

# EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

February 25th and 26th, 2020  
LAGOS (Nigeria)

## **The risks of refoulement of trafficked persons, member states' responsibilities and law enforcement actions. Introductory speech**

**by Godwin e Morka\***

### Presentation outline

- Introduction
- Externalisation of Borders
- The Flipside of Externalisation Practices
- Externalisation Practices in Some Countries
- Immigration Detention Practices- Provisions of the Protocol to Prevent, Suppress and Punish trafficking in Persons (Especially Women and Children) & The Principles of the UN 1951 Convention on Refugees
- Asylum and Denial
- Trends in Asylum Acceptance/Rejection
- The Nigerian Experience
- The Principle of Safe third Countries
- Rights to Asylum for Victims of TIP
- Provisions of the Palermo Protocol and 1951 Convention and Council of Europe Convention
- The Need for the Adoption of the Protocol for Identification, Safe Return and Reintegration of Trafficked Persons
- CONCLUSION

### **Introduction**

As migration issues continue to evolve globally, various policies are being developed to address the numerous challenges arising from the movement of people.

---

\* Director of Research and Programme development, NAPTIP

World governments continue to devise strategies to curtail the activities of miscreants who take advantage of the ignorance or vulnerability of others in the process of migration.

Externalization was framed as a security imperative; and as a strategy for migration containment and control.

Control of migration flows is a step towards preventing irregular immigration or to protect migrants from the dangers of the journey.

A major deterrent to irregular migration defaulters is migrant detention practices.

The mixed flow of migrants is usually a combination of emigrants traveling for various reasons including asylum seekers, refugees, TIP victims, smuggled migrants and others.

Recent surveys show that human trafficking victims also suffer immigration detention; a situation that Jesuit Refugees Service UK (2019) described as an egregious failure of support to them (the victims).

There are reasons to believe that detention of victims of TIP by Immigration control undermines the system for identifying and supporting victims, resulting in their being re-traumatized.

In several instances, victims of human trafficking are denied asylum and the much needed protection; hence the need to deepen discussion on this subject.

Every year, hundreds of thousands of people become enslaved as victims of human trafficking with some taken away from their home countries and moved abroad, where they are exploited.

Few fortunate ones who escape or are rescued may not want to return for obvious reasons including fear of being punished or re-trafficked if they return.

Such victims who do not wish to return home then resort to seeking protection in another country, in form of asylum or under any other guise.

### **Externalization of borders**

According to Centre for Migration Studies of New York (2016), Externalization of migration controls describes extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims.

**Border Externalisation**, also known as the transfer of border controls to foreign countries, has in recent times become the main instrument through which the European Union seeks to stop migratory flows to Europe

Externalization policies are often adopted by countries primarily for the purpose of achieving better border control and migration management as it explicitly seeks to prevent the entry of migrants into a destination state.

### **The Flipside of externalisation**

The FLIPSIDE of externalisation is that it encourages migrants' apprehension, interdiction, interceptions, or "turn-backs", mostly without recourse the reasons of fleeing in the first place.

This portends serious consequence where the migrant is a victim of human trafficking seeking protection/asylum; when intercepted and sent back to country of origin, s/he stands the risk of returning to the arms of the traffickers who had exploited him/her.

V. Moreno-Lax and Pedersen questioned the rationale for externalizing EU Migration Control while ignoring the human rights of migrants and identified some dimensions to border externalisation:

**Spatial Dimension:** captures the remoteness of the geographical distance that is interposed between the locus of power and the locus of surveillance

**Relational Dimension:** Relates to the multiplicity of actors engaged in the venture through bilateral and multilateral interactions, usually through coercive dynamics of conditional reward, incentive, or penalization

**Functional Dimension:** Concerns the cost-effectiveness of distance-creation (in both ethical and legal grounds) vis-à-vis the (unwanted) migrant, who, removed from sight, is no longer considered of concern to the supervising State the range of externalizing policy devices at the service of externalising agents in terms of purpose, format, delivery, and ultimate control.

### **Externalisation Practices in Some Countries**

Italy: The country's efforts in border externalization are focused on the countries that are most involved in the central Mediterranean route; particularly Libya as well as Niger and Egypt.

These three (3) countries are the focus of a report by prominent Italian NGO, ARCI, published as "Externalisation Policies Watch Project" authored by Sara Prestianni

From 2016, ARCI has been monitoring this trend independently and has regularly published in-depth analyses of the process of externalisation of the European and Italian policies on migration, highlighting the most serious consequences in terms of systematic violations of fundamental rights.

Libya: concretely strengthening the role of the Libyan Coast Guard to intervene and intercepting migrants at sea, the same migrants that are running from detention centres where abusive and inhuman treatments have been repeatedly reported.

In April 2018, the Office of the United Nations High Commissioner for Human Rights in cooperation with the United Nations Support Mission in Libya, detailed such abuses in a report titled 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya'.

Consequently the UN has repeatedly called for the dismantling of all detention centres for refugees in Libya, saying the facilities are not fit to ho

Egypt: Collaborates actively with the EU in preventing departures from its coast and actively collaborates with readmission procedures.

Cairo is the center of a border police training program for all of Africa (ITEPA project.) According to the ARCI report:

In 2017, the Italian government signed a "technical agreement" on migration with Egypt, financed with the Funds for Internal Security - Borders and Visa.

Part of the objectives of the project is the opening of a Center for international training on migration for 360 border officers from 22 African countries including Nigeria'; the pilot was officially launched in Europe on March 20, 2018.

### **Immigration Detention Practices**

Legitimate Purposes for Detention:

- To protect public order
- To protect public health
- To protect national security

Purposes not Justifying Detention:

Illegal and Irregular Entry (Art. 31, 1951 Convention)

As a Deterrent

In expulsion proceedings

Mandatory *detention* is the *practice* of compulsorily detaining or imprisoning people seeking political asylum, or who are considered to be illegal immigrants or unauthorised arrivals into a country.

Some countries have set a maximum period of *detention*, while others permit indefinite *detention*.

Jesuit Refugee Service UK (2019) hinted that Detention Action published a report on 16 trafficking victims in detention whom they had supported between December 2016 and June 2017.

JRC concluded that the National Referral Mechanism in place at the time failed to protect victims in the context of immigration detention, and that a conflict of interest on the part of the Home Office between combatting modern slavery and removing those without leave to remain was a key cause of this failure.

### Detention Concerns:

Detention used as a routine, rather than exceptional

Means to dissuade and deter migration or asylum applications

Inadequate reception and screening mechanisms

Long term or indefinite detention

Substandard conditions

Increasing rate and use of detention, also of children

The evidence of report from the Labour Exploitation Advisory Group, which indicated that 143 victims of trafficking experienced immigration detention, the UK Home Office established a taskforce to end the detention of victims of human trafficking under immigration powers and advocate for vital changes to government policy and practice regarding this issue.

This is a good practice that may be adopted by various state parties.

There was commitment from Home Office to strengthen and implement its own guidance to ensure that no victim of human trafficking is ever detained. Instead, victims, and people who may be victims, should be provided with the support to which they are entitled under international and national frameworks in the community, including adequate material assistance, secure accommodation, psychological assistance and legal information and support.

Nigeria has been associated with a very high rejection rate of African asylum applications in Europe.

UN Refugee Agency UNHCR 2016 report shows the countries that had the highest rate of rejection in the EU last year were Afghanistan (41,163 applications rejected), Iraq (35,044), Pakistan (24,558), and **Nigeria** (21,427), all of which have elevated levels of violence and instability.

The challenges of insecurity and attendant forceful displacement among other undesirable conditions contribute to the increasing desire of large Nigerian population to flee.

The international refugee law has incorporated the principle of "safe third country" as a **limited basis for asylum denial** in countries of destination (UNHCR Executive Committee 1999).

Whether this provides effective protection, especially with victims of human trafficking; this may be assessed thus:

No risk of persecution within the meaning of the 1951 Convention or serious harm in the previous state;

No risk of onward *refoulement* (*deportation, banishment, Exorcisation*) from the previous state;

Compliance with relevant international human rights standards, including adequate standards of living, work rights, health care and education;

Access to a right of legal stay;

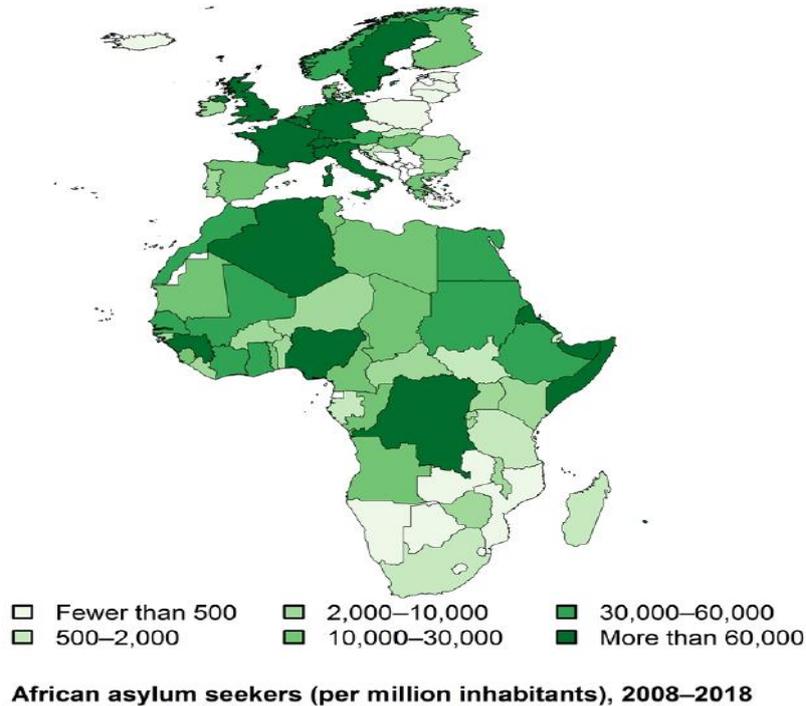
Assistance of persons with specific needs; and

Timely access to a durable solution

## **Asylum and Denial**

According to Demographic Research: Volume 39 Article 47 (2018), African asylum seekers became more numerous, their numbers tripling between 2008 and 2018. A descriptive overview of the geographic patterns of recent asylum migration from Africa to Europe is given shows: Italy received 262,000 asylum applications by African citizens between January 2008 and March 2018), France (238,000), and Germany (219,000) have received the largest numbers of refugees from Africa in the past decade.

**African asylum seekers, 2008–2018**



## **Rights to Asylum for Victims of TIP**

### **Provisions of the Palermo Protocol and 1951 Convention**

**The Protocol to Prevent, Suppress and Punish Trafficking in Persons; especially Women and Children confers a special status on victims of human trafficking that should be respected by receiving states thus:**

...Each 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.

**...Each State Party shall give appropriate consideration to humanitarian and compassionate factors.**

The Attention of State Parties may be drawn to the Following:

In line with Article 3 of the Council of Europe Convention, State parties should ensure that asylum seeking victims of trafficking are afforded all the rights as other suspected victims of trafficking, in terms of access to safe and appropriate accommodation, education, training, work and the possibility of acquiring longer-term status in the State.

State parties are mandated by Article 6(3) to provide for the physical, psychological and social recovery of victims of trafficking in terms of housing, medicals, psychosocial support, etc.

## 1951 Convention principles

- Non-refoulement
- Non-discrimination
- Non-penalization for illegal entry (or stay)
- Exceptional nature of expulsion
- Humanitarian nature
- Cooperation with UNHCR

*Victims of human trafficking as well as refugees seeking Asylum therefore deserve special attention when considering their asylum application.*

The Attention of State Parties may be drawn to the Following:

In line with Article 3 of the Council of Europe Convention, State parties should ensure that asylum seeking victims of trafficking are afforded all the rights as other suspected victims of trafficking, in terms of access to safe and appropriate accommodation, education, training, work and the possibility of acquiring longer-term status in the State.

State parties are mandated by Article 6(3) to provide for the physical, psychological and social recovery of victims of trafficking in terms of housing, medicals, psychosocial support, etc.

There may be very negative impacts on a victim of trafficking by waiting for the refusal of her application for refugee status and a subsequent notification of intention to deport pursuant to specific sections of the Immigration Acts of receiving countries or even a deportation order to be issued, before she becomes eligible to be identified as a suspected victim.

## **GUIDES TO ESTABLISHING THE ASYLUM ELIGIBILITY OF VICTIMS OF HUMAN TRAFFICKING**

The U.S. government has taken important steps to combat trafficking and assist trafficked persons by securing immigration relief for trafficked persons is the T visa under U.S. law.

This allows them obtain at least temporary legal residence and access to refugee benefits; though the requirements for T visas, have been described as having but asylum can fill in the gaps.

Unlike the T visa process, asylum protection does not require cooperation with law enforcement, which may be an insurmountable hurdle for survivors of trafficking.

## **The Protocol for Identification, Safe Return and Rehabilitation of TIP Victims**

The need to relax border control rules and adapt them to the imperatives of human dignity, victim protection, and decriminalising the irregular movement of forced migrants (including victims of human trafficking, this Protocol was produced by **NAPTIP**.

## **Overview of the Protocol:**

Returning victims of trafficking to their home country is often a difficult process for victims of trafficking, because they face psychological, health, legal, documentation and financial problems.

Many victims also have problems in reintegrating with their families and communities because of the following reasons among others.

The trafficked person may feel ashamed to return home without having earned a lot of money to support the family or to pay off debts making them feel hopeless and that they have failed their families.

Supported reintegration is a right owed to trafficked persons by virtue of their status as victims of crime and of human rights violations.

Therefore, the Nigerian Government has developed this Protocol for the Identification, Safe Return and Rehabilitation of Victims of Trafficking (VoTs).

The Protocol stimulates an arrangement in destination countries that will foster cooperation and linkages between law enforcement agencies and social service providers to provide care and support to victims of Trafficking, training and enlightenment to relevant stakeholders and encourage mutual cooperation in investigation of human trafficking cases.

## **The Process of Identification:**

When you come across a potential victim of human trafficking, there are certain parameters you can deploy to determine their actual status:

Use the **Indicators** (discussed earlier) of trafficking to confirm their status.

Provide support and protection to the victim of trafficking as enshrined in the Palermo Protocol

Interview the victim using a standard Protocol to establish basic identity such as name, age, sex, place of origin etc.

## **Support Services:**

When a victim has been so identified, the Agency should in collaboration with the Nigerian Mission, assign a primary care giver who will then assume responsibility for the care and support of the victim in the country of residence.

The primary care giver should determine the type of support needed by the victim (psychosocial, medical, security, shelter, legal service, counselling etc.) using the indicators of trafficking.

The primary care giver should identify other care givers who will provide requisite support and services to the victim.

The primary care giver should ensure that victims of trafficking are accorded humane treatment as enshrined in the UN Conventions e.g. Palermo Protocol, Article 6.

## Safe Return:

Upon determination of safety of victim, process shall be initiated to safely return the victim to Nigeria. In this regard, state and non-state actors in the destination country and country of origin shall work together towards successful and safe return of trafficked victims. This process should be coordinated by NAPTIP in collaboration with the following relevant institutions;

Nigerian Mission

Primary Care Giver

Law Enforcement Agencies at destination countries

IOM/UN Agencies

Host Country

Subject to the extant laws in destination country, safe return of a TP to his/her country of origin should be based on other considerations including:

Request/consent of the victim

Safety and security of the victim at country of destination, and upon return to country of origin  
Individual assessment and management of risks associated with return, including the different risks faced by men and women, persons of different ages and potential involvement of family members in trafficking

The availability of and actual access to social assistance programmes in country of origin

In cases of trafficked children, the child's best interests must be determined in consultation with the child or parental figure

Where in the best interest of the TP, it is not safe to return to country of origin, for instance for fear of reprisal attacks, ongoing investigation or prosecution against trafficker(s), physical medical conditions or other significant concerns (e.g. mental health) the primary care giver should explore other alternatives such as;

Work with NAPTIP to identify and respond to the fears of the victims. Assist to settle victim in foster home, seek asylum in destination country, long term shelter services and safe houses or other options in accordance with standard international practices.

## **Specific Role of Law Enforcement at Destination:**

Law Enforcement Agencies in the destination country should in line with the provisions of their laws and in adherence to International human rights, protect the rights and privacy of the trafficked victims from time of rescue to departure.

Countries of destination are encouraged not to hold victims in detention centres along with criminals, while children should be put in child friendly shelters of international standard.

Law Enforcement Agencies in the destination country should in line with the provisions of their laws and in adherence to International human rights, protect the rights and privacy of the trafficked victims from time of rescue to departure.

Countries of destination are encouraged not to hold victims in detention centres along with criminals, while children should be put in child friendly shelters of international standard.

Remove barriers in information and intelligence sharing with relevant law enforcement agencies in country of Origin.

Share information and intelligence through diplomatic channels; letters rogatory and other agreed channels. This must be done with utmost confidentiality.

In collaboration with NAPTIP put in place a Standard Operating Procedure on intelligence sharing and joint investigations.

## **Conclusion**

Victims of human trafficking deserve protection by all; both state and non-state actors.

When in need of asylum, a paramount consideration should be the fact that they are fleeing from their traffickers and rejecting their applications may result in sending them back to their exploiters.

Measures should be taken to ensure that Victims of trafficking are given the protection afforded them by National Conventions.

There should be network of service providers including law enforcement, judiciary, etc. that will provide the necessary support for victims of trafficking