

EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

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The resettlement: legal nature and the Geneva Convention*

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As the flow of foreigners fleeing from Libya becomes increasingly blocked, the European Union and Member States placed an increasing emphasis on instruments already identified in the so-called “European Migration Agenda”¹ of 2015 that could balance the inevitable restrictions on the exercise of asylum as determined by strict controls on movements. The European Commission thus began to promote reestablishment or “*resettlement*” from Libya as a safe gateway to Europe for refugees: through this instrument, 20,000 refugees should have been resettled in Europe by 2020².

Due to difficulties in applying the resettlement procedures directly from the Libyan detention centers, due to the situation of severe instability and the constant human rights violations in Libya, this instrument was then integrated with the Emergency Transit Mechanism (“ETM”) in 2017, according to which foreign nationals deemed to be potential refugees by UNHCR could be evacuated from Libya and transferred to Niger, and then eventually access the resettlement program³.

* The intervention is the result of the research work carried out in the context of the Sciabaca and Oruka projects of ASGI, <https://sciabacaoruka.asgi.it/> For further information see ETM and Resettlement <https://www.asgi.it/33638-2/>, open letter from ASGI to OIM and UNHCR https://www.asgi.it/wp-content/uploads/2020/01/2020_1_Lettera-aperta-ad-Unhcr-e-OIM_def.pdf. This contribution is an extract from the article “The activities of international organizations in Libya and the problems affecting the externalization of the right of asylum” published on <https://www.questionegiustizia.it/rivista/articolo/1-attivita-delle-organizzazioni-internazionali-in-libia-e-le-problematiche-ripercussioni-sull-esternalizzazione-del-diritto-di-asilo>

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¹ Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions. European migration agenda, 13 May 2015. Available on <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015DC0240&from=EN>

² *Resettlement* becomes a central tool starting from 2017: “the Union should offer at least 50 000 resettlement places to admit by 31 October 2019 persons in need of international protection from third countries [...] to support Member States in implementing this target EUR 500 million should be made available from the Union budget”. European Commission, “recommendation on enhancing legal pathways for persons in need of international protection,” 27 September 2017. Available on https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_enhancing_legal_pathways_for_persons_in_need_of_international_protection_en.pdf

³ UNHCR Niger, “Emergency Transit mechanism (ETM)”, December 2019. Available on <https://reliefweb.int/sites/reliefweb.int/files/resources/73486.pdf>

Therefore, as confirmed by the updates to the European Agenda on Migration in 2018⁴, ETM and resettlement should have become central mechanisms in the integrated approach to manage migratory flows, to ensure access to protection and the right of asylum for refugees who are unable to flee Libya through “outsourced” border control.

UNHCR describes ETM as a program to “provide life-saving assistance to refugees in Libya, through evacuation in Niger, which has temporarily extended its asylum space”; the UNHCR believes that it is “seeking lasting solutions, including resettlement”⁵.

Refugees and asylum seekers detained in detention centers in Libya come into contact with UNHCR, which identifies them and registers them as potential refugees and then transfers them to Niger⁶. Access to the centers is regulated only by the Libyan authorities, who can facilitate or prevent the entry of UNHCR staff and decide which prisoners can meet their officials⁷. As already reported by ASGI⁸, the asylum seeker may also be subject to repeated hearings with UNHCR staff before the transfer to Niger.

As envisaged in the memorandum between UNHCR and the Government of Niger, the transfer to Niger⁹ is exclusively voluntary and is reserved to persons who, after their status as asylum seekers in Libya has been established, they can be evacuated to Niger where they will have access to the UNHCR’s refugee status assessment procedure and to any potential resettlement. Nor Niger citizens or “those who can access the International Organization’s voluntary Return Program (IOM) from Libya” can benefit from ETM¹⁰.

Foreign nationals present in Niger can also access the resettlement program when they have been voluntarily readmitted from Libya and were welcomed into the IOM transit centers. According to the *Standard Operational Procedures* agreed by the two organizations, IOM reports to UNHCR

⁴ European Commission, “European Agenda For Migration Update”, 16 May 2018. Available on https://ec.europa.eu/commission/presscorner/detail/it/IP_18_3743

⁵ UNHCR Niger, “Country operation Update”, March 2018. Available on <https://data2.unhcr.org/en/documents/details/69587>

⁶ Asylum seekers were often transferred to the *gathering and Departure facility* (GDF) managed by UNHCR; the center is closed for security reasons (<https://www.unhcr.org/news/press/2020/1/5e32c2c04/unhcr-suspend-operations-gdf-tripoli-amid-safety-concerns.html>) to date.

⁷ On the operation and situation of Libyan detention centers, see: United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, “desperate and dangerous: Report on the human rights situation of migrants and refugees in Libya”, December 2018. Available on <https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf>

⁸ ASGI, “the Emergency Transit mechanism program and resettlement from Niger. Legal reconstruction, present and future issues”, 2018. Available on <https://www.asgi.it/33638-2/>

⁹ The memorandum between UNHCR and the Republic of Niger, signed in Niamey on 20 December 2017, lasts two years and concerns: the entry of citizens evacuated from Libya into Niger; the recognition of asylum; the transit and reception of migrants in Niger; possible solutions in the event of non-recognition of asylum or non-transfer to a third country. The text of the agreement is available at https://www.asgi.it/wp-content/uploads/2019/05/memorandum_Niger_UNHCR.pdf

¹⁰ This indication is not clear when indicating subjects excluded from ETM: in particular, it is not understood whether only those who have already agreed to voluntary repatriation and are waiting for the transfer to their country of origin would be excluded, or whether those who are likely or potentially likely to have access to voluntary repatriation would be excluded, without, however, specifying on what basis the prognostic judgment would be based.

potentially eligible persons to access the resettlement¹¹. After UNHCR has taken over¹², the foreign citizen will have access to the international protection procedure before the Government of Niger and a special National Election Commission (NEC)¹³.

Whether they are asylum seekers who have been evacuated from Libya via ETM or foreigners who are already in Niger and reported by the IOM, the personal hearing on international protection needs is always carried out by UNHCR staff, in accordance with the abovementioned memorandum with the Government of Niger. At the outcome of the hearing, UNHCR prepares an assessment (“*Refugee Status Determination Assessment*”)¹⁴ which is not, however, binding on the Niger NEC, which is always responsible for the final decision on the application for protection. If NEC recognizes someone the status of refugee, s/he will be able to access the resettlement, when the UNHCR’s assessment is also positive. Otherwise, the Government of Niger will still be able to recognize asylum in Niger, although this is a solution that the government has explicitly described in the above mentioned memorandum as being viable for a limited number of people evacuated through ETM and as residual hypotheses, to be used after the unsuccessful experiment of other possible options¹⁵. It is therefore likely that, in the presence of a positive assessment by UNHCR, the Government of Niger will accept the asylum application in order to allow access to resettlement procedures toward a third country.

In the event of rejection of an application by the NEC, asylum seekers may appeal to *the Comité de recours*¹⁶. In the event of refusal even on appeal, UNHCR can still recognize the applicant as a refugee under its mandate¹⁷.

As previously explained, in the event of negative opinion from the UNHCR, asylum seekers will not be able to leave Niger, even if the Government of Niger recognizes him/her as refugee. Contrary to the decision of the NEC, UNHCR's negative opinion is not appealable, despite the fact that it has had serious adverse effects on the applicant, who is at that moment precluded access to the resettlement program.

¹¹ UNHCR, “Procédures Opérationnelles Standard pour l’identification et le référencement des demandeurs d’asile entre L’Organisation Internationale pour les Migrations (IOM) et Let Haut Commissariat des Nations Unis pour les Réfugiés (UNHCR) au Niger”, 18 janvier 2016. Available on <http://www.refworld.org/docid/57fde5cf4.html>

¹² From the reading of *the UNHCR/Niger Memorandum*, it would seem that foreign citizens could theoretically have access to asylum applications even without UNHCR’s prior referral. In addition, citizens from specific countries, e.g. the north-east area of Nigeria, are recognized with an *international prima facie protection* and the subsequent issue of a residence permit.

¹³ The rules of procedure governing the operation of the Nigerian NEC of 14 July 2000 are available at <http://www.refworld.org/pdfid/4a1ff7882.pdf>

¹⁴ *The Refugee Status determination Assessment* includes: the summary of the request, an assessment of the credibility of the subject, the presentation of the facts, their analysis from the legal point of view and in particular the possibility of reporting in them a well-founded fear of persecution, the assessment of possible grounds for exclusion from refugee status as provided for in art. 1(F) of the Geneva Convention, and finally a recommendation on the recognition or otherwise of international protection by the applicant.

¹⁵ *The memorandum* specifies the nature of Niger as a transit country and not as a destination country for refugees or asylum seekers from Libya through the ETM and hence the exceptional recognition of refugee status for those who, evacuated from Libya, do not receive positive opinion from UNHCR.

¹⁶ UNHCR, “Comment peut-on être reconnu comme réfugié au Niger?” without date. Available on <https://www.unhcr.org/fr/562e47496.pdf>

¹⁷ Refugees under mandate are considered refugees from UNHCR under the mandate of the United Nations General Assembly, which also includes persons in a country which is not a member of the 1951 Geneva Convention. In this case, UNHCR’s determination of refugee status does not bind the country to ensure that the person has access to certain rights under the Convention, such as access to employment, education, or health services.

An asylum seeker evacuated from Libya and recognized by the NEC as a refugee and on whose status UNHCR has expressed a positive opinion, will finally be able to access the resettlement procedure.

According to UNHCR's "Resettlement Manual",¹⁸ resettlement is a protective instrument, as well as one of three "lasting solutions" for refugees, alongside voluntary repatriation and local integration¹⁹. Resettlement, as UNHCR itself has defined, "relates to the selection and transfer of refugees from a state in which they sought protection from a third state that has consented to admit them – as refugees – with permanent residence status"²⁰.

It is important to emphasize that UNHCR does not qualify resettlement as a refugee's right. It follows that it is not configurable an obligation for a third State to receive a refugee on its territory through resettlement²¹. UNHCR is responsible to identify refugees for whom to submit a request for resettlement, through an inevitably discretionary and unquestionable selection process. There are internal guidelines of the organization pursuant to which the resettlement is proposed where the need for protection is not merely temporary and the refugee belongs to one of the following categories: persons in need of physical or legal protection, survivors of torture and/or violence, persons in need of medical care, women and girls at risk, persons for whom it is possible to reunite families, children and adolescents at risk, or people for whom there are no other lasting alternative solutions²².

In any event, no formal notice is given to interested parties as to the outcome of the assessment of whether or not the requirements for access to the resettlement program are met, and therefore the reasons for the negative opinion. The choice of the destination countries to which the resettlement request has to be sent is also left to the discretion of the UNHCR, which carries out the resettlement request taking into account family reports, the priority of the request, the number of annual quotas, the availability of the recipient country to any medical treatment, the language knowledge, cultural aspects, nationality, family configuration and, if possible, the preference expressed by the refugee²³.

With regard to resettlement from Niger, the discretion of the UNHCR in the choice of beneficiaries appears to be at least partly mitigated, as all refugees evacuated from Libya that meet the additional criteria already mentioned above (including, UNHCR's own opinion on refugee status) are automatically included in the program. For each of them, UNHCR sends a request for a reception to a European or extra-European country that has given its availability. The request shall be accompanied by a set of precise information relating to the person concerned with his or her protection needs. Each request must include a "*Resettlement Registration form*" with which UNHCR presents the needs of each refugee to the country of destination, with a set of precise information regarding its application for protection, its assessment by the United Nations Agency, the degree of priority and the requirements related to the request for resettlement.

¹⁸ UNHCR, "Resettlement handbook", 2011. Available on <https://www.unhcr.org/46f7c0ee2.pdf>

¹⁹ UNHCR, "Solutions for Refugees", no date. Available on <https://www.unhcr.org/50a4c17f9.pdf>

²⁰ "*Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has acted to admit them – as refugees – with permanent residence status*". UNHCR, "Evaluation of Emergency Transit Centers in Romania and the Slovak Republic", 2016. Available on <https://www.unhcr.org/575935d17.pdf>

²¹ UNHCR, "Resettlement handbook", cit., p. 36.

²² Ibid.

²³ Ibid.

Following the request, an investigation phase is established between the UNHCR and the country of possible destination, which may request additional information²⁴; some States, including France, often conduct new talks with potential beneficiaries during *ad hoc missions* involving members of the Ministry of the Interior. Other countries, including Italy, send UNHCR a questionnaire containing specific questions²⁵. With rare exceptions, all countries of possible destinations ask for fingerprints to be collected. The request for resettlement is made for one country at a time, and where one state rejects the request, UNHCR may decide to resubmit the request to another state.

The refugee is not part of the procedure, involving only UNHCR and the possible host state. Requests, possible discards and the reasons therefore shall never be communicated in writing to the refugee, who shall wait for the procedure to end without being able to introduce new elements in support of the request or in opposition to the State of possible destination.

As previously mentioned, there is no obligation on the host State to accept a refugee in its territory through resettlement, the refugee has no means of appeal to oppose the decision concerning him or to enforce any omissions, defects or errors in the procedure.

In light of the above, it must therefore be concluded that both ETM and resettlement consist of institutions of a humanitarian, discretionary and concessionary nature.

Firstly, with regard to the Libyan context, access to such mechanisms is not free, since the beneficiaries are people who are in situations of detention in conditions that are often inhumane, at the mercy of jailers who inevitably have the power to decide, in manner out of control, who can have contact with UNHCR and thus potentially access to the ETM program and subsequent resettlement from Niger. The real possibility of taking advantage of evacuation also depends on practical and organizational factors, such as the availability of quotas in Niger or posts on humanitarian flights.

The same discretion is inherent in the next phase of the evaluation of the request for protection and the identification of the host country. All UNHCR decisions, despite their obvious repercussions on the sphere of fundamental refugees' rights, are discretionary and unappealing. Furthermore, as previously explained, the refugee never receives written measures in a language that he can understand and has no opportunity to speak with UNHCR about its choices on the country to which the request is made or whether to submit a new request following a request of rejection, if any.

The concessionary nature of this procedure makes the instruments of ETM and resettlement a path without guarantees, compressing the spectrum of legal appeal and claim by the person concerned, thereby marking a profound difference with the right of asylum which, as is known, constitutes a subjective right which can be recognized even in a judicial way in an internal context such as the Italian one, as constantly confirmed by the case law of the Supreme Court²⁶.

²⁴ The reference is, for example, to those relating to military service or political activity, information on the level of education, employment, languages spoken, etc. Finally, the document, before its approval, is signed by the refugee who authorizes the transmission of information to the country of destination and authorizes UNHCR to receive communications on its behalf.

²⁵ An exception in this regard seems to be Finland, *whose assessment* is based exclusively on the dossier prepared by UNHCR. See European Migration Network, "Resettlement And Humanitarian Admission Programs In Europe. What works?", 2016. Available on https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies_00_resettlement_synthesis_report_final_en.pdf.

²⁶ See the Supreme Court (*Corte di Cassazione*), United Sections, judgment 29460/2019.

Moreover, UNHCR explicitly excludes that resettlement can be regarded as a refugee's right, nor has UNHCR itself argued that such a mechanism could constitute a surrogate for the right to asylum or an appropriate compensation for its absence where access to asylum is denied, as it is currently in the Libyan context.

Conclusions

The mechanisms of ETM and resettlement applied in Libya, although introduced with humanitarian purposes to meet the protection needs of migrants, asylum seekers and refugees, are not instruments that can replace in any way the lack of access to international protection or even just mitigate the effects of the progressive denial of the right of asylum for the thousands of foreign citizens that are in Libya. ETM and resettlement are instruments of a concessionary nature, applied with very wide margins of discretion and not subject to any kind of judicial control. It is clear that the two instruments do not match with the right of asylum as provided for in the 1951 Geneva Convention and the Italian Constitution: a full and perfect subjective right, the recognition of which can be claimed by anyone without any further conditions or distinctions, even less of a discriminatory nature such as nationality or mode of entry into the territory. From a legal standpoint, therefore, ETM and resettlement cannot be regarded as instruments which in themselves legitimize the logic of the process of outsourcing the right to asylum, since they cannot in any way be considered substitutes or substitutes for it.

The European Union and the Member States call on and finance these measures, extending their scope for the future as well. In its most recent 2019 progress report on the implementation of the European Agenda on Migration, the European Commission qualified UNHCR's evacuation to Niger as "vitally important"²⁷. In September 2019, UNHCR launched an additional ETM program, which was also funded by the Italian government, aimed at evacuating refugees and asylum seekers from Libya to Rwanda²⁸. The latest and most recent development in this area is the statements by the current Minister for Foreign Affairs and International Cooperation, Luigi Di Maio, who at a parliamentary hearing held on 11 December 2019²⁹, declared to have asked and received from UNHCR and IOM a proposal to manage detention centers in Libya. The request for civic access made by ASGI to obtain a copy of the documents in question, in order to know the content of the proposal³⁰, was rejected by the Ministry.

However, the increasing use of the two mechanisms must be included in the more comprehensive management strategy (or, better to say, an attempt to block) of migratory flows from Libya by the European Union and its Member States, thus, becoming part of the government rhetoric that wants them to paint as a counterweight sufficient to counterbalance policies, which are otherwise intolerable and unsustainable, even in the face of public opinion, close border control, and even public

²⁷ European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council. Report on the state of implementation of the European migration agenda", 16 October 2019. Available on <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2019:0481:FIN:IT:PDF>

²⁸ <https://sciabacaoruka.asgi.it/il-governo-italiano-non-ha-richiesto-alcuna-garanzia-per-i-trasferimenti-di-migranti-dalla-libia-al-ruanda/>

²⁹ Hearing before the Parliamentary Control Committee on Schengen, monitoring of Europol's activities and immigration, 11 December 2019. Registration is available at https://www.camera.it/leg18/1132?shadow_primapagina=10032

³⁰ ASGI, "Action Plan for Migrants in Libya, worrying statements by the Foreign Minister", 9 January 2020. Available on <https://sciabacaoruka.asgi.it/unhcr-oim-gestione-campi-di-migranti-in-libia/>

prosecutor-minting, and forced residence of asylum-seekers and refugees in a country torn apart by a devastating armed conflict that has lasted for nearly ten years.

If, therefore, ETM and resettlement do not constitute in any way attenuations, or even repairs, of the violations of the right of asylum determined by the policies of externalization, the real impact of these two instruments cannot fail to be seen in the context of the broader political and legal process that has tended to externalize the application for asylum and its evaluation for more than 40 years, including through the creation in third countries of appropriate centers for this purpose. In this context, UNHCR's undoubted contribution to this type of intervention in Libya and Niger, which is strongly requested, supported and financed by the EU and the Member States, despite its non-existence in the right to asylum, it risks being used in an instrumental way by them to support the legitimacy of policies to deny access to European territory in order to apply for international protection.

In fact, following the introduction, also thanks to the contribution of the UNHCR, of a mechanism for evaluating the application for extraterritorial asylum and the consequent possibility of entry of a (albeit small) number of refugees into the European Union, the Member States of the Union have repeatedly been able to recall the role played by international organizations as a guarantee of protection against refugees in Libya, thus mixing the same scale as UNHCR action, which is omitted to a delicate attempt to protect the Geneva Convention even in a particularly precarious and dangerous context, in which its activity can only be limited and partial.

It cannot therefore be ruled out a priori that the work of UNHCR has given some legitimacy to the process of outsourcing international protection to Libya, which is strongly desired by the European States. The humanitarian intervention of the UNHCR through ETM and resettlement seems to have had an impact on this path undertaken by the European Union and the Member States, to the extent that they supported and did precisely the intervention of the UNHCR as appropriate to guarantee, at least to a certain extent, the right to asylum, although outside the European territory and in absence of the substantive and procedural guarantees provided for in the internal systems of the European States themselves. In this context, the idea that this process is no longer only imaginable but actually possible has been taken a little further, as confirmed by the same management proposals as the detention centers in Libya submitted by the IOM and UNHCR to the Italian Ministry of Foreign Affairs or the proposal for landing platforms in North African countries.

In doing so, the ONU Refugee Agency runs the clear risk that its actions, while being implemented with clearly humanitarian aims and in a desperate attempt to safeguard the fundamental principles of the Geneva Convention even in extreme contexts such as today's Libya, they end up providing legitimacy and support for proposals for extraterritorial evaluation of applications for protection and are governed by the logic of externalization of the right to asylum, thereby restricting, rather than broadening, the area of protection for asylum seekers and refugees.