrative capacity leaving it in a stage of dependency towards foreign expertise (b and c). Additionally, legal transplants can seem advantageous because they are a cost-efficient way of developing ones' legal framework (c). As Cape Verde is used to transplant Portuguese legislation, the influence of the former colonial power in the content of the laws developed is high (a and b). The case of Morocco is very different, and the EU is taking a supportive role in legal and policy developments. In Morocco: a) the postcolonial ties are less strong than in Cape Verde, b) Morocco has a high level of negotiation and c) Morocco has a low administrative capacity (but higher than Cape Verde). Because Morocco has a high power of negotiation, it can negotiate the content of the Mobility Partnership and influence the EU and Member States to implement projects that support its own policy and legal needs (b). For similar reasons, Morocco can benefit from adequate capacity building to develop its administrative capacity in relevant fields and be less influenced in the content of its new laws and policies (b and c). Additionally, Morocco has looser ties to its former colonial power and can involve more actors in the capacity building that is provided to its officials which limits the influence of only one country and therefore the risks of legal transplants (a, b and c).

In Chapter 5, the “standard” conditionality used by the EU in its relations with third countries was described, showing that the EU can use conditionality to push third countries to follow and implement policies that are favourable to the EU and which often include the fight against irregular migration. Then the “more for more” conditionality was discussed. It was included in Mobility Partnerships after the Arab Spring uprisings as the EU realised that they would need to propose more positive incentives to third countries in order to increase cooperation on migration. The third type of conditionality introduced in this Chapter is “reversed conditionality”. It is often assumed that Mobility Partnerships are unfair and driven by EU’s “more for more” conditionality putting a high pressure on third countries<sup>18</sup>. Drawing on Cassarino’s

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<sup>18</sup> Sergio Carrera and others, ‘EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?’ (2016) CEPS Papers in Liberty and Security in Europe; Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘EU Migration Policy in the Wake of the Arab Spring What Prospects for EU-Southern Mediterranean Relations?’ (2012) *MEDPRO Technical Report*

notion of “reversed conditionality”<sup>19</sup>, this thesis advocates a more balanced view of EU-third country relations and argues that Mobility Partnerships are also instrumentalised as part of domestic agendas of third countries<sup>20</sup>.

The first Mobility Partnerships were concluded with third countries with a weak leverage vis-à-vis the EU and only after the Arab Spring did this pattern change. Reslow<sup>21</sup> highlights the “take it or leave it” approach taken in the cases of Moldova, Cape Verde and Senegal, where the EU unilaterally proposed the same Mobility Partnership text to these third countries with little room for negotiation. Nevertheless, the relations between different parties to a Mobility Partnerships may be more dynamic than what is often assumed. More dynamic relations can be understood as relations that consider the interests of the third country, which is not only seen as a beneficiary. Morocco was the first country that refused the list of projects in the Annex to the Joint Declaration because it was not negotiated with them and simply imposed. It is interesting because it shows that Morocco had some leverage that prior countries concluding a Mobility Partnership did not have. Then, throughout the development of the Mobility Partnerships in Morocco we can see that the EU mainly took a supportive role and provided funding and capacity building in relation to Morocco’s interests. As a case in point, with the launch in 2014 of the Moroccan National Strategy on Immigration and Asylum (NSIA)<sup>22</sup>, the list of projects proposed by the EU and the Member States was considerably modified in order to support the Moroccan strategy. The EU should consider the idea of dynamic relations when negotiating and implementing Mobility Partnerships but also other instruments such as the EU Compacts. Third countries that are priorities for the EU in terms of migration management are the key to an effective implementation of the different tools. Agreements must be concluded considering third countries’ own needs to solve their national immigration challenges.

Morocco and Cape Verde are clearly different in terms of geopolitical importance for the EU. We argue in this thesis that Cape Verde has a low geopolitical importance for

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1, 15; Stefan Brocza and Katharina Paulhart, ‘EU Mobility Partnerships: a Smart Instrument for the Externalization of Migration Control (2015) 15(3) *Eur J Futures Res* 1.

<sup>19</sup> Jean-Pierre Cassarino, ‘Informalising Readmission Agreements in the EU Neighbourhood’ (2007) 42(2) *The International Spectator* 179 <https://halshs.archives-ouvertes.fr/hal-01232695/document>. ‘Accessed 13 January 2017’.

<sup>20</sup> Chapter 5.

<sup>21</sup> Natasja Reslow, ‘The Role of Third Countries in EU Migration Policy: The Mobility Partnerships’ (2012) 14(4) *EJML* 395.

<sup>22</sup> MCMREAM, Stratégie Nationale d’Immigration et d’Asile, 2014 <http://www.marocainsdumonde.gov.ma/fr/le-minist%C3%A8re/affaires-de-la-migration/strat%C3%A9gie-nationale-dimmigration-et-dasile> ‘Accessed 19 January 2018’.

the EU because of, among other reasons, its geographical location, small population size and small emigration fluxes towards the EU. This low geopolitical importance confers a low power of negotiation to Cape Verde. On the other hand, Morocco has a high power of negotiation, mainly due to its role of “gate-keeper”, conferring the country a higher power of negotiation. A key finding to emerge from this study is that the power of negotiation that a country gains from its geopolitical importance for the EU influences the measure to which a Mobility Partnership is relevant for the development of the legal framework in that country. We argue that with a low level of negotiation power, the Mobility Partnership is mainly used as a tool by the EU and Member States to impose their interests upon the third country. Whereas, with a high negotiation power, the Mobility Partnership is used as a tool by the EU and the third country to achieve both their objectives. In this configuration, the third country can influence the content of the Mobility Partnership. It is often forgotten that third countries that have gained an important level of negotiation power because they are of key geopolitical importance for the EU in terms of migration control are not passively implementing EU’s migration policies. A third country can use the conditionality mechanism to its advantage by pushing the EU to cooperate on issues of the third country’s interest. This is the case of Morocco which through its role of “gate-keeper” and close cooperation on border control became an extremely valuable ally of the EU in the fight against irregular migration.

In the thesis we argue that the power of negotiation influences the relevance of Mobility Partnerships in two ways<sup>23</sup>. First it influences the content of the Mobility Partnership and therefore the projects that are being implemented. This means that a country with a high power of negotiation can influence the implementation of legally and policy relevant projects when the EU and Member States can impose policy and legally relevant projects to a country with a low power of negotiation. Secondly, the influence that the EU and Member States have on the content of new legal and policy developments is also differentiated according to the power of negotiation of a third country. In this case, the factors of administrative capacity and power of negotiation are combined. We argue that if a country has a low administrative capacity it will be more likely to be influenced in its legal and policy development. It should be clarified

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<sup>23</sup> Chapter 5.



that being influenced by foreign legislation in itself is not inadequate and is a common practice throughout the world<sup>24</sup>. What can be seen as more problematic is the transposition *ad-litteram* of legal provisions which are not adapted to the needs of the receiving country.

As presented in Chapter 1 several reasons can explain the existence of legal transplants and policy transfer. The first one is the likelihood for foreign experts to replicate laws and policies in force in their country. In the case of Morocco, because experts from different nationalities are involved in the projects leading to legal and policy developments this risk is minimized. But in the case of Cape Verde, the new laws on immigration and on asylum were fully drafted by a Cape Verdean and a Portuguese expert. In this case we argue that the risk of transposition *ad-litteram* of legal provisions is high. This is especially strengthened by the fact that Portugal and Cape Verde have strong postcolonial ties and a long-standing tradition of legal transplant. We argue that the occurrence of legal transplants and policy transfer is higher if the country has a low power of negotiation<sup>25</sup>. This can be explained by the fact that a country with a higher level of negotiation power can negotiate relevant capacity building projects to be included in Mobility Partnerships as well as involving more actors in the implementation of these capacity building projects. This way the influence of a single actor is reduced which makes legal and policy transplants less likely to occur. This does not mean that there is no influence at all from the different actors. It should also be noted that, even in the case of a low power of negotiation, the third country still has its own agency. Although, the officials of a third country with low power of negotiation might not be able to put forth their interests in a successful manner it does not mean that they are completely passive recipients.

When looking beyond the role of Member States in legal transplants and policy transfers, we can see that the EU can also play a role. Iann Manners argues that technical assistance can be a way for the EU to transfer its norms. In the case of Morocco, even though it seems that the country has more agency to direct the type of technical assistance or capacity building that it receives, it is not immune to this type of transfer of norms. The same argumentation can be applied to the existence of “overt

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<sup>24</sup> Alan Watson, *Legal Transplants: An Approach in Comparative Law* (Edinburgh: Scottish Academic Press 1974).

<sup>25</sup> Chapter 5.

diffusion”, “contagion” or procedural diffusion”<sup>26</sup> in Cape Verde and Morocco. Both countries have benefited from development aid and technical support for decades and are used to collaborate with EU officials, which are based on their territories. The collaboration between the Moroccan and Cape Verdean governments and the EU Delegation in these countries goes far beyond the question of migration. The processes and ideas developed and shared through this cooperation can lead to a transfer of norm that could lead to policy and legal change. It should also not be dismissed that many officials in Cape Verde and Morocco have studied in Europe, being influenced by European or more generally Western norms<sup>27</sup>.

Another question that merits to be discussed further is the relevance of Mobility Partnerships to enhance migrants’ access to rights. The first pillar of the GAMM<sup>28</sup> covers mobility, legal migration and integration. The notion of circular migration has been closely related to the Mobility Partnership tool<sup>29</sup>. Mobility Partnerships were presented by the EU as a tool favouring circular migration and therefore enhancing legal migration options for third country nationals in the limits and conditions set by the Member States. Circular migration was perceived by the EU as “an important shift in migration patterns” for countries of origin<sup>30</sup>. The negotiations of the first Mobility Partnerships, including the one with Cape Verde, was influenced by the idea of a triple win approach using circular migration<sup>31</sup>. However, with the conclusion of the first Mobility Partnerships criticism started to raise<sup>32</sup>. The economic crisis that struck Europe starting in 2008, had a negative impact on the implementation of Mobility Partnerships in terms of legal migration opportunities. It is often assumed that Mobility Partnerships are unfair tools created in favor of the EU and its Member States, not providing new opportunities for legal migration to third countries. In 2011 Carrera and Raúl Hernández I Sagrera published an article in which they criticized circular migration opportunities provided by the Mobility Partnerships with Moldova, Cape Verde and Georgia<sup>33</sup>. They argued that concretely these Mobility Partnerships give “few tangible

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<sup>26</sup> Iann Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40(2) *JCMS* 235, 244-245.

<sup>27</sup> Interview 13 Moroccan Ministry of Labour, Rabat, 19 January 2016.

<sup>28</sup> European Commission, ‘The Global Approach to Migration and Mobility’ COM(2011) 743 final, Brussels, 18 November 2011.

<sup>29</sup> Commission of the European Communities (n5) 4.

<sup>30</sup> Global Commission on International Migration, ‘Migration in an Interconnected World: New Directions for Action’, 5 October 2005 1, 31.

<sup>31</sup> Chapter 3.

<sup>32</sup> Sergio Carrera and Raúl Hernández I Sagrera (n6) 28.

<sup>33</sup> *Ibid* 97.

examples of effective ‘circular migration’ initiatives”<sup>34</sup>. Legal migration was presented as one of the novelties of the Mobility Partnership, however, in practice, very little projects have been implemented aiming at developing legal migration channels for third country nationals. In Chapter 3 we found that the topic with the lowest implementation *ratio* pertains to Mobility, legal immigration and integration. We argue that Mobility Partnerships do not deliver on their promise of increased mobility.

However, this does not mean that Mobility Partnerships are not relevant for enhancing migrants’ rights. Both Mobility Partnership played a significant role in the development and implementation of immigration and asylum strategies in Cape Verde and Morocco aiming at enhancing the rights of immigrants living in these third countries and to improve their integration. Sub-Saharan migrants in Morocco and Cape Verde can directly benefit from the legal and policy changes supported by the EU and Member States through the Mobility Partnership. Their access to rights can be enhanced even though this is not the primary aim of Mobility Partnerships. The focus should be put on migrants’ rights in the third country rather than on the limited access to the EU. Indeed, the legal framework for migrants’ rights in the third country can be positively impacted by the implementation of a Mobility Partnership as is the case in Morocco and Cape Verde. The legal and policy developments in Morocco and Cape Verde improved, to some extent, the access to socio-economic and political rights for sub-Saharan migrants. These positive consequences of the Mobility Partnerships are often overlooked as they were not foreseen at the time of the negotiation of the instruments. Mobility Partnerships often have a negative image as they are seen only as a tool that failed to keep its promise to enhance mobility. Mobility Partnerships are more than just an opportunity for legal migration channels towards Europe (which it is not) and this should be underlined. Some academics wonder however, whether the improvement of migrants’ rights following the regularization period constitutes a lasting change or only an interruption in Morocco’s repressive policy against sub-Saharan migrants<sup>35</sup>. It should be noted that even though improvements are still needed in terms of migrants’ access to rights the fact that this access is improved is already a positive step in the right direction. Morocco and Cape Verde are still developing countries with difficulties

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<sup>34</sup> Ibid 101.

<sup>35</sup> Myriam Cherti and Michael Collyer, ‘Immigration and Pensée d’Etat: Moroccan Migration Policy Changes as Transformation of “Geopolitical Culture”’ (2015) 20(4) *The Journal of North African Studies* 590, 602.

to provide access to rights to their own nationals. Therefore, rather than analyzing migrants' access to rights in comparison to Western standards it would be more interesting to see if the access to the existing rights in Morocco and Cape Verde is the same for nationals and immigrants.

Besides, it is striking to see how much emphasis is put on the development and implementation of the NSIA and NIS in comparison with the emigration strategies in Morocco and Cape Verde. It is striking because both Morocco and Cape Verde have a large population of emigrants living in Europe whereas the percentage of immigrants living in these two countries is still very low. It represents, in 2014, 0,25% in Morocco and 3,2% in Cape Verde<sup>36</sup>. One could wonder why the strategies on emigration targeting a much higher share of the population are not more developed and why, so much focus is put on a phenomenon (immigration) which taken in numbers is not significant. When linking the development and implementation of both immigration and emigration strategies to the Mobility Partnerships we can clearly see that the focus is exclusively put in the support of the development and implementation of the immigration strategies. This does not only demonstrate the interests of the EU and the Member States in the development and implementation of immigration strategies in third countries but also the growing need of third countries for such strategies as they become a migration destination country<sup>37</sup>. It can also show how EU's priorities condition third countries priorities. By having an easier access to financial and technical support for strategies which have the interests of the EU, the third countries will be incentivized in developing an immigration strategy rather than an emigration strategy. As the emigration strategies are not able to attract the same level of financial support they seem to be overshadowed.

Furthermore, we can discuss whether Mobility Partnerships enable the conclusion of other binding acts or the implementation of specific policies with third countries in support to the externalisation of EU's migration policy. The thesis puts forward that the EU uses the Mobility Partnership tool, among others, to externalise the reception of

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<sup>36</sup> For Morocco: Haut-Commissariat au Plan, 'Les Résidents Étrangers au Maroc (selon RGPH 2014)' 18 December 2017 1, 4; For Cape Verde: Instituto Nacional de Estatística, 'Inquérito Multi-objectivo Contínuo 2014 Estatísticas das Migrações' (2015) 1, 14.

<sup>37</sup> Mohamed Berriane, Hein de Haas and Katharina Natter (n12) 517.

migrants and refugees in neighbouring third countries<sup>38</sup>. This externalization approach includes the development of asylum law and reception capacities in third countries to involve them in the procedure of reception of asylum seekers and share the “burden” of asylum seekers and refugees with neighbouring third countries. The EU also externalizes some of its migration control to neighbouring third countries to fight the entry of irregular migrants in its territory, converting them into EU’s “gate-keepers”. Strong border control capacities, the fight against human trafficking and the conclusion of Readmission Agreements are several ways put forth by the EU to “support” third countries in successfully playing their roles. The analysis suggests that Mobility Partnerships do have relevance in the development of legal frameworks in third countries, in areas of migration, human trafficking and asylum law as well as the development of stronger border controls. The EU is using different strategies when implementing Mobility Partnerships in order to promote legal and policy developments in these fields. EU’s support for Morocco’s NSIA can be seen as a way for the EU to externalise its migration and refugees’ reception. Indeed, the Moroccan strategy, by regularizing immigrants and improving their access to work and basic rights such as minimum health care, access to the labour market and education, could influence migrants to settle in Morocco<sup>39</sup>. These migrants may have initially only transited through Morocco in the hope to enter Europe. However, the strengthening of borders combined with an improvement in immigrants’ situation and access to rights, transformed the transit situation into a more permanent settlement<sup>40</sup>. Through Mobility Partnerships third countries can be involved in the fight against irregular migration and the externalisation of EU’s migration control. However, it is simplistic to believe that third countries have no say in the matter. The interests of the different parties as well as their capacity to negotiate are conditioning EU’s actions.

This research has thrown up many questions in need of further investigation. For example, national immigration strategies have been concluded in Cape Verde, Morocco but also Tunisia and Algeria. Algeria is a country that did not conclude a Mobility Partnership. Therefore, one can wonder if the Mobility Partnership is really the key factor in the development and implementation of such strategies or rather the

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<sup>38</sup> Chapters 4 and 5.

<sup>39</sup> Chapter 5.

<sup>40</sup> Myriam Cherti and Michael Collyer (n35) 597-598; Chapter 5.

consequence of diffusion. In Chapter 1, we presented several situations in which the diffusion of norms can occur. Iann Manners suggests that the EU can diffuse its norms to third countries through *contagion* or through the strategic communication about new policies. The diffusion of a norm can also be done through *procedural* diffusion which can be the consequence of the institutionalisation of a relationship through for example cooperation agreements. Moreover, a comparison could be made on the effective implementation of such a strategy in a country with a Mobility Partnership and a country without in order to determine whether Mobility Partnerships can be influencing deeper political and legal changes or more sustainable capacity developments leading to the actual implementation of the national immigration strategies.

Further research is also required to determine the future of the GAMM and Mobility Partnerships following the creation of the Migration Partnership Framework and the EU Compacts. Indeed, the Migration Partnership Framework and the EU Compacts could be considered as a repackaging of the goals and methods used by the GAMM and Mobility Partnerships. In this case it would be interesting to analyse the role of interdepartmental struggles inside the EU Commission. Indeed, the GAMM and Mobility Partnerships are tools developed and managed by DG Home, whereas, the Migration Partnership Framework and the EU Compacts are tools developed by DG Devco. Jordan, for example, has recently concluded a Mobility Partnership and only a few months later an EU Compact. One can wonder what is the difference between the two instruments, what is their respective scope and is one instrument more influential than the other? Do the new EU Compacts mark the end of the Mobility Partnerships?

Moreover, if Mobility Partnerships are only proposed to countries fulfilling several criteria such as close ties (politically and geographically) to Europe, one can argue that few countries beyond EU's neighbourhood will be able to meet this criterion and therefore the Mobility Partnership tool might be replaced by the EU Compacts. Additionally, this research will serve as a base for future studies on the role played by Mobility Partnerships and newer tools such as the Migration Partnership Framework and the use of EU Compacts in the EU strategy of externalisation of immigrants and refugees' reception. The question of the lifespan of a Mobility Partnership and the potential "after Mobility Partnership" can also be raised. Even though in the official discourse it is argued that Mobility Partnerships do not die, we saw in the case of Cape

Verde that this argument is contestable<sup>41</sup>. What are the next steps in the EU-Cape Verdean relations, for example, once the Mobility Partnership terminated?

The thesis shows that we can only understand the relevance of Mobility Partnerships if we take seriously the interests of the third country and understand the context in which Mobility Partnerships are being negotiated and implemented.

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<sup>41</sup> Chapter 5.





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## ANNEX I INTERVIEW LIST

- 0 DG Home Affairs, Brussels, 27 June 2015
- 1 DG Devco, Brussels (by phone), 28 October 2015
- 2 EEAS, Brussels (by phone), 15 October 2015
- 3 DG Home Affairs, Brussels, 18 November 2015
- 4 Council of Europe, Strasbourg, 21 December 2015
- 5 AMERM, University Mohammed V, Rabat, 12 January 2016
- 6 EU Delegation, Rabat, 13 January 2016
- 7 EU Delegation, Rabat, 13 January 2016
- 8 French Embassy, Rabat, 14 January 2016
- 9 UNHCR, Rabat, 15 January 2016
- 10 Expertise France, Rabat, 15 January 2016
- 11 Portuguese Embassy, Rabat, 18, January, 2016
- 12 Council of Europe, Rabat, 19 January 2016
- 13 Moroccan Ministry of Labour, Rabat, 19 January 2016
- 14 GIZ \*, Rabat, 20 January 2016
- 15 IOM\*, Rabat, 20 January 2016
- 16 MCMREAM \*, Rabat, 21 January 2016
- 17 Spanish Embassy \*, Rabat, 22 January 2016
- 18 ICMPD, Brussels, 13 May 2016
- 19 Belgian Embassy, Rabat, 12 April 2016
- 20 CEI, Rabat, 15 April 2016
- 21 CCSM, Rabat, 15 April 2016
- 22 FASED\*\*, Rabat, 19 April 2016
- 23 CNDH \*, Rabat, 21 April 2016
- 24 Red Chabaka\*, Tanger, 22 April 2016
- 25 APIMA, Rabat, 23 April 2016
- 26 CEI, Rabat, 25 April 2016
- 27 Collectif des travailleurs migrants au Maroc, Rabat, 25 April, 2016
- 28 DG Home Affairs, Brussels, 20 October 2016
- 29 DG Home Affairs, Brussels, 26 October 2016
- 30 DG Near, Brussels, 27 October 2016
- 31 ICMPD, Brussels, 27 October 2016
- 32 ICMPD, Brussels, 28 October 2016
- 33 Direção Geral das Comunidades, Praia, 23 February 2016
- 34 Centro Comum de Vistos/ Portuguese Consulate, Praia, 23 February 2016
- 35 DGI, Praia, 23 February 2016
- 36 MIREX, Praia, 23 February 2016
- 37 CAMPO, Praia, 24 February 2016
- 38 IOM, Praia, 24 February 2016
- 39 EU Delegation\*, Praia, 25 February 2016.
- 40 Institute of Social and Legal Sciences of Cape Verde, Praia, 26 February 2016
- 41 Luxembourg Embassy, Praia, 2016
- 42 CNDH\*, Praia, 26 February 2016
- 43 Associação dos Guineenses Residentes em Cabo Verde, Praia, 14 November 2016
- 44 Associação dos Filhos e Amigos para o Desenvolvimento Integrado da Região de Bafatá, Praia, 16 November 2016

- 45 Ex-Secretário de Estado dos Negócios Estrangeiros/Former Ambassador, Praia, 16 November 2016
- 46 Associação dos Serraleoneses Residentes em Cabo Verde, Praia, 17 November 2016
- 47 Associação dos Estudantes e investigadores Guineenses, Praia, 17 November 2016
- 48 Associação de Guineenses, Boa Vista, 24 November 2016
- 49 Camara Municipal, Boa Vista, 25 November 2016
- 50 Plataforma das Comunidades Africanas Residentes em Cabo Verde, Boa Vista, 29 November 2016
- 51 Association des Senegalais, Boa Vista, 29 November 2016
- 52 Associação dos Emigrantes Senegaleses Residentes em Cabo Verde, Praia, 2 December 2016
- 53 Associação Esperança Africana, Praia, 2 December 2016
- 54 Association des Senegalais, Praia, 2 December 2016
- 55 Association avenir école Cape – Vert, Paris, 18 December 2016
- 56 Association Cap – Vert Amiens, Amiens, 19 December 2016
- 57 Association Cap – Vert Amiens, Amiens, 19 December 2016
- 58 Alliance et Echanges, Creil, 19 December 2016
- 59 Section des femmes du Secteur France du Parti africain pour l'indépendance du Cap Vert (PAICV), Paris, 20 December 2016
- 60 Association des femmes d'Asnieres, 20 December, 2016
- 61 Calima, Strasbourg, 1 June 2017
- 62 ATMF, Strasbourg, 2 June 2017
- 63 Conseil de la communauté marocaine à l'étranger, Rabat (by phone), 12 June 2017
- 64\* Associação Essalam, Porto, 11 October 2017
- 65 Associação Cabo-Verdiana de Setubal, Setubal, 3 November 2017
- 66 Associação Girassol Solidario, Lisbon, 4 November 2017
- 67\* Associação da Comunidade Marroquina em Portugal, Lisbon, 4 November 2017
- 68\* Associação dos Antigos Alunos do Ensino Secundario de Cabo Verde, Lisbon, 4 November 2017
- 69 Congresso dos Quadros Cabo-Verdianos da Diaspora/ Universidade do Minho, Braga, 5 December 2017

\*Two respondents attended the same Interview.

\*\*Three respondents attended the same Interview.



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 May 2008 (27.05)  
(OR. fr)**

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**ADDENDUM TO "I/A" ITEM NOTE**

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from : General Secretariat of the Council  
to : Permanent Representatives Committee / Council  
Subject : Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde

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The Republic of Cape Verde, the European Community and the participating Member States of the European Union, namely the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg and the Portuguese Republic (hereinafter referred to as "the Signatories");

ACTING in the existing framework for their cooperation, in particular the Cotonou Partnership Agreement and the Special Partnership between the European Union and the Republic of Cape Verde (hereinafter referred to as, respectively, "the EU" and "Cape Verde") approved by the Council of the European Union on 19 November 2007, and its Action Plan, which refer specifically to migration questions;

RECOGNISING the benefits and opportunities that well managed migration can bring to migrants and the Signatories alike;

CONFIRMING their commitment to facilitating the movement of persons between Cape Verde and the EU, whilst working to ensure better management of migration flows including illegal migration flows;

RECALLING the Global Approach to Migration adopted by the Council of the European Union and, in particular, the Council conclusions of 10 December 2007 on mobility partnerships and circular migration in the framework of the Global Approach, the European Commission communication of 16 May 2007 on circular migration and mobility partnerships between the European Union and third countries, the declaration and action plan adopted at the Rabat Ministerial Conference on Migration and Development in July 2006, and WELCOMING the adoption on 9 December 2007 by the Second EU-Africa Summit of a Partnership on Migration, Mobility and Employment;

CONSIDERING the bilateral agreements on migration which have already been concluded by Cape Verde with certain Member States;

HAVE DECIDED on a Mobility Partnership based on reciprocity and with the objectives of facilitating the movement of persons between their territories, as well as legal migration, in particular circular and temporary migration, developing genuine cooperation on migration and development, and preventing and combating illegal immigration, smuggling of migrants and trafficking in human beings, including the promotion of an effective readmission and return policy, while respecting human rights and taking into account the situation of migrants and the socio-economic development of the Signatories.

To this end, they will further develop their dialogue and cooperation on migration issues, in particular with a view to endeavouring to:



## **Mobility, legal migration and integration**

1. Promote a better framework for legal mobility, supported by a strengthening of information, integration and protection measures for migrants, while exploiting existing labour market opportunities, and reducing the risks linked to illegal migration and trafficking in human beings;
2. Inform potential migrants about legal migration channels to the EU, employment opportunities in the Member States on the basis of national labour market situations, and the dangers of illegal migration and illegal work; provide information about the labour market situation in Cape Verde; promote pre-departure training and support measures for temporary workers and encourage circular migration of workers;
3. Strengthen Cape Verde's institutional and administrative capacity to manage migration, including in the areas of asylum and refugee protection, through training and the exchange of experts and best practices. The emphasis will be placed on legislative actions, institutional and operational development, and the promotion of migration policies;
4. Improve the social protection of legal migrants;
5. Develop a dialogue on short-stay visa issues to facilitate the mobility of certain categories of person;

## Migration and development

6. Foster cooperation with Cape Verdean communities abroad by strengthening links with the diaspora, and assist the diaspora in their efforts to contribute to the development of Cape Verde; contribute to the reform of the financial sector in order to create favourable conditions for investment by the diaspora in their country of origin, facilitate transfers by migrants and encourage the introduction of financial products adapted to the needs of migrants and of transfer beneficiaries with a view to increasing the impact of such transfers on the development of Cape Verde and encouraging the use of such transfers for investment purposes;
7. Mitigate the adverse effects of the emigration of highly qualified persons and develop appropriate responses, in particular through temporary or permanent return policies aimed specifically at highly qualified Cape Verdean migrants and European nationals of Cape Verdean origin; promote the temporary migration of highly qualified Cape Verdean citizens for the purpose of improving their qualifications, and facilitate the recognition of skills and qualifications; foster exchanges of students, researchers and specialists and develop training and temporary work programmes;
8. Support voluntary return and the lasting reintegration of returning migrants by putting in place the appropriate mechanisms; inform Cape Verdean citizens abroad about the labour market situation, employment prospects and business opportunities in their home country, as well as about return possibilities; strengthen cooperation on training of migrant workers who are prospective returnees; contribute to the development of entrepreneurship and strengthen the legal framework for investment and business; and promote reflection on the social dimension of migration in the country of origin;

## **Border management, identity and travel documents, fight against illegal migration and trafficking in human beings**

9. Step up efforts to combat illegal migration and trafficking in human beings, as well as strengthening air and sea border management capacities; improve the security of travel documents, identity documents and residence permits; develop Cape Verde's capabilities in relation to surveillance and search and rescue at sea;
10. Facilitate twinning projects and initiatives by Member States in the area of border management, taking into account the role of the Frontex agency (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) as a facilitator and/or coordinator of operational cooperation on security management at borders between Member States and third countries;
11. Within the framework of a working arrangement, promote the development of extensive operational cooperation between the Frontex agency and the Cape Verdean authorities, represented by the Cape Verdean National Police, with the aim of combating illegal immigration and related cross-border crime by means of border controls, as well as reinforcing security at the borders between the Member States of the European Union and Cape Verde;
12. Develop a dialogue on the question of the readmission of persons residing without authorisation, in order to ensure efficient cooperation for their return;
13. Carry out information and warning campaigns to make the population aware of the risks associated with illegal immigration and of the dangers of exploitation and trafficking in human beings;

## Implementation

14. The Mobility Partnership is conceived as an open-ended, long-term framework based on a political dialogue, which will be developed within the general context of the existing relations between the European Community and its Member States and Cape Verde, and will evolve over time;
15. The EU intends to contribute to the implementation of the partnership through initiatives by the Community and the participating Member States, within the limits of their respective competences, in accordance with the applicable procedures and with due regard for the principle of Community preference. The Community agencies, in particular Frontex, will be involved in the implementation of the Partnership. The Partnership remains open to any other Member State wishing to participate;
16. In order more accurately to define migration issues of common interest, the Signatories intend to develop a migration profile of Cape Verde and pursue their dialogue and consultations in a spirit of partnership. They intend to meet at least twice a year at the appropriate level in order to review priorities and continue to develop of the Partnership, as the case may be. The Partnership will be implemented at operational level by the Local Monitoring Group set up under the Special Partnership and to which the various other actors involved in the Mobility Partnership will be associated as appropriate;
17. With a view to implementing the Mobility Partnership, the Signatories confirm their intentions with regard to the initiatives set out in the Annex hereto (hereinafter referred to as "the Annex"), within the limits of their available financial means. They intend to carefully coordinate their respective efforts and update the Annex, which contains a list of proposed activities, on a regular basis;
18. If appropriate, the Signatories will make an evaluation of this partnership;

19. The provisions of this joint declaration are not designed to create legal rights or obligations under international law.

Done at .....

For the Republic of Cape Verde

For the European Community

For the Kingdom of Spain

For the French Republic

For the Grand Duchy of Luxembourg

For the Portuguese Republic

## Annex on proposed activities

Within the framework of their Mobility Partnership, the Participants confirm their intention to take the following initiatives:

### *1. Monitoring and awareness of migration flows*

Objective: Analyse migration flows to determine needs and enhance the efficiency of migration policies

- (i) Proposal to draw up and regularly update a detailed migration profile of Cape Verde to assist decision-makers in Cape Verde to define and implement the most appropriate policies and to help the various donors to support those efforts in the best possible way. The document will provide a clearer insight into the migration phenomena affecting Cape Verde and their impact on the country's development, and into the situation of the Cape Verdean population or people of Cape Verdean origin living abroad, particularly in the EU.

### *2. Employment, management and facilitation of legal migration and integration*

Objective: Develop employment opportunities in Cape Verde and abroad, facilitate and properly manage legal emigration of Cape Verdean citizens, in particular for the purpose of employment, and improve the integration of Cape Verdean migrants in their host societies

- (i) Based, inter alia, on the experience gained when establishing the "Centro de Apoio ao Migrante no País de Origem" (CAMPO), proposal by the Portuguese Republic to develop, with the support of the Community and other interested Member States and in conjunction with the Cape Verdean authorities, the activities of CAMPO, whose role could consist of providing information to prospective migrants on legal migration opportunities in the participating Member States and on employment opportunities in both Cape Verde and those Member States, pre-departure preparation and training services, and information and assistance services to Cape Verdean migrants wishing to return to their country of origin to pursue employment or self-employment there (support for economic and social reintegration).

- (ii) Proposal by the Portuguese Republic to continue to promote the admission of certain categories of Cape Verdean worker, particularly on a temporary basis and with a view to circular migration, through the signing of a new protocol on migration questions with the government of Cape Verde extending the scope of the Protocol on the temporary migration of Cape Verdean workers to work in Portugal, signed by the two parties on 18 February 1997.
- (iii) Proposal by the Portuguese Republic to develop a bilateral cooperation instrument between the Portuguese Republic's Institute for Employment and Vocational Training (IEFP) and its Cape Verdean counterpart, with the aim of simplifying and boosting the efficiency of worker migration procedures.
- (iv) Proposal by the Kingdom of Spain to launch, for the benefit of Cape Verde, a schools/workshops programme aimed at facilitating the integration of apprentices, particularly through training actions tailored to the Cape Verdean labour market, to meet labour needs identified by that country. Other interested Member States and the European Community could join the programme if they so wished. The Kingdom of Spain also proposes to support the development of business initiatives by women.
- (v) Proposal by the French Republic to open a certain number of professional activities to Cape Verdean migrants and no longer to maintain objections based on the employment situation in the sectors concerned. The opening up of the labour market in this respect will be a component of the bilateral agreement on concerted management of migratory flows.
- (vi) Proposal by the signatory Member States to foster the development of existing partnerships between the University of Cape Verde and higher education institutions in the EU, and to foster the conclusion of similar partnerships with other institutions, notably with a view to promoting exchanges of students and teaching staff, particularly through the award of grants. The European Community would support those efforts under existing programmes supporting cooperation between higher education institutions. The Member States concerned would facilitate the issue of residence permits for the purpose of such exchanges, with due regard for the existing Community rules.

- (vii) Proposal by Cape Verde and the Member States concerned to explore the possibility of developing, within the appropriate fora, a dialogue on issues relating to the integration and treatment of third-country nationals residing on the territory of the Signatories.
- (viii) Proposal by the Grand Duchy of Luxembourg to study the possibility of setting up an initiative on temporary circular migration with Cape Verde.
- (ix) Proposal by the Grand Duchy of Luxembourg to develop and strengthen the "Migrer les yeux ouverts" ["Migrating with open eyes"] programme to familiarise future Cape Verdean migrants under family reunification with the social, linguistic and other realities of life in Luxembourg.
- (x) Proposal by the Grand Duchy of Luxembourg to offer twinning between partner universities.

### 3. Mobility and short-stay visas

Objective: Facilitate mobility between Cape Verde and the European Union by means of short-stay visas

- (i) Proposal by the European Commission to submit a recommendation to the Council of the European Union with a view to obtaining negotiating directives for a facilitation agreement concerning the issue of short-stay visas. This initiative falls within the wider context of a dialogue on visa matters to be held in the joint working party in charge of following up on this Declaration.
- (ii) Proposal by the Portuguese Republic to set up a Common Visa Application Centre for short-term visas in Praia.



4. Links between migration and development, diasporas, money transfers

Objective: Encourage the Cape Verdean diaspora to contribute to the development of their country of origin, in particular through transfers of money and skills, and facilitate circular and/or return migration to mitigate the effects of the emigration of highly qualified persons

- (i) Proposal by the Portuguese Republic to continue its support for the activities of the Instituto das Comunidades in migration and development matters, particularly through the "DIAS de Cabo Verde" project, which aims to foster circular migration of highly qualified migrants and is already co-financed by the European Community under the Aeneas Programme. The project would enable the development of circular migration by supporting partnerships between institutions in Cape Verde and the countries of emigration. The Kingdom of Spain proposes to contribute to these efforts through its support for the "Mobilising Cape Verdean Skills Abroad" programme, managed by the Instituto das Comunidades.
- (ii) Proposal by Cape Verde and the participating Member States to foster cooperation and partnerships between their hospital and research institutions, particularly with a view to strengthening the capacities of the Cape Verdean institutions, reducing the effects of the lack of qualified staff in the field of health in Cape Verde and encouraging exchanges of staff. In this context, a proposal by the Kingdom of Spain to launch a programme to strengthen the capacities of the Cape Verdean national health system, and a proposal by the Portuguese Republic to support the Cape Verdean national health system in the fields of haemodialysis and oncology.
- (iii) Proposal by the French Republic to develop, within the framework of a bilateral agreement on concerted management of migratory flows, a co-development programme for the benefit of Cape Verde under which Cape Verdean migrants legally established in France and French citizens of Cape Verdean origin could contribute, through transfers of money, skills or other resources, to the development of Cape Verde and carry on economic activities there on the basis of experience already acquired in other countries.

- (iv) The programme would have five parts:
- Promoting the reduction of the cost of money transfers;
  - Promoting productive investment;
  - Mobilising the skills of elites within the diaspora;
  - Support for local development projects;
  - Support for young people's initiatives.

5. Asylum and immigration

Objective: Assist Cape Verde to establish an asylum system which meets international standards

- (i) Proposal that Cape Verde ratify and fully implement the 1951 United Nations Convention on the Status of Refugees and its 1967 Protocol.
- (ii) Proposal by the Portuguese Republic to provide Cape Verde with technical assistance and expertise to establish an asylum system which meets international standards, drawing on European experience in this area.

6. Cooperation on border management, identity and travel documents, and the fight against illegal migration and trafficking in human beings

Objective: combat illegal migration and trafficking in human beings and improve border management and document security

- (i) Proposal that Cape Verde take steps to ensure effective implementation of the United National Convention against Transnational Organised Crime and its Protocols on smuggling of migrants and trafficking in persons, as well as compliance with its international obligations in relation to rescue at sea.

- (ii) Proposal that the operational arrangement that the Frontex agency and Cape Verde, represented by the Cape Verdean National Police, have mutually agreed to conclude, should cover activities in the field of information exchange and risk analysis, training, research and development, coordination of joint operational measures, and an active discussion on the improvement of technical equipment and technology at borders, while examining the scope for increased cooperation in the area of joint return operations, best practices and improvement of operational interoperability between the border guard organisations of the Member States and Cape Verde.
- (iii) Joint proposal by the Frontex agency and Cape Verde that the "Frontex Common Core Curriculum for Border Guard Basic Training" and the advanced training programme on the falsification of documents be implemented by the Cape Verdean National Police, and that provision be made for the improvement of both instruments on an ongoing basis.
- (iv) Proposal by the European Community and the Member States concerned to facilitate the establishment of police cooperation with Cape Verde and, in particular, between Cape Verde and Europol (the European Police Office) in terms of exchange of information on the fight against networks engaged in smuggling of migrants and trafficking in human beings.
- (v) Pursuant to the provisions of Article 13 of the Cotonou Agreement, proposal by the European Commission to submit a recommendation to the Council of the EU with a view to obtaining negotiating directives for an agreement on readmission of persons residing without authorisation covering third-country nationals and stateless persons.
- (vi) Proposal by the Portuguese Republic to undertake projects aimed at strengthening the capacities of the Cape Verdean authorities, particularly in the following areas:
- Strengthening the system for recording information on entries, exits and stays of foreigners on Cape Verdean territory (including a system for registering and issuing residence permits);
  - Continuing the installation of a more effective control system at the air borders;

- Introducing biometric features in travel documents;
  - Trainer training actions in the area of air and sea border control, documentary fraud, fingerprints and police control and investigation techniques;
  - Information and awareness-raising campaigns about the dangers of trafficking in human beings.
- (vii) Proposal by the Kingdom of Spain to strengthen the capacities of Cape Verde in relation to maritime security in its maritime zone and, in particular, to vessel inspection, surveillance and search and rescue at sea. It will contribute to sea patrol and surveillance operations against illegal migration flows with Cape Verde and will offer air resources and training courses for pilots and maintenance staff. Additionally, the Kingdom of Spain proposes to continue the "Seahorse" project, in particular by setting up a cooperation centre in Cape Verde. Lastly, in the context of police cooperation, it proposes that the telecommunications capacities of the Cape Verdean authorities be improved and that training actions continue to be undertaken in various fields for the benefit of the Cape Verdean authorities.
- (viii) Considering the humanitarian tragedy associated with illegal migration, the Kingdom of Spain proposes the strengthening of the National Red Cross Society in Cape Verde.
- (ix) Proposal by the Kingdom of Spain to reinforce the capacity of the Ministry of Defence in respect of new information and communication technologies.
- (x) Proposal by the French Republic to cooperate with Cape Verde on security (fight against drugs trafficking and illegal immigration) and training in document control, and to step up its contribution to border management efforts coordinated by the Frontex agency.





**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 3 June 2013 (05.06)  
(OR. fr)**

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**ADDENDUM TO "I/A" ITEM NOTE**

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from: General Secretariat of the Council  
to: Permanent Representatives Committee/Council

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Subject: Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States

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The Kingdom of Morocco, the European Union (hereinafter "EU") and the participating Member States of the EU, namely the Kingdom of Belgium, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Sweden, and the United Kingdom (hereinafter "the Signatories"),

- RECOGNISING that the issue of migration is a key element of the exemplary partnership which has linked Morocco and the EU for several decades;
- EMPHASISING the need to work together in a spirit of partnership with a view to ensuring better management of migration based on a comprehensive and balanced approach, to the mutual benefit of the parties concerned;

- ACTING within the existing framework of the EU-Morocco partnership, and in particular on the basis of the Euro-Mediterranean Association Agreement in force since March 2000, the 2005 EU-Morocco Action Plan established as part of the European Neighbourhood Policy (ENP), the new joint document on strengthening bilateral relations (Advanced Status) adopted in 2008, and the Action Plan for the implementation of Advanced Status (2013-2017);
- ACTING in line with the regional and international processes involving Morocco and the EU, in particular the Euro-African Migration and Development Dialogue (the Rabat Process), the EU-Africa Dialogue, the Euro-Mediterranean Partnership, the 5+5 Dialogue and the Global Forum on Migration and Development (GFMD); TAKING ACCOUNT also of the ACP-EU Dialogue on Migration, on the basis of the Cotonou Convention;
- DRAWING ON the Global Approach to Migration and Mobility adopted by the EU, and in particular on the four operational priorities it envisages, as well as the Moroccan government's priorities for migration and development;
- RECALLING that respect for fundamental rights underpins the EU's and Morocco's migration policies, including in relations with third countries;
- RECALLING the quality of relations in the field of migration between Morocco on the one hand, and the EU and the participating Member States on the other, and recognising the achievements made in the context of bilateral instruments and agreements on this matter;
- EMPHASISING the contribution of Moroccans residing in Europe to the rapprochement and development of relations between Morocco and Europe;
- RECOGNISING the benefits and positive impact of well-managed migration, both for the signatory parties and for migrants, by its contribution to the development of human, economic and commercial exchanges between the parties;

- REAFFIRMING their determination to develop further their cooperation on migration on the basis of a comprehensive and balanced approach that takes account of all migration-related issues on the basis of the four priority areas identified in this declaration;
- RECALLING the joint communications of the European Commission and of the High Representative of the Union for Foreign Affairs and Security Policy of 8 March and 25 May 2011 on a "Partnership for Democracy and Shared Prosperity with the Southern Mediterranean" and a "New response to a changing neighbourhood"; and the European Commission communication of 24 May 2011 on "A dialogue for migration, mobility and security with the Southern Mediterranean countries";
- RECOGNISING the specific characteristics of Morocco as country of origin, transit and, increasingly, final destination in terms of migration flows, and EMPHASISING Morocco's continued efforts to tackle migration routes, including maritime routes, to fight illegal immigration and combat cross-border networks involved in the trafficking and smuggling of human beings;
- REAFFIRMING that the prevention and control of illegal immigration must be reinforced comprehensively and cooperatively by all the countries involved and RECOGNISING that poverty and socio-economic imbalances are among the fundamental causes of migratory movement;
- AWARE that the management of migration flows cannot be achieved solely by means of monitoring measures but also requires concerted action to tackle the root causes of migration, particularly by implementing development projects in countries of origin;
- CONSIDERING that cooperating effectively to maximise the impact of migration on development and the concerted organisation of legal migration and mobility are essential to effective and mutually beneficial management of migration;

- ACTING in compliance with the legislative frameworks of Morocco, the EU and the participating Member States;
- RECALLING the EU's missions to Morocco on 13 October 2011, 6 December 2011, 28 May 2012, 18 and 19 October 2012, 14 and 15 February 2013 and 28 February 2013 in the framework of the Dialogue on Migration, Mobility and Security;

HAVE DECIDED to establish a Mobility Partnership with the following objectives:

- to manage the movement of persons for short periods and legal and labour migration more effectively, taking into account, with regard to the latter, the labour market of the signatories.
- to strengthen cooperation on migration and development in order to exploit the potential of migration and its positive effects on the development of Morocco and European countries.
- to combat illegal immigration, networks involved in the trafficking and smuggling of human beings, and to promote an effective return and readmission policy while respecting fundamental rights, the relevant legislation and ensuring the dignity of the people concerned.
- to comply with duly ratified international instruments concerning the protection of refugees.

To this end, they will ENDEAVOUR to develop further their dialogue and cooperation on migration, mobility and security in a spirit of shared responsibility and solidarity, in particular along the following lines:



## **Mobility, legal immigration and integration**

1. To further improve aspects of the conditions of consular services and procedures for the issuing of Schengen visas.
2. To pursue cooperation between the EU Member States and Morocco on simplifying the procedures for access and legal stays (including the possibility of issuing multiple-entry and longer-term visas, and waiving administration fees for certain categories of people).
3. To open negotiations between the EU and Morocco, in accordance with the signatory parties' internal procedures, with a view to concluding an agreement to facilitate the issuing of visas, in order to ensure more fluid mobility between the EU and Morocco.
4. To better inform Moroccan citizens about the options for legal immigration to the EU, including the entry conditions and the rights and duties arising from these.
5. To better inform Moroccan citizens with the requisite qualifications about the employment, study and training opportunities available in the participating Member States, in particular by increasing cooperation between their employment services and Moroccan employment services.
6. To cooperate closely in order to facilitate mutual recognition of vocational and academic qualifications.
7. To endeavour to improve coherence between the policy concerning the mobility of persons and the other areas of sectoral cooperation (trade, education, research, culture) in order to make it easier for Moroccan vocational trainees, students, academics, researchers and businessmen and women to enter and stay in the EU Member States.

8. To support Moroccan nationals who are legally resident in the EU and nationals from third countries residing legally in Morocco in their efforts to integrate.
9. To work together to develop cooperation for the implementation of active policies promoting integration and interculturality and combating exclusion and xenophobia, in order to avoid prejudices and stereotypes amongst the host country and migrants. To promote the role of Moroccan migration associations in the integration process.
10. To preserve the social security entitlements of Moroccan migrant workers and their family members, as provided for by the implementation of the decision of the Association Council on the coordination of social security between Morocco and the EU within the framework of Articles 65 to 68 of the EU-Morocco Euro-Mediterranean Association Agreement in order to improve the portability of rights to pensions and annuities in respect of old age survivor status, industrial accident or occupational disease as well as of invalidity resulting from industrial accident or occupational disease, ensuring compliance with the current bilateral agreements and conventions on social protection.
11. To examine methods for strengthening the protection and portability of social security rights for Moroccan migrant workers and their family members in the EU.

**Preventing and combating illegal immigration, people-smuggling, border management**

12. To continue cooperation on readmission to the mutual benefit of both parties and in compliance with the existing reciprocal obligations between Morocco and the EU Member States.

13. To resume negotiations between the EU and Morocco in order to conclude a balanced readmission agreement, with provisions relating to third-country nationals as well as accompanying measures and reconciling the need for operational efficiency with the requirement to observe the fundamental rights of migrants. The promotion of active and efficient cooperation with all regional partners will be essential in order to support efforts in this area.
14. To support Morocco's efforts and enhance its capacity at the legislative, institutional and operational level in order to prevent and combat illegal migration and networks involved in the trafficking of migrants and the smuggling of human beings.
15. To enhance information exchange, administrative capacity and operational and technical cooperation with regard to border management, the detection and dismantling of networks involved in trafficking migrants and cross-border organised crime, and combating illegal immigration.
16. On the basis of the programmes already launched by Morocco, to enhance procedures for the security and issue of travel documents in compliance with International Civil Aviation Organization (ICAO) standards; of identity documents and residence permits; and of other official documents issued by the Moroccan authorities.
17. To enhance information exchange, administrative capacity and organisational and technical cooperation between Morocco, the EU and its Member States in order to assist migrants who are victims of human trafficking, in particular those most vulnerable to exploitation.

18. To increase the capacity of the Moroccan authorities, if necessary in cooperation with the EU Member States, to address all aspects of the issue of unaccompanied minors, in particular through the implementation of policies aimed at preventing the migration of unaccompanied minors and facilitating their protection and willing return, in accordance with the principle of the best interests of the child, in accordance with the 1989 United Nations Convention on the Rights of the Child, and the implementation of accompanying measures facilitating their social, educational and family reintegration in their country of origin.
19. To cooperate on conducting information and awareness-raising campaigns on the risks and dangers of illegal migration and of exploitation by people-smuggling networks, in particular by promoting the role of civil society.
20. With respect for migrants' dignity and fundamental rights, to support the development of initiatives facilitating the voluntary return and socio-economic reintegration of illegal migrants, both for Moroccan nationals residing in the EU and for third-country nationals residing in Morocco.

### **Migration and development**

21. To strengthen cooperation between Morocco and the EU and its Member States in support of the socio-economic development of regions with high migration potential by implementing targeted policies and encouraging investment, including by Moroccans resident abroad, in order to generate employment.
22. To reinforce the role of Moroccan nationals in the EU in contributing to the development of Morocco, in particular by mobilising Moroccan expertise within the EU, and to support development initiatives for Morocco taken by civil society in collaboration with the relevant institutions and bodies of both parties.

23. To help Moroccan migrants residing legally in the EU to acquire vocational or academic skills which will enable them to develop viable economic activities and improve their employability on their return to Morocco.
24. To facilitate the social reintegration of migrants and their families voluntarily returning to Morocco and to enable them to benefit from the skills acquired during their time abroad, while paying particular attention to the specific needs of the most vulnerable migrants.
25. To enhance the establishment of measures in the EU and Morocco to reduce the cost of remittances by Moroccan migrants, in cooperation as appropriate with relevant private-sector actors.
26. To encourage migrants to invest productively in Morocco, in particular by promoting the financial education of the migrants and recipient families.
27. To implement policies to prevent and deal with the "brain drain", including by promoting circular migration and the mobilisation of skills.

### **International protection**

28. To support the strengthening of the Moroccan legislative and institutional framework for asylum, in accordance with international standards and Morocco's constitutional and legislative provisions. To continue the implementation of the principles of the 1951 Geneva Convention and its 1967 Protocol.
29. To promote the capacities of the Moroccan authorities responsible for asylum procedures, in particular through technical support and close cooperation with the relevant agencies and bodies of the EU and its Member States, and with the UN High Commissioner for Refugees (UNHCR).

## **Horizontal initiatives**

30. To increase Morocco's ability to manage migration flows in accordance with the four operational priorities defined by the EU's Global Approach to Migration and Mobility and Morocco's migration priorities.
31. To increase consultation and dialogue with a view to improving the respective migration policies of Morocco, the EU and the Member States concerned.
32. To consolidate cooperation and dialogue between the parties in order to adopt a common approach to migration.
33. To explore means of developing cooperation between the judicial authorities of the Member States, within the framework of their competence, on aspects relating to migration issues.
34. To increase the capacities of civil society players involved in migration, the protection of the most vulnerable groups, particularly victims of trafficking in human beings, both in Morocco and in Europe.
35. To improve and implement the policies and the legal framework governing migration, encouraging on the one hand the appropriate treatment of the various categories of migrants, and on the other hand the involvement of civil society in drawing up and monitoring those policies.
36. To pay greater heed to migration issues in the development and implementation of the signatory parties' policies, particularly with regard to development, employment and training, commercial and economic policy and gender issues, and to ensure that they are fully consistent with one another.

37. To promote scientific knowledge of migratory phenomena, ensuring that data are collected on migratory movements, and to put in place mechanisms to make it possible to study them so as better to define the policies and measures needed for joint and mutually beneficial migration management.

### **Implementation**

38. The Mobility Partnership is conceived as a long-term cooperation framework in line with the Global Approach to Migration and Mobility and with Moroccan migration policy, and is based on political dialogue and cooperation, which will evolve over time on the basis of the existing relationship between Morocco and the EU.
39. The signatory parties take the view that the elements contained in the various components of this partnership will be implemented using a balanced overall approach and constitute a package, particularly the visa and readmission facilitation agreements.
40. The EU and the undersigned Member States, within the framework of their respective powers and in accordance with the applicable procedures, and Morocco, intend to contribute to the implementation of the Mobility Partnership. The EU agencies, Frontex, Europol, CEPOL, Eurojust, EASO and the ETF, will be involved in the implementation of the partnership. The partnership remains open to any other Member State wishing to participate.
41. Morocco will take action to ensure that the objectives of this partnership are attained, taking account of the technical and financial means available.
42. In order to determine issues of common interest, monitor implementation of the partnership and, where necessary, reconsider its priorities, in accordance with the migration strategies of the signatory parties, and also to develop that partnership further, the Signatories intend to meet at least twice a year at an appropriate level decided by mutual agreement, within the framework of the existing structure for dialogue and cooperation. The Working Party on Social Affairs and Migration will also be involved in monitoring the partnership.

43. With a view to implementing the Mobility Partnership, the Signatories confirm their intention to cooperate at an operational level, including by incorporating relevant partners and actors present in Morocco through a cooperation platform as appropriate.
44. With a view to implementing the Mobility Partnership, the Signatories confirm their intention to follow the initiatives set out in the indicative Annex which are currently being finalised by the parties. Partnership actions will be implemented subject to the financial and technical resources to be deployed by the EU, the EU Member States and, in the case of the EU, in compliance with the division of powers between the EU and the Member States.
45. The Signatories intend to ensure proper coordination of their respective efforts and to update the Annex of activities, to be finalised by the parties, on a regular basis. An update of the actions identified in the current partnership will be made in the light of the progress made.
46. The provisions of this joint declaration and its Annex are not designed to create legal rights or obligations under international law.

Done at (...),

The Kingdom of Morocco, the European Union and the participating Member States of the European Union, namely

*For Morocco*

*For the European Union*

*For the Kingdom of Belgium*

*For the French Republic*



*For the Federal Republic of Germany*

*For the Italian Republic*

*For the Kingdom of the Netherlands*

*For the Portuguese Republic*

*For the Kingdom of Spain*

*For the Kingdom of Sweden*

*For the United Kingdom*

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The Annex to the EU-Morocco Mobility Partnership currently being finalised by the parties will comprise a series of activities which the European Union and its Member States are prepared to organise, finance or co-finance in order to bring about this partnership. Since the Annex is intended to be an evolving one, the listing of activities is purely indicative and their implementation will be the subject of appropriate contacts between the Moroccan and European authorities concerned, in particular in order to take into account the interests of the two parties and reflect their priorities. By September 2013 at the latest, a meeting will be scheduled to consider which projects, if any, are to be added, cancelled or modified.

It should be noted that in accordance with the provisions of points 42 and 45 of the Joint Declaration, the Signatories intend *inter alia*

- to meet at least twice a year at an appropriate level decided by mutual agreement, in order to monitor implementation of the partnership and, therefore, of the Annex as the operational component of the partnership; point 42 furthermore states that the Working Party on Social Affairs and Migration will also be involved in monitoring the partnership;
- to ensure proper coordination of their respective efforts and update the Annex on a regular basis. Point 45 furthermore states that updating of the actions featuring in the current partnership will be done in the light of the progress achieved in this field.

## ANNEX

Part 1: New projects as at 25 March 2013

<b>SECTION</b>	<b>OBJECTIVE</b>	<b>Partner</b>	<b>Proposed initiative</b>
<b>Mobility, legal immigration and integration</b>	<b>1. To further improve aspects of the conditions of consular services and procedures for the issuing of Schengen visas.</b>	<b>EU</b>	Increasing the consular presence of Member States in Morocco.
	<b>2. To pursue cooperation between the EU Member States and Morocco on simplifying the procedures for access and legal stays (including the possibility of issuing multiple-entry and longer-term visas, and waiving administration fees for certain categories of people).</b>	<b>EU</b>	Using the flexibility offered by EU legislation on short-stay visas.
	<b>3. To open negotiations between the EU and Morocco, in accordance with the signatory parties' internal procedures, for the conclusion of an agreement to facilitate the issuing of visas, with a view to ensuring more fluid mobility between the EU and Morocco.</b>	<b>EU</b>	Negotiating – subject to directives to be adopted by the Council – a visa facilitation agreement for certain categories of persons.
	<b>4. To better inform Moroccan citizens about the options for legal immigration to the EU, including the entry conditions and the rights and duties arising from these.</b>	<b>IT</b>	Training Moroccan civil servants to enhance their skills in managing migration flows to Italy (training course on legal mechanisms for migration to Italy and on Italy's immigration legislation, and information about the integration manual, which is available in eight languages including Arabic and French). <i>(Italian Ministry of Labour and Social Policy)</i>
		<b>BE</b>	Developing an information campaign targeted at young people in cities, particularly in the north, to inform them about legal migration

			options which would help them further their personal plans, and to raise their awareness of the risks involved in the process leading up to migration. ( <i>Aliens' Office</i> )
		<b>ES</b>	Helping to plan and conduct awareness-raising campaigns designed to better inform Moroccan citizens about means of legal immigration to Spain (procedures, conditions, deadlines) and about the prevention of illegal immigration. ( <i>Ministry of Employment and Social Security</i> )
	<b>5. To better inform Moroccan citizens with the requisite qualifications about the employment, study and training opportunities available in the participating Member States, in particular by increasing cooperation between their employment services and Moroccan employment services.</b>	<b>EU</b>	Possible course of action, to be identified in cooperation with the Moroccan government: capacity-building for employment agencies and other national institutions involved in promoting labour migration/preventing illegal migration and the reintegration of returning migrants into society and the workplace, particularly in accessing the existing channels for training, financing, and support in legal and social matters. ( <i>Thematic programme – European Commission</i> )
		<b>ES</b>	Providing technical assistance (on-site visits, training and exchange of best practices and/or ad-hoc cooperation) to the Moroccan authorities in order to create suitable information channels, or improve existing channels, that provide information about real job prospects in Spain.

			These would help improve the procedures and instruments used to manage the labour market . <i>(Ministry of Employment and Social Security)</i>
		<b>SE</b>	Strengthening the employment services' capacities to promote legal migration for professional purposes
	<b>6. To cooperate closely in order to facilitate mutual recognition of vocational and academic qualifications.</b>	<b>EU</b>	Proposal from the European Training Foundation (ETF) to put in place measures to facilitate interested Member States' recognition of vocational and university qualifications issued by Moroccan institutions; for example, cross-referencing Morocco's national framework for qualifications with the European Qualifications Framework. <i>(European Training Foundation (ETF))</i>
		<b>EU</b>	ETF support to set up a national qualifications framework in order to improve compatibility with the needs of the labour market. <i>(European Training Foundation (ETF))</i>
		<b>EU</b>	ETF support to develop common qualifications for certain professions in priority sectors of the economy in the Member States and Morocco, such as tourism and public buildings and works. <i>(European Training Foundation (ETF))</i>

	<p><b>9. To work together to develop cooperation for the implementation of active policies promoting integration, interculturality, and the combating of exclusion and xenophobia, in order to avoid prejudices and stereotypes between the host country and migrants; to promote the role of associations of Moroccan migrants in the integration process.</b></p>	<p><b>PT</b></p>	<p>Hosting working groups to promote training activities on integration support networks, such as the establishment of national immigration support centres (one-stop shops) or special projects to increase the capacity of institutions, the state and civil society to integrate immigrants. <i>(High Commission for Immigration and Intercultural Dialogue)</i></p>
		<p><b>ES</b></p>	<p>Strengthening the Moroccan authorities' institutional capacities for first reception services and infrastructures for migrants in vulnerable situations. <i>(Ministry of Employment and Social Security)</i></p>
	<p><b>10. To uphold the social security rights of Moroccan migrant workers and their family members, as provided for by the implementation of the decision of the Association Council on the coordination of social security between Morocco and the EU within the framework of Articles 65 to 68 of the EU-Morocco Euro-Mediterranean Association Agreement in order to improve the portability of pension rights, old-age pensions, survivors' pensions, benefits for victims of occupational accidents or occupational disease, and pensions for invalidity arising from occupational accidents or occupational disease, ensuring compliance with the current bilateral agreements and conventions on social protection.</b></p>	<p><b>PT</b></p>	<p>Strengthening institutional capacities via a programme of technical cooperation to develop information and awareness-raising campaigns for Moroccan migrant workers on the subject of their social entitlements in Portugal. <i>(Ministry of Social Solidarity and Social Security)</i></p>

Preventing and combating illegal immigration, people-smuggling, border management	<b>12. To strengthen cooperation on readmission to the mutual benefit of both parties and in compliance with the existing reciprocal obligations between Morocco and the EU Member States.</b>	NL	Exchange of best practice on readmission (e.g. determination of foreign nationals' identity/nationality). <i>(Ministry of Security and Justice: Repatriation and Departure Service)</i>
	<b>13. To resume negotiations between the EU and Morocco in order to conclude a balanced readmission agreement, with provisions relating to third-country nationals together with accompanying measures and reconciling the need for operational efficiency with the requirement to respect the fundamental rights of migrants. It will be essential to promote active and effective cooperation with all regional partners in order to support efforts in this field.</b>	EU	Resumption of negotiations – subject to the directives to be adopted by the Council – on an EU-Morocco readmission agreement, with provisions relating to third-country nationals.
		NL	Supporting Morocco in the implementation of the EU readmission agreement, and supporting Morocco in implementing the return of third-country nationals, for the most part sub-Saharan Africans. A key aim will be to establish standard procedures for identification and verification (ascertaining nationality) and assistance in obtaining (or replacing) travel documents, if necessary, by facilitating

			cooperation between Morocco and the countries of origin, and potentially by putting AVR arrangements in place. The establishment of the AVR arrangements could be a continuation of an OIM project funded by the Netherlands ( <i>Ministry of Security and Justice: Repatriation and Departure Service</i> )
	<b>14. To support Morocco's efforts and enhance its capacity at the legislative, institutional and operational level in order to prevent and combat illegal migration, the trafficking of migrants and the smuggling of human beings.</b>	<b>EU</b>	On the basis of a working arrangement between Frontex and the Moroccan authorities: possibility of benefiting from the specific training instruments developed by Frontex and/or other relevant activities, where appropriate. (See also point 15).
		<b>NL</b>	Providing advice on the establishment of a legal framework on illegal immigration, trafficking in and smuggling of human beings; evaluating the organisational structures and institutions which deal with migration issues; advising on the importance of international cooperation and projects; providing training and advice on the creation and development of "risk profiles" of illegal immigrants; giving advice on the transmission of signals on migration-related crime. (Ministry of Security and Justice: Immigration and Naturalisation Service)
	<b>15. To enhance information exchange, administrative capacity and operational and technical cooperation with regard to border management, the detection and</b>	<b>UK</b>	Offer of a study visit/workshop to learn and gather information about the UK approach to border management, advice on the prevention



	<b>dismantling of networks involved in trafficking migrants and cross-border organised crime, and combating illegal immigration.</b>		of illegal immigration and strategies to prevent cross-border crime.
		<b>BE</b>	Information exchange on the management of migration from certain western and central African countries, where the participants have a particular specialisation ( <i>Aliens' Office</i> )
		<b>EU</b>	Frontex proposal to exchange and share information and risk analyses.
		<b>EU</b>	Conclusion of a working arrangement between Frontex and the Moroccan authorities.
		<b>EU</b>	Frontex proposal to involve the Moroccan authorities in charge of border management in joint operations coordinated by Frontex, where appropriate.
		<b>ES</b>	Enhancing information exchange in the fight against illegal immigration and the prevention of organised crime: information-exchange action taken in line with the Project Seahorse Network. <i>(Ministry of the Interior)</i>
		<b>FR</b>	Implementing new training measures focused on investigation in the fight against document fraud and illegal immigration. Organising immersion courses for investigators in French and Moroccan police units responsible for combating the smuggling of migrants, in order to encourage the exchange of operational information. <i>(Ministry of the Interior: Central Border Police Directorate - unit for operational coordination)</i>

			<i>of the fight against the smuggling and exploitation of migrants; International Cooperation Directorate).</i>	
		<b>PT</b>	Hosting working visits, promoting work experience and training measures in order to contribute to institutional capacity building in the areas of integrated border management, return and readmission, illegal immigration and the various aspects of trafficking in human beings. <i>(Ministry of the Interior; Immigration and Borders Service)</i>	
		<b>PT</b>	Establishing an operational network of contacts between the authorities at the borders. <i>(Ministry of the Interior: Immigration and Borders Service)</i>	
	<b>16. On the basis of the programmes already launched by Morocco, to enhance procedures for the security and issue of travel documents in compliance with International Civil Aviation Organization (ICAO) standards; of identity documents and residence permits; and of other official documents issued by the Moroccan authorities.</b>		<b>NL</b>	Course on identifying and analysing infringements of application procedures, and how to tackle them. <i>(Ministry of Security and Justice: Immigration and Naturalisation Service)</i>
			<b>NL</b>	Advising on issuing procedures for breeder documents and passports; advice on the level of security of existing documents or documents to be developed; advice on bringing the security of existing documents up to date; training course on document security <i>(Ministry of Security and Justice: Immigration and Naturalisation Service)</i>

		<b>PT</b>	Development of exchange and/or technical assistance projects in the following fields: technology and information systems related to the security of identity, travel and residence documents; border control; management of documents related to foreign nationals' stay/residence; processing and analysis of information. <i>(Ministry of the Interior: Immigration and Borders Service)</i>
		<b>FR</b>	<ul style="list-style-type: none"> <li>• Advice and follow-up on setting up a Moroccan office to tackle document fraud, responsible for centralising intelligence, analysing the facts of fraud cases that have come to light and sending out alerts.</li> <li>• Continue training at the police institute in Kenitra on document fraud and measures to raise awareness about identity theft and the use of lost and stolen documents.</li> </ul> <i>(Ministry of the Interior: Central Border Police Directorate – office for document fraud)</i>
		<b>BE</b>	Strengthening the capacity of Moroccan institutions and NGOs to cater for victims of human trafficking by developing a joint handbook and through staff training. <i>(Aliens' Office)</i>
	<b>17. To enhance information exchange, administrative capacity and organisational and technical cooperation between Morocco, the EU and its Member States in order to assist migrants who are victims of human trafficking, in particular those most vulnerable to exploitation.</b>		

		<b>EU</b>	Cooperation between Europol and Morocco to develop a method of assessing human-trafficking threats. ( <i>EUROPOL</i> )
		<b>EU</b>	Technical assistance to strengthen the national legal framework for prohibiting and combating human trafficking (this initiative could be implemented, as appropriate, via the EU's MIEUX 2 programme).
		<b>EU</b>	Support to bring in a national mechanism for fighting human trafficking (in cooperation with the IOM). Possible areas of action, to be identified in cooperation with the Moroccan government, and on the basis of the MIEUX 2 project recommendations (see above): <ul style="list-style-type: none"> <li>• development of a legislative and judicial framework;</li> <li>• specialised training courses for investigators, judges, police, border guards and consular staff;</li> <li>• prevention and public awareness campaigns;</li> <li>• setting up a system of referral to a national coordinator;</li> <li>• mechanism to protect victims and to protect witnesses in an inquiry;</li> <li>• assistance for victims of trafficking (reception centres);</li> <li>• mechanism to assist the return or reintegration of victims (<i>SPRING</i> programme, to be confirmed).</li> </ul>

	<p><b>18. To increase the capacity of the Moroccan authorities, if necessary in cooperation with the EU Member States, to address all aspects of the issue of unaccompanied minors, in particular through the implementation of policies aimed at preventing the migration of unaccompanied minors and facilitating their protection and willing return, in accordance with the principle of the best interests of the child pursuant to the 1989 United Nations Convention on the Rights of the Child, and the implementation of accompanying measures facilitating their social, educational and family reintegration in their country of origin.</b></p>	ES	<p>Technical assistance to set up suitable information channels and support steps taken by the Moroccan authorities to improve specific information and awareness-raising measures for families, schools and other institutions, which are designed to protect minors' best interests by preventing and warning about the risks of illegal emigration by minors, in order to discourage them from migrating to Spain illegally and in dangerous circumstances (<i>Ministry of Employment and Social Security</i>)</p>
		ES	<p>In order to facilitate the return of minors, assisting and collaborating with the Moroccan authorities to improve the identification of unaccompanied Moroccan minors in Spain and their families, including the exchange of information on any decision to repatriate a minor. In relation to the identification of unaccompanied minors, developing appropriate procedures for the immediate issuing of documents substantiating minors' Moroccan nationality. In relation to the identification and traceability of families, reopening ordinary communication channels with Moroccan consulates to allow them to respond more flexibly in terms of locating families and</p>

			<p>issuing documents for minors, thus helping to streamline return procedures.  <i>(Ministry of Employment and Social Security; Spanish Ministry of the Interior)</i></p>
		<b>ES</b>	<p>Establishing mechanisms to enable progress on the voluntary return of Moroccan minors who reach adulthood in Spain; technical assistance to improve communication, speed up the steps to be completed and help achieve social and professional reintegration in Morocco, while assessing the conditions in which returnees are received and reintegrated, via support and information measures, as well as guidance on education, careers and training.  <i>(Ministry of Employment and Social Security)</i></p>
		<b>NL</b>	<p>Promoting the return of unaccompanied Moroccan minors by developing a reintegration programme and accommodation centres. Assisting Moroccan migrants via the IRE project and other assisted voluntary return (AVR) arrangements.  For unaccompanied minors from third countries on Moroccan territory:  Technical assistance in developing methods and procedures to tackle the detention of unaccompanied minors on Moroccan territory, with a view to returning the unaccompanied minors to their country of origin through specialised AVR programmes for</p>

			unaccompanied minors; identification of accommodation centres. <i>(Ministry of Security and Justice: Repatriation and Departure Service)</i>
	<b>20. With respect for migrants' dignity and fundamental rights, to support the development of initiatives facilitating the voluntary return and socio-economic reintegration of illegal migrants, both for Moroccan nationals residing in the EU and for third-country nationals residing in Morocco.</b>	<b>EU</b>	Supporting the IOM's programme of assisted voluntary return (support for the voluntary return of migrants to Morocco, or from Morocco to their countries of origin, and their social and economic reintegration), in cooperation with a Moroccan ministry, within the framework of introducing institutional measures (SPRING programme, to be confirmed).
<b>Migration and development</b>	<b>22. To reinforce the role of Moroccan nationals in the EU in contributing to the development of Morocco, in particular by mobilising Moroccan expertise within the EU, and to support their development initiatives for Morocco in collaboration with the relevant institutions and bodies of both parties.</b>	<b>EU</b>	Possible course of action, to be identified in cooperation with the Moroccan government: Drawing up a migratory profile of the main Moroccan communities resident in Europe and identifying ways of using their skills to contribute to the planning and/or implementation of national development policy. <i>(Thematic programme – European Commission)</i>
		<b>FR</b>	Carrying out measures to support the start-up and growth of businesses run by Moroccan migrants and to build the capacity of Moroccan structures, particularly those focused on the founding of businesses (by migrants). <i>(Inclusive development department)</i> <i>(Ministry of Foreign Affairs, migration and development team in DGM's sub-directorate for democratic governance)</i>

		<b>FR</b>	Carrying out measures designed put the skills of Moroccan migrants living in France to use for the good of Morocco. ( <i>Inclusive development department</i> ) ( <i>Ministry of Foreign Affairs, migration and development team in DGM's sub-directorate for democratic governance</i> )
		<b>FR</b>	Supporting local development measures carried out by Moroccan migrants living in France. ( <i>Inclusive development department (Ministry of Foreign Affairs, migration and development team in DGM's sub-directorate for democratic governance)</i> )
		<b>EU</b>	Supporting the "migration and development" strategy of the Ministry of Moroccans Residing Abroad, particularly in the field of policies to encourage productive investment in Morocco by Moroccans living abroad (supporting business start-ups); and policies to provide support for returning and reintegrating into working life. (SPRING programme, to be confirmed)
	<b>23. To help Moroccan migrants residing legally in the EU to acquire vocational or academic skills which will enable them to develop viable economic activities and improve their employability on their return to Morocco.</b>	<b>IT</b>	Offering courses in Italy for Moroccans employed in the agriculture and food sector, in cooperation with the Mediterranean Agronomic Institute of Bari. ( <i>Italian Ministry of Labour and Social Policy</i> )



	<p><b>24. To facilitate the social reintegration of migrants and their families voluntarily returning to Morocco and to enable them to benefit from the skills acquired during their time abroad, while paying particular attention to the specific needs of the most vulnerable migrants.</b></p>	<p><b>IT</b></p>	<p>Offering courses for Moroccan trainers who work for local public training centres, to refine their skills in certain areas (e.g. processing leather and other materials, construction, cookery and pastry-making). <i>(Ministry of Labour and Social Policy)</i></p>
<p><b>International protection</b></p>	<p><b>28. To support the strengthening of the Moroccan legislative and institutional framework for asylum, in accordance with international standards and Morocco's constitutional and legislative provisions. To continue implementation of the principles of the 1951 Geneva Convention and its 1967 protocol.</b></p>	<p><b>NL</b></p>	<p>Capacity building in the area of international protection, jointly with the European asylum curriculum and UNHCR. <i>(Ministry of Security and Justice: Immigration and Naturalisation Service)</i></p>
		<p><b>DE</b></p>	<p>Long or short-term deployment of consultants to advise the relevant Moroccan authorities on passing/drafting legislation, and on administration, in the fields of immigration, residency law, international protection and asylum, following a needs assessment. <i>(Federal Ministry of the Interior (BMI)/Federal Office for Migration and Refugees (BAMF))</i></p>
		<p><b>EU</b></p>	<p>Supporting the roll-out of a national asylum system in Morocco (in cooperation with UNHCR): assistance in putting the legal framework in place; training and institutional assistance for the national body that will be established for asylum matters</p>

			(SPRING programme, to be confirmed).
	<b>29. To promote the capacities of the Moroccan authorities responsible for asylum procedures, in particular through close cooperation with the relevant agencies and bodies of the EU and its Member States, and with the UN High Commissioner for Refugees (UNHCR).</b>	<b>EU</b>	Proposal from the European Asylum Support Office (EASO) to provide, on demand and on the basis of a needs assessment, specific expertise on asylum, potentially in the form of a training course. (EASO)
		<b>DE</b>	For the practical implementation of asylum procedures: study visits and/or workshops for Moroccan officials. <i>(Federal Ministry of the Interior (BMI)/Federal Office for Migration and Refugees (BAMF))</i>
		<b>PT</b>	Hosting working visits and/or training courses on the reception of asylum seekers in need of international protection, as well as on processing and examining applications for international protection. <i>(Ministry of the Interior: immigration and borders service)</i>
<b>Horizontal initiatives</b>	<b>30. To increase Morocco's ability to manage migration flows in accordance with the four operational priorities defined by the EU's Global Approach to Migration and Mobility and Morocco's migration priorities.</b>	<b>NL</b>	Setting up a centre for the collection, processing and analysis of data and statistics on (illegal) migration flows, including ways of using the data collected to adapt policy (for example, the mobility partnership with Cape Verde). <i>(Ministry of Justice: Immigration and Naturalisation Service)</i>

	<p><b>36. To pay greater heed to migration issues in the development and implementation of the signatory parties' policies, particularly with regard to development, employment and training, commercial and economic policy and gender issues, and to ensure that they are fully consistent with one another.</b></p>	<p><b>EU</b></p> <p>European Training Foundation (ETF) proposal to promote Morocco's participation in initiatives developed by the ETF and, more specifically, in exchanging experience with countries that are signatories to a mobility partnership or are negotiating a mobility partnership with the EU, in order to share examples of best practice to support the practical implementation of the partnerships. <i>(European Training Foundation (ETF))</i></p>
		<p><b>EU</b></p> <p>Possible courses of action, to be identified in cooperation with the Moroccan government:</p> <ul style="list-style-type: none"> <li>• Supporting the interinstitutional coordination (Foreign Affairs, Justice, Labour, Vocational Training, Social Affairs and Interior) needed to implement the mobility partnership.</li> <li>• Cooperating on the development and/or implementation of an integrated, i.e. interministerial, migration policy.</li> <li>• Analysing and carrying out a capitalisation process on the measures (including studies) taken in the field of migration by donors (including the EU) and by public authorities. Giving the competent authorities feedback about the outcomes of such measures, identifying the measures that fit the authorities' priorities and on which they would like to cooperate with the EU. Continuing and building on the most promising measures in line with</li> </ul>

			national development policy and with effective participation by the authorities at national, regional and/or local level. <i>(Thematic programme – European Commission)</i>
		<b>DE</b>	Offering intercultural work experience, extending the "Scholars in Residence" project, organising cultural trips, e.g. trips for activists from Morocco, Tunisia, Algeria and Mauritania on the subject of "democracy and the role of women in the Maghreb". <i>(Federal Foreign Office)</i>
	<b>37. To promote scientific knowledge of migratory phenomena, ensuring that data are collected on migratory movements, and to put in place mechanisms to make it possible to study them so as better to define the policies and measures needed for joint and mutually beneficial migration management.</b>	<b>NL</b>	Three-month training programme (English course, qualification programme, scholarship) for (Moroccan) officials, designed to enhance their capabilities in the management of migration flows. <i>(Ministry of Foreign Affairs)</i>

Part 2: projects in progress as of 25 March 2013

SECTION	OBJECTIVE	Partner	Initiative
<b>Mobility, legal immigration and integration</b>	<b>2. To pursue cooperation between the EU Member States and Morocco on simplifying the procedures for access and legal stays (including the possibility of issuing multiple-entry and longer-term visas, and waiving administration fees for certain categories of people).</b>	<b>FR</b>	Facilitating the movement of persons between Morocco and France by issuing short-stay visas for multiple entries, also known as circulation visas, valid for stays of up to three months per half-year over a period of between one and five years, to Moroccan nationals engaged in promoting economic or cultural relations between Morocco and France. <i>(Ministry of the Interior's directorate for immigration in cooperation with the Ministry of Foreign Affairs)</i>
		<b>ES</b>	Facilitating the procedure for issuing visas, including multiple-entry visas for certain categories of people. Reducing to a minimum the time taken to issue visas on humanitarian grounds. <i>(Ministry of Foreign Affairs and Cooperation)</i>
	<b>4. To better inform Moroccan citizens about the options for legal immigration to the EU, including the entry conditions and the rights and duties arising from these.</b>	<b>FR</b>	Organising initiatives to promote the labour-migration frameworks that exist, in particular, to help young professionals find job offers suited to their profiles, by involving French companies with a presence in Morocco and Moroccan companies with links to French companies.
		<b>ES</b>	Operación Paso del Estrecho, relating to the arrival of a large number of Moroccan migrant workers from various places in Europe, travelling during the holiday period to return to their families in Morocco <i>(Ministry of the Interior,</i>

		<i>Directorate-General for Civil Protection)</i>
	<b>DE</b>	<p>The "Make it in Germany" portal is an initiative for the recruitment of qualified staff (<a href="http://www.make-it-in-germany.com">http://www.make-it-in-germany.com</a>). The portal shows which sectors are seeking qualified staff and explains the terms and conditions on which employment in Germany depends.</p> <p><i>(Federal Ministry of Economics and Technology (BMWi), Federal Ministry of Labour and Social Affairs (BMAS), in cooperation with Germany's employment agency)</i></p>
	<b>EU</b>	<p>The EU immigration portal (<a href="http://ec.europa.eu/immigration">http://ec.europa.eu/immigration</a>), launched by the Commission in November 2011, offers information that will be useful to Moroccan nationals interested in emigrating to an EU Member State, as well as those who are already in the EU and may be interested in changing their country of residence. The website offers specific information about emigrating to each Member State, tailored to various categories of migrants: workers, students, researchers and those seeking to join their families. The site also has links to Member States' official websites on which more detailed information is available, and links to sites belonging to support organisations for migrants. The EU immigration portal explains migrants' rights and the risks associated with illegal immigration. An Arabic language version will be launched in the first half of 2013.</p>
<b>5. To better inform Moroccan citizens with the requisite qualifications about the employment, study and training</b>	<b>EU</b>	<p>Strengthening cooperation between employment agencies based in various interested EU Member States and the Moroccan agencies via</p>

	<p><b>opportunities available in the participating Member States, in particular by increasing cooperation between their employment services and Moroccan employment services.</b></p>		<p>EUROMED Migration III (2012-2014), a regional project financed by the European Neighbourhood and Partnership Instrument.</p>
		<p><b>EU</b></p>	<p>Strengthening the institutional capacity of ANAPEC – Morocco's national agency for the promotion of employment and skills – by addressing (i) human-resources management; and (ii) the provision of intermediation services in order to boost the employability and/or employment of job-seekers, by anticipating market needs and seeking to meet employers' expectations.</p>
	<p><b>6. To cooperate closely in order to facilitate mutual recognition of vocational and academic qualifications.</b></p>	<p><b>EU</b></p>	<p>Promoting mobility for Moroccan students, researchers and academics to attend EU higher-education institutions via the EU's Erasmus Mundus and Marie Curie programmes and their successors from 2014 onwards, namely Erasmus For All and Marie Skłodowska-Curie). Stepping up university exchanges and partnerships with southern Mediterranean countries including Morocco. <i>(European Commission)</i></p>
		<p><b>EU</b></p>	<p>Possibility of benefiting from the Tempus programme and its successor from 2014 onwards (Erasmus for All), which supports the modernisation of Morocco's higher education system and its convergence with the objectives of the Bologna process. The programme has enabled the development of tools that improve the comparability and compatibility of the skills acquired by students. <i>(European Commission)</i></p>
	<p><b>FR</b></p>	<p>Facilitating Moroccan students' access to employment to gain a first experience of the workplace prior to returning to their</p>	

			country of origin, provided they have successfully completed a course of education culminating in a degree equivalent to a least a Master's or <i>licence professionnelle</i> at a nationally accredited French higher education institution or at a Moroccan higher education institution that has concluded an agreement on awarding degrees in international partnership with a French higher education institution.
	<b>7. To endeavour to improve coherence between the policy concerning the mobility of persons and the other areas of sectoral cooperation (trade, education, research, culture) in order to make it easier for Moroccan vocational trainees, students, academics, researchers and business people to enter and stay in the EU Member States.</b>	<b>EU</b>	Promoting projects that help tailor courses to the needs of the labour market via the EU's Tempus programme and its successor from 2014 onwards (Erasmus for All). <i>(European Commission)</i>
		<b>EU</b>	Strengthening the institutional capacity of the OFPPT – Morocco's office for occupational training and promotion of employment – by acting on (i) regional devolution; (ii) the quality of training, to boost the employability of those who have completed state-provided occupational training, while anticipating market needs; and (iii) the launch of a large sectoral institution specialised in public works (the EM BTP in Settat). <i>(Institutional twinning, geographical programme for Morocco)</i>
		<b>FR</b>	Simplifying the issuance of student residence permits for the purpose of study or work experience.
<b>8. To support Moroccan nationals who are legally resident in the EU and nationals from third countries residing in Morocco in their efforts to integrate.</b>	<b>DE</b>	Establishing and developing bilateral cooperation between German and Moroccan organisations in the sciences, research and technology, within the framework of cooperation between	



			Germany's Federal Ministry of Education and Research (BMBF) and the Moroccan Ministry of Higher Education, Scientific Research and Executive Training, on matters of particular interest to both sides (such as environmental research, renewable energy sources and health research). <i>(Germany's Federal Ministry for Education and Research (BMBF) and Morocco's Ministry of Higher Education, Scientific Research and Executive Training)</i>
		<b>DE</b>	German-Moroccan University partnerships, scholarship programme for (Moroccan) students, promoting Moroccan-German projects as part of the "higher education dialogue with the Islamic world" programme (launched in 2006). <i>(Federal Foreign Office)</i>
		<b>EU</b>	Revising the 2004 Directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. <i>(European Commission)</i>
	<b>9. To work together to develop cooperation for the implementation of active policies promoting integration, interculturality and the combating of exclusion and xenophobia, in order to avoid prejudices and stereotypes amongst the host country and migrants. To promote the role of associations of Moroccan migrants in the integration process.</b>	<b>IT</b>	Pilot project in Morocco's Chaouia-Ouardigha region (which has a marked trend of migration to Piedmont): the project aims to support integration policies by offering pre-departure linguistic and civic guidance to Moroccan nationals authorised to rejoin their families in Italy, as well as to build capacity among the local authorities so that they can provide such assistance on a permanent basis.

		<p><i>(Italian Ministry of the Interior)</i>  EBOCLA project – first stage (feasibility study) already under way</p>
	<b>EU</b>	<p>Promoting respect for sub-Saharan migrants' rights in Morocco – implemented by Caritas France and Caritas Morocco:</p> <ul style="list-style-type: none"> <li>• helping children and young migrants integrate in school and professional life;</li> <li>• strengthening the legal, administrative and political framework in Morocco for the protection of vulnerable migrants (women and children);</li> <li>• raising the population's awareness of inter-cultural matters, and fighting discrimination.</li> </ul>
	<b>EU</b>	<p>Tamkine-Migrants project: Strengthening the protection of migrants' rights in a transit country, Morocco; implemented by Terre des Hommes Spain, France Volontaires and two Moroccan associations:</p> <ul style="list-style-type: none"> <li>• improving access to public healthcare services for migrant women and children;</li> <li>• improving access to justice for migrant women and children who are victims of abuse or violence;</li> <li>• improving access to education and training for migrant women and children;</li> <li>• raising awareness in Morocco's civil society about the issue of sub-Saharan migrants and about taking a multicultural approach in the services offered;</li> <li>• raise awareness among Morocco's policy-makers about the issue of sub-Saharan migrants and put forward proposals for aligning the national legal framework on international legislation.</li> </ul>

Preventing and combating illegal immigration, people-smuggling, border management	14. To support Morocco's efforts and enhance its capacity at the legislative, institutional and operational level in order to prevent and combat illegal migration, the trafficking of migrants and the smuggling of human beings.	ES	On-line training courses including those which have already run, for example as part of the "legal immigration days", and those provided by the Guardia Civil and the national police. <i>(Ministry of the Interior)</i>
	15. To enhance information exchange, administrative capacity and operational and technical cooperation with regard to border management, the detection and dismantling of networks involved in trafficking migrants and cross-border organised crime, and illegal immigration.	ES	For some time, there have been liaison officers at Moroccan and Spanish airports. <i>(Ministry of the Interior)</i>
		FR	<ul style="list-style-type: none"> <li>• Enhancing cooperation between the Moroccan mobile immigration brigade (BMI), which was set up in 2011 at Casablanca airport, and the Orly and Roissy platforms, complementing the cooperation involving the DCI liaison officer posted to Morocco. Fostering and intensifying contacts between French and Moroccan staff of the departments responsible for combating illegal immigration networks.</li> <li>• Improving the exchange of operational information on immigration networks by organising regular meetings with the Moroccan authorities, in order to combat organised criminal groups as effectively as possible. Stressing the importance of close cooperation between France and Morocco in identifying and seizing criminal assets to combat organised crime as effectively as possible.</li> </ul> <i>(Ministry of the Interior: Central Border Police Directorate - unit for operational coordination of the fight against the smuggling and exploitation of migrants; International Cooperation Directorate).</i>

	<p><b>16. On the basis of the programmes already launched by Morocco, to enhance procedures for the security and issue of travel documents in compliance with International Civil Aviation Organization (ICAO) standards; of identity documents and residence permits; and of other official documents issued by the Moroccan authorities.</b></p>	FR	<ul style="list-style-type: none"> <li>• In support of the General Secretariat for Immigration and Integration (SGII), taking part in negotiations with the aim of improving the rate of issuance of consular <i>laissez-passer</i>.</li> <li>• Deepening the cooperation between the DCI's liaison officer posted to Casablanca airport and the Moroccan authorities as regards the exchange of operational intelligence and training courses on combating illegal immigration.</li> </ul> <p><i>(Ministry of the Interior: Central Border Police Directorate – office for document fraud)</i></p>
	<p><b>17. To enhance information exchange, administrative capacity and organisational and technical cooperation between Morocco, the EU and its Member States in order to assist migrants who are victims of human trafficking, in particular those most vulnerable to exploitation.</b></p>	FR	<p>Building capacity to combat the trafficking of human beings for labour: training specialised officials and Moroccan police to fight economic and social criminality resulting from international trafficking in labour.</p> <p><i>(Ministry of the Interior – national gendarmerie (DGGN) – criminal investigation department (SDPJ) – office for combating illegal work)</i></p>
	<p><b>18. To increase the capacity of the Moroccan authorities, if necessary in cooperation with the EU Member States, to address all aspects of the issue of unaccompanied minors, in particular through the implementation of policies aimed at preventing the migration of unaccompanied minors and facilitating their protection and willing return, in accordance with the principle of the best interests of the child pursuant to the 1989 United Nations Convention on the Rights of the Child, and the implementation of accompanying measures facilitating their social,</b></p>	BE	<p>Establishing contacts and strengthening links with the Moroccan authorities in order to find lasting solutions for unaccompanied minors and to have local partners provide more possibilities for reintegration.</p> <p><i>(Fedasil (Federal Agency for the Reception of Asylum Seekers))</i></p>
		EU/IT	<p>SALEMM (solidarity with children from Maghreb and Mashreq):</p> <p>Steps to prevent the migration of children and adolescents from the focus countries, by capacity-building for social workers in four key areas, namely organised social activity, educational guidance, vocational training and psychosocial support; setting up an information point on legal immigration.</p>

	<b>educational and family reintegration in their country of origin.</b>		Moroccan associates: ANAPEC, <i>Entraide National</i> , INAS (national institute for social action) and three Moroccan associations. ( <i>Italian Ministry of the Interior</i> ) Project was launched on 18 December 2012 and will continue in subsequent years.
		<b>EU</b>	<i>Project on migration of minors entitled "Enfants en voyage: pour une approche responsable des migrations des mineurs" and implemented by the NGO ProgettoMondo Mlal:</i> - Preventing and managing illegal migration of unaccompanied minors in Morocco. - Promote a culture of responsible migration in the provinces of Beni Mellal, Khouribga, Tangier and Nador, with particular reference to social groups and institutions involved in or affected by the phenomenon of illegal migration of unaccompanied minors.
	<b>20. With respect for migrants' dignity and fundamental rights, to support the development of initiatives facilitating the voluntary return and socio-economic reintegration of illegal migrants, both for Moroccan nationals residing in the EU and for third-country nationals residing in Morocco.</b>	<b>BE</b>	Supporting the Moroccan authorities in finding a humane and sustainable solution for migrants in distress, by way of assisted voluntary return and reintegration of migrants who have arrived in Morocco and are unable to move onwards. Reintegration is a crucial component of this project, which makes return sustainable and indirectly benefits development in the country of origin. ( <i>Aliens' Office</i> )
		<b>NL</b>	Supporting reintegration of Moroccans readmitted to Morocco (including medical cases). ( <i>Ministry of Security and Justice: Repatriation and Departure Service</i> )
		<b>NL</b>	Supporting voluntary return and reintegration of illegal migrants who were stranded in Morocco and have been directed to their country of origin. ( <i>Implemented by the IOM, co-financed by the Ministry of Foreign Affairs together with Belgium and other countries</i> )

<b>Migration and development</b>	<b>21. To strengthen cooperation between Morocco and the EU and its Member States in support of the socio-economic development of regions with high migration potential by implementing targeted policies and encouraging investment, including investment by Moroccans resident abroad, in order to generate employment.</b>	<b>EU</b>	<p>Project to support the forces driving integrated development in the rural areas of Morocco's north, enabling a sustainable improvement in the living conditions and income of rural people in the Al Hoceima province (in the Rif region in the north of Morocco).</p> <ul style="list-style-type: none"> <li>• The project includes, in particular, measures to vitalise the substance of the local economy (diversifying and boosting economic activity, including support for job creation) and bring about social development (access to basic infrastructure and basic social services) for disadvantaged rural populations, particularly young people and women.</li> </ul>
	<b>22. To reinforce the role of Moroccan nationals in the EU in contributing to the development of Morocco, in particular by mobilising Moroccan expertise within the EU, and to support their development initiatives for Morocco in collaboration with the relevant institutions and bodies of both parties.</b>	<b>NL</b>	Temporary return of migrants resident in the Netherlands who can transfer their expertise to their country of origin, Morocco. <i>(Ministry of Foreign Affairs)</i>
		<b>NL</b>	Promoting the involvement of Moroccan nationals resident in the Netherlands in developing enterprise among Moroccan migrants and in having the government create conditions favourable to enterprise among migrants. <i>(Ministry of Foreign Affairs)</i>
		<b>DE</b>	Programme to support and accompany project sponsors (as part of the Migration for Development programme) offering induction seminars and individual advice on the process of starting a business in the country of origin. The programme was initially a pilot project in Morocco and was subsequently extended to Cameroon and Georgia.

			<i>(Federal Ministry of Economic Cooperation and Development)</i>
		<b>DE</b>	Programme to support migrants' associations (as part of the Migration for Development programme) in their work to foster development in migrants' countries of origin, e.g. Morocco. Support is provided in terms of financing, planning and networking between associations in Germany and Europe. <i>(Federal Ministry of Economic Cooperation and Development (BMZ) / Centre for International Migration and Development (CIM))</i>
		<b>EU/NL</b>	Activities designed to develop reintegration programmes, continuation of existing initiatives such as the IntEnt project (Ministry for Foreign Affairs) and the European Reintegration Initiative (a project financed by the European Union in cooperation with Belgium, France, Germany and Sweden). <i>(Ministry of Security and Justice: Repatriation and Departure Service)</i>
		<b>BE</b>	MEDMA – project to mobilise Moroccans living in Belgium to contribute towards the development of Morocco.
		<b>EU</b>	Fostering business and job creation in the Maghreb: Support for starting innovative businesses in Morocco, Algeria and Tunisia, by leveraging the know-how of entrepreneurs from these countries living in Europe; helping entrepreneurs among the diaspora to start businesses in their country of origin. Moroccan partner: <i>Fondation Création d'Entreprises</i> (Thematic programme)

	<p><b>24. To facilitate the social reintegration of migrants and their families voluntarily returning to Morocco and to enable them to benefit from the skills acquired during their time abroad, while paying particular attention to the specific needs of the most vulnerable migrants.</b></p>	<p><b>FR</b></p>	<p>Programme of reintegration assistance: Agreement between OFII (French Bureau for Immigration and Integration) and ANAPEC (Moroccan National Agency for the Promotion of Employment and Skills).</p>
		<p><b>DE</b></p>	<p>Facilitating circular migration (mobility abroad) to allow holders of a German permanent residence permit to leave the country for up to 24 months without losing their right to that residence permit. <i>(Federal Ministry of the Interior (BMI))</i></p>
		<p><b>DE</b></p>	<p>The programme for the return of experts (as part of the Migration for Development programme) assists Moroccans in their return to Morocco and reintegration there. The programme aims to tap migrants' potential and offers young university graduates and experts returning to their country of origin support in the form of individual advice, help finding a job and, in some cases, financial assistance (e.g. subsidies on top of their salary). The intention is for their return to bring about a permanent transfer of the know-how they have gained in Germany to their local area. <i>(Federal Ministry of Economic Cooperation and Development (BMZ)/Centre for International Migration and Development (CIM), in cooperation with Germany's employment agency)</i></p>
	<p><b>25. To enhance the establishment of measures in the EU and Morocco to reduce the cost of remittances by Moroccan migrants, in cooperation as appropriate with relevant private-sector actors.</b></p>	<p><b>NL</b></p>	<p>Reducing the costs associated with (Moroccan) migrants' remittances (<i>Geld naar Huis</i> website). <i>(Ministry of Foreign Affairs)</i></p>
	<p><b>27. To implement policies to prevent and</b></p>	<p><b>EU</b></p>	<p>Maintaining the system for keeping in touch with former</p>



	<b>deal with the "brain drain", including by promoting circular migration and the mobilisation of skills.</b>		scholarship students that was set up under the EU's Erasmus Mundus programme.
<b>Horizontal initiatives</b>	<b>37. To promote scientific knowledge of migratory phenomena, ensuring that data are collected on migratory movements, and to put in place mechanisms to make it possible to study them so as better to define the policies and measures needed for joint and mutually beneficial migration management.</b>	<b>EU</b>	Supporting the Joint European Master in International Migration and Social Cohesion (MISOCO), a specialised master's degree in the field of migration, which is funded under the EU's Erasmus Mundus programme.