

# CAN THE EU BE HELD ACCOUNTABLE FOR FINANCING DEVELOPMENT PROJECTS THAT VIOLATE HUMAN RIGHTS?

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## ABSTRACT

*The European Union (EU) is one of the largest providers of development cooperation worldwide. The EU proclaims that poverty reduction and the furtherance of individuals' human rights are among the primary goals of its development aid. However, how does the EU ensure that these goals are actually met? Moreover, what mechanisms does the EU provide in order to address adverse effects its development cooperation might trigger? Given that the EU often provides funds for countries with already weak state structures and often times deplorable human rights records, the possibility that further human rights violations will occur is not far-fetched. For example, from 2007-2010, grave human rights offenses, such as torture, arbitrary detentions, and other forms of mistreatment occurred in Ukrainian detention centers funded through the EU's Neighbourhood Policy.*

*This Note will focus on the individual and the means the individual has to hold the EU accountable for funding development aid projects that have adverse effects. The starting point for this analysis involves the framing of the EU's responsibility for funding human rights violations from both the perspective of the law of international responsibility and of international human rights law. Given the legal uncertainties in these areas, the possibilities of judicially holding the EU accountable for funding development projects resulting in human rights violations are very limited. There is huge disparity between the EU's broadly stated commitments and its obligations towards human rights and the fact that in its development aid efforts, the EU does not have mechanisms in place to ensure that these standards are actually met. Hence, it is high time for the EU to provide for an individual complaints mechanism for affected individuals.*

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I. POSSIBLE CONSEQUENCES OF DEVELOPMENT COOPERATION: UNINTENDED ADVERSE EFFECTS AND INADVERTENT HARM TO INDIVIDUALS

In February 2015, the German news agency Deutsche Welle unearthed major human rights violations against asylum seekers and other migrants in detention centers in Ukraine.<sup>1</sup> These violations included severe forms of mistreatment, some of which amounted to torture and arbitrary detentions.<sup>2</sup> One Afghan refugee reported being tied to a chair and subsequently subjected to electric shocks by the guards.<sup>3</sup> The surprising fact? Most of the detention centers in which these human rights violations occurred were financed in part by the European Union (EU) in the framework of its European Neighborhood and Partnership Financial Cooperation (ENP).<sup>4</sup> Between 2007 and 2010, the EU disbursed at least 30 million Euros for the establishment of migrant detention centers in Ukraine.<sup>5</sup> The proclaimed aim of this disbursement was to safeguard human rights.<sup>6</sup>

As early as 2010, Human Rights Watch documented inhumane conditions in the migrant detention centers.<sup>7</sup> However, the European Parliament only took action in 2015 after the media reports pointed to

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1. Jan D. Walter, *Michalski: “EU finanziert Flüchtlingslager in Drittländern,”* DEUTSCHE WELLE (Feb. 16, 2015), <http://www.dw.com/de/michalski-eu-finanziert-fluechtlingslager-in-drittländern/a-18261215>; Maximilian Popp, *“Guantanamo of the East”: Ukraine Locks Up Refugees at EU’s Behest,* DER SPIEGEL (Feb. 17, 2015), <http://www.spiegel.de/international/europe/ukraine-receives-eu-funds-to-block-asylum-seekers-from-reaching-europe-a-1018907.html#ref=rss>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Europa finanziert Flüchtlingsgefängnisse in der Ukraine,* PRO ASYL (Feb. 17, 2015), <https://www.proasyl.de/news/europa-finanziert-fluechtlingsgefängnisse-in-der-ukraine/>; *Ukraine Immigration Detention,* GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/europe/ukraine> (last updated Dec. 2012).

6. *Id.*

7. *Id.*

human rights violations in the detention camps.<sup>8</sup> Several members of the Progressive Alliance of Socialists and Democrats (S&D), one of the Parliament's largest groups, launched an inquiry about the situation in March 2015.<sup>9</sup> According to the Commission's answer in September 2015, the aid disbursed in the framework of the ENP was aimed "to bring the facilities in Ukraine in line with European best practices and international humanitarian standards."<sup>10</sup> When asked what measures the Commission took to remedy the situation in which international and European human rights standards were violated with the support of EU taxpayers' money, the Commission asserted that it supported NGOs dealing with complementary assistance to migrants and with the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) to improve Ukrainian legislation.<sup>11</sup> However, the Commission did not suggest that it would take concrete steps to alleviate the situation in the detention centers or to put pressure on the Ukrainian government to end the human rights violations.<sup>12</sup> Instead, the Commission stated that it would continue to financially support Ukraine.<sup>13</sup>

In this context, Human Rights Watch criticized the EU for not having an institution responsible for inspecting the conditions on the ground and assessing whether international human rights standards are upheld.<sup>14</sup> The example of the Ukrainian detention centers demonstrates that, although it may be well intended, in some cases development aid can have adverse effects on individuals, even while assisting the beneficiary country in some way.<sup>15</sup> In light of these findings, two questions emerge: is the EU accountable for financing development projects that result in human rights violations, and do the EU's mechanisms suffice to address these violations?

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8. Parliamentary Questions, Subject: Violation of Human Rights of Asylum-Seekers, Refugees and Other Migrants in Ukraine, EUR. PARL. DOC. (E-003926/2015) (Mar. 11, 2015), <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-003926&language=EN>.

9. *Id.*

10. Parliamentary Questions, Answer Given by Vice-President Mogherini on Behalf of the Commission, EUR. PARL. DOC. (E-003926-15) (Sept. 24, 2015), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-003926&language=EN>.

11. *Id.*

12. *Id.*

13. *Id.*

14. Walter, *supra* note 1.

15. Kirsten Schmalenbach, *Accountability: Who Is Judging the European Development Cooperation?*, 2 EUR. BEIHEFT 163, 163 (2008); Benoît Mayer, *Development Is No Excuse for Human Rights Abuses: Framing the Responsibility of International Development Agencies*, 5 TRADE L. & DEV. 286, 293 (2014).

To this day, affected individuals have not brought human rights violations in this context to the attention of the EU. Thus, the question of whether the European Commission intervenes in projects depends on its own auditing bodies, including the European Court of Auditors (ECA), the European Parliament, and the European Anti-Fraud Office (OLAF), and which are mainly concerned with guarding the member states' fiscal interests.<sup>16</sup> In the above-mentioned case, the ECA noted in a report that even though the EU envisioned improving human rights standards in Ukraine, no steps were taken to actually alleviate the situation on the ground.<sup>17</sup> However, the ECA's decisions are merely declaratory in nature and do not have binding effect.<sup>18</sup>

Given that, thus far, all major multilateral development banks, including the World Bank, have adopted review mechanisms regarding the projects they are funding,<sup>19</sup> it seems imperative to evaluate whether the EU should be obligated to provide affected individuals with similar redress mechanisms in its development cooperation. In order to answer this question, this Note will describe the legal framework of EU development aid in Part II and then discuss the EU's accountability for funding projects that inadvertently result in human rights violations in Part III. Lastly, Part IV of this Note will examine whether the EU is obligated to provide for an individual complaints mechanism.

## II. SETTING THE STAGE: THE MYRIAD OF LEGAL SOURCES OF EU DEVELOPMENT COOPERATION

Generally, EU development cooperation takes on a myriad of forms and is implemented in various ways. The EU can either fund development projects itself or distribute aid via the EU member states.<sup>20</sup> The implementation of the different projects can occur directly on a

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16. See PHILIPP DANN, *THE LAW OF DEVELOPMENT COOPERATION: A COMPARATIVE ANALYSIS OF THE WORLD BANK, THE EU AND GERMANY* 465 (Andrew Hammel trans., Cambridge Univ. Press 2013).

17. European Court of Auditors (ECA) Special Report No. 9, 2016, EU External Migration Spending in Southern Mediterranean and Eastern Neighbourhood Countries until 2014, 43, ¶ 88.

18. See Schmalenbach, *supra* note 15, at 166. For an in-depth analysis on this topic and the ECHO's own website, that under "accountability" merely alludes to its own annual reports and the audits conducted by the European Court of Auditors, European Commission, Humanitarian aid and civil protection, "Accountability", [http://ec.europa.eu/echo/who/accountability\\_en](http://ec.europa.eu/echo/who/accountability_en) (last updated Apr. 13, 2016).

19. Benoît Mayer, *Development Is No Excuse for Human Rights Abuses: Framing the Responsibility of International Development Agencies*, 5 *TRADE L. & DEV.* 286, 315 (2014).

20. *EU Development Cooperation: Improving but still Cumbersome*, ORG. FOR ECON. CO-OP. AND DEVEL., <http://www.oecd.org/dac/peer-reviews/eudevelopmentco-operationimprovingbutstillcumbersome.htm> (last updated Apr. 24, 2012); Schmalenbach, *supra* note 15, at 164.

centralized basis by the European Commission or through EU bodies, or on a decentralized basis, in which case the beneficiary country itself is responsible for implementing the funded project.<sup>21</sup>

The overarching policy instruments for the EU's development cooperation are the non-legally binding new European Consensus on Development,<sup>22</sup> as concluded by the European Parliament, Council, and Commission in 2017, and the EU Council's Agenda for Change.<sup>23</sup> Both instruments establish the general principles for the EU's development cooperation and build on the United Nations 2030 Agenda for Sustainable Development.<sup>24</sup>

Legally, the EU's development cooperation rests on several pillars. Article 21(1) of the Treaty on the European Union (TEU)<sup>25</sup> provides the EU with the overall mandate in the field of development cooperation and contains guiding principles. The competences in this field are rooted in Article 4(4) of the Treaty on the Functioning of the European Union (TFEU),<sup>26</sup> according to which the Union has the competence to carry out activities and conduct a common policy in the areas of development cooperation and humanitarian aid.<sup>27</sup> This cooperation is further specified and governed by the provisions found in Title III, Articles 208–214 TFEU, on cooperation with third countries and humanitarian aid. The legal framework applicable to EU development aid differentiates between the geography of the benefactor and the

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21. Commission Regulation 1905/2006, art. 28, 2006 O.J. (L 378); Schmalenbach, *supra* note 15, at 164.

22. The New European Consensus on Development “Our Word, Our Dignity, Our Future,” of June 30, 2017, 2017 O.J. (C 210/01) [hereinafter New European Consensus], which followed the European Consensus on Development of Feb. 24, 2006, 2006 O.J. (C 46/1) [hereinafter European Consensus].

23. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2011) 637 final (Oct. 13, 2011).

24. The European Commission integrated the Sustainable Development Goals into the European policy framework in a Communication in November 2016, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Next steps for a sustainable European future, COM (2016) 739 final (Nov. 22, 2016); *Factsheets on the European Union: A General Survey of Development Policy*, EUR. PARL., [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_6.3.1.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.3.1.html) (last updated June 2017).

25. Consolidated Version of the Treaty on European Union art. 21, Oct. 26, 2012, 2012 O.J. (C 326) 13.

26. Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47.

27. DANN, *supra* note 16, at 174.

thematic focus of the aid disbursed. The framework encompasses nine different instruments.<sup>28</sup>

The main legal instruments applicable to EU cooperation with countries from Africa, the Pacific, and Caribbean States (ACP states) are both the Cotonou Agreement<sup>29</sup>—the succeeding instrument to the Fourth Lomé Convention in 2000—and the 11th European Development Fund, which finances aid to the ACP states for the period 2014-2020 (a total of 30.5 billion Euros).<sup>30</sup> The disbursement of financial aid for non-ACP countries rests primarily on the Development Cooperation Instrument,<sup>31</sup> which was established in 2006 and was replaced in 2014 by the regulation establishing a financing instrument for development cooperation for the period of 2014–2020.<sup>32</sup> Furthermore, the EU provides financial aid via the European Neighbourhood Instrument (ENI), which focuses on South Mediterranean countries and East Neighbourhood countries, to which the EU pledged 15.4 billion Euros of its budget for 2014-2020.<sup>33</sup>

The EU's provision of humanitarian aid forms part of the EU's development cooperation policy and is rooted in Article 214 TFEU. The EU, together with its member states, is the leading provider for humanitarian aid worldwide.<sup>34</sup> In 2014 alone, through the Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), the European Commission disbursed emergency assis-

28. See *International Cooperation and Development: Funding Instruments*, EUR. COMM'N, [http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments\\_en](http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments_en) (last visited Oct. 21, 2016); EU Development Cooperation in Fragile States: Challenges and Opportunities, EUR. PARL., [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433724/EXPO-DEVE\\_ET\(2013\)433724\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433724/EXPO-DEVE_ET(2013)433724_EN.pdf) (last visited Dec. 12, 2016).

29. Council Directive 2000/483, 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, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement].

30. See *International Cooperation and Development: European Development Fund (EDF)*, EUR. COMM'N, [http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments/european-development-fund\\_en](http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments/european-development-fund_en) (last visited Nov. 30, 2016).

31. Regulation 1905/2006, of the European Parliament and of the Council of Dec. 18, 2006, Establishing a Financing Instrument for Development Cooperation, 2006 O.J. (L 378) 41.

32. See DANN, *supra* note 16, at 176; Regulation 233/2014 of the European Parliament and of the Council of Mar. 11, 2014, Establishing a Financing Instrument for Development Cooperation for the period 2014-2020, 2014 O.J. (L 77) 44.

33. Regulation 232/2014, of the European Parliament and of the Council of Mar. 11, 2014, Establishing a European Neighbourhood Instrument, 2014 O.J. (L 77) 27 [hereinafter Regulation 232/2014].

34. See *Humanitarian Aid: ECHO Factsheet*, EUR. COMM'N, [http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/humanitarian\\_aid\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/humanitarian_aid_en.pdf) (last updated 2017).

tance, for which it committed over 1.27 billion Euros.<sup>35</sup> The ECHO is in charge of coordinating humanitarian aid for the EU member states, but also provides direct financial support to developing countries.<sup>36</sup>

III. THE EU'S ACCOUNTABILITY IN ITS DEVELOPMENT COOPERATION: THE LAW ON INTERNATIONAL RESPONSIBILITY AND THE EU'S HUMAN RIGHTS OBLIGATIONS

The following assessment of the EU's accountability will begin by pinpointing the scope and concept behind the term "accountability." It will further analyze the EU's accountability under the law on international responsibility and international human rights law.

A. "Accountability"—Who? To Whom? For What? When? How? With Which Consequences?<sup>37</sup>

The notion of "accountability" is not a fixed legal construct.<sup>38</sup> Neither international treaty law nor international customary law nor legal scholars provide for a uniform answer. Taking into account the semantics of the word "accountability," the following definition has been suggested: "to have to answer for one's action or inaction and depending on the answer, to be exposed to potential sanctions."<sup>39</sup> The traditional understanding of accountability was limited to the legal responsibility and liability for internationally wrongful behavior.<sup>40</sup> Scholars now agree that accountability is much more multilayered and expands beyond the traditional concept of inter-state accountability as conceptualized by the International Law Committee's Draft Articles on State Responsibility.<sup>41</sup> Accountability in the broad sense is understood to encapsulate the meaning of making one actor answerable to certain

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35. *Id.*

36. Daniel Mekonnen & Mirjam van Reisen, *The EU Lisbon Treaty and EU Development Cooperation: Considerations for a Revised EU Strategy on Development Cooperation in Eritrea*, 45 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 324, 324 (2012) (Ger.).

37. Questions derived from Professor Brown Weiss and Professor Abbott's Seminar at Georgetown Law on "Poverty Reduction and Accountability." See Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 *AM. SOC'Y. INTL. L. PROC.* 477, 481 (2010).

38. DANN, *supra* note 16, at 445.

39. *Id.* at 447 (quoting Grant and Keohane).

40. Rosalyn Higgins, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*, 147 (Oxford Univ. Press; 1994).

41. Brown Weiss, *supra* note 37, at 480; Benoît Mayer & Yvonne Wong, *The World Bank's Inspection Panel: A Tool for Accountability?*, 6 *WORLD BANK LEGAL REV.* 495, 495 (2014).



rules or standards and to evaluate whether these standards have been met.<sup>42</sup>

Accountability for actions can occur at multiple levels and involves multiple players. The relationship in which accountability is framed is a particular point of contestation. In the context of development aid, some authors argue that accountability takes place only between the development actor and its constituents or funders regarding fiduciary responsibilities.<sup>43</sup> However, this approach would lead to a responsibility gap. It does not fully grasp the emerging extraterritorial human rights obligations, the concept of responsibility to protect, and the fact that the ILC Draft Articles also recognize responsibility of states to include *erga omnes* obligations.<sup>44</sup> These concepts all aim at holding international actors extensively accountable vis-à-vis individuals. Thus, the concept of accountability not only encompasses the answerability of the EU towards its stakeholders (here, the member states), but also the relationship between the EU as aid donor towards individuals who might be negatively impacted by its development aid.<sup>45</sup>

This Note's scope is limited to the narrow aspects of accountability and will concentrate on the question of legal responsibility of the EU as a donor of development aid vis-à-vis negatively impacted individuals. The law of international responsibility and international human rights will be used as points of reference. Throughout the analysis the following six aspects of accountability will be kept in mind. Who is responsible to whom, for what, when, how and with which consequences?

B. *Introducing the Main Players—Who is Accountable to Whom in EU Development Cooperation?*

Generally, a direct violator of human rights bears primary responsibility for the respective violation.<sup>46</sup> In the case of the Ukrainian detention centers, the Ukrainian state authority would bear such responsibility for the violation. However, international law recognizes the principle

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42. Brown Weiss, *supra* note 37 (arguing that accountability and responsibility are two distinct concepts).

43. Mayer, *supra* note 15, at 293.

44. See Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, with Commentaries, on Its Sixty-Third Session, U.N. Doc. A/66/10 (2011) [hereinafter DARIO].

45. Schmalenbach, *supra* note 15, at 165; DANN *supra* note 16, at 445. Cf. Brown Weiss, *supra* note 37, at 483 (describes accountability vis-à-vis the individual as "bottom-up" accountability).

46. Schmalenbach, *supra* note 15, at 174, 178; Mayer, *supra* note 15, at 343.

of contributory responsibility.<sup>47</sup> As discussed below, the law on international responsibility addresses an actor's responsibility for aiding and abetting another state in its misconduct. Thus, as an aid donor, the EU could potentially be held co-responsible for contributing to human rights violations by funding detrimental development projects. Furthermore, this Note will shed light on further primary responsibilities the EU might violate in this regard.

In situations where the EU directly provides financial aid from its own budget to third-party countries, the final decision as to whether financial aid is disbursed rests on the European Commission alone or is taken together with the European Parliament.<sup>48</sup> Due to the organic model governing the EU, decisions of bodies acting on behalf of the EU can be directly attributed to the EU.<sup>49</sup> When considering to whom the EU is accountable, this Note will focus exclusively on the victims of human rights violations as individual actors.<sup>50</sup>

C. *Legal Accountability Framework—What International Legal Standards Does the EU Have to Answer to?*

The scope of the EU's international legal responsibility is disputed in scholarly writing. This can be traced back in part to the fact that hardly any case law exists on the external responsibility of the EU towards third country nationals. The controversy was furthermore sparked by the adoption of the Draft Articles on Responsibility of International Organizations<sup>51</sup> by the International Law Commission in 2011 and the articles' unclear relationship to EU law.

1. The law of international responsibility of states and international organizations is still emerging

Under the international law of responsibility two main instruments drafted by the International Law Commission (ILC) are relevant: the

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47. Mayer, *supra* note 15, at 309; Andrea Kämpf & Inga Winkler, *Zwischen Menschenrechtsförderung und Duldung von Menschenrechtsverletzungen?*, 2 ZEITSCHRIFT FÜR MENSCHENRECHTE 63, 73 (2012).

48. Schmalenbach, *supra* note 15, at 164.

49. Pieter Jan Kuijper & Esa Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking out*, in THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES, 35, 50-1 (Malcolm Evans & Panos Koutrakos eds., 2013).

50. Other potential rights-holders that come to mind are the international community, the beneficiary (although it is highly unlikely that they would want to pursue action), the EU member states or international interest groups. See Schmalenbach, *supra* note 15, at 163-65 for enumeration.

51. Int'l Law Comm'n, Rep. on the Work of its Fifty-Second Session, U.N. Doc. A/55/10 (2000).

Draft Articles on State Responsibility (DASR) and the Draft Articles on Responsibility of International Organizations (DARIO).<sup>52</sup> Most of the articles of the DASR are understood to mirror customary international law<sup>53</sup> because they are regularly cited by international tribunals and endorsed by states.<sup>54</sup> The DARIO cannot be regarded as reflections of customary international law due to a lack of relevant state practice supported by *opinio juris*.<sup>55</sup> Rather, they represent the fulfillment of the ILC's mandate to encourage the progressive development of international law according to Article 13 UN Charter.<sup>56</sup> Both Draft Articles contain numerous provisions regarding the responsibility of states and international organizations for breaching international legal obligations.

The Draft Articles are only horizontally applicable, meaning they can only be invoked between states or between states and an organization, and do not trigger individual rights. However, it is generally accepted that the Draft Articles apply to human rights treaties<sup>57</sup> and, thus, it is conceivable that third states could invoke the responsibility of the EU.<sup>58</sup>

a. *DASR vs. DARIO—Which Regime is Applicable to the EU?*

The applicability of the DASR or the DARIO to the EU is not a purely academic issue, but has real implications. If the former is pertinent, a (in part) legally binding set of rules would frame the question of accountability due to their customary nature.<sup>59</sup> The DARIO on the other hand are non-binding and are merely evidence of emerging rules of customary international law. Due to the EU's specific nature, it is

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52. *Id.*; Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, of its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter U.N. Doc. A/56/10].

53. See Statute of the I.C.J., art. 38, ¶ 1b; for an international norm to become customary two elements are needed: state practice supported by the states' conviction that this practice constitutes an international norm (*opinio juris*); see also North Sea Continental Shelf (Germ. v. Neth.), Judgment, 1969 I.C.J. 44 (Feb. 20).

54. James R. Crawford, *State Responsibility*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 65 (Rüdiger Wolfrum ed., 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>.

55. Kristina Daugirdas, *Reputation and the Responsibility of International Organizations*, 25 EUR. J. INT'L. LAW 991, 994 (2014).

56. U.N. Charter art. 13.

57. See DARIO, *supra* note 44, at 66.

58. See analysis below at IV.B.1.

59. The EU—even though not a state—is bound by customary international law due to its own provisions, see ECJ, Case C-366/10, Air Transport Ass'n of Am., 2011 E.C.R. I-13755, at ¶ 101.

more likely that the latter govern the international responsibility of EU actions.

In order for the EU to answer for violations of public international law, it must be recognized as having legal personality under public international law.<sup>60</sup> This is the case. The finding of the International Court of Justice which recognizes that international organizations can have legal personalities is now firmly established and positively affirmed by the introduction of Article 47 TEU via the Treaty of Lisbon.<sup>61</sup> The difficulties surrounding the question of the applicability of the DARIO and DASR to the EU arise from the fact that the EU is not an international organization in the conventional sense. The EU has long surpassed its original status as a mere association of states and has been recognized as a “supranational organization,” an organization *sui generis*.<sup>62</sup> In certain areas the EU member states have transferred their sovereign rights to the EU. In these areas, the EU has the ability to exercise sovereign rights with direct effects in the domestic sphere of member states.<sup>63</sup> Hence, one could surmise that the EU should fall under the ambit of the DASR. This is furthermore underlined by the following idea voiced by Tomuschat prior to the existence of the Draft Articles: “If states acting individually have been subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community, there is no justification for exempting international organizations from the scope *ratione personae* of such rules.”<sup>64</sup>

Nonetheless, given that the EU does not fulfill the necessary criteria characterizing a state,<sup>65</sup> most scholars reference the DARIO when

60. Cf. Christian Tomuschat, *The International Responsibility of the European Union*, in THE EUROPEAN UNION AS ACTOR IN INTERNATIONAL RELATIONS 177, 178 (Enzo Cannizzaro ed., 2002).

61. Esa Paasivirta, *The Responsibility of Member States of International Organizations? A Special Case for the European Union*, 12 INT’L ORGS. L. REV. 448, 452 (2015).

62. E.g., Bundesverfassungsgericht [German Fed. Const. Ct.] Oct. 12, 1993, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3047, 3048, ¶ 60, 1993 (Ger.).

63. Rudolf Geiger, *Article 1 TEU*, in EUROPEAN UNION TREATIES: A COMMENTARY, 9, 13 (Rudolf Geiger et al. eds., 2015).

64. See Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, in 281 RECUEIL DES COURS 135 (Hague Acad. of Int’l L. eds., 1999).

65. See the three-element doctrine developed by Georg Jellinek, whereby a state exists under the conditions of a permanent population, a defined territory and effective control over people and territory (governance). The EU does not have a permanent population, because the EU citizenship is only an annex citizenship dependent on the member state’s citizenship. Further, the EU lacks autonomous State power and sovereignty—the extent of its competencies depends on its member states. Lastly, it does not have a democratically legitimized constitution. GEORG JELLINEK,

assessing the international responsibility of the EU.<sup>66</sup> In this regard, the ILC itself expressly stated in its commentary to the DASR that these are solely applicable to states given the special considerations of other international legal persons, and explicitly declared them exempt from the scope of application.<sup>67</sup>

b. *EU Law and the DARIO—A Complicated Relationship*

The relationship between the DARIO and EU law is contested amongst international scholars.<sup>68</sup> On several occasions during the drafting of the DARIO, the EU suggested the ILC include clauses aimed at its particularities.<sup>69</sup> These proposals were rejected and did not find entry into specific provisions of the DARIO, which are perceived by the ILC to apply to all organizations irrelevant of their specific provisions and their myriad constructions.<sup>70</sup> Because the DARIO themselves do not provide any clarity on the interplay between the two regimes and do not represent binding international norms, the relationship between EU law and the DARIO will be defined by *opinio juris* and state practice in the future.

Article 64 of the DARIO contains a *lex specialis derogat legi generali* rule, which stipulates that the articles do not apply “where and to the extent that the . . . implementation of the international responsibility of an international organization . . . [is] governed by special rules of international law, rules of the organization applicable to the relations between the international organization and its members.” Thus, the DARIO are

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ALLGEMEINE STAATSLHRE 183 (Springer 1922); Tobias Lock, *Why the European Union is Not a State*, 5 EUROP. CONST. L. REV. 407, 409 (2009).

66. See, e.g., Kuijper & Paasivirta, *supra* note 49.

67. U.N. Doc. A/56/10, *supra* note 52, at art. 1, cmt. 7.

68. See Bruno Simma & Dirk Pulkowski, *Leges Speciales and Self-Contained Regimes*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 139, 141 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

69. EU Presidency Statement on the ILC Report 2004, New York, Nov. 5, 2004, U.N. Doc. A./CN.4/637, at 38 (February 14, 2011); see also Hoffmeister’s illustration of the EU’s intervention at the drafting stage. Frank Hoffmeister, *Litigating against the European Union and Its Member States—Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?*, 21 EUR. J. INT’L L. 723, 728-29 et seq. (2010).

70. See Paolo Palchetti, *The Law of Responsibility of International Organizations: General Rules, Special Regimes or Alternative Mechanisms of Accountability?*, 2 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 72, 77 (2015). The fact that the ILC DARIO do not differentiate among different types of organizations found vast criticism among legal scholars. See Jan Klabbers, *Self-Control: International Organisations and the Quest of Accountability*, in THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION 75, 76 (Malcolm Evans & Panos Koutrakos eds., 2013).

not applicable if a particular rule regarding the EU's responsibility can be found under EU law.<sup>71</sup>

According to the ILC commentary on the DASR, which in Article 55 contains a parallel provision, the *lex specialis* rule does not merely apply if the matter in question is dealt with by the competing provision in question. The clauses must be inconsistent with each other or a discernible intention must exist indicating that the provision is supposed to exclude the other.<sup>72</sup> For the purposes of the focus of the present Note, the issue of whether EU law provides for a specific provision, governing the responsibility of the EU for knowingly financing development projects resulting in human rights violations, will be analyzed.

With regards to a member state's responsibility for enforcing EU law, a quite sophisticated liability regime has evolved mainly through the jurisprudence of the European Court of Justice (ECJ).<sup>73</sup> However, the EU's responsibility towards third parties, especially regarding human rights violations is fairly underdeveloped in comparison. Human rights treaties could be regarded as providing for *leges specialis* according to Article 64 DARIO.<sup>74</sup> Yet, up until this day the EU is not party to human rights treaties under which it could be held accountable. Furthermore, Article 340(2) TFEU, which governs the EU's non-contractual liability could be regarded as constituting a special rule foregoing the DARIO's applicability.<sup>75</sup> The former provision has a different scope of applicability because it encompasses individuals invoking damages vis-à-vis the EU, while the DARIO are applicable between the international organization and states and do not directly grant rights to individuals.<sup>76</sup> Additionally, under the DARIO every internationally wrongful act leads to the actor's responsibility, while under Article 340(2) TFEU only certain, particularly serious breaches of norms conferring individual

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71. See Christiane Ahlborn, *The Rules of International Organizations and the Law of International Responsibility*, 03 ACIL Research Paper 29 (2011), [http://www.sharesproject.nl/wp-content/uploads/2011/04/C.Ahlborn\\_Rules-of-IOs-and-the-Law-of-International-Responsibility\\_ACIL-Working-Paper-2011-3-SHARES\\_Revised-7.6.2011.pdf](http://www.sharesproject.nl/wp-content/uploads/2011/04/C.Ahlborn_Rules-of-IOs-and-the-Law-of-International-Responsibility_ACIL-Working-Paper-2011-3-SHARES_Revised-7.6.2011.pdf); Simma & Pulkowski, *supra* note 68, at 142.

72. Palchetti, *supra* note 70, at 82.

73. See, e.g., Case C-6/90, *Francovich & Bonifaci v. It.*, 1991 E.C.R. I-05357.

74. Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. INT'L L. 883, 892 (2010).

75. See *infra* section IV.B.3. for a closer analysis of Article 340 TFEU and its application by the European Court of Justice.

76. Simma & Pulkowski, *supra* note 68, at 160.

rights trigger the EU's responsibility.<sup>77</sup> The DARIO's relationship to EU law will still be formed by future state practice and *opinio juris* because the status quo is still unclear, and the DARIO only represents emerging rules of international law.<sup>78</sup>

c. *Responsibility of the EU under the DARIO*

Under the DARIO, the EU is responsible for complicity in internationally wrongful acts, such as contributing to human rights violations. Thus, the act of knowingly financing development projects violating human rights itself constitutes an internationally wrongful act in breach of the DARIO's principles.

The key provisions of the DARIO can be found in Articles 3 and 14. Article 3 DARIO provides the general rule that an international organization is responsible for internationally wrongful acts. According to Article 4 DARIO, an internationally wrongful act exists if the act is first of all attributable to that organization under international law and secondly constitutes a breach of an international obligation of that organization. The latter includes breaches of human rights obligations.<sup>79</sup> Article 14 DARIO extends the international organization's responsibility for aiding or assisting a state in the commission of an internationally wrongful act. Article 14 triggers responsibility if the organization had knowledge of the circumstances of the internationally wrongful act and if the act would be internationally wrongful if committed by that organization.

Knowingly providing development aid that in turn results in human rights violations, can be seen as fulfilling these requirements. The violation of an individual's human rights through the beneficiary state constitutes an internationally wrongful act in itself. In the case cited above concerning the maltreatment of migrants in Ukrainian detention centers by prison guards, Ukraine as a signatory of the European Convention on Human Rights (ECHR)<sup>80</sup> is in violation of its obligation to respect the enumerated human rights according to Article 1. The

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77. The ECJ leaves EU organs with a wide margin of appreciation; on the relationship between the DARIO and Art. 340(2) TFEU see Jean-Marc Thouvenin, *Responsibility in the Context of the European Union Legal Order*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 862, 868-9 (James Crawford et al. eds., 2010).

78. And in practice, especially by international and European courts; Daugirdas, *supra* note 55.

79. See U.N. Doc. A/56/10, *supra* note 52, at 38, 57.

80. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, U.N.T.S. 221.

maltreatment of the detained violates the prohibition of torture according to Article 3 ECHR and the arbitrary detentions violate the detainees' right to liberty according to Article 5 ECHR. Under Article 14 DARIO the international organization is only responsible for aiding or assisting a state in the commission of an internationally wrongful act if the act itself would constitute an internationally wrongful act of the organization. As will be established in the following, the EU is obligated to respect human rights in its development cooperation and thus the act itself would constitute an internationally wrongful act of the organization.

2. EU development cooperation must be in line with the EU's human rights obligations

The following analysis will establish that the EU is obligated to adhere to human rights in its development cooperation. This issue is not quite clear—first, given the question of whether the EU as an aid donor has to comply with certain standards and, second, whether individuals are protected extraterritorially. The analysis will focus on the EU's general human rights framework and EU development law in particular.

a. *Obligation to Adhere to Human Rights According to the EU's General Human Rights Framework*

Owing to its structure as an international organization and the fact that most human rights treaties provide only for states to become signatories, the EU thus far has only signed the Convention on the Rights of Persons with Disabilities and no other human rights treaties.<sup>81</sup> The Treaty of Lisbon and Protocol 14 of the ECHR paved the way for the EU to become the first non-state party to the ECHR.<sup>82</sup> Due to a recent set-back by the European Court of Justice declaring the draft accession agreement between the EU and the Council of Europe<sup>83</sup>

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81. Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, 25 EUR. J. INT'L L. 1071, 1078 (2014).

82. Elizabeth F. Defeis, *Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon*, 35 FORDHAM INT'L L. J. 1207, 1217 (2012); Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2014, Europ. T.S. No. 194.

83. Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, 3-5 Apr. 2013, 47+1(2013)008, <http://www.echr.coe>.



incompatible with EU law,<sup>84</sup> the EU has still not become a member state of the ECHR.<sup>85</sup> Thus, the ECHR is not a direct source of the EU's human rights obligations.<sup>86</sup>

Be that as it may, EU law itself provides a vast array of sources for the obligation of the EU and its bodies to adhere to fundamental rights recognized within the EU rights regime. The ECJ in recent case law held that the EU is obligated to adhere to international law “in its entirety, including customary international law,” providing for a direct source of human rights obligations from an international law perspective.<sup>87</sup> Article 6 of the TEU identifies three additional sources: the Charter of Fundamental Rights of the European Union (CFREU) (Article 6(1)), the European Convention on Human Rights (ECHR), and “general principles” of Union law, which are made up of fundamental rights as guaranteed by the ECHR and result from the common constitutional traditions of the member states (Article 6(3)).<sup>88</sup>

b. *The Emergence of the Extraterritorial Applicability of Human Rights Under International Human Rights Law*

Insofar as the EU is obligated to adhere to customary international law, the status of the extraterritorial applicability of human rights obligations regarding its development aid efforts is still evolving. International courts only reluctantly recognize the extraterritorial applicability of human rights treaties and generally mandate further requirements, such as a close link between the affected person or property and the actor.<sup>89</sup> This link cannot be established in the situation in which the

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int/Documents/UE\_Report\_CDDH\_ENGeuoparl.europa.eu/meetdocs/2009\_2014/documents/libe/dv/5thmeeting\_finalrep\_/5thmeeting\_finalrep\_en.pdf.

84. Opinion C-2/13, Opinion pursuant to Article 218(11) TFEU, ECLI identifier: ECLI:EU:C:2014:2454 (Dec. 18, 2014).

85. *Fundamental Rights in the European Union*, at 24 (Mar. 2015), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS\\_IDA\(2015\)554168\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf).

86. Case C-543/14, *Ordre des barreaux francophones v Conseil des ministres*, margin 23, ECLI identifier: ECLI:EU:C:2016:605 (July 28, 2016).

87. Case C-366/10, *Air Transp. Ass'n of Am.*, *supra* note 59, at ¶ 101; *see* Bartels, *supra* note 81, at 1078; DANN, *supra* note 16, at 272. *See also* Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 778 (2006) (elaborating on which human rights have become customary and bind the EU).

88. Even though the relationship between all of these sources is not fully resolved, it is undisputed that the EU and its organs are obligated to adhere to fundamental rights. *See* Defeis, *supra* note 82, at 1229; Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 645, 656 (2011).

89. *See* Kämpf & Winkler, *supra* note 47, at 63, 70 (discussion notion of “effective control”).

EU merely finances a development aid project.<sup>90</sup>

However, the emergence of such a rule for development aid specifically is reflected by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles), which stipulate that states in their development aid efforts have extraterritorial obligations with respect to protecting human rights.<sup>91</sup> On the other hand, the Maastricht Principles were conceived by legal experts and do not reflect binding customary international law due to a lack of state practice supported by *opinio juris*. As such they can only be referred to as a subsidiary source of international law according to Article 38(1)(d) ICJ-Statute.<sup>92</sup> Bartels furthermore suggests that the existence of Article 14 DARIO, which makes the EU responsible for aiding and abetting another state's internationally wrongful act, can establish the broad emergence of an extraterritorial human rights obligation under customary international law.<sup>93</sup>

*c. The Extraterritorial Application of Human Rights Obligations in Development Cooperation*

Historically, human rights did not play a role in development cooperation, which was merely perceived as affecting inter-state relationships. The aid donor did not have any obligations, while at the same time individuals were not accorded any rights vis-à-vis the donor.<sup>94</sup> The extraterritorial obligation of the EU as a donor of development aid is emerging, as will be shown by the following illustration.

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90. See detailed analysis by Mayer, *supra* note 15, at 303; ANDREA KÄMPF, HUMAN RIGHTS REQUIRE ACCOUNTABILITY: WHY GERMAN DEVELOPMENT COOPERATION NEEDS A HUMAN RIGHTS COMPLAINTS MECHANISM, Policy Paper No. 28, 16 (German Ins. for Hum. Rts. ed., 2015), [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Human\\_Rights\\_Require\\_Accountability.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Human_Rights_Require_Accountability.pdf) (arguing that the ECHR does not apply to development cooperation because donors do not exercise sovereign authority over a territory or a person in their partner countries).

91. See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted 28 September 2011 ¶ 8, 9, [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) (last visited Nov. 30, 2016).

92. Statute of the I.C.J., art. 38, ¶ 1d; KÄMPF, *supra* note 90, at 65.

93. Bartels suggests that Article 14 of the DARIO already reflects customary international law, however he himself concedes that the relevance of these rules to policy measures with extraterritorial effects is a mere possibility. Bartels, *supra* note 81, at 1081.

94. DANN, *supra* note 16, at 262.

Both the CFREU and the jurisprudence on the general principles are silent with regards to their territorial applicability.<sup>95</sup> The regime of Article 6 of the TEU primarily focuses on the EU's territory.<sup>96</sup> However, current case law and statements made by EU institutions seem to suggest that the EU accepts the general extraterritorial applicability of fundamental rights.<sup>97</sup> This is mirrored by Article 21 No.1 of the TEU which articulates the general principle that "the Union's action on the international scene shall be guided by . . . the universality and indivisibility of human rights . . . and respect for international law."<sup>98</sup>

The general conclusion that the EU is obligated to respect human rights and that this obligation extends extraterritorially is reflected in numerous provisions applicable to the EU's development cooperation. Articles 208(1) (for development cooperation in general) and 214(1) (for humanitarian aid specifically) of the TFEU, read in conjunction with Article 21(3) of the TEU, stipulate the general principle that the EU in its external actions is obligated to adhere to human rights.<sup>99</sup>

Over the past years the EU has included human rights provisions in its development cooperation agreements.<sup>100</sup> Initially, these provisions were set out as one-sided obligations addressing solely the beneficiary country and were perceived as policy statements rather than positive obligations.<sup>101</sup> However, in the last years, the EU has introduced clauses based on the principle of reciprocity into its development cooperation agreements.<sup>102</sup> These clauses create legally binding commitments not only for the beneficiaries, but also for the EU.<sup>103</sup> The ECJ

95. Bartels, *supra* note 81, at 1076; Markus Kotzur, *Intro CFREU*, in *EUROPEAN UNION TREATIES: A COMMENTARY* 1067, 1067 (Rudolf Geiger et al. eds., 2015) (asserting a generous applicability of the CFREU wherever the situation is governed by EU law).

96. DANN, *supra* note 16, at 273.

97. Bartels, *supra* note 81, at 1075 (referring to the European Commission and High Representative of the European Union for Foreign Affairs and Security).

98. Kotzur, *supra* note 95 (pointing out that the preamble and the TFEU's approach to universality indicate that limitations exclusively to EU citizens were not intended).

99. Martin Broberg, *EU Humanitarian Aid after the Lisbon Treaty*, 22 *J. CONTINGENCIES AND CRISIS MGMT.* 166, 168 (2014); Mekonnen & van Reisen, *supra* note 36, at 343.

100. Christian J. Tams & Alessandra Asteriti, *Erga Omnes, Jus Cogens, and their Impact on the Law of Responsibility*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION* 163, 174 (Malcolm Evans & Panos Koutrakos eds., 2013).

101. ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* 259, 387 (2003).

102. Chimugwanya Nwobike, *Beyond Conditionality: Human Rights in EU Development Partnership with Developing Countries*, 19 *SRI LANKA J. INT'L L.* 387, 395 (2007).

103. This assertion is not completely uncontested, but reflects the majority consensus. *See id.* at 398; Bartels, *supra* note 81, at 1079.

has established that these agreements are binding on both parties and as such are enforceable.<sup>104</sup> This stems from the fact that the EU as a subject of international law is obligated to adhere to the international agreements it signs.<sup>105</sup> Furthermore, Dann invokes the principle of coherence as an argument for the binding nature of these clauses—if the EU demands respect for human rights by the benefactor in its agreements, it cannot then pursue projects that endanger human rights.<sup>106</sup>

The reciprocity of the obligations is highlighted by Article 9 of the Cotonou Agreement, which foresees that “*the parties refer to their international obligation and commitments concerning respect for human rights*” and “*reiterate their deep attachment to human dignity and human rights*” (emphasis added). The Cotonou Agreement’s revision in Ouagadougou in 2010 introduced an express principle of reciprocity with this new sentence into Article 9: “*the principles underlying the essential and fundamental elements . . . shall apply equally to the ACP States on the one hand, and to the European Union and its Member States, on the other hand*” (emphasis added).<sup>107</sup> The concept of reciprocity is also alluded to in the New European Consensus which explicitly mentions the principle of “mutual accountability.”<sup>108</sup>

Both the Development Cooperation Instrument (DCI) relating to cooperation with non-ACP states and the relevant provisions regarding the EU’s Neighbourhood Policy, through which the EU disbursed financial assistance to the establishment of Ukraine’s detention centers mentioned in the introductory paragraphs, make express reference to the reciprocal safeguard of and adherence to human rights.<sup>109</sup> In 2015 the EU declared that its review of the European Neighbourhood Policy would ensure that its engagement would be “fully compliant with

104. Case C-316/91, Eur. Parl. v. Council of the Eur. Union, 1994 E.C.R. I-625, ¶ 29.

105. Case C-469/93, Chiquita Italia, 1995 E.C.R. I-4533; Malcom Evans & Phoebe Okowa, *International Responsibility of the EU and the European Court of Justice*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION* 139, 142 (Malcolm Evans & Panos Koutrakos eds., 2013).

106. DANN, *supra* note 16, at 273.

107. See the European Commission’s online publication highlighting the changes made to the Cotonou Agreement in Ouagadougou, at 24 (2014), [http://www.europarl.europa.eu/intcoop/acp/03\\_01/pdf/mn3012634\\_en.pdf](http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf).

108. New European Consensus, *supra* note 22, at ¶ 18.

109. See Regulation 233/2014, *supra* note 32, at pmb. 11.25. See also Regulation 232/2014, *supra* note 33, at art. 1(1), 1(2)(c), 3(3) (containing the words “human rights” ten times, making the “mutual commitment to human rights”, the “shared commitment to human rights” and “promoting human rights” top priorities of its cooperation).

international law, including international human rights law.”<sup>110</sup>

3. Extent of the EU’s Human Rights Obligations—For What Exactly?

The following paragraph will establish the concrete obligations the EU has as a donor of development aid. The Maastricht Principles build on the Limburg Principles of 1986, which identified three tiers of human rights obligations: the duty to respect, the duty to protect, and the duty to fulfill.

a. *Duty to Respect*

Taking into consideration the strong arguments in favor of extraterritorial obligations, the EU is first of all obligated to respect human rights and refrain from all activity that has negative consequences on human rights.<sup>111</sup> The EU breaches its human rights obligations if it implements projects directly resulting in human rights violations.<sup>112</sup> The EU rarely implements development cooperation projects directly. For the most part, the EU merely finances development cooperation projects. However, keeping in mind the responsibility of the EU to abstain from aiding and abetting a state’s human rights violations under the law of international responsibility, the EU’s obligations to respect extend to an obligation to refrain from funding projects that result in human rights violations.<sup>113</sup> With regards to the scenario of the Ukrainian detention centers, the EU is thus obligated to refrain from financing these centers if the human rights violations endure. This legal standard is complemented by the rationale that absent such an obligation, huge gaps would result vis-à-vis the realization of human rights in other countries.<sup>114</sup>

b. *Duty to Protect*

The donor institutions are obligated to ensure that their aid does not violate human rights (and thus to adhere to the “second tier” of the

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110. Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Review of the European Neighbourhood Policy, at 4, COM (2015) 50 final (Nov. 18, 2015), [http://ec.europa.eu/enlargement/neighbourhood/pdf/key-documents/151118\\_joint-communication\\_review-of-the-enp\\_en.pdf](http://ec.europa.eu/enlargement/neighbourhood/pdf/key-documents/151118_joint-communication_review-of-the-enp_en.pdf).

111. Bartels, *supra* note 81, at 1074; DANN, *supra* note 16, at 274.

112. Schmalenbach, *supra* note 15, at 177.

113. DANN, *supra* note 16, at 275.

114. KAMPF, *supra* note 90, at 68.

Limburg Principles).<sup>115</sup> This stems directly from the obligation to respect and the prohibition of aiding another state's human rights violations.<sup>116</sup> Thus, the EU is obligated to exert influence on recipient countries violating human rights in the implementation of the funded development cooperation project. If these neglect to suppress and prevent human rights violations from occurring or do not provide remedies, the EU will have to cease the project's funding.<sup>117</sup> As established above, the EU included human rights clauses in its development cooperation agreements.<sup>118</sup> The continuation of human rights violations and a state's unwillingness to fulfill its obligation to protect the individuals' human rights amounts to a contractual breach under Article 60 of the Vienna Convention on the Law of Treaties<sup>119</sup> triggering the possibility of suspending the treaty for the EU.<sup>120</sup>

This obligation is echoed by the Accra Agenda for Action, which was reaffirmed by the Global Partnership for Effective Development Cooperation in the 2016 Nairobi Outcome Document.<sup>121</sup> Article 13(c) of the Accra Agenda for Action stipulates that "developing countries and donors will *ensure* that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability" (emphasis added).<sup>122</sup> The European Commission acting on the behalf of the EU is a signatory

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115. *Id.* at 16.

116. See DANN, *supra* note 16, at 276; Ahmed & Butler, *supra* note 87, at 800.

117. Andrea Kämpf & Anna Würth, *Mehr Menschenrechte in die Entwicklungspolitik!*, Policy Paper, no. 15, 2010, at 8, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/policy\\_paper\\_15\\_mehr\\_menschenrechte\\_in\\_die\\_entwicklungspolitik\\_bf.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/policy_paper_15_mehr_menschenrechte_in_die_entwicklungspolitik_bf.pdf).

118. See *supra* III.C.2.c.

119. Vienna Convention on the Law of Treaties art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

120. Daniel-Erasmus Khan, *TFEU Article 209*, in EUROPEAN UNION TREATIES: A COMMENTARY 768 (Rudolf Geiger et al. eds., 2015). See also Cotonou Agreement, *supra* note 29, at art. 96 (allowing for "appropriate measures"). Because Article 60 of the VCLT reflects customary international law, the EU, even as a non-party to the Convention, can rely on this provision. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Afr.), Judgment, 1971 I.C.J. 3, ¶ 94 (June 21) (making reference to the customary nature of Article 60 of the VCLT).

121. Nairobi Outcome Document, Global Partnership for Effective Development Cooperation (Dec. 1, 2016) <http://effectivecooperation.org/wp-content/uploads/2016/12/OutcomeDocumentEnglish.pdf>.

122. Accra Agenda for Action, Org. for Econ. Co-operation and Dev. ¶13(c) (Sept. 4, 2008), <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

party to both of these agreements<sup>123</sup> and is thus committed to adhere to their provisions.

c. *Duty to Fulfill*

The EU is also obligated to fulfill human rights. This entails a “due diligence obligation” concerning the projects it funds.<sup>124</sup> The EU is obligated to assess the potential human rights risks of development projects prior to their funding.<sup>125</sup> Surprisingly, unlike most aid donors, such as the World Bank or the International Monetary Fund, the EU does not have a formalized human rights impact assessment procedure in place prior to granting development aid.<sup>126</sup>

An obligation to conduct such an assessment can be derived from various sources. Article 57(4)(e) of the Cotonou Agreement provides that the ACP States and the EC (now the EU) are jointly responsible for monitoring and evaluating the effects and results of the development projects in question. Article 12 of Regulation 236/2014 regarding the EU’s DCI offers a similar provision stipulating the Commission’s obligation to evaluate the impact and the effectiveness of its policies. However, neither instrument makes express reference to the necessity of evaluating the human rights impact. The DCI regulation in Article 12(1) solely mentions that the assessments should take into account the issue of gender equality. Given the EU’s broad commitment to human rights and the fact that one of the prime goals of its development cooperation is to further human rights, a project contributing to human rights violations in the receiving country would render the project “ineffective” and thus needs to be taken into consideration in the EU’s impact assessment.

The Maastricht Principles—even if not binding on the EU—can be referred to as guidelines in this respect.<sup>127</sup> According to Principle 14,

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123. See Countries, Territories and Organizations adhering to the Busan Partnership for Effective Development Co-operation, Org. for Econ. Co-operation and Dev., <http://www.oecd.org/dac/effectiveness/busanadherents.htm>; Countries, Territories and Organizations Adhering to the Paris Declaration and AAA, Org. for Econ. Co-operation and Dev., <https://www.oecd.org/dac/effectiveness/countriesterritoriesandorganisationsadheringtotheparisdeclarationandaaa.htm>.

124. KÄMPF, *supra* note 90, at 16; Helmut Philipp Aust & Georg Nolte, *Equivocal Helpers—Complicit States, Mixed Messages and International Law*, 58 INT’L AND COMP. L. Q. 1, at 15 (2009); *contra*, Bartels, *supra* note 81, at 1075.

125. DANN, *supra* note 16, at 277 (comparing a human rights impact assessment to the World Bank’s safeguard policies).

126. *Id.* at 278.

127. See Kämpf & Winkler, *supra* note 47, at 76.

states are obligated to conduct a prior risk assessment regarding the potential extraterritorial impacts their actions have on the enjoyment of economic, social and cultural rights. This obligation is not only limited to an *ex ante* assessment, but also extends to an obligation to monitor and control the effects of the development cooperation throughout the duration of the project in question.<sup>128</sup>

D. *Interim Remarks: The EU's Responsibility for Funding Projects Resulting in Human Rights Violations*

From the perspective of EU law and the emerging law on international responsibility, the EU is obligated to adhere to human rights standards in its development aid. This includes the EU's obligation to abstain from funding projects that result in human rights violations. The duty to adhere to international human rights law further encompasses the obligation to perform due diligence prior to and during the project in question and ensure that the project's implementation respects human rights.

IV. THE NECESSITY FOR AN INDIVIDUAL COMPLAINTS MECHANISM

The necessity for an individual complaints mechanism first depends on the EU's legal obligation to provide for such a mechanism and secondly on the question of whether current EU mechanisms already provide sufficient redress for affected individuals.

A. *The EU is Obligated to Provide a Complaints Mechanism Under General Human Rights Law and EU Law—With What Consequences?*

Given that the EU can be held accountable for being involved in aid projects detrimental to individuals' human rights, the EU is obligated to provide a possibility for individuals to bring forward their grievances. Maastricht principle number 37 specifically underscores this right in the context of development aid, obligating states to provide for effective remedies for individuals affected by development aid projects.<sup>129</sup> Furthermore, this understanding results from several human rights treaties, including Article 2(3) of the ICCPR,<sup>130</sup> which guarantees the right to effective remedy. This obligation equally applies to the EU even though it is a non-state actor and not party to these human rights

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128. *Id.*

129. Mayer, *supra* note 15, at 339.

130. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 14668.



treaties. States should not be able to rid themselves of their human rights obligations by transferring competencies to the EU. This is mirrored by Article 9(2) of the Cotonou Agreement, which makes general reference to the parties' obligations to ensure "effective and accessible means of legal redress."<sup>131</sup>

The right to an effective review mechanism is furthermore supported by customary international law, to which the EU is bound.<sup>132</sup> A vast majority of international development agencies so far have established review mechanisms that accept individual complaints.<sup>133</sup> This reflects *opinio juris* and state practice necessary for the evolution of customary international law.<sup>134</sup>

B. *Judicial Enforceability of EU Human Rights Obligations for Third-Country Individuals*

The following section will analyze whether affected individuals have the ability to bring their grievances to the attention of the EU. The *status quo* is tantamount with regards to the question of whether the establishment of an individual complaints' mechanism is necessary. The focus hereby lies mainly on the judicial fora available at the international and the EU levels. Individual appeals to domestic courts will mostly be ineffective given that the EU often times enjoys immunity before national courts, regularly contractually waives liability in its partnership agreements, and the fact that national courts might be unable or unwilling to prosecute given that development aid is often disbursed in states with already weak state structures.<sup>135</sup>

1. International Court of Justice: *Ubi Non Accusator, Ibi Non Judex*—No Plaintiff, No Judge

Considering the International Court of Justice ("ICJ") as a suitable forum for individuals to address their grievances against the EU might seem far-fetched given that only states have standing before the Court.<sup>136</sup>

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131. Cotonou Agreement, *supra* note 29, at art. 9(2).

132. Bartels, *supra* note 81, at 1078.

133. Mayer, *supra* note 15, at 315, 319.

134. The practice is "indirect" state practice given that the primary actors in this regard are international organizations. *See id.* at 319.

135. DANN, *supra* note 16, at 463; Mayer & Wong, *supra* note 41, at 499; Schmalenbach, *supra* note 15, at 178.

136. Article 34(1) of the Statute of the I.C.J. stipulates that "only States may be parties in cases before the Court."

There are however several means by which the individuals' human rights violations could be brought before the Court. First, the relevant nationals' state could seek diplomatic protection on their behalf. This seems highly unlikely given that human rights violations often occur with the participation or at least the consent of the beneficiary state on whose territory the human rights violations occur.<sup>137</sup>

Thirlway provides an alternative theory, which opens up another possibility.<sup>138</sup> Article 14 DARIO invokes the auxiliary responsibility of the EU for aiding the beneficiary state. According to Article 48 DARIO, wherever an international organization and a state are responsible "for the same internationally wrongful act, the responsibility of each state or organization may be invoked in relation to that act." The ICJ so far has refused to adjudicate acts falling outside of its purview.<sup>139</sup> However, the ECtHR in several judgments was willing to decide in principle on the responsibility of an entity not subject to its jurisdiction, which might prompt the ICJ to follow suit.<sup>140</sup> One could envision a scenario, in which one state holds the beneficiary state accountable for violating a human rights treaty, whereas the involvement and (joint) responsibility of the EU would be adjudicated upon as an annex or implicit decision. Article 42 DASR allows for an "injured state" to invoke another state's responsibility. It might seem difficult to find "an injured state" given that human rights are primarily conceptualized as safeguards of the individual vis-à-vis the state.<sup>141</sup> Simma offers a solution in this regard. He follows a more progressive path and surmises that the human rights treaty regime can be seen as a "mutual, bilateral undertaking" owed to other States parties" and as such should benefit from bilateral enforce-

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137. Mayer, *supra* note 15, at 324.

138. Hugh Thirlway, *Responsibility of International Organizations: What Role for the International Court of Justice?*, RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS 351, 358 (Maurizio Ragazzi ed., 2013).

139. See I.C.J. *Monetary Gold Principle*, in "Monetary Gold Removed from Rome in 1943 (It. v. Fr.)", Preliminary Questions, 1954 I.C.J. 19, 32 (June 15); see also Mayer, *supra* note 15, at 325.

140. Thirlway, *supra* note 138, at 359.

141. Allowing the invocation of responsibility by a state other than the injured party if the obligation is "owed to the international community as a whole" is also not helpful in this regard. See U.N. Doc. A/56/10, *supra* note 52, at art. 48. The latter according to the ILC Commentary to the DASR encompasses obligations *erga omnes. Id.* Only grave breaches of human rights, such as the prohibition of genocide and the prohibition of slavery, are considered to have acquired this status. *Id.* Most development aid projects, such as the Ukrainian case, however do not result in human rights violations of this magnitude. *Id.*

ment.<sup>142</sup> This notion is alluded to by the ECtHR in its *Northern Ireland* case, where it deduced that the Convention established “objective obligations which . . . benefit from a ‘collective enforcement.’”<sup>143</sup> In this case, the member states would all be benefactors of the treaty and could be considered “injured states” under Article 42 DADR. They could invoke the responsibility of the beneficiary state, which might then result in an adjudication of the auxiliary responsibility of the EU.

Other problems exist in addition to establishing admissibility before the ICJ. Whereas an internationally wrongful act could be established, as was elaborated above, Article 14 DARIO further requires knowledge of the internationally wrongful act. The ICJ applies a high *mens rea* threshold to the parallel provision of the DADR, whereby the actor has to have “full awareness” that the supplied aid would be used to commit the internationally wrongful act.<sup>144</sup> The commentary on the DADR provides that the organ must have “intended . . . to facilitate the occurrence of the wrongful conduct.”<sup>145</sup> Both are hard to establish given the many actors involved in development cooperation.

Aside from the legal hurdles, the practical implications of this theory for the case at hand are limited as well given the interests involved. Referring to the case of the Ukrainian detention centers: which third country would have an interest in invoking the Ukrainian’s (and the EU’s implicit) responsibility? The individuals who suffered human rights violations are asylum seekers from third states, such as Afghanistan and Somalia.<sup>146</sup> It is highly unlikely that any state, let alone the countries of origin, would invoke human rights obligations on their behalf.<sup>147</sup> This contention is supported by the fact that so far barely any state has filed an inter-state complaint regarding another state’s human rights violations.<sup>148</sup>

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142. Simma & Pulkowski, *supra* note 68, at 161. Other authors, such as Frowein, reject the idea of bilateral enforcement. *See id.* at 160 n.75; Bird, *supra* note 74, at 893 (concurring).

143. *Ireland v. UK*, 25 Eur. Ct. H.R. (ser. A), at ¶ 239 (1978).

144. *Bosnia v. Serbia*, 2007 I.C.J. Rep. 921, ¶ 423.

145. Yearbook of the Int’l Law Comm’n, Rep. of the Comm’n to the G.A. on the Work of Its Fifty-Third Session, Vol. II, Part Two, 66, U.N. Doc. A/CN.4/SER.A (2001).

146. See media report by PRO ASYL, *supra* note 5.

147. This would also be technically difficult given that neither Afghanistan nor Somalia have reciprocal human rights duties towards Ukraine, owing to the fact that neither are member states to the same human rights treaties.

148. Simma & Pulkowski, *supra* note 68, at 162; Bird, *supra* note 74, at 895.

## 2. European Court of Human Rights: A Future Beacon of Hope?

Proceedings before the ECtHR by the affected individual against the EU seem equally unlikely given that the EU is not a party to the ECHR. According to Article 1 ECHR the ECtHR is only competent to rule on the responsibility of contracting parties. One could, however, envision that the individual file a claim against all twenty-eight member states as representatives of the EU. It is unclear if the ECtHR would be willing to accept such a claim and “pierce the corporate veil,” as Hoffmeister coins it, in the course of the EU’s development cooperation efforts due to a lack of precedent.<sup>149</sup> This speculation will become obsolete as soon as the EU finally accedes to the ECHR. In this case foreign nationals would be able to launch a complaint according to Article 34 ECHR, which provides redress for “any person” regardless of their nationality. Even this might provide difficulties though, given the ECtHR’s unclear relationship to the ECJ and what stance the ECtHR might take on the extraterritorial applicability of human rights with regards to EU development aid.

## 3. The European Court of Justice: Article 340 in conjuncture with Article 288 TFEU as the “saving grace”?

The more obvious judicial forum is the ECJ. Even here no precedent exists concerning the invocation of human rights violations by individuals negatively affected by EU development aid.<sup>150</sup> Two possible motions come to mind for the case at hand. First of all, the individual could file an action for annulment under Article 263(4) TFEU. This motion allows the ECJ to review the legality of acts taken by EU bodies, such as the EU Commission and the EU Parliament, who are mainly responsible for the disbursement of development aid. This complaint can be filed by every natural or legal person, including non-EU nationals.<sup>151</sup> Hence, the suit could be filed by the injured individual. However, only such acts are actionable, which either address the claimant or that “directly” and “individually” concern the claimant or “regulatory acts” with individual concern. The decisions regarding the disbursal of development aid do not address the individual. The Court applies a

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149. Hoffmeister, *supra* note 69, at 731; Evans & Okowa, *supra* note 105, at 149.

150. The only judgments regarding individual complaints in the context of international development aid concern complaints regarding the procurement process. *See, e.g.*, Case T-185/94, *Geotronics v. Comm’n*, 1995 E.C.R. II-02795.

151. Markus Kotzur, *TFEU Article 340*, in *EUROPEAN UNION TREATIES: A COMMENTARY* 874, 880 (Rudolf Geiger et al. eds., 2015).

high threshold with regards to acts of “direct” and “individual” concern.<sup>152</sup> Especially the requirement of direct concern is, as both Schmalenbach and Dann have pointed out, almost insurmountable given that development aid projects still need to be implemented by a third party—here, the beneficiary.<sup>153</sup> The same reasoning applies to the actionability of the decision as a “regulatory act” given that only acts not requiring further implementation are covered.

Secondly, the individual could file a motion for damages according to Article 340 in conjuncture with Article 268 TFEU, which allows an individual to seek redress against the EU for non-contractual liability. Article 340 TFEU obliges the EU to make good any damage caused by its institutions in the performance of their duties. All individuals regardless of their nationality are able to seek this form of redress before the ECJ.<sup>154</sup> Article 340 TFEU requires that the EU bodies’ acts contravene EU law.<sup>155</sup> This encompasses violations of the EU’s obligations under international law, including international human rights law.<sup>156</sup> The claimant could invoke either the Commission’s act of financing a project detrimental to individuals’ human rights or the EU’s duty to adhere to due diligence standards before acquiescing to finance a project and the violation of its obligations to implement measures to ensure the beneficiary fulfills its human rights obligations, such as terminating the agreement as a last resort.

The ECJ in its jurisprudence requires an adequate casual link between the violation of the EU’s duty and the damage done. Mekonnen & van Reisen suggest that this link is most times disrupted given that the project still has to be implemented by the beneficiary.<sup>157</sup> However, this line of argumentation would render the obligation of the EU not to aid a state in its internationally wrongful act meaningless, because in these cases the main actor is always the violating state. Furthermore, as Schmalenbach rightly argues, this argument does not apply to the situation in which the EU breached its (own) due diligence obligations

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152. Schmalenbach, *supra* note 15, at 180 (finding that the requirement of “individuality” is easily given if the case falls under either the DCI regulation or the Cotonou Agreement given that the Commission is obligated to conduct appropriate environment screening at the project level).

153. *Id.*; Dann, *supra* note 16, at 463.

154. Markus Kotzur, *TFEU Article 340*, in *EUROPEAN UNION TREATIES: A COMMENTARY* 1024, 1026 (Rudolf Geiger et al. eds., 2015).

155. Matthias Ruffert, *AEUV Art. 340*, in *KOMMENTAR ZUM EUV/AEUV*, margin 12 (Christian Callies & Matthias Ruffert eds., 2016).

156. Marc Jacob & Matthias Kottmann, *AEUV Art. 340*, in *DAS RECHT DER EUROPÄISCHEN UNION*, margin 82 (Eberhard Grabitz et al. eds., 2016).

157. Mekonnen & van Reisen, *supra* note 36, at 339-340.

or obligations to exercise its influence on the beneficiary to end human rights violations.<sup>158</sup> However, the ECJ regularly requires a “flagrant” violation of the EU body’s obligations and vests the claimant with the burden-of-proof for both the causality and the breach.<sup>159</sup> Both make it extremely hard to invoke the EU’s responsibility and make it highly unlikely that individuals will succeed in this forum.

#### 4. EU Ombudsman

Lastly, the individual could try to appeal to the EU Ombudsman. However, this form of redress is ineffective due to a number of reasons. The EU Ombudsman is not legally bound to accept complaints by non-EU nationals. Article 288 TFEU only alludes to EU citizens or persons residing within the EU. Most importantly, however, the Ombudsman only provides suggestions because decisions are non-binding.<sup>160</sup>

#### V. ALLOWING INDIVIDUALS TO ADDRESS THEIR GRIEVANCES AND WIDENING CHANNELS OF EXISTING GRIEVANCE MECHANISMS

The analysis of this Note has made a gap quite apparent: the EU is obligated to adhere to human rights in its development aid cooperation and is even responsible for funding projects resulting in human rights violations, not taking adequate measures to end human rights violations or preventing these from happening. At the same time the possibilities for individuals to effectively address their grievances are scant at best. Thus, the EU urgently needs to create a monitoring body and expand the competences of its existing complaints mechanisms to allow effective remedies to the affected individuals.

The EU should follow through with actually implementing measures and safeguards to ensure that the human rights obligations it so readily signs on to are actually adhered to.<sup>161</sup> Thus far the auditing bodies of

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158. See Schmalenbach, *supra* note 15, at 182.

159. See e.g., Case 5/71, Schöppenstedt v. Council, 1971 E.C.R. 975, ¶ 11; Case T-178/98, Fresh Marine Co. SA v. Comm’n, 2000 E.C.R. II-03331, 118; Kotzur, *supra* note 154.

160. Schmalenbach, *supra* note 15, at 183.

161. See Laure Delcour, *The 2015 ENP Review: Beyond Stocktaking, the Need for a Political Strategy*, Coll. of Eur. Pol’y Br. (Dec. 2015), [https://webcache.googleusercontent.com/search?q=cache:nTh68BTINDEJ:https://www.coleurope.eu/system/files\\_force/research-paper/delcour\\_cepob\\_1-15\\_0.pdf%3Fdownload%3D1+%&cd=1&hl=en&ct=clnk&gl=us](https://webcache.googleusercontent.com/search?q=cache:nTh68BTINDEJ:https://www.coleurope.eu/system/files_force/research-paper/delcour_cepob_1-15_0.pdf%3Fdownload%3D1+%&cd=1&hl=en&ct=clnk&gl=us) (commenting on the Regulation (EU) No. 232/2014 of the European Parliament); Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014, Establishing a European Neighborhood Instrument, 2014 O.J. (L 77) 27, 27.

the EU have only taken cursory glances at the EU's human rights record with regard to its development aid. The ECA's and OLAF's focus on fiscal responsibility are insufficient with regards to the human rights commitments the EU has taken on. The EU should open up channels for individuals to address their grievances at the EU level. First, this would start with widening the ability to address grievances before the ECJ. Thus, the ECJ's jurisprudence necessitating high thresholds regarding direct concern and causality needs to be lowered and tailored to the special circumstance of multiple actors involved in development cooperation. However, given the legal pitfalls especially with regards to the nexus needed for liability, the EU should pair the possibility of complaints before the ECJ with further complaints mechanisms.

The EU should ensure that it finally implements the necessary steps to follow through with its obligation to accede to the ECHR to allow for proceedings before the ECtHR. Lastly, the EU should widen the EU Ombudsman's range of action and instate a clear complaints procedure to enable the official involvement of EU institutions.<sup>162</sup> The World Bank's inspection panel seems like an obvious model in this regard. Even though a body comparable to the World Bank's inspection panel would surpass the existing status quo, the EU should ensure that it instates a complaints mechanism that allows for effective remedies. Thus, a body that can make binding decisions and formally engage the Commission's participation is needed.

At the same time, the EU should consider improving transparency within its development cooperation efforts. Transparency is a major factor in ensuring that institutions are actually held accountable.<sup>163</sup> As was shown at the beginning of this Note, the EU's development aid cooperation takes on many different shapes and forms and is a vastly changing area. Hence, the affected population usually does not know how the development project was funded, what exactly was negotiated between the donor and the beneficiary and has no knowledge of existing redress mechanisms or available avenues to address complaints.<sup>164</sup> This situation needs to be remedied through more elaborate publications of the EU's development aid efforts.

The fact that the EU is currently unwilling to step up to the plate and implement concrete measures to ensure that its development aid does

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162. See Schmalenbach, *supra* note 15, at 187 (suggesting allowing the Ombudsman to receive individual complaints and going on country missions to investigate).

163. DANN, *supra* note 16, at 450.

164. KAMPF, *supra* note 90, at 17.

not harm individuals is evidenced by the case of the Ukrainian detention centers. In answering the EU parliamentarian's questions about how exactly the EU avoids human rights violations as a result of financing, the Commission's answer was evasive at best: "The EU continues to support Ukraine to better manage irregular migration and treat asylum-seekers according to the European and international standards."<sup>165</sup> Concrete actions are phrased differently: the situation is in dire need of improvement.

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165. Parliamentary Questions, Answer given by Vice-President Mogherini on Behalf of the Commission, *supra* note 10.