

BOFAXE

Follow the Money and See Where It Goes

UNMASKING THE EU'S LIBYA PROGRAMME – PART I

On 20 May 2020, Philipp Dann, Michael Riegner and Lena Zagst presented on [völkerrechtblog](#) the complaint before the European Court of Auditors (CoA), which a group of NGOs led by the [Global Legal Action Network \(GLAN\)](#) submitted about a month ago. The authors had provided an expert opinion to [the complaint](#), claiming that the EU's "Libya Programme" violated EU budget and constitutional law. The authors argue that the EU's financial support to the Libyan authorities is wrongful, as it is not sufficiently linked to the objective of 'development' and thus lacks a basis in EU budget law, and because the EU failed to fulfil its human rights due diligence (HRDD) obligations. We want to add to the post by assessing the complaint in its broader context: Firstly, by focussing on the HRDD obligations under EU Law, followed by looking "beyond" EU Law to assess the EU's responsibility under general international law. Lastly, we assess the (dis-)advantages of this rather alternative means of litigation.

It is not the first time that the dire human rights situation in Libya was brought to the attention of an international judicial body (cf. the [situation referred to the ICC by the United Nations Security Council](#)). The same is true for the European practice of deterrence, preventing migrants and refugees to enter the EU as early on their journey as possible (examples are the by now seminal case of [Hirsi Jamaa and Others v. Italy](#), and the pending [S.S. and Others v. Italy](#), both before the European Court of Human Rights (ECtHR)). However, this is the first complaint that seeks to reprehend the European border security management by asserting the unlawfulness of the financial support provided by the European Commission through the backdoor of EU budget law via the CoA.

The CoA is the EU's professional external investigatory audit agency (cf. Art. 285 f. TFEU) and it supervises how the EU organs spend the funds allocated to them by the member states. Although it cannot annul financial decisions, an audit into the Libya Programme would lead to notable political pressure on the EU Commission. To understand the complaint, let us briefly recall the outline of the Libya Programme, which was developed under the 'European Union Emergency Trust Fund for Stability and Addressing Root causes of Irregular Migration and Displaced Persons in Africa' (EUTFA). The EUTFA was created in 2015 as a consequence of the rising numbers of migrants seeking refuge in the EU and is mainly funded by the European Development Fund. The Libya Programme (cf. action fiche [phase one](#) and [two](#)) utilizes those funds to support the Libyan border control agencies in their effort to deter refugees and migrants on the Mediterranean Sea and return them to Libya.

In focusing on the EU's failure to comply with its obligation to exercise HRDD in its external actions, the complaint adds to a topical discussion around the scope and content of HRDD. The concept of due diligence is well established in environmental law and on the rise in international law generally (and it's academic assessment, in the words of Anne Peters, "[couldn't be more timely](#)"). In the context of human rights, due diligence refers to the standard of care that a state must meet to avoid human rights violations, especially those committed by other actors, such as businesses or third states.

HRDD is generally defined as a procedural obligation consisting of a human rights impact assessment, as well as adequate measures to mitigate and remedy the risks. The duty bearer has to gather information about the actual or potential impacts their activities have. The assessment must consist of actively investigating the situation at hand, not only addressing already existing knowledge; and should involve all stakeholders. The impact assessment is followed by mitigation measures aiming at the prevention of potential future violations; and remediating occurring violations. In this sense, HRDD is an ongoing, continuous process. The scope of the impact assessment and the concrete nature and intensity of necessary mitigation and remedial measures will vary and have to be determined on a case by case basis.

As [laid out](#) by Dann, Riegner and Zagst, the EU has to comply with these HRDD obligations in its external actions as well, including any cooperation revolving around border control and refugee/migration management. This obligation arises from EU constitutional law: Different from the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (EUCFR) does not contain a restrictive jurisdiction clause. Its Art. 51 (1) states that the provisions of the Charter applies when EU institutions implement Union law, which is the case in the Libya programme. A systematic reading of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) support the applicability of human rights in the EU's external actions (cf. Art. 3 (5), Art. 21 (1) (3) TEU; Art. 208, 214 TFEU). Both treaties emphasize that external actions should be guided by and adhere to the protection of human rights and international law. Lastly, secondary EU Law relating to development policies and external actions mirror this human rights obligations, for this case most notable the regulation governing the EDF (cf. Art. 2 (5) (b) Regulation 2015/322). credible allegations of human rights violations arise.