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Bare Life and the European Union's Externalisation of Borders and Migration Control

A thanato-political analysis of the immigration detention facilities in Libya

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Introduction

Since recent times, the issue of migration has assumed a peculiar place in discourse which deserves attention. Security concerns seems to have substituted the traditional humanitarian approach, in turn resulting in more and more draconian borders regimes. The European Union's strategy aimed at stemming migrations flows conceived as a security threats seems to contradict on their very grounds the ever proclaimed values of solidarity and assistance to the so-called third world.

The Central Mediterranean route has recently assumed a pivotal strategic importance for the European Union, which has accordingly re-enforced its bonds with North African countries with the aim to keep migrants at a distance. Following the assumptions of the new Migration Partnership Framework (MPF) approved in 2016, the European Union has in fact been strengthening these relationships aiming at fulfilling short- and long-term objectives, within which the one to protect lives and to support the development of third countries. Nevertheless, as it results from empirical data and researches conducted in the area, policies enacted on the Central Mediterranean route have instead aggravated the insecurities at the South of the EU's external borders, resulting in thousands of casualties and in new emerging vulnerabilities. These policies, that can be understood as part of a strategy of *externalised obstruction of asylum*, consist in the financing and support to detention facilities, to the Libyan Coast Guard and to a number of non-state actors that have managed to enter the North African mechanisms of power. It seems that the European effort to externalise the migration and borders control to third countries under the paradigm of remote control, paradigmatically exemplified by the decision to withdraw Operation Sophia's ships and to substitute them with drones (incapable of conducting

rescue missions that deliver migrants to the European shores), has in fact resulted not only in the endangering of the trip from Africa to Europe, but also in the trapping of asylum seekers and migrants in a situation of absolute rightlessness, in which the dominium of law seems to retract itself from certain categories of people. The immigration detention facilities in Libya represent a striking example of the ominous conditions to which people escaping their home countries to seek asylum (or a better life) are exposed with the blessing of the European Union which keep striking pacts and agreements with unsafe third countries, de facto breaching, as it will be further discussed ahead, the fundamental principle of non-refoulement and obstructing the fundamental right to leave any country.

With regard to the recent echo achieved by Agamben's speculation over the relationship between life and politics, the aim of this work is the one to analyse the externalisation of border and migration control strategy pursued by the European Union alongside the Italian philosopher's category of bare life and through the conceptualisation of the state of exception. In particular, I am going to show how the current regime of European border management is reproducing a threshold of indistinction in which migrants and asylum seekers remain captured in the form of the exception, in turn relegating them to a condition of fundamental rightlessness. Following Agamben's argument that "the camp" has come to be the *nomos* of modernity, the detention facilities in Libya will be framed as part of a structure concocted by the European Union to keep migrants away from its territory (and from its juridical order) while apparently acting within the juridical order whose limits are blurred by the generalisation of the state of exception.

In the first chapter, I will draw on Agamben's reinterpretation of the Foucauldian bio-politics, making evident how, rather than being a feature of modernity, life has always

been a crucial factor in the calculations and mechanisms of power. Moreover, I am going to focus on the concept of the exception as principle of dislocation of the juridical order and as fundamental basis of sovereignty. A particular attention will be dedicated to the archaic Roman law figure of *Homo Sacer*, a man who can be killed with impunity and whose life is liminal between the inside and the outside of the political community. The second chapter is dedicated to the European strategy of externalisation of border and migration control. In particular, I will conduct an analysis of the detention camps in Libya and I will then expand to the policies through which the European Union is mastering the pursue of this strategy.

In the third chapter, I will go back to the Agambenian speculation over the state of exception and the mastered coincidence between life and politics which has in turn resulted in the fundamental rightlessness of those whose life is not includible into the political system. A particular attention will be dedicated to Hannah Arendt's work on the failure of the system of protections elaborated in the aftermath of the Second World War in order to guarantee human rights also to those whose biological existence is severed from a national belonging. In particular, it will be shown how, outside citizenship, the recognition of all human life as belonging to mankind has not been mastered by modernity and that the intrinsic working of modern power keep on producing lives that are not deemed worthy to be lived. Drawing on Agamben's theorisation of "the camp", I will argue that its structure is reproduced in the pursuing of an externalisation effort conducted by the European Union.

Finally, I will conclude drawing on Esposito's and Agamben's ideas on the general value of life in its biological essence, in contrast with the dichotomisation happened thanks to the evolution of the Western culture. It will emerge that, far from being a feature of a particular historical moment or peculiar of a certain collocation on the traditional

axis Left-Right, the exclusionary modality concealed with the trend which sees the normalisation of the exception, continue and be the only one working in politics.

CHAPTER ONE: LIFE AND POLITICS

The aim of the present chapter is the one to introduce the essential concepts which I will apply to the analysis of the detention camps in Libya in relation to the European production of vulnerabilities at the South of its borders: bio-politics, sovereign power, sovereign exception and bare life. The structure has been thought as a dense dialogue between Foucault and Agamben, with the scope to highlight the differences between the two approaches and to support the Italian philosopher's stance.

I will then focus on the Italian philosopher's speculation, reconstructing how the production of bare life – which is life unworthy to be lived, and therefore killable – is the original activity of the sovereign power and that violence is, as a result, an intrinsic characteristic of the modern state, regardless it is a democratic or totalitarian state. It will be shown how the mastered coincidence between biological, sheer life and the political one achieved with democratisation and citizenship has in fact resulted in the exposing all life to the sovereign thanato-political threat.

1.1 Bio-politics and bio-power in Foucault

In his works dedicated to the organization of power in the modern era, Foucault individuated two shapes it can assume: disciplinary power, as it was developed between the seventeenth and the eighteenth century as a "technology of labour" and directed towards the individual bodies; and bio-power, the threshold of modern modes of governance which *regulates* not the man-body, but the man intended as a living being, the man-specie. For the scope of this work, the main focus will be put on the regulative effects of bio-power, even if it should be noted that the two modalities, or

technologies, of power – according to the French philosopher - continued coexisting until our times in what Foucault referred to as the *society of normalization*.

Bio-politics, as it was defined by Foucault (1976), consists in the process – triggered by modernity - through which natural life begins to be included in the mechanisms and calculations of State's power. The critical transformation of power, occurred around the end of the Eighteenth century, was accompanied by the emersion of the disciplinary field of demography and the predisposition of the correlated monitoring instruments. The aim of bio-politics is the one to manage and regulate the population considered as a whole, at the same time as a political and a biological matter (as a political *because* biological matter), to improve the efficiency of the mechanisms of production and more generally for economic concerns. In "Society Must Be Defended", the French philosopher notes how with the advent of modernity, the biological aspects of life were for the first time in history projected into politics, and the simple fact of living was no longer considered as a remainder only emerging in the vicissitudes of death and fatality; but rather life as such and its preservation became the principal object of power. At the basis of the revolutionary impulse of the bio-political paradigm, there is a radical shift from the sovereign power's relationship to life:

"The ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death" (Foucault, 1997: 138).

In this sense, the one of Foucault can be defined, as Roberto Esposito does (Esposito, 2009: 27), a positive bio-politics as opposed to a "negative" sovereign power. The newly emerged concern over the "body of the population" has in fact the scope to take care of society and to establish an equilibrium on a certain optimized state of life.

In a bio-political system, death constitutes the flip of the coin of the right of the social body to ensure its own life, to maintain it and to develop it (Foucault; 1976). Death cannot be anymore the instrument of power in the hands of the sovereign, but comes to be the limit to be continuously removed. Anyway, as for their ontological thickness, the relation between the two – life and death – is far from being unproblematic. In fact, looking at the unprecedented experiment of the Nazi regime, Foucault questions how possibly the bio-political power, so much interested in people's lives' conservation and reproduction, actually kills, exposes to death and demands the death not only of its enemies, but of its citizens as well (Foucault, 2003: 254).

The full implications of *thanato-politics* find an interesting development in Agamben's and Esposito's works. Their studies demonstrate that the association of the positive power over life with the negative power of death is hardly coincidental, but rather lies at the heart of the bio-political project. Their research work demonstrates that the problematic of bio-politics may no longer be viewed in terms of a simple temporal succession from the dark age of the sovereign negativity to the glorious age of positive power that makes life live. Bio-power, however we define it, is always already defined as a power of life and death, not only in the sense that fostering the life of some presupposes the death of others, but also in the more ominous sense that the life fostered, amplified and optimised in bio-political practices remains in proximity to death precisely by virtue of being enfolded in an apparatus of power, whose bio-political productivity does not exclude sovereign negativity (Prozorov, 2013: 191).

1.2 The bio-political implications of sovereign power and the exception of zoē in bios.

As Foucault does, Giorgio Agamben considers the nexus between bio-power and its extreme performance in the advent of Nazism with the scope to unveil the secret relation between politics and life.

What distinguishes Foucault from Agamben is first of all a completely different approach in the analysis of power. In a "liberation from the theoretical privilege of sovereignty" effort, the first treated power outside the traditional juridico-institutional framework concerning sovereignty and the theory of the state, while favouring an in depth analysis of the ways in which power penetrates subjects' very bodies and forms of life, at the same time through discipline and bio-political regulatory power. In this way, his analysis of institutions takes the point of view of the relations of power, and not vice-versa (Foucault, 1982). On the other hand, Agamben is interested with finding the point of intersection between the juridico-institutional (which refers back to sovereignty and to the theory of the state) and the bio-political models of power, the unpacking of which will unveil the subtle continuity between democracy and totalitarianism. He assumes that the two analyses cannot be separated (Agamben; 1998:6) and that the inclusion of bare life in the political realm, far from being a peculiarity of the modern state, constitutes the original, if concealed, nucleus of sovereign power. The whole Agambenian analysis turns around this crucial point of convergence, which will bring him to unveil the relation between life and politics which "secretly governs modern ideologies" (Agamben; 2003).

Accordingly, at the theoretical origin of Agamben's negative bio-politics, which develops to a point where it becomes thanato-politics, there is the introduction of two additional layers to Foucault's thought: on the one hand, the Aristotelian distinction between bios and zoē understood through the conceptualisation of the sovereign of

exception; and on the other hand, the description of the process by which the exception in modern politics everywhere becomes the rule.

The inclusive exclusion of zoē in bios.

As Agamben notes, the Greeks had not a single word to refer to life, but they differentiated *zoē* from *bios*; the first expressing "the simple fact of living common to all living beings" (which Agamben refers to as *bare life*) and the second referring to "the form or a way of living proper to an individual or a group" (Agamben, 1998:1) and pointing at a qualified form of life.

The Aristotelian phrase "born with regard to life, but existing essentially with regard to the good life" exemplifies how this original distinction at the basis of the organization of the polis resulted in "an inclusive exclusion", an exception, "of zoē in the polis", almost as if politics was the place in which life had to transform itself into good life and in which what had to be politicised were always already bare life (Agamben, 1998:7). The relation between zoē and bios assumes the same form of the one between the voice and language, the first common to all human beings and which signals pain and pleasure; the second as a unique characteristic of man, which manifests the fitting and the unfitting, the just and the unjust. Voice is the presupposition for *logos*, but at the same time "the living being has logos by taking away and conserving its own voice in it". In the same way, the living being "dwells in the polis by letting its own bare life be excluded, as an exception, within it" (Agamben 1998: 7-8). This particular relation –which takes the form of the exception - between bare and political life, the first being at the same time condition and embarrassment of the second, lies at the basis of Western politics. Rather than being a product of modernity, or the symptom of the decay of sovereign power as Foucault would argue,

"the production of a bio-political body", or bare life, "is as old as the sovereign exception" (Agamben; 1998: 6) and as such constitutes the nucleolus of the sovereign power.

The structure of the exception

A discourse on bare life and on the modern structure of power, as it may already be clear, presupposes some clarifications on the structure of the exception.

The function of the sovereign exception, as it is conceptualised through the idea of potentiality[1] which in Agamben's speculation assumes a crucial role, is the one to create and define the very space in which the positive juridical order can have its validity, it constitutes the sovereign nomos of localisation and ordering (or *Ortung* and *Ordnung*, in Schmitt's words). To simplify, the exception is to the rule what negative theology is to positive theology. Without negative theology, as suggested by Gianbattista Vico, it would be impossible to postulate anything positive about God. It is only thanks to the fact that its validity is suspended in the state of exception that can positive law define the normal case as the realm of its validity, and in turn constitute itself in the form of localisation and ordering. Following this line, the exception of zoē in bios as it has been above described, constitutes the ground on which power, and more importantly all politics, can constitute itself.

In the passage from potentiality to actuality in the political system, the structure of the exception assumes the form the state of exception, by which "the sovereign creates and guarantees the *situation* that the law needs for its validity" (Agamben; 1998: 17). At the

[1] For an in depth discussion of the concept of potentiality in Agamben's theorization of sovereignty, see: Gullì, B. (2007). *The Ontology and Politics of Exception: Reflections on the work of Giorgio Agamben*. In Calarco, M. & DeCaroli, S. (eds.). *Giorgio Agamben. Sovereignty and Life.* Stanford: Stanford University Press.

same time, interestingly, the state of exception actually enlarges the determination of the juridical order by its own non-application: it allows the sovereign not only "a taking of land", but above all, as suggested by Schmitt, a "taking of the outside". What is excluded from the juridical order is in fact reintegrated in the mechanisms of power in the form of the exception which consists, to define it in terms of potentiality, in *the positive withdrawal from the law*.

If the original political relation consists in the inclusive exclusion of zoē in bios, then the sovereign (defined following Schmitt's conceptualisation as *the one who decides on the exception*) does not decide on what is licit and what is not, but rather "on the inclusion of the living", as an exception, "in the sphere of law" (Agamben 1998: 26).
Agamben therefore argues that sovereignty and Western politics crucially originated in the same exception that procures the inclusive exclusion, or capture, of bare life in the sovereign ban, and that this relation regulates the interaction between politics and life in a way that, regardless of the various promulgated declarations of rights, bare life as such will always be abandoned by law.
So, on the one hand, the paradox of the sovereign who is at the same time outside and inside the law, individuated by Carl Schmitt, results in the impossibility, when the state of exception is applied, to discern whether the law is being observed or transgressed, what is licit from what is not and the exception therefore resembles "the legal form of what cannot have a legal form" (Agamben; 2003: 10). On the other hand, being modern sovereign power more and more based on the state of exception, as it will be further discussed in the next paragraphs, the structure of inclusive exclusion reproduces itself in a careful research for life against to which to define its domain. Bare life is at the same time excluded from and captured by the political order, in what Agamben refers

to as *the relation of the ban* which is potentiality (or, better, potentiality-not-to that passes into actuality) of the law to maintain itself in its own privation, to apply in no longer applying. The bio-political imperative to classify and, more importantly, to select, results in the judgment upon the importance of one's life which ultimately forms the heart of the sovereign power's violence in modern politics. This process is exactly what Agamben refers to in "*The* Open" as the functioning of the "anthropological machine" (Agamben 2002: 40) that is "the grammar of production of the human against a background of life defined as worthless and eliminable".

In this sense, Agamben rejects Foucault's thesis that the sovereign power has been replaced by one that "foster life or disallow it to the point of death" (Foucault, 1978: 138). Power remains strictly anchored to sovereign power, and therefore to the old power of death, to the point that it is impossible for it to work if not in as a lethal machine (Agamben; 1998: 175). Those whose life is not deemed worthy of living, or not "politicized" enough, who may be killed but not sacrificed, are banned: they occupy a liminal position, a limbo of indistinction between internal and external. In this sense, death is not a biological moment, but a political decision on the value of life.

Homo Sacer

The *Homo Sacer*, an obscure figure of archaic Roman law, is one "whose life is included in the juridical order solely in the form of its exclusion (that is, of its capacity to be killed)" (Agamben 1998: 8) and represents for Agamben a crucial figure to explain the abandonment of zoē by law in modern times.

Homo Sacer is not simply set outside the law, but rather he is abandoned by it, that is "exposed and threatened on the threshold in which life and law, outside and inside,

become indistinguishable" (Agamben 1998: 28-29). At the same time, he cannot be sacrificed in a religious ceremony, thus he is excluded from the religious domain as well. *Homines sacri*, or the *wolf-men* (Agamben 1998: 105), perfectly embody the relation of the ban: they are not those who do not belong to the community; but rather those who are expelled from it and therefore included in it by the *nomos* of the exception, which is the one, as noted above, of dislocation of the juridical order. The bandit cannot be nominated and conceived if not against a definition of collective identity, as he who exceeds it. In the same way, the collective identity cannot be defined if not as contrasted to what "stays outside" it. In this sense, the political community could not exist in the absence of the *homo sacer*.

It is following this line that Agamben unfolds the irreducible ambiguity of an inclusive exclusion, or an exclusion that only happens as an exception or suspension of a positive norm or definition. The Hobbesian state of nature does not describe a *situation* (in the sense of "condition of possibility") belonging to the past; rather it is the exception and the threshold which constitutes and dwells into the juridical order, and takes the name of state of exception in which the application of the law is indistinguishable for its non-application.

"In the city, the banishment of sacred life is more internal than every interiority and more external than every extraneousness" (Agamben, 1998: 111).

In this sense, it is not the Hobbesian contract to form the community, but the exclusion of bare life, of the diverse, from it.

1.3 On the threshold of modernity

According to Agamben, the decisive feature of modernity is not so much, as Foucault argued, the emergence of bio-politics, which – as it is demonstrated by the exception

of zoē in bios -accompanies Western politics since its inception in Ancient Greece; but the fact that, together with the process by which the exception everywhere becomes the rule, a phenomenon originally situated at the margins of political order as a liminal category – bare life – gradually begins to coincide with the political realm; and "exclusion and inclusion, outside and inside, bios and zoē, right and fact, enter into a zone of irreducible indistinction" (Agamben 1998: 9-10).

The modern state, placing at its very legitimating core and centre the citizen, who is such because "he has a body", realised step by step the paradoxical overlapping between zoē and bios, biological and political life. As a consequence of this process, modern bio-politics constantly needs to redefine the threshold of life that distinguishes and separates what is inside from what is outside. Once zoē is politicised by declarations of rights, the distinctions at the threshold that make it possible to isolate a sacred life must be newly defined. Here it is where the anthropological machine has to be re-activated, redefining thresholds that pass beyond "the dark boundaries separating life from death" in order to identify a new living dead man, a new sacred man (Agamben 1998: 131). As it will be further discussed in the third chapter, the mechanism of exclusion, the anthropological machine, is still at work in our contemporary democracies, resulting in the retirement of law from certain categories of human beings whose life is conceived as *sheer living*, and in particular refugees, asylum seekers and migrants in general.

Having clarified how the fundamental relation between life and politics creates and reproduces the sovereign ban, we can now answer Foucault's interrogative about how possibly power in its modern form "kills, calls for deaths, demands deaths, and gives order to kill" (Focault 2003: 254). Going back to the starting point of both authors'

investigations, for Foucault what makes the relation between Nazism and bio-politics so tight was the communality of intents in leaving the smallest space possible for "fate" in the biological processes of life and death, and the genocide of the Jews was a tool to neutralise the threats posed to the German-specie in its biological health. Indeed, following Agamben's argument, Nazism is the natural, exacerbated result of the expansion of the sphere of zoē into that of bios and it was rendered possible by the normalisation of the state of exception as method of government. Thus, Nazism made evident the point of convergence between bio-political and juridico-institutional models of power that accompanies our contemporaneity as well: the state of exception is "the original dispositive whereby the law refers back to life and includes it by means of its own suspension" (Agamben, 2003: 10).

The camp

The state of exception, which has gradually been normalised in a process dated back to the French Revolution, creates a space of legal vacuum in which bare life remain captured as a consequence of its exclusion from the political community. The *normalisation* of the state of exception, which blurs in a "threshold of indeterminacy", resulted from the inversion of the relation between necessity and exception in the passage from antiquity to modernity.

"The principle according to which necessity defines a peculiar situation whereby the law loses its *vis obligandi*… overturned into the principle according to which necessity constitutes, so to speak, the ultimate ground and the source of the law itself" (Agamben 2003: 37).

Exceptional provisions are always taken on the basis of a subjective evaluation, so that they have a paradoxical state of being as juridical acts which cannot be taken within the scope of law. The state of exception can thus be defined as the legal form of what

cannot have a legal form. It is at the heart of the indiscernibility between law and fact, as it is configured by the state of exception, that the camp as the "hidden paradigm of the political space of modernity" which constantly reproduces the structure of the ban, can be understood as the bio-political paradigm of our age (Agamben; 1998: 115; 123). In the chapter "The Camp as *Nomos*" of Homo Sacer, Agamben defines the camp as structure:

"The essence of the camp consists in the materialisation of the state of exception an in the subsequent creation of a space in which bare life and the juridical rule enter into a threshold of indistinction […] we must admit that we found ourselves virtually in the presence of a camp every time such a structure is created, independent of the kinds of crime that are committed there and whatever its denomination and specific topography" (Agamben; 1998: 174).

Other approaches to the study of the issue of migration, and in particular of the denial of recognition of immigrant persons as bearers of human rights, appear not to catch, in its fundamentality, the existing link between politics and life. Approaches like humanitarianism, or human security, as they were recently developed in the context of a widening interest in the field of Security Studies, are critical from a normative or ethical point of view, in encouraging liberal democratic states to move "closer to realising the values they claim to live by now" (Gibney; 2004: 260), but lack a political view to overcome the essential contradiction underlying the state in its modern form which grounds the subjugation of those whose life is not deemed worthy to be lived as un-political. Notwithstanding the fact that human security approaches actually master to overcome the conceptualisation of migration as a mere factor in the calculation of power and national security of states – typical of the traditional strategic approach – they do not consider how framing it in terms of conflicting security claims between

states and humans produces particular effects in the configuration of relations between people and in terms for the struggle for political legitimacy. As a consequence, they reiterate the de-politicisation of the immigrant body as vulnerable subject, object of aid and assistance, and therefore fail to consider the same political actorness that should be recognized to overcome the legal vacuum in which migrants move.

CHAPTER 2: LIBYA'S DETENTION CAMPS

In this chapter, after a brief introduction of the current political situation and the legal basis of immigrant detention in Libya, I am going to draw upon data collected by a number of human rights groups active on the territory in the detention facilities of Az-Zawiyah, also known as "Ossama Centre" and located in Western Libya; Ain Zara in the area surrounding Tripoli; and the Kufra "holding facility" in the South. Finally, I am going to draw on the European policies and investments' framework towards Libyan detention facilities and Coast Guard as part of a strategy to circumvent the duty to receive people fleeing persecutions and wars. It is by the circumvention of its duties that, while apparently acting within the law, the European Union is perpetrating a securitised modality of government and in turn producing bare life at the South of its borders.

The necessity to cooperate with African countries in an attempt to stem migration to European countries has since a long time assumed a strategic importance that put Libya in the top priorities of the European Union. Agreements and cooperation with Northern African countries are not new: several pacts were already stipulated and relationships were cultivated long before the so-called "migratory crisis" affecting the shores of the Mediterranean Sea in the last four-five years. Already in early 2000s, after a decade of open-door policy, Libya began adopting more restrictive migration policies, including the establishment of migrant detention centres in response to pressure from EU countries. Nevertheless, the overthrown of Gaddafi's government in the aftermath of the 2011 revolution and the resulting uncertain – and violent – political situation, as the same dictator warned the year before (Traynor; 2010), resulted in ever increasing

masses of people wishing to cross the Mediterranean Sea to reach the European shores. Since then in fact, the political situation in Libya has been characterised by a downward spiral of uncertainty and instability, while the legitimacy and control over resources and infrastructures have since then mainly been contended between two rival entities: the UN-backed Government of National Accord (GNA) headed by Fayez al-Sarraj and based in Tripoli; and the Khalifa Haftar's, the general of the Libyan National Army (LNA), one based in Tobruk, in the West of the country. Notwithstanding the decisive predominance of these two rival entities, in the absence of a state authority exercising control over the national territory, dozens of rival militia groups and military forces, with varying agendas and allegiances, continued to flout international law with impunity. Overall, evidence shows that Libya's fragile equilibrium has brought to a substantial amalgamation of the state apparatuses and institutions with a number of militias and non-state actors whose accountability and concern over human rights is outstandingly poor. Militias and armed forces affiliated with the two governments engaged in arbitrary detentions, torture, unlawful killings, indiscriminate attacks, abductions, and forcible disappearances. Many detained in Libya facilities have been subjected to forced labour, torture, sexual abuse, and extortion. According to data collected by the United Nations High Commissioner for Refugees (UNHCR), which, together with the International Organization for Migration (IOM) is the most active implementing partner of European Union's missions, the number of migrants and asylum seekers detained in Libya should be comprehended between 8 and 10 thousand units; while as mid-October 2018 there were a total of 55.912 refugees and asylum seekers, mainly Syrian, Iraqis and Eritrean in the overall Libyan territory (UNHCR; 2018). Ill-treatment, abuses and excessive violence on the behalf of migrants and asylum seekers have been well recorded and documented by a number of NGOs and

associations, both local and international. Migrants, refugees and asylum seekers are knowingly exposed to a litany of abuses, including at the country's numerous detention facilities controlled by the governmental Directorate for Combating Illegal Migration (DCIM). For these reasons, and as it will be shown in the account of detention facilities, Libya is hardly to be considered a safe country for asylum seekers and migrants.

2.1 The Libyan legal framework for detention

There are mainly two laws that constitute Libya's legal framework concerning regular entry and exit, irregular migration, and detention and they both date back to the Gaddafi era. The provisions contained in Law No. 6 (1987) Regulating Entry, Residence and Exit of Foreign Nationals to/from Libya as amended by Law No. 2 (2004); and Law No. 19 (2010) on Combating Irregular migration, appear not to provide a clear ground for administrative immigration detention as well as other measures. Under both laws, violations of migration provisions are criminalised with fines and imprisonment. However, according to the Global Detention Project (GDP) and the Danish Refugees Council analyses, and as also stated by the European Commission 2013 report, the restrictive measures for immigration reasons generally occur without a juridical order and not as part of a criminal process (European Commission: 2013; Danish Refugees Council: 2014). Prison authorities and militias, as reported by the European Commission, hold thousands of detainees in long-term arbitrary detention without charges or due process. According to Art 9 of the International Covenant on Civil and Political Rights (ratified by Libya in 1989), detention can be considered arbitrary when: the grounds for the arrest are illegal; the victim was not informed for the reasons of the arrest; the procedural rights of the victim were not respected; and the victim was not brought before a judge within a reasonable amount of time. Nevertheless, it is the

same Law No. 19 that allows for indefinite detention of those considered to be irregular migrants that "are to be put in jail" and then deported. Moreover, in 2012, officials from the Ministry of Justice and Ministry of Interior acknowledged to Amnesty International "that they had little involvement in the arrest and detention of migrants".

The above cited laws do not distinguish between migrants, refugees, victims of trafficking or others in need of international protection while, in theory, provides *de facto* recognition of the status of refugees to people belonging to seven nationalities - Eritreans, Ethiopians, Iraqis, Palestinan, Somalis, Sudanese of Darfuri origins, and Syrians (Amnesty International; 2017). As recorded by the Global Detention Project's 2018 report on Libya Immigration Detention (GDP; 2018), most of the arrests happen automatically for everyone seeking to cross the Mediterranean Sea who is intercepted by the Libyan Coast Guard. There is a complete lack of formal procedures to allow detainees to ask for legal assistance: immigration detainees cannot challenge the grounds of their detention or of deportation decisions and are handed over to "holding centres" after serving prison sentences, usually for ordinary criminal offences such as theft (Danish Refugees Council; 2014).

Libya has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nation Convention against Transnational Organized Crime in 2004; it took part to the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights as well as of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Also, Libyan law provides some protections as those contained in Law No. 10 (2013) concerning the Criminalisation of Torture, Forced Abduction, and Discrimination; and the prohibition of arbitrary arrest and

detention as for the Code of Criminal Procedure. Nevertheless, the reality on the ground seems to paint a different picture.

Apart from the regular breach of international law widely reported, an overarching problem is Libya's refusal to ratify the 1951 Refugee Convention or the 1967 Protocol, in part because authorities fears that better conditions would be a "pull-factor" for migrants. Moreover, there is no formal cooperation with the UNHCR, although UNHCR does maintain an official in Tripoli and is tolerated since 1991 under an informal mandate that allows it to issue asylum seekers with letters of attestation (although these are not always recognised by Libyan authorities).

2.2 Detention facilities

The selection of the cases-study has been informed by a concern to show how the different degrees of the official Libyan State authorities' involvement (mainly through the Directorate for Combating Illegal Immigration, DCIM) in the management of the detention facilities funded by the EU, as well as the European strategy of investments for human rights training and structures' improvements, do not overall result in ameliorated conditions for detainees but rather help to keep asylum seekers and migrants in the rightlessness situation perpetuated under the volatile Libyan authority.

As for what emerges from a number of reports and denounces made by human rights groups and international institutions as well, women asylum seekers and migrants are particularly vulnerable to abuse and ill treatment in detention in Libya, especially as a result of the absence of female guards which is a violation of international norms for the treatment of prisoners. As for unaccompanied minors, they are not recognised as a vulnerable group requiring greater attention (European Commission; 2013).

Az-Zawyah Al Nasr - Ossama Centre

One of the most outstanding examples of the inhumane Libyan detention regime is without any doubt the Az-Zawyah "holding facility", also known as "Ossama Centre". Located in the surroundings of the GNA's headquarters in Tripoli, this facility can hold up to one thousand people at any one time, but UN investigation founded it repeatedly overcrowded (UN; 2016). The same agency described the conditions of detained people as inhumane and the detention centre not to be equipped to hold migrants. In April 2016, the IOM joined a call from the UN to investigate an incident at the facility where guards shot dead five migrants who were seeking to escape. The IOM's Displacement Tracking Matrix (DTM) has visited the camp in 2017 and reported inadequate conditions for what concerns ventilation and medical care, as well as unsuitable conditions for children and women (IOM; 2018).

As it has been more than once reported, while this "sprawling concrete-and-sheet-metal monument to humanity" (Tinti; 2017) is supposed to be administered by the DCIM, it is in fact under the control of the Al-Nasr Brigade, a militia led by Muhammad al Koshlaf who is also well known for being part of a local fuel smuggling network. According to the Global Detention Project and as resulting from information collected by Peter Tinti (Tinti; 2017), Koshlaf's brigade is closely tighten with Abd al-Rahman Milad's (also known as Bija) one. The latter is at the same time the Coast Guard commander, and therefore an official agent of the UN backed government in Tripoli, and the undisputed leader of human traffic trade in Tripoli (Wintour; 2018). Notwithstanding the alleged accusations moved by the United Nations in 2018, the European Union has continued developing relationship with him, and to finance and train his Coast Guard units who keep and "rescuing" migrants in the Libyan territorial waters to bring them back in the Az-Zawyah detention centre.

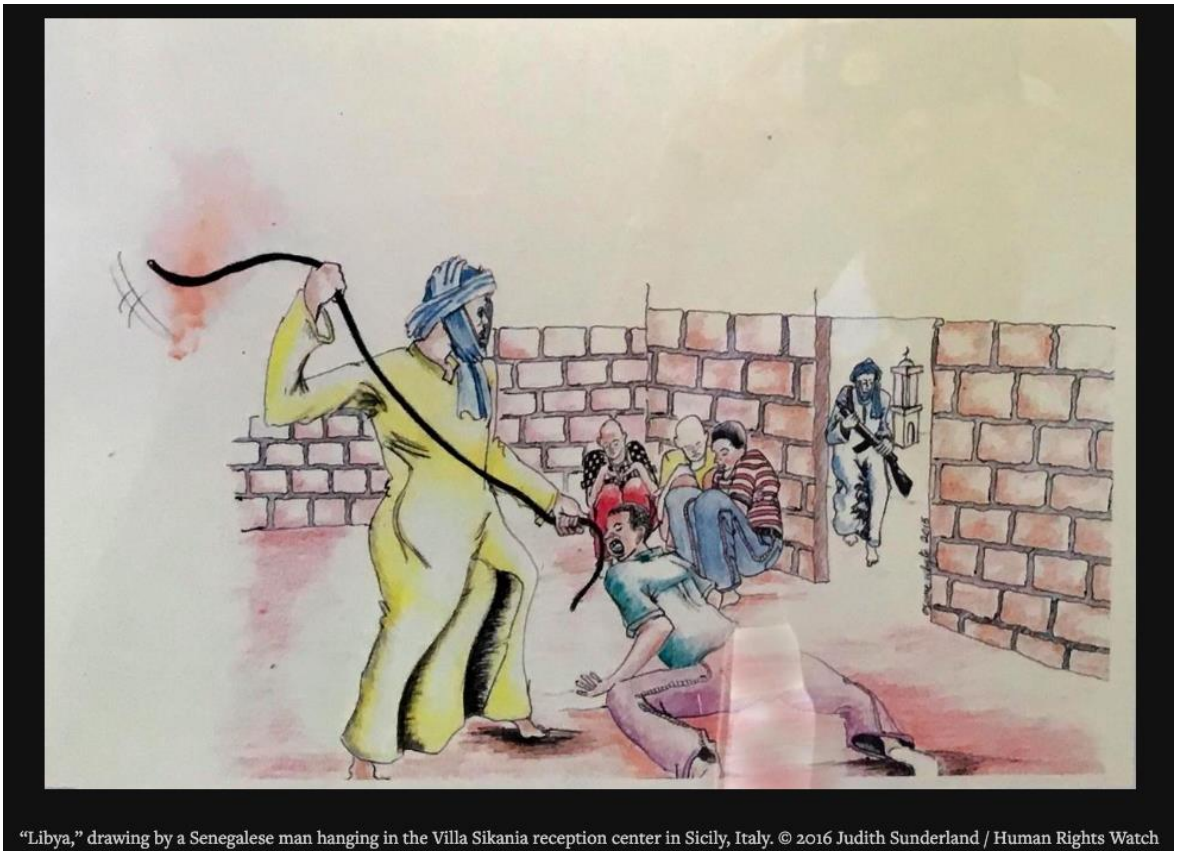
Ain Zara

Some fifty kilometres Eastern to Az Zawyah, there is the Ain Zara centre composed by two warehouse-type building, each divided in two cavernous rooms covered in mattresses and meagre personal belongings. In this facility it is the militia known as Battalion 42 or "al-Sheik" (from the name of its leader, Hakim al-Sheik) to guard detainees. Human Rights Watch has found in 2018 an elevate number of children detained in inadequate conditions. All the detainees there were brought back to Libya after having been intercepted at sea by the Coast Guard. Human Rights Watch has reported abysmal sanitary conditions, with no latrines working. Nutrition is not enough, with detainees being feed once a day, and no special care is given to new-born babies. Kameela, a 23 years old Somali detainee has told volunteers allowed inside to have suffered sexual abuses for prolonged periods of time in front of her husband while he was pointed a gun at his head. She got pregnant from one of those abuses (Human Rights Watch; 2019).

Kufra

In October 2013, the episode which involved the Libyan Coast guard shooting at a boat full of asylum seekers and migrants who were about to leave Libyan waters had a large resonance (BBC News: 2013). Many of the survivors were disembarked on the Eastern coast and deported to Kufra, an official DCIM facility often described as the worst detention center in Libya. Kufra is an isolated city in the Sahara Desert in south-eastern Libya that serves as a key transit route for irregular immigration.

Both the IOM and the UNHCR have access to the centre. According to Human Rights Watch, the centre has a central courtyard and six large detention rooms, which can hold more than 100 people, with frequent overcrowding. An assessment by IOM conducted in November 2018, recorded no functioning latrines, no adequate bedding, no health services available as well as poor lightning and ventilation and pregnant women detained in unadapt conditions (IOM; 2018). A 28-year-old Ethiopian man told Amnesty's operators he had been beaten regularly, being placed in a box and being flogged and burned with hot water. His wife said the head of the centre would regularly beat her and the other women there (Amnesty International; 2016). According to some accounts, Kufra has been financed through of a series of secretive agreements between the Libyan and Italian governments as early as 2003 (GDP; 2015: 9).



"Libya," drawing by a Senegalese man hanging in the Villa Sikania reception center in Sicily, Italy. © 2016 Judith Sunderland / Human Rights Watch

Men in one of the large hangar rooms at the Ain Zara detention center, Tripoli, July 5, 2018. © 2018 Human Rights Watch

Men outdoors at Abu Salim Detention Centre, Libya | ® Robert Y. Pelton/MOAS.eu | August 2016.

2.3 The European Union and its member states

The European Union and its Member States (and Italy in particular) have a long tradition of cooperation with Northern African countries. Since Gaddafi's government overthrow, bigger efforts were necessitated in order to stem migration directed towards the European Continent. Notwithstanding the deepening chaos in the country and the multiple denounces presented by human rights groups and international organisations concerning detention conditions, corruption, flourishing migrant smuggling rings and the incapability of the official state's authorities to cope with militias and non-state actors; the European Union and its member states have continued financing projects and infrastructures in the country while training its officials. Since the EU-Turkey deal in 2016, the EU interest in Lybia stems from the fact that with the sealing of the Aegean border, the central Mediterranean route now concentrates the highest volume of maritime traffic in terms of unauthorised arrivals. Accordingly, the 2016 new Migration Partnership Framework has been underpinning EU efforts to train the Coast Guard in order to bolster its capacity to stop human traffic, increase search and rescue operations, and prevent the departure of unseaworthy boats headed towards Europe. Within the European Union External Action Service (EEAS) framework, the EU has so far pledged $160 million for new detention centres to warehouse migrants before they can be deported back to their home countries and to train and equip the Libyan Coast Guard so that it can intercept migrant boats at sea (European External Action Service 2018). As it emerges from evidence, these policies are empowering militias and criminal organisations that have allied themselves with the UN-backed government and lined up for European largesse.

The 2017 Memorandum of Understanding and Malta Declaration

One of the cornerstones of the Italian effort in strengthening the Libyan borders is the Marco Minniti – by the time the Italian Interior Minister – policy's flagship: The Memorandum of Understanding (MoU) signed on the 2nd February 2017 by the Italian PM Paolo Gentiloni and Fayez al-Sarraj as a renewal of the 2008 "Friendship Pact" between the two countries. Despite the February 2012 *Hirsi Jamaa and Others v. Italy* rule of the European Court of Human Rights, which observed that "Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya" (ECHR; 2012); Italy continued signing agreements with the Northern African country, involving training programmes, the detention of migrants, and the provision of drones to assist in the control of the borders (GDP; 2015).

The document, constituted by eight articles and characterised by a very generic (and sometimes legally imprecise[2]) language, has triggered a dialogue involving, aside from institutional players, local tribes (in particular Tebu, Suleyman and Tuareg), entrepreneurs and even contending actors. Italy accepts to fund the establishment of "reception" centres in Libya, where migrants and refugees are to be detained while awaiting voluntary of forced return to their home countries (Preamble and Article 2).

While the two main objectives declared in the document are the ones to control the migration flows and to support the development of the region, since the beginning, the cooperation between the two countries clearly focused on reducing entries to Italy at any cost through securitising borders. The Italian effort to strengthen the Libyan

[2] The Italian version of the document exhibits more than one reference to the term "clandestine" as a synonym for non-regular migrant. It was 2014 when Luigi Manconi, head of the Human Rights Commission in the Italian Senate, managed to have the term removed from all official acts produced by the Italian authorities. The term has been judged first of all offensive, suggesting the idea of a sneaking around migrant.

borders concretized into €200 million financed through the Italian Fund for Africa, a cooperation and development-oriented fund. The same non-state actors with which the Italian government stroke the deal (within which the Al-Nasr brigade's leader and Abu-Qarin, accused of organising a migrant boat journey from Libya to Italy on 18 April 2015 in which 800 people drowned) were later sanctioned by the United Nations for human trafficking.

The 2017 MoU has been immediately welcomed by the European Union, which released the Malta Declaration by which funds were allocated for the pursuit of stemming "illegal immigration" through the European Union Trust Fund (EUTF, which covered the fifty percent of the total expenses); and enhanced and reinvigorated European Common Security and Defence Policy (CSDP) missions in the country were promoted. The training and assistance provided by the EU and Italy supposedly aim at enabling Libya to autonomously conduct rescue and pull-back operations of all migrants sailing off from Libyan shores towards Europe as part of mixed operations to control borders and "rescue lives" at sea.

EU missions in Libya

As it has been documented above, most of the migrants caught in the sea by the Libyan Coast Guard are brought back to detention centres on the country's shores or deported in other "holding facilities" in the inward. There are mainly three operative missions that the European Union is currently financing with the aim to train the Libyan Coast Guard and in this way refurbishing the ominous detention centres in the country: EUBAM Libya; EUNAVFOR Mediterranean (also known as Operation Sophia); and operation Themis.

EUBAM Libya, within the Common Security and Defence Policy (CSDP) framework, was initially launched in May 2013 as an integrated border management mission in Libya. In 2017 the mandate of the mission was extended to June 2020 and currently provides assistance to the Libyan authorities "in a number of priority areas on border management, law enforcement and criminal justice" (European External Action Service 2018). The mission operates from its headquarters in Tripoli, with a sub-office in Tunis. The budget for the period from January 2019 to June 2020 is €61.7 million (European External Action Service 2019).

Operation Sophia is a CSDP military deterrence-informed mission. It was launched in June 2015 with the aim of disrupting smuggling and human trafficking networks and contributing implementing the UN arms embargo on the high seas off the coasts of Libya. In the period between January and September 2019, the European Union has allocated €3.861.200 for pursuing the objectives within this framework, and in particular to train the Libyan Coast Guard and Navy (European Council 2018; 2019). The mission is participated by around 400 personnel and 26 participating member States (European External Action Service 2019).

Operation Themis is the "degenerated nephew" of the Italian Mare Nostrum rescue mission. When Italy announced that it was ending the operation in 2014, Frontex launched Operation Triton, a border surveillance program operating close to the Italian coast. Responding to the change, a representative of the Council of Europe said: "We know that [under Triton] there will be gaps and a vacuum in the territorial waters off Libya, for instance, and that is where the main accidents occur". And a Frontex official acknowledged: "Of course, we will also do search and rescue actions, but if you don't have enough capacity will you be there in time? I would expect many more sea deaths the moment that Mare Nostrum is withdrawn" (Davies 2014; European

Commission 2014). In February 2018, Triton has been replaced by Operation Themis, which, notwithstanding the concern expressed by UNHCR (2018), removed the obligation of the previous mission to bring rescued migrants only to Italy and allows for migrants and asylum seekers to be disembarked again on the Libyan shores.
In addition, as part of its European Neighbourhood and Partnership Instrument (ENPI) programme, which has also financed immigration detention in Ukraine, the EU announced in January 2014 a €10 million programme to finance a "rights-based migration management and asylum system in Libya", including improving detention conditions and reviewing administrative procedures (European Commission; 2014a).

While the declarated aim of European Union's investment in Libya is the one to ameliorate the abysmal detention conditions in the country, overall its involvement and projects in the region have not changed the fundamental rightlessness of individuals trapped on the so-called "holding facilities". In fact, it can be argued that the EU's policies contribute to a cycle of extreme abuse against migrants in Libya.

The Libyan Coast Guard, a fundamental partner of the EU's strategy, has been repeatedly accused of being colluded with militias and smugglers. Altai Consulting's analysis shows that only in two naval bases the Coast Guard has a functioning chain of command that responds to the Ministry of Defence; while the most of them are managed by non-state actors who have benefited from EU's training and support (Altai Consulting; 2017). Moreover, in the European Court of Human Rights' 2018 case *Legal Action Against Italy Over its Coordination of Libyan Coast Guard Pull-Backs resulting in Migrant Deaths and Abuses*, it emerged that the Libyan Coast Guard ship responsible of the drowning of at least 20 people, was donated by Italy and that the personnel on

board was trained by Operation Sophia. Their action was coordinated by the Rome Maritime Rescue Coordination Centre (MRCC), which pushed for migrants to be disembarked in Libya and detained back in the well-known deplorable conditions.

The European behaviour is hardly in line with the human rights law framework. While EU countries are not directly performing any containment themselves, their behaviour stands in contradiction with both the principle of non-refoulement and with the fundamental right to leave any country. As officials' declarations and reports' content show, the EU institutions and missions provide aid or assistance with knowledge of the circumstances. By keeping on financing the Lybian detention and deportation machine, the EU is responsible for wrongful acts according to Articles 16 and 17 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR). The violation of the absolute non-refoulement principle is foreseen, while the support is directly aiming at allowing Libyan actors to conduct the intended operations.

In this sense, EU's support to detention as part of its foreign policy, represent the part of the externalisation of borders mechanism intended at stemming immigration at any cost, and in particular accepting the outstanding violation of human rights in the territory. The differentiation of juridical status achieved by de-territorialisation (or dislocation), instead of enhancing security results, as Zolberg argues, in supporting smuggling and trafficking.

Armed forces allied to internationally recognized government fight with armed group in Tripoli, Libya September 22, 2018. © 2018 Hani Amara/Reuters

CHAPTER 3: A STRATEGY OF EXTERNALISED OBSTRUCTION OF ASYLUM

The externalisation of frontiers is the main tool by which the European Union is producing bare life in the so-called third world, by avoiding migrants to ever be capable to claim for rights and sequestering them to the ominous condition of *homines sacri* of our times. The institution of the ban, the device by which sovereign power makes a judgement over people's lives, seems to be reproduced in what some scholars have defined as the humanitarian anarchy at Europe's Southern Mediterranean borders. By being inhibited from reaching the sovereign territory on which to make a claim for asylum, people on the move are forbidden from ever joining the juridical order. In Agambenian terms, they are excluded through their inclusion (Hyndman & Mountz; 2008: 254). Borders, avoiding people in transition to ever claim for asylum, work as an instrument of deprivation of rights. The normalisation of the exception, and its expansion in the realm of the juridical order precisely works as a principle of dislocation, capturing what is outside the juridical order in the form of its suspension. Borders, according to Buckel and Wissel

"produce a special technique in the creation of relations not in alignment with the law […] the establishment of ex-territorial spaces – be they camps, transit zones or the Mediterranean Sea – produces sites in which the balance of power imbuing legal norms become invalid. Thus, the border still produces *the outside* of the political and legal society" (Buckel and Wissel; 2010: 39).

Thus, the production of bare life seems to be at work also under conditions of European integration. Re-scaling the problem of state sovereignty, as Hardt and Negri extendedly did in *Empire* (Hardt & Negri; 2000), makes in fact apparent how the *European state*

project currently reproduces the loss of "the rights to have rights" in extended form through means of externalising borders and migration control. The institution of an Area of Freedom, Security and Justice (AFSJ) as well as the recently escalating preoccupation with terrorism and lately with human security, work as justification for a "state of willed exception", in that necessity seemingly grounds the externalisation policies of the European Union, in turn providing a basis for the inhumane treatment suffered by detainees in Libya. The result of such policies is, in the words of Bach, the production of "specific zones of stratified rights" (Bach; 2008: 153). Moreover, the exposition of migrants and asylum seekers to something that comes uncomfortably close to the state of nature, in which they lost any relation to the world built by human beings, makes it possible for an analogy with the Agambenian concept of the camp-as-a-structure.

This chapter focuses on the two main trends individuated by Agamben in the description of modernity, and in turn refers them back to the case-study of detention camps in Libya as part of the broader EU's strategy to externalise migration and borders control. Overall, it will be shown how this strategy pursued by the European Union by means of the above described policies, results in a striking contradiction of the principle of non-refoulement and of the protection of the right to leave any country. The technique of *externalised obstruction of asylum* in fact reproduces the mechanisms of the anthropological machine which ultimately consists in making a bio-political evaluation and decision over the value of life, keeping some at a distance.

If the anthropological machine is at work in the South of the European borders through the communitarian policies, this should be measured against the two main trends that

Agamben individuated in his work: a generalisation of the state of exception, in which exception more and more becomes the rule and the application of law becomes indistinguishable from its infringement; and the inclusion, if not confusion, of bare life in the political system, to the point that "exclusion and inclusion, outside and inside, bios and zoē, right and fact, enter into a zone of irreducible indistinction" (Agamben 1998: 9-10).

3.1 The normalisation of the exception

It is only with modernity that the state of exception as we know it makes its appearance *within* the juridical order.

As for the process by which the exception becomes the rule, we need to look back at the evolution of the concept of necessity and how it has been relating to the one of exception, as it has been applied to the juridical order over time. In Graziano's *Decretum*, written in the 12th century, the necessity allowed for the transgression in the single exceptional case, and it was aimed at guaranteeing the common security of men. This trend also appears evident in Dante's De Monarchia, while the idea that the suspension of law could be *necessar*y to guarantee common security did not exist in the Medieval world. The contemporary conceptualisation of exception, interestingly developed in the period between the two World Wars, especially by Santi Romano, is one in which necessity shifts outside the law (as it only can be applied to a situation unknown to precedent laws), and becomes instead the source of law itself. In this sense, while the pre-modern exception is an opening of the juridical system to an external fact; the modern state of exception is an attempt to include in the juridical order the same exception, in this way creating a zone of indistinction between law and fact in a way that, in the end, they coincide (Agamben; 2003: 36). It is in this sense that

modern sovereignty grounds itself on the concept of exception and that law and fact enter in a zone of indistinction. The modern trends of governing by the logic of exception, which means by a state of exception that is not even declared but which is rather substituted by an expanding of the security paradigm in order to make it more and more resembling to the rule, is pretty evident in the securitization and militarization of the external border of the European Union.

As reported by Ceccorulli (2014), the security discourses characterising the Justice and Home Affairs Commissioners of the EU have been developing since the Treaty of Amsterdam (1999). The introduction of the idea of an Area of Freedom, Security and Justice (AFSJ) "in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (Art 1.5 of the Amsterdam Treaty) had an important effect on the perception of borders. The security discourse has in fact been evolving and changing over time: from a concern over the preservation of the stability of the AFSJ (European Council; 1999); to a preoccupation on organised crime and terrorism; to its final form framed in terms of human security. The discourse of "saving lives" has assumed a rationale on its own, not necessarily linked to emergency events. Paradoxically, it is this human security rationale which is permitting the EU to pursue policies that contribute to human insecurity such as readmission agreements, empowering Libya's non-state actors and the development of additional tools to patrol the external border (Ceccorulli; 2014: 59-60). The language of emergency, that is a fundamental part of this trend, "has so transformed the legal landscape that we are in, in a lawless world, with detainees residing a legal black hole, in a legal limbo, in anomalous zone, in the legal equivalent of outer space" (Neoclous; 2008: 41). By not

declaring the state of exception, and seemingly behaving within the limits of the juridical order, the European Union's borders management creates and reproduces the threshold of indistinction in which rule and fact, outside and inside, exclusion and inclusion, enter into a zone of irreducible indistinction; while at the same time rendering the application of the law indistinguishable from its breach.

The generalisation of the paradigm of security as the normal technique of government in the field of migration implies a security understanding of borders, and in turn an "insecuritization" of people outside them (Ceccorulli 2014: 66). It has made possible the EU's direct support for the detention camps in Libya - which crucially brought some scholars to argue that the European Union has actually de-localisated its border from Southern Italy to the Northern shores of Africa (Andrijasevic; 2008: 8) - as well as the agreements between the Italian and the Libyan authorities, including sea-patrolling and deportation. As it seems evident from an analysis of the array of EU border-management policies, the language of emergency underpinning them results in a transfer of illegitimacy of the "illegal migrant" who is as a result excluded from benefitting from the European isle of wealth and protection. The criminalisation of the immigrant body through the use of a certain – often inappropriate – language, results in the asylum seeker becoming the life unrecognized as life. In this way, security preoccupations, as argued by Agamben (1998: 172), absolve the same role played by the concept of race under Nazi Germany: they realise an immediate coincidence between fact and law so that it is not clear whether law is being applied or not and in which migrant bodies are captured in the form of bare life.

Notwithstanding the European indulgence in stipulating pacts and agreements with the aim of stemming migration flows, several commentators have already convincingly spelt out the illegality of its approach towards Libya (Moreno-Lax & Giuffré; 2017).

Both the right to protection against *refoulement* and the right to leave any country, considered fundamental in the Western juridical systems, are systematically contradicted through the pursuing of the EU's externalisation of borders. The above described EU policies – explicitly aimed at stemming migration flows as it was already evident in the MPF's rhetoric – seem to move outside the legal framework of international law, in particular resulting in a retirement of the juridical order from migrants and asylum seekers. It seems in fact, that while the EU is not directly engaged in pull-backs operations and in human rights violations; funding, training and support may result in responsibility according to customary law in three ways: complicity, direction and control, and independently (ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ASR).

According to Article 33(1) of the 1951 Refugee Concention, without which the international protection regime would be futile,

"No contracting State shall expel or return a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

While the article does not make any precise reference to the issue of the applicability *ratione loci*, the jurisprudence of the European Court of Human Rights has in a number of cases confirmed the extraterritorial applicability of the Treaty when the State deal with individuals who risk being subjected to torture or degraded treatment if handed over to the authorities of countries of origin or transit (ECtHR, *Medvedyev and Others v France,* Appl. 3394/03, 29 Mar. 2010). It has also explicitly emphasised States' duty to

prevent refoulement from occurring, wherever jurisdiction is exercised (ECtHR, *Hirsi Jamaa and Others v Italy,* Appl. 27765/09, 23 Feb. 2012).

Libya, as I have shown through evidence collected in detention camps and as it emerges from its political situation and recent escalating of violence, cannot be considered a safe country. The UNHCR confirms it, and the European Commission's reports seem to move in the same direction. Thus, even admitting that the Coast Guard is being trained to autonomously conduct search and rescue operations (with poor results), returns to Libya endorsed and economically supported by the EU would remain inconsistent with international human rights.

The right to leave any country, contained in Art. 12 ICCPR complements the right to protection against refoulement. Restrictions to free movement have to be "provided by law, be necessary to protect national security, public order, public health or morals or the rights and freedoms of others" (Art. 12(3) ICCPR). Overall, according to jurisprudence, while limitations are permissible, they must not render the right ineffective. Thus, a general measure preventing almost the entire population of a State from leaving, such as the training of the Coast Guard and the direct support to indefinite detention in Libya, cannot be considered necessary especially because as it has been recorded by the European Commission itself, evaluations are made by the Libyan authorities (and militias) solely on the grounds of nationality. Notwithstanding these specifications, the EU policies seem to burden on the exercise on the right, and to do it through the means of non-legally binding Statements or MoUs, in this way not providing for adequate protection against arbitrariness and ostensibly obstructing the right of migrants to claim for asylum.

3.2 Bare life under conditions of democratisation

It is not possible to understand the mechanisms of power in modernity if one does not take into account the fact, with democratization, "what lies at its basis *(of the contemporary modern state)* is not man as a free conscious political subject but, above all, man's bare life" (Agamben; 1998: 128). Quite ironically in fact, what resulted from the democratic attempt to free men from absolutism by placing rights in the head of the individual as such, independently from his status, offered a "new and more dreadful foundation" for sovereign power (Agamben; 1998: 128). The 1679 writ of the Habeas Corpus (Agamben; 1998: 123) - consisting in the attribution of rights to anyone who could exhibit a *corpus* and not anymore, as in the *ancien régime* only to the free man, defined against his statuses and prerogatives – did nothing but exposing, once again, the body of *homo sacer*, bare life in its helplessness and abandonment. In this sense, Agamben argues that one should look at the historical function of declaration of rights, that since the 1789 Declaration of Rights of Man and the Citizen, represent the originary figure of the inscription of natural life in the juridico-political order of the Nation-State (Agamben; 1998: 127). In the passage from divinely authorised royal sovereignty to national sovereignty, the figure of the citizen invested with rights substituted the one of free man of the ancien régime; and the political system, re-activating the anthropological machine, finds new homines sacri, new persons whose unpolitical nature grounds their exclusion from the *ordinamento* and, in turn, their exposition to death. Nazism and Fascism were, above all, the crucial redefinitions of the relations between man and citizen, between zoē and bios, in which sovereignty was acting as a device of life's value estimation.

Universal declarations of rights formulated by various committees and organizations in the aftermath of the tragedies of the Second World War, in an attempt to fill the gap

existing between man and citizen, did not master to protect zoē. The right of every human being to belong to mankind is still lacking. Working in a solely "humanitarian and social" modality, these organizations did nothing but representing human life in the figure of bare, sacred life deemed as object of aid and protection and therefore, despite themselves, "maintained a secret solidarity with the very powers they ought to fight" (Agamben; 1998: 133). The very juncture to be solved is that, as the Italian philosopher argues, "a humanitarianism separated from politics cannot fail in the isolation of bare life at the basis of sovereignty, and the camp – the pure space of exception – is the biopolitical paradigm it cannot master" (Agamben; 1998: 134). In this perspective, following Hannah Arendt discourse, refugees are those who do not have the right to have rights. Being their existence interpreted by the political system as a sheer biological fact, refugees remain captured in the sovereign ban, and therefore excluded through their own inclusion. They are the truly *sacred* human beings, in the sense that this term used to have in the Roman law of the archaic period: doomed to death. The principle of universality underpinning the declarations of rights in the aftermath of the tragedy of the Nazi genocide, proved to work as a "senseless validity", in that the person is protected only if referable to a nation-state, in the form of citizen. The refugee, occupying an uncomfortable position in the continuity between man and citizen, nativity and nationality, is automatically placed outside the juridical order (and therefore outside law) and in turn relates himself with the citizen in what Gregory refers to as an *architecture of enmity* (Gregory; 2004. Cited in Hyndman and Mountz; 2008: 252). As the state of exception today has reached its "utmost planetary unfolding" (Agamben; 2005: 111), the absolute principle of non-refoulement as well as the universal right to leave any country, are retracting themselves from certain categories of life, the ones unrecognized as such. Interestingly, the right to leave any

country has been replaced by the one to remain in one's home country, a right introduced by Madame Sadako Ogata in UNHCR in 1993. This has been underpinning the programmes, promoted by the same EU and implemented by the IOM, of "assisted voluntary return", one of the few ways migrants can exit detention centres in Libya. It remains unclear to what extent can the concept of "voluntary consent" can be taken seriously for someone detained in the Libyan hell. On the other hand, the principle of non-refoulement has been substituted by what Hyndman and Mountz define as *neo-refoulement*, which aims at shifting the asylum from a legal domain where international instruments to protect refugees are still very intact to the political domain where migrants' flows are managed outside the territorial dimension juridical order, through the practice of *remote control*.

It is in this way that the borders of the nation-state that were supposed to mark nothing but the jurisdiction of the democratic constitution according to democratic republicanism, and were supposed to be traversable for everyone willing to accept the applicable law (Maus 2002: 231), turned out to be a technique of deprivation of rights.

3.3 The camp

In Agamben's words, the camp a piece of land placed outside the normal juridical order, but it is nevertheless not simply an external space, but taken outside in the form of the exception. In addition to this definition, the camp in the speculation of the Italian philosopher also stands for a structure, one in which the state of exception is normalised and bare life and the juridical rule enter into a threshold of indistinction. The camp conceived in this way is the *nomos* of modernity, which is characterised, as it has been highlighted above, by the process by which the exception becomes the rule and the gradual coincidence between the sphere of life and that of politics.

As a donor, through direct institutional involvement, it seems that the European Union is precisely re-creating the structure of the camp, by including migrants and asylum seekers only in the form of their exception from the juridical order, and in this way asserting its primary sovereign decision, the one over the definition of necessity and over the value of life. The detention facilities in Libya are part of this structure, a structure participated also by quasi-military actions in the Mediterranean Sea and readmission programs, which respond to a strategy of obstruction of asylum which paradoxically entails EU direct institutional involvement, but happens outside its law. The sovereign manifests itself by suspending the application of the law and exposing bare life in all its precariousness. It is through this strategy, aimed at keeping migrants and asylum seekers away from the juridical order where they could claim their rights that the European Union is actually cooperating in keeping them in a situation of fundamental rightlessness in Libya, de facto exposing them to the same dilemma in the relationship between asylum seekers and the international order that had initially given rise to the modern refugee law. While the European Union claims its commitment to human rights, reality on the ground shows how the prioritization of security, and its pervasiveness in discourse, have worked in an attempt to sever any jurisdictional link with asylum seekers. Because of the intensified control of the borders that the EU demands to its African partners, more asylum seekers remain for extended period of time in unsafe accommodations, exposed to traffickers and waiting for smugglers to arrange onward movement.

Conclusions

The aim of this work has been the one to explore the European borders and immigration policies through the lenses of bio-politics, trying to let emerge the secret tie uniting politics and life which is currently reproducing vulnerabilities and zones of stratified rights in the South of European borders.

Agamben's work shows how no matter how far declarations of rights and guarantees are proclaimed, the essential knot of the sovereign power remains there with its thanato-political threat. The figure of *Homo Sacer*, who can be killed and yet not sacrificed, who is included in the political system only through its exclusion, stands for an existential condition and its repercussions are always going to be burdened by those whose politicization has not been mastered. The conception of legal person as bearer of rights and protections has opened up for a striking coincidence between bios and zoē which in turn makes it necessary for the system to constantly renew means and targets of exclusion. The essence of the legal person, or of the citizen, is *per se* exclusionary in that it can only be defined against something else, the *Homo Sacer* who cannot be considered a person if not for a limited time. In archaic Roman law, the figure of the Homo Sacer occupies a liminal position between two statuses, the one of person and the one of thing. Nevertheless, as Esposito observes, under the same *ordinamento* the right of the father to freely dispose of his sons' life meant that no one in Rome, even if born as a free man, could unreservedly rely on his belonging to the status of person. In this sense, while the fundamental change from the objectivistic conception of the Roman law to the individualistic one achieved with modernity has to be recognised in its importance, the construct of legal person, as well as that of the citizen remains something far from being a natural quality. It is rather possible to *become* a person only

by pushing others in the dimension of *things* (Esposito; 2008:187). Only a non-person, a living non-personal matter can create – as grounds and object of others' sovereignty – something like a person. When the French Revolution mastered the *personification* of all men, it did it by charging of value the non-bodily, the personal part of human existence. While deepening the internal dichotomization between "soul" and "body", "man" and "animal"; the politicisation of men resulted in a second division: the one between men who are considered worthy of living and those who are not because recalling the animalistic existence of all men. Nazism was precisely the attempt to subordinate the animal dimension to the rational one, while on the other hand the personalist tradition works in an opposite direction. In *The Open,* Giorgio Agamben shows how, instead of constituting an autonomous essence, the one of man is a constitutively non-human category in that it can only be defined against something that is not human. In this way, the human essence is such because it has no precise identity and it can be charged of any nature or significance (Agamben; 2002: 36). The language, which has since antique times represented the cultural distinction between animal and man, bios and zoē, mastered the withdrawal of the talking man from his own silence, as already and not yet human. Western politics has not succeeded in the metaphysical task of constructing the link between zoē and bios, voice and language.

It is for these reasons that the definition of man comes to be so perilous when bios and zoē enter into a zone of indistinction and the state of exception comes to be the rule.

Asked to give a definition of our times, and judging from the evet that took place in Guantamo Bay and in Iraq as well as those currently taking place at the South of the European borders, we might say that it the age of the actual, or potential, suspension of law. Interestingly, as suggested by Calarco and DeCaroli (2007), whether the

suspension of law is actual or potential, this does not affect the discourse in its significance. It is precisely on the concept of potentiality, which according to Agamben is always also impotentiality (or potentiality-not to), that the concept of exception in grounded. Being the exception based on the concept of potentiality, it will always result in a form of exclusion, which is at the same time also an inclusion. It is precisely in this sense that the bare life of migrants and asylum seekers, their biological life, is included in the political realm in the form of its exclusion. The anthropological machine at work at the Southern borders of the European Union is precisely working as a means to classify and select the animality of men, to decide over the value of life intended as bios, as a way through which to construct and define the juridical order.

Declarations of rights will not be enough until the *natural sweetness of zoē*, as Aristotle puts it, cannot be politicised and hierarchies of the living will continue existing. But how to politicise the "beautiful day" (*euēmeria*) of zoē? Does zoē really need to be politicised, or is politics not already contained in zoē as its most precious centre (Agamben; 1998: 10)?

In a more and more securitised political landscape, where the exception becomes the source of law, it is the decision over life to become the ultimate political decision and mission. For this reason, the camp as a structure in which everything is possible reproduces the peculiarities of the European management of borders security, in which people's rights are suspended or always about to be denied. The camp mirrors the detachment of bare life from the nation-state and renders visible in its most striking form the structure of the sovereign power.

Debris covers the ground after an airstrike on the Tajoura migrant detention center in Tajoura east of Tripoli in Libya where 53 migrants were killed, Wednesday, July 3, 2019. © 2019 Hazem Ahmed/AP Photo

Demonstrators gather to protest against the presence of militias in the Libyan capital in Tripoli's Martyrs' Square on March 17, 2017. © MAHMUD TURKIA/AFP/Getty Images

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