Extraterritorial asylum processing: the Libya-Niger Emergency Transit Mechanism

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The Libya-Niger Emergency Transit Mechanism launched in 2017 successfully evacuated a large number of asylum seekers detained in Libya. However, the outcomes for many of the asylum seekers, and indeed for the three main partners (UNHCR, the EU and Niger), were far from what they had hoped for.

In late 2017, UNHCR, the European Union (EU) and Niger attracted international attention by presenting the Emergency Transit Mechanism (ETM) as a humanitarian solution to the well-documented torture and exploitation of asylum seekers and refugees in Libya. Implemented with funding from the EU Trust Fund for Africa, this programme proposed flying 3,800 vulnerable people from Libyan detention centres to Niger, Libya’s southern neighbour. In Niger, their asylum claims would be determined before refugees could access resettlement or complementary pathways to Europe and North America. However, a significant number of evacuees received negative asylum decisions in Niger, which undermined the initial depiction of Niger as a space of ‘transit’.

Rejections represent a core issue of the ETM and extraterritorial asylum processing at large, though it has not been widely discussed. Although Niger was declared a transit state, its role in filtering evacuees before their arrival in the Global North and the conflicting selection criteria between evacuation, refugee status determination and resettlement made rejections likely. Nigerien officials and ETM asylum seekers opposed to Niger’s role as a holding country have called on UNHCR and resettlement countries to live up to their international responsibilities.1

A buffer state between Libya and Europe

The creation of the ETM was integral to European attempts to keep refugees and migrants at bay in Libya. With European funding and support, the Libyan coast guard intercepted refugees and migrants and detained them. UNHCR had partial access to the detention centres but its refugee protection and resettlement procedures were constrained by the civil war and limitations imposed by the government. The central idea of the ETM was thus to ‘deterritorialise’ these procedures – that is, to move them to a third State – in order to provide immediate protection and to select asylum seekers before their physical arrival in Europe or North America. In this sense, Niger also played the role of a buffer state that allowed for a selection process before migrants arrived at Europe’s borders.

At the same time, the ETM made access to asylum for refugees in Libya partially possible. It was partial because only a certain proportion of those in detention and among the 50,000 registered with UNHCR in Libya were offered evacuation. Many
more were only given the option to accept voluntary return to their countries of origin.\textsuperscript{2} The plan involved high political stakes for UNHCR, the EU and Niger. It introduced a protection factor in EU externalisation policies which were often criticised for being security- and exclusion-focused and enhanced the reputation of Niger, currently the largest refugee host country in West Africa, as a country of hospitality.

In numerous reports, the EU, UNHCR and Nigerien officials alike depicted Niger as a transit country, and this was also reflected in the 2017 Memorandum of Understanding between UNHCR and the Nigerien Interior Minister. Procedurally, however, the MoU also included provisions for the remainder of evacuees excluded from resettlement in Niger. Although UNHCR prepared asylum files and issued recommendations, the final (negative) asylum decision rested with Niger.\textsuperscript{3} This allowed the State to take responsibility for implementing subsequent immigration decisions such as deportation and legalisation.

**Conflicting selection criteria**

There were conflicting selection procedures throughout the process. Due to constraints on its operation in Libya, UNHCR only undertook a simplified screening procedure for selecting candidates for evacuation to Niger. In contrast to earlier emergency evacuation schemes, detainees were screened according to their vulnerability and only undertook asylum procedures once in Niger.\textsuperscript{4} As a result, a large number of people were evacuated to Niger who would later not be eligible for refugee status.

In addition, the situation in Libya did not allow for orderly selection procedures. UNHCR staff in Niger confirmed that the screening was “not done on everyone” initially and not done well due to the lack of rule of law. Apart from allegations of corruption against Libyan officials, detainees also changed their biodata in order to increase their evacuation chances.\textsuperscript{5} The pervasiveness of these different informal practices in Libya raised the likelihood of rejections in Niger.

Furthermore, resettlement countries applied their own criteria in Niger when processing resettlement applications and rejected certain profiles based on their countries’ interests and capacities. Germany rejected an Ethiopian woman in order to avoid a precedence for Ethiopian refugee recognition in Germany. The Netherlands precluded refugees with more serious medical conditions due to their cost. France refused unaccompanied minors who did not already have family members in the country, because of the complexities involved in their integration and to prevent subsequent family reunifications. Several European countries made decisions against candidates based on security reasons. Although UNHCR resubmitted cases to other resettlement countries and sought complementary pathways, the interests of resettlement countries risked further refugees remaining in Niger. Complementary pathways were also severely restrained.
by the highly selective visa policies of
Global North consulates in Niger.

Responsibility and burden sharing
As a result of conflicting selection criteria,
a number of evacuees in Niger had issues
with their cases. In 2018, the Nigerien
asylum authorities took decisions on 415
ETM files and rejected 85 out of them in the
first instance. In August 2019, a UNHCR
official interviewed in the course of this
research reported that he considered about
100 applicants to be “complex cases”, which
required detailed credibility assessments.
Also, there were about 20 “potentially
dangerous profiles in international
criminal networks” who had reportedly
been involved in migrant smuggling and
trafficking or crimes against humanity. These
exclusion cases took UNHCR by surprise.

After the final appeal process, Niger
would be responsible for immigration
decisions. As deportations to Libya and
resettlement were ruled out for these
cases, rejected claimants would probably
have to stay in Niger. Confronted with
multiple security issues in managing the
ETM, Nigerien officials and government
representatives were often reluctant to
assume responsibility for rejections,
and strongly criticised UNHCR and
the resettlement countries for leaving
Niger to carry the burden.

Those asylum seekers who received
negative first-instance decisions felt stuck
in limbo after waiting for more than a year
since their evacuation, and blamed UNHCR.
One of them said: “UNHCR brought us
here. UNHCR is playing with us. We
can’t do anything.” They saw UNHCR as
responsible for their future because it was
UNHCR that had relocated them to Niger,
a country they had not sought to go to.

Some asylum seekers with negative first-
instance decisions considered returning to
Libya via the Sahara, despite the violence
they had suffered in Libya. They did not
see Niger, which ranks last globally in the
Human Development Index, as offering
them the potential of a decent life. These
asylum seekers had spent thousands of
dollars and faced high personal risk to
migrate to Europe via Libya in order to
pursue their dream of a better life. They had
not planned for a life of precarity in Niger.

Conclusion
The implementation of the ETM in Niger
underlines the unresolved issue of rejections
in third-country asylum processing. From
a humanitarian perspective, the ETM has
surely saved and improved the lives of
many refugees. Nevertheless, a core problem
at the outset was the disconnect between
evacuation, refugee status determination
and resettlement with respect to their
selection criteria and decision-makers. While
the humanitarian evacuation centred on
vulnerability and was the responsibility
of UNHCR, the asylum adjudication relied
on a perceived fear of return to the country
of origin and was ultimately Niger’s
responsibility. Resettlement offers, on the
other hand, were decided by resettlement
countries based on their own interests and
capacities. With these conflicting logics of
evacuation, refugee status determination
and resettlement, exclusions were inevitable.
As these cases were more numerous and
complex than initially expected, the search
for solutions exposed conflicting interests
between African actors (both Nigerien
officials and ETM asylum seekers), UNHCR
and the EU. Asylum seekers and Nigerien
officials believed that a decent life lay outside
Niger (in the Global North), while Nigerien
officials and politicians refused, for security
issues, to allow Niger to become a holding
country. These conflicts of interest manifested
themselves against a backdrop of strong
asymmetries of power. These structural
tensions challenge the viability of these
forms of extraterritorial asylum processing.

Those introducing an ETM in Rwanda
in 2019 appeared to have learned from
experiences in Niger and as a result
included alternative solutions in the initial
agreement, namely local integration in
Rwanda and voluntary return to countries
of origin.6 However, although the process
is more transparent, it shifts the burden
to asylum seekers in difficult situations
From complementary to ‘primary’ pathways to asylum: a word on the ‘right to flee’

Violeta Moreno-Lax

The international community needs to move away from the prevailing discretion-based model for pathways to asylum. The ‘right to flee’ must be taken seriously.

Containment, externalisation and the ‘irregularisation’ of mobility are some of the strategies used by States to impede or deter asylum seekers’ entry into their territories so as to avoid protection-related responsibilities. Despite their incompatibility with global solidarity and responsibility sharing, they have become a standard means of migration management.

To reach a (potential) country of asylum, few alternatives exist to so-called spontaneous arrivals, that is, arrivals usually through dangerous and irregular means. The alternatives are collectively referred to as ‘complementary pathways’, which may include resettlement, private or community sponsorship programmes, humanitarian admission, evacuation schemes, protected entry or embassy procedures, family reunification, educational scholarships, or labour mobility schemes. These are normally small-scale and available only for persons who are deemed to qualify as refugees, who have undergone some form of status determination by either UNHCR or the officials of the State concerned, and who find themselves in a particularly vulnerable situation or have special family or other ties to the country of destination. Additional conditions may well be imposed to ensure that only those who are perceived to be more valuable, more deserving or better able to make a net contribution to the receiving country’s economy will benefit from these initiatives. This leaves the vast majority of refugees to fend for themselves, forced to try to reach protection by their own means.

However, ‘complementary pathways’ remain voluntary, and there is no legal duty for States to set them up in a systematic way. In short, there is no legally binding obligation on so-called States of destination to regulate, let alone facilitate, access to international protection. As a result, there are no refugee-specific channels to escape persecution in a safe and regular fashion and to request admission as a (yet-to-be-recognised) refugee specifically for the purpose of seeking asylum. There are no ‘primary’ pathways to international protection.

What about the right to flee?

A change of approach is required, which can be based on two key legal elements relating to the right to flee in the context of international protection.