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EU: TIME TO REVIEW AND REMEDY COOPERATION POLICIES FACILITATING ABUSE OF REFUGEES AND MIGRANTS IN LIBYA

One year after the resumption of the armed conflict in Tripoli, and at a time when the humanitarian situation in Libya continues to deteriorate due to further military escalation and the spreading of the Covid-19 virus, Amnesty International, the Italian Recreational and Cultural Association (ARCI), Associazione for Juridical Studies on Immigration (ASGI), Avocats Sans Frontières (ASF), Cairo Institute for Human Rights Studies (CIHRS), Euro-Mediterranean Human Rights Network (EuroMed Rights), the Global Legal Action Network (GLAN), Human Rights Watch (HRW), International Federation for Human Rights (FIDH), Lawyers for Justice in Libya (LFJL), Oxfam International, and Saferworld are calling on EU institutions to stop any actions trapping people in a country where they are in constant, grave danger.

EU institutions should review and reform the bloc's policies of cooperation with Libya on migration and border management and control. During the past three years, these have facilitated the containment of tens of thousands of women, men and children in a country where they have been exposed to appalling abuse.

The call coincides with the submission by GLAN, ASGI and ARCI of a complaint before the European Court of Auditors (ECA). In their complaint, the three organisations are requesting

the body to launch an audit into EU's cooperation with Libya. Such an audit would seek to determine whether the EU has breached its financial regulations, as well as its human rights obligations, in its support for Libyan border management.

THE EU COOPERATION WITH LIBYA ON BORDER CONTROL AND ITS CONSEQUENCES

EU Member States and Institutions have long responded to the arrival of refugees and migrants, crossing the central Mediterranean on unseaworthy and overcrowded boats, by cooperating with Libyan authorities to stop departures and ensure that people rescued or intercepted at sea would be disembarked in Libya. In recent years, this policy has been pursued through new and numerous means, including the provision of training, speedboats, equipment and various forms of assistance to Libyan authorities such as the Libyan Coast Guard and Port Security (LCGPS, under the Ministry of Defence) and the General Administration for Coastal Security (GACS, under the Ministry of Interior), both under Libya's Government of National Accord (GNA).

EU institutions have played a key role in the definition and execution of this strategy. While significant resources have been invested in projects aimed at alleviating the suffering of refugees and migrants stranded in Libya, and remain central to EU public communications on the topic, EU actions have nonetheless facilitated and perpetuated this policy of containment. The contained people have become victims of human rights violations and abuse, including indefinite, arbitrary detention and cruel, inhuman and degrading treatment, which such cosmetic measures have not remedied.

Indeed, the overall policy of cooperation with the Libyan authorities on border control and management has been designed and consistently implemented at the EU level. It started with the launch of the EU Border Assistance Mission in Libya (EUBAM) in 2013, with the goal to support the Libyan authorities in improving and developing the security of the country's borders.¹ It continued with the modification of the mandate of naval operation EUNAVFOR Med Sophia, tasked since June 2016² to train members of the Libyan Coast Guard. It expanded with the Joint Communication by the European Commission and the High Representative for Foreign Affairs, dated 25 January 2017, indicating action to step up the capacity of the Libyan Coast Guard as a key priority.³ The strategy was completed through the Malta Declaration,⁴ of 3 February 2017, which explicitly indicated "training, equipment and support to the Libyan national coast guard and other relevant agencies" as its first priority. Crucially, this declaration also affirmed the intention to strengthen the mainstreaming of migration within the EU's official development assistance for Africa, including through the mobilization of resources under the EU Emergency trust fund for stability and addressing root causes of

¹ https://eeas.europa.eu/csdp-missions-operations/eubam-libya/3859/about-eu-border-assistance-mission-libya-eubam_en

² EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added, 20 June 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/06/20/fac-eunavfor-med-sophia/>

³ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf

⁴ <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>

irregular migration and displaced persons in Africa (EUTFA).

The EU has then concretely implemented this strategy through the funding of specific projects, in particular the project “Support to Integrated border and migration management in Libya” (IBM project), launched in July 2017 and funded by the EUTFA with a total of €91.3m.⁵ The project has focused almost entirely on enhancing the operational capacity of Libyan authorities in maritime surveillance: assisting with the supply and maintenance of speedboats; setting up basic facilities to coordinate operations and planning the establishment of fully-fledged operational rooms; and supporting the definition of a Libyan Search and Rescue Region, declared by Libya in December 2017. This, notwithstanding the fact that the country cannot be considered a place of safety for the disembarkation of people rescued at sea, a fact that even the Libyan authorities admitted earlier this month. It should also be noted that, despite the assistance provided, Libya has been unable to attend to this rescue area and has benefited from extensive and decisive support from Italy to coordinate maritime operations, including many triggered following sightings by EU assets.⁶

While this strategy has achieved its objective of drastically reducing the number of people reaching Europe via the central Mediterranean – as well as the absolute number of deaths at sea, given the plummeting departures – it has also led to dramatic human consequences. Following disembarkation in Libya, since 2016 tens of thousands of women, men and children have been transferred to detention centres nominally under the control of the Libyan Ministry of Interior, where people have been detained arbitrarily for an indeterminate period of time, and where inhumane conditions and overcrowding are accompanied by the prevalence of torture and other ill-treatment. Cases of beatings, sexual violence, exploitation, forced labour, unlawful killings, and deaths in custody due to inadequate medical treatment or lack of adequate food, have been widely documented. Even outside of detention centres, refugees and migrants are constantly exposed to the risk of kidnappings, robberies, trafficking and exploitation.⁷

The already dire humanitarian situation has been compounded, in recent weeks, by newly escalating violence in Tripoli as well as by the spreading of Covid-19 disease. All parties to the conflict, including the GNA and the Libyan National Army (LNA), have committed serious violations of international humanitarian law. Indiscriminate attacks have resulted in deaths among civilians, including dozens of refugees and migrants killed in the bombing of the detention centre of Tajoura, near Tripoli, in July 2019.⁸ The risk of an escalation of violence in

⁵ <https://ec.europa.eu/trustfundforafrica/region/north-africa/libya>

⁶ <https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>

⁷ UN, *Report of the Secretary-General António Guterres on the United Nations Support Mission in Libya*, 15 January 2020, https://unsmil.unmissions.org/sites/default/files/sg_report_to_sc_15_january_2020_eng.pdf

Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, December 2017, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>

Human Rights Watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*, January 2019, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>

⁸ Amnesty International, *Libya's relentless militia war: Civilians harmed in the battle for Tripoli, April-August 2019*, October 2019, <https://www.amnesty.org/en/documents/mde19/1201/2019/en/>

Libya due to the fragile political situation should have been foreseen by EU decision-makers.

Many risks were well-known by EU Member States' and institutions' officials when designing the cooperation with Libya. In particular, the systematic human rights violations in detention centres – the very centres where Libyan authorities detain people who, with EU support, they intercept at sea – have been documented widely for a number of years, including by UN agencies who have also attempted to respond to such risks through human rights due diligence steps and the adoption of restrictive measures on their programmes.⁹

While fully conscious of the horrific violations and abuses experienced by refugees and migrants taken to Libya, EU institutions have undertaken to implement the above-mentioned strategy for the past four years. The EU has thus contributed to the disembarkation in Libya and transfer to detention centres of tens of thousands of women, men and children. What is more, taking into account the 2012 European Court of Human Rights decision in the case *Hirsi Jamaa and Others v. Italy*, ruling that maritime pushbacks towards Libya breach the European Convention on Human Rights – this strategy has been designed to circumvent responsibility under international and EU laws, in multiple ways.¹⁰ First, the focus on the capacity-building of the LCGPS is meant to ensure that people are intercepted at sea and subsequently disembarked in Libya by non-European actors – since both international and EU law prohibit the transfer of anyone to a country where their rights and freedoms are at serious risk. Second, EU institutions have tried to minimise the EU's direct involvement and deflect attention from their responsibility for the serious abuses they have contributed to by focusing on funding projects implemented primarily by Member States. Finally, by transferring European development and other aid resources into the EUTF, a fund that can be used with reduced transparency and limited supervision, and then using those funds to realize projects such as IBM, they have reduced avenues for holding decision-makers to account for the harmful contributions made by such actions.

THE COMPLAINT BEFORE THE EUROPEAN COURT OF AUDITORS

On 27 April 2020, GLAN, ASGI, and ARCI submitted a complaint before the European Court of Auditors, the EU body responsible for auditing the use and management of the EU budget.

The complaint was drafted based on an expert opinion by academic experts on EU budget and development laws, Prof Dr Phillip Dann and Dr Michael Riegner of Humboldt University and Ms Lena Zagst of Hamburg University, published alongside the complaint. Following close to a year's efforts to obtain information from various EU institutions about the use of EU

⁹ See, among many others:

UN Support Mission in Libya and Office of the UN High Commissioner for Human Rights, *“Desperate and Dangerous”: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018,

<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> and *“Detained and dehumanised”: Report on human rights abuses against migrants in Libya*, 13 December 2016,

https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf

UNHCR, *Position on returns to Libya (Update II)*, September 2018, <https://www.refworld.org/pdfid/5b8d02314.pdf> and *Position on returns to Libya (Update I)*, October 2015, <https://www.refworld.org/docid/561cd8804.html>

¹⁰ <http://hudoc.echr.coe.int/eng?i=001-109231>

funds, the complaint argues that EU funds used to implement the EU's migration policy have been mismanaged, in breach of EU laws governing the EU budget, and with consequences for the EU and its Member States under international law. The complaint claims that the European Commission has failed to uphold its obligations under EU law to ensure that it is not acquiescing or contributing to serious human rights violations. In particular, it argues that provision of financial means to implement projects resulting in return to and containment in Libya of people at risk of human rights abuse, with knowledge of these consequences and in the absence of any legally required measures to mitigate such risks, engages the responsibility of the EU institutions. The complaint is unique insofar as it specifically addresses the responsibilities of EU institutions relevant to the use of EU funds in such projects, linking their financial disbursements and human rights obligations. Crucially, it is filed in the context of several previous and ongoing litigation efforts before domestic and regional courts and international bodies, including the European Court of Human Rights and the UN Human Rights Committee.

The complaint calls on the ECA to launch an audit into the IBM programme for the misuse of EU funds and for its harmful impacts on human rights. The complaint argues, based on EU financial legislation, the illegality of the IBM programme due to inconsistency with the permissible funding objectives for development and other underlying funds disbursed by the EUTF. Specifically, the use of EU funds in the IBM programme contravenes the obligation to follow legal requirements for the use of such funds, to ensure that use 'does no harm', and is compliant with EU law regarding sound financial management principles of effectiveness, efficiency and transparency. The arguments are based on the appended legal opinion and supported by information specific to the IBM programme researched and analysed by the groups.

The human rights impact of the funding is particularly severe due to the fact that the IBM programme, now in its second phase, which is set to last until late 2021, is being implemented without any conditionality or restriction on the use of funding or review of funded activities, and without a human rights review or monitoring of the human rights impact. EU and international law, the complaint argues, requires that the EU and its Member States make the implementation of the programme conditional on the closure of detention centres and the enactment of asylum laws by Libyan authorities, amongst other concrete and verifiable steps. The programme should also provide for robust and effective review mechanisms that could result in its suspension if conditions are not respected.

There is no doubt that EU institutions have been long aware of the risks involved in cooperating with Libyan authorities on border control and management. A recent investigation by The Guardian revealed how in early 2019 the Director of Frontex, Fabrice Leggeri, wrote to Paraskevi Michou, the Director-General of the Directorate-General for Migration and Home Affairs in the European Commission, outlining issues arising from sharing information about the position of boats in distress with Libyan authorities, highlighting how "the Commission and in general institutions may face questions of a political nature as a consequence of the SAR-related operational exchanges of information."¹¹ Indeed, questions about the lawfulness of the

¹¹ <https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>

cooperation have previously been asked, not only by members of civil society. As early as March 2017, a review by the UK Independent Commission for Aid Impact noted that the UK and EU work efforts to build the capacity of the LCGPS aimed at increasing the likelihood that refugees and other irregular migrants were intercepted by the LCGPS, and that those intercepted were placed in detention. The body, which reports its findings to the British Parliament, expressed concern that “the programme delivers migrants back to a system that leads to indiscriminate and indefinite detention and denies refugees their right to asylum”, and concluded that the risk of UK aid causing unintended harm to vulnerable migrants, or preventing refugees from reaching a place of safety, had been inadequately assessed.¹² Subsequently, both the UN High Commissioner for Human Rights and the Commissioner for Human Rights of the Council of Europe expressed deep concern about the consequences of European cooperation with Libya on border control.¹³

In 2018, the ECA opened a first, general audit on the EUTF, leading to the Special Report “European Union Emergency Trust Fund for Africa: Flexible but lacking focus”.¹⁴ In its conclusions, the ECA found that the fund’s more general established objectives were too broad to efficiently steer action and measure impact; that the Commission did not comprehensively analyse needs nor the means at its disposal to address them; that the selection of projects had been fast but not fully consistent and clear; and that, while projects have started to deliver outputs, their monitoring was deficient. Among other weaknesses, the report highlighted the lack of a specific risk assessment framework, or – in the case of projects for the North of Africa – of any documented criteria for selecting project proposals. The funding of the IBM programme reveals that these concerns have now materialised.

The “action fiche” for the first phase of the IBM programme – i.e. the document summarizing its objectives and relevant plans and activities – acknowledges that “Under the existing Libyan legislation, once rescued, irregular migrants generally end up in detention centres which generate international concerns.”¹⁵ The action fiche for the second phase of the programme expands on this: “The treatment of migrants in Libyan detention centres is of great concern: there is a lack of food, hygiene is abhorrent and there is a situation of total despair. Equally important is the absence of a clear and verifiable system of the rule of law, which meets the international and human rights standards. Migrants in detention centres have often no access to legal process and cannot address any misuse of power. This situation has led to criticism on the current programs financed by the EU in Libya and influenced the design of this

¹² Independent Commission for Aid Impact, *The UK’s aid response to irregular migration in the central Mediterranean*, 10 March 2017, www.icaei.independent.gov.uk/report/uks-aid-response-irregular-migration-central-mediterranean/

¹³ See, among others: OHCHR, *UN human rights chief: Suffering of migrants in Libya outrage to conscience of humanity*, November 2017, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393> and CoE Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-168094eb87>

¹⁴ https://www.eca.europa.eu/Lists/ECADocuments/SR18_32/SR_EUTF_AFRICA_EN.pdf

¹⁵ https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en

action.”¹⁶

Despite such references to human rights and international law, the programme has not provided for any measure adequate to address the role of such funding in contributing to the dire situation of refugees and migrants trapped in Libya. Other measures supposedly adopted to mitigate the human rights impact of the programme, such as trainings and political demarches, either depend on the good will of Libyan authorities, or are tokenistic. While EU officials express concern that the continuation of abuse against refugees and migrants in Libya may “further damage the narrative and reputation of the EU”, the risk of actively facilitating this abuse is not considered in the brief risk analysis provided in the action fiche for the second phase . Notably, most of the project’s impact monitoring is outsourced to the Italian Ministry of Interior, which is also in charge of implementing many of the planned actions and has repeatedly refused to disclose information or even discuss related concerns.

As the IBM project is set to last until end 2021, it is high time to reassess this project, as well as the implications of the wider strategy adopted by the EU and its Member States to stop irregular crossings in the central Mediterranean. Human rights violations should be stopped and remedied, not encouraged and enabled. At a time when refugees and migrants stuck in Libya, as a result of EU decisions and projects, are exposed not only to serious abuse but also to the risks emerging from intensifying conflict and spreading disease, Europe should ensure the accountability of its own institutions and that any migration cooperation programmes are devised in line with its international obligations, not least in terms of their financial dimension.

¹⁶ https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-second-phase_en