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Re-(B)ordering:

The Impact of the European Union's Externalisation of Migration on the Human Rights of Migrants in Libya

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RE-(B)ORDERING: THE IMPACT OF THE EUROPEAN UNION'S EXTERNALISATION OF MIGRATION ON THE HUMAN RIGHTS OF MIGRANTS IN LIBYA

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ABSTRACT

The European Union (EU) maintains a policy of externalisation towards migration, with specific reference to Libya. What has resulted is the transformation of the European border through extra-territoriality, which consequently silences migrant voices and leads to a violation of human rights. The EU not only tolerates human rights violations occurring in Libya as a result of its policies, but proactively enables these abuses to occur. Consequently, migrants who attempt to reach Libya and then cross the Mediterranean into Italy and beyond, risk being condensed to exceptional human beings, wholly because they fall within the gaps of the global system.

Keywords: Libya, European Union, Migration, Externalisation, Human Rights.

In 2017, video surfaced of African migrants in Libya allegedly being sold in an open market as slaves.¹ The video was shocking, and thousands protested outside of Libyan embassies calling for action to end the practice.² In addition, almost monthly were news outlets being inundated with stories of migrant drownings at sea whilst trying to reach Europe from Libya,³ and in a nation continuing to overcome Civil War, migrants too, have borne the brunt of alleged

¹ Nima Elbagir, Raja Razek, Alex Platt, and Bryony Jones, "People for sale: Where lives are auctioned for \$400", *CNN*, 14 November, 2017, <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>.

² Casey Quackenbush, "The Libyan Slave Trade Has Shocked the World. Here's What You Should Know", *Time*, 1 December, 2017, <http://time.com/5042560/libya-slave-trade/>; Cristina Matamoros, "Anti-slavery march calls on Libya to end 'crime against African humanity'", *Euronews*, 09 December, 2017, <https://www.euronews.com/2017/12/09/anti-slavery-march-calls-on-libya-to-end-crime-against-african-humanity->.

³ Samy Magdy, "UN Says 40 Migrants Feared Dead In Capsizing Off Libya", *PBS Newshour*, 27 August, 2019, <https://www.pbs.org/newshour/world/un-says-40-migrants-feared-dead-in-capsizing-off-libya>; ABC News, "Up To 115 Feared Dead In 'Worst Mediterranean Tragedy' So Far This Year", *ABC News*, 26 July, 2019, <https://www.abc.net.au/news/2019-07-26/up-to-150-migrants-feared-dead-as-boat-capsizes-off-libya/11348570>; ABC News, "More Than 100 People Missing After Boat Sinks Off The Coast Of Libya", *ABC News*, 20 January, 2019, <https://www.abc.net.au/news/2019-01-20/up-to-117-missing-after-boat-sinks-off-coast-of-libya/10730104>; Michael Levenson, "At Least 74 Drown in Wreck off Lybia, U.N. Agency Says", *The New York Times*, 12 November, 2020, <https://www.nytimes.com/2020/11/12/world/middleeast/libya-shipwreck-migrants.html>.

war crimes.⁴ Despite indignation towards Libyan authorities, Europe's role in these horrific conditions had largely gone uncriticised by popular media.⁵ Although people have been crossing the Mediterranean by boat since at least the late 1980s,⁶ the central Mediterranean migration route via Libya, is now the principal route for mixed flows into Europe.⁷ Yet, the European Union (EU) maintains an 'externalisation' of migration policies, preventing migrants (including asylum seekers) from even reaching the jurisdiction of EU Member States,⁸ and consequently increasing their risk of these violations of life, liberty, and freedom. Externalisation of migration has been referred to as 'policing at a distance',⁹ and a 'remote control',¹⁰ and refers to processes of transferring a nation's border management to third countries.¹¹ A discourse of securitisation regarding migration has resulted in the adoption of these externalising practices within the European Union.¹² The impact of this practice is three-fold. Firstly, the externalisation process has manifested itself in the EU providing funding to, and political agreements with, Libyan authorities to run detention facilities, conduct sea patrols and ultimately ensure migrants do not reach Europe.¹³ Secondly, what is meant by 'border' is transformed by this display of extra-territoriality, and hence allows for the silencing of migrant voices.¹⁴ Lastly, an individual's right to asylum is subsequently undermined. Migrants become legally inadmissible without a state

⁴ Patrick Wintour, "UN Calls For Inquiry Into Libya Detention Centre Bombing", *The Guardian*, 03 July, 2019, <https://www.theguardian.com/world/2019/jul/03/air-strike-kill-libya-tripoli-migrant-detention-centre>.

⁵ BBC News, "'Used as a slave' in a Libyan detention centre", *BBC News*, 2 January, 2018, <https://www.bbc.com/news/world-africa-42492687>.

⁶ Martin Baldwin-Edwards "Between a Rock & a Hard Place: North Africa as a Region of Emigration, Immigration and Transit Migration." *Review of African Political Economy* 108 (2006): 311–324.

⁷ Nina Perkowski and Vicki Squire (2019) "The anti-policy of European anti-smuggling as a site of contestation in the Mediterranean migration 'crisis'", *Journal of Ethnic and Migration Studies* 45 no. 12 (2019): 2167-2184.

⁸ Bill Frelick, Ian Kysel, and Jennifer Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrant," *Journal on Migration and Human Security* 4, no.4 (2016): 190.

⁹ Elspeth Guild and Didier Bigo, "Le visa Schengen: expression d'une stratégie de "police" à distance," *Cultures & Conflicts* 49, no. 1 (2003): 22, 30.

¹⁰ Andreas Fahrmeir, Olivier Faron, and Patrick Weil, *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books, 2005), 86.

¹¹ Clint Betkey, "A Lottery of Asylum: Cooperative Challenges in the European Union During the 2015-2016 Asylum-Seeker Surge" (Master Thesis, The University of California, 2017); Michael Flynn, "There and Back Again: On the Diffusion of Immigration Detention," *Journal on Migration and Human Security* 2, no.3. (2014): 165.

¹² Flynn, "There and Back Again."; Asher Hirsch and Nathan Bell, "The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime," *Human Rights Review* 18, no. 1 (2017): 417-418.

¹³ Frelick, Kysel, and Podkul, "The Impact of Externalization of Migration Controls."

¹⁴ Lorenzo Rinelli, *African migrants and Europe* (Great Britain: Routledge, 2015).

considering their claim for asylum,¹⁵ and non-refoulement principles are violated which result in exposure to human rights abuses in Libya.¹⁶ Thus, migrants who attempt to reach Libya and then cross the Mediterranean into Europe risk being condensed to exceptional human beings who are subject to human rights violations enabled by the EU, all because they fall within the gaps of the global system.¹⁷

EXTERNALISATION IN THE EU

A discourse of securitisation has motivated the implementation of the externalisation of migration within the European Union. Externalisation of migration is the process by which destination countries enhance, promote, outsource, impose, or directly carry out migration and border management activities outside of their borders (i.e., in the territories of transit and origin countries or in international waters) in order to deter unwanted arrivals at their borders.¹⁸ In recent years, migration policy has become an increasingly politicised issue.¹⁹ Irregular migration (migration that takes place external to regulatory norms) challenges a nation's ability to decide whom it allows in, thereby defying national sovereignty.²⁰ This has resulted in anxiety affixed to the fear of losing control over territorial boundaries,²¹ and is related to xenophobia in which it is believed increasing migration will lead to a lessening of cultural integration and escalation of security risks.²² Irregular migration from a European standpoint is therefore perceived as an issue of safeguarding borders.²³ Migrants are considered 'potential hostiles rather than those fleeing hostilities.'²⁴ Highlighting this point, at the launch of the European Union Agency's border

¹⁵ Amnesty International, "Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants" (2017), <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

¹⁶ Ibid; Rinelli, "African migrants and Europe," 12.

¹⁷ Rinelli, "African migrants and Europe." Arendt, "The Origins of Totalitarianism".

¹⁸ Luiza Bialasiewicz, "Off-shoring and out-sourcing the borders of EUrope: Libya and EU border work in the Mediterranean", *Geopolitics* 17, no. 4 (2012): 843–866.

¹⁹ Stephen Castles, "Migration policies are problematic – because they are about migration," *Ethnic and Racial Studies* 40, no. 9 (2017): 1538.

²⁰ Hirsch and Bell, "The Right to Have Rights," 422.

²¹ Didier Bigo, "Security and immigration: toward a critique of the governmentality of unease," *Alternatives* 27, no. 1 (2002): 65.

²² Ibid.

²³ Rinelli, "African migrants and Europe," 12.; Nina Perkowski and Vicki Squire (2019) "The anti-policy of European anti-smuggling as a site of contestation in the Mediterranean migration 'crisis'", *Journal of Ethnic and Migration Studies* 45 no. 12 (2019): 2167-2184.

²⁴ Hirsch and Bell, "The Right to Have Rights," 422; A securitisation discourse instead simplifies complex population movements and ignores root causes for migratory flows see e.g. Rinelli, "African migrants and Europe."; Leonie Ansems de Vries and Elspeth Guild "Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management." *Journal of Ethnic and Migration Studies* 45 no. 12 (2019): 2156–2166

security agency, Frontex, it was stated that border policing was necessary to address security issues such as international terrorism, thereby linking migrants with insecurity.²⁵ This architecture of securitisation has resulted in the predominance of a discourse of fear regarding 'invasions' of migrants.²⁶ The President of the Czech Republic, for example, labelled migrants as orchestrating an 'organised invasion' of Europe.²⁷ Moreover, 'irregular' is often replaced with 'illegal'.²⁸ The semantics of these terms should not be overlooked.²⁹ Although the EU effectively makes irregular migration illegal through the criminalisation of unauthorised entry, transit, and residence of irregular migrants,³⁰ this indiscriminately affects a heterogeneous migrant population. In this context, particular concerns have been raised about the rising interaction between criminal law and migration management across Europe, such that it represents an all-encompassing "illegalisation" of migration with significant implications for the protection of individual human rights.³¹ Irregular migration is legal under multiple human rights covenants and the use of the word 'illegal' instead demonises and politicises migration, and so allows for punitive action as an acceptable response to its perceived illegality.³² This further 'naturalizes and renders reasonable the sealing of borders against applications for asylum'.³³ The effect is then an emphasis on governmentality founded on distrust of the uninvited other.³⁴ For this reason, externalisation is often disingenuously framed as a security necessity, rather than purely a strategy of migration control.

²⁵ Franco Frattini, "Inauguration speech of the Frontex Agency," Speech, Management Board of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States, presented June 30, 2005.

²⁶ Paolo Biondi, "The Case for Italy's Complicity in Libya Push-Backs," *News Deeply*, 24 November, 2017, <https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs>.

²⁷ Shehab Khan, "Refugees coming to Europe an 'organised invasion', says Czech President Milos Zeman," *The Independent*, 27 December, 2015, <https://www.independent.co.uk/news/world/europe/refugees-coming-to-europe-an-organised-invasion-says-czech-president-a6787286.html>.

²⁸ Joseph Nevins, *Operation Gatekeeper and Beyond: The War on "Illegals" and the Remaking of the US-Mexico Boundary* (Routledge, 2010), 15.

²⁹ Jaume Pinos, "The Conflicting Aims of the European Neighborhood Policy and its Secondary Effects," *Journal of Borderlands Studies* 29, no. 2 (2014), 133.

³⁰ European Union Agency for Fundamental Rights, "Fundamental Rights of migrants in an irregular situation in the European Union: Comparative Report", *European Union Agency for Fundamental Rights* (2011): p. 42, <https://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>.

³¹ Catherine Dauvergne, *Making People Illegal: What Globalisation Means for Migration and Law* (Cambridge University Press, 2012).

³² Nevins, "Operation Gatekeeper and Beyond."

³³ Liisa Malkki, "Refugees and Exile: From 'Refugee Studies' to the National Order of Things," *Annual Review of Anthropology* 24, no. 1 (1995), 508.; Martin Baldwin-Edwards and Derek Lutterbeck "Coping With the Libyan Migration Crisis," *Journal of Ethnic and Migration Studies* 45 no. 12 (2019), 2241–2257.

³⁴ Bigo, "Security and immigration."

Although externalisation has become the *prima facie* favoured migratory response of the EU, it would be erroneous to consider the European Union as being homogenous in its migratory decision making. There are currently 27 Member States and so exists variation between state-based attitudes.³⁵ EU Member States can advise on policy through their representatives in the European Parliament and Council.³⁶ Externalisation of migration is an issue that has been contentiously debated, with specific reference to ethics and effectiveness. In 2003, Germany labelled proposed detention centres in Libya as “concentration camps” and refused to support the policy.³⁷ This inability to previously institute an EU-wide externalisation policy has been explained, in part, as the effect of the ‘self-constructed normative image of the EU’ in which it upholds liberal ideals of migration protection.³⁸ This is in addition to links with particular national histories and culture (as seen above with Germany with the Holocaust and persecution of Jewish people).³⁹ However, this normative image has begun to shift as a result of migration patterns, and what follows is a shift in policy decisions.⁴⁰ An increase in the number of crossings on the Mediterranean since 2013 consequently meant an increased chance of boats becoming capsized, resulting in the loss of thousands of migrant lives each year.⁴¹ The Mediterranean Sea was dubbed a “mass grave” due to the number of migrant drownings.⁴² With the deaths of so many individuals – many of them asylum seekers – the situation resulted in a humanitarian crisis that European governments were obliged to address in compliance with various international laws.⁴³ Many EU Member States chose to respond by prioritising a reduction in the arrival of

³⁵ The Royal Society, *UK research and the European Union: The role of EU regulation and policy in governing UK research* (2016), <https://royalsociety.org/~media/policy/projects/eu-uk-funding/phase-3/EU-regulation-and-policy-in-governing-UK-research.pdf>.

³⁶ “Official Website of the European Union,” The European Union, accessed 14 December 2020, https://europa.eu/european-union/index_en.

³⁷ Flynn, “There and Back Again,” 189.

³⁸ Carl Levy, “Refugees, Europe, Camps/State of Exception: ‘Into the Zone,’ the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice),” *Refugee Survey Quarterly* 29, no. 1 (2010): 96.

³⁹ Rinelli, “African migrants and Europe.”

⁴⁰ Ibid.

⁴¹ International Organization for Migration, “Missing Migrants database, Mediterranean region”, *Missing Migrants* (Interactive Web Page), accessed 20 September 2019, <http://www.missingmigrants.iom.int/region/Mediterranean>.

⁴² Vice News, “Italy's Mediterranean Mass Grave: Europe Or Die,” <https://www.youtube.com/watch?v=opbSFGIAefQ>.

⁴³ Ibid; Amnesty International, “Libya’s Dark Web of Collusion.”; As an initial response, Italy launched “Operation Mare Nostrum” in 2013 with the aim of ensuring the rescue of migrants in danger at sea. However, it was argued that it acted as a “pull factor” for migrants by encouraging them to journey to Europe, and so was consequently terminated in 2015 see Rinelli, “African migrants and Europe.”

migrants as a way to bypass these normative constraints.⁴⁴ This included constructing border fences between Spain and Morocco, cooperation between governments as between Greece and Turkey, and strict visa requirements.⁴⁵

However, some went against the grain. Germany instead claimed to accept 800,000 refugees in 2015 and criticised the militarised-response of other European nations.⁴⁶ Despite initial intentions, the influx of refugees into Germany had contributed to a political crisis, with claims that the country was shouldering an undue proportion of refugees, thereby placing undue strain on its resources.⁴⁷ Consequently, Germany began to wind back its acceptance of migrants, and head towards a more hard-line approach that included creating 'transit centres' along the Austrian border.⁴⁸ It is evident then, that many European nations are responding to migration with externalisation tactics.⁴⁹ Undoubtedly, there is still an intensely complex democratic situation on two levels – both between and within Member States.⁵⁰ However, as can be seen, there has been an increasing shift by Member States towards externalising migration controls.

Specifically, the EU has developed externalisation policies with specific reference to Libya. There were estimated to be more than 680,000 migrants in Libya between September to October 2022.⁵¹ Although experiencing a lull during the peak of the COVID-19 pandemic, the number of migrants in Libya is currently higher than the number of migrants for the corresponding period in 2019.⁵² These individuals do not represent a particular migration crisis but the amalgamation of many.⁵³ Half of all migrants are from sub-Saharan Africa, fleeing persecution from terrorist groups in countries like Nigeria and Somalia, or simply wishing to seek a better life in Europe.⁵⁴ Libya is perceived to provide the easiest place for migrants to cross over the ocean and onto the shores of Italy.⁵⁵ The European Union – with a particular focus on

⁴⁴ Maribel Casas-Cortes, Sebastian Cobarrubias, and John Pickles, "Riding Routes and Itinerant Borders: Autonomy of Migration and Border Externalization," *Antipode* 47, no. 4 (2015): 894.

⁴⁵ Amnesty International, "Libya's Dark Web of Collusion."

⁴⁶ Heather Horn, "The Staggering Scale of Germany's Refugee Project," *The Atlantic*, 12 September, 2015, <https://www.theatlantic.com/international/archive/2015/09/germany-merkel-refugee-asylum/405058/>.

⁴⁷ Max Fisher and Katrin Bennhold, "Germany's Europe-Shaking Political Crisis Over Migrants, Explained," *The New York Times*, 03 July, 2018, <https://www.nytimes.com/2018/07/03/world/europe/germany-political-crisis.html>.

⁴⁸ Ibid.

⁴⁹ Hirsch and Bell, "The Right to Have Rights," 423.

⁵⁰ Betkey, "A Lottery of Asylum."

⁵¹ "IOM Libya Update October", *IOM UN Migration* (2019), accessed 01 December 2020, <https://libya.iom.int/sites/default/files/news/October%202020%20Monthly%20Update.pdf>.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Amnesty International, "Libya's Dark Web of Collusion."

⁵⁵ Frelick, Kysel, and Podkul "The Impact of Externalization of Migration Controls."

Italy – have employed a number of externalisation measures intended to close the migratory path into Libya and across the Mediterranean.⁵⁶ This can be generalised into three broad approaches: Italian joint patrols with, and enabling of, the Libyan Coast Guard on the Mediterranean to intercept people at sea; the EU providing technical and financial support to assist in the operation of Libyan detention centres where migrants are held; and political agreements between the EU and authorities within Libya (including the UN-backed Government, as well as armed militia groups) to persuade them to terminate people smuggling and increase border controls.⁵⁷ Migrants are now being intercepted at sea, both in Libyan and international waters, and returned to Libya, where they are transferred to detention centres.⁵⁸ In October 2022 alone, a total of 19,308 migrants who attempted the Central Mediterranean sea crossing were returned to Libyan shores.⁵⁹ Over 1,000 individuals have been reported as ‘rescued or intercepted’ by the Libyan authorities in the first two weeks of 2023 alone.⁶⁰ These policies are part of the greater externalisation of migration within Europe that has resulted in the creation of what some scholars have dubbed ‘Fortress Europe’,⁶¹ in which all attempts are made to keep migrants out.

BORDER TRANSFORMATION AND SILENCING VOICES

As a result of this externalisation, what is meant by ‘border’ is transformed and has allowed for extra-territoriality. Extra-territoriality refers to the ability of a state to exercise authority beyond the limits of its territory.⁶² Sovereignty is no longer defined by the Westphalian state model in which there is control over a distinct territory, but as is evident with the EU and Libya, is increasingly linked with movements of people transpiring outside of territorial confines.⁶³ Barriers for migration are instead set beyond Europe. The externalisation of migration processes in Libya, therefore, are extra-territorial behaviours of the EU focused on controlling mobility.⁶⁴ This includes the creation of EU-backed detention centres and conditional political

⁵⁶ Betkey, “A Lottery of Asylum”

⁵⁷ Amnesty International, “Libya’s Dark Web of Collusion.”

⁵⁸ Amnesty International, “Libya’s Dark Web of Collusion”; IOM, “Libya’s Migrant Report: Round 44.”

⁵⁹ IOM, “Libya’s Migrant Report: Round 44.”

⁶⁰ UNHCR, “UNHCR Update Libya 17 January 2023” (2023), accessed 23 January 2023, <https://reporting.unhcr.org/document/4002>.

⁶¹ Flynn, “There and Back Again.”

⁶² Anneliese Baldaccini, “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea” in *Extraterritorial Immigration Control Legal Challenges*, eds. Valsamis Mitsilegas and Bernanrd Ryan (Martinus Nijhoff Publishers, 2010), 229.

⁶³ Maribel Casas-Cortes, Sebastian Cobarrubias, and John Pickles “‘Good neighbours make good fences’: Seahorse operations, border externalization and extra-territoriality,” *European Urban and Regional Studies* 23, no. 3 (2014): 231.

⁶⁴ Rinelli, “African migrants and Europe.”

agreements with Libyan authorities.⁶⁵ This blurs the boundaries of a set territory, and the former static and quantifiable borders of Europe become itinerant and theoretical.⁶⁶ This European bordering generates places to amend the geopolitical meaning of EU territory,⁶⁷ 'for the border is not a thing but a materialization of authority'.⁶⁸ Ultimately, it is evident that what is meant by the EU border is transformed by externalisation, to instead represent an extra-territoriality of authority in order to control the migration of people.

This transformation of the territorial border has stopped migrant paths and allowed for human rights violations to occur – including forced labour, torture and other ill-treatment, extortion, and sexual assault – without widespread publicised attention from the international community.⁶⁹ Rinelli claims that the aim of externalising migration by the EU, particularly through detention centres in Libya, is to treat migrants as if they were out of sight and out of mind, as 'if they were invisible, or visible yet non-existent, like ghosts'.⁷⁰ By arbitrarily and indefinitely detaining migrants in a geographically isolated location, the externalisation of European migration control diminishes their ability to be political subjects, and thus makes them discursively absent.⁷¹ By design, their existence will be concealed and inaudible which facilitates the internationally imperceptible human rights abuses that occur.⁷² Scathingly, this is what journalist Rahawa Haile describes as Western countries' attempt to force asylum seekers and migrants to 'find a quieter place to die'.⁷³ It has been known by the EU for a decade that human rights abuses have been occurring to migrants in Libya, such as torture and extortion, however, because of the inability of migrants to speak out, it is only in recent years with the advancement

⁶⁵ Ibid.

⁶⁶ Ibid 40; Maribel Casas-Cortes, Sebastian Cobarrubias and John Pickles, "Re-bordering the neighbourhood: Europe's emerging geographies of non-accession integration", *European Urban and Regional Studies* 23, no. 1 (2012): 37; Instead, boundaries other than territorial have become increasingly pertinent. This includes creating distinction between individuals on a non-territorial basis through class and race. By presenting a set difference between "us" and "them" the state can establish its identity, See Audrey Macklin, "Who Is the Citizen's Other? Considering the Heft of Citizenship" *Theoretical Inquiries in Law* 8, no. 2 (2007): 333; Ivan Ruxandra "Borders, migration, and the changing nature of sovereignty," *Studia Europaea* 57, no. 4 (2012): 75.

⁶⁷ Jennifer Hyndman, "The Geopolitics of Migration and Mobility," *Geopolitics* 17, no. 2 (2012): 246.

⁶⁸ Iain Chambers, *Mediterranean Crossings: The Politics of an Interrupted Modernity* (Duke University Press, 2008), 6.

⁶⁹ Rinelli, "African migrants and Europe.,"; Human Rights Watch *Libya Events of 2020* (2021) <https://www.hrw.org/world-report/2021/country-chapters/libya>; Ian Urbina, "The Secretive Prisons That Keep Migrants Out of Europe," *The New Yorker*, 28 November, 2021, <https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe>.

⁷⁰ Rinelli, "African migrants and Europe," 79.

⁷¹ Rinelli, "African migrants and Europe."

⁷² Ibid.

⁷³ Rahawa Haile, "Libya's Slave Trade Didn't Appear Out of Thin Air", *Social Justice Foundation*, 06 December, 2018, <https://psmag.com/social-justice/understanding-libyas-slave-trade>.

of technology that the international community has become aware of the extent of these abuses.⁷⁴ European politics of migration control in Libya reveal how externalisation can remove the ability of migrants to be political subjects and thus allow for human rights abuses without attention from the international community.

HUMAN RIGHTS VIOLATIONS

Migrants existing in Libya are subject to human rights violations, including forced labour, torture, and sexual exploitation, through a lack of legal protections. Arendt exclaims that ‘The world found nothing sacred in the abstract nakedness of being human’.⁷⁵ The contradiction is that without the membership to a state, human beings lack the protection of human rights.⁷⁶ This concept of ‘the right to have rights’ denotes that rights can only be secured by states, and so in theory, to be stateless also implies being rightless.⁷⁷ What exists is a state of exception.⁷⁸ In essence, for individuals to have their humanity acknowledged necessitates political membership and belonging.⁷⁹ On one pole exists a distinct collection of citizens and on the other lies the discarded and ‘wretched of the Earth’⁸⁰ Those migrants existing in Libya who lack this political membership, arguably then, do not have rights. This is what the 1951 Refugee Convention seeks to offer protection from.⁸¹ States which have signed the Refugee Convention owe refugees under their jurisdiction particular rights which are guaranteed under international law.⁸² The problem arises when Libya has not signed the Refugee Convention,⁸³ and thus are not bound to protect refugees in their jurisdiction. Refugees are often deprived of citizenship rights and with feeble implementation of international law, they are frequently incapable of acquiring their human

⁷⁴ Amnesty International, “Libya’s Dark Web of Collusion.”

⁷⁵ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1973), 299.

⁷⁶ Ibid.

⁷⁷ Ibid; Rhoda Howard-Hassmann, ‘Introduction: The Human Right to Citizenship’, in *The Human Right to Citizenship: A Slippery Concept*, eds. Rhoda Howard-Hassmann and Margaret Roberts, (University of Pennsylvania Press, 2015), 1.

⁷⁸ Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005).

⁷⁹ Hirsch and Bell, “The Right to Have Rights,” 420.

⁸⁰ Rinelli, “African migrants and Europe.”; “Wretched of the Earth” is a 1961 book by Franz Fanon in which he analyses the dehumanizing effects of colonisation upon the individual and nation.

⁸¹ *Convention Relating to the Status of Refugees*, open for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

⁸² Ibid.

⁸³ Although Libya did sign the “Convention on Refugee Problems in Africa” by the Organisation of African Unity, which implicitly recognises the 1951 Convention; Kim Rygiel, “Governing mobility and rights to movement post 9/11: managing irregular and refugee migration through detention,” *Review of Constitutional Studies* 16, no. 2 (2012): 211.

rights including right to life, liberty and security of a person.⁸⁴ Further, not all migrants existing in Libya are refugees, and even fewer rights are afforded to these individuals.⁸⁵ Thus, the externalisation of migration policies with Libya has exploited an 'implementation gap' in international law in which no nation is explicitly responsible for the protection of migrants.⁸⁶ What exists then, are those who live 'smack in the fissure' without the dignity of protection for sake of being human.⁸⁷

Without the 'right to have rights', the externalisation of migration within the context of the EU and Libya leads to undermining an individual's right to asylum. The EU's border externalisation prevents migrants from even falling under the jurisdiction of destination countries within Europe in an attempt to limit formal legal obligations, including the right to seek asylum.⁸⁸ This renders migrants legally inadmissible. Further, Libyan law criminalises irregular migration with penalties such as deportation or detention.⁸⁹ With an extremely weak rule of law in Libya, in addition to the absence of a legal framework for asylum, migrants who remain in Libya are therefore denied rights relating to asylum, in addition to other humanitarian protections.⁹⁰

By the same token, the externalisation of migration by the EU also enables human rights abuses on a physical and mental scale. The criminalisation of irregular migration in Libya has resulted in mass and indefinite detention of migrants.⁹¹ The Independent Fact Finding Mission (FFM) on Libya appointed by the Human Rights Council, in its reports submitted in November 2021 and March 2022, uncovered a pattern of human rights violations committed against migrants in Libya.⁹² The FFM found that the Libyan Coast Guard intercepts migrants at sea, followed by arbitrary arrest and detention by the Department for Combating Illegal Migration. This is accompanied by a range of human rights abuses as part of systemic and widespread attacks against the migrant population. In 2019 it was estimated that up to 20,000 were being

⁸⁴ Arendt, "The Origins of Totalitarianism," 276.

⁸⁵ Amnesty International, "Libya's Dark Web of Collusion."

⁸⁶ Volker Türk and Rebecca Dowd, "Protection Gaps" in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, (Oxford University Press, 2014), 282; Heaven Crawley and Brad Blitz "Common Agenda or Europe's Agenda? International Protection, Human Rights and Migration From the Horn of Africa." *Journal of Ethnic and Migration Studies* (2019) 45 no.12: 2258–2274. doi: <https://doi.org/10.1080/1369183X.2018.1468393>.

⁸⁷ Arendt, "The Origins of Totalitarianism."

⁸⁸ Flynn, "There and Back Again."

⁸⁹ Amnesty International, "Libya's Dark Web of Collusion."

⁹⁰ Rinelli, "African migrants and Europe."

⁹¹ Rinelli, "African migrants and Europe."

⁹² Report of the Independent Fact-Finding Mission on Libya, 1 October 2021, A/HRC/48/83, para. 61; Report of the Independent Fact-Finding Mission on Libya, 23 March 2022, A/HRC/49/4, para. 46.

held in detention centres in Libya.⁹³ Various organisations that have been granted access to the EU-backed facilities have recorded the inhumane conditions in which men, women, and children are kept. They note that migrants are subject to torture, cruel and degrading treatment – including sexual violence – from those who are in charge.⁹⁴ Further, in addressing the accusations of modern slavery that have dominated popular media since 2017, it is evident that bonded labour is occurring.⁹⁵ Modern slavery covers a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery-like practices, and human trafficking. Although not defined in law, it is used as an umbrella term that focuses attention on commonalities across these legal concepts. Essentially, it refers to ‘situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power.’⁹⁶ The lack of ability to apply for asylum and the continuous influx of migrants into Libya mean that these detention centres become overcrowded.⁹⁷ In October 2021, the Al Mabani detention centre in Libya, the largest in the country, was holding more than 5,000 people, four times over its official capacity.⁹⁸ This includes 100 children and 300 women. In an effort to reduce numbers, the local “*dallala*” (meaning intermediaries) would allegedly purchase migrants for approximately 30 Libyan dinars each, and would require them to work under bonded labour until they could reimburse the price they were purchased for.⁹⁹ Forced labour in difficult conditions such as in construction or agriculture is also evident: “*I was sold to an Arab man who forced me to work and told me to call my family so they would send money. He sold me to another Arab man who forced me to work for him too*”.¹⁰⁰ Given these points, it is clear that migrants in Libya are being subject to forms of modern slavery such as forced labour. These detention centres are facilitated by the financial aid given to Libya from the EU, through their

⁹³ International Organization for Migration, “Missing Migrants database, Mediterranean region.”

⁹⁴ Amnesty International, “Libya’s Dark Web of Collusion.”; Amnesty International, *Scapegoats of fear: Rights of refugees, asylum-seekers and migrants abused in Libya*, (2013), <https://www.amnestyusa.org/wp-content/uploads/2017/04/mde190072013en.pdf>; Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Libya* (2017), http://www.ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/42; Heaven Crawley et al. *Unravelling Europe’s ‘Migration Crisis’: Journeys Over Land and Sea* 2018 (Policy Press); Report of the Independent Fact-Finding Mission on Libya, “A/HRC/49/4.”

⁹⁵ Amnesty International, “Libya’s Dark Web of Collusion.”

⁹⁶ International Labour Organisation and Walk Free “Global Estimates of Modern Slavery” 2021 https://www.ilo.org/global/topics/forced-labour/publications/WCMS_854733/lang--en/index.htm.

⁹⁷ Amnesty International, “Libya’s Dark Web of Collusion.”

⁹⁸ UNICEF, “The safety and wellbeing of children at high risk in detention centres in Libya,” (2021), <https://www.unicef.org/press-releases/safety-and-wellbeing-children-high-risk-detention-centres-libya>.

⁹⁹ Ibid; Many Christian migrants noted this was the same price that Judas asked for to betray Jesus, Rinelli, “African migrants and Europe.”

¹⁰⁰ Izza Leghtas, “‘Hell on Earth’: Abuses Against Refugees and Migrants Trying to Reach Europe from Libya,” *Refugees International* (2017), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/592f37468419c2ac554b4c9f/1496266580341/2017.6.1+Libya.pdf>.

migration externalisation processes.¹⁰¹ The EU has established an Emergency Trust Fund for Africa, committing more than €455 million in projects in Libya since 2015, with 13% of funding going towards border management,¹⁰² including the Libyan Coast Guard and Department for Combating Illegal Immigration. Thus, it is clear the externalisation of migration by the EU has the effect of enabling human rights abuses of migrants in Libya.

In addition, the EU arguably violate non-refoulement principles by enabling migrants on the Mediterranean and within international waters to be returned to Libya where they will undoubtedly experience forms of exploitation.¹⁰³ Non-refoulement is the practice of not forcibly returning or otherwise transferring any person to a country where they would be subject to persecution. This principle is absolute and entrenched in both international treaty law and customary international law.¹⁰⁴ As part of the EU externalisation of migration, Italy is arguably engaged in refoulement by actively undertaking procedures whose end result is to return migrants on the Mediterranean to Libya, in which they will face persecution.¹⁰⁵ The EU cannot claim to be ignorant of these human rights violations. Several resolutions of the European Parliament have highlighted the critical situation in Libya in recent years.¹⁰⁶ Further, not only is the EU arguably violating non-refoulement principles by returning migrants to Libya, but a secondary refoulement also takes place in which Libya has engaged in mass deportations of migrants.¹⁰⁷ Between 2012 and 2014, it is estimated that 40,000 migrants (including asylum seekers) were deported to countries of origin, and this practice continues.¹⁰⁸ In October 2022, the Office of the United Nations High Commissioner for Human Rights released a report tabling that migrants who are forced to return to their countries of origin under the guise of "assisted returns" in Libya, often face severe human rights violations and abuses, which fall short of international

¹⁰¹ Rinelli, "African migrants and Europe."

¹⁰² European Union, "EU Emergency Trust Fund for Africa North of Africa window June 2021 Update," (2021), https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_libya_en.pdf.

¹⁰³ Biondi, "The Case for Italy's Complicity in Libya Push-Backs."

¹⁰⁴ For example: Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 33(1) of the Convention Relating to the Status of Refugees.

¹⁰⁵ *Hirsi Jamaa and Others v Italy* (2012) Application No. 27765/09 Eur Court HR; The question of whether the EU is more broadly responsible for acts committed by Libya remains ambiguous.

¹⁰⁶ Amnesty International, "Libya's Dark Web of Collusion," 56; European Parliament, Resolution on the situation of migrants in Libya (2012/2879(RSP)), 22 November, 2012, http://www.europarl.europa.eu/cmsdata/40865/att_20121128ATT56804-7744803661669500636.pdf.

¹⁰⁷ Altai Consulting, "UNHCR and Impact, Mixed migration trends in Libya: Changing dynamics and protection challenges," (2017), <http://www.altaiconsulting.com/wp-content/uploads/2017/07/LIB-HCR-MAS-Final-Report.pdf>.

¹⁰⁸ *Ibid.*

human rights laws and standards.¹⁰⁹ The EU's externalisation policies ensure that migrants remain in Libya, and thus are vulnerable to refoulement by Libyan authorities.

CONCLUSIONS

The European Union maintains an externalisation of migration policies with specific reference to Libya. This framework has partly arisen as a result of securitisation,¹¹⁰ and a consensus between EU Member States.¹¹¹ What has resulted is the transformation of the European border through extra-territoriality, and hence silences migrant voices.¹¹² This has compounded in the undermining of an individual's right to asylum and the weakening of refugee protections. Externalisation of migration within the context of the EU and Libya leads to migrants becoming legally inadmissible without a state considering their claim for asylum,¹¹³ and violates non-refoulement principles which results in exposure to human rights violations in Libya,¹¹⁴ namely modern slavery.¹¹⁵ The EU therefore, not only tolerates human rights abuses occurring in Libya as a result of their externalisation of migration policies, but proactively enables these abuses to occur.¹¹⁶ Thus, migrants who attempt to reach Libya and then cross the Mediterranean into Europe risk being condensed to exceptional human beings who are subject to human rights violations enabled by the EU, all because they fall within the gaps of the global system.¹¹⁷

¹⁰⁹ Office of the United Nations High Commissioner for Human Rights, "Nowhere but back: Assisted return, reintegration and the human rights protection of migrants in Libya," 22 October, 2022, <https://www.ohchr.org/sites/default/files/2022-12/Report-on-assisted-return-and-reintegration.pdf>.

¹¹⁰ Hirsch and Bell, "The Right to Have Rights."

¹¹¹ Betkey, "A Lottery of Asylum."

¹¹² Rinelli, "African migrants and Europe."

¹¹³ Amnesty International, "Libya's Dark Web of Collusion."

¹¹⁴ Rinelli, "African migrants and Europe."

¹¹⁵ Amnesty International, "Libya's Dark Web of Collusion."

¹¹⁶ Ibid.

¹¹⁷ Rinelli, "African migrants and Europe." Arendt, "The Origins of Totalitarianism".