

BOFAXE

Follow the Money and See Where It Goes

UNMASKING THE EU'S LIBYA PROGRAMME – PART II

What adequate HRDD in external actions looks like depends widely on the control the EU has in the relevant programme, as well as the degree of knowledge, foreseeability, likelihood and severity of human rights risks. One factor to consider is that HRDD is most prominently discussed as a standard of conduct for non-state actors or for states in relation to non-state actors, such as corporations and private actors who cannot be held directly accountable under international law. Libya as a state, however, is responsible for human rights violations attributable to it. Its status as an accountable subject of international law must have implications on the EU's human rights obligations, at least to some extent. However, it is our argument that, while the EU can generally trust that other states do not violate their human rights obligations, it cannot rely on this presumption when credible allegations of human rights violations arise.

In the case of Libya, there is no way the EU was not aware of the severe human rights abuses refugees and migrants face(d) in Libya, latest when the second phase of the Libya program was approved. Further, the alleged and documented violations were egregious, including violations of the *ius cogens* prohibition of torture, and the likelihood of the violations to continue was very high. Therefore, the EU did not only have an obligation to exercise a minimum level of due diligence, but not to cooperate with Libyan authorities, especially not to finance their inhumane "migration management". HRDD, although generally a procedural obligation, can in our opinion condense and give effect to an obligation not to engage, if there is no way of effectively mitigating the risk of contributing to human rights violations. Similar provisions can be found in the UN's HRDD policies when engaging with non-UN security forces, if high and grave human rights risks cannot be mitigated (see [here](#)). Altogether, the only adequate result after exercising HRDD in the case of the Libya program would have been not to support the inhumane migration policies of Libyan actors at all.

Having established that the EU *should* not have supported the Libyan actors, what do we make of the fact that it did nevertheless? We approach this question of the EU's responsibility from an international legal perspective adding to the previous post's focus on EU law.

First, as mentioned, Libyan actors have been deemed responsible for serious violations of international human rights law: The ECtHR, e.g., considered the regime to be in violation of the prohibition of torture, part of customary international law, as well as enshrined in Art. 7 ICCPR and the Convention against Torture, both of which Libya is a party to (cf. case of [Hirsi Jamaa et. al. v. Italy](#), paras 125 et seq.).

While the EU itself is not a party to the relevant human rights treaties, it is still bound by the customary status of these rules (cf. [ECJ, Case C-366/10](#), at para. 101). By financing the Libyan coastguard, the EU assists Libya continuing its internationally wrongful practices. Analogously to the responsibility of accomplice states (cf. Art. 16 of the Articles on State Responsibility), international organization are responsible for aiding or assisting a state in the commission of an internationally wrongful act (cf. Art. 14 of the [Articles on the responsibility of international organizations](#)).

As to international criminal law, the ICC is investigating into the situation in Libya to determine individual criminal liability for crimes against humanity (from 15 February 2011 onwards). According to the ICC Prosecutor [herself](#), her office is also investigating "serious and widespread crimes against migrants" transiting through Libya. As argued [here](#), the investigation could also cover the investigation of the involvement of European Agents in colluding with Libyan actors and assisting in the establishment and maintenance of a system that has produced such crimes.

Altogether, the EU practice seems to be wrongful from more than one perspective. Why is it then that the complaint is brought before the CoA, which will focus (only) on the budgetary implications and will not hand down a binding judgment (cf. Art. 285 f. TFEU)?

Firstly, despite the complaint's weak legal power (CoA findings are not binding), its strength lies in the exploration of an innovative and creative approach of holding the EU accountable for "[financial complicity](#)", which, notably, is backed up by the expert opinion and is based on convincing factual research and legal reasoning. It adds to the already existing approaches and discussion, which will put further pressure on the EU. In this regard, the complaint must not be seen as an alternative to the existing litigation efforts, but as a supplement. Further, the complaint has the chance to hold the EU accountable as a whole (as it is not merely directed against member states) by tackling the EU's involvement at its root, namely the funding.

Regardless of the outcome of the complaint, the EU has yet to develop a way to address migration that complies with its human rights obligations. The approaches of rejecting migrants at its frontiers or supporting the "bouncers" have proven ineffective, inhumane and therefore wrongful. In its self-perception, the EU is a pioneer of peace, reflected in Art. 2 of its founding treaty: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (...)". Through outsourcing the illegal containment and deterrence of refugees and migrants, the EU cannot evade responsibility for violating its own human rights obligations and values. Conversely, it must exercise adequate HRDD in its external actions. As we have argued for the case of the Libya program, this might amount to an obligation not to engage.

It is now up to the guardian of the EU's finances to investigate the legal and budgetary implications of the EU's involvement in serious human rights abuses and to decide whether the EU lived up to its obligations – the decision may be well considered, but declaring the EU practice as legitimate seems hardly justifiable from a legal point of view.

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