

**Global Legal Action Network (GLAN), Association for Juridical Studies on
Immigration (ASGI) and Italian Recreational and Cultural Association (ARCI)**

**Complaint to the European Court of Auditors Concerning the Mismanagement of EU
Funds by the EU Trust Fund for Africa’s ‘Support to Integrated Border and Migration
Management in Libya’ Programme**

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ANNEX Expert Opinion by Prof. Dr. Dann, Dr. Riegner, and Ms. Zagst

Introduction

1. This complaint brings to the attention of the Court of Auditors breaches of EU financial regulations and constitutional law. These are being committed through the European Union Emergency Trust Fund for Stability and Addressing Root causes of Irregular Migration and Displaced Persons in Africa (hereinafter: EUTF), specifically the “Support to integrated border and migration management in Libya” programme (IBM) under the EUTF’s North of Africa window.¹ The stated objectives of the IBM programme are “to improve the Libyan capacity to control their borders and provide for lifesaving rescue at sea, in a manner fully compliant with international human rights obligations and standards.”² The EUTF provided a first tranche of IBM programme funding in the sum of 46,300,000 EUR in July 2017, and a second tranche in the sum of 45,000,000 EUR in December 2018, which is planned until 13 December 2021.³ The funds are made available to the programme’s implementing partners: the Italian Ministry of Interior, joined in the programme’s second phase by the Vienna-based international organisation, the International Center for Migration Policy Development (ICMPD).⁴
2. The complaint demonstrates that breaches of EU financial regulations, constitutional law, and the Charter of Fundamental Rights result from the implementation of the EUTF’s IBM programme. It shows that the funding under the IBM programme renders the EU and its Member States complicit in violations resulting from Italy’s cooperation with Libyan actors. To comply with its obligations under EU laws on financial regulation and external action, the EU must condition its funding of Italian-Libyan cooperation on ensuring Libyan actors respect human rights and international law. Specifically, EU institutions and Member State governments must condition any funding and cooperation with the Libyan authorities on concrete and verifiable steps towards:
 - a. The prompt release of all refugees and migrants being arbitrarily detained in Libya, and the end of the system of automatic, indefinite detention.
 - b. Guaranteeing the UNHCR’s full access to people of concern across the country and its possibility to carry out its full mandate, irrespective of the nationality of beneficiaries.

¹ Action fiche of the EU Trust Fund to be used for the decisions of the Operational Committee, “Support to integrated border and migration management in Libya” under Action Fiches T05-EUTF-NOA-LY-04 for phase one; and T05-EUTF-NOA-LY-07 for phase two [hereinafter: IBM programme action fiche, phase one or phase two] https://ec.europa.eu/trustfundforafrica/sites/eutf/files/t05-eutf-noa-ly-04_fin.pdf and <https://ec.europa.eu/trustfundforafrica/sites/eutf/files/t05-eutf-noa-ly-07.pdf>.

² IBM programme phase one action fiche p 2.

³ The budget period is 26 December 2022. <https://eutf.akvoapp.org/en/project/7601/>.

⁴ An international organization with 17 Member States active in 90 countries worldwide that “takes a regional approach in its work to create efficient cooperation and partnerships along migration routes”; ICMPD, About Us, <https://www.icmpd.org/about-us/>.

- c. The signing and ratification of the 1951 Refugee Convention and its 1967 Protocol and adoption and enactment of new legislation, policies and procedures on migration and asylum, providing for the decriminalization of irregular entry, stay and exit; an end to automatic detention; and the creation of an asylum system that complies with international standards.
- d. The establishment of independent, impartial, and transparent monitoring of human rights violations against refugees and migrants in Libya, with the aim to ensure accountability for state and non-state actors.⁵

In the current circumstances, and until such revisions are in effect, the programme should be suspended.

3. The complaint relies, for some of its claims, on an expert opinion specific to the IBM programme's compliance with these requirements, provided by EU and international law experts Prof. Dr. Phillip Dann and Dr. Michael Riegner of Humboldt University and Ms. Lena Zagst, doctoral researcher at the University of Hamburg, which is appended. (The expert opinion refers to the IBM programme as the 'Libya action'.)
4. The complaint shows two ways in which the EUTFA's IBM programme breaches EU law. First, the IBM programme is incompatible with the legally permissible objectives of the European Development Fund, the EUFTA's main funding source. These objectives include the reduction and eradication of poverty as set out in Art 1(2) of the European Development Fund's (EDF) Regulation 2015/322, as well as the objectives set out in the Development Cooperation Instrument and the European Neighbourhood Instrument. These breaches are summarised below and discussed in detail in Section B of the appended expert opinion.
5. Second, the complaint shows that the legal framework applicable to the implementation of the EUFTA IBM programme is fundamentally deficient. It fails a) to uphold sound financial management principles and ensure parliamentary control as required under Financial Regulation 2018/1046, and b) to provide adequate safeguards for the protection of human rights of refugees and migrants affected by the IBM programme, as required by the EU Charter of Fundamental Rights and by other EU external action obligations.⁶

⁵ Amnesty International and Human Rights Watch, Plan of Action: Twenty Steps for a Fair and Predictable Rescue System in the Mediterranean Sea, 6 March 2019

<https://www.amnesty.org/download/Documents/EUR0199612019ENGLISH.PDF>.

⁶ See provisions on international law and human rights obligations of EU institutions in the context of their external action: Articles 3(5), 21(1) and (3), Consolidated Version of the Treaty of Europe (FTEU). See Section C of the expert opinion. See on the human obligations of the EU in its external policies: Olivier de Schutter et al. Human Rights Due Diligence: The Role of States (2012). Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 European Journal of International Law 1071; Enzo Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 European Journal of International Law 1093; Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), The EU Charter of

6. The EU's assistance to foreseeable Libyan violations of international law entails the EU's legal responsibility.⁷ The unwillingness and inability of Libyan authorities to effectively discharge their duty to rescue boats in distress in their maritime search and rescue (SAR) zone, and their routine abuses against rescued refugees and migrants as well as members of SAR NGOs, have been widely documented and challenged before the European Court of Human Rights.⁸ These legal challenges substantiate the impact on the rights of individuals⁹ of the EU's support to Libya under the IBM programme.
7. Correspondence between EU officials shows foreknowledge that supporting and funding Italy's cooperation with Libyan actors placed the EU at high risk of legal liability.¹⁰ By providing material, technical and political assistance to Libyan authorities, who would have been unable to operate in absence of such support, the EU has supported the interception of refugees and migrants and their return to cruel, inhuman, and degrading conditions of detention, torture, and modern slavery. EU support has enabled the return of individuals to Libya that has resulted in their denial of access to asylum and amounts to *refoulement*.¹¹
8. The undersigned organisations submit the complaint to the European Court of Auditors as the body entrusted with protecting the interests and rights of EU citizens to pursue transparency and seek accountability for the misuse of EU funds, and with protecting the EU's ability to observe its obligations to uphold and respect international law in its external actions.¹² The organisations are involved in legal interventions and advocacy before Italian, European and international bodies to challenge the harmful impacts of Italy's cooperation with Libyan authorities, the status of the Italy-Libya cooperation agreement, the misuse of Italian funds, and the lack of transparency by Italian and EU institutions. We discuss these interventions throughout the complaint. The complaint is submitted following efforts by the undersigned organisations and their partners to

Fundamental Rights: A Commentary (2014); A Berkes, 'The extraterritorial human rights obligations of the EU in its external trade and investment policies' 2(1): 5 *Europe and the World: A law review* (2018) 21.

⁷ Article 16 ARSIWA. These arguments were made by the International Commission of Jurists and ECRE in ASGI's case against financial support through the Africa Fund to the Libyan-Italian cooperation in the field of migration before Italian courts, discussed below.

⁸ The EU has acknowledged that the Libyan violative practices have become more severe and widespread since the beginning of Italy's cooperation with Libyan actors in 2017. Amnesty International, "Libya's Dark Web of Collusion" (2017) pp 42-50. Human Rights Watch, "No Escape from Hell" (2019) pp 20-34.

⁹ On the human rights impact of cross-border decisions, see Human Rights Committee, General Comment 36, Right to life.

¹⁰ Links to correspondence between Fabrice Leggeri, the head of Frontex, to Paraskevi Michou, the highest-ranked migration official in the EU: <https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>

¹¹ *Hirsi Jamaa and Others v Italy* [GC] No. 27765/09 (European Court of Human Rights 23 February 2012).

See also, in *Sea Watch* case before the Tribunal of Agrigento, Uff. GIP, judgment of 2 July 2019, judge Vella; and Criminal proceedings against GIP Catania, Nunzio Sarpietro in *Open Arms's* case, decision of 15.05.2019; *Mediterranea's* case, Tribunal of Agrigento, 29.01.2020; and *Vos Thalassa's* case, Tribunal of Trapani, 23 may – 3 June 2019.

¹² Art 41, Charter of Fundamental Rights of the European Union (on the right to good administration).

obtain information about the processes and criteria for monitoring and evaluation of the IBM programme, discussed in Section 5 of the complaint.

1. Illegality of the IBM programme: Misuse of Funds, Undermining European Parliament's Authority

9. The use of EU funds by the EUTFA to implement the IBM programme is inconsistent with the funding objectives for which funding is legally permitted under the EDF and related instruments, including the Development Cooperation Instrument (DCI) governed by Regulation 233/2014 and the European Neighbourhood Instrument (ENI) governed by Regulation 232/2014.¹³
10. The EUTFA is an EDF-fund, according to Article 1(3) of Council Regulation (EU) 2015/322 on the implementation of the 11th European Development Fund. The EUTFA's main source of funding is the EDF budget (approximately 3.7 billion Euro). Thus like all EDF-funded activities, it must comply with the primary objective of reduction and eradication of poverty.¹⁴ These objectives place stringent legal limits on misuse of funds contrary to the European Parliament's budgetary authority that the Court of Justice of the EU has used to annul Commission decisions specifically in relation to the funding of border management projects because the funded programme did not comply with the funding objectives established in applicable legislation.¹⁵
11. The eradication of poverty is, however, not the only objective of the funding disbursed by the EUTFA's North Africa Window. While it is concerned with addressing the root causes of destabilisation, forced displacement and irregular migration (Art. 2.1 Constitutive Agreement), some EUTFA programmes like IBM have the primary objective of supporting border control and migration management activities. These alone do not correspond with any of the stated goals for EDF, DCI or ENI funds. The Court of Justice has stated elsewhere that border control and migration management activities must show for a "direct connection with its [EDF's] aim of strengthening investment and development."¹⁶
12. The IBM programme's overall objectives include: "to develop the overall capacity of the relevant Libyan authorities and strengthen institutional reform in the areas of land and sea border control and surveillance"¹⁷; "to address the crises in the regions of the Sahel and the Lake Chad, the Horn of Africa, and the North of Africa"; "support all aspects of stability and contribute to better migration management as well as addressing

¹³ See appended expert opinion, pp. 6-7.

¹⁴ Objectives listed in Art. 1(2)(a) and (b) Regulation 2015/322 ("EDF regulation") include: "(i) fostering sustainable and inclusive economic, social and environmental development; (ii) consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law; and (iii) implementing a rights-based approach encompassing all human rights."

¹⁵ ECJ, C-403/05, Judgment v. 23.10.2007 Rn. 64.

¹⁶ ECJ, C-403/05, Judgment v. 23.10.2007 Rn. 66. See appended expert opinion, p

¹⁷ Action Fiche Phase II, p.9, 3.1.

the root causes of destabilisation, forced displacement and irregular migration, in particular by promoting resilience, economic and equal opportunities, security and development and addressing human rights abuses.”¹⁸ These short-term objective to control immigration is incompatible if not contradictory with the longer-term, sophisticated core objectives of EU development cooperation that underpin the EDF, as enshrined in the Lisbon Treaty.¹⁹

13. The illegality of the IBM programme is a product of the structural deficiencies of the EUTFA’s systems and programming. Three such deficiencies raised by Section C(I) of the appended expert opinion, are the lack of a) clear and coherent definition of the objectives of the trust fund; b) clear added value and avoidance of duplication; and c) compliance of trust fund objectives with legal requirements of funding sources.²⁰ The Court of Auditors has also scrutinised the fund’s operations and found that the true objectives of the fund are not addressing root causes of irregular migration, as may be sufficient to ensure consistency with the EDF. Rather, the true objective of the fund is to reduce the number of migrants passing from Africa to Europe.²¹
14. The ambiguity surrounding the fund’s objectives contravenes the requirement in the 2018 financial regulation that the objectives of all trust funds be precisely defined in their constitutive instrument.²² The EUTF’s stated purpose as a limited-time²³ emergency instrument is to “respond to the different dimensions of crisis situations by providing support jointly, flexibly and quickly”.²⁴ The Commission explains the need for such flexibility to “save and protect people, creative economic opportunities and legal pathways”.²⁵
15. The fund’s relaxed reporting requirements heighten the risk that the EUTF divert the use of its underlying funds, especially EDF funds, towards incompatible objectives, as well as impede financial and parliamentary control. The lack of transparency around the EUTFA’s programming and the fact that the EUTFA combines different financial resources in a single bank account, makes it difficult, if not impossible, to scrutinise how specific funds are used.²⁶

¹⁸ Agreement Establishing the EUTFA and Its Internal Rules (EUTF constitutive agreement) para 15. IBM action fiche phase two, p 6.

¹⁹ Art 208, FTEU.

²⁰ Appended expert opinion, pp 8-10.

²¹ Ibid, p 9. CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, S. 5.

²² Article 235, Financial Regulation 1046/2018.

²³ <http://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-317-F1-EN-MAIN-PART-1.PDF>.

²⁴ European Commission, Governance and Procedure: EU Trust Fund for Africa for stability and addressing root causes of irregular migration and displaced persons, p 2 https://ec.europa.eu/europeaid/sites/devco/files/eutf_governance_final_en.pdf. European Commission, Strategic orientation document: the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, 5 February 2016.

²⁵ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p 39.

²⁶ https://ec.europa.eu/europeaid/sites/devco/files/t05-eutf-hoa-reg-09-better-migration-management_en.pdf.

16. The Commission's diversion of funds to purposes directly outside those approved by Parliament, such as the provision of services or equipment intended to threaten or deliver lethal force, "frustrate[s] the democratically legitimated parliamentary decision".²⁷ This inconsistency is, as the appended opinion maintains, "not simply a technical issue but a violation of the budgetary authority of the European Parliament, and thus a problem of institutional balance and democratic principle within the EU's constitutional order."²⁸ Irrespective of the ability to prove the diversion of funds by the EUTF, the 2018 financial regulation requires that all *thematic* trust funds, excluding emergency funds, must be approved by parliament.²⁹

2. Failure to Respect Human Rights: Procedural and Substantive Deficiencies

17. To comply with EU law, the EUTF must ensure that a) all programmes are preceded by a human rights impact assessment, and implemented on the basis of measures to avoid and mitigate such risks, and are accompanied by a system that continuously monitors and evaluates human rights impacts.³⁰ The allocation of funds should arguably also be contingent upon implementing partners' and beneficiaries' commitments and undertakings to respect human rights.³¹ These obligations are enshrined in primary and secondary EU laws.³² The former include the Charter of the Fundamental Rights,³³ and the EU's obligation to ensure 'strict observance of international law'.³⁴ The latter pertain to the financial regulations that govern the EDF and ENI funds provided to the EUTF, such as the EDF regulation's requirement to "promote [...] a rights-based approach encompassing all human rights, whether civil and political, economic, social and cultural, in order to integrate human rights principles in the implementation of this Regulation".³⁵
18. Despite the severity of such acts and the EU's position of relative influence over Italy and its cooperating Libyan partners, the IBM programme is implemented without the procedural and substantive guarantees necessary to ensure that the EU and its Member States do not contribute to Libyan violations. First, the programme has been approved absent an *ex ante* human rights impact assessment (Section 2.1). Secondly, it is being implemented without clear review criteria for ensuring respect for human rights

²⁷ See appended expert opinion, p 4. On the role of the EP in European development cooperation, see generally P. Dann, *The law of development cooperation*, 2013, pp. 175, 468-9.

²⁸ Philipp Dann, Michael Riegner, Lena Zagst, 'Opinion on the legality of EU funding for the Libyan coastguard', Annex I.

²⁹ *Ibid*, p 10.

³⁰ See appended expert opinion, p 12.

³¹ Article 2(4), Regulation (EU) 2015/322. See also Article 2, Executive Regulation EU/205/323.

³² See appended expert opinion, pp 11-12.

³³ Articles 6(3) and 51(1) and (2), EU Charter of Fundamental Rights.

³⁴ Articles 3(5), 21(1) and (3), FTEU. See also C-286/90, *Poulsen v. Diva Navigation*, 1992 E.C.R. I-6019, ¶ 9; and C-366/10, *Air Transport Association of America*, Judgment, Dec. 21, 2011, ¶ 123.

³⁵ Article 2(5)(b), Regulation (EU) 2015/322. See also Article 1(4), Regulation No 232/2014. European Commission, *European Emergency Trust Fund for Africa: 2018 Annual Report*, Luxembourg 2019, S. 13. Dies., *European Emergency Trust Fund for Africa: 2018 Annual Report*, Luxembourg 2019, S. 46.

(Section 2.2). Human rights considerations are, from what the EU and Italian authorities have made known about the programme, absent from the programme’s baseline assessments and financing arrangements. This has resulted in the invalid approval of the programme’s second phase in December 2018 (Section 2.3).³⁶

2.1 Lack of Human Rights-Specific Assessments

19. The need to perform *ex ante* human rights assessments for financial cooperation projects is fundamental to the EU’s ability to respect human rights and international law in its external actions.³⁷ It is mandated by the obligation to guarantee that the EU is not contributing to violations of substantive rights, including: the right to liberty and security (Article 6(3) of the Charter of Fundamental Rights); the right to life and integrity of the person (Arts. 2 and 3);³⁸ the prohibition of torture and inhuman or degrading treatment (Art. 4); the prohibition of slavery (Art. 5.1); and the right to asylum and protection from removal or expulsion to a state where the individual risks being subject to torture or other inhuman or degrading treatment (Arts. 18 and 19).
20. To guarantee such protections, the EU is required to provide for a human rights assessment framework. To comply with the EU Charter of Fundamental Rights, and the right of EU citizens to benefit from proper administration,³⁹ “an explicit consideration of the human rights impact” was needed to secure the legality even of informal deals.⁴⁰ The Court of Justice of the EU has upheld the obligation to conduct human rights impact assessments even of trade agreements that may indirectly encourage the violation of human rights.⁴¹ Experts maintain that such assessments are a minimum requirement for external action with possible human rights impacts.⁴² A study by the Centre for European Policy Studies commissioned by the European Parliament maintained that “devising any kind of EUTF [trust fund] should be subject

³⁶ Relevant information to this concern is found in documents to which the undersigned organisations were refused access by DG Near, with a pending confirmatory application (discussed below). See e.g., Several member states have requested specific risk assessment mechanisms at Trust Fund Board meetings: Court of Auditors, European Union Emergency Trust Fund for Africa, Luxembourg 2018, S. 16.

³⁷ See on the application of the due diligence requirement to the EU’s financial cooperation: Nora Götzmann (ed) *Handbook on Human Rights Impact Assessment* (Elgar 2019). Carla Ferstman, ‘Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent “Irregular” Migration: European Union and United Kingdom Support to Libya’, *German Law Journal* (2020), 21, pp. 459–486. See on due diligence in international law: Olivier de Schutter et al. *Human Rights Due Diligence: The Role of States* (2012). Neil McDonald, ‘The Role of Due Diligence in International Law’, 68 *International and Comparative Law Quarterly* 4 (2019) pp. 1041-1054.

³⁸ See also GC 36 re right to life under ICCPR for the duty to protect beyond borders, irrespective of extraterritorial obligations.

³⁹ Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU–Turkey Agreement, Strasbourg, 18 January 2017.

⁴⁰ *Ibid.*, para. 25.

⁴¹ Case T-512/12 *Frente Polisario v Council*, paras. 231, 241 et seq. C-266/16 *Western Sahara Campaign UK*, para. 37, 63.

⁴² See appended expert opinion, pp 11-12.

to an ex ante and ongoing/regular assessment of the impact on fundamental rights”⁴³ and the implementation of EU trust fund programmes must be “fully consistent with EU general principles and legal commitments laid down in the EU Treaties [...] including on democracy, the rule of law and human rights, as well as respect of UN principles and instruments.”⁴⁴ The Court of Auditors’ own guidance requires that the EU adopt concrete control measures to address ‘inherent risks’ in EU agency activities. Such risks include that of the EU and Member States breaching human rights commitments by becoming complicit in Libyan authorities’ extensively-documented inhumane acts against migrants.⁴⁵

21. Ensuring that the response to the migration ‘crisis’ is respectful of international and human rights laws is also part of the IBM programme’s objectives. These include the “improvement of the human rights situations for migrants and refugees [...] through ensuring that the Libyan authorities targeted by this action comply with human rights standards in SOPs in SAR operations”.⁴⁶ The EU’s action fiches for the IBM programme maintain that “migration management inspired by the full respect for human rights and international standards is an across-the-board objective of all activities covered by the project”.⁴⁷ The action fiche for the programme’s first phase notes the “challenging” human rights situation, “in particular the conditions in detention centres where irregular migrants are brought after being rescued” but not the inherent incompatibility that results from the fact that the programme is essentially funding the return of individuals to Libya through cooperation between Italian and Libyan authorities.⁴⁸ To meet programme objectives and protect against the mismanagement and misuse of EU funds, the Commission must ensure that borders are controlled in a manner compliant with relevant international law and human rights standards.
22. Guidance by the EU Fundamental Rights Agency’s 2016 ‘guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries’⁴⁹ addresses the ways in which the EU should avoid contributing

⁴³ European Parliament, Policy Department for Budgetary Affairs, Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices (2018) Recommendation 6 on p 77 <http://aei.pitt.edu/93684/1/EUTrustFundsForEP.pdf>.

⁴⁴ Recommendation 10 p 80, Ibid.

⁴⁵ The Court of Auditors has defined two kinds of risks to achieving economy, efficiency and effectiveness that risk to undermine sound financial management, and must therefore be addressed in the design of the programme as well as throughout its implementation: 1) risk that is inherent in nature (inherent risk) which exists before existing controls and/or risk response; and 2) risk that arises from weaknesses in internal control (control risk) and thus remains after taking existing actions and controls into account. European Court of Auditors, ‘Risk Assessment in Performance Audits’, October 2013, p 2 http://www.eca.europa.eu/Lists/ECADocuments/GUIDELINE_RISK_102013/GUIDELINE_RISK_102013_EN.pdf.

⁴⁶ IBM programme phase two, p 2-3.

⁴⁷ IBM programme action fiche phase one, p 14.

⁴⁸ See eg, HRW and AI third party intervention in the SS case: https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf.

⁴⁹ EU Agency for Fundamental Rights, Guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries (December 2016)

to the kinds of serious human rights abuses and international law violations that are being perpetrated by Libyan beneficiaries of the IBM programme. A commitment to human rights protection was also part of the Commission's 2013 'Implementing Decision on the Annual Action Programme for 2013 (part 2) in favour of Libya', which held that: "Programme activities will focus on improving the legal and institutional set-up and capacities of the authorities responsible for migration and asylum management, in line with international standards and best practices to guarantee that migrants are treated with full respect of human rights and human dignity and in line with international standards guaranteeing international protection."⁵⁰

23. Despite these obligations and commitments, human rights considerations have remained secondary to the implementation of the border and migration management-foci of the IBM programme. The action fiche for the second phase of the programme acknowledges that the EU is supporting Libyan actors involved in serious human rights abuses, but only as a "reputational concern" related to others' view of the programme, and proposes to address this concern with a surface-level, public-relations response that "support[s], in dialogue with IOM, the ongoing progressive opening of 'safe spaces' as an alternative to detention, proceeding at the pace that conditions allow and in negotiation with the national authorities."⁵¹
24. Despite attempts by the undersigned organisations to seek information about the scope, content and purpose of any human rights-specific control measures in place for the IBM programme, these remain unknown. The Commission's 10 October 2019 response to inquiries made by the undersigned organisations consists of generic statements that human rights are considered in the course of EU-funded programmes, e.g., "The EU systematically applies a rights based approach in its activities and development programmes" and "considers human rights principles and standards as a means and a goal of development cooperation".⁵² In October 2018, in response to questions, Commissioner Hahn noted that the EUDEL is using a range of control measures, including Results Oriented Monitoring (ROM) missions, expenditure verification missions and financial audits, as well as a Mutual Accountability Project (MAP).⁵³ None of the documents received by the undersigned organisations reveal the specific content of such measures in relation to the IBM programme.
25. The IBM programme triggers all six of the "reputational risks" listed on the EUTFA's risk register, including a Level 12 (out of 25) risk of lack of partner countries' political will, capacities and resources to sustain EUTF results over time; and a level 16 risk of

<https://fra.europa.eu/en/publication/2016/guidance-how-reduce-risk-refoulement-external-border-management-when-working-or>.

⁵⁰ https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/c_2013_9196_annex_en.pdf

⁵¹ IBM programme action fiche phase one, p 13.

⁵² Commission response 10 October 2019, Annexed, p 15.

⁵³ Written Questions to Commissioner Hahn, 2017 Discharge to the Commission <https://www.europarl.europa.eu/cmsdata/155120/2018-10-15%20DG%20NEAR%20replies%20to%20questionnaire%20HAHN%20-%20FINAL.pdf>.

wrong perception that EUTF-funded actions support security and migration agenda of countries violating human rights.⁵⁴ Yet the programme documents lack clarity on the scope of the EU's response by way of adequate procedural and substantive guarantees.⁵⁵ Other EUTFA projects have included more explicit reference to human rights in project documents, such as the “medium-level” risk that human rights violations will increase as is noted in the EUTFA's ‘Managing mixed migration flows in Libya through expanding protection space and supporting local socioeconomic development’ programme.⁵⁶

26. The Commission's response to the undersigned organisations recalls that UN agencies in the position of implementing partners are subject to the UN ‘Human Rights Due Diligence Policy’ (HRDDP) issued by the Secretary General in 2011. The 2018 ‘Initial Risk Assessment’ conducted in accordance with the HRDDP issued by the UN Secretary-General in 2011⁵⁷ for UNSMIL and UNDP's operations in Libya, concludes that ‘there is a real risk that in Tripoli, individuals on the Government's payroll or claiming an affiliation with the Ministry of Interior or the Ministry of Justice may commit grave violations of international humanitarian and human rights law’ including the ‘right to life; protection against arbitrary arrest and unlawful detention; rights of the person in detention’ and the ‘prohibition of torture and ill-treatment,’ *inter alia*.⁵⁸ The risk assessment found a ‘real risk of commission of violations of ... fair trial rights, due process rights and the right to be protected against arbitrary detention’ by the ‘Judiciary and Prosecution Service’.⁵⁹ The risk assessment concludes that UN operations in Libya should continue ‘unless serious human rights violations or a significant change in risks (sic) factors aggravating them occur’.⁶⁰ Indeed, in its response to the undersigned organizations the Commission complains that although ‘[t]he EU has negotiated together with the OHCHR the provision of extensive support to human rights capacity building and monitoring [...] the envisaged cooperation with OHCHR could not be rolled out due to obstacles to implementation identified on the UN side’.⁶¹ It is reasonable to assume that these unspecified ‘obstacles’ are linked with the results of the UN's HRDD procedures, which the EU lacks.

27. In sum, the IBM programme is being implemented without any dedicated *ex ante* human rights impact assessments. Nor are such assessments incorporated into the monitoring and review of the programme. Some ad hoc human rights related checks

⁵⁴ EUTFA risk register https://ec.europa.eu/trustfundforafrica/sites/eutf/files/risk_register_eutf_0.pdf.

⁵⁵ Action Fiche, Managing mixed migration flows in Libya through expanding protection space and supporting local socioeconomic development (T05-EUTF-NOA-LY-03), pp 18-19.

⁵⁶ Action fiche T05-EUTF-NOA-LY-03.

⁵⁷ Letters dated 25 February 2013 from the Secretary General addressed to the President of the General Assembly and to the President of the Security Council (A/67/775-S/2013/110), communicating the policy adopted by the SG in 2011.

⁵⁸ UNSMIL, UNDP, Executive Summary of the Initial Risk Assessment (IRA) and Recommendations for Endorsement by the HRDDP Task Force, 14 August 2018, p 2 (on file).

⁵⁹ Ibid.

⁶⁰ Ibid, p 3.

⁶¹ Ibid.

may have taken place, as appears to be the case from the Commission's response, but these are neither decisive to the programme's approval, as confirmed by the basis and process for its second phase's approval as we observe next.

2.2 Invalid Approval of IBM's Second Phase

28. Since July 2017, neither the EU nor Italian implementing authorities for the IBM programme have addressed concerns that the EU is acquiescing to and supporting serious human rights violations by Libyan authorities, including policies of containment, collective expulsion, and systemically cruel, inhuman and sometimes torturous conditions of deprivation of liberty. Despite not having revealed the monitoring reports and assessments it has conducted, the EU's **approval of the second phase of the IBM programme indicates that if any concerns about human rights abuses were raised, they were dismissed.**
29. The EU encouraged and, through the IBM programme, supported work towards the declaration of a SAR region, a feasibility study for the setup of a Libyan Maritime Rescue Coordination Centre (MRCC) in Tripoli, adequate SAR standard operating procedures as well as evidence of improved human rights protection for migrants in Libya.⁶² The approval of the second phase of the IBM thus hinged on a positive assessment of Libyan authorities' practices in two regards: a) their competence, i.e. ability and willingness, to maintain their newly-declared SAR zone, including by operating proper communication facilities and procedures following training and support for the maintenance of equipment by Italy and, in most cases, Operation Sophia (Operation Irini as of 1 April 2020);⁶³ and b) their ability to improve human rights protection for migrants in Libya and improved performance in terms of respect for human rights by the specific authorities in receipt of funds and other support through this programme.
30. When the decision to approve the second phase was due, however, there was no information to suggest that Libyan authorities could maintain the SAR zone on their own. The Italian authorities have continuously needed to make up for serious operational capacity-linked deficiencies of the Libyan authorities, by providing crucial coordination and support to the Libyan MRCC, as affirmed by Italian courts and was

⁶² Parliamentary Question, Answer given by Mr Avramopoulos on behalf of the European Commission
Question reference: P-003665/2018, 4 September 2018

https://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html.

⁶³ Article 1(c)(621), Law No. 232, 11 December 2016, and Italian Ministry of Foreign Affairs, Director General for Italians abroad and migration policies, Decree 4110/47 of 28 August 2017, www.asgi.it/wp-content/uploads/2017/11/Allegato_2.pdf. In June 2016, the EU amended the mandate of the operation to include capacity-building and training of the LCGN. As of November 2017, 195 Libyan personnel had undergone training. Amnesty International, 'Libya's Dark Web of Collusion' (2017) p 45. See also, HRW and AI third party intervention in SS case, p 5. Operation Sophia was as of 1 April 2020 turned into Operation Irini: <https://www.ceps.eu/operation-irini-in-libya/>.

argued in the *Fondo Africa* case.⁶⁴ The communication infrastructure in Libya is provided by Italian Navy officials stationed in Tripoli, through an Italian Navy vessel permanently docked in its port.⁶⁵ The Libyan MRCC is often unavailable and, according to German political officials, does not answer calls.⁶⁶ It is housed in a disused airport facility,⁶⁷ and has its reports compiled by the Italian authorities.⁶⁸

31. Despite Italy's support, Libyan authorities are systemically unable to respond competently and effectively to boats in distress. The inability to rely on Libyan coastguard authorities as "a reliable partner for maritime rescue" was affirmed by leaked reports on Operation Sophia/EUNAVFORMED. These showed the transgressions committed by the Libyan coast guard authorities, including their involvement with smugglers. It revealed their failure to pay the salaries of coast guard personnel, which resulted in the Operation being downsized and excluding naval assets. Nevertheless, the operation was extended repeatedly, most recently until 31 March 2020.⁶⁹
32. Humanitarian groups involved in rescue operations in the Mediterranean who were interviewed by the undersigned organisations report that since summer 2019 the Libyan JRCC has mostly been unresponsive in coordination and proven itself unable to identify a place of safety. The Libyan JRCC has either not responded to requests for a place of safety, or responded by assigning a port in Libya for the disembarkation of survivors, which Libya recently declared that it will no longer allow due to the ongoing global pandemic.⁷⁰ One humanitarian group reported that Libyan authorities provided them

⁶⁴ Coordination of rescue operations by Libya is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans." Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo (27 March 2018) <https://www.statewatch.org/news/2018/apr/it-open-armssequestration-judicial-order-tribunale-catania.pdf>.

Tribunale di Ragusa, Ufficio del Giudice per le indagini preliminari, Decreto di rigetto di richiesta di sequestro preventivo (16 April 2018)

http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf. See also M. Petrillo and L. Bagnoli, 'The Open Arms case continued: New documents and Malta' (12 April 2018) <https://openmigration.org/en/analyses/the-open-arms-case-continued-new-documents-and-malta/>.

⁶⁵ The Operations Centre of the Italian Navy. See Paese Italia, 'Marina Militare, cambio al vertice del comando Squadra Navale. A Taranto il 12 ottobre' (10 October 2019) (in Italian) http://www.paeseitaliapress.it/news_10666_Marina-Militare-cambio-al-vertice-del-comando-SquadraNavale-A-Taranto-il-12-ottobre.html; Marina Militare Italiana, 'Italian Navy Maritime Situational Awareness', http://www.marina.difesa.it/EN/operations/shade_med/Documents/shade_med_1_2016/IT_CINC_FLEET.pdf.

⁶⁶ Andrej Hunko, Member of the German Bundestag, German Government confirms: Libyan authorities not contactable for maritime rescue, 25 February 2019.

⁶⁷ <https://www.internazionale.it/notizie/lorenzo-bagnoli/2019/11/13/italia-libia-guardia-costiera>. Media investigations have highlighted how the Libyan coast guard authorities that run the MRCC have used lines of Italian vessels to communicate, that its emergency lines are not fully functional, and that its officers in charge of answering phone calls often do not speak English. See: <https://bit.ly/2rAAAAJ> and <https://bit.ly/2p981cH>, cited in HRW and AI third party intervention in the SS case, p 5.

⁶⁸ Ibid.

⁶⁹ <https://www.consilium.europa.eu/en/press/press-releases/2019/09/26/eunavfor-med-operation-sophia-mandate-extended-until-31-march-2020/>.

⁷⁰ Lorenzo Tondo, 'Libya says migrants stopped at sea will not be let back in', *The Guardian*, 10 April 2020 <https://www.theguardian.com/world/2020/apr/10/libyan-officials-migrants-stopped-seaports-unsafe>.

with information regarding a boat in distress; they were unable to find it, but no further information nor follow up was given by the Libyan authorities despite further requests.

33. Such support would not have been problematic were it not for its clearly foreseeable and highly harmful human consequences. By December 2018, when the second phase of IBM was approved, there was plentiful evidence that the human rights situation has not improved and that the Libyan coast guard authorities were unable or unwilling to manage the SAR zone. The support has since enabled the abuses committed by the Libyan authorities against migrants and members of SAR NGOs, such as the incident on 26 October 2019 when Libyan coast guard fired warning shots in the air and pointed mounted guns at rescuers and migrants, documented by the SAR NGO boat Sea Eye.⁷¹
34. Despite information requests by undersigned organisations to the Commission, both the scope and nature of any assessments and review undertaken ahead of the December 2018 approval of the second phase of the IBM programme, and the rationale for said decision, remains unclear.

2.3 Inappropriate Reliance on Italian-Libyan Cooperation

35. This controversial decision to approve the second phase of the IBM programme in December 2018 was made on the basis of the erroneous presumption that EU funds were being managed and used in accordance with EU constitutional and financial laws by the Italian authorities.⁷² The EU's reliance on Italy to this end has however been inappropriate, given the lack of safeguards in Italy's cooperation with Libyan authorities, which is itself intended to affect the interception at sea and return of individuals to violative conditions in Libya.
36. The IBM programme documents explicitly refer to the close ties between Libyan and Italian authorities and the influence that Italy has exerted throughout this long-standing relationship.⁷³ The programme is intended to "ensure permanent and effective support to the GACS and LCGPS in their reorganization process".⁷⁴ Italy has sought to enable the Libyan Coast Guard and Navy "to force the LCG&N to become the primary actor and progressively take full ownership of their area of responsibility"⁷⁵ and to gain exclusive control over a remarkably large SAR zone by assisting its declaration. EU

⁷¹ <https://www.dw.com/en/libya-authorities-fire-warning-shots-at-migrant-rescue-ship/a-51001668>.

⁷² We do not had access to the ROM reporting under the IBM programme due to transparency restrictions.

⁷³ First phase IBM action fiche, p 13.

⁷⁴ Ibid. See also, AI and HRW third party intervention in the SS case: https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf.

⁷⁵ Frontex, 'Frontex launching new operation in Central Med' (01 February 2018) <https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-medyKqSc7> ; EUNAVFOR MED, Six Monthly Report 1 JUN 2018 - 30 NOV 2018, EEAS(2019) (18 May 2019) p. 4 See also, Ministero delle Infrastrutture e dei Trasporti, Comando Generale del Corpo delle Capitaneria di Porto, Guardia Costiera, 'Le capacità di ricognizione nella difesa dei confini nel dominio marittimo' (28 February 2018) p. 19 <https://docplayer.it/72840151-Ministero-delle-infrastrutture-e-dei-trasporti-comando-generale-del-corpo-delle-capitanerie-di-porto-guardia-costiera.html>.

funds have helped expand the Italian Navy Mare Sicuro operation within “Libyan internal and territorial waters controlled by the Government of National Accord, in order to support Libyan naval assets.”⁷⁶ Italy has equipped Libyan actors with a maritime rescue coordination center and provided at least six vehicles to the Libyan coast guard authorities (two Corrubia-class patrol boats and four class-500 vessels).⁷⁷

37. The EU’s deferential reliance on its Italian implementing partners may also be seen in the EU’s choice to forego a financing agreement with the Italian authorities responsible for implementing the IBM programme.⁷⁸ The Commission confirmed, in its 26 July 2019 answer to the undersigned organisations, that “there is no MOU in place between the EU and Libyan authorities that would form the basis for and govern the disbursement of funds,” but also that it is “not in a position to reply whether there is any MOU in place between any of the EU MS and Libyan authorities”. In the absence of any other cooperation instrument relevant to migration between Italy and Libya, the EU-funded programme in question appears to be relying, at least informally, on the Italy-Libya Memorandum of Understanding on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security (MoU), for its implementation by Italy.⁷⁹
38. The MOU stipulates, without any conditions or reservations, that “the adaptation and financing of ... reception centres” will be enabled through “recourse to funds made available by Italy and the European Union”.⁸⁰ This includes “training of the Libyan personnel within the ... reception centres to face the illegal [sic] immigrants’ conditions” (art 2 MOU).⁸¹ The potential human rights impacts of such support to

⁷⁶ See Parliamentary questions, Question reference: E-004603/2018, Answer given by Mr Avramopoulos on behalf of the European Commission, 21 December 2018, http://www.europarl.europa.eu/doceo/document/E-8-2018-004603-ASW_EN.html. EU Commission, Grant agreement for an action with one beneficiary. Agreement Number - HOME/2017/ISFB/ AG/EMAS/0051, <https://www.guardiacostiera.gov.it/stampa/Documents/progetti-finanziati/Grant%20Agreement%200051%20signed.pdf>; and Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell’Italia alla missione internazionale in supporto alla Guardia Costiera Libica (DOC CCL, n. 2) (28 July 2017) p. 6, <https://www.camera.it/dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf>.

⁷⁷ Camera dei Deputati, XVII LEGISLATURA Commissioni Riunite (III-IV Camera e 3a-4a Senato) Resoconto stenografico, Seduta n. 28 di Martedì 1 agosto 2017 (in Italian) https://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2017&mese=08&giorno=01&idCommissione=0304c0304&numero=0028&file=indice_stenografico; Camera dei Deputati, Risoluzione n. 6-00338 (2 August 2017); Senato della Repubblica, Doc. XXIV n. 78 e n. 80 (2 August 2017).

⁷⁸ According to the programme’s Action Fiche: “In order to implement this action, it is nor (sic) foreseen to conclude a financing agreement with the partner country”. IBM programme action fiche phase one, p 16.

⁷⁹ Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (signed on 2 February 2017) available (in Italian) <http://www.governo.it/sites/governo.it/files/Libia.pdf> and (in English) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

⁸⁰ See also, MOU preamble: “Reaffirming the resolute determination to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea, through the provision of temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs”; http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

⁸¹ Ibid, Art 2(2) and (3).

Libyan personnel is not addressed in the MOU, and there is no reference to measures capable of mitigating the risk that EU funding could contribute to violations.⁸² The incidents that led to pending challenges against Italy before the ECtHR confirm these concerns. The UN Committee Against Torture criticised the “lack of assurance that co-operation with the Libyan Coast Guard by Italy would be reviewed in light of serious human rights violations” already in December 2017.⁸³

39. Given the failure to subject the MOU to Parliamentary scrutiny, its validity under Italian law is contestable. On 19 February 2018, ASGI legally challenged the Government's failure to present the draft law authorising the ratification of the MOU for Parliamentary approval pursuant to Article 80 of the Italian Constitution. The MOU itself maintains, in its Article 5, that its enforceability hinges on the parties' commitment to “interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties”.⁸⁴ Italy's Constitutional Court deemed ASGI's challenge inadmissible as it was not raised by Parliament, but rather a group of individual members.⁸⁵
40. Italian and international civil society have made repeated calls for the annulment of the MOU-based cooperation framework. Most recently, on 2 November 2019, 21 Italian and international organisations addressed the Italian authorities to request the annulment of the Agreement which formalised the “collective pushbacks of people who are fleeing war and persecution as well as finance[d] a concentration camp system in Libya.” The NGO statement noted: “Widespread corruption, complicity and infiltration at the institutional level of individuals who are subject to sanctions by the UN Security Council for crimes against humanity, rule out that conditions exist to renew the agreement with the Tripoli government.”⁸⁶
41. The Italian government has not adequately responded to these concerns, nor engaged with civil society concerns about the objectives and effects of its cooperation with Libya. Its latest proposed amendments⁸⁷ go some way in this direction. For example, they promise to revive the workings of the Mixed Committee, which was established by the MOU to ensure its implementation, but has remained largely inoperative.⁸⁸

⁸² See also <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.

⁸³ S.S. and Others v. Italy No. 21660/18. Case communicated on 26 June 2019 (in French) [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-194748%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-194748%22]}).

⁸⁴ Free and Equal (LEU) is an Italian left-wing parliamentary group in the Chamber of Deputies and a sub-group in the Senate.

⁸⁵ Constitutional Court Order 168/2018 on inadmissibility, and https://www.asgi.it/wp-content/uploads/2018/02/2018_2_27_ASGI_Libia_Italia_scheda-tecnica.pdf.

⁸⁶ <https://www.acli.it/lettera-aperta-al-governo-e-al-parlamento-per-lannullamento-del-memorandum-italia-libia/> (in Italian) quoted from <https://www.aljazeera.com/news/2019/11/deal-curb-migrant-arrivals-italy-libya-renewed-191102122821537.html>.

⁸⁷ <https://www.avvenire.it/attualita/pagine/esclusiva-nuovo-memorandum-italia-libia> and http://www.ansa.it/sito/notizie/politica/2019/11/06/libia-lamorgese-tripoli-disponibile-a-rivedere-accordo.-orfini-pd-imbarazzante_a292c9fd-16f7-4db8-8000-9a52a8c7af6b.html.

⁸⁸ Article 3, Italy-Libya MOU.

Overall, the amendments do not provide for the systemic change necessary to redress the current situation, and have as yet not been approved by the Libyan side. On 2 February 2020 the Memorandum was renewed for a further three years, notwithstanding their approval. In all cases, the cooperation framework will remain a soft, non-legally binding instrument that enshrines pre-existing policies on collaboration with Libyan authorities.⁸⁹

42. ASGI and its partners have also launched a judicial challenge before Italian courts against Decree 4110/47, which allocated €2.5 (of the 200) million from Italy's Africa Fund for "technical support by the Italian Ministry of Interior to the competent Libyan authorities to improve border and migration management, including combating migrants smuggling and search and rescue activities". The challenge had two grounds: a) the *ultra vires* use of the funds outside the mandated development of the Italian "Africa Fund," per Article 1(621) of Law 232/2016 to restore coast guard vessels and improving their capacity to carry out maritime border control; and b) the contribution made by such funds to breaches of international law, including human rights law, and the 2016 EU Council regulation banning provision of equipment that could fuel the conflict.⁹⁰
43. The International Commission of Jurists (ICJ) and ECRE's joint third-party intervention in the case highlighted the international responsibility of the Italian Government for knowingly giving a contribution to violative actions attributable to the Libyan authorities;⁹¹ noting Italy's failure to refrain from contributing to the most serious (*jus cogens*) violations of international law, such as prohibition of torture, enslavement, forced labor. Amnesty International's intervention in the case argued that the financial support was in fact *intended* by Italy to reinforce the capacity of Libyan maritime authorities to intercept refugees and migrants at sea in the full knowledge that this would expose such individuals to systematic human rights violations, including arbitrary detention and torture and other ill-treatment. By failing to place restrictions and obtain assurances that equipment would not be used for acts contrary to international law, the Italian government willfully acquiesced to and thus contributed to these grave unlawful actions. ASGI's requests for information about such measures prior to filing the case were refused. The fact that Italy also contributed to relief projects through the "Africa Fund" is irrelevant. In January 2019, the Lazio Administrative Court decided that in the absence of an error of fact or law, it had no basis to interfere in the administration's decision. On 10 May 2019, ASGI lodged an appeal before the Italian Supreme Administrative Court, which remains pending.⁹²

⁸⁹ Matteo Villa, a migration researcher at ISPI, quoted in <https://www.aljazeera.com/news/2019/11/deal-curb-migrant-arrivals-italy-libya-renewed-191102122821537.html>.

⁹⁰ Violeta Moreno Lax, *Accessing Asylum in Europe* (Oxford 2017).

⁹¹ Draft Article 16 enshrines a norm of international customary law according to the International Court of Justice.

⁹² First hearing before the Supreme Administrative Court for the African Fund case <https://www.asgi.it/wp-content/uploads/2019/07/Africa-Fund.pdf>.

3. Failure to Condition Financial Support on Respect for Human Rights

44. To uphold its obligations and commitments under EU law and ensure that it does not contribute to serious human rights abuses, the EU must actively address such risks. The EU should do so through conditionality and restrictions in the design and implementation of relevant EU funded programmes. Specifically, the EU's funding of Italian-Libyan cooperation should be conditioned on ensuring respect by Libyan actors for human rights and international law. Specifically, it must make continuing cooperation with the Libyan authorities' conditional on:

- a. The prompt release of all refugees and migrants being arbitrarily detained in Libya, and the end of the system of automatic, indefinite detention.
- b. The full and formal recognition of the United Nations Refugee Agency, UNHCR, in the form of a memorandum of understanding that guarantees the organization's full access to people of concern across the country and the possibility to carry out its full mandate, irrespective of the nationality of beneficiaries.
- c. The signing and ratification of the 1951 Refugee Convention and its 1967 Protocol and adoption and enactment of new legislation, policies and procedures on migration and asylum, providing for the decriminalization of irregular entry, stay and exit; an end to automatic detention; and the creation of an asylum system that complies with international standards.
- d. The establishment of independent, impartial, and transparent monitoring of human rights violations against refugees and migrants in Libya, with the aim to ensure accountability for state and non-state actors.⁹³

45. In addition to making funding conditional on the Libyan authorities' acceptance of these positions and the commitment to undertake concrete steps towards their implementation, the EU must also ensure that Italy as implementing partner adopts the necessary control measures to effectively restrict and monitor the use of EU funds by the Libyan authorities. In other contexts the EU has used conditionality clauses in external funding instruments to obtain migration management objectives, such as on returns.⁹⁴ Other countries have based cooperation agreements in the field of migration on respect for the Refugee Convention and human rights, or an equivalent regime that provides similar safeguards.⁹⁵

⁹³ Amnesty International and Human Rights Watch, Plan of Action: Twenty Steps for a Fair and Predictable Rescue System in the Mediterranean Sea, 6 March 2019

<https://www.amnesty.org/download/Documents/EUR0199612019ENGLISH.PDF>. See also, Amnesty International, Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean (2018).

⁹⁴ Directorate General for Internal Policies of the Union, Policy Department for Budgetary Affairs, 'Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices' (February 2018) pp 71-72 <http://aei.pitt.edu/93684/1/EUTrustFundsForEP.pdf>.

⁹⁵ See e.g. the successful Australian High Court challenge of the 'Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement' for failing to comply with the Refugee Convention: Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 280 ALR 18. See also,

46. In the case at hand, while being fully aware of the harmful consequences of its support for Italian-Libyan cooperation and more specifically the interception at sea and return of individuals to Libya,⁹⁶ the EU has at best placed minimal restrictions and conditions on funding to the Italian authorities. The absence of human rights-specific assessments, discussed above, signal that the commitment to upholding respect for human rights and international law in the context of the implementation of the IBM programme is cosmetic. Even if the EU were to ensure that assurances were obtained from the Libyan authorities to undertake reforms, the systemic and deep-seated shortcomings of the rule of law in Libya, and the collusion between Italy's Libyan partners and traffickers at sea and in detention centres,⁹⁷ would bring into question the EU's ability to rely on such assurances in good faith. In the interim, the EU has no other option but to suspend all support that directly or indirectly benefits the Libyan authorities until, if only if, such revisions are put into effect.

3.1 Training as Inadequate Mitigation

47. Not only has the EU failed to condition the receipt of EU funds on Libyan authorities' commitments and concrete steps to end abuses, it has instead adopted a host of political demarches to encourage Libyan actors to respect human rights. These include several-weeks-long training sessions provided to the Libyan General Administration for Coastal Security by Frontex and EUBAM. In the absence of reliable control measures that restrict and condition Italy's use of EU funds, EU-run training programmes do not correct the contribution made by the EU and Member States to the serious human rights abuses committed by Libyan actors.

48. Human rights training is part of the Joint Frontex-Libya-Italy Pilot Training Action in Support of the GACS⁹⁸ implemented in the bilateral cooperation between Italy and Libya to "strengthen the coast guard function of the Libyan GACS by complementing capacity building activities launched by Italy in the context of the EUTF financed project".⁹⁹ The human rights trainings are therefore linked to equipment supplies by Italy, including the delivery by 2020 of "repaired vessels to the GACS (3 out of 8 already delivered) as well as the training of additional 88 GACS crew members in addition to the 43 already trained in 2017."¹⁰⁰

Michelle Foster, 'The Implications of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing at International Law', *Melbourne Journal of International Law* 13 (2012) 1-29.

⁹⁶ Amnesty International, *Libya's Dark Web of Collusion* (2017) p 56.

⁹⁷ See eg, Associated Press, 'Making Misery Pay: Libya Militias Take EU Funds for Migrants', 31 December 2019 <https://apnews.com/9d9e8d668ae4b73a336a636a86bdf27f>.

⁹⁸ Terms of Reference for Frontex-EUBAM-Libya Joint Pilot Training (received from EUBAM).

⁹⁹ Terms of Reference: Joint Frontex-Italy-EUBAM Pilot Training Action in Support of Libyan General Administration for Coastal Security (GACS), Annexed (received from EUBAM).

¹⁰⁰ *Ibid*, p 1.

49. The EUTF operates under a ‘more for more’ conditionality framework, in which more financial support is given to countries that implement reforms to improve respect for human rights and other reforms necessary to ensure Libyan actor’s respect for international law standards.¹⁰¹ The core principle of ‘doing no harm’ and mutual accountability is also enshrined in the Principles for Good International Engagement in Fragile States and Situations, the New EU Consensus for Development, the EU Global Strategy (Council Conclusions in October 2016), and the EU ‘Policy Coherence for Development’.
50. According to these instruments, human rights training programmes are not a mitigating measure for the contribution that development aid may in fact be making to serious abuses, as is the case at hand. Nor can such training programmes function as a benchmark that could be used to hold Libyan beneficiaries to account for implementing reforms. Such secondary measures are insufficient to guarantee that the Libyan authorities end certain practices and institute others, including by annulling and enacting laws, as the Council of Europe Human Rights Commissioner’s report has maintained: “the fact that human rights training has been provided to the Libyan Coast Guard, and support provided to international organisations working in Libya, this is not an adequate answer to this crucial question.”¹⁰² Training does not suffice to constitute a rights-based approach as required by the EDF-regulation, and is far outweighed by the principal objectives and activities of the Libya action.¹⁰³

3.2 Absence of a ‘Conflict Sensitivity’ Framework for Humanitarian Actors

51. Other EU funds, outside the IBM, support humanitarian actors who work to ameliorate conditions in detention centres. These humanitarian organisations report that they are regularly subject to access restrictions to certain facilities and individuals. They cannot guarantee that the food, clothing and other goods they provide are actually given to detainees as opposed to confiscated by DCIM officials.¹⁰⁴ Representatives of humanitarian organisations who have worked in Libya told the undersigned groups that their and other agencies’ work is highly limited in terms of the difference they are able to make in the conditions of detention. They face concerns that their operations risk inadvertently working with members of Libyan militias who are not GNA civil servants, and that they are being “used” to legitimise EU activities and funds by making their consequences, such as abusive conditions of detention, slightly more survivable.

¹⁰¹ Ibid, p 21. Cf. the coordination mechanism the ‘facility for refugees in Turkey’, Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, The ‘Facility’ between the European Commission and the EU Member States, Brussels, 2016; discussed in Ibid, pp 23-25.

¹⁰² Council of Europe Commissioner for Human Rights, ‘Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean’ (June 2019) p 43 <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>.

¹⁰³ Appended expert opinion, p 6.

¹⁰⁴ Maggie Michael, Lori Hinnant, Renata Brito, ‘Making Misery Pay: Libya Militias take EU funds for migrants’, Associated Press, 31 December 2019 <https://apnews.com/9d9e8d668ae4b73a336a636a86bdf27f>.

52. To implement its obligation to respect human rights and ‘do no harm’ in conflict-affected situations, the EU is required to ensure that all implementing partners in receipt of its funds operate under a ‘conflict sensitive’ framework that ensures that they are not contributing to serious violations of international law and human rights. Both action fiches and the Commission’s response to the undersigned organisations make references to conflict sensitivity considerations only in passing. It is unclear in what ways the EU has conditioned and restricted funding, scrupulously screened individuals and entities for instance from within DCIM, advocated for the prosecution of abusive individuals,¹⁰⁵ or ensured that humanitarian actors are not legitimising abusive actors. In fact, it has been reported that EU funds are siphoned off for purposes other than ameliorating conditions in detention.¹⁰⁶
53. Humanitarian actors told the undersigned organisations that they are unaware of any protocols or measures that may have been adopted by the EU or Italy to guarantee that they do not exacerbate the harms of migrant detention in Libya. Humanitarian organisations have also reported that EU or Italian state institutions have been unresponsive to concerns that due to their EU-funded activities, they risk falling afoul of their own voluntary codes of conduct.¹⁰⁷ The UK’s aid watchdog ICAI, in a March 2017 report, noted that humanitarian support has not been properly monitored:

We have not seen data showing if UK support to the detention centres, or the agencies responsible for operationalising this support, has increased the number of detainees. However, we conclude that there is a risk that providing financial or material support – even neutral humanitarian support – to detention centres might create conditions that would lead to more migrants being detained. We are not satisfied that the responsible departments have done enough analysis to assess the requirements of the “do no harm” principle.

54. Despite reference by the EU and Member States to their humanitarian aid and evacuation and repatriation programme,¹⁰⁸ such measures do not absolve the EU and Member States of responsibility for wrongful assistance to violative acts. In the absence of an operational conflict-sensitivity framework, the EU and Member States are acting in breach of their obligations to ‘do no harm’ enshrined in the Commission in DG ECHO’s guidelines on humanitarian protection,¹⁰⁹ and UN human rights bodies’ positions on the responsibilities of international agencies.¹¹⁰ Despite the absence of

¹⁰⁵ See recommendations by the HRDDP Task Force, Draft 2018, pp 3, 6-7 (on file).

¹⁰⁶ HRW interviews with humanitarian actors, cited in HRW, ‘No Escape From Hell’ (2019) p 28.

¹⁰⁷ See eg a report based on consultations with humanitarian groups working in Libya: Danish Refugee Council, ‘Principles and Approaches for Conflict-Sensitive Migration Assistance in Libya’ (February 2019) (on file; limited distribution).

¹⁰⁸ HRW, ‘No Escape From Hell’ (2019) p 30.

¹⁰⁹ DG ECHO’s guidelines, Humanitarian Protection (April 2009) https://ec.europa.eu/echo/files/policies/sectoral/humanitarian_protection_funding_guidelines_en.pdf.

¹¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 2, International Technical Assistance Measures (Art. 22), ¶6, U.N. Doc. E/1990/23 (Feb. 2, 1990); see also Committee on Economic, Social

appropriate conditionality and mitigation measures, the UK noted specifically in relation to detention, that it ‘is encouraging the Libyan authorities to improve conditions in detention centres’ and that work supported by the EUTFA is ‘supporting efforts to improve awareness and respect for human rights and prevent abuse of those in these centres.’¹¹¹

3.3 Member States’ Reliance on EU Due Diligence Processes

55. Whereas the EU relies on Italian implementing partners to ensure that the EU and its Member States are not contributing to the serious human rights abuses being perpetrated by Libyan authorities. Member States, who make the largest non-voluntary contributions to EUTFA (88% of its total funds) through both ‘on budget’ funds (e.g. the European Neighbourhood Instrument and EU Humanitarian Funds) and non-budgetary funds (principally the European Development Fund),¹¹² rely on the EU to ensure their compliance with their own domestic aid accountability standards.

56. To date, €318 million of EUTF funds have been allocated for activities in Libya. Funds are provided to the EUTF by Member States – including, e.g., the €42m attributable to UK Official Development Assistance.¹¹³ Decisions regarding the allocation of the EUTF funds provided by Member States are made at EU level by committees comprised of Member States, which follow recommendations by the Commission. Member states also make direct pledges specifically to the EUTFA, which are known as “voluntary contributions”. The UK, for instance, has allocated an additional €3m of its Official Development Assistance to the EUTFA, of which 60% (approximately €1.8m) is to be programmed in Libya. Previous UK contributions to the first phase of IBM programme include an estimated €6.33m of Official Development Aid made available for a period of 36 months from July 2017 with the following objectives:

to strengthen the fleets for General Administration for Coastal Security (“GACS”) and Libyan Coast Guard and Port Security through training on international standards and human rights, fleet maintenance and the supply of rubber boats; setting up the Interagency National Coordination Centre and Maritime Rescue Coordination Centre for operations at sea; and coastal areas/search and rescue (“SAR”) and assisting the Libyan Government of

and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11.1): Forced Evictions, ¶¶17-18, U.N. Doc. E/1998/22 (May 20, 1997).

¹¹¹ DFID Media Team, UK aid's role in Libyan detention centres, 22 November 2018 <https://dfidnews.blog.gov.uk/2018/11/22/response-to-the-guardian-article-on-uk-aid-in-libyan-detention-centres/>.

¹¹² Response by UK GLD on file with authors.

¹¹³ See EXPLANATORY MEMORANDUM FOR EUROPEAN COURT OF AUDITORS REPORT, Court of Auditors Special Report no: 32 The European Union Trust Fund for Africa: Flexible but lacking focus, Submitted by Department for International Development on 19 December 2018 http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/12/Signed_EM_-_UNNUMBERED_ECA_Special_Report_no_32_The_European_Union_Trust_Fund_for_Africa.pdf.

National Accord (“LGNA”) in declaring a Libyan SAR region including developing adequate SAR standard operating procedures.¹¹⁴

Many if not most of these activities have been undertaken in the framework of the Italy-Libya cooperation framework.

57. In the case of the UK, these standards are in theory relatively stringent.¹¹⁵ In regard to its contributions to EUNAVFORMED’s Operation Sophia, the UK government held that “the EU mainstreams human rights assessment, mitigation and monitoring into all phases of planning, implementation and review of its CDSP missions, for example through the provision of international humanitarian and human rights law training to LCGN and the vetting of trainees.”¹¹⁶ The UK has maintained that such reliance does not detract from the robust risk assessment, mitigation and monitoring that has been conducted, and that DFID has actively engaged with the EU-level processes for the monitoring, analysis and mitigation of risks including in respect of human rights.¹¹⁷ While the UK government has claimed that such arrangements are meant to effectively respond to concerns around the impacts of the use of UK funds, the Independent Commission for Aid Impact’s (ICAI), in a report from March 2017, documented the lack of monitoring of the impact on human rights of EU funded activities:

“we are concerned that the programme delivers migrants back to a system that leads to indiscriminate and indefinite detention and denies refugees their right to asylum. We are also concerned that the responsible departments were not able to provide us with evidence that an Overseas Security and Justice Assistance human rights risks assessment or equivalent was carried out prior to the support to the Libyan coastguard, as required by the government’s own Human Rights Guidance.

[...] Design documents describing aid interventions should describe both the risks and benefits of an intervention, alternatives considered, and an articulation of the risk appetite. While the government informed us that as this was a contribution to an EU project it would be sufficient to rely on EU assessment systems, we were not provided with information about these systems or evidence that the analysis had been fed into project design.

¹¹⁴ Ibid.

¹¹⁵ The UK’s Overseas Security and Justice Assistance Guidance of 2017 and the Partnerships for Poverty Reduction: Rethinking Conditionality Policy Paper of 2005 create obligations to monitor and assess the risks of assistance to serious violations of human rights and, in the case of the latter, to publish assessments of partner governments’ records. The GLD response cites: *R (Shah) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 3891 (Admin) at §§12-16 and §22 and in *R (Nour) v Secretary of State for Defence* [2015] EWHC 2695 (Admin) at §18.

¹¹⁶ Ibid.

¹¹⁷ See on UK government reliance on the EU without “information about these systems or evidence that the analysis had been fed into project design”, para. 4.41.

Similarly, we have not seen evidence that the responsible departments and implementing partners have analysed the economic and political conditions surrounding Libya's system of detention centres in sufficient detail. This is important because there are credible reports that some Libyan state and local officials are involved in people smuggling and trafficking, and in extortion of migrants in detention."

58. Over a year later, the UN OHCHR's December 2018 report on the human rights situation of migrants and refugees in Libya documented similar monitoring failures:

"At the time of writing, there was a lack of independent monitoring of the impact, including on human rights, of activities funded by the European Union in the field of migration, including those aimed at supporting the LCG and addressing the situation of migrants and refugees in DCIM detention centres. According to the European Union, a limited monitoring mechanism has been established for members of the LCG undergoing training through Operation Sophia."¹¹⁸

59. The same position and recommendations were made by the House of Common's Foreign Affairs Committee in October 2019:

"The EU's migration deals with Libya have achieved the short-term political "win" of cutting migrant numbers, but at the cost of fuelling human rights abuses, strengthening armed groups, and undermining stability in the longer term. There is compelling evidence of large-scale arbitrary detention, torture and sexual violence against migrants, and we are concerned by the evidence that UK funding could be contributing to these abuses. We recommend that the UK should put in place robust monitoring and safeguards to ensure that its funding to migration programmes in Libya is not contributing to abuses, as well as to strengthen protection for migrants in Libya, and should press its European partners to do the same. Ensuring close dialogue on migration with European partners after Brexit will help the UK to make this case. In its response to this report, the Government should set out its assessment of how far human rights measures within its assistance to the Libyan Coastguard have improved this force's human rights performance, including actions taken, dates, and quantifiable measures."¹¹⁹

60. At the time of writing, it remains unclear if the EU has adapted any measures to deliver on its position "since day one" that "these conditions [in detention centres] are

¹¹⁸ United Nations Support Mission in Libya/UNHCHR, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 20.12.2018, S. 21 [ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf](https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf).

¹¹⁹ Foreign Aff. Comm., Finding a Diplomatic Route: European Responses to Irregular Migration Inquiry, HC 107 (Nov. 4, 2019), para. 21 <https://publications.parliament.uk/pa/cm201919/cmselect/cmfa/107/107.pdf>.

unacceptable and detention centres should be closed.”¹²⁰ The Commission has held that “[t]he EU has been firmly opposing the institutionalisation and further exploitation of the detention system”, and that “[v]iolations of human rights and violence against civilians, including refugees and migrants, are completely unacceptable and must be denounced in the strongest terms”.¹²¹ This also implies, perhaps somewhat irresponsibly given the position of Libyan authorities in relation to their own acts discussed below, that improvements to that system are possible: “Under international law, the detaining authorities are responsible for providing a humane treatment and meeting the basic needs of the people held. [...] The primary responsibility lies with Libyan authorities to provide the detained refugees and migrants with adequate and quality food while ensuring that conditions in detention centres uphold international agreed standards.”¹²² According to the Commission, “[t]he EU has constantly urged Libyan authorities to put in place mechanisms improving the treatment of the migrants rescued by the Libyan Coast Guard also after their disembarkation to Libya.”¹²³ It is clear, however, that it has chosen not to adopt measures to this effect in the context of its financial support to Italy’s cooperation with Libyan actors.

3.4 Consequent Breaches of EU and International Law

61. The EU and Member States have been placed on notice that their support to Italy’s cooperation with Libya may result in their contribution to serious abuses of the rights of migrants and refugees. In December 2017, the UN Committee Against Torture “expressed deep concern about the lack of assurance that co-operation with the Libyan Coast Guard by Italy would be reviewed in light of serious human rights violations.”¹²⁴ In December 2018, UNSMIL and OHCHR made a similarly “unambiguous call to the EU and its member states to take all necessary action to ensure any such co-operation is consistent with human rights law”.¹²⁵
62. The absence of concrete measures to monitor and review human rights impacts, as well as the actual harmful impacts contributed to by the EU through its support to Italy’s cooperation with Libya, render the EU in breach of its obligations to ensure that EU external actions do not negatively affect human rights in third countries in accordance with obligations enshrined in Articles 3 (5) TEU, and Articles 21 (1) and (3) and 214 of the TFEU. The EU’s external actions are also subject to its obligations under the Charter of Fundamental Rights, which has no jurisdictional clause similar to those

¹²⁰ Recently reiterated by EU spokesperson Maja Kocijancic following the airstrike on Tajoura detention centre: “Our position is very clear. The conditions in which migrants are held in detention centres are unacceptable and detention centres should be closed”; <https://www.middleeasteye.net/news/eu-says-refugee-detention-centres-libya-should-be-closed>.

¹²¹ Commission response, 26 July 2019, Annexed, p 16.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017, para. 22.

¹²⁵ UNSMIL and OHCHR, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, December 2018, pp 58-59.

found in the ECHR and ICCPR, and which attributes responsibility based on competence as opposed to control of territory.¹²⁶

63. The absence of conditions on receipt of EU funds under the IBM programme by Libyan beneficiaries raises additional concerns regarding the EU and Member States' ability to uphold the sanctions regime imposed on Libyan actors by the UN Security Council.¹²⁷ The absence of mutual accountability between Italy as implementing partner and Libyan beneficiaries indicates that the EU and Member States cannot reasonably rely on this informal funding arrangement to guarantee that equipment provided with such funds is not diverted in ways that breach UN sanctions. One indication in this regard comes from the fact that the EU does not know *inter alia* who is on the payroll of the Libyan ministries of interior and defence, due to the lack of command structure and internal accountability.¹²⁸ This may also raise a separate set of concerns under Italy's obligations to uphold its obligations as a State Party to the Arms Trade Treaty, and the EU Common Position on Arms Exports.

4. The Grave and Harmful Human Impacts of EU Funding

64. Beyond the EU's failure to assess, condition and monitor human rights compliance in the context of the IBM programme, there is the fact that the EU's support to Italy's cooperation with Libyan actors, which has the primary objective of enhancing the Libyan coast guard's capacity to increase interceptions and returns to Libya,¹²⁹ contributes to *actual* harmful impacts that such activities have had on individuals; specifically refugees and migrants seeking to access asylum or simply to escape the persecutory conditions to which all migrants that have been intercepted at sea are subject in Libyan detention.
65. The EU's funding of Italian authorities disregards the fact that Italy's cooperation with Libyan actors exposes certain refugees and migrants to life-threatening conditions in Libya, and of entrenching the harmful impacts of Italy's cooperation with Libyan rights-abusers. The implementation of such support without any guarantees

¹²⁶ Article 51 (1) and (2), EU Charter of Fundamental Rights. Moreno-Lax/Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facility, the Effectiveness Model' in Peers et al (eds.), *Commentary on the EU Charter of Fundamental Rights* (Oxford University Press 2014) 1657, at 1679. There is no case law suggesting that domestic acts of the EU with extraterritorial effects are outside the jurisdiction of the Charter. See eg, Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *EJIL* (2014) 1071, at 1076. In *Mugraby* (Case T-292/09), the Court did not question the assumption that the EU may be accountable for a violation of HR by a third party in a third country.

¹²⁷ UN Security Council, Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya <https://www.un.org/securitycouncil/sanctions/1970#current%20sanctions%20measures>.

¹²⁸ House of Commons, Foreign Affairs Committee, Libya: Examination of intervention and collapse and the UK's future policy options Third Report of Session 2016–17, September 2016, paras. 68, 109, and 112 <https://publications.parliament.uk/pa/cm201617/cmselect/cmfa/119/119.pdf>. See also, High-level working group report, op cit.; and International Commission of Jurists July 2019 report, op cit.

¹²⁹ The Italy-Libya MOU aims "to enabl[e] Libyan authorities to conduct operations at sea and disembark people in Libya, with Italy's material, technical and political support, coordination and capacity building. AI and HRW third party intervention in SS case, para 6.

conveniently ignores the abhorrent conditions faced by those intercepted, pushed back, pulled back, or otherwise returned to Libya and placed in detention,¹³⁰ and that return of individuals to Libya is itself, in many cases, unlawful and constitutes an act of *refoulement*.

4.1 Deteriorating Conditions for Refugees and Migrants in Libya

66. The situation for refugees and migrants in Libya has been life-threatening and dire for some time. That it continues to deteriorate is due in part to the unconditional incentives that Libyan authorities have received from their Italian counterparts with support from EU funds.
67. Already in December 2018, the OHCHR reported that “Migrants and refugees are crammed into hangars or other structures unfit for human habitation, characterized by overcrowding, poor hygiene, inadequate lighting and ventilation, and insufficient access to washing and sanitation facilities.”¹³¹ The situation for migrants further deteriorated with the outbreak of hostilities,¹³² which resulted in the death of 53 migrants in Tajoura detention centre on 2 July 2019¹³³ in an attack that the UN said “clearly could constitute a war crime”.¹³⁴ The authorities have continued holding detainees in the detention centre even after the attack.¹³⁵
68. A report by the presidency of the EU council for a “high-level working group on asylum and migration,” which was distributed to ‘key officials’ in September 2019 and leaked to the media in November 2019, concluded that Libyan authorities have persistently failed to improve the situation in the camps or deal with the regular reports of “disappearances” of people picked up by the Libyan coastguard. Further, the report found that “The [Libyan] government’s reluctance to address the problems raises the question of its own involvement”.¹³⁶ EU officials are not allowed onshore to monitor the activities of the Libyan coastguard due to “security challenges”, the report notes,

¹³⁰ UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (20 December 2018) <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>; United Nations Security Council, ‘United Nations Support Mission in Libya, Report of the Secretary-General’ (26 August 2019) UN Doc S/2019/682.

¹³¹ OHCHR, *Desperate and Dangerous* (2018) p 42.

¹³² See ‘UNHCR Update Libya’, 19 July 2019, ReliefWeb https://reliefweb.int/updates?primary_country=140#content; ‘Libya: Tripoli Clashes Situational Report No. 23 As of 10 May 2019 (covering 7 – 10 May)’, 10 May 2019, ReliefWeb <https://reliefweb.int/report/libya/libya-tripoli-clashes-situational-report-no-23-10-may-2019-covering-7-10-may>.

¹³³ See OCHA, ‘Libya: Attack on Tajoura detention center, Humanitarian Update, 3 July 2019 www.humanitarianresponse.info/files/documents/files/humanitarian_update_attack_on_tajoura_dc_03_july_2019.pdf’.

¹³⁴ UN News, ‘Libya detention centre airstrike could amount to a war crime says UN, as Guterres calls for independent investigation’, 3 July 2019 <https://news.un.org/en/story/2019/07/1041792>.

¹³⁵ Noting contradictory reports by the EU: ASGI et al African Commission, pp 16-17.

¹³⁶ Daniel Boffey, ‘Migrants detained in Libya for profit, leaked EU report reveals’, The Guardian, 20 November 2019 https://www.theguardian.com/uk-news/2019/nov/20/migrants-detained-in-libya-for-profit-leaked-eu-report-reveals?CMP=Share_iOSApp_Other.

and finds that “conditions for migrants in Libya have deteriorated severely recently due to security concerns related to the conflict and developments in the smuggling and trafficking dynamics and economy, in addition to the worsening situation in the overcrowded detention facilities”. The detention of migrants has been a “profitable business model”; “Serious cases of corruption and bribery in the centres have been detected”; a number of the detention centres are alleged to have links to human trafficking.¹³⁷

69. **Since the beginning of the cooperation (2016) over 50,000 people have been disembarked in Libya, usually to be taken to detention centres. There were at least 9,225 maritime returnees to Libya in 2019; most of whom we can assume had spent time in Libyan detention, some of whom may still be there, while others may have been re-trafficked and others released.**¹³⁸ Between 2,500-3000 migrants, most of which are maritime returnees, are currently being held in detention centres. This number was between 5,000-6,000 (and by some estimates even higher) during much of the period of cooperation, since 2016. The precise number of detainees is unknown since there is no proper registration system for migrants; only some of which are registered at disembarkation by international agencies, and many go missing from detention centres. These figures do not include individuals held in unofficial centres, which may include individuals intercepted at sea, and where the situation of such individuals cannot be monitored. The total number of detention camps, official and unofficial, is also unknown; available sources give figures for the number of *official* centres that vary from 15 to 37.
70. As of September 2019, 3,700 of these detainees are held in areas where they are at risk of being exposed to hostilities. The detaining authorities have not committed either to provide for their needs or to ensure that they are not mistreated. The life-threatening situation unfolding amid escalating hostilities in detention centres including Zintan, Al-Zawiyah and Tajoura was highlighted in an urgent request for provisional measures filed on 22 July 2019 to the African Commission for Human and Peoples Rights by the Cairo Institute for Human Rights Studies, Libyan Platform, and ASGI and ARCI, the NGOs highlighted.¹³⁹ These people at risk include, according to UNHCR, at least 5,100 refugees in at least 26 Libyan detention facilities run mainly by DCIM. The urgent request filed by the rights groups asks the Commission to order provisional measures on the Libyan Government of National Accord (GNA) to end human rights violations

¹³⁷ Ibid. Many migrants indeed reported that traffickers have access to detention centres and colluded with guards operating there, see Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants* (11 December 2017) p. 60, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

¹³⁸ IOM Libya Update 16-31 December 2019 https://www.iom.int/sites/default/files/situation_reports/file/biweekly_update_16_to_31_december_2019_corrected.pdf.

¹³⁹ CIHRS, ARCI and ASGI, ‘NGO coalition requests African Commission on Human Rights to probe atrocities against migrants in Libya’, 22 July 2019 <https://www.asgi.it/wp-content/uploads/2019/07/Press-Release-23.07.19.pdf>.

against refugees and migrants and to launch an investigation.¹⁴⁰ The request makes reference to extensive investigative reports.¹⁴¹ In Az-Zawiyah (Ossama) detention centre, for instance, UN investigators described conditions of detention as “inhumane,” including chronic severe overcrowding, poor hygiene, lack of access to basic necessities or adequate medical care. Women and children were held in “critical conditions” and “many migrants are frequently beaten, while others, notably women from sub-Saharan countries and Morocco, were sold on the local market as ‘sex slaves’”.¹⁴²

71. The Libyan authorities’ response to evidence that these abuses are endemic and widespread is outright denial that such problems exist. Abdallah Toumia, Commander of the Libyan Coast Guard and Port Security, explained that the Libyan “government is committed to saving the lives of migrants and respecting human rights,” and the allegations that his men committed crimes are falsehoods.
72. Libya’s 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 criminally punish violations of migration provisions with fines and *de facto* indefinite imprisonment. However, it is unclear whether irregular migrants in Libya are detained by virtue of the aforementioned provisions or pursuant to some other administrative, or completely unregulated, regime. Most migrants are ‘retained for processing’ by the Directorate for Combatting Illegal Migration (DCIM) under Libya’s Ministry of Interior, which does not have authority to detain and does not follow a procedure provided in law. A 2019 report by the International Commission of Jurists identifies severe shortcomings in the rule of law in Libya, including rampant impunity for officials at all ranks, especially at detention centres for migrants.¹⁴³ Migrants and refugees do not have access, before or during detention, to any legal process, let alone

¹⁴⁰ “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, 18 December 2018, UNSMIL/OHCHR (<https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf>).

¹⁴¹ MSF, ‘Healthwise it was a disaster in Libya’s Zintan and Gharyan Detention Centres’, 24 June 2019, <https://msf.lu/en/news/healthwise-it-was-a-disaster-in-libyas-zintan-and-gharyan-detention-centres> and UN News, ‘Libya’s migrants and refugees with tuberculosis ‘left to die’ in detention centres’, 7 June 2019 <https://news.un.org/en/story/2019/06/1040011>. Channel 4 News, ‘Starvation, disease and death at Libya migrant detention centre’, 7 June 2019, <https://www.channel4.com/news/starvation-disease-and-death-at-libya-migrant-detention-centre?fbclid=IwAR3kytflXFGPS41J01UtWBWCo9O0DtPPNwraR8Q7ZlQjKetMtMwyDEEsM7A>.

¹⁴² See “Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council”, UN Security Council, 1 June 2017, p. 132 <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>. See also, Amnesty International, ‘Libya’s Dark Web of Collusion’ (2017) p. 30.

¹⁴³ Law No 10 of 2013 punishes with a minimum of five years imprisonment of anyone who “inflicts or orders another person to inflict physical or mental pain on a detainee” (Article 2), but there is no judicial procedure for conviction; in many cases detention is in an unofficial facility; and migrants are in some cases sold to smugglers for work and other, including sexual forms of slavery. International Commission of Jurists, Accountability for Serious Crimes under International Law in Libya: an Assessment of the Criminal Justice System (July 2019) <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

effective remedies to contest the legality of their deprivation of liberty.¹⁴⁴ The same laws that stipulate that migrants should be treated “in a humane manner, keeping their dignity and rights, without assault on their money or assets” provide no oversight or remedy to challenge unlawful detention,¹⁴⁵ and in fact permit the expulsion of migrants from Libya without recourse to asylum procedures.¹⁴⁶

4.2 EU Responsibility for Violations of International Law

73. The EU’s support of Italian-Libyan cooperation has in fact enabled and facilitated the Libyan authorities’ return of boat migrants to Libya, where migrants are at high risk of torture, inhuman and degrading treatment, slavery, forced or compulsory labour, violations of their right to liberty and security, to leave any country, and to an effective remedy. The return of migrants and refugees to Libya, which is deemed “not a safe place for landing operations,”¹⁴⁷ is an act of *refoulement* in light of the consequences it entails for returnees.
74. The “extent and pervasiveness” of Italy’s role in Libya’s migration and SAR system, attests to Italy’s decisive influence over Libyan actors since at least 2017. The Court of Ragusa highlighted in its April 2018 decision that “these capabilities were instrumental to enabling the LCGN [Libyan coast guard and navy] to locate migrant boats at sea and issuing instructions to any ships in the area, including instructions to stay away from migrant boats as the LCGN would approach them.”¹⁴⁸ This extensive influence amounts to strategic overall control. ASGI, GLAN and others, including interveners in the *SS v Italy* case such as the Council of Europe’s Commissioner for Human Rights, Amnesty International, and Human Rights Watch, maintain that Italy exercised jurisdiction under the ECtHR and ICCPR over the violative acts co-perpetrated with Libyan actors.¹⁴⁹
75. By funding activities taking place under Italy’s cooperation with Libya, the EU has in fact contributed to the implementation of a policy of collective expulsion or *refoulement* of refugees, asylum seekers and other migrants to Libya and the prevention of their exit from Libyan territory. This policy, which sets the stage for Italy’s cooperation with Libya, makes the EU and Member States complicit in the system that subjects them to

¹⁴⁴ EU Commission, EU Emergency Trust Fund for Africa, *Action Fiche of the EU Trust Fund to be used for the decision of the Operational Committee* (12 April 2017) p. 5.

¹⁴⁵ Amnesty International, ‘Libya’s Dark Web of Collusion’ (2017).

¹⁴⁶ Article 6, Law No. 19 (2010) on Combating Irregular Migration.

¹⁴⁷ Statement made by Spanish Parliamentary and member of the civil liberties, justice and home affairs committee (LIBE) Juan Fernando López Aguilar: European Parliament, Search and rescue in the Mediterranean (debate), 23 October 2019 https://www.europarl.europa.eu/doceo/document/CRE-9-2019-10-23-INT-3-371-0000_EN.html

¹⁴⁸ HRW and AI third party intervention in SS case, p 5. Tribunale di Ragusa, Ufficio del Giudice per le indagini preliminari, Decreto di rigetto di richiesta di sequestro preventivo, 16 April 2018, <https://bit.ly/34CM9p6>. The decision was confirmed in May, see: Giornale di Sicilia, Il Tribunale del Riesame di Ragusa conferma il dissequestro dell’Ong Open Arms, 17 May 2018.

¹⁴⁹ Ibid, para 7.

indefinite detention and to cruel, inhuman and degrading treatment, torture, forms of modern slavery, and threats to life.

76. The illegality of the dire human consequences brought about by this cooperation have been widely condemned by international and Italian authorities. The UNHCR has called “for the end of migration detention in Libya”¹⁵⁰ even while noting that “new detainees are being brought to the detention centres, after being rescued or intercepted off the coast of Libya, faster than the rate at which people are being evacuated”.¹⁵¹ Whereas Italian courts, such as the Court of Assizes of Milan, affirmed the brutality of the conditions of detention at the Beni Walid detention centre, where some migrants have been held,¹⁵² and highlighted the political consequences of supporting the implementation of these policies by Libyan actors. Drawing similar conclusions, the Court of Appeal of Assize of Agrigento sentenced a Gambian citizen, a member of a criminal organization that controlled and managed the Sabratha camp, to ten years imprisonment for the crime of enslavement for threatening, using violence, and keeping a group of migrants waiting for the journey to Italy in a state of continuous subjugation.¹⁵³
77. Two pending cases before the ECtHR and the UN Human Rights Committee seek to hold Italy to account for the harmful impacts of its cooperation with Libyan actors, which it undertakes with the EU’s financial support. The documentation and allegations made in these cases are indicative both of the severity of the violations resulting from the use of EU funds, and of the manner in which arrangements under the auspices of Italian-Libyan cooperation have evolved with a view to protect Italian authorities from the legal consequences for actions they take through Libyan authorities by enabling and instructing them to pursue such acts; particularly after the European Court of Human Rights’ judgment in the *Hirsi* case which upheld Italy’s responsibility for interception and return of individuals to Libya.

ECtHR, SS et al v Italy

78. The *SS et al* case is an application filed to the European Court of Human Rights on behalf of 22 claimants by lawyers from the organisations ASGI and GLAN, pertaining to incidents documented by Forensic Oceanography, in which the Italian Coast Guard’s coordination with Libyan authorities resulted in the interception and return of migrants

¹⁵⁰ ‘UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change’ 11 July 2019 <https://reliefweb.int/node/3211089>.

¹⁵¹ UNHCR, ‘UNHCR secures release of 96 detainees from Libya’s Zintan detention centre’, 4 June 2019 <https://www.unhcr.org/news/briefing/2019/6/5cf61e4e4/unhcr-secures-release-96-detainees-libyas-zintan-detention-centre.html>.

¹⁵² Corte d’assise di Milano, sent. 10 ottobre 2017 (dep. 1 dicembre 2017), Pres. Ichino, Est. Simi, Imp. Matammud <https://www.penalecontemporaneo.it/d/5976-una-condanna-della-corte-d-assise-di-milano-svela-gli-orrori-dei-centri-di-raccolta-e-transito-dei>.

¹⁵³ The charges were made under Article 600 of Italy’s Criminal Code; ASGI, ‘Riduzione di schiavitù in Libia confermata dalla Corte d’Assise di Agrigento’, 26 June 2019 <https://www.asgi.it/asilo-e-protezione-internazionale/libia-schiavitù-agrigento/>.

to Libya. The case submits that the influence of Italian authorities over the Libyan Coast Guard is sufficient to establish their jurisdiction over and responsibility for the human rights abuses committed by the Libyan authorities during interceptions, and abuses resulting from the return of migrants to Libya which is the very objective of Italian-Libyan cooperation.

79. The application is based on an incident in which the Italian Navy maintained command and control throughout an incident at sea in which the Libyan Coast Guard on board the *Ras Jadir* (a patrol vessel donated by Italy under the terms of the MoU) interfered with the efforts of a humanitarian SAR ship, Sea-Watch 3, to rescue 130 migrants from a sinking dinghy, an action that resulted in the death of at least 20 of them. The interference by the Libyan vessel was partly coordinated from Rome by the Maritime Rescue and Coordination Centre (MRCC) which is managed by the Italian Coast Guard, and by an Italian navy ship, part of the *Mare Sicuro* operation which has operated in Libyan territorial waters facilitating interceptions. After the Libyan Coast Guard ‘pulled back’ the survivors to Libya, they endured detention in inhumane conditions, beatings, extortion, starvation, and rape. Two of the survivors were subsequently ‘sold’ and tortured with electrocution.

80. The case was communicated to Italy in May 2019, and eight interventions including by the Commissioner for Human Rights of the Council of Europe were filed in support of the case.¹⁵⁴

UN HRC, SDG v Italy

81. The *SDG* case is an individual complaint against Italy submitted, with support from GLAN, before the UN Human Rights Committee, in its quasi-judicial capacity under the Additional Protocol to the ICCPR. In November 2018, the claimant was intercepted on the high seas off the coast of Libya by a Panamanian merchant vessel, the *Nivin*, which, following joint instructions of the Italian and Libyan Coast Guards, disembarked him in Libya. Upon return, he was forcibly removed from the vessel, arbitrarily detained and subjected to torture and forced labour. The complaint argues that by violating its responsibility to offer a port of safety, Italy violated its human rights obligations under the International Covenant on Civil and Political Rights. Italy thus had control over the violations of the claimant’s rights during his distress at sea, which triggered events that led to his torture and *refoulement*, arbitrary detention and slavery, and violated his right to leave any country and access an effective remedy.¹⁵⁵

¹⁵⁴ The other organisations and institutions that filed interventions are: Human Rights Watch, Amnesty International, The AIRE Centre, Dutch Refugee Council, European Council on Refugees and Exiles, International Commission of Jurists, Rome Tre University, Turin University.

¹⁵⁵ *SDG v Italy*, Communication to Human Rights Committee, paras. 17 and 58 https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf.

82. The *Nivin* case is representative of the trend towards the externalisation of border control and maritime interdiction through a new modality of delegated containment of migrants, by which private merchant vessels are directed by the MRCC Rome to intercept migrant boats and to direct them to seek instructions from the Libyan Coast Guard on where to disembark survivors, resulting in their return to Libya.¹⁵⁶ The research organization Forensic Architecture has documented other such cases of “privatised push-backs,” where EU coastal States engage commercial ships to return refugees and other persons in need of protection back to an unsafe location like Libya.¹⁵⁷ The complaint argues that Italy and other states are acting in serious breach of their obligations under international law by using private merchant vessels to effectuate *refoulement*.

5. Failure to Ensure Transparency of the Use of EU Funds

83. Article 15 of the Treaty on the Functioning of the European Union (TFEU) establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies. The right to access documents, and its fundamental nature, is further emphasised by Article 42 of the EU Charter of Fundamental Rights, which Article 6(1) of the Treaty on the European Union (TEU) says enjoys “*the same legal value as the Treaties*”. Article 1 of the Public Access Regulation enshrines the principle of the “*widest possible access to documents*”. Article 42 is a corollary of the Article 41 right to good administration which includes “the obligation of the administration to give reasons for its decisions.”¹⁵⁸

84. The EUTF is an emergency fund that benefits from flexibility and adjustments in the allocation of funding and vetting of both implementing partners and their management of EU funds. Obligations under both EU and international law require the EU to answer concerns about the implications and impacts of EU budgetary allocations that contribute to the exacerbation of serious abuses against refugees and migrants, including those resulting from their very return to Libya. The failure to disclose such documents is also a breach of the sound financial management principle of transparency, as explained in the International Aid Transparency Initiative.¹⁵⁹

85. In a context where the EU and Member States is in fact contributing to serious violations, the availability of information about the use of EU taxpayers’ money is of

¹⁵⁶ For SDG it also gave rise to a refugee claim against Libya due to his leadership role in trying to prevent his and others’ return to Libya by the merchant vessel; *SDG v Italy*, Communication to the Human Rights Committee, para. 60 https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf.

¹⁵⁷ Forensic Oceanography, ‘The *Nivin* case: Migrants’ resistance to Italy’s strategy of privatized push-back (2019) p 10 <https://forensic-architecture.org/investigation/nivin>.

¹⁵⁸ The obligation to give reasons comes from Article 296 of the Treaty on the Functioning of the European Union. See case law references: <https://fra.europa.eu/en/eu-charter/article/41-right-good-administration>.

¹⁵⁹ Article 187(2) Financial Regulation 966/2012, and, as of 2 August 2018, Article 234(2) Financial Regulation 2018/1046. See for the IATI: <https://iatistandard.org/en/about/iati-standard/>.

great concern to the public. Publicly accessible information on how the monitoring, evaluation and review of the IBM programme, allows citizens to engage with decision-makers on issues related to the use of EU funds to support the kind of serious abuses being perpetrated by Libyan actors. Yet, without the possibility for civil society to access any part of the ROM reports *inter alia*, it is impossible to guarantee accountability for the EU's use of its funds in this highly sensitive context. The possibility for citizens to guarantee transparency and accountability with regard to the use of their tax money is a pre-condition for the effective exercise of their democratic rights. By refusing to disclose any of the programme's monitoring and review documents, the EU is in violation of the fundamental rights of citizens to scrutinise EU actions.

5.1 Document and Information Requests from the EU

86. The undersigned organisations tried to obtain information about the manner in which the programme in question has been vetted, evaluated and controlled in relation to the EU's financial regulations and external action-based human rights and international law obligations. Both requests for documents and for information were filed by GLAN and ASGI on 3 May 2019, respectively to DG Home, DG Devco, DR Near, EUBAM, EUDEL and Frontex. The requests inquired about the kinds of monitoring and evaluation assessments the EU has conducted of its migration funded programmes in Libya with a focus on their human rights impacts. Specifically, they asked how due diligence processes and adequate guarantees to ensure 'doing no harm' were implemented in the context of such programmes to a) ensure that the EU and Member States do not contribute to serious violations, and b) address the fact that enabling return to Libya may itself constitute a violation of Member States' obligations under EU and international laws.
87. On 15 July 2019, EUBAM responded having identified four documents, of which it granted access to three: the MOU between EUBAM and ICMPD; the Terms of Reference for the Frontex-Italy-EUBAM training action in support of GACS; and the contents of said training programme. Access to the fourth document, the summary evaluation of the joint pilot project from May 2019, was refused on grounds that it would "seriously undermine the decision-making processes regarding the current and future activities of Frontex and Member States" by revealing the negotiating positions of the parties and eroding mutual trust amongst them.
88. DG Near responded that it will process the requests submitted to EUBAM and EUDEL. DG Devco and Home responded by stating that they are not involved in the management of said funds. On 26 July 2019, DG Near responded to the request for information presented in a series of five sets of questions specific to the monitoring, evaluation and review processes and decisions adopted in the course of the implementation of EU-funded programmes in Libya (not limited to the IBM

programme). DG Near officials proceeded to answer the questions in groups (of five), providing 2-3 pages of discussion per set of questions (and thus omitting answers to some crucial questions). The quality of the answers provided was generic. The Commission refused or redacted documents to conceal all information related to monitoring and evaluation. The questions and documents concerning the specific measures adopted, if any, to ensure that the funding does not contribute to serious violations of international law and human rights abuses in line with the EU's obligations in this regard, both under EU financial management laws as well as other EU and international law provisions, as discussed below.

89. On 10 October 2019, DG Near responded to the request for documents indicating that the scope of the request needs to be limited due to the strain it places on its resources. We proceeded to confine the request to documents specific to the two phases of the IBM programme. DG Near's response consisted of a list of 61 documents it was able to reveal, some in heavily redacted form, as well as a list of 65 further documents, which included all the review reports, to which access was rejected. We proceeded to appeal the decision to reject and redact these documents, through a detailed confirmatory application, filed before the Commission by GLAN and ASGI on 30 October 2019. It argued that the Commission failed to take seriously the "*overriding public interest in disclosure*" of said documents and thus ensure that it provides the 'widest possible access' and showing for detailed and specific assessments of each document that justifies the application of exceptions to the principle of disclosure. The Commission responded on 11 February 2020 by disclosing a further set of 68 documents, all of which are so heavily redacted that they do not offer any further substantive insight on the concerns we have raised.

5.2 Information Requests from Italian Authorities

90. The EU is required to ensure that sound financial management rules of EU law are implemented by partners. ASGI and ARCI amongst other organisations and media outlets in Italy have gone to great length to obtain documents and information from the Italian authorities about the activities they have undertaken as part of the IBM programme, and the amounts that they have expended from the funds made available to them by the EU. The limited information made available shows for gaps in expenditure and raises doubts about the ability of Italian authorities to uphold the standards of sound financial management of efficiency, effectiveness and economy in handling EU funds.
91. ASGI filed four requests for information and documents in 2018 and 2019 that cover the IBM programme implemented by the Italian Ministry of the Interior. The Ministry of the Interior was requested to disclose information about the expenditures related to the IBM program. The Ministry of the Interior in relation to phase one indicated that the measures would be published on a website called 'poliziadistato.it'. What was made

public however are the notices addressed to companies, and not the spending decrees that are issued many months before. Information about the use of most of the resources provided to Italy by the EU in the context of the IBM programme has not been disclosed for security reasons. Without such decrees, citizens cannot challenge the use of public funds before domestic courts.

92. The same is true for the second phase of the IBM programme. The Ministry of the Interior replied to the first set of information requests made by ASGI by stating that the spending had not yet started. ASGI later found out that the government's position was that revealing this information would prejudice international relations. ASGI's appeal against the government's decision to refuse disclosure of information about the implementation of the Italy-Libya MoU, including the financial resources used to that effect, before the Supreme Court remains pending.

Conclusions and Requests

93. Italy's cooperation with Libyan actors is intended to effectuate the return of refugees and migrants to Libya as part of the implementation of a policy of containment. The EU and Member States are obligated under EU and international law, to condition funding of Italy's cooperation with Libyan actors on the fulfillment of key demands. It remains unclear whether and how the EU has accounted for and responded to concerns about its complicity in the violations resulting from Italian-Libyan cooperation, at least as a matter of international law.
94. In a June 2019 report, the Commissioner for Human Rights of the Council of Europe maintained that "assistance aimed at enhancing rescue capacity may not be distinguishable from assistance enabling the Libyan Coast Guard to prevent people from fleeing Libya" and is thus "in clear violation of the obligation only to disembark rescued persons in a place of safety."¹⁶⁰ Because of these risks, the Commissioner notes, "the onus was now on member states to show urgently that their support was not contributing to human rights violations, and to suspend this support if they could not do so."¹⁶¹ And yet, she adds, "there has been a remarkable silence over how member states have ensured that they are not contributing, directly or indirectly, to violations of the human rights of refugees, asylum seekers and migrants intercepted by the Libyan Coast Guard."¹⁶² The Commissioner also made reference to this long-standing default by the EU and Member States in her submission to the ECtHR in the context of the *SS et al.* case: "despite her repeated calls and those of other bodies, Council of Europe

¹⁶⁰ Council of Europe Commissioner for Human, 'Rights Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean' (June 2019) p 43 <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>.

¹⁶¹ Ibid, pp 43-44.

¹⁶² Ibid.

member states had not provided evidence of adequate guarantees to ensure that their support to Libya was not contributing to serious human rights violations.”¹⁶³

95. The EU is contributing through the IBM programme to Italian-Libyan actions that violate human rights. The IBM programme is a pillar of the EU’s plan for the management of migration through the central Mediterranean route. This plan transfers responsibility for search and rescue from Italy to the Libyan Coast Guard and restricts the activity of search and rescue NGOs, despite the deficient capacity of the Libyan actors in this regard and the serious abuses that Libyan actors have caused to the rights of refugees and migrants during their maritime interception, including the resultant their arbitrary, indefinite and violative detention upon their return to Libya. Therefore, the Commission is under an urgent obligation to ensure that it is able to rely on Italy to use EU funds for legitimate and lawful purposes in compliance with EU and international laws, the obligations of EU institutions, and the rights of its citizens.
96. In order to address the concerns raised in this complaint and its appended expert opinion and ensure the full implementation of EU law and policy commitments, it is necessary for the EUTFA-funded IBM programme to be subjected to close scrutiny by the Court of Auditors, and for the Court to order a) the IBM programme to be suspended and reassessed; b) the use of EDF and other funds by the EUTFA to be subject to review; and c) the EUTFA framework to be amended to comply with relevant legal requirements in EU law, including by putting in place human rights due diligence procedures.
97. The concerns raised in this complaint with regards to the IBM programme bear out the findings of the 2018 report of the Court of Auditors that the EUTFA lacks focus, risks EU budgetary inefficiency and ineffectiveness, and that its programmes are in need of review.¹⁶⁴
98. Members of the European Parliament have also raised concerns about the EUTFA’s programming, including its misallocation of EU development funds. The fact that these concerns have not been addressed shows the need to ensure democratic control by Parliament in line with its role in approving thematic funds such as the EUTFA.¹⁶⁵ It would be appropriate for the Court of Auditors to work closely with members of the European Parliament in scrutinising the allocation and use of funding through the IBM programme.

¹⁶³ Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, Application No. 21660/18 S.S. and others v. Italy, 15 November 2019, para. 23 <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d>.

¹⁶⁴ EU Court of Auditors, Special report no 32/2018: European Union Emergency Trust Fund for Africa: Flexible but lacking focus, 5 December 2018 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=48342>.

¹⁶⁵ Art. 234 (1) of the 2018 FinReg.



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Legal opinion on the legality of EU funding for the Libyan coastguard

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A. Factual background

For several years, the European Union (EU) and some of its member states, especially Italy, have cooperated with Libyan authorities to reduce the number of migrants who attempt to reach the European Union by crossing the Mediterranean. After Muammar al-Gaddafi's fall in 2011, new modes of cooperation have been introduced which include support for the Libyan Coastguard and its ability to implement a Search and Rescue Zone established in 2017 and recognised by the International Maritime Organization in June 2018. For the purposes of this opinion, two units of the Libyan Coastguard are of relevance, the General Administration for Coastal Security (GACS) under the Ministry of Interior, and the Libyan Coast Guard and Port Security (LCGPS) under the Ministry of Defence.

During 2018 and 2019, the EU has supported the Libyan Coastguard through Italy with approximately 90 million Euro under the project "Support to Integrated border and migration management in Libya" ("the Libya action"). The Libya action has two phases, the first starting implementation in January 2018, the second starting implementation in January 2019. The first action was adopted in July 2017 and comprises 46,3 million Euros, the second approved in December 2018 comprising 45 million Euros.¹ The project is described in two action documents for the two phases. Both documents summarize the action and its objectives, give context and background on the situation in Libya, and go on to describe the objectives, expected results and implementation in more detail.

Intransparent implementation practices and inaccessible documents make it difficult to understand how the 90 million euros are actually spent. Clues can be found in various documents, which however do not give a comprehensive picture. For example, according to the Annual Report 2018, "44 crew members and 9 scuba divers of the coastal guard received practical and theoretical training."² The terms of reference for the cooperation between Frontex, Italy and EUBAM for a Pilot Training Action Program mention that "[t]he EUTF financed project implemented by Italy foresees by 2020 the delivery of repaired vessels to the GACS (3 out of 8 already delivered) as well as the training of additional 88 GACS crew members in addition to the 43 already trained in 2017."³ In its 2018 Annual Report on the European Emergency Trust Fund for Africa, the Commission only lists the various approved actions such as the Libya action without giving any details.⁴ Only slightly more information can be found in the First Monitoring Report on the North of Africa of June 2019.⁵ This lack of transparency regarding relevant facts complicates the legal assessment in this opinion.

The main source of the funding for the Libya action is the North Africa Window of the European Emergency Trust Fund for Africa (EUTFA). In the first phase, the EUTFA contributed 91,2 % of funding to the Libya action, complemented by co-financing from Italy

¹ First Phase: T05-EUTF-NOA-LY-04, Action fiche July 2017: https://ec.europa.eu/europeaid/sites/devco/files/action-document-libya-action-fiche-20170727_en.pdf; Second Phase: T05-EUTF-NOA-LY-07, Action fiche, Dec. 2018: <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf> (all internet links last accessed 19.12.2019).

² *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 41.

³ *Frontex*, Terms of Reference: Joint Frontex-Italy-EUBAM Pilot Training Action in support of the Libyan General Administration for Coastal SEcurity (GACS), 18.07.2019.

⁴ *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 55.

⁵ *EU Trust Fund for Africa*, North of Africa Window: First Monitoring Report, Juni 2019, p. 43 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf_noa_report_web_2019-10-11.pdf).

(4,8 %) and from the EU Internal Security Fund (4 %). The EUTF results from the *Khartoum Process* initiated in 2014 and was launched in November 2015.⁶ Contributions to the EUTF come mainly from the EU (89% in 2018), 11% come from EU member states, Switzerland, Norway and other donors.⁷ At the end of 2018, around 4.2 billion EUR were allocated to the trust fund.⁸ Under the North Africa Window of the EUTF, 659.2 million Euros have been approved for various actions. 30 % of the budget is spent on "improved migration management".⁹

Within the EU framework, the EUTF is a trust fund under the umbrella of the 11th European Development Fund (EDF). The EDF budget is the main source of EU contributions to the EUTF (3.7 billion Euro). Smaller contributions come from funding lines under the Development Cooperation Instrument (DCI), the European Neighbourhood Instrument (ENI) and the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO).¹⁰

The language of European Union funding documents, focused on border management and saving lives¹¹, stands in sharp contrast to the human rights violations in Libya documented by the United Nations High Commissioner for Human Rights and independent non-governmental organizations like Amnesty International and Human Rights Watch.¹² There is a real risk that migrants rescued or apprehended at sea and returned to Libya face detention under conditions that amount to torture and inhuman and degrading treatment, violations of the rights to personal liberty and physical integrity, or forms of modern slavery. The European Commissioner of Human Rights confirmed again in 2019 that indiscriminate returns of migrants at sea to Libya without individualized assessment violate the European Convention of Human Rights, in particular the *non-refoulement* principle based on Art. 3, as the European Court of Human Rights already held in 2012.¹³

⁶ *European Commission*, Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa, 12.11.2015 (ec.europa.eu/trustfundforafrica/sites/eutf/files/original_constitutive_agreement_en_with_signatures.pdf).

⁷ *European Commission*, EUTF for Africa Fact Sheet, 2019, p. 1 (ec.europa.eu/trustfundforafrica/sites/eutf/files/factsheet_eutf_short_22.10.pdf) In more detail: *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, pp. 44–46.

⁸ *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 13.

⁹ *European Commission*, EUTF for Africa Fact Sheet, 2019, pp. 2 f. (ec.europa.eu/trustfundforafrica/sites/eutf/files/factsheet_eutf_short_22.10.pdf).

¹⁰ *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 13.

¹¹ For example: *European Commission*, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 5, 8.

¹² *United Nations Support Mission in Libya/UNHCHR*, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 20.12.2018 (ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf); *AI/HRW*, Written Submissions on Behalf of the Interveners Amnesty International and Human Rights Watch (hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf).

¹³ *European Commissioner for Human Rights*, CommDH(2019)29 -Third Party Intervention SS and others v. Italy_EN, 15.11.2019; European Court of Human Rights, *Hirsi Jamaa et al. v. Italy*, Application no. 27765/09, judgement of 23.2.2012.

B. Legality of the Libya Action

This legal opinion finds that the Libya action is illegal in its current form because it does not meet the applicable requirements imposed by EU law on funding external actions.¹⁴ More specifically, the Libya action is inconsistent with the objectives for which funding is legally permitted under the EDF and related instruments. This inconsistency is not simply a technical issue but a violation of parliamentary authority, and thus a problem of institutional balance and democratic principle within the European multilevel constitutional order. This view is supported by case law of the Court of Justice of the EU.

I. The Libya Action is inconsistent with legally permissible funding objectives under the EDF

The Libya action is inconsistent with the legally permissible objectives of its main funding source, the EDF. The Libya action focuses on border management which makes no contribution to poverty reduction, which is the primary objective of the EDF.

1. Permissible funding objectives under the EDF are limited to poverty reduction

In the regulation which establishes the 11th EDF, the Council has defined and limited the objectives and purposes for which resources from the EDF can be spent. These legal requirements apply to all disbursements from the EDF budget and cannot be circumvented by channeling funds through an EU trust fund such as the EUTF. Hence, to the extent that the Libya action is funded with EDF resources, the action must comply with the funding objectives of the EDF regulation.

The primary objective of the EDF is the reduction and eradication of poverty, Art. 1(2)(a) Regulation 2015/322 ("EDF regulation"). Other objectives according include (Art. 1(2)(b)):

- "(i) fostering sustainable and inclusive economic, social and environmental development;*
- (ii) consolidating and supporting democracy, the rule of law, good governance, human rights*
- and the relevant principles of international law; and*
- (iii) implementing a rights-based approach encompassing all human rights."*

The definition of these funding objectives is not just rhetoric but establishes concrete legal requirements. The Court of Justice has interpreted funding objectives to impose genuine legal limits on how the Commission uses funds designated for development purposes. In the leading case on the matter, brought by the European Parliament (EP) against the Commission, the Court of Justice annulled a Commission decision on funding border management in the Philippines because it did not comply with the funding objectives established in applicable legislation.¹⁵ The Courts judgement emphasizes the constitutional dimension behind the seemingly technical issue of funding objectives: Enforcing compliance with the funding objectives enshrined in legislation ultimately protects parliamentary control and budgetary authority. If the EP consents to allocate funds for a particular purpose enshrined in law, the Commission cannot divert these funds to other purposes and thus frustrate the democratically legitimated parliamentary decision.¹⁶ If member states allocate funds for development purposes, as in the case of the EDF, the

¹⁴ On the general legal framework of EU external assistance, see P. Dann/M. Wortmann, Development Cooperation and Humanitarian Law, in: Hofman et al (eds), Specialized Administrative Law of the EU, Oxford 2018, pp. 128-150.

¹⁵ ECJ, C-403/05, Judgment v. 23.10.2007 para. 64.

¹⁶ On the role of the EP in European development cooperation, see generally P. Dann, The law of development cooperation, 2013, p. 175, 468-9.

same argument applies to the parliaments of the member states, which are part of the EU's democratic legitimacy architecture.¹⁷

2. The Libya action is not within the range of permissible funding objectives of the EDF

To be legal, the Libya action must contribute to at least one permissible funding of objective under the EDF regulation. That is not the case. The objectives and activities described in the action documents for the Libya action do not contribute to poverty reduction nor to any other of the purposes enumerated in the EDF regulation.

Both action documents for the Libya action describe basically the same objective for the funded projects, namely "to develop the overall capacity of the relevant Libyan authorities and strengthen institutional reform in the areas of land and sea border control and surveillance".¹⁸ To achieve this objective, action document for phase one of the project names strengthening of the fleets, setting up of an Interagency National Coordination Centre and a Maritime Rescue Coordination Centre, assistance to Libyan authorities with a view to enabling them to declare a SAR Region, enhancement of territory surveillance capacity.¹⁹ The action document for phase two envisages "delivery and maintenance of vessels, but also [by] supplying communication and rescue equipment, rubber boats and vehicles as well as related technical training."²⁰

None of these principal objectives and activities contributes to poverty reduction. Poverty can be understood as a combination of insufficient income, social exclusion and lack of voice.²¹ Developing the capacity of the Libyan coast guard to establish and enforce a SAR zone in the Mediterranean and return migrants to Libya does not contribute to reducing income poverty, social exclusion and lack of voice. It also does not contribute to any of the other permissible objectives listed in the EDF regulation. It neither fosters economic, social and environmental development, nor does it contribute to democracy, rule of law, good governance, human rights.

In particular, developing the capacity of an enforcement institution like the Libyan coast guard is insufficient to count as a contribution to good governance. In the leading case on Philippine border management, the Court of Justice deemed the strengthening of institutional capacity of border management insufficient as a goal in itself and required it to be "direct connection with its aim of strengthening investment and development."²² While the Court recognized that generally, border management contributes to internal

¹⁷ See especially Art. 10(2), 12 TEU. *I. Cooper*, A ›Virtual Third Chamber‹ for the European Union? National Parliaments after the Treaty of Lisbon, *West European Politics*, 35 (2012) 3, 441–465; *A. Wonka*, Accountability without Politics? The Contribution of Parliaments to Democratic Control of EU Politics in the German Constitutional Court's Lisbon Ruling, in: *A. Fischer-Lescano/C. Joerges/A. Wonka* (eds.), *The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives*, 2010, 55–62.

¹⁸ *European Commission*, Action fiche of the EU Trust Fund to be used for the decisions of the Operational Committee, 27.07.2017, p. 2 (ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en); *European Commission*, Action Document: Support to Integrated border and migration management in Libya - Second phase, p. 2 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf).

¹⁹ *European Commission*, Action fiche of the EU Trust Fund to be used for the decisions of the Operational Committee, 27.07.2017, pp. 9–12 (ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en).

²⁰ *European Commission*, Action Document: Support to Integrated border and migration management in Libya - Second phase, p. 2 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf).

²¹ *P. Dann*, *The law of development cooperation*, 2013, p. 177–180, 226 et seq., with further references.

²² Case C-403/05, Judgment v. 23.10.2007 para. 66.

stability and security of a country, these objectives were not mentioned in the applicable regulation, which rather focused on “the human dimension of development and economic cooperation in a spirit of mutual interest.”²³ This reasoning also applies to the case at hand: The EDF regulation does not name stability and security of partner countries as permissible aims, and even if it did, preventing migrants from crossing the Mediterranean would not contribute to Libya’s stability and security but rather foster the EU’s interest in migration control.

Capacity development for the coast guard also does not consolidate or support to human rights, as required by the EDF regulation. While the action document for phase one lists as a last expected result “evidence of improved human rights protection, and improved human rights standards performance by the Libyan authorities”²⁴, it remains unclear which concrete measures were taken to achieve this result. The action document for phase two states that human rights abuses in Libyan detention centres and the resulting criticism of EU support for Libyan authorities have “influenced the design of this action” but again does not specify how the design takes these problems into account.²⁵ While the second action document reports a “huge increase in rescue capacity” of the Libyan Coastguard, the main concern seems to be the “80 % decrease of total arrivals in Italy”.²⁶ It is also conceivable that the training of the coast guard staff involved some content on human rights, but even if it did, this minor element alone does not suffice to constitute a rights-based approach as required by the EDF-regulation and is by far outweighed by the principal objectives and activities of the Libya action. Simply adding human rights language and minor human rights activities to an otherwise impermissible project does bring it in conformity with the legally permissible funding objectives.

In sum, funding the Libya action with resources from the EDF, channeled via the EUTFa, violates Art. 1(2)(a) and (b) of Regulation 2015/322. If EDF funding for the EUTFa is to continue, the Libya action must be ceased. If the Libya action is to continue, it must be funded from other sources, whose legal bases permit funding the activities in question.

II. The Libya action is not legally permissible under other funding lines currently contributing to the EUTFa

Funding to the EUTFa also comes from sources other than the EDF. These funding lines also establish legally binding funding objectives, typically targeted at long-term development goals. The reasoning concerning the EDF applies, *mutatis mutandis*, to these funding sources. Consequently, funding from these sources for the Libya action is also illegal.

This concerns funds allocated from the Development Cooperation Instrument, a line under the EU general budget. Under Article 2(1)(a) of Regulation No 233/2014, “the primary objective of cooperation under this Regulation is the reduction and, in the long term, the eradication of poverty.” In this regard, the same reasoning applies than under the EDF.

²³ C-403/05, para. 64.

²⁴ *European Commission*, Action fiche of the EU Trust Fund to be used for the decisions of the Operational Committee, 27.07.2017, p. 9 (ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en, 19.12.19).

²⁵ *European Commission*, Action Document: Support to Integrated border and migration management in Libya - Second phase, p. 5 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf, 19.12.19).

²⁶ *European Commission*, Action Document: Support to Integrated border and migration management in Libya - Second phase, p. 2 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf).

Here, the EP has more influence on the financing decisions²⁷, and diverting funds from stated purposes is an affront to the budgetary authority of the EP.

Besides, the EUTFA also receives funds from the European Neighborhood Instrument (ENI).²⁸ Compared to the amounts allocated from the EDF, the ENI is of minor importance.²⁹ In any event, the ENI-Regulation No 232/2014 requires funding to “focus on promoting enhanced political cooperation, deep and sustainable democracy, progressive economic integration and a strengthened partnership with societies between the Union and the partner countries” (Art. 1(1)). While this can include “creating conditions for the better organisation of legal migration” (Art. 1(2)(c)), it is not evident how the Libya action contributes to improving the organisation of legal migration. To the contrary, it is likely that the improved capacity of the Libyan coast guard leads to the indiscriminate prevention of any form of migration, and it does not contribute in any way to offering safe and legal pathways for refugees legally entitled to protection.

C. Inadequacy of the legal framework applicable to the Libya action

The legal framework applicable to the Libya action is inadequate from the perspective of EU financial regulations and primary constitutional law. More specifically, the EUTFA circumvents legal requirements that ensure sound financial management and parliamentary control, and it does not contain adequate safeguards for the protection of human rights of migrants affected by the Libya action.

I. The EUTFA circumvents legal requirements for emergency trust funds that ensure sound financial management and parliamentary control

As an EU Trust Fund, the EUTFA must comply with the legal requirements of the EU Financial Regulations. EUTFA circumvents these requirements and its legal framework lacks clarity and transparency.

1. Legal requirements for EU emergency trust funds

Since the EUTFA was established in 2015, applicable legal requirements result mainly from Art. 187 of Financial Regulation 966/2012 (FinReg 2012). The latest Financial Regulation 2018/1046 (FinReg 2018) – which introduces new procedures and requires parliamentary approval for thematic trust funds in Article 234 – is applicable from 2 August 2018 onward. With respect to contributions from the EDF, these requirements are applicable by virtue of Art. 42 of the EDF-Financial Regulation 215/323.³⁰

Art. 187 FinReg 2012 establishes the following legal requirements for the establishment and management of EU trust funds for external action:

- 1. For emergency, post-emergency or thematic actions, the Commission may create trust funds under an agreement concluded with other donors. The constitutive act of each trust fund shall define the objectives of the trust fund.*
- 2. Union trust funds shall be implemented in accordance with the principles of sound financial management, transparency, proportionality, non-discrimination and equal*

²⁷ Carrera/Den Hertog et al., Oversight and Management of the EU Trust Funds, 2018, p. 46 (europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU(2018)603821_EN.pdf).

²⁸ European Commission, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 13.

²⁹ European Commission, European Emergency Trust Fund for Africa: 2018 Annual Report, Luxembourg 2019, p. 46.

³⁰ Article 42 of Reg. 2015/323 on Union Trust funds reads :“1. Subject to paragraph 2 of this Article, Article 187 of Regulation (EU, Euratom) No 966/2012 shall apply. 2. With regard to Article 187(8) of Regulation (EU, Euratom) No 966/2012, the competent committee shall be the committee referred to in Article 8 of the Internal Agreement.”

treatment, and in accordance with the specific objectives defined in each constitutive act. [...]”

3. Union trust funds shall comply with the following conditions:

... (b) Union trust funds shall bring clear Union political visibility and managerial advantages as well as better Union control of risks and disbursements of the Union and other donors' contributions. They should not be created if they merely duplicate other existing funding channels or similar instruments without providing any additionality.

From these provisions, three legal requirements emerge that stand out as particularly relevant in the present case:

- *a clear and coherent definition of the objectives of the trust fund:* As the Court of Justice held in its leading case on Philippine border management, funding objectives are legal requirements susceptible to judicial review. They are intended to guide funding decisions, to make allocation of funds transparent and predictable, including to the funders and EP, and to serve as yardsticks for judicial review. To be able to fulfil these functions, the objectives of trust funds must be clearly defined and be coherent in themselves. Their function as legal guidance also requires that trust funds must define selection criteria which ensure that funding actions actually contribute to objectives. This requirement is reinforced by the principle of transparency, which requires both clarity of the legal framework and a transparent implementation in practice.
- *clear added value and avoidance of duplication:* The creation of a new, separate trust fund in addition to existing funding instruments increases management cost and complexity. Hence, creation of a new trust fund is only permissible where it has a clearly documented added value and avoids duplication of existing funding instruments.
- *compliance of trust fund objectives with legal requirements of funding sources:* a third requirement that results from the overall legal framework is that trust funds must also comply with the legal requirements of the funding instruments from which it receives its resources. In particular, the EUTFA must comply with the funding objectives of the EDF, which cannot be circumvented by channelling EDF resources through a trust fund.

2. The EUTFA does not meet applicable legal requirements

The legal framework for the EUTFA does not define its objectives clearly and coherently. As a result, it does not demonstrate a clear added value and it conflicts with the funding objectives of the EDF. If the main objective of the EUTFA is to address “root causes” of migration, it largely duplicates existing funding instruments that already address these causes and its added value is doubtful. If the main objective of the EUTFA is to address a short-term migration crisis, it cannot be funded from the EDF, which has long-term developmental objectives.

The objectives of the EUTFA are defined in its two constitutive legal acts, namely Commission Decision C(2015) 7293/1³¹ and the Constitutive Agreement between the European Union and 27 states, including Norway and Switzerland ('the Constitutive Agreement')³². According to the Commission Decision, the overall objective of the Trust

³¹ *European Commission*, C(2015)7293/F1, Commission Decision of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, 20.10.2015.

³² *European Commission*, Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa,

Fund is "to address the crises in the regions of the Sahel and the Lake Chad, the Horn of Africa, and the North of Africa. It will support all aspects of stability and contribute to better migration management as well as addressing the root causes of destabilisation, forced displacement and irregular migration, in particular by promoting resilience, economic and equal opportunities, and security and development." (Article 1(2) of C(2015) 7293/1; cf. also recital 10). According to the Constitutive agreements, the main objectives of the EUTFA are border control and migration management as well as addressing the root causes of destabilisation, forced displacement and irregular migration (Art. 2.1 Constitutive Agreement).

This definition mixes the short-term goal of migration management with the long-term objective of addressing "root causes" of migration. This combination creates several problems and contradictions which inhibit the clarity and coherence of objectives and of the applicable legal framework.

Firstly, if the EUTFA is to address "root causes" of migration, it is not clear why it was set up as an emergency trust fund. The European Court of Auditors (CoA) already pointed out this contradiction in its 2018 evaluation of the EUTFA: "Particularly given that the EUTF for Africa was set up as an 'emergency' trust fund, this begs the question of what was the 'emergency' to which it attempted to respond. The logic was to address the 'root causes of irregular migration and displaced persons', which is inherently a development question, requiring a medium- to long-term outlook. Academic knowledge in this field is quite conclusive, underlining that drivers of migration are complex and that economic development could only reduce migration in the long term, if at all."³³ Indeed, in its response to the CoA the Commission stated that while it "considers that the EUTF may have an indirect impact on illegal border crossings to Europe, along with other EU instruments, [i]ts main drivers are however to support stability, save and protect people, create economic opportunities and legal pathways."³⁴

However, if this is true and if addressing root causes of migration requires long-term instruments, the EUTFA does not have a clearly visible added value but rather duplicates existing funding instruments, especially the EDF. The potential added value of the EUTFA of 'leveraging' additional contributions also is not evident in practice: the Commission has had to make top-up contributions from the EDF/EU budget itself, as Member States' contributions are not as forthcoming as expected.³⁵ If it is true that the nature of the EUTFA as an emergency instrument permits a faster selection of projects to address a crisis in the short-term³⁶, this might qualify as an added value but creates other problems.

Secondly, if the EUTFA's main objective is to address the short-term of effects of a perceived migration emergency, then it contradicts the objectives of its funding sources, namely the EDF. The evaluation report by the EU CoA indicates that the true objective of the EUTFA is not addressing root causes of irregular migration in a long-term sense but

12.11.2015 (ec.europa.eu/trustfundforafrica/sites/euetfa/files/original_constitutive_agreement_en_with_signatures.pdf). The Constitutive Agreement is accompanied by several Annexes, including a Definition of Activities to be financed by the EUTFA (Annex I). According to Article 22 of the Constitutive Agreement, these annexes constitute an integral part of the Agreement.

³³ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 33. See also Hein de Haas, Development and Change 2007, Vol. 38/5, pp 819-841; Bakewell, Third World Quarterly 2008, Vol. 29/7, pp 1341-1358.

³⁴ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 39.

³⁵ *Carrera/Den Hertog et al.*, Oversight and Management of the EU Trust Funds, 2018, p. 44 ([europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU\(2018\)603821_EN.pdf](https://europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU(2018)603821_EN.pdf)). Cf. Recital 10 of the Constitutive Agreement.

³⁶ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 1 See Recital 10 of C(2015) 7293.

rather to reduce the number of migrants passing from Africa to Europe.³⁷ In this vein, recital 3 of the Commission Decision states that the “crisis manifests itself as a growing flood of forced migration”. This view might justify the establishment of the EUTFA as an emergency trust fund that does not duplicate other funding instruments. It however creates problems for the use of funds dedicated to long-term development objectives especially from the EDF. As the Libya action indicates, measures funded by the EUTFA may conflict with the funding objectives of the EDF, by not contributing to poverty reduction and by creating risks for the human rights of migrants returned Libya by the coast guard. At the very least, the legal framework would have to establish clear selection criteria that ensure funds are used for actions in line with the requirements of their source. But such selection criteria are also lacking, as demonstrated in the next point.

Thirdly, the EUTFA does not contain legal rules and procedures that ensure funded actions comply with the combination of short-term and long-term objectives. While trust funds can legally pursue more than one objective, legal problems arise when these objectives are hard to reconcile with each other. These problems can only be avoided if the trust fund has clearly defined selection criteria which ensure that approved measures actually contribute to both goals at the same time. This is not the case, however, in the EUTFA: As the CoA pointed out, the funding objectives are defined too broadly and there are “no documented criteria for selecting project proposals” for the Horn of Africa and North of Africa windows”.³⁸ As a result, the legal framework lacks legal clarity and the funding process remains opaque.³⁹ This lack of clarity and transparency continues in the implementation phase: Key documents are not available or must be requested, and the plethora of information and monitoring systems means there is no single, comprehensive overview of the results achieved by the EUTFA for Africa as a whole.⁴⁰

The lack of legal clarity and transparency also creates problems from a constitutional perspective: it impedes financial and parliamentary control and does not offer standards for judicial review as required by the Court of Justice. Moreover, the overbroad use of emergency language and instruments is misleading and tends to circumvent ordinary mechanisms of parliamentary control and public scrutiny. This becomes particularly evident as the current financial regulation FinReg 2018 requires parliamentary approval for thematic trust funds (but not emergency trust funds), as pointed out above. A trust fund to address root causes of migration is in substance a thematic trust fund, and declaring it an emergency fund does not change this. Hence, under currently applicable legislation, the EUTFA would most likely require parliamentary approval. Even without this new rule, the EUTFA legal framework remains deficient from the constitutional perspective of democratic legitimacy and legal certainty.

In sum, the legal framework of the EUTFA is legally deficient and requires a fundamental overhaul. This overhaul is primarily the task of the European legislator. If the EUTFA is set up again under the new FinReg 2018, it most likely requires parliamentary approval.

II. The EUTFA does not establish adequate human rights safeguards for project-affected people

The EUTFA legal framework is also deficient because it does not establish adequate safeguards for the protection of the human rights of persons affected by the actions it

³⁷ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 5.

³⁸ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 17.

³⁹ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, 10, 12–13. See also *Carrera/Den Hertog et al.*, Oversight and Management of the EU Trust Funds, 2018, p. 41 ([europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU\(2018\)603821_EN.pdf](http://europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU(2018)603821_EN.pdf)).

⁴⁰ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 7.

funds. More specifically, it lacks a transparent and binding framework for human rights due diligence that assess and monitors risks for affected individuals and vulnerable groups, especially migrants returned to Libya by the Libyan coast guard.

1. The EUTFA is legally required to establish a human rights due diligence framework

The EU has legal obligations to protect human rights in its external actions, including in actions funded through the EUTFA. These obligations legally require the EU to integrate a human rights due diligence framework in funding instruments like the EUTFA. While the primary responsibility to respect and protect human rights of refugees and migrants in Libya lies with Libyan authorities⁴¹, the EU must ensure that its funding decisions and their implementation do not contribute to human rights violations by Libyan authorities.

In primary law, the Charter of Fundamental rights obliges all EU organs to respect and protect human rights, including in external action. The Charter specifically protects against the type of violations faced by migrants returned by the Libyan coast guard to Libya, namely against torture and inhuman or degrading treatment (Art. 4) and slavery (Art. 5.1.), and also protects migrants against refoulement in such conditions (Arts. 18, 19). Protection against such violations is not limited to the territory of the member states. The Charter has no jurisdictional clause similar to Art. 1 ECHR or Art. 2 ICCPR, and the language of the Charter is one of competence (see Art. 51 (1), (2)) irrespective of territory.⁴² Besides, Art. 3 (5) and Art. 21 (1) and (3) TEU explicitly establish that the EU is bound to respect international law and required to ensure that EU policies do not negatively affect human rights in third countries. There is no case law suggesting that domestic acts of the EU with extraterritorial effects are outside the jurisdiction of the Charter, and the Court of Justice has not rejected the proposition that the EU can be responsible for non-contractual damage in a third country.⁴³

The Charter also establishes a duty to protect against human rights violations committed by third parties (Art. 6(3)). This implies, *a maiore ad minus*, an obligation not to aid and abet such violations by third parties, especially through financial assistance.⁴⁴ This duty to protect against third-party violations can be fulfilled in various ways, and the competent organs retain a margin of discretion in this regard. This is particularly true in case of violations that occur in the territory of a third state.⁴⁵ The intensity of legal requirements will vary with the degree of control competent EU organs have with respect to the situation, and with the likelihood and severity of the violations in question.

In situations like the Libya action, extraterritorial human rights protection will largely depend on procedural safeguards. There is increasing agreement in legal scholarship and practice that a minimum requirement for external action with possible human rights impacts is the conduct of human rights due diligence, and in particular human rights impact assessments. The obligation to conduct due diligence is established in different areas of

⁴¹ DG NEAR., Response to application for request of information, 26.07.2019, p. 16.

⁴² Moreno-Lax/Costello, The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facility, the Effectiveness Model, in: Peers et al (eds.), *Commentary on the EU Charter of Fundamental Rights*, Oxford 2014, 1657, at 1679.

⁴³ Cf. e.g. Case T-292/09 – *Mugraby*; Case T-73/03 – *Zaoui*; see also L. Bartels, The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects, EJIL (2014) 1071, at 1076; P. Dann, Law of Development Cooperation, 2013, 272-273 with further references; B. Simma et al., Human Rights Considerations in development cooperation activities of the EU, in: Alston (ed.), *The EU and Human Rights*, Oxford 1999, pp. 571-626.

⁴⁴ Case T-512/12 – *Frente Polisario v Council* para. 231.

⁴⁵ Case T-292/09 – *Mugraby*.

international law, which the EU is bound to respect.⁴⁶ The EU already conducts human rights impact assessments in the context of trade agreements and other-trade related measures⁴⁷, and the European Courts as well as the Ombudsman have recognized a legal obligation to do so in cases where a trade agreement may even indirectly encourage the violation of fundamental rights.⁴⁸ If the risk of indirect encouragement through trade is sufficient to trigger an obligation for human rights due diligence, then direct financial support triggers this requirement *a fortiori*.⁴⁹

Secondary law applicable to the EUTFA confirms the requirement that the EU has an obligation to act with due diligence with respect to human rights in partner countries that it supports. The EDF regulation requires that the Union "shall promote [...] a rights-based approach encompassing all human rights, whether civil and political, economic, social and cultural, in order to integrate human rights principles in the implementation of this Regulation [...]" (Article 2(5)(b) Regulation 2015/322). Art. 1(4) generally requires that funding shall comply with the values of "liberty, democracy, the universality and indivisibility of, and respect for, human rights and fundamental freedoms, and the principles of equality and the rule of law". Art. 2 (4) EDF-Regulation states that "[s]upport to partners will be adapted to their development situation and commitment and progress with regard to human rights, democracy, the rule of law and good governance." Similar requirements can be found in the other funding instruments contributing to the EUTFA. Art. 1(4) of the ENI-Regulation⁵⁰, for example, requires that "[f]unding under this regulation shall comply with those values and principles", i.e. liberty, democracy, respect for human rights. These requirements are not just rhetoric but create actual legal obligations. At a minimum, they require EU organs to ensure that its funding does not enable or contribute human rights violations by authorities in partner countries and conduct due diligence to that end.⁵¹

To ensure compliance with the requirements of due diligence, funding decisions must be preceded by a human rights impact assessment. This assessment must objectively evaluate human rights risks and include measures to avoid and mitigate these risks. Project implementation must be accompanied by a system that continuously monitors and evaluates human rights impacts on the ground.⁵² Where there are heightened human rights risks, as in the context of the Libya action, the assessment must be conducted independently and transparently, and its outcomes must be made available to the public. Where the EU concludes a financing agreement with the partner country in accordance

⁴⁶ N. Götzmann (ed), Handbook on human rights impact assessment, 2019; J. Kulesza, Due diligence in international law, 2016; N. McDonald, The role of due diligence in international law, International and Comparative Law Quarterly 68 (2019), 1041. In the context of environment and human rights, see *Inter-American Court of Human Rights*, Advisory Opinion OC 23/17, 7.2.2018, p. 55 et seq. On the EU's obligation to respect international law, see Cases C-366/10 – ATAA; C-162/96 – Racke.

⁴⁷ European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, July 2015, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf.

⁴⁸ Case T-512/12 – *Frente Polisario v Council* para. 231, 241 et seq.; C-266/16, *Western Sahara Campaign UK*, para. 37, 63; Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435, para 47; C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, para. 52. See also *European Ombudsman* (2014), 'Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement', para. 11, <https://www.ombudsman.europa.eu/en/decision/en/64308>

⁴⁹ Dann, Law of Development Cooperation, 2013, 277-278 with further references.

⁵⁰ Regulation (EU) No 232/2014, L 77/27.

⁵¹ P. Dann, Law of Development Cooperation, 2013, 277; Case T-512/12 – *Frente Polisario v Council* para. 225, 231.

⁵² On these requirements, see in detail N. Götzmann (ed), Handbook on human rights impact assessment, 2019. On administrative supervision and independent evaluation, see P. Dann/M. Wortmann, Development Cooperation and Humanitarian Law, in: Hofman et al (eds), Specialized Administrative Law of the EU, Oxford 2018, pp. 145.

with Art. 184 (2) FinReg 2012, the agreement must legally obligate the partner country to respect and protect human rights and not use the funds for contrary purposes. It can even be argued that in situations of heightened risk, the conclusion of such an agreement is required in order to impose concrete legal obligations on partner authorities in respect of human rights risks arising in the context of the project.

2. EUTFA does not have an adequate framework for human rights due diligence

The EUTFA does not have the framework for human rights due diligence required by EU primary and secondary law. In the Constitutive Agreement of the EUTFA there is no provision for a human rights risk assessment framework. While the management of the EUTF is embedded in the internal control system of respectively DG NEAR and DG DEVCO and risk assessment takes place at the level of each action document⁵³, this existing framework and its implementation falls short of the requirements imposed by primary and secondary law. It does not foresee an independent evaluation of human rights risk, remains intransparent and does not publish assessment results. As the UN has found, there is a lack of independent monitoring of the impact, including on human rights, of activities funded by the European Union in the field of migration, including those aimed at supporting the Libyan coast guard.⁵⁴ In response to this criticism, several member states have requested specific risk assessment mechanisms at EUTFA board meetings.⁵⁵

The deficiencies of the EUTFA framework become particularly apparent when compared with the safeguard mechanisms of other donor institutions, especially the World Bank's. The World Bank has a transparent and legally binding system of environmental and social safeguards that is routinely applied to all investment projects. This system requires ex-ante risk assessments and classifications, independent analysis and public consultations for specific high-risk projects, and the inclusion of legally binding commitments to mitigation and monitoring in funding agreements.⁵⁶ These safeguards are far from perfect, but do provide a minimum standard of protection which the EU should not fall behind. For a necessary reform, they provide some indication how a human rights due diligence system that is proportionate to the risks encountered can be designed.

In sum, the EUTFA framework needs a fundamental overhaul also from a human rights perspective. As indicated earlier, this overhaul is primarily the task of the EU legislative organs, but this does not preclude judicial action by individuals whose human rights are negatively affected by actions attributable to EU funding sources from the EUTFA.

D. Summary and conclusion

The Libya action is illegal because it is inconsistent with the objectives for which funding is legally permitted under the EDF and related instruments. This inconsistency also implies a violation of the budgetary authority of the European Parliament, and thus is a problem of institutional balance and democratic principle within the EU's constitutional order. Under present conditions, the Libya action must be ceased. If the Libya action is to continue, it must be funded from sources whose legal bases permit the activities in question.

⁵³ DG NEAR, Response to application for request of information, 26.07.2019, p. 8.

⁵⁴ *United Nations Support Mission in Libya/UNHCHR*, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 20.12.2018, p. 21 ([ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf](https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf)). See also DG NEAR, Response to application for request of information, 26.07.2019, p. 14–17.

⁵⁵ CoA, European Union Emergency Trust Fund for Africa, Luxembourg 2018, p. 16.

⁵⁶ P. Dann/M. Riegner, The World Bank's Environmental and Social Safeguards and the evolution of global order, *Leiden Journal of international law* 32 (2019), 537, with further references.

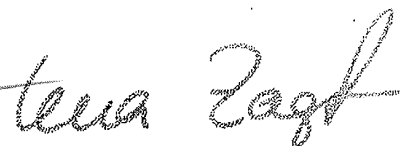
In addition, the legal framework applicable to the Libya action is inadequate from the perspective of EU financial regulations and primary constitutional law. The EUTFA circumvents legal requirements that ensure sound financial management and parliamentary control, and it does not contain adequate safeguards to ensure that the funding does not contribute to the violation of migrants' fundamental rights by Libyan actors. The legal framework of the EUTFA requires a fundamental overhaul that brings it in line with financial requirements and establishes a system of human rights due diligence that ensures adequate assessment, monitoring and mitigation of risks for project affected persons, especially vulnerable groups like migrants returned to Libya by the Libyan coast guard.



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