

The "Emergency Transit Mechanism" program and the resettlement from the Niger.**Legal analysis, current and future concerns¹***Introduction*

This document was drafted as a result of a survey carried out at Niamey, in Niger, from 15th to 20th November 2018, attended by ten legal experts (lawyers and university professors)².

The survey focused primarily on the mechanism of *resettlement* for the people who submit the application for asylum in Niger. As will be explained later on, the resettlement is already known in several countries, among which Lebanon and Sudan, where the refugees are eligible for the programme on the basis of the provisions of the UNHCR Resettlement Handbook³.

The mechanism is fully managed by UNHCR. UNHCR contacts the countries that have offered their readiness to resettle the refugees in their territories, organises the hearings and the exchange of information, and communicates the final decisions in relation to the resettlement of the asylum seekers. Such instrument, with the necessary adjustments, is also applied in Niger with the initiative of the European Commission. Niger, in fact, as well as Sudan and Lebanon, is a transit country for many refugees who try to reach the Member States of the European Union.

We have to consider, though, that few foreign citizens seek asylum in Niger – with the exception of the refugees from the north-east of Nigeria, who settle on the border of Niger – **but continue their journey towards Libya in order to reach the Member States of the European Union.**

This possibility, in the last few years, has become increasingly illusory and the possibility of success highly unlikely, following the strengthening of the Libyan coastguard and of its capacity to intercept the vessels which leave the Libyan coasts.

In parallel, European governments have withdrawn from the international waters that they used to patrol in order to rescue vessels of migrants in state of difficulty⁴. On the one hand, an increasing number of vessels that leave the Libyan coasts end up drifting or are exposed to the risk of a shipwreck without any rescue; secondly, thousands of foreign citizens return to prison and to Libyan detention centres⁵, both official and run by armed groups, which are overcrowded, characterized by total lack of hygienic conditions and where foreign citizens suffer reiterated acts of torture.

¹ Updated to November 2018

² The legal survey, the drafting of this document and the scientific analysis have been realized in the field of ASGI's activities (www.asgi.it) and Spazi Circolari (www.spazicircolari.it)

³ <https://www.unhcr.org/46f7c0ee2.pdf>

⁴ Please see the Italian website <http://www.senatoripd.it/difesa/documento-conclusivo-della-commissione-difesa-sullattivita-delle-ong/>

⁵ "Since 2017, Italy and the EU provide assistance to the LCG to increase its capacity to carry out search and rescue operations and prevent irregular departures on the Central Mediterranean route.¹³¹ As a result of increased LGC operations, the number of people crossing from Libya to Italy has reduced significantly,¹³² while

Taking into consideration that people stay in Niger for only a short time and considering the terrible situation in Libya, provoked also by the Member States' choice of curbing the influx of immigrants, a readjustment of the resettlement programme was necessary.

The latter is usually meant for refugees who are already beneficiaries of protection and accepted in third countries or UNHCR administered camps; on the contrary, foreign citizens in Libya do not have access to international protection, are not allowed to leave the detention centres and their safety is permanently threatened. In addition to this, they are at risk of *refoulement* and they cannot come into contact with international organisations if not previously authorised by Libyan authorities. In this contest, both applications for protection and admission in resettlement programmes are unfeasible.

As a consequence, the mechanism of resettlement currently in force in Niger and meant for the people who are in Libya was complemented by the *Emergency Transit Mechanism*. The latter is managed by UNHCR and meant for foreigner citizens located in Libya, and potentially refugees. With that mechanism, it will be possible to relocate the potential asylum seekers to Niger, to assess their application and, as provided by the general framework, to relocate them to the third States that will voluntarily accept their resettlement.

Therefore, **the ETM must be seen as the necessary corollary for the function of the resettlement mechanism**, where more and more foreign citizens, after leaving Niger, attempted reaching European coasts but were left detained in Libyan detention centres as a result of an increasingly impermeable block.

The European Union and its Member States have identified the tool of resettlement as a way to ensure safe access to Europe for refugees since the commencement European agenda regarding migration established on May 13th 2015⁶, and in parallel with the reinforcement of certain policies on border checks and the reaffirmation of the role of Europe as a welcoming place for refugees and asylum seekers. Indeed, all the interventions that the Commission outlined for the achievement of the designated goals have been considered as necessary tools for the communitarian strategy on migration management and control. The primary identified tools carry, on the one hand, the logistic, formative and technological support for border authorities, in particular for the Libyan coastguard and, on the other hand, the donation of financial resources to Libyan communities for the management and the improvement of conditions inside detention centres and in the operations of disembarkation. Furthermore, a conspicuous amount of economic resources from the European Union and its Member States has been allocated to international organisations, to increase the number of voluntary repatriations from the Libyan detention centres and for the evacuation and subsequent resettlement of refugees from detention centres to third countries.

out of the total number of people who do still attempt the crossing, the proportion of persons intercepted or rescued at sea by the LCG has increased. 133 The increase in interceptions and rescue operations conducted by the LCG resulted in greater numbers of persons disembarked (and detained) in Libya”.

<https://www.refworld.org/docid/5b8d02314.html>

⁶<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015DC0240&from=GA>

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Therefore, the ETM and resettlement are part of such a holistic strategy and have become, given the framework of the update on the European agenda of 2018, a fundamental element for an integrated approach on migration. The results of the interventions of the Libyan coastguard and the interception activities of foreign citizens in the sea must be read in parallel with the number of voluntary repatriations from Libya and Niger and the number of refugees who, after being evacuated, are transferred to countries of the European Union.

Such a total and integrated approach regards, on the one hand, the reinforcement of the control on external borders, the decrease of arrivals and the blocking of migrants in Libya, and on the other hand, counterbalancing such policy, the possibility that the same migrants who are rejected and blocked can enter Europe through limited and predefined ways of access or obtain voluntary repatriation to the Countries of origin. Such tools follow the end of establishing a necessary frame of respect to the fundamental rights of the refugee and of the individual whom the policies of control and block endanger. The point indicated in the update of the European agenda on the migration of the 4th of December 2018 is reported as following: *"The experience of the past three years has shown that the best results come through **an integrated approach along a migratory route as a whole**. Along the Central Mediterranean route this has brought tangible results: **reducing irregular flows** by some 80%, helping over 40 000 persons to return home voluntarily mostly from Libya and Niger in the past two years; **and offering evacuation and resettlement** to nearly 2 500 vulnerable persons in need of international protection."*

The financial commitments and the expected results of the resettlement programme

ETM and Resettlement, being the main elements of the integrated strategy to control the migratory phenomenon, have over time required financial commitment and expected results. To understand the importance of these instruments, it is sufficient to look at the objectives indicated by the European Commission. In fact, in the 2015 European agenda regarding migration, **resettlement was profiled as a negligible and residual instrument** (the objective was to reach, by 2020, the resettlement of **20,000** refugees in Europe⁷); in 2017, instead, it became a central instrument. Furthermore, in the update of the European Commission dated March 14th 2018, it is reported that *"Following the Commission's Recommendation of September 2017, **the new scheme for at least 50,000 persons in need of international protection to be resettled by 31 October 2019, supported by EUR 500 million from the EU budget, will give a further boost to EU resettlement efforts**".*

Meanwhile, in order to make the two mechanisms effective, the resources allocated by the European Commission to UNHCR have been increased (most of them coming from the *European Trust Fund*).

For the time being, it lacks a global view about the number and the amount of each loan granted to UNHCR for the progress of ETM and of resettlement but, for example, it is possible to refer to the update of the European agenda of March 2018, in which the European Commission decided to allocate

⁷Resettlement instead becomes one of the main instrument in the update of the European Commission dated 14 March 2017, where it is reported that *"Following the Commission's Recommendation of September 2017, the new scheme for at least 50 000 persons in need of international protection to be resettled by 31 October 2019, supported by EUR 500 million from the EU budget, will give a further boost to EU resettlement efforts"*.

115 million to UNHCR, to IOM, and to the projects already published on the EU Trust Fund website, such as the one entitled "*Integrated approach to protection and emergency assistance to vulnerable and stranded migrants in Libya*" (T05-EUTF-NOA-LY-06)⁸. For the latter, the estimated realization costs amount to 29 million: 16 million of which are allocated into the indirect management entrusted to IOM, and 13 million of which in the indirect management entrusted to UNHCR is meant for the ETM mechanism.

In light of the increasingly fundamental role entrusted to ETM and to Resettlement throughout the entire migration control system, a study on their functioning and content appears relevant, in particular, in order to understand how these instruments affect the effectivity of the right to asylum.

Throughout the report, we will start from the studying of the characteristics of *resettlement*, also taking into account what is reported in the UNHCR Resettlement Handbook, which describes the resettlement as an exceptional instrument of protection of the right of asylum, referring to it as part of the mechanism of evacuation from Libya and as an instrument of the European policy to control the migration and to block the foreign nationals from Libya (as a counterweight to border control measures).

Therefore, starting from the in-depth study of these two mechanisms, we will examine whether ETM and resettlement are suitable instruments for ensuring a balance between border checkpoints management and the rights of refugees and asylum seekers. Specifically, we will examine whether such mechanisms are suitable to grant the right of asylum of people who cannot reach the European costs to seek international protection and to be granted fundamental rights.

Following this, it should be clear whether the mechanism represents a suitable solution in order to grant refugees the right of asylum while we are facing a humanitarian crisis for which the European Union and Member States are partially responsible, together with those who have the responsibility to manage the detention centres.

That being said, despite the fact that the survey mainly focused on the mechanism of resettlement and on the peculiarities of Niger, a full discussion cannot ignore the **ETM** – created and financed by the European Union – since the majority of refugees who have access to resettlement (or are excluded) have been released from the Libyan centres under the same humanitarian evacuation programme.

However, the information relating to this programme is incomplete: in fact, it is not possible to have access to conventions, programme details, objectives to reach, target and operation budget. The only gathered information is the one which comes from the press, the UNHCR's and Commission's official communication sector and the ONG reports (e.g., Amnesty International).

After dealing with ETM despite the lack of sources, we will proceed to deal with **resettlement** which has specific characteristics, although it arises from a mechanism which has already been in force for years.

⁸See <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-06.pdf>

In addition to the fact that most of the foreign citizens who access the resettlement come from Libya under the ETM, we would still like to point out other profiles of interest: the assessment process regarding asylum application, the balance required by Niger between asylum seekers evacuated from Libya and those resettled, the role of Niger considered by the authorities as a country of transit and not as first asylum for all those returning from Libya, the connection between the UNHCR and the IOM and the referrals of people who could access voluntary repatriation and who can be qualified as asylum seekers.

Finally, we will analyse the characteristics of the resettlement in light of the system in which the resettlement is embedded and its possibility to achieve its objectives. We will also deal with the issue as to whether the characteristics of the institution, and in particular its concessionary nature, based on a confidential and informal dialogue between third countries and the UNHCR, in which relocation is never qualified as a right, are sustainable in the current situation.

On that basis, it seems appropriate to specify that both the resettlement from Niger and the ETM are programmes that are completely independent of the European Resettlement Regulation, which never entered into force and which was blocked by the European Council on 20 June 2018⁹ after both the Commission¹⁰ and the European Parliament¹¹ had made their proposals. At the moment, therefore, there is no European or national framework providing a legal framework for the mechanism, which remains thus exclusively bound by conventions and protocols concluded from time to time between the UNHCR, the third countries of dispatch and the third countries of destination¹².

THE EMERGENCY TRANSIT MECHANISM. *The so-called programme of humanitarian evacuation from Libya*

The European Union and the Member States, starting from the European agenda regarding migration of May 13th 2015¹³, in parallel with the enhancing of the border check policies and the reassertion of the role of Europe as place of hospitality for refugees and asylum seekers, considered the resettlement as a safe way, for the refugees, to have access in Europe. **The resettlement - at that time – was considered an exceptional instrument** and the achievement was resettling 20,000 refugees in Europe within 2020¹⁴. However, already in 2015, Niger was identified as privileged territory to build a multifunctional centre "*in collaboration with the International Organisation for Migration (IOM), the UNHCR and the authorities of Niger*" in order to offer "*information, local protection and the*

⁹ <https://www.guengl.eu/news/article/eu-council-missed-opportunity-on-world-refugee-day>

¹⁰ http://www.europarl.europa.eu/doceo/document/A-8-2017-0316_IT.html?redirect

¹¹ <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A52016PC0468>

¹² See the decision of the Court of Rome dated 19 February 2019 about the release of a humanitarian *visa to a Nigerian* child for the reunification with his mother. About that case, the Court affirmed the direct applicability of Article 25, Regulation EC 810/09.

¹³ <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015DC0240&from=GA>

¹⁴ Resettlement instead becomes one of the main instrument already in 2017 in the update of the European Commission dated 14 March 2018 where it is reported that II "Following the Commission's Recommendation of September 2017, the new scheme for at least 50 000 persons in need of international protection to be resettled by 31 October 2019, supported by EUR 500 million from the EU budget, will give a further boost to EU resettlement efforts"

opportunity of resettlement for people who need it". Considering the unstable conditions and the constant violation of human rights in Libya, which prevent the application of resettlement directly from the Libyan detention centres, **the resettlement, starting from 2017, is supplemented with the Emergency Transit Mechanism**, which provides that the foreign citizens, deemed by the UNHCR as potential refugees, shall be evacuated from Libya and transferred to Niger, where probably they could access to the resettlement programme. **Indeed, on the side-lines of the 5th AU-EU Summit of 29-30 November 2017 in Abidjan, Côte d'Ivoire**, the EU, with the African Union and the United Nations, decided to set up a joint task force on migration which could accelerate the resettlement of the people in need of international protection¹⁵. In this context, we find also the bilateral agreement between UNHCR and Niger "on the establishment of an emergency evacuation mechanism and transit from Libya to Niger" (the **Emergency Transit Mechanism**, hereinafter the **ETM**) of November 2017¹⁶.

In the Country Operation Update of the UNHCR of March 2018, the ETM is described as follows: "**This programme aims to provide life-saving assistance to refugees in Libya, through evacuation to Niger, which has temporarily expanded its asylum place. The aim is to seek durable solutions, including resettlement for these refugees, who are mainly Eritrean, Somali, Ethiopian, Sudanese and South Sudanese (...). The resettlement of refugees evacuated from Libya to Niger is part of UNHCR's overall resettlement programme. The refugees who are settled in Niger (...) are included in the programme. (...) As regard the refugees evacuated from Libya, the key challenge is improving the fluidity of the process of departures for resettlement**¹⁷".

On the website of the Italian ONG COOPI (International Cooperation), partner of UNHCR in the ETM, it is said that: "**The mechanism provides the identification, by the UNHCR's staff in Libya, of the refugees and the asylum seekers more vulnerable detained in the Libyan detention centres. These people have voluntarily evacuated, to the transit countries where they can safely wait either for their**

¹⁵ see <https://www.consilium.europa.eu/it/meetings/international-summit/2017/11/29-30/>

¹⁶ The memorandum between the UN High Commissioner Office for Refugees and the Republic of Niger through the Interior Minister is signed in Niamey on 20 December 2017. This memorandum lasts two years and its object is: the entry of citizens evacuated from Libya to Niger, the asylum recognition, their transit and hospitality in Niger, alternative solutions in case of failure to recognise the asylum or of failure to transfer to a third country. The text of the agreement was not available at time of the survey, because UNHCR had rejected to show it noting the existence of a prejudice to international relations with Niger or the possibility of creating dangerous situations. The Nigerian authorities instead have considered available the text of the agreement and they have delivered it to the researches during the survey, not detecting the existence of such danger consequent to the knowledge of the content. The agreement is available on the following link: https://www.asgi.it/wp-content/uploads/2019/05/memorandum_Niger_UNHCR.pdf

¹⁷ "This programme aims to provide life-saving assistance and long-term solutions to the most vulnerable refugees trapped in detention in Libya, through evacuation to Niger, which has temporarily extended its asylum space. The aim is to seek durable solutions, including resettlement for these refugees, who are mainly Eritrean, Somalian, Ethiopian, Sudanese and South Sudanese. (...)The resettlement of refugees evacuated from Libya to Niger is part of UNHCR's overall resettlement programme. Refugees who were already present in Niger and deemed to require resettlement as a solution, are also included in the programme. (...) As regards to those refugees evacuated from Libya, the key challenge identified is in terms of improving the fluidity of the process of departures for resettlement.";

fonte: <https://data2.unhcr.org/fr/documents/download/63016>

*cases to be processed and to obtain the resettlement in third countries. Because of this situation, UNHCR in Niger and the Nigerian Government have stipulated an agreement in order to launch the ETM by the end of 2017. This memorandum makes it possible to provide temporary shelter to people who need international protection in Niger, while they wait for alternative long-term solutions in third Countries, first and foremost the resettlement*¹⁸.

In the Resettlement update #48¹⁹ it is clearly illustrated the current framework of the ETM (updated on 11 February 2019), of which some data are reported:

- on 11 February 2019, 56,507 asylum seekers and refugees were registered at the UNHCR in Libya; 4,327 people were identified by the UNHCR and its partners to be currently in one of the available Libyan detention centres. The registration permits only the annotation of personal data;
- since the beginning of the evacuation operation from Libya (at end of 2017), 3,016 people (including the unaccompanied minors) have been evacuated to Niger (2,332 people), in Italy (415 people) and in Romanian (269 people). 157 unaccompanied minors, instead, are still in Niger;
- since 1 September 2017, 4,665 people have found alternative solutions to resettlement (voluntary return, humanitarian visas, family reunifications...);
- on 11 February 2019, 12 countries (Belgium, Canada, Finland, France, Germany, Italy, Malta, Netherlands, Norway, Sweden, Switzerland, and United Kingdom) made available 6,351 places for the resettlement.

The citizens held in the detention centres in Libya are hence identified by UNHCR as potential refugees and they are transferred to Niger. The authorization for the access to these centres is given by the Libyan authorities, which until now have allowed the contact with citizens belonging only to 7 nationalities²⁰. As a consequence of the interviews carried out, it has emerged that the same person, before the transfer to Niger, is subject to multiple hearings with the UNHCR's staff.

As evidenced by the Memorandum between UNHCR and Niger, the transfer is voluntary and it is organised by the High Commissioner for Refugees by air or land. However, it is applicated only to those who comply with the criteria listed below, who, after their arrival in Niger, have to be resettled in a third country. Even before the evacuation, the UNHCR prepares the necessary measures to inform the candidates for the evacuation on the procedures of Refugees Status Determination, on the

¹⁸ "The mechanism envisages the identification of the most vulnerable refugees and asylum seekers by UNHCR Libya staff held in Libyan detention centres. These people are evacuated, on a voluntary basis, to transit countries where they can wait, in suitable protected conditions, for their cases to be processed and put forward for resettlement in third countries. It was under such circumstances that UNHCR Niger and Niger's Government signed an agreement to implement the ETM in late 2017. This memorandum makes it possible to provide temporary shelter to people needing international protection in Niger, while they wait for alternative, long-term solutions in third countries, first and foremost resettlement."; see: <https://www.coopi.org/en/niger-sheltering-libyan-refugees.html>

¹⁹ See: <https://data2.unhcr.org/en/documents/download/67926>

²⁰ <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>

possibilities of durable solutions potentially applicable and on the consequences in case of rejection or non-acceptance by a resettlement country.

Section 3 of Memorandum lists those who can be evacuated and can temporarily stay on the Nigerian territory, in particular they are:

- Refugees recognised by the High Commissioner for Refugees in Libya in force of its Mandate;
- Asylum seekers registered at High Commissioner for Refugees in Libya;
- Stateless persons or at risk of stateless and for who the determination of nationality could not be finalised in Libya;
- Unaccompanied minors in accordance with the principle of the child's best interest.

On the contrary, Nigerian citizens or "those who can access to the voluntary return programme of the IOM from Libya" cannot access to the evacuation programme and to the subsequent transfer to Niger in view of resettlement. This last sentence is not clear in indicating the subjects excluded by the ETM: in particular, it is uncertain whether only those who have already agreed to the voluntary return and are waiting for the transfer to homeland would be excluded from the ETM, or also those who could likely and potentially access to the voluntary return, without, in this case, specifying the basis of this prognostic judgement.

In the Memorandum it is specified that people who may be simultaneously on the Nigerian territory and waiting for the resettlement after being evacuated from Libya can be at maximum 600, except for extraordinary measures potentially authorised in case of humanitarian emergency situations.

The evacuation procedure provides the identification of the foreign citizen in Libya as potential refugee by the UNHCR, who will communicate his data to the Nigerian Government, which shall authorise or reject the request within 7 days; in any case, no motivation is required. Following the positive feedback to the entry in Niger, the asylum seeker will receive a travel document released by the country of origin, by the International Red Cross Committee or by another subject prior approval of the license by the Nigerian authority, which will always authorise the entry of the foreign citizen with affixed visa on his travel document.

*THE RESETTLEMENT OF EVACUATED REFUGEES OR VOLUNTARY MOVED AWAY FROM LIBYA.
The assessment of the asylum request and the transfer to third countries*

In addition to what provided for the asylum seekers transferred from Libya to Niger through the *Emergency Transit Mechanism*, **the foreign citizens in Niger may access to the resettlement programme also consequently to a report by IOM**, when they are voluntary repatriated from Libya and hosted in the transit centres of the migrations' organisation. According to the *Standard Operational Procedure (SOP) IOM– UNHCR*²¹, the IOM should then report to UNHCR the situation of those refugees potentially eligible to access to the resettlement.

²¹ <http://www.refworld.org/docid/57fde5cf4.html>

Specifically, in the accommodation centres, as provided in the *Memorandum Niger – IOM – UNHCR*²², the IOM discloses information on the right to seek asylum and, in the presence of an asylum seeker, informs UNHCR about it. UNHCR or the General Directorate of Civil Status, Migration and Refugees (*Direzione Generale dello Stato Civile, delle Migrazioni e dei Rifugiati - DGECDM*) meets the asylum seekers and discloses information related to the eligibility's procedures for the *status* of refugees in Niger. Different interlocutors, during the legal survey in Niger, have evidenced as such *Memorandum*, it is not properly working also because of an unavailability of IOM to report the asylum seekers to UNHCR. Such lack of coordination represents a serious potential violation of the asylum's right, where it is obvious that those who enter in contact with the IOM and are in need of protection could never be reported to UNHCR, and consequently to be included in the resettlement programme. In particular **worries have been expressed in relation to Nigerian women, most of them victims of trafficking in human beings** for the purpose of sexual exploitation, who have access only to the voluntary return programme. Indeed they are not reported to UNHCR for the submission of the protection request and subsequently for the resettlement. In the light of these serious criticality, a new Memorandum between IOM and UNHCR should be put in place.-

The procedure of request and assessment of the application for international protection necessary for resettlement

On the exam of the asylum request: the hearing and the opinion of UNHCR and the transmission to the commission for eligibility. The case of negative opinion

Subsequently to the taking over by the UNHCR²³, the foreign citizen could access to the request for international protection before the Nigerian Government and the specialised National Commission for Eligibility (NCE)²⁴.

According to the Memorandum, the asylum seekers evacuated in the framework of ETM or reported by IOM, **have a hearing carried out by the High Commissioner for Refugees concerning the reasons for persecution**. After the interview, the staff responsible drafts the RSD Assessment, which includes: the resume of the request, an assessment of credibility, the presentation of facts and their analysis from a legal standpoint and in particular the possibility to frame them into the refugee category, the

²² The memorandum of Understanding among the govern of the Republic of Niger, the International Organisation of Migration (IOM), the High Commissioner of UN for Refugees (HCR) in the context of mixed flows in Niger signed on 2 March 2017 for a period of 2 years on the identification procedures of the asylum seekers in Niger between the foreign citizens who came from west Africa and central Africa. The text of memorandum has been delivered by the Nigerian authorities during the inspections and it is now available at the following link: https://www.asgi.it/wp-content/uploads/2019/05/memorandum_Niger_UNHCR_OIM.pdf

²³ It is emerged from the interviews with the national commission that, in theory the foreign citizens may access to the asylum application also without the prior referral of UNHCR. Moreover, to the citizens coming from specific countries, e.g. north-east of Niger, is recognised an international protection *prima facie* and the subsequent release of a residence permit.

²⁴ Information on the national commission for the refugee status on <http://www.refworld.org/pdfid/4a1ff7882.pdf>

valuation of the causes of exclusion and, in the end, a recommendation to determine if the applicant should or not be recognised as holder of international protection.

Hence, in case of positive opinion by UNHCR, Niger could grant or not the international protection to the asylum seeker, who, only if recognised as a refugee, could access the resettlement programme. Otherwise, in case of negative opinion, the Nigerian Government could recognise to the applicant the right of asylum in Niger, or could reject his request and recognise, if the requirements are met, a different authorization for residence. It is noted that Niger has agreed to host, temporarily, the foreign citizens coming from Libya who have the expectation to be recognised refugees and then transferred in third countries. Therefore, if the opinion of UNHCR is positive and there are no obstacles to the request of resettlement by the asylum seeker, the Nigerian Government will likely grant asylum in order to facilitate the transfer to a third country; on the contrary, if the opinion of UNHCR is negative, the asylum seeker will not be able to leave Niger, either in case of asylum recognition or in the event of rejection of the request. In these cases, where the charge of the foreign citizens evacuated from Libya falls entirely on Niger, the Nigerian Government can recognise the international protection, but it will do it only in exceptional cases. The Memorandum Niger – UNHCR provides that the Nigerian Government does not oppose the **principle of granting asylum in Niger, but it is provided that this option remains exceptional and implemented as a last resort**. Indeed, always in the Memorandum UNHCR-Niger, it is clarified the nature of Niger as a transit country and not as a destination country for refugees or asylum seekers coming from Libya with ETM, and so, the exceptionality of recognition of the refugee status for those who, evacuated from Libya, do not grant the positive opinion by UNHCR: "*Considering the burden of asylum already assumed by the Niger Government, the eligibility decisions taken by the Commission for Eligibility to the Status of refugee pursuant to this mechanism shall potentially indicate that the evacuated people recognised as refugees will benefit from the right of residence in Niger solely for transit purposes to third countries*".

Precisely, already during the procedure of assessment of the asylum request, the UN Agency submit a recommendation or opinion to the Nigerian Government on the qualification of the foreign citizen pursuant to the Geneva Convention. If such recommendation is positive, the foreign citizen, potentially not recognised as a refugee by the Government shall bring an action before the competent authority (*Comitato di Grazie dei Ricorsi*) even with the UNHCR's help. In any case the UN Agency shall recognise him as refugee for mandate²⁵, even if the Nigerian authorities may exclude any form of protection. On the contrary, **if the UNHCR's opinion is negative, even if the Nigerian Government should recognise the international protection to the applicant, he could not access to the resettlement programme**, but he could stay in Niger as beneficiary of international protection recognised by such country. **The possibility to appeal against the negative UNHCR's opinion is excluded**, despite the harmful effects on people who cannot access to the resettlement programme.

²⁵ The recognition for mandate is directly made by UNHCR.

The determination of the status for mandate integrates a broader definition than that at article 1 of the Geneva Convention, extending also to people subject to discriminatory effects for armed conflicts or other disasters made by men, for example foreign domination, occupation, colonialism. For further information <https://www.unhcr.org/46f7c0ee2.pdf>

In case the asylum request of the potential refugee is rejected and if all the internal remedies have been implemented, the Nigerian Government and the High Commissioner for Refugees will inform the person concerned of the **actions to be taken in order to regularise his own situation on the Nigerian territory and on the possible facilities of which he would have right if he should decide to return voluntary to the Country of origin.**

Indeed, according to the Memorandum IOM-UNHCR-Niger for the asylum seekers, whose request will be rejected both at the end of the examination of the admissibility of the application and at the end of the procedure for determining the refugee status in Niger, the IOM will offer the return to the country of origin or to any other country where the applicant enjoys a clear and undisputed legal status, but the applicants shall personally communicate their own will to make such return. Specifically, according to the SOP IOM-UNHCR, the foreign citizens who show up at the office of the UNHCR and who, after the exam, do not result asylum seekers or are rejected by the Nigerian commission, are indicated to the IOM by the UNHCR in order to receive the information for access the assisted return programme. This is a written procedure, that includes a communication between IOM and UNHCR and the compilation of a document by the interested person in which he declares his will to go back²⁶.

FOCUS: Negative opinion by UNHCR

The asylum seeker – or refugee for the Nigerian perspective – **will not receive a copy of the UNHCR's opinion**, nor he shall challenge it before any court if negative. **However, the legal effects produced by the opinion are completely independent from the application in relation to refugee status:** the potential action against the decision of rejection shall not have any effect on the opinion which continues to preclude the admission to the resettlement programme. Consequently, the opinion should be considered a final act, challengeable by the foreign citizen and revocable in self-defence by who issued the act.

The exclusion from the programme of *resettlement* has a critical impact on legal perspectives of the refugees, even if they are recognized as refugees by Niger. It cannot be excluded that (among other reasons, because of the ratification of Geneva Convention of 1951 by Niger, on the recognition of refugee status), for such people, Niger could be qualified as a first country of asylum. For this reason, it cannot be excluded that they could be sent back there, in case of application of the criteria of first country asylum both by the Member States of the European Union²⁷ and by the African states. Indeed, on the basis of the information collected during the interview to the asylum officials of UNHCR in Niamey²⁸, the UNHCR does not exclude the application of the criteria of first country asylum both for foreign citizens in Libya, and for those who are in Niger and have already been recognized as refugees by other neighbouring states, for example Chad.

²⁶ <http://www.refworld.org/docid/57fde5cf4.html>

²⁷²⁷ Art.33 of the directive 2013/32/EU "The Member States may consider an application for international protection as inadmissible only if: b) a country which is not a Member State is considered country of first asylum of the applicant pursuant to article 35"

²⁸ The meeting took place in the offices of UNHCR in Niamey with the officials responsible of protection.

If the application is manifestly well-founded and the protection for mandate granted directly by the High Commissioner, **the UNHCR may also not send the dossier to the commission for eligibility.**

When this survey started to be carried out, the Government of Niger had not started yet to notify the decisions of rejection of international protection even of those who have been evacuated from Libya in the framework of the ETM, who however – as confirmed by the UNHCR, by the national commission and by COOPI – had already been decided. Such moment is decisive for the asylum seekers, to whom is not communicated that their requests have been rejected and that they have the subsequent possibility to appeal, **but it is communicated that it is precluded for them the possibility to access the resettlement programme** since the decision of rejection is a consequence of a UNHCR's irrevocable negative opinion – as stated by the interviewees.

As a confirmation of this, it should be noted that, as indicated in the memorandum UNHCR- Niger, the High Commissioner for the Refugees will deploy any effort to facilitate to find durable solutions which may include: the resettlement of the refugees or stateless persons in need of international protection to a third country, the family reunification of an unaccompanied minor when this solution is in the child's best interest, the assisted voluntary return of a refugee or stateless person in its own country or habitual residence, the admission to a third country with a scholarship or integration of a refugee or of a stateless.

Once the migrant has been recognised as a refugee and receives a positive opinion by UNHCR, he will be able to access the resettlement.

The procedure of resettlement

People who may be resettled.

UNHCR promotes the resettlement of people who have been recognised as refugees under its mandate or who have been recognised as refugees by the country where they were at the moment of the resettlement. The resettlement is a protection instrument and one of the "durable" solutions promoted by the UNHCR. In addition to this, as indicated in the Handbook of Resettlement, it is not a right of the refugee: "*Resettlement is not a right, and there is no obligation for the states to accept refugees through resettlement*"²⁹. The resettlement is defined by UNHCR as follows: "*The resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status (...)*"³⁰ (UNHCR, 2011a: 3). The refugee determination procedure is firstly made on the basis of the Geneva Convention of 1951 and it is the competence of the Contracting State where the asylum seeker submits the request. The UNHCR may, however, in some circumstances, carry out the status

²⁹ Page 36 of UNHCR Resettlement handbook <https://www.unhcr.org/46f7c0ee2.pdf>

³⁰ *The resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status*

ascertaining procedure (RSD) under its mandate. Often, the UNHCR puts in place the procedure to determine a refugee's status in those States which are not members of the Geneva Convention or that, even if they are members, have not adopted an asylum procedure or a procedure that can effectively carry out to the recognition of protection, or that have ratified the convention with a territorial limitation. **In the specific case of Niger the assessment and the decision on the application for asylum, as seen, is made by the Nigerian Commission for the Eligibility** which decides upon the request of protection with support of UNHCR. UNHCR organises and carries out the interviews and gives a non-binding opinion on the request, that later transmits to the Nigerian authority that, at the end of the assessment process, adopts its decision of recognition or rejection of the instance for protection.

The request of resettlement

The assessment of the request of resettlement is the competence of the UNHCR; it decides for which refugees the resettlement is the most appropriate solution (cases in which it is valued that there is no an alternative solution and that the need of protection is not temporally limited) and grants it to the refugees which belong to one of these categories: people in need of physical or legal protection; survivors of torture and/or violence, persons in need of medical care, women and girls in danger, family reunification, children and adolescents in danger and, in general, when for the person there is no alternative solution. Even in this case there is not a formal communication on the existence of requirements to access to the programme. As for Niger, on the ground of information obtained, **the refugees who have been admitted to the ETM programme or who have been reported under the Memorandum IOM-UNHCR-Niger are automatically included in the resettlement programme once recognised as beneficiaries of protection with a positive opinion of UNHCR.** The acceptance by a third state of their transfer, as we will say, works instead in a different way.

The communication with the refugee who can access to the programme

As indicated in the Resettlement Handbook and as repeated also by our interlocutors during the survey, the core messages that shall be communicated to the refugee who is convened by the UNHCR in order to assess the possibility of giving him access to the resettlement programme are the following: **"the resettlement is not automatic and it is not a right of the refugee"** and *"the refugee cannot choose the country of destination and the final decision remains in the hand of the country itself"*. Such information is also given to the refugees who have been taken to Niger with the ETM programme not being able to give them any certainty even in respect to the positive outcome of the resettlement.

The interview

The potential beneficiary of the resettlement is convened for an interview by the UNHCR at the presence of the interpreter, during which the UNHCR assesses the reasons in support of the application for protection are reviewed and its specific needs are assessed. Following the interview and the assessment on the necessity to access the resettlement as the only proper measure for the protection of the refugee, the official responsible for the resettlement **can** authorise the preparation for the resettlement request.

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In the specific case of Niger, all the refugees who have arrived under the ETM programme or who have been reported under the protocol IOM-UNHCR-Niger, are interviewed and in their favour the procedures for the resettlement request are arranged. The main difference with the resettlement known in other Countries is that the Nigerian Government gives its own availability **to host for a limited period foreign citizen who are escaping from Libya and in any case for a specified number of them**. Hence, in case of possible slowdown with transfers in third countries, the Nigerian Government will reduce the number of foreign citizens who can be transferred to its own territory, impairing the effectiveness of this mechanism and the opportunity to approach a growing number of asylum seekers and refugees stuck in Libya.

As provided in the *Memorandum* UNHCR-Niger, in addition to these categories of persons, the UNHCR can request the resettlement also for a limited number of refugees who have been already recognised as such by Niger.

However, even in the present case, if in the future the UNHCR shall deem appropriate not to submit the resettlement request, **the refugee would not receive any communication of suspension or of the refuse to submit its resettlement request**; equally there is no an administrative or judicial redress against the rejection decision.

The communication with the Country of destination

Any request must include the RRF (Resettlement Registration Form) by which the UNHCR illustrates the needs of each refugee to the country of destination, with a series of exact information relative to its application for protection, to the assessment of the same by the UN Agency, the degree of priority and the needs linked to resettlement request. The countries of destination may require additional information for example information related to the army service or to political activity, information on education, employment, languages spoken etc. In the end, prior to its approval, the document is signed by the refugee who authorises the transmission of information to the country of destination to which UNHCR will send the request and by which it authorises UNHCR to receive on its own behalf the communication from the requested country. As indicated by UNHCR, in the phase of assessment of resettlement request, some Countries, such as France, usually conduct new interviews, while others, for example Italy, ask to UNHCR to fill out a formulary with specific questions. Moreover, almost all countries collect the fingerprints, except Finland whose assessment is exclusively linked to the dossier made by UNHCR.

The presentation of the request

The choice of the Countries of destination to which send the resettlement request is left to the UN Agency, which will submit the sending considering: family relationships, priority of the request, number of annual tranches, availability of the country of destination to medical treatment, languages skills, cultural aspects, nationality, configuration of the family and, whether possible, the preference expressed by the refugee. The resettlement request is made only for one country at a time, and if one

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Country rejects the instance, this is communicated to UNHCR that can decide to resubmit the request to another Country. The decision of resubmitting or not the request may also depend on the reasons given by the Country of destination: indeed, if the validity of the reasons for refuge should be challenged or if there are security problems, these could also be preclusive to future further acceptances and requests. During the interview with UNHCR, it has been confirmed that **the refugee shall be made aware only orally of the rejection by a third country of accepting its transfer and it shall be assured that UNHCR will resubmit new requests**. Anyway, neither the new request, nor the rejections and the reasons of rejection are notified or communicated in writing to the refugee, who remains simply waiting for the procedure to come to a successful conclusion, unable to introduce new evidence in support of his request or to challenge the assumption of the receiving State.

The final decision rests with the Country of destination

In order to accept or not the resettlement request, the Countries of destination may both interview the potential resettled and rely upon the dossier sent only, or may decide that only some of the applicants will conduct the interview. The interviews are effectuated during specific missions where members of the Ministry of the Interior participate.

FOCUS: The lack of documentation, the access to documents, the correction and the deletion of data

The lack of access to the documentation related to the requests sent, to the minutes of audition, to the negative decisions on the resettlement request, to the decision of suspension of the request, create a serious and irreparable *vulnus* to the legal position of the refugees and to their capacity to protect their own rights. The refugee, who only knows orally and through UNHCR on the rejection of one State to authorise its transfer, **cannot participate in an active manner to the forming of conviction of the requested Country**. In addition, potential long waits to which the refugee is forced, could alternatively be linked both to a delay in replying of the third countries, to investigation, to researches ongoing, and to the decision to suspend definitely or temporarily the resettlement proceeding because of one or more negative decisions. **The lack of written provisions prevent the refugees to legal qualify this wait** which, in case of rejection to any transfer, could also last for years. The Countries that reject the request of protection – as reported by UNHCR – may indicate a remedy to challenge the reject, without any kind of duty.

In the resettlement Handbook is noted that the refugees can access to the information that they have given, but **they have a limited access to the information generated by UNHCR** or to the documentation coming from other sources. In these cases, the UNHCR should balance its own interest (security considerations of the staff or of protection of the UNHCR's sources of information) with the legitimate interest of the refugee to know the reasons of any decision which have implications on his legal situation. A solution proposed is to share only a brief summary without mentioning the names of the members staff who have contributed to take that decision. In any case, the documentation related to the interview or to the assessment of credibility cannot be shared. Clearly such limitation

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comes from the qualification of resettlement as institute with franchised character, where the possibility of reaction against a decision deemed unlawful is not guaranteed and consequently it is not understood the importance to have the necessary documentation in order to understand the logical *iter* of who has taken the decision.

All the data collected are reported to the telematic file ProGress where all data and information on the individuals who are registered by UNHCR are noted (even outside from the resettlement procedure) and in which the biometric data of the refugees and asylum seekers are recorded.

In order to fill, as far as possible, this gap of documentation relatively to his own legal position, we have required to our interlocutors of UNHCR, which were the right to access to the documents, recognised to the refugees under the resettlement proceeding. We are advised to further the question in "*Guidance on the protection of personal data of persons of concern to UNHCR*" of 2018. According to this guidance, it is recognised to the refugee the right to receive information on data used by UNHCR or shared with other subjects; the right to ask for the access to data and information; **the right to correct or delate data**; the right to object to the manner in which its own data are treated. **As for the access to documents**, this is recognised without limitations relatively to the documents that have been produced by same holder of the data: e.g. identity documents, marriage certificate etc. On the contrary could be enhanced limitations when the object of the documental access concerning documents or registrations generated by UNHCR (*internal work products*) or by a partner of UNHCR on his behalf, as interviews or opinions. In case of transfer of data from UNHCR to other partner or third parties, UNHCR must explain the reasons of transfer. Moreover, the interested may ask to UNHCR to correct or delate their personal data whether these are inaccurate, incomplete, not necessary or excessive.

In relation to the right of the refugee to access to documents relating to him and to amend, correct or delate his data, in the guidance it is abstractly indicated only the right, without giving any practical information about the competent authority to receive these instances, the time within the authority is required to answer and how to challenge a potential answer of rejection. One wonders, hence, how this right is effectively exercisable in lack of a proceeding, of an authority required to supervise on the fulfilment or default and of applicable sanctions in case of failure to satisfy the request.

It is noted that the right to privacy is not an absolute right and it should be balanced with other fundamental rights and public interests, in accordance with the proportionality principle. Information undisclosed may include, for example, those regarding the physical and mental health of a person whether from their publication derives a threat to the provision of essential services, those that if disclosed may prejudice the privacy of other persons, those relative to criminal investigation or cases when the UNHCR processed personal information on its own initiative or in response to legitimate requests of national authorities, information with expectation of confidentiality transmitted by third parties. **In the end the paragraph 9 deals with the sharing and transferring of personal data to partner or third parties**, that include the wide variety of subjects with who UNHCR cooperates among which governments, intergovernmental and non-intergovernmental organisations, UN Agencies, community-based organisations, universities and private sector. This situation is particularly relevant in the case of resettlement, **whether all the personal data collected by UNHCR shall be transferred**

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to the requested country in order to allow it to form its conviction. The third receiving country hence, it is not subject to a clear duty of deletion of data so, if it not decided to authorise the transfer of the refugee, it would continue to maintain personal data of foreign citizens who had never passed on its own territory and with who it has no connection or interest. However the conservation of such data for a time potentially unlimited could impact on the right of the refugee if the member state has personal information and sensitive data of the citizen that could be used in the future in the event that the refugee will be able to reach its territory. In that case it is not excluded that the third country, received a request for international protection from the foreign citizens, could use the data transmitted by UNHCR to assess the credibility of the subject or to declare it ineligible pursuant to articles 35 and 38 of the Directive 2013/32/32. In this latter case the principle of first country of asylum or safe third country would be applied using the information relative to the recognition of the protection occurred in Niger or of the transfer on the Nigerian territory, unless necessary bilateral agreement with Niger for the readmission of third citizens and the examination on the existence of conditions indicated in the legislation abovementioned.

The hospitality during the stay in Niger

According to the Memorandum UNHCR-Niger, the Nigerian Government shall take the necessary measures in order to allow to the evacuated persons to legally reside on their own territory for a period that will not exceed the six months. The High Commissioner for Refugees could require, exceptionally, the extension of this authorisation for stay only once, and on an individual basis. However, such timeframe, at least as far as indicated by the COOPI, which deals with the hospitality of asylum seekers and refugees could be underestimated given that the assessment procedures of the asylum and resettlement request are generally longer than the 6 estimated months.

The Government of the Republic of Niger shall ensure the protection of the places designated to host the evacuated people, while during the period of their transit in Niger, the High Commissioner for Refugees shall give to the evacuated people a temporary accommodation, food, products for the basic hygiene and emergency medical care in the places designated by the competent authorities of the Republic of Niger; furthermore, **the High Commissioner for the Refugees shall build and equip the hosting infrastructures.** Subsequently to the deactivation of the evacuation and transit mechanism, the abovementioned infrastructures and relative equipment shall be owned by the Niger State.

It will always be an obligation of the High Commissioner for Refugees to arrange transportation of the evacuated people outside Niger in order to access to a durable solution in a third country; to ensure services related to the resettlement of refugees or stateless among which: health check in the run-up to the resettlement and the medical examination prior to their departure toward the resettlement country; cultural orientation and/or language courses in the run-up to the resettlement. **Many of these services are carried out by COOPI** where a detailed discussion is held with the directors. Indeed, COOPI is one of the 15 non-governmental organisations, which on behalf of UNHCR deal with the implementation of its various projects in Niger. As it is well known and as we were told, UNHCR

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receives the funding from Community or National funds to carry out the activities of its competence, including those that were discussed, which are usually delegated and carried out by ONG, associations or organisations on behalf of UNHCR and under its oversight, control and co-ordination.

COOPI³¹ is an Italian ONG which operates in contexts characterised by extreme poverty and socio-political or environmental weakness through an approach which links actions in emergency situations with the reconstruction and development of the communities. **COOPI deals with UNHCR to manage 20 refugees in Niamey and 6 in Agadez** for those who come from Libya. The responsible of the project points out that some of these will soon have to be closed in favour of bigger structures, less expensive and located also dozens of kilometres from the city of Niamey. Pending the resettlement in third countries, the subcontracted organisation focuses on providing assistance, physiological support, especially for those who during the stay in Libya have suffered physical and mental assaults; on material managing of houses; on providing medical assistance to hosts, linguistic and cultural orientation focused on the country where the resettlement will take place. The receiving of acceptance has been 1500 persons, of whom 400 resettled, and at least a hundred who have not been granted the recognition of protection and who could not have access to the resettlement programme.

The hospitality arranged by COOPI begins already at the moment of their arrival at the airport with the flight from Libya, or when they seek asylum with UNHCR because they are in Niger as a consequence of other migratory patterns or of autonomous return from Libya. All citizens enter as asylum seekers in the accommodation centres.

Conclusions

As seen in the introduction, the evacuation and resettlement mechanisms have been introduced by the European Union as counterweights to deadlock policies of the Libyan route, that by the strengthening border authorities have made it difficult and dangerous to reach the European coasts³². Moreover the Libyan legislation does not recognise the asylum right and has not even ratified the Geneva Convention of 1951; hence all the foreign citizens, refugees and migrants who are intercepted by the Libyan Coast Guard are detained for an unlimited time in detention centres and they are considered irregular migrants subject to the risk of refoulement in their countries of origin.

However, it would be appropriate to question upon the effectiveness of these instruments and on the possibility that these could effectively represent a counterweight to the violation due to the known deadlock operations, implemented by the European Union, precisely in the light of the former discussion. Starting from the affirmation that the introduced instruments are mechanisms with a

³¹ <http://www.coopi.org>

³² The political, logistical and technological support for the Libyan authorities has become so structural and the border control is so impermeable that the European Commission has declared the vertiginous collapse (up to 90%) of arrivals on European coasts of people escaping from Libya. In the light of this situation, the European Commission has introduces some mechanisms that should restore the respect of asylum right and fundamental rights of refugees and migrants currently present in Libya, including the ETM and the Resettlement.

franchised character, where the access and the recognition of the asylum right to the refugee relies on proceeding with weak substantial and procedural guarantees. It becomes necessary to assess if these instruments, considered their legal nature, may be valid and effective, in order to allow the entrance in Europe for those who intend to present asylum requests; hence, if these instruments allow a widespread and real access to the asylum request and to the guarantees related.

Such reasoning, indeed, does not have as object the difficulties of respect and access to asylum right in a context like the Libyan one, instead it wants to make an assessment on the eligibility of these instruments introduced to rebalance the violations borne as a consequence of increasingly stringent border controls and blocking of refugees from Libya.

If, the Community politics can lead to violations of Geneva Convention on the asylum right, it is required a serious meditation on the ETM and Resettlement instrument **in order to verify, if these can restore the full and effective right of protection for refugees as we know and as guaranteed on the European territory.**

Indeed, in the event that it should be assumed that the instruments introduced, in particular for their legal nature, are not effective mechanisms of guarantee and protection of the asylum right, as it should be pursuant to the European project, hence it will be necessary to frame the UNHCR's interventions in Libya in favour of refugees in another category. So, instead of an effective counterweight to the blocking policies and instrument to restore the possible violations of the asylum right, **the resettlement and ETM mechanisms should be considered humanitarian interventions**, faces sporadically and on the basis of discretionary assessment to improve the situation of suffering or to facilitate access to the recognition of the asylum right in variable portions to the refugees in Libya.

The recognition of a legal nature to the Resettlement and EMT of franchised and discretionary nature, so distant from what is proper of the asylum right and so the classification of these two mechanisms within the humanitarian framework, **lead to a reflection on the relationship between the blocking policies and the compliance with the Geneva Convention of 1951.**

Indeed, where it should be assumed that such mechanisms do not represent valid instruments to protect the asylum right in Libya and an effective counterweight to the European policies which contribute to the violations of the asylum right toward the refugees, one must question the responsibility of the European Union and Member States which impose policies that could contribute to the violations against refugees and asylum seekers, without however finding incisive instruments to guarantee their fundamental right to asylum and protection.

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