

Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 33/30, 27/1, 26/19, 24/3, and 25/13.

In this connection, we would like to bring to your attention information we have received concerning **the European Commission's proposal to review the EU Action Plan on Return, which may have implications of returns of migrants to Libya intercepted at sea, in possible violation of the principle of non-refoulement.**

According to the information received:

On 25 January 2017, the European Commission presented a Joint Communication to the European Parliament, the European Council and the Council, proposing a set of concrete operational actions, concerning the Central Mediterranean Route. Reportedly, the proposed actions comprise the provision of financial and material support and the delivery of capacity-building to Libyan Coast Guards, with the objective of enabling the Libyan authorities to perform search and rescue operations, with the consequent disembarkation of intercepted migrants on the Libyan coast. Furthermore, it is alleged that the European Union foresees an assisted voluntary returns project for migrants in Libya. Heads of State or Government of the European Union will be invited to endorse the operational actions on 3 February 2017 in an informal summit in Malta.

It has been alleged that since 2011, ongoing conflict and insecurity have led to the collapse of the rule of law in Libya, with increasing deterioration of the security environment since 2014. The country faces the breakdown of its justice system, worsened by the proliferation of armed groups, criminal gangs, smugglers and traffickers. All parties to the conflict and criminal groups allegedly perpetrate widespread violations and abuses of international human rights law, including unlawful killings, abductions, hostage-taking, enforced disappearances and torture. It has been reported that migrants coming to Libya are amongst the most vulnerable people in the country. Lacking tribal or other community protections, they are allegedly subject to gross violations of human rights, including arbitrary

detention, torture, unlawful killings and forced disappearance, trafficking in persons, forced labour, sexual exploitation and other forms of contemporary slavery, with no protection provided by Libya's law enforcement agencies. Reportedly, migrant children and women are the most exposed. Reportedly, the latter often fall victim of rape, other sexual violence and trafficking for sexual exploitation. Moreover, it has been reported that migrants leaving Libya are often subject to physical violence and intimidation. It has been alleged, that they are embarked at gun point after several weeks of forced labor and other human rights abuses while in the country.

It is alleged, that governmental authorities have been involved in widespread patterns of abuse, including by members of the Department for Combatting Illegal Migration (DCIM) and the Libyan Coast Guard. The abuses allegedly occur in a wide range of migration management-related activities, including in search and rescue operations and in detention facilities, in which migrants are detained, once intercepted at sea.

According to the information received, the interceptions conducted by the Libyan Coast Guard are carried out in a dangerous and life-threatening manner, followed by incidents of physical aggression, robbery and extortion by members of the Libyan Coast Guard. Pursuant to Libyan Law, once intercepted, migrants are reportedly subject to mandatory and indefinite detention, in inhumane and degrading facilities run by the DCIM or criminal groups. Detention – whether by DCIM or criminal groups – is reportedly characterized by the lack of formal registration, legal process or access to lawyers or judicial authorities. The deaths of migrants in detention often go unreported or migrants disappear. According to the information received, the detention facilities fail to adhere to any international legal standards, with migrants struggling in overcrowded conditions, lacking access to water, food, toilets and washing facilities.

Moreover, it is reported that Libya does not meet the criteria to be considered a place of safety for disembarkation following rescue at sea. Accordingly, the International Organization for Migration (IOM) has suspended its returns programs to Libya in August 2014, including for Libyan nationals. Similarly, the United Nations High Commissioner for Refugees (UNHCR) has urged all States to suspend forcible returns to Libya, including Tripoli, until considerable improvement of the security and human rights situation is verified.

Furthermore, it is alleged, that Libyan authorities are not in a position to assess protection claims and assist migrants with specific needs, such as women, children, elderly, disabled, sick and victims of trafficking. In this regard, concerns are raised with regards to an assisted voluntary returns program, as migrants protection needs may be easily overlooked and/or they could face refoulement to places where they are at risk of torture or other cruel and inhuman and degrading treatment.

While we do not wish to prejudge the accuracy of these allegations, we wish to express our heightened concern over the possible human rights implications of measures taken by the European Union to strengthen the Libyan authorities' capacity and performance of search and rescue operations, which would imply the return of migrants to an unsafe third country. Given the rampant lawlessness and gross violence perpetrated against migrants across the country, we are concerned that eventual cooperation between the European Union and the Government of Libya would contribute to the pervasive and consistent patterns of human rights violations in the country. In particular, we are concerned that strengthening activities, institutions and mechanisms that would increase the interception of migrants at sea and their unlawful return to Libya, a state where they are at risk of persecution and being subjected to torture and other ill-treatment, and enforced disappearance, would constitute a violation of the principle of non-refoulement. Furthermore, we wish to express concern over the apparent absence of an adequate assessment of the human rights implications of such measures, despite robust documentation that Libya does not meet the criteria to be considered a place of safety for disembarkation following rescue at sea, nor is it a safe place for migrants' return.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

For your information a letter with the same allegations has been sent to the Governments of Libya and Italy.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide all information or additional comments in relation to these allegations.
2. Please provide information on the measures and precautions taken to ensure that any agreement signed with the Government of Libya in compliance with European Union Member States' obligations under international law. In particular, to ensure that migrants intercepted at sea will be taken to places of safety, in accordance to international human rights obligations and standards, particularly the principle of non-refoulement.
3. Please explain whether any analysis and/or consultation has been undertaken to assess the impact such a plan of action has on the human rights of vulnerable migrants, asylum seekers, refugees as well as trafficked persons and those at risk of trafficking from among them. Please share the outcome of any such analysis or consultation.

4. In this regard, please share the European Commission's strategy with respect to the assessment of human rights implications of any migration management programmes and policies that the European Union might implement, renew or reinforce in coordination and partnership with the Government of Libya.
5. Please provide information on existing mechanisms to promote capacity-building and support search and rescue operations conducted by Libyan authorities under already existing partnership framework approaches, as well as their respective human rights implications assessments, in accordance to the European Union member states' obligations under international law.
6. Please specify how trainings to Libyan authorities address the human rights of migrants, victims of trafficking and those at risk of trafficking in a comprehensive way.
7. Please provide information regarding how the proper identification of all potential protection needs and respect for international and human rights law – particularly with regard to the principle of non-refoulement – are taken into account when carrying out the plan of action proposed in the Communication of 25 January 2017.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to prevent violations, and in the event that they take place, to ensure the accountability of any person responsible of the alleged violations.

We intend to publicly express our concerns as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention.

Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

José Antonio Guevara Bermúdez
Vice Chair of the Working Group on Arbitrary Detention

Houria Es-Slami
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

François Crépeau
Special Rapporteur on the human rights of migrants

Urmila Bhoola

Special Rapporteur on contemporary forms of slavery, including its causes and consequences

Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we wish to recall that the prohibition of refoulement is explicitly included in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ratified by all member states of the European Union. Furthermore, the prohibition of return to a place where individuals are at risk of torture and other ill-treatment is enshrined in Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This absolute prohibition against refoulement is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under article 33 of the 1951 Refugee Convention or domestic law. Accordingly, non-refoulement under the CAT must be assessed independently of refugee or asylum status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed.

In addition, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5) establishes that no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution.

The prohibition of torture and other Cruel, Inhuman or Degrading Treatment or Punishment is also enshrined in Article 3 of the European Convention on Human Rights (ECHR). Furthermore the ECHR states that it's Article 3 is not subject to any exceptions or to derogations and it must be upheld even "in time of war or other public emergency threatening the life of a nation" (Art. 15 (2) ECHR), and it leaves no scope for limitations by law under any circumstances, whether they be safety, public order or other grounds.

We would also like to refer to paragraph 9 of the General Comment No. 20 of the Human Rights Committee which states that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

We would also like to draw the attention to paragraph 16 of the Resolution A/RES/65/205 of the UN General Assembly which urges States "not to expel, return ("refouler"), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, and recognizes that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement."

Furthermore, paragraph 7d of Human Rights Council Resolution 16/23 urges States “not to expel, return (refouler), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, [...]”

We also would like to draw the attention to the thematic report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/25/60), which states that the non-refoulement obligation is a specific manifestation of the more general obligation of States to ensure that their actions do not lead to a risk of torture anywhere in the world.

We would also like to refer to article 3 of the Universal Declaration of Human Rights and article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by all EU member states, which provide that every individual has the right to life and security of the person, that this right shall be protected by law, and that no person shall be arbitrarily deprived of his or her life. We would like to recall the jurisprudence of the Human Rights Committee, according to which States have a special responsibility of care for an individual's life when in custody, and that it has to take adequate and appropriate measures to protect his/her life.

With regard to the systematic detention of migrants and asylum seekers, who are returned to Libya, we would like to draw attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988. Principle 14 states that a person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands, information concerning the reason for the arrest, as well as information on and an explanation of his rights and how to avail himself of such rights, and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Further, we would like to draw attention to Article 9.1 of ICCPR, which provides that everyone has the right to liberty and security of person. The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but “must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10). The detention of migrants and asylum seekers should thus be a measure of last resort. The ICCPR further stipulates that all persons deprived of their liberty be ensured the right without delay to control by a court of the lawfulness of the detention (art. 9 (4)). We would also like to draw your attention to article 10 of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Further, the Standard Minimum Rules for the Treatment of Prisoners, Rule 22(2), provide that “(s)ick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil

hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. Furthermore, Rule 25(1) provides that, “(t)he medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed”. We would also like to draw your attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by General Assembly resolution 43/173 of 9 December 1988), which provide that “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge” (Principle 24). We would also wish to refer to the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111, according to which “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation” (Principle 9).

We further would like to draw the attention to the Standard Minimum Rules for the Treatment of Prisoners (adopted by the Economic and Social Council by resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). We would also like to draw attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988 (adopted by General Assembly resolution 43/173 of 9 December 1988). The Committee against Torture and the Human Rights Committee have consistently found that conditions of detention can amount to inhuman and degrading treatment. For a more detailed overview of the international human rights standards governing the detention of migrants, including the obligation of States to always resort to alternatives to detention first, we would like to draw attention to the report of the Special Rapporteur on the human rights of migrants to the Human Rights Council (A/HRC/20/24).

In addition, the International Convention for the Protection of All Persons from Enforced Disappearances, establishes that no one shall be subject to enforced disappearance, which is considered to be the “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”. Article 16 of ICED specifies that “No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.” A similar provision is contained in article 8 (1) of the 1992 Declaration on the Protection of All Persons from Enforced Disappearances.

We would also like to refer to the provisions of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (the Protocol), ratified by all EU member states. It's article 8 (2) states: When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall be preferably be voluntary.

Reference is further made to Article 6 of The Protocol concerning assistance to and protection of victims of trafficking in persons. The Article provides, in particular, that in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care, is taken into account.

We would also like to bring to your attention Article 7 which specifies that in addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. Moreover, that in implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

In relation to the exploitation allegedly faced by migrants in Libya, we would like to draw your attention to Article 2 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which calls upon State Parties to take practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of all slavery related institutions and practices. Furthermore we would like to Article 8 of the ICCPR, which states that “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited” and that “no one shall be held in servitude”.