Master Thesis

_A Crisis in Need of a Permanent Emergency Response_  
On the European Union its Use of Development Aid for Extra-Territorial Migration Control

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INTRODUCTION AND PROBLEM STATEMENT

In response to the ‘migration crisis’\(^1\) of 2015, the EU and its member states declared that they would ‘step up efforts to mainstream migration into their development cooperation’.\(^2\) The main policy effort in this regard was the launch of the ‘EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa’ (EUTF for Africa). This financial instrument has been used to provide ‘flexible, speedy and efficient delivery of funding to contribute to better migration management’.\(^3\) Even though it was presented as a new policy instrument, the EUTF for Africa did not contain of any ‘new’ resources. Instead, the trust fund channelled existing development fund resources to projects that serve migration controlling objectives. The EUTF for Africa marks the first time that previously separated EU funding lines for external relations, home affairs, development cooperation, humanitarian aid and neighbourhood policy are brought together in a single instrument to serve a common purpose: controlling migration flows outside the EU its own territory.\(^4\)

With this thesis, I aim to show that the EUTF for Africa marks a departure from ‘traditional’ EU development aid policy focused on the socio-economic development of recipient countries, to an instrumentalization of development aid for migration control purposes. Equating irregular migration with an ‘emergency’ or ‘crisis’ has allowed the EU to take exceptional measures and create an instrument in which security, migration and development policy could overlap, despite the legal constraints of the respective policy fields. The decision to redirect EU funds from development to ‘migration management’ objectives was not subject to any democratic oversight by the European Parliament. Instead, the European

\(^1\) Several authors hold that politicians have exploited fears and anxieties that have become widespread for the purpose of their own, often nationalist, agendas through ‘crisis-labelling’. Labelling events as a crisis is in turn instrumental to the adoption of emergency or exceptional measures. See: Teun van Dijk, ‘Discourse and Ideology’, in: Discourse studies: A Multidisciplinary Introduction (Sage, 2011); Zygmunt Bauman and Carlo Bordoni. State of crisis (Polity Press, 2014); Katy Long, ‘Imagined threats, manufactured crises and “real” emergencies: the politics of border closure in the face of mass refugee influx’ in Anna Lindley (eds.), Crisis and Migration (Routledge, First Edition, 2014, pp.170-192); Julien Jeandesboz, & Polly Pallister-Wilkins, ‘Crisis, enforcement and control at the EU borders’ in Anna Lindley (eds.), Crisis and Migration. (Routledge, 2014, p. 127).

\(^2\) European Council, Valletta Summit, 11-12 November 2015, Political Declaration, 2015.


Commission and the European Council created their own mandate\textsuperscript{5} on the basis of a ‘need for emergency support’\textsuperscript{6} to address a crisis which ‘manifests itself as a growing flow of forced migration… towards Europe’\textsuperscript{7}. This and other statements press the question whose crisis is being addressed and whether increased border management implemented by local authorities is the appropriate response if people are indeed forced to leave their country.

Scholars have increasingly voiced their concern about the conditionality of development aid and the fact that actions supported by the EUTF for Africa encourage partner countries to intensify measures to stop migration to Europe.\textsuperscript{8} With financial support from the EUTF for Africa, Italy has supported the Libyan Coast Guard to intercept migrants’ boats in the Mediterranean, increase its capacity to tackle smugglers and prevent irregular departures. This has resulted in thousands of migrants and asylum seekers being detained in inhuman conditions inside Libya, a country that has consistently refused to sign or ratify the 1951 Refugee Convention and its 1967 Protocol.\textsuperscript{9} According to the EU Border Assistance Mission Libya (EUBAM), the violations of human rights in the detention centres consist of ‘extreme abuse and mishandling of detainees, including sexual abuse, slavery, forced prostitution, torture and maltreatment’.\textsuperscript{10} These fundamental rights violations have been confirmed by the UN Secretary-General on the United Nations Support Mission in Libya (UNSMIL).\textsuperscript{11} At the same time, the UN Human Rights Commissioner stated that the ‘…increased interventions of the EU and its member states had done nothing so far to reduce the level of abuses suffered by migrants’ and that ‘…the European Union its support for Libya its Coast Guard has resulted in thousands of migrants being detained in “horrific” conditions inside Libya is inhuman’.\textsuperscript{12}

\textsuperscript{6} Idem, p.4
\textsuperscript{7} Idem, p.2
With the establishment of the EUTF for Africa, the EU created a space in which the policy areas of security, migration and development could be governed by a shared strategic framework with shared funding resources. Yet, this new instrument in the EU its external relations did not constitute itself in a legal vacuum. The different policy fields that overlap in the migration-development nexus are governed by different legal frameworks, which all carry different levels of democratic control by the European Parliament. Nevertheless, the instrument its ‘emergency’ character has allowed the EU to step outside these legal frameworks. To clarify the implications that the EUTF for Africa would have posed to established legal instruments, I will examine several hard- and soft law instruments in the field of development and migration and apply them to the EUTF for Africa.

The EU has clear rules, enshrined in the EU treaties and international agreements, for the development aid it delivers: the primary objective of development aid should be poverty reduction and, in the long term, poverty eradication. On the international level, the DAC adopted Official Development Assistance (ODA) as the ‘gold standard’ of foreign aid in 1969. ODA is defined by the OECD Development Assistance Committee (DAC) as government aid that ‘promotes and specifically targets the economic development and welfare of developing countries’. In theory, development aid thus consists of financial resources that are transferred from donor to recipient country in order to reach certain, developmental, objectives of the recipient country. Because the vast majority of the resources in the EUTF for Africa were drawn from established development aid instruments, many scholars and NGO’s have argued that the projects funded under the trust fund must fulfil the same objectives. Nevertheless, in many of the projects funded, it seems as if developmental objectives, rules and procedures have seized to apply. I will illustrate this by analysis of one of the approved projects in Libya which consists of funding and support for the Libyan Coastguard.

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13 Treaty on the Functioning of the European Union (TFEU), Article 208
14 There are 30 members of the Development Assistance Committee (DAC), including the European Union (acting as a full member of the committee) and 20 EU Member States.
After many scholars and NGO’s critiqued the use of development aid for migration purposes (such as the funding of the Libyan Coastguard), new ODA-criteria were established to clarify which projects might or might not be funded.\textsuperscript{17} Although the DAC affirmed that funding for search and rescue operations falls beyond the scope of ODA, other migration related objectives such as border control have recently been included in the ODA-framework. It seems that the legal framework has been ratified to follow the logic underlying the EU its exceptional measure, namely that development aid may be used to control migration. I will argue that this development fits Giorgio Agamben his theoretical analysis of the sovereign its use of the state of exception in order to mainstream rationales underlying ‘temporary’ suspensions of the law into new ‘permanent’ orders. According to Agamben, these new orders are left with rules that might be deemed ‘legal’ (because they are provided for by law), but which have in fact lost all of their ‘lawful’ content because their ‘creator’ (i.e. the sovereign) completely side-lined any rule of law principle on the basis of their ‘exceptional’ status. In the case of the EUTF for Africa, I will argue that it is at the point where migration objectives are mainstreamed in the EU its development policies, that the EU its exceptional measures start to become the rule of a new ‘unlawful’ order.

The use of a financial instead of a legal instrument to control migration has to be understood against the backdrop of the limited success of cooperation efforts on extra-territorial migration control so far.\textsuperscript{18} Because the EU has limited competences vis-à-vis third countries, funding has become crucial for the Commission to induce policy changes. This ‘policy-making through funding’ has been employed by the Commission throughout the migration ‘crisis’ and will probably gain more importance over the upcoming years.\textsuperscript{19} The use of a financial instead of a legal instrument has profound consequences for the rights of migrants and asylum seekers and the adherence of the EU to rule of law principles. Although the establishment of the EUTF for Africa was provided for by law, it is not governed by a body of law under which it can be held accountable. If financial instruments allow states to decide whether they ‘step outside’ the legal framework to obtain their goals, this may lead to a situation where rules and principles concerning the protection of refugees are disregarded.\textsuperscript{20} The main concern here is that

\textsuperscript{17} OECD Development Assistance Committee, ‘Development Co-operation Directorate, Changes to the DAC Statistical Collections to be Implemented in 2019 on 2018 Data’ (February 6th, 2019). Retrieved from:
\textsuperscript{18} Sandra Lavenex & Rahel Kunz, ‘The migration–development nexus in EU external relations’, European Integration, 2016, p.439
\textsuperscript{19} Den Hartog, Money talks: Mapping the funding for EU external migration policy, 2016
arrangements governing inter-state cooperation which affect the rights of irregular migrants or asylum seekers, often do not contain provisions to make sure that policies adhere to existing obligations of states under international law, such as the free access to courts, effective access to education and the right to leave a country. This leaves irregular migrants and asylum seekers without any legal mediations, and thereby dependent upon the arbitrary control of civil servants to safeguard their fundamental rights.

In this thesis, I will argue that it is only because the EU has allowed itself to operate outside the established legal framework that projects aimed to control migration outside the EU its own territory could be financed. Although this ‘temporary’ suspension of the law was provided for by law, I will argue that it is exactly this constructed legality that creates a space in which legal norms lose their content. The interaction between politics and law in which ‘exceptional’ political measures are reinforced and thereby permanently mainstreamed into the law, creates a specific politico-juridical structure based on the sovereign discretion to act more freely in cases of emergency. Although perceived as exceptional measures, these interactions between law and politics can lead to lasting changes in the relationship between migration and development in the EU its external policy and funding. The trust fund has been set up to last until 2020 and will probably be incorporated the next Multiannual Financial Framework (MFF) of the EU for the period 2021-2027. The ability to combine funds from different policy areas to achieve one’s own security objectives could thereby represent a new phase in the EU its external migration and development policy. The Commission even proposed that the budget of the EUTF for Africa will be increased in this new MFF. Although the EUTF for Africa was initially conceived as a temporary emergency instrument, it has the potential to become the new fundamental structure of the legal order governing both migration and development policies.

21 1951 Refugee Convention, Article 16
22 Idem, Article 22
23 Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, Article 2(2)
METHOD AND RESEARCH QUESTION

In this thesis, I will address the following research question:

‘How did the European Commission and European Council create an instrument through which development aid could be used for migration control purposes outside the existing legal framework and what are the consequences of this instrument for the rights of irregular migrants and asylum seekers?’

I will answer this question by addressing multiple sub questions. The first chapter of this thesis will present a brief sketch of the securitization of development aid and the shift from a complementary to an instrumental relation between development and security in EU policy. I will argue that this shift has in part enabled - or at least contributed to the possibilities to - the use of development aid for migration control purposes. Chapter 2 will outline another process that enabled the use of development aid for migration control purposes. In this chapter, I will describe how the frame of migration streams as a ‘crisis’ and the consequent ‘need’ to address this crisis (i.e. control migration outside its own territory), have additionally allowed for the instrumentalization of development aid for migration control purposes. In Chapter 3 I will outline how the EU has used its exceptional powers to create an instrument that could address this question without the need to bare any legal responsibility. I will argue that this is the case because this ‘new’ financial instrument operates outside the law. The theoretical analyses of Carl Schmitt and Giorgio Agamben on the state of exception will be used to substantiate this claim. Following this discussion, Chapter 4 will consist of a legal analysis of the hard- and soft law instruments that should apply to projects funded with development aid resources under normal or status quo circumstances. This analysis will be used to both show the contradictions in the projects funded under the EUTF for Africa and to argue that the ‘exceptional’ situation of using development aid for migration control purposes has already started to be mainstreamed into the legal order whilst the ‘emergency’ instrument was still in force. Finally, in Chapter 5, I will analyse one of the projects funded under the EUTF for Africa to show the (legal) implications for migrants and asylum seekers when their rights while being subject of policy measured that are funded by the EUTF for Africa.
1. THE SECURITY-DEVELOPMENT NEXUS: FROM A COMPLEMENTARY TO AN INSTRUMENTAL APPROACH

In this chapter, I will describe how the relation between security and development policy in the European Union has shifted from an approach in which both fields complemented each other, to an approach in which development aid has become instrumental to achieve the EU its security interests. There are different political processes which have led to this shift from a complementary to an instrumental approach. First, the construction of migration as a pressing crisis or exceptional situation which is threatening to the EU its national security has created the possibility for the EU to press the need for ‘emergency’ or exceptional measures. Second, extra-territorial migration control was needed in order to not let any migrants set foot on European soil and thereby ‘answer’ to the constructed crisis. However, the EU soon came to understand that it was not very attractive for African states to make agreements that merely benefitted the EU. An incentive was needed to condition African countries in their efforts to control their borders. Development aid provided an easy and flexible tool to reward those countries willing to cooperate effectively with the EU on migration management and ensure that there were consequences for those who refuse.26

In this thesis, I will use two separate notions of securitization. The first refers to the construction of migration as a security issue, which has most prominently been studied by the Copenhagen School. The other notion of securitization refers to the instrumentalization of development aid for security purposes, which can concretely be measured by the divergence of resources from development aid policies towards migration control projects. In the following two sections, I will briefly outline these two definitions of securitization before I turn to their realizations in the EU policy context.

1.1 THE COPENHAGEN SCHOOL

To date, the construction of security in international politics has mainly been studied by use of the analytical framework of the Copenhagen School. Scholars writing in this tradition have most prominently used the concept of ‘securitization’ to show how particular issues are constructed as security threats by attaching national security value to them. Securitization here

refers to ‘the process of presenting an issue in security terms’. Securitization takes place the moment when actors address an issue as a security issue and this move is accepted. Through this discourse, security concerns can be prioritized and dealt with through exceptional means that lie outside standard procedures, which I will discuss more extensively in Chapter 4.

In this thesis, the analytical framework provided for by the Copenhagen School provides insight in the use of discourse related to a ‘state of exception’; which can in turn lead to the invocation of policy measures that are not compatible with the existing legal framework. Yet, the Copenhagen School approach also has its limits. Although the Copenhagen School provides powerful insights to study when and how securitized rationales are invoked, it cannot account for the consequences of this discourse: the question whether the securitization of development aid actually leads to a prioritization of the donor its interests remains untouched. In order to study the extent to which foreign aid has in practice been transformed and how, it is important to use a broader notion of the term ‘securitization’, which will be described in the following section.

1.2 Securitization as a Process

Whilst the Copenhagen School scholars base themselves on the rationale that development aid is securitized at the moment that an issue is presented as a security threat, it is also possible to study the securitization of development aid as a continuum. Here, the securitization of development aid is defined as a process in which the donors’ security objectives are increasingly prioritized over the socio-economic development of recipient countries. This process can take different forms and becomes apparent in for example discourse, aid flows and institutional structures. In this thesis, I will use this broader notion of securitization, with a main focus on discourse and aid allocation. Within this broader notion, the Copenhagen School its approach will be used as a supportive theoretical framework to specifically analyse certain changes in discourse.

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30 Stephan Keukeleire & Kolja Raube. ‘The security–development nexus and securitization in the EU’s policies towards developing countries’ (2013), *Cambridge Review of International Affairs*, p.556
To study the actual effects of the increased consideration of security concerns in development policy, it is important to study how much, to whom and why development aid is disbursed and for what type of activities. This thesis will both consist of an analysis of discourse as an analysis of the changes in aid allocations over time, based on the belief that these securitizing practices are interconnected and can all point to the altruistic or egoistic motives of states or organisations.\(^3\) In addition, this approach does not consider securitization as a hegemonic act (i.e. not all development aid has to be securitized at once in order to speak of ‘securitization’), but instead looks at the ways in which development aid is being securitized. The focus of this thesis lies in the extent to which securitization has modified the distribution of aid and the instrumentalization of aid for new purposes.\(^2\) Securitization can therefore simultaneously occur through an allocation of the highest levels of assistance to specific countries, the creation of new financing instruments and an increased used of justifications for aid in terms of national security.

1.3 TOWARDS A NEW SECURITY-DEVELOPMENT NEXUS: THE INSTRUMENTALIZATION OF DEVELOPMENT AID

This section will consist of a brief overview of the changing discourse in the EU its statements on development policy and security. I will argue that since 2015, the relationship between development aid and security in the EU its external policy has shifted from a complementary to an instrumental approach. This shift has both became apparent in EU statements as proposed changes to legal agreements.

In the context of the EU its external policy, the relationship between security and development has been studied by the so-called ‘security–development nexus’.\(^3\) Some authors have argued that the fields of development and security are inherently interconnected and should therefore not be addressed in separate policies. This position builds on the premise that security is primarily directed towards protecting vulnerable people and providing a stable

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\(^3\) Idem, p.3
\(^2\) Brown & Grävingholt, The Securitization of Foreign Aid, p.2
environment in which development projects can be implemented in an effective manner. Where economic and social development strengthen security, enhanced security also creates more opportunities for development. In contrast to this holistic approach, different authors have increasingly pointed to the use of the security-development nexus by governments and international institutions to further their own security interests instead of the interests of the recipient countries. As a consequence, long-term development and poverty reduction is increasingly sacrificed for the security agenda of donor countries. It is this proposition that I aim to affirm with this thesis.

The position of security in relation to the EU its development policy has significantly changed over the past decades. The European Security Strategy (ESS), published in 2003, was the first official EU document to present a more comprehensive approach to security and development. Following this strategy, the EU Commission, Council and Parliament jointly stated in 2006 that ‘security and development are important and complementary aspects of EU external action’. Since this statement, several policy initiatives have brought EU security- and development policy closer together, especially when these measures were directed to the African content. Two of the most notable examples in this regard are the revisions of the Cotonou Partnership Agreement (CPA) by the EU and a group of African, Caribbean and Pacific (ACP) states. This agreement has been the framework for the EU its relations with developing countries since 2000 and outlines the objectives of the European Development Fund (EDF). Whilst the agreement initially only consisted of poverty-reduction policies, its 2005

40 The African, Caribbean and Pacific Group of States (ACP) is an organization created by the Georgetown Agreement in 1975. It is composed of 79 African, Caribbean and Pacific states, with all of them, save Cuba, signatories to the Cotonou Agreement, also known as the ‘ACP-EC Partnership Agreement’ which binds them to the European Union. There are 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific.
revision included anti-terrorist and weapons of mass destruction non-proliferation clauses. Additionally, the second revision of the Cotonou agreement in 2010 included a joint declaration in which the Parties agreed to ‘strengthen and deepen their dialogue and cooperation in the area of migration’ and set out three pillars for cooperation: migration and development, legal migration and illegal migration and border management. This statement already pointed to a wish to strengthen the relationship between development aid policy and migration control, yet concrete steps in this regard did not become apparent until 2015.

Although the EU became more assertive in its promotion of a complementary approach to security and development over time, it did not explicitly recognize migration as an integral and fundamental part of its development policy in Africa until the Valetta Summit of 2015. It was during this summit that the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTF for Africa) was officially launched. This financial instrument would provide for the ‘flexible, speedy and efficient delivery of funding to contribute to better migration management’. Even though it was presented as a new policy measure, the EUTF for Africa did not contain of any ‘new’ resources. Instead, several resources from already existing development funds were pooled together in a new instrument. The vast majority of the money in the trust fund comes from the European Development Fund (EDF), the EU its main instrument for providing development aid to the ACP countries which is governed by the Cotonou Agreement and the rules on Official Development Assistance (ODA). Other (smaller) development funds that were included in the new trust fund are the Development Cooperation Instrument (DCI) and the European Neighbourhood Instrument (ENI).

At the Valetta Summit, the EU and its member states declared that they would ‘step up efforts to mainstream migration into their development cooperation’. This statement already reflects a wish to eventually grant this new temporary instrument a more permanent status. In the political declaration presented at the Valetta Summit, the European and African Heads of

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41 Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, November 4th, 2010.
42 Furness, & Gänzle, The European Union’s development policy: a balancing act between ‘A more comprehensive approach’ and creeping securitization, p.8.
45 European Council, Valetta Summit, 11-12 November 2015, Political Declaration, p.3.
State and Government also declared that they ‘recognize the high degree of interdependence between Africa and Europe as we face common challenges that have an impact on migration’. What is interesting about this statement, is that it does not only refer to irregular migration as a destabilizing factor which might threat the development of African countries, but also as a shared security challenge for which the EU is dependent on the cooperation of the African states. This points to a shift in the security-development nexus from a recognition that the security and development of a recipient country should not always be addressed as independent issues, to the idea that development aid can be used to simultaneously address the security challenges (in this case migration control and the arrival of irregular migrants) of the European Union and foster the development of recipient countries. Whether this also led to a divergence of resources away from socio-economic development to projects aimed at controlling migration outside the EU its own territory, will be examined in the following chapters.

46 Idem, p.2


2. THE INSTRUMENTALIZATION OF DEVELOPMENT AID FOR EXTRA-TERRITORIAL MIGRATION CONTROL

In the following chapter, I will discuss two political processes that preceded the actual divergence of development aid to EU security interests. The allocation of development funds will always involve political choices in terms of the interests, priorities and rationales that the aid is supposed to serve. Therefore, when discussing the instrumentalization of development aid, it is not the question whether aid is being instrumentalised, but for what objectives aid is being instrumentalised. Although these objectives and rationales might differ per project funded by the EUTF for Africa, I propose here that a general trend towards an instrumentalization of development aid for EU security interests (in this case migration control) can be detected. This trend consists of a move away from a solidarity-based ethos in which aid is being allocated to serve the interests of the recipient counties (here defined as socio-economic development and the reduction of poverty) to security considerations that serve the self-interest of the EU and its member states (in this case i.e. enhanced extra-territorial migration control). In the case of the EUTF for Africa, I will argue that the political frame of ‘emergency’ and ‘crisis’ in combination with the Commission its limited competences to control migration outside its own territory, has created opportunities for the redirection of EU funds from development objectives to ‘migration control’ objectives.

2.1 A MIGRATION ‘CRISIS’ IN NEED OF AN EMERGENCY RESPONSE

Presenting particular issues as an existential threat to a certain referent object (for example society, or a state) has been used a key legitimization for states to invoke special or exceptional powers. Labelling a certain issue a ‘crisis’ can give a political issue an exceptional character, which in turn paves the way for new patterns of action that would not be acceptable under normal circumstances.\(^{47}\) The ‘findings’ upon which the exceptional order is found, classify the steps taken as inevitable reactions to a state of affairs of immeasurable proportions.\(^{48}\) In this section, I will argue that the EUTF for Africa could be established though exceptional decisions, without any involvement of the European Parliament, because it has been legitimized by such an ‘emergency’ rationale.


It has to be noted here that labelling migration as a crisis does not lead to a situation in which EU migration policies solely operate through the logics of emergency and exception.49 The securitization of migration is also constructed by bureaucratic practices that have been developed over time, such as the shift in the security-development nexus and the revisions of the Cotonou agreement described earlier. Yet, most scholars acknowledge that these two domains, crisis-labelling and bureaucracy, coexist and sometimes reinforce each other by shaping migration as a single field of EU concern which enlarges the discretion of bureaucrats and professionals.50

Since 2015, the EU and its member states have become more assertive in their efforts to stem migration flows before migrants and asylum seekers reach European external borders. In these efforts, the EU has for a large part focused on the increased influx of irregular migrants and asylum seekers via the route that flows from Sub-Saharan Africa to North Africa and across the Mediterranean Sea to Europe. The possibility to provide for funding through development funds has provided African states with incentives to enhance their border control. But in order to reconfigure these development funds, the EU first needed the discretion to step outside the established legal framework. I will argue here that it is only because the migration flows in 2015 were labelled a ‘crisis’ that this discretion could be acknowledged. After the securitization of migration, the exercise of sovereign discretion was cast as a derivative matter: a question of classification after the fact. The decision of the Commission became the decision of the reasonable person, made on the basis of a generalized ‘threat to the EU’.51 What this threat consisted of, and when it would indeed be addressed, remained to be discovered after the creation of the EUTF for Africa.

On the 27th of May, the Commission put forward its first package of measures to address the migration ‘crisis’. This package consisted of an action plan to address migrant smuggling and a recommendation to EU member states to resettle 20,000 people in need of international protection.52 This recommendation of resettlement has so far not been followed up by the member states. On the 9th of September 2015, the second package of measures designed to

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50 Jeandesboz & Pallister-Wilkins, *Crisis, enforcement and control at the EU borders*, p.115
52 European Commission, ‘European Commission makes progress on Agenda on Migration’ (Press release IP/15/5039, May 27, 2015)
address the crisis was presented. It included the idea of an emergency trust fund that would provide the resources to strengthen the capacity of African countries to manage and control their borders. Formally, the EUTF for Africa was designed as an emergency instrument, to ‘respond to the different dimensions of crisis situations by providing support jointly, flexibly and quickly’,53 while at the same time complementing political dialogue, development cooperation programmes, humanitarian assistance and crisis response assistance.54 The Commission communicated to the European Parliament that ‘the measures described… have been developed as emergency measures in response to a specific crisis’. Yet, the Commission also held that ‘it would be an illusion to believe that this is a short-term need which will not return… the reinforcement of Frontex55 and the setting up of new forms of cooperation with member states should be seen as a level of support and solidarity which is here to stay’.56 These statements reveal a paradox inherent in the EUTF for Africa: on the one hand, it has to respond to an ‘emergency’ situation, whilst on the other hand, it focuses on ‘tackling the root causes of migration’. Thereby, the Commission already asserted that the need for this emergency measure would be a permanent one, since it seems to forecast that the ‘crisis’ is here to stay. This statement not only reveals a wish to permanently use development aid for migration control purposes, but also seems to contradict the idea that the root causes of migration could effectively be addressed in the future.

The dual objective of the EUTF for Africa raises several questions. First of all, it is unclear why existing development instruments with a long-term development rationale, such as the European Development Fund, are insufficient to address the root causes of migration. Second, if there is an additional emergency that needs to be addressed, it is uncertain what ‘emergency’ the Commission has attempted to respond to by establishing the emergency trust fund. Although presented as a level of ‘support and solidarity’, it remains controversial who’s emergency is addressed, and which party supports the other. As migration policy has become an increasingly securitized issue, the externalization of migration control is often framed as being essential for a destination state its own security while simultaneously being a life-saving humanitarian endeavour towards migrants. The statement by the European Commission that ‘controlling

55 i.e. the name of the European Border and Coast Guard Agency
56 European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration’, COM (2015) 240
migration flows beyond a state its external borders is essential in order to protect migrants from the dangers of the otherwise risky journey’,\(^{57}\) is a clear example of discourse that presents migration control as a humanitarian act. The question is whether measures to control migration on other territories, such as funding the Libyan Coastguard, are intended to serve anything more than the interest of destination states in migration containment and control, instead of serving humanitarian purposes.\(^{58}\) By looking at the shift in objectives of the projects funded by the EUTF for Africa, it seems that the emergency was perceived to be at the EU its external borders, along the migration routes, and in the Mediterranean more specifically.\(^{59}\) In the case of the EUTF for Africa, these security actions consist of measures to control migration outside the EU its own territory. The content of these measures and its consequences for migrants and asylum seekers will be discussed in the following section.

2.2 THE NEED FOR EXTRA- TERRITORIAL MIGRATION CONTROL

In reaction to the increased influx of asylum seekers in the EU in 2015\(^{60}\) and the growing securitized perception of migration, the EU and its member states have increasingly been trying to contain and even stem migration flows before they reach their external borders. Different barriers, such as increased border controls and the gathering of entry-exit data, have been established to prevent migrants and asylum seekers from setting foot on EU territory so that obligations of protection are not triggered.\(^{61}\) Yet, for these deterrence policies to succeed, cooperation with third countries is required. These actions of cooperation can be direct, in the sense that the EU is directly involved in the implementation of control mechanisms on the territories of the third state, or indirect, in which case the EU will make means such as funding conditional on the implementation of certain procedures in and by third states.


\(^{59}\) Carrera et al., Oversight and Management of the EU Trust Funds: Democratic Accountability Challenges and Promising Practices, p.21

\(^{60}\) In 2015, 1,255,600 first time asylum seekers applied for international protection in the Member States of the European Union (EU), a number more than double that of the previous year. Retrieved from: https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 (Eurostat, 2016).

Providing for funding and training of the Libyan Coastguard is an example of an indirect deterrence measure. The rationale behind the funding of a deterrence mechanism is that, as long as asylum seekers do not arrive at the EU its external borders and assistance is indirect, there is no obligation under international law to consider the merits of their claim and assess their admissibility for protection in the European Union. *Non-refoulement*, which is considered the most important obligation of states that are signatories of the 1951 Refugee Convention, prohibits states from returning a refugee to territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.\(^{62}\) Moreover, the *non-refoulement* obligation prohibits states from returning any person to a state where he or she would be exposed to the danger of torture or cruel, inhuman and degrading treatment or punishment. To fulfil these obligations, it is required of states that they provide access to screening and examination of any refugee or asylum claim.\(^{63}\) Yet, all of these obligations are dependent on the control over a person or territory.\(^{64}\) As long as the EU does not have direct control over the concerned migrants or refugees (which it would have if they reach the EU its territorial waters), the EU does not incur any legal responsibility for possible human rights violations inflicted by for example the Libyan Coastguard. So far, providing assistance (in terms of financing) to actions that could lead to these violations is not a direct enough link to actually hold the EU responsible.\(^{65}\)

Funding is of particular relevance for the Commission in the areas of borders, asylum and migration, where EU competences are limited and difficult to exercise.\(^{66}\) In the context of the EU its external migration policy in Africa, the European Commission has only reached one legally binding formal readmission agreement with a sub-Saharan African country: Cape Verde.

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\(^{62}\) 1951 Refugee Convention, Article 31(1)
\(^{63}\) This requirement applies irrespective of the fact that not all migrants and asylum seekers entering a state may ultimately be determined to require international protection. See: 1948 Universal Declaration of Human Rights, Article 14.
\(^{64}\) The territorial scope of human rights treaties and the concept of state jurisdiction have been examined by several supervisory bodies of international and regional human rights treaties such as the United Nations Human Rights Committee (OHCHR), the Inter-American Commission on Human Rights (IACHR) and the European Court of Human Rights (ECtHR). The main criteria employed by these bodies are factual control or *de facto* jurisdiction (over territory or person). See: Loizidou v Turkey (1995) ECtHR, 15318/89; Lopez Burgos v. Uruguay (1981), UNHRC, 52/1979; Hirsi Jamaa and Others v. Italy (2012), ECtHR, 27765/09.
\(^{65}\) In the case of Hirsi Jamaa and Others v. Italy, the ECtHR asserted that state jurisdiction under international law is ‘essentially territorial’ and that only in exceptional cases, the Court has accepted that ‘acts of the contracting states performed, or producing effects, outside their territories’ can constitute an exercise of jurisdiction by them.
\(^{66}\) Den Hartog, *Money talks: Mapping the funding for EU external migration policy*, p.1
in 2013. The Commission started negotiations with Morocco (2000), Algeria (2002), and Nigeria (2016), but here agreements have never been concluded.\textsuperscript{67} The Commission has stated that ‘the migration crisis in the Mediterranean… has also revealed much about the structural limitations of EU migration policy and the tools at its disposal’.\textsuperscript{68} The gradual shift towards informal patterns of cooperation on migration control, return policies and migration management has become attractive because of its invisibility, flexibility and adaptability to security concerns.\textsuperscript{69} As ‘innovative and sophisticated tools’, they are more flexible, less time consuming in terms of democratic processes (because formal internal procedures do not have to be followed) and less strict than formal agreements. In sum, alongside the prioritisation of security over developmental objectives, the operability of the cooperation on migration related issues has been prioritised over its formalisation and legal certainty.\textsuperscript{70}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure.png}
\caption{Figure 1: Migration routes to Europe.}
\end{figure}


\textsuperscript{68} European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration’, COM (2015) 240

\textsuperscript{69} Jean-Pierre Cassarino, ‘Informalising readmission agreements in the EU neighbourhood’ (2007), \textit{The International Spectator}, p.179

\textsuperscript{70} Idem, p.192.
3. THE EUTF FOR AFRICA: A TEMPORARY CRISIS IN NEED OF A PERMANENT EMERGENCY RESPONSE

In the previous chapters I have discussed the processes that led to the possibility for the Commission to use its exceptional powers and divergence development aid to migration control purposes. Yet, as previously mentioned, these political processes did not constitute themselves in a legal vacuum. In order for the Commission to exclude all the legal provisions that normally apply to the development funds and actions, it had to include these funds in an emergency instrument. It is through the political and legal use of the ‘state of exception’, that what would ex ante have been considered unlawful, has been legalized. In this chapter I will analyse some of the writings of Carl Schmitt and Giorgio Agamben on the sovereign its use of the state of exception in order to better understand the politico-juridical structure underlying the EUTF for Africa. I will compare the differences in their positions on the legitimate use of the state of exception in order to show how the state of exception creates the possibility to create a new, unlawful order.

3.1 CARL SCHMITT: SOVEREIGN POWER THE STATE OF EXCEPTION

The relations between sovereign power and appeals to exception, emergency and crisis-labelling have been subject to the studies of many scholars.\(^{71}\) Among them, Carl Schmitt was one of the first to conceptualize the state of exception in legal theory. In his work, Schmitt studied what he took to be the weakness of the modern liberal, parliamentary state as a form of political organization. He joined the Nazi party in 1933 and published several works, some of them anti-Semitic, in which he explicitly defended the politics of the Nazi regime.\(^{72}\) Although these facts are too important not to be mentioned here, I still believe that political theorist can profit intellectually from critically evaluating Schmitt his work.

Schmitt has conceptualized the state of exception as the sovereign its ability to transcend the rule of law in the name of the public good. It is the sovereign, ‘he who decides on the exception’\(^{73}\), who has the power to unite the legal and the non-legal by means of an extra-legal

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\(^{72}\) Gopal Balakrishnan, The enemy: an intellectual portrait of Carl Schmitt (Verso, 2000)

\(^{73}\) Carl Schmitt, Politische Theologie: Vier Kapitel Zur Lehre von der Souveränität (München Und Leipzig, 1922)
decision. With this, Schmitt means that the sovereign has the discretion to temporally suspend the law (the non-legal), because this is provided for by law (the legal). According to Schmitt, it is because the law cannot execute itself, that there has to be a sovereign designated with the task of defending the legal order in times of crisis. In other words: Schmitt believes that there are situations where the state, in order to survive, must infringe its own rules. To make sure that the existing constitution is not completely suspended, but merely abrogated (the legal), this decision of lawlessness has to be legalized: every government must provide a legal basis for the sovereign to govern in times where it has to guarantee its own existence.

Although a crisis may compel the sovereign to move beyond existing norms or even suspend part of these norms temporarily, according to Schmitt, the sovereign remains to work within the legal framework. Schmitt referred to the state of exception as a delimited space not subject to law, which is still clearly embarked in the legal order. This embarkment in the legal order consists of a legal basis which provides for the possibility to derogate from the existing legal framework. In other words: it is law used to legally suspend other law. With this proposition, Schmitt tries to include the state of exception in the juridicial sphere. This sphere is a space where laws continue to be made and applied, yet in a non-democratic manner. The sovereign thus has the power to include anomic in the legal realm by virtue of its power to transcend the rule of law. This way, Schmitt aims to create a legal vacuum where, even when the law itself is suspended, the juridicial order is preserved.

According to Schmitt his theory of the state of exception and sovereign power, the EUTF for Africa would represent a truly exceptional phenomenon within the EU legal order. With truly exceptional, I mean that Schmitt would not see it as structure that has the potential to replace the juridicial order, but instead as a clearly embarked area within this juridicial order. In contrast to Schmitt, I believe that the EUTF for Africa is less an outcome of the law its suspension than of elaborate regulatory efforts by a range of legal authorities to transform the law in a flexible and speedy manner. The fact that migration objectives are being mainstreamed into development policy, proves that there is no return to the ‘normal’ order, but a wish to transform the law in a non-democratic manner. In other words: I believe that the Commission (i.e. the sovereign) did not enforce the state of exception to protect the normal order, but instead used this politico-juridicial structure to mainstream the exception into the normal order. It is exactly the EUTF for Africa through which a space of lawlessness has become ‘legalized’.

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74 Schmitt, Politische Theologie, p.13
75 Idem, p.10
which in turn made it possible to create a space where no legal mediations for migrants and asylum seekers exist. I will further discuss this proposition on the hand of Giorgio Agamben his analysis of the state of exception.

3.2 GIORGIO AGAMBEN: LEGALIZING LAWLESSNESS, FROM EXCEPTION TO RULE

The theoretical analysis of the ‘state of exception’ was further developed by the Italian philosopher Giorgio Agamben. Departing from Schmitt his conception of the sovereign as ‘he who decides on the exception’, Agamben criticizes Schmitt for his interpretation of the state of exception as a delimited space in which the law is superseded while the juridical order is preserved. For Agamben, the state of exception is not included in-, but alien to the juridical sphere. It is not a ‘state of law’, as held by Schmitt, but rather a ‘space without law’.

In the analysis of Schmitt, the state of exception extends or completes the sovereign its necessary powers. There are ‘higher law’ that have to be protected by the sovereign and for which he may consequently suspend secondary laws. Agamben contests that the use of such powers are legitimate to preserve the law. On his reading, Schmitt his theory of the state of exception is a legal structure designed to domesticate the very possibility of non-state (or pure) violence, and thereby privilege sovereign violence at all costs.

Agamben holds that Schmitt his attempt to unite the legal and the non-legal by reinserting a legal vacuum into the legal order is paradoxal. It is by virtue of a sovereign declaration of a state of exception that an extra-legal decision becomes lawful. According to Agamben, this extra-legal decision does not lose its ‘void’ legal character by the mere creation of new law. The state of exception consequently represents a ‘space without law’, it is a structure that completely empties the law of its content and can and should therefore not be inscribed in the juridical context. Thus, where for Schmitt, the sovereign who decides on the state of exception still operates within the legal order, Agamben holds that the power that a government acquires over others through the state of exception makes that it can operate outside the law. In the case of the EUTF for Africa, this means that the fact that the decision to establish

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76 Giorgio Agamben, State of Exception, p.50-51.
77 For Schmitt, the acts of the sovereign are in each case characterized by repeated references to some higher source of competence and direction. Schmitt his analysis rests on the assumption that there is a pre-determined programme or a ‘higher’ law to be defended, for which ‘secondary’ laws may be suspended. See: Fleur Johns, ‘Guantanamo Bay and the Annihilation of the Exception’ (2005), European Journal of International Law, p.630.
78 Humphreys, Legalizing lawlessness: On Giorgio Agamben’s state of exception, 2006.
79 Agamben, State of Exception, p.50
an emergency trust fund was provided for by law, does not make the projects funded under the EUTF for Africa lawful.

Where Schmitt sees the state of exception as a *temporally* limited space which is clearly embarked, Agamben investigates how the suspension or transformation of law within a ‘state of emergency’ or crisis has the tendency to become the new permanent order. The state of exception is thus not just a temporary suspension of law; it is that temporary suspension of the law that is revealed to constitute the *fundamental structure* of the legal system itself.\footnote{Agamben, *State of Exception*, p.59} According to Agamben, these realities should not be deemed legal because they are governed by the sovereign its judicial power in emergency situations. If this would be the case, a paradigm is created which allows for ‘expansionary legalism’: the transformation of the law through the creation of law with disregard for the separation of powers.

In sum, the main difference between the two theoretical analyses of the state of exception outlined above is that where Schmitt sees the state of emergency as an exception to the rule, Agamben stresses that the exception has the tendency to become the rule (i.e. the structure of the new order). In the following paragraphs, I aim to show how the EUTF for Africa became an exception to the normal order. Although it remains to be seen if the use of development aid for migration control purposes by the EU will be prolonged after 2020, I will already aim to show in Chapter 4 how the rationale underlying the EUTF for Africa has already been integrated in ODA guidelines. I believe that this shows that the state of exception was not used by the EU to preserve the law (as held by Schmitt), but to transform the law outside the legal order. Consequently, the EUTF for Africa now starts to represent a space in which the rule of law ceased to exist. In addition, I will argue on the hand of the hard- and soft law instruments that would normally apply to development aid that it is precisely this extra-legal space that has allowed the EU to fund projects aimed at controlling borders. If the EU would have acted within the legal paradigm, there would have been too many legal restrictions on development aid to actually use it to for example fund the Libyan Coastguard (which will be discussed in Chapter 5). I believe that this reveals how the invocation of the state of exception was not an inevitable consequence of the ‘migration crisis’, but rather a constructed extra-legal space which allowed the Commission and the Council to induce policy changes in third countries without having to bear legal responsibility for its potential consequences for the human rights of migrants and asylum seekers.
3.3 Exceptional Powers at Work: A New Migration-Development Nexus in the EUTF for Africa

In this thesis, I have so far argued that the political context of ‘emergency’ and ‘crisis’ in combination with the need of the Commission to find new instruments to cooperate with third countries, has created the possibility for the Commission to redirect EU funds away from development objectives to migration control projects. The instrumentalization of EU development funding for migration control could only take place because of this political context combined with the juridicial structure of the state of exception described in the previous section. The concrete result of this politico-juridicial context is the EUTF for Africa: a financial instrument that is able to redirect development funds subject to ODA-criteria to projects that aim to establish stricter border controls, extra capacity for ‘entry-exit’ data management or equipment for coast guards.

In theory, the EUTF for Africa should operate along four strategic priorities: greater economic and employment opportunities, strengthening of resilience of communities, improved migration management in countries or origin, transit and destination and improved governance and conflict prevention.81 The first two of these priorities combine classic aspects of development cooperation and humanitarian aid. Alongside emergency responses such as food aid, they also encompass long-term measures to improve the living conditions of refugees, internally displaced persons and other vulnerable groups.82 The third strategic goal of the EUTF for Africa, improving migration management, serves as a catch-all term for projects that are aimed at enhancing security management such as border protection. These components can overlap to a certain extent with the fourth strategic objective (improving governance and prevent conflict), yet the funds provided for migration management in general have a more exclusive focus on migration control.83

Although the EUTF for Africa was established as an emergency fund, it was set up to last from 2015 till 2020. Many authors have questioned what the EUTF might say about the

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82 Kipp, From exception to rule: the EU Trust Fund for Africa, p.17.
future direction of EU development- and migration cooperation. More specifically, it is suggested that the EUTF more closely links development aid to EU interests and makes aid conditional to promote these interests. The contradiction between EU interests and development objectives is also visible in the division within European institutions between migration and development. Where the Directorate General for Migration and Home Affairs (DG HOME) has an agenda to push on return and readmission in its external policy, the Directorate General for International Cooperation and Development (DG DEVCO) is more concerned with ensuring balance among the different goals of the EUTF for Africa and its compliance with ODA-criteria.\(^{84}\)

This also becomes apparent in the two different strategies that the EUTF for Africa is supposed to serve. On the one hand, the EU has committed itself to the UN 2030 Agenda for Sustainable Development, which focuses on issues such as good governance, the rule of law and peaceful societies. This agenda is furthermore based on shared responsibility, mutual accountability and engagement by all, principles that are also reflected in the Cotonou agreement. On the other hand, the EUTF serves to tackle the ‘root causes of irregular migration’ and ‘improve migration management in countries of origin, transit and destination’. These goals more clearly align with the objectives outlined in the EU its Migration Partnership Framework, which aims to ‘mobilise the instruments, resources and influence of both the EU and its member states to establish cooperation with partner countries in order to sustainably manage migration flows’.\(^{85}\) The different rules and principles embedded in these different hard- and soft law instruments will be further discussed in Chapter 4.

3.3.1 THE ALLOCATION OF FUNDS – A NEW DEVELOPMENT APPROACH CONDITIONED ON MIGRATION MANAGEMENT?

To allow for a better understanding of the consequences of the EUTF for Africa, it is important to see how the allocation of development aid has changed since 2015. Before the materialization of the EUTF for Africa, the only EU development aid directly used for external migration policy was included in the Global Public Goods and Challenges (GPGC) programme. The GPGC was

\(^{84}\) Castillejo, The European Union Trust Fund for Africa: a glimpse of the future for EU development Cooperation, p.7.

part of the Development Cooperation Instrument (DCI), which is now for a large part transferred to the EUTF for Africa. The GPGC programme was initially set for the 2014-2020 period and the approved budget for projects in relation to migration and asylum consisted of approximately €344 million.\textsuperscript{86} The European Development Fund (EDF) also existed at this time, yet it did not consist of any thematic programmes focusing on migration.

By comparing the amount of funding channelled towards migration related projects prior to- and after 2015, it becomes clear that an increased amount of development aid is directly spent on the strategic objective of migration management. The pooling of different development funds in the EUTF for Africa makes it difficult to make an exact statement of the percentage of development aid spend on migration programmes compared to the initial 2014-2020 budget, in part because some of its projects have been continued under the new trust fund. What can be stated, however, is that there has been a major increase in the budget that is directly and exclusively spent for migration management, especially compared to other development objectives. Where under the Global Public Goods and Challenges programme Migration and Asylum amounts to 7\% of its total budget,\textsuperscript{87} the strategic objective of migration management under the EUTF for Africa amounts to 27\% of its budget.\textsuperscript{88}

When looking at the types of projects that are funded per region, it becomes clear that addressing the socio-economic development of recipient countries are prevalent in migrants’ countries of origin. This is clearly demonstrated by the allocation of EUTF funds to the six participating West African states (as the source of half of all the arrivals registered in Italy in 2016 and 2017): Côte d’Ivoire, Gambia, Guinea, Mali, Nigeria and Senegal. In 2018, 42\% of the funds was spent on employment programmes, 18\% on strengthening resilience, 21\% on migration management and 19\% on improving governance and preventing conflict. This contrasts with the distribution in transit countries\textsuperscript{89} like Burkina Faso, Chad, Djibouti, Libya, Mauritania and Niger, where the largest share goes to migration management.


\textsuperscript{87} The total budget of the GPGC budget amounted 4.9 billion euros, of which 344 million was reserved for the thematic programme on Migration and Asylum, See: European Commission, Directorate General International Cooperation and Development, ‘Programme on Global Public Goods and Challenges 2014-2020’ (Table p.30, 2014)


\textsuperscript{89} i.e. countries through which migratory flows (regular or irregular) move.
(35 percent), followed by programmes for improving governance and preventing conflict (25 percent), promoting employment (22 percent), and strengthening resilience (17 percent). It thus seems that the allocation of funds is based on the migratory ‘status’ of a country in relation to the EU, instead of the specific needs of the entire population of a recipient country.

In sum, the divergence of resources from development to migration control objectives becomes visible in the total amount spent on migration related projects and the rationales underlying the allocations of resources. Apart from the changes in budget allocation, it is important to note that the legal nature of the EUTF for Africa has direct consequences for the obligations of states vis-à-vis migrants and asylum seekers. The move from hard- and soft law to a financial instrument to induce policy changes will be discussed in the following chapter.

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90 Kipp, From exception to rule: the EU Trust Fund for Africa, p.17
4. THE LEGAL FRAMEWORK GOVERNING THE EUTF FOR AFRICA: FROM HARD LAW, TO SOFT LAW, TO A STEP OUTSIDE THE LAW?

In the following paragraphs, I will argue that it is the particular political-juridical structure of the EUTF for Africa that made it possible to exclude all the legal provisions that should normally apply to those funds and actions that are now included in the ‘state of exception’ instrument. I will do this by describing the legal provisions that should normally apply to development aid and contrast this in Chapter 5 with an example of a project funded by the EUTF for Africa. The suspension of rules on development aid and the move away from this legal status quo seems to be legitimized on the basis of its temporality (it is an ‘emergency’ measure). Yet, it starts to become clear that this arrangement outside the ‘normal’ state of law, the state of exception, has started to become the new rule. This becomes apparent in the new ODA-criteria, which have recently been amended to include migration related purposes.

In this legal analysis, I will discuss both legally binding (hard law), non-legally binding commitments (soft law) as the EUTF for Africa (a financial instrument). By showing the different legal commitments under different instruments, I aim to make the additional argument that with the establishment of the EUTF for Africa, the EU is not only moving away from legally binding commitments (hard law), to non-legally binding commitments (soft law), but in fact moves to a space in which it is unclear to whom the EU owes any commitment at all (the financial instrument).

4.1 LEGALLY BINDING INSTRUMENTS

In principle, international actors are free to choose their own means of committing themselves and in establishing the legal nature of an instrument. This has been affirmed by the Court of Justice of the EU, which is of the opinion that the intention of the parties to an agreement ‘must in principle be the decisive criterion’.91 There are several instruments that can be used by the EU to carry out its external action in the field of migration. Here, I will focus on those instruments that are adopted in the international order (in contrast to the EU its internal order). These instruments can either be legally binding (hard law) or they may be committing in other ways (soft law). Many authors have addressed the ‘transformation’ or ‘informalisation’ from hard to soft law.92 This transformation manifests itself in situations where the EU opts for

91 France v. Commission (2004), Court of Justice, Case C-233/02, para 42
92 See: Kal Raustiala, ‘Form and substance in international agreements’ (2005), American Journal of International
arrangements with third states which do not include any legal commitments. Although these soft law or ‘political’ arrangements carry no legal obligations, they might still have a direct effect on the rights of migrants and asylum seekers (as discussed in Chapter 3(2)).

I will argue that with the creation of the EUTF for Africa, an instrument has come to the fore that cannot simply be described as either a hard- or soft law instrument. It is an instrument that, by virtue of its legal basis and through a configuration of already existing development funds, created a space in which none of the ‘normal’ soft- or hard law instruments or procedures seem to apply. This way, the EU did not only move from hard to soft law instruments, but it actually allowed itself to ‘step outside’ the legal framework. The main difference between soft law instruments and financial instruments is that where soft law arrangements still carry political obligations between two parties, under the EUTF for Africa it seems that the EU makes the decisions whilst the (legal) responsibility for the implementation of these actions lies with the authorities in third countries.

4.1.1 THE COTONOU AGREEMENT VS. THE CONSTITUTIVE AGREEMENT OF THE EUTF FOR AFRICA

All of the EU its development instruments are established under the framework of the ACP-EU Partnership Agreement, also known as the Cotonou Agreement, which was signed in 2000 for a period of 20 years.93 This agreement sets out the general principles that should guide the objectives of development cooperation, such as the equal status of the countries that provide and receive development aid and the right of the ACP countries to determine their own development policies. Article 1 of the Cotonou Agreement states that the partnership between the ACP States and the European Community and its member states shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development. The European Development Fund (EDF) was established as the funding instrument for the Cotonou Agreement. Until 2015, it was this financial instrument that was used to implement the development measures arising from the Cotonou Agreement.

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93 Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 - Protocols - Final Act – Declarations, 2000/483/EC
The establishment of the EUTF for Africa made an end to this structure. It was established by the conclusion of the ‘Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa’ \(^{94}\) (hereafter: the Constitutive Agreement) between the European Commission and the member states. Where the Cotonou Agreement was an agreement between the European Union and African states, this agreement thus merely included European (state) actors. Although the Constitutive Agreement states that the European Union shall act in accordance with the rules applicable to the EDF, \(^{95}\) the rules that guide the approval of projects under the EUTF for Africa merely consist of financial and administrative rules. What this means for the compatibility of the EUTF for Africa with the Cotonou Agreement, will be discussed in the following paragraphs.

With regard to the objectives of projects, the Constitutive Agreement states that ‘the action must contribute to the main objectives and purpose of the trust fund, as set out in Article 2(1)’. \(^{96}\) Article 2(1) reads that ‘the overall objective and purpose of this Trust Fund shall be to address the crises in the regions 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, security and development and addressing human rights abuses’. This objective departs from the objective of the Cotonou Agreement on several levels. First, it is unclear what exact ‘crises’ the trust Fund is supposed address. It is mentioned that the trust fund will support ‘all aspects of stability’, which leaves a wide discretion for the Operational Committee to define what projects fall within its scope. Next to this, where the main objective of the projects funded under the EDF was to reduce poverty, the objectives of the Trust Fund are more focused on migration related policies.

The Cotonou Agreement specifically calls for equal ownership of development strategies. There is no question that the EUTF for Africa its governance arrangement has fewer provisions for African ownership than the development instruments from which the funds are drawn. Although the vast majority of the EUTF for Africa its resources come from the EDF,


\(^{95}\) Constitutive Agreement, Article 3(5)

\(^{96}\) Idem, Article 9(1)
the trust fund does not have the co-management rule that underpins the Cotonou Agreement and the EDF.\textsuperscript{97} The organizational structure of the EUTF for Africa does not allow partner countries to have a seat in the Operational and Strategic Committee as ‘full members’. In addition, the strategic objectives of the projects are prepared and agreed by the Commission and the EEAS.\textsuperscript{98} Representatives of eligible countries’ authorities concerned by the agenda of the Strategic or Operational Committee may merely be invited as ‘observers’ to the meetings of the Operational Committee.\textsuperscript{99} The same procedure is set for regional organisations such as the Economic Community of West African States (ECOWAS). Only those parties that have contributed more than 3 million euros have a vote on the Trust Fund Board.\textsuperscript{100} Actions below 10 million euros may be approved by the Manager of the Operational Committee alone.\textsuperscript{101}

### 4.1.2 Official Development Assistance

The Development Assistance Committee (DAC) of the OECD, which consists of 30 countries including the EU and its member states, establishes the reporting rules and sets the criteria for activities to be defined as official development aid. Official development assistance (ODA) is defined as government aid, provided for by official agencies, which is administered with the main objective of promoting the economic development and welfare of developing countries.\textsuperscript{102} When rules on coverage of a specific activity are not sufficiently detailed, parties can take it upon themselves to decide whether activities could be defined as development aid. To narrow the discretion of states in interpreting what can be defined as government aid, the DAC continuously redefines ODA reporting rules. ODA has for example been delineated in fields such as military aid: no military equipment or services are reportable as ODA. Likewise, anti-terrorism activities are excluded.

The part of the EUTF for Africa funds that have been drawn from the EDF, ENI and DCI (around 90%)\textsuperscript{103} should in theory meet the requirements for ODA eligibility. Likewise, in cases where a beneficiary country or regional organization has agreed to the transfer of funds covered by existing programmes into the trust fund, the scope and objectives of the original

\textsuperscript{97} Castillejo, \textit{The European Union Trust Fund for Africa: a glimpse of the future for EU development Cooperation}, p.12
\textsuperscript{98} Constitutive Agreement, Article 5(3)
\textsuperscript{99} Idem, Article 6(1)
\textsuperscript{100} Idem, Article 5(5)
\textsuperscript{101} Idem, Article 6(6)
\textsuperscript{103} Kipp, \textit{From exception to rule: the EU Trust Fund for Africa}, p.12
programming provisions should be respected. Following the ODA-criteria is a legal obligation for the EU and its member states, since it is mentioned in Article 208 of the Treaty on the Functioning of the European Union (TFEU) that ‘the Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations’. Despite these safeguards, however, deep concerns remain about the ODA-eligibility of projects funded under the EUTF for Africa.104

For a long time, migration related projects represented a grey area of ODA eligibility. In order to take away this ambiguity, the DAC has recently developed a specific reporting code for ‘migration and mobility facilitation’.105 This new code was approved by the DAC members in December 2018 and has to be implemented in 2019 for reporting on 2018 data. Although these reports have not yet been published, it is clear that according to the new ODA-criteria on migration, actions that pursue ‘first and foremost providers’ interest are excluded from ODA.106 The new code seems to reinforce the traditional developmental perspective by stating that ‘co-operation between developed and developing countries on various aspects of migration for a mutual benefit is not per se a sufficient criterion for qualifying as ODA; the primary motivation must be the promotion of economic development and welfare of a developing country’.107 In addition, the new code states that ‘activities addressing the root causes of forced displacement and irregular migration should not be coded under the code migration and mobility facilitation, but under their relevant sector of intervention’.108 This delimits the catch-all term ‘root causes’ that now covers the multitude of objectives covered under the EUTF for Africa.

In the new purpose code, support to border and coast guards’ activities to intercept and return migrants and other projects mainly aimed at restricting migration to donor countries are

107 Idem, DAC-code 151.
108 Idem, DAC-code 151.
defined as non-eligible activities.\textsuperscript{109} Yet, in the new code, ‘capacity building for strategy and policy development (including border management) in developing countries’, is eligible as ODA.\textsuperscript{110} In addition, projects which aim to strengthen the ‘transnational response to smuggling of migrants and combatting trafficking in human beings’ is included in the new code. It is interesting to note that, where before the EUTF for Africa no development aid could be primarily spent on migration control activities, it is now being included and thereby legalized in the paradigm that governs development aid. Although the new code states that ‘activities may not pursue first and foremost the providers’ interest’, it may be very difficult to reveal in practice when this is the case. As mentioned earlier, the Commission has often presented its security measures as ‘life-saving humanitarian endeavour towards migrants’.\textsuperscript{111} When and if the DAC will be critical in its examination of the primary motivations underlying migration policy measures funded by development aid, remains to be seen.

In the light of the analysis of Agamben, it is important to note that what was first proposed to be an exception to the rule (in order to find a ‘solution’ or response to the migration ‘crisis’), now seems to turn out to become the new rule. With the new ODA-criteria on migration, development aid may be used for migration control purposes, whereas migration was first completely excluded from the realm of development policy. Even though some ‘extreme’ cases, such as search and rescue operations to intercept migrants before they reach European coasts, are now formally excluded, it seems that the formal inclusion of migration into development policy has simultaneously taken place. In the following section, I will discuss how this relates to the objectives of development aid enshrined in EU law.

4.1.3 APPLICABLE EU LAW

The article in the TFEU relevant for the development aid resources included in the EUTF for Africa, is Article 208 on development cooperation. This article sets the objective of EU development policy, by stating that ‘Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty’. Secondly, it


\textsuperscript{110} Idem, p.4

states that policies in the field of development cooperation should be conducted within the framework of the principles and objectives of the Union its external action. These principles and objectives are set out in Article 21 of the Treaty on the European Union (TEU)\textsuperscript{112} with the aim of ensuring that ‘the Union its action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’.\textsuperscript{113} These principles include the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law. Although a precise definition of the ‘rule of law’ cannot be found in the EU treaties, the Copenhagen criteria\textsuperscript{114} refer to the rule of law as ‘the idea that both the EU itself and all EU countries are governed by a body of law (legal codes and processes) adopted by established procedures rather than discretionary or case-by-case decisions’. This reflects the idea that the rule of law does not only consist of having legal bases for actions (legality), but also that the EU is governed by a body of law under which it can be held accountable (legal certainty). In addition, this article makes explicit that the EU shall develop relations and build partnerships with third countries which share these principles.

Although legally binding agreements with third countries are subject to several procedural and substantive rules, EU law leaves a wide discretion for the Commission to adopt non-legally binding or measures, also referred to as ‘soft law’, in the area of migration. The EU its external (im)migration policy finds its legal basis in Article 79 and 80 of the Treaty on the Functioning of the European Union (TFEU). Article 79 lists four areas in which the European Parliament and the European Council shall adopt measures. Only one of these areas, ‘combating trafficking in persons’, relates to measures that could be related to the EU its external migration policy. Article 79 is less specific about the areas in which the Commission can take action, by merely stating that ‘the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings’.

\textsuperscript{112} Consolidated Version of the Treaty on European Union (2008), OJ C115/13
\textsuperscript{113} Treaty on European Union, Article 21(1)
\textsuperscript{114} The Copenhagen criteria are the conditions to which any country wishing to become an EU member must conform. These conditions are set out in Article 49 and Article 6(1) of the Treaty on European Union (TEU)
The only legal obligation for the Commission that follows from this article is that external immigration policy is directed towards these objectives. The article does not state which actions the Commission can or cannot take to achieve these objectives or which procedures it should follow. If the Commission wishes to make legally binding agreements with third countries regarding migration control, Article 218 of the TFEU is applicable. This article outlines the procedure that should be followed when the Union and third countries or international organisations negotiate and conclude an agreement. It furthermore outlines the respective roles of the Council, the Commission and the European Parliament, details on how negotiations are opened and concluded and the requirement number of votes to adopt the agreement. Yet, the possibility to take soft law measures leaves the Commission with the possibility to take actions that are more flexible, especially with respect to the role of the institutions. Nevertheless, these actions also risk circumventing the rights of certain actors, as will be discussed in Chapter 5.

4.4 Soft Law Instrument - The Migration Partnership Framework

As mentioned above, formal agreements are governed by all kinds of procedural requirements laid down in Article 218 of the TFEU. These rules ensure the roles and prerogatives of the different EU institutions when a formal agreement is composed. In contrast, informal arrangements are less strictly regulated and can be used in a more flexible manner. These informal arrangements may vary greatly in terms of formats and content, ranging from administrative arrangements setting out standard operating procedures to commitments of cooperation in return procedures, such as memoranda of understanding (MOUs) and joint statements.

One of the main ‘soft law’ or ‘informal’ arrangements that relate to the EUTF for Africa, is the Migration Partnership Framework (MPF). This instrument was adopted in June 2016 with the aim of fully embedding migration in the EU its foreign policy and mobilizing instruments, resources and influence of both the EU and member states to establish cooperation with partner states.

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115 Treaty on the Functioning of the European Union, Article 218(2)
116 Wessel, Hard and Soft Law in the European Union, p.3
117 See for example: European Commission, European Union External Actions (EEAS), ‘Joint Way Forward on migration issues between Afghanistan and the EU’ (Kabul, 2016); Libya-Italy, ‘Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic’ (Archivio dei Trattati Internazionali, 2017).
118 European Commission, Migration Partnership Framework: a new approach to better manage migration, 2016
countries in order to ‘sustainably manage migration flows’. The MPF was openly presented as an instrument which avoided ‘the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement’ in the field of readmission. Its ‘pragmatic partnerships’ with third countries would include a ‘win-win relationships’ to tackle the ‘shared challenges of migration and development’. It seems that the win for the EU here consists of indirect control over the third country its borders or readmission policy, whereas the ‘win’ for third countries lies in the development aid or visa benefits made conditional on cooperation in this field. The question that remains, is whether there is a “win” for the people that are directly affected by these policy arrangements (namely migrants and asylum seekers).

The shift towards more soft law policy makes that it becomes more difficult for both individuals as civil society to hold (European) states accountable for their actions towards migrants and asylum seekers. Because soft law arrangements are not legally binding, they do often not entail a clear distribution of (legal) responsibilities for the shared objectives of the partners to the arrangements. Moreover, in the case of for example the Memorandum of Understanding between Libya and Italy, the two parties to the agreement hold different human rights obligations towards individuals. Where Italy is a member to the 1951 Refugee Convention, Libya is not a party to this Convention. This makes that it has very different legal responsibilities under international law than Italy. If Italy finances the actions that are implemented by Libyan authorities, it becomes diffuse whether these human rights obligations seize to apply or not.

The MPF mentions the EUTF for Africa as an example of a more flexible use of financial tools in order to tackle the root causes of migration. Yet, in the Fifth progress report on the Partnership Framework on Migration, the only concrete result linked to the EUTF that is mentioned is the ‘positive progress along the Central Mediterranean Route’ due to the approval of a €46.3 million project under the EUTF for Africa to reinforce border and migration management capacities of the Libyan authorities. This project will be described in fuller detail in Chapter 5, but for now it is important to note that from the Commission its point of view, the EUTF for Africa could legitimately be used as an instrument to reach its objectives with regard extra-territorial border control.

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120 European Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council, COM (2016) 700’
4.5 Financial Instrument – the EUTF for Africa

As described in the previous sections, there are multiple rules that could (or should) in principle apply to the actions that are funded with development aid through the EUTF for Africa. Yet, according to the Constitutive Agreement that established the EUTF for Africa, the procedural and internal aspects of the trust fund must be treated as ‘independent’ instruments with ‘no legal personality’.

What this means for the legal norms, rights and duties enshrined in several hard- and soft law agreements, is unclear. Since the main part of the trust fund its resources consists of development funds, one could argue that the legal framework used for development aid should always apply. Yet, the EUTF for Africa is simultaneously created to implement the EU its new Migration Partnership Framework, which is primarily focused on managing migration and creating financial incentives for third countries to establish readmission agreements. Consequently, it is very uncertain which legal obligations apply to the EU when it approves and funds actions, which in turn poses questions to the lawfulness of the actions that are funded under the trust fund.

The Financial Regulation governing the EU budget allows the European Commission to create and administer EU trust funds for external actions for emergency, post-emergency or thematic action. However, it is unclear what circumstances or criteria are required in order to trigger an emergency or ‘thematic’ action. Because these criteria are not defined, it is impossible to assess whether the duration, circumstances and scope of these exceptional actions are proportionate. Although the state of exception invoked by the Commission might be provided for in law, the possibilities for the Commission to derogate from the normal division of powers in what it defines as ‘emergency’ circumstances seem to be limitless. The legal basis of the EUTF for Africa is found in Decision of 20/10/2015 of the Commission, which empowered the Directorate General for International Cooperation and Development to sign the Constitutive Agreement between the EU and its Member States (and thereby establish the EUTF for Africa). This Constitutive Agreement sets out internal rules that apply to the trust fund. With regard to the legislative procedure to be followed, it refers to Article 187 of the Financial Regulation, which grants the Commission the competence to create trust funds.

121 Constitutive Agreement, Article 1(2)
122 International legal personality can be defined as the capacity to bear legal rights and duties under international law, see: Jan Klabbers, ‘Presumptive Personality: the European Union in International Law’, in Martin Koskenniemi (eds): *International Law Aspects of the European Union* (1998, p.231)
123 Idem, Article 187(1)
The only legal requirement with regard to the European Parliament and the European Council is that the Commission annually submits a report on the activities supported by the funds\textsuperscript{125}.

The consequence of these ‘exceptional’ procedures, provided for by law but without any clear requirements, is that the governing authorities (in this case the Commission and the European Council) can allow themselves to step outside the legal framework and create a space where legal frameworks that normally govern EU external relations could be disregarded. As mentioned earlier, no legally binding obligations follow from soft law instruments. Yet, these instruments do still carry political commitments. Financial instruments, on the other hand, do not even contain of public political commitments between states. Instead, the EU has the sole prerogative to decide on the objectives of projects, while the implementation of these projects is completely dependent on the authorities in African states. Consequently, the policies that affect migrants and asylum seekers are implemented in a zone without any legal or political mediations. What this could concretely mean for the rights of migrants and asylum seekers, will be discussed in the following chapter.

\textsuperscript{125} Idem, Article 187(10)
5. **Case Study - EU Support for the Libyan Coastguard**

In the following paragraphs, I will analyse the action document of the project ‘Support to Integrated border and migration management in Libya – First phase’.\(^{126}\) I choose this project because its actions clearly reflect the new migration-development nexus described in previous chapters. The different objectives included in the action document allow for a better understanding of the ways in which the EUTF for Africa creates a space for the fields of development, migration and security to intersect. Nonetheless, it is important to note here that this project is not reflective of all the projects that have been approved under the EUTF for Africa. There is a wide range in objectives that different projects in different regions seek to cover. What this case study does show, is what type of security and migration related projects can possibly come to the fore in an instrument that is constructed as an ‘exception’ to the rule.

The EUTF for Africa has two governing bodies which are both chaired by the European Commission: the Strategic Board and the Operational Committee. The Strategic Board sets the objectives for the EUTF for Africa, whereas the Operational Committee adopts the action that have to be implemented. Both bodies are composed of representatives of the European External Action Service (EEAS) and EU and non-EU donors (mainly EU member states). Representatives of the concerned African partner countries and regional organisations are not ‘full members’ to the Committee but can merely attend as observers. The projects that are approved are described in so-called ‘action documents’, which outline the policy objectives, amount of funding, the ‘beneficiaries’ and the expected results. Partners in the implementation of these projects range from the UNHCR to the International Criminal Police Organization (Interpol). This variety of partners is also reflected in the wide range of objectives of the different projects. So far, 57 projects have been approved, which cover both projects aimed at the eradication of poverty as well as projects aimed at migration management. The project that I will discuss here provided for training, equipment and support to the Libyan national coast guard and other relevant agencies. The withdrawal of 42 million euro from the EUTF for Africa to fund this project was approved in 2017.

### 5.1 Support to the Libyan Coastguard – Objectives and Risks

On the 23rd of June 2017, the European Council concluded that ‘training and equipping the Libyan Coast Guard is a key component of the EU approach and should be speeded up’ and that ‘cooperation with countries of origin and transit shall be reinforced in order to stem the migratory pressure on Libya’s and other neighbouring countries' land borders’. Before this meeting, the Italian Ministry of Interior had already been providing training and equipment to Libyan coast guards. In this regard, both the Libyan President of the Presidential Council Fayez Mustafa Serraj and the Italian Prime Minister Paolo Gentiloni signed a Memorandum of Understanding on cooperation in the field of fighting migration and enhancing border security.

The project to support integrated border and migration management in Libya in large part served as financial support for the implementation of the Memorandum of Understanding mentioned above. More than 42 million euro was drawn from the trust fund. In addition, Italy co-financed over two million euros. The general objective of the project as mentioned in the action document is ‘to strengthen the capacity of relevant Libyan authorities in the areas of border and migration management, including border control and surveillance, addressing smuggling and trafficking of human beings, search and rescue at sea and in the desert’. The specific objectives of the projects include ‘setting up basic facilities in order to enable the Libyan guards to better organize their Search and Rescue and border surveillance operations’, ‘developing operational capacity of competent Libyan authorities in land border surveillance and control in the desert’ and to ‘enhance operational capacity of the competent Libyan authorities in maritime surveillance, tackling irregular border crossings, including the strengthening of SAR operations and related coast guard tasks’.

None of the general or specific objectives in the action document seem to include a developmental objective. The action fiche does state that the activities in this project will contribute to the domain of ‘development benefits of migration and addressing root causes of irregular migration and forced displacement’. It is argued that this contribution lies in the ‘strengthening of capacities of public administration in security and rule of law as well as improving border management in a way that facilitates legitimate economic activity’. Although it is impossible to know whether this has indeed been the case since there has been no evaluation.

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128 Libya-Italy, Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2017
of these objectives, it is clear that the ‘reduction and, in the long term, the eradication of poverty’ was far from this project its primary objective. If any contributions to the stability or socio-economic development of Libya were in fact made, these were indirect consequences of a more general effort to strengthen Libya its public administration.

The action document entails an assessment of potential risks that should be taken into account. What is interesting in the light of the previously mentioned ‘developmental perspective’ in this program, is that the risk assessment states that ‘the actions envisaged at the southern borders carry a possible risk of destabilization of the established socio-economic models based on nomadic trade and activities. Moreover, they also raise concerns due to the difficult access of international actors and the very limited control from the authorities in the region’. In other words: enhancing the border control at the Southern borders of Libya would only increase the risks of destabilizing its socio-economic situation. The risk assessment also mentions that, under the existing Libyan legislation, once rescued, irregular migrants generally end up in detention centres which generate international concerns. It mentions that proper access of humanitarian actors for the protection of migrants will have to be negotiated with the Libyan authorities, yet it does not make this a requirement for the funding of the Libyan Coastguard and thereby limiting its own Search and Rescue zone. In other words: the project in Libya is not only incompatible with the developmental objectives enshrined in legal instruments (such as the ODA- and EU treaty definition of development aid), but also has the potential to worsen the situation of migrants and asylum seekers. In the following section, I will describe the potential (legal) consequences for migrants and asylum seekers of both this arrangement and the use of a financial instrument to induce policy changes in general.

5.2 HUMAN RIGHTS VIOLATIONS – NON-REFOULEMENT

The risk assessment of the action document is concluded by the following statement: ‘In the face of the deteriorating situation in Libya, it is nevertheless clear that the risks of inaction largely outweigh the risks of action’. In other words: the EU states puts forwards that although the risks of this project are great, if it would not fund and supply the Libyan Coastguard it would not be possible to save any person its live at sea. With this statement, the EU quit clearly puts itself outside the realm of parties that should or could carry the responsibility to rescue people at sea. Although the EU is conscious of the risks of giving

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129 Treaty on the Functioning of the European Union, Article 208
Libyan authorities the responsibility to safe people at sea in the context of ongoing conflict in Libya, they rather take these risks than act on their own behalf.

This lack of responsibility sharing has also been noted by the United Nations Support Mission in Libya (UNSML) and the United Nations Human Rights Office of the High Commissioner (OHCHR), who state in their report on the situation in Libya that ‘the European Union and its Member States have prioritized enhancing the operational capacity of the Libyan Coastguard, while at the same time restricting the lifesaving search and rescue activities of humanitarian NGOs through a series of measures’. In addition, the United Nations Committee Against Torture has expressed concerns that the Memorandum of Understanding between Italy and Libya did not contain any particular provision that may render cooperation and support conditional on respect of human rights. Although eventually the Memorandum of Understanding was successfully challenged by a group of Libyan human rights defenders in the Libyan Supreme Court, its implementation continued along the funding lines of the EUTF for Africa. Therefore, Italy has continued to assist in the maintenance of vessels and the provision of technical support and training, without having to comply to any of the human rights obligations enshrined in the 1951 Refugee Convention.130

Unlike migrants and refugees rescued by European Union and foreign vessels in international waters, those rescued by the LCG in Libyan and, increasingly, in international waters, are brought back to Libya. The non-refoulement obligation131 prohibits states from returning any person to a state where he or she would be exposed to the danger of torture or cruel, inhuman and degrading treatment or punishment. Many international organisations, such as the UNCHR, have insisted that at this time Libya cannot be considered a place of safety. The risks of return to Libya consist of being subjected to serious human rights violations and abuses, including prolonged arbitrary detention in inhuman conditions, torture and other ill-treatment, unlawful killings, rape and other forms of sexual violence, forced labour, extortion and exploitation. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has characterized such practices of ‘pullbacks’, whereby countries of destination cooperate with other countries to prevent migrants and refugees from arriving, as violations of the principle of non-refoulement.132 In other words: if the EU will continue to

131 The 1951 Refugee Convention, Article 33
cooperate with Libya in order to not let migrants and asylum seekers reach its external borders, this might be considered an indirect violation of the *non-refoulement* principle.

Although many human rights violations by the Libyan Coastguard have been affirmed by many authorities, the EUTF for Africa has created a space in which no party can be held accountable for these violations. As mentioned before, Libya is not a party to the 1951 Refugee Convention and can therefore not be held responsible for the violations of obligations that follow from this agreement. The EU, on the other hand, cannot be held legally responsible because it has indirectly ‘delegated’ the control over the affected persons to Libyan authorities and hence did not directly commit these violations. In addition, irregular migrants or asylum seekers do not have the possibility to challenge the lawfulness of actions funded under the EUTF for Africa, because there are no formal agreements to be reviewed by a Court. The ‘action documents’ in which the objectives, risks and funding of the projects are described, represent nothing more for a Court than a development funding arrangement, because the EU does not have the intention for EUTF for Africa to carry any ‘legal personality’. As mentioned earlier, it is the intention of the parties that determines its legal or non-legal nature, which makes that the ‘action documents’ will probably not be considered international agreements. Nevertheless, as proved by the funding arrangement with Libya, these ‘action documents’ can still have major effects on the situation of migrants and asylum seekers.

133 France v. Commission (2004), Court of Justice, Case C-233/02, para 42
6. CONCLUSION

In this thesis, I have analysed the interconnected legal and political process that have led to a divergence of EU resources from the socio-economic development of recipient countries to projects aimed at controlling migration outside the EU its own territory. I have argued that this prioritization of the donors’ security objectives over the socio-economic development of recipient countries has become apparent in EU discourse, aid flows and juridicial structures. It has become clear that since 2015, the relationship between development aid and security in the EU its external policy has shifted from a complementary to an instrumental approach. Not only did the EU fund more projects that had a clear migration control objective, it also majorly increased its total budget spent on migration policy.

In the case of the EUTF for Africa, I have argued that the political context of ‘emergency’ and ‘crisis’ in combination with the Commission its limited competences to control migration outside its own territory, has created opportunities for the redirection of EU funds from development objectives to ‘migration control’ objectives. Presenting extra-territorial migration control as both essential for the EU its own security as a life-saving humanitarian endeavour towards migrants created opportunities for the Commission to use its ‘exceptional’ or ‘emergency’ powers. By constructing a ‘crisis’, it became possible to invoke a legal basis that allowed for the creation of a financial instrument without the need to follow the ordinary legislative procedure in which the European Parliament has democratic control. Furthermore, the rules and legal norms that normally apply to development aid, such as the Cotonou Agreement, seized to apply. This way, the EU did not only move from hard to soft law instruments in its relations with African countries, but it actually allowed itself to ‘step outside’ the legal framework.

By taking this step outside the law, the European Commission and the European Council suspended their commitment to rule of law principles. The EU Copenhagen criteria reflect the idea that the rule of law does not only consist of having legal bases for actions (legality), but also that the EU is governed by a body of law under which it can be held accountable (legal certainty). Although the decision to set up an emergency trust fund was not illegal, it did constitute an extra-legal reality where no mediation through law exists. Migrants and asylum seekers who are affected by projects funded under the EUTF for Africa, are completely dependent on the arbitrary control of civil servants and their will to adhere to human rights law. The use of a financial instruments as policy instruments, without making this funding conditional on any human rights obligations, leaves migrants without any legal mediations to
protect their rights. Although the Constitutive Agreement of the EUTF for Africa did include some rules regarding internal and administrative procedures, the trust fund itself did not have any legal personality and is thus not a ‘legally binding agreement’ on the basis of which violations of human rights law could be challenged in court.

The case study of the Libyan Coastguard shows that by using a financial instrument with no legal personality, human rights become extremely dependent upon the will of states to enforce them. If civil servants decide not to enforce the rights of those in need of protection, there is no authority to hold responsible. Libyan authorities are not a party of the 1951 Refugee Convention and the Commission will state that it did not control the situation and therefore does not hold any legal responsibility. In addition, it is not possible to challenge the lawfulness of the ‘action documents’ that provide for the objectives and implementation of the projects funded under the EUTF, because these documents do not have any legal status. A court would simply not review the document because of its lack of legal personality. The EUTF for Africa is therefore comparable with the ‘zone of utter lawlessness’ as described by Agamben, where irregular migrants and asylum seekers are subject to the (negative) effects of policy measures funded through the EUTF for Africa, there are no legal mediations available to them. Migrants and asylum seekers can solely rely on the arbitrary decision of Libyan and European authorities to protect their fundamental rights.

Although the EUTF for Africa was invoked as a temporary measure to address an ‘emergency’, it starts to transform the fundamental structure of the juridical order governing development policy. With the new ODA-criteria on irregular migration, development aid may be used for migration control purposes, whereas migration was first completely excluded from the realm of development policy. Even though some ‘extreme’ cases, such as search and rescue operations to intercept migrants before they reach European coasts, are now formally excluded, it seems that the formal inclusion of migration into development policy has simultaneously taken place. Thus, the arrangement outside the ‘normal’ state of law, the state of exception, has started to become the new rule.

The EUTF for Africa represents a new conjunction of policy fields, which I have called the migration-development nexus. It is this nexus that has the potential to become the new fundamental basis of EU foreign policy. The (financial) instruments that are used in this field have to simultaneously address developmental and migration objectives, best described as addressing the ‘root causes of irregular migration’. It is questionable which of these objectives will prevail in the upcoming years. Although the new ODA-criteria affirm that the socio-
economic development of recipient countries has to be the primary objective of development aid, the inclusion of ‘capacity building for strategy and policy development (including border management) in developing countries’ could be used as a catch-all term for states to fund border control with development aid. It is nevertheless clear that the European Commission does not want to return to situation prior to 2015, where development aid resources where not spent on migration control purposes. This reveals how the invocation of the state of exception was not an inevitable consequence of the ‘migration crisis’, but rather a constructed extra-legal space which allowed the Commission and the Council to induce policy changes in third countries without having to bear legal responsibility for its potential consequences for the human rights of migrants and asylum seekers.

For the Multiannual Financial Framework 2021-2027, the Commission has proposed to integrate the EUTF for Africa into the regular budget.\textsuperscript{134} Although this seems to be consistent with the idea that the EUTF for Africa was a temporary instrument based on the existence of an emergency, this thesis has aimed to show that with this integration, a new political-juridicial structure is mainstreamed into the EU budget. Hannah Arendt has once written that ‘the principle of separation of power… actually provides a kind of mechanism build into the very heart of government through which new power is constantly generated’.\textsuperscript{135} What I aimed to show with this thesis, is that the EUTF for Africa is not simply an exceptional measure that temporarily functions outside the realm of ‘normal’ procedures. Instead, the rationale behind the EUTF for Africa currently lies in the very heart of the EU its external migration policy. It is up to us as scholars to recognize and analyse these structures in order to rearticulate what is the rule, and what is the exception.

\textsuperscript{134} European Commission, ‘EU Budget for the Future: the Neighborhood and the World’ (Fact Sheet, 2 May 2018)
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