

COMPLAINT TO THE EUROPEAN OMBUDSMAN UNDER ARTICLE 228 TFEU: TRANSFERS OF SURVEILLANCE CAPABILITIES TO THIRD COUNTRIES BY EEAS

I. The complainants

Privacy International (PI) is a London-based non-profit, non-governmental organization (Charity Number: 1147471) that researches and advocates globally against government and corporate abuses of data and technology. It exposes harm and abuses, mobilises allies globally, campaigns with the public for solutions, and pressures companies and governments to change.¹ PI challenges overreaching state and corporate surveillance so that people everywhere can have greater security and freedom through greater personal privacy. This submission relates to PI's ongoing work on 'Challenging the Drivers of Surveillance'.²

Access Now defends and extends the digital rights of users at risk around the world.³ By combining direct technical support, comprehensive policy engagement, global advocacy, legal interventions, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

Border Violence Monitoring Network (BVMN) is a non-profit coalition of organizations working to document in the form of testimonies and consolidated into reports human rights violations at border, pushbacks, collective expulsions and state violence along the EU's external borders in the Western Balkans, Greece and Turkey since the network's formulation in 2016.⁴ BVMN is registered under the framework of RigardU e.V. in Germany.

Homo Digitalis (HD) is a digital rights civil society organization based in Athens, Greece.⁵ HD works for the protection of human rights and freedoms in the digital age, by organizing raising awareness activities for the wider public, conducting research studies to inform policy decisions, and participating in legal actions before competent authorities at a national and EU level.

International Federation for Human Rights (FIDH) is an international human rights NGO federating 192 organisations from 117 countries.⁶ Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.

Sea-Watch e.V. is a civil non-profit organisation (NGO) which has conducted search and rescue operations in the Central Mediterranean Sea for over seven years, currently with the *Sea-watch 3* and the *Sea-Watch 4*.⁷ Sea-Watch also documents human rights violations

¹ Privacy International (PI), <https://privacyinternational.org>.

² PI, Challenging the Drivers of Surveillance, <https://privacyinternational.org/challenging-drivers-surveillance>.

³ Access Now, <https://www.accessnow.org>.

⁴ Border Violence Monitoring Network (BVMN), <https://www.borderviolence.eu>.

⁵ Homo Digitalis (HD), <https://www.homodigitalis.gr/en>.

⁶ International Federation for Human Rights (FIDH), <https://www.fidh.org/en>.

⁷ Sea-Watch e.V., <https://sea-watch.org/en>.

and reports people in distress using civil reconnaissance airplanes, *Seabird 1* and *Seabird 2*, operated together with the Swiss non-profit organisation *Humanitarian Pilots Initiative*.

II. Purpose of this Submission

The purpose of this complaint is to request that the European Ombudsman opens an inquiry into whether the failure of the European External Action Service (hereinafter '**EEAS**') to carry out prior human rights risk and/or impact assessments when transferring surveillance capabilities to third countries constitutes maladministration.

The aforementioned organisations (hereinafter the '**Complainants**') submit that EU institutions, including EEAS, are under an obligation to conduct human rights risk and impact assessments prior to engaging in any form of surveillance transfer. Prior risk and impact assessments are needed to ensure that any surveillance transfer will not result in serious violations of the right to privacy and/or that such transfers will not facilitate other human rights abuses. However, our extensive research into EU surveillance transfers suggests that in most of these cases no prior human rights risk and impact assessments seem to have been carried out prior to EEAS's engagement with authorities and law enforcement agencies in third countries.

We believe that such practices raise significant concerns about the institutions' compliance with their obligations under EU law and could amount to instances of maladministration.⁸ They may not only result in impeding transparency and public scrutiny, but they may also seriously undermine the rights and freedoms of both EU and non-EU citizens, including human rights defenders and journalists. Such transfers will very often involve extremely intrusive forms of surveillance that, without the proper (prior) assessments, may be left prone to abuse by regimes that fail to respect human rights.

The Complainants are therefore urging the European Ombudsman to open an inquiry into the concerns detailed in this submission and to investigate the matter, including by obtaining further documents from the relevant institutions and bodies. Specifically, we are, first, asking the Ombudsman to confirm that EEAS is under an obligation to carry out human rights risk and impact assessments prior to engaging in any form of transfer of surveillance capabilities to authorities of third countries. Second, should the European Ombudsman find that EEAS has failed to carry out said assessments, we ask her to find that such failures constitute maladministration, and we invite her to issue recommendations to effectively address the matter that could potentially have implications for millions of people located both within and outside the EU.

The rest of this complaint is structured in as follows:

- First, we provide an overview of the key institutional framework that we have identified as enabling EEAS to carry out transfers of surveillance capabilities to third countries;
- Second, we detail the previous engagement and exchanges PI had with EEAS, in the context of both access to documents requests as well as written correspondence seeking clarifications;

⁸ According to the European Ombudsman, "[m]aladministration occurs if an institution or body fails to act in accordance with the law or the principles of good administration, or violates human rights. Maladministration can include administrative irregularities, unfairness, discrimination or the abuse of power, for example in the managing of EU funds, procurement or recruitment policies. It also includes the failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest", <https://www.ombudsman.europa.eu/en/how-can-the-ombudsman-help>.

- Third, we describe the legal framework, under which we understand that EU institutions, including EEAS, are obliged to carry out human rights risk and impact assessments before engaging with authorities of third countries in the context of transfers of surveillance capabilities; and,
- Fourth, we highlight the grave human rights concerns arising in the context of surveillance transfers and provide further evidence of lack of (prior) human rights risk and impact assessments.

III. EEAS's involvement in the transfer of surveillance capabilities to third countries

EU bodies and EU member states have pursued counterterrorism and migration policies which are at odds with fundamental values. As a result, for example, the EU has passed legislation regarding the collection and use of Passenger Name Record (PNR) data,⁹ has funded the development of advanced surveillance technology,¹⁰ and is seeking interoperability between EU large-scale information systems, which the European Data Protection Supervisor has stressed "*could become a dangerous tool against fundamental rights.*"¹¹

EEAS is the EU's "diplomatic service", responsible for implementing its Common Foreign and Security Policy, which includes promoting environmental protections, providing assistance in crisis zone, and promoting democracy worldwide.¹² The EU is a key security player in the Sahel region, providing €147 million to establish the African led G5 Sahel Joint Force aiming to improve regional security and fight terrorist and criminal groups.¹³ It is also involved in a number of missions:

- EUCAP Sahel Niger¹⁴ was launched in 2012. It is a civilian mission of the EU and aims to assist Niger in the fight against terrorism and in the management of migration flows. Over 120 experts from European security forces, justice and civil society are permanently deployed to Niger. EUCAP supports the Nigerien Security Forces and provides them with training and equipment, including training in investigations, surveillance, and forensics. Since 2012, more than 13,000 members of the security forces and authorities have received trainings and assistance and equipment. The mission has increasingly engaged in a broader range of tasks, including information gathering and exchange in the field of migration. In this regard, since 2016 the EU mission has established a permanent presence in the Agadez desert region, a place where many migrants pass through to reach Libya. Between 2012 and 2017, the mission's costs amounted to 69.46 million. The mission has last been extended in September 2018 for two more years. The EU is funding it with €63.4 million for this period.

⁹ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119.

¹⁰ Statewatch, The European security-industrial complex, 24 May 2021 (latest update), <https://www.statewatch.org/observatories/the-european-security-industrial-complex>.

¹¹ EDPS, Summary of the Opinion of the European Data Protection Supervisor on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 2018/C 233/07, https://edps.europa.eu/sites/default/files/publication/18-04-16_opinion_interoperability_executive_summary_en.pdf.

¹² EEAS, About the European External Action Service (EEAS), https://eeas.europa.eu/headquarters/headquarters-homepage/82/about-european-external-action-service-eeas_en.

¹³ EEAS, The European Union's Partnership with the G5 Sahel Countries, https://eeas.europa.eu/sites/default/files/factsheet_eu_g5_sahel_july-2019.pdf

¹⁴ EEAS, EUCAP Sahel Niger: Partnership for Security in the Sahel, https://www.eeas.europa.eu/sites/default/files/eucap_sahel_niger_general_factsheet_en_2019.pdf.

- EUCAP Sahel Mali¹⁵ began in January 2015. The mission's stated purpose is to assist the Malian authorities in the reorganization of its security forces in order to improve the rule of law in the country. EUCAP would provide training and advice to the national police and the national guard with the goal of implementing the security reforms introduced by the local government. Just under 200 staff members are located at the mission's headquarters in the capital, Bamako. Between 2015 and 2017 the mission's costs amounted to €66.48 million. In 2017, the EU Council decided to extend the mission until January 2019, providing an extra 28.45 million euros. Its mandate was expanded to include activities of strengthening the internal security forces' capacity to fight against terrorism and organised crime and supporting Mali in managing migration flows and border management.¹⁶ In February 2019, the mission was extended until January 2021 with a budget of €66.9 million.
- EEAS is active in Libya with the EU Border Assistance Mission (EUBAM) since May 2013.¹⁷ Its aim was initially to support the capacity of Libyan authorities to enhance the security of their land, sea, and air borders and to develop a broader Integrated Border Management (IBM) strategy. EUBAM currently also supports the Libyan authorities in capacity building and strategic planning within the Ministry of Interior (MoI) on law enforcement and institutional reform and strategic planning assistance to the Ministry of Justice (MoJ) and broader capacity building for the relevant criminal justice actors. EUBAM cooperates closely with Frontex and Europol that have embedded experts in the mission and plays a coordinating role for the EU and other international groups' activities in Libya. The mission is aiming to take on an increasingly 'hands-on approach', moving from a planning focus to a direct engagement in border management.¹⁸ In December 2018, the EU Council extended EUBAM until June 2020 and allocated a budget of 61.6 million euros, while, crucially, also revising its mandate.¹⁹ The mission is now required to "actively support the Libyan authorities in contributing to efforts to disrupt organised criminal networks involved in smuggling migrants, human trafficking and terrorism".

IV. PI's correspondence with EEAS, including access to documents requests

a. Access to documents requests

Between August and November 2019, PI submitted a series of access to documents requests, under Regulation (EC) No 1049/2001, to several EU bodies, including EEAS, regarding the transfer of surveillance capabilities to non-EU countries.²⁰ The requests sought documents providing information on the transfer of personal data, surveillance technology, training, financing, and legislation to third countries.

¹⁵ EEAS, EUCAP Sahel Mali, https://www.eeas.europa.eu/eucap-sahel-mali_en?s=331.

¹⁶ EEAS, EUCAP supports the deployment of Border specialist in the regions on Mali (18 April 2018), https://www.eeas.europa.eu/node/43148_en.

¹⁷ EEAS, EU Border Assistance Mission in Libya (EUBAM), https://www.eeas.europa.eu/eubam-libya_en?s=327.

¹⁸ Council of the European Union, Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell 11471/18 (Brussels, 27 July 2018), <https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>.

¹⁹ EEAS, EUBAM Libya becomes a fully-fledged civilian CSDP mission (17 December 2018), https://www.eeas.europa.eu/node/55578_en.

²⁰ PI, Challenging the Drivers of Surveillance: EU Access to Documents Requests, 18 September 2019, <https://privacyinternational.org/report/3225/challenging-drivers-surveillance-eu-access-documents-requests>.

Among others, PI requested documents demonstrating how the agencies ensured that any transfer of surveillance capabilities would adhere to EU human rights law and principles, including a request for any risk and/or due diligence assessments, evaluations or audits which were conducted, and specific information about the type and content of these risk and/or due diligence assessments, evaluations or audits.

EEAS initially responded to PI's request on 13 December 2019, confirming that no documents were held by the Agency (Annex 1). However, following a confirmatory application by PI, EEAS responded on 9 March 2020, identifying 63 documents held by it in relation to the access to documents request (Annex 2). Only 5 of these documents were provided to PI in full, all of them dealing with Operational Guidelines. The rest of the documents were either partially disclosed or their disclosure was refused on grounds relating to the exceptions contained in Regulation (EC) No 1049/2001.

The documents received by EEAS suggest that no prior human rights risk or impact assessments, including any privacy or data protection impact assessments, are carried out in the context of transfer of surveillance capabilities to third countries.

b. Correspondence with EEAS

On 9 March 2022, PI wrote to the High Representative of the Union for Foreign Affairs and Security Policy European Union External Action Service (EEAS) via email to share its concerns and request further clarifications "*regarding procedures the EEAS has in place to ensure its cooperation with third countries respects human rights and does not contribute towards human rights violations, including violations of privacy or data protection rights*" (Annex 3).

Specifically, PI asked EEAS to:

- Provide details on what measures exist to protect human rights when providing capacity building to, or otherwise supporting, third countries with such surveillance capabilities;
- Provide information on what review of legal and other safeguards in the country to which such support is being provided is undertaken prior to providing such support;
- Provide information on what due diligence or human rights risk and impact assessments are undertaken prior to providing such support;
- Provide information on what if any data protection impact assessments are undertaken prior to providing such support.

On 12 April 2022, EEAS replied to PI by email (Annex 4). In its response, the EEAS provided no specific information with regard to the questions above, including information about whether prior human rights risk and impact assessments are carried out before engaging in transfers of surveillance capabilities to third countries.

V. Relevant Legal Framework

In accordance with its founding principles, including the principles of liberty, democracy, respect for human rights and freedoms and the rule of law, the European Union's external relations are underpinned by a constant commitment to human rights, freedoms and the

rule of law.²¹ Article 2 of the Treaty on European Union (TEU) underlines that the EU's founding values are "*human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*". Article 3 of the Treaty on European Union (TEU) requires the European Union in "*its relations with the wider world*" to contribute to "*the protection of human rights*", while Article 21 of the TEU lists "*democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity*" among the principles inspiring the European Union's external action. Similarly, Article 205 of the Treaty on the Functioning of the European Union (TFEU) determines that the EU's international actions are to be guided by the principles laid down in Article 21 of the TEU.

Article 21(3) of the TEU clarifies that the EU has a duty to respect the listed principles, including human rights, in the development and implementation not only of all areas of the Union's external action, but also of the external aspects of its other policies. Human rights, therefore, form part of those common principles and objectives that should cement policy coherence among different areas of the EU's external action.²²

With the adoption of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union (CFREU) came into direct effect, as provided for by Article 6(1) TEU, thereby becoming a binding source of primary law.²³ Most of the rights recognised by the Charter are granted to "*everyone*" regardless of nationality or status. Among the rights and freedoms guaranteed by the CFREU are human dignity (Article 1), the right to life (Article 2), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of expression and information (Article 11), the right to asylum (Article 18), the prohibition of collective expulsion (Article 19), the right to good administration (Article 41) and the right of access to documents (Article 42).

Article 51 para 1 of the CFREU states that "*the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union*". It adds that "[t]hey shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers." In its judgment in *Ledra*, the Court of Justice of the European Union (CJEU) confirmed that Article 51 CFR applies to the EU institutions always and at all times as it is addressed to them also "when they act outside the EU legal framework".²⁴ In its reviews of the compatibility of the European Commission's actions with the CFREU, the CJEU has increasingly focused on procedural aspects, assigning particular weight, to whether EU institutions have exercised due diligence in assessing the potential fundamental rights impacts of their choices.²⁵

Furthermore, the second EU Action Plan on Human Rights and Democracy, published by the Council of the European Union in 2015, which seeks to cover the period between 2015 and 2019, underlines:

The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common

²¹ European Parliament, Human Rights, <https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights>.

²² Chiara Macchi, With trade comes responsibility: the external reach of the EU's fundamental rights obligations, *Transnational Legal Theory* (Vol. 11:4, 2020) pages 409-435.

²³ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

²⁴ Case C-8/15 P, *Ledra Advertising v. Commission and ECB*, 20 September 2016, para 67.

²⁵ See Olivier De Schutter, The implementation of the Charter by the institutions of the European Union in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), pages 1644-1645.

Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy. In the area of development cooperation, a human rights based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations.²⁶

The European Ombudsman has repeatedly held that the European Commission's refusal to conduct a human rights impact assessment in the context of trade agreement negotiations constitutes maladministration. For example, in her draft recommendation adopted on 26 March 2015, the EU Ombudsperson found that "*the Commission's failure to carry out a specific human rights impact assessment, in relation to Vietnam, constitutes maladministration.*"²⁷ The issue in this case was whether the European Commission should carry out a human rights impact assessment in the context of its negotiations to conclude a free trade agreement with Vietnam:

10. In her analysis leading to her recommendation, the Ombudsman pointed out that good administration means, in the first place, observance of and respect for fundamental rights. In fact, where fundamental rights are not respected, **there cannot be good administration**. Accordingly, EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights. This applies also with respect to administrative activities in the context of international treaty negotiations.

11. The Ombudsman noted that the principles set out in Article 21(1) TEU and Article 21(2) TEU apply also in the area of the common commercial policy. Although the Ombudsman agreed with the Commission that there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement, she took the view that it would be in conformity with the spirit of the legal provisions mentioned above to carry out a human rights impact assessment. Since the 2009 sustainability impact assessment concerning ASEAN covers only certain aspects of the impact on social rights, it is not a proper substitute for a human rights impact assessment.

25. As rightly argued by the complainants, the human rights impact assessment is not a collection of data or a response to public opposition, but rather an analytical tool for demonstrating that all necessary factors and circumstances have been taken into account in framing a policy. The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the implementation of the agreement concerned. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into. This analytical tool cannot be replaced by trade or non-trade policy measures, meetings with stakeholders, internal summaries or reports of such meetings.²⁸

²⁶ Council of the European Union, EU Action Plan on Human Rights and Democracy (2015), page 10, https://www.consilium.europa.eu/media/30003/web_en_actionplanhumanrights.pdf.

²⁷ European Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission (26 March 2015), <https://www.ombudsman.europa.eu/en/recommendation/en/59398>.

²⁸ European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement (26 February 2016), <https://www.ombudsman.europa.eu/en/decision/en/64308>.

Most recently, in March 2021, the European Ombudsman found that the European Commission's failure to complete a sustainability impact assessment (SIA) essential to evaluating the social and environmental impact of the negotiated trade deal between the EU and Mercosur – the South American trade bloc comprised of Argentina, Brazil, Paraguay and Uruguay – constituted maladministration.²⁹ In her decision, the Ombudsman noted that "*while it was impossible to foresee the dynamics of the negotiations, the SIA in this case has taken much longer to finalise than anticipated. Specifically, the Commission should have ensured that the SIA was finalised before the conclusion of the EU-Mercosur trade negotiations*".³⁰ She also underlined that:

39. While Article 21 TEU does not set out an explicit and legally binding requirement to conclude an SIA before the end of trade negotiations, SIAs are one of the Commission's most important tools to ensure that the principles set out in Article 21 TEU are respected in trade agreements.³¹

Our understanding is that EEAS is under an obligation to conduct human rights risk and impact assessments, including privacy and data protection impact assessments, prior to engaging in any transfer of surveillance capabilities. Such assessments must consider impact and risks on the whole spectrum of human rights. Without prior assessments it is not possible to ensure that any surveillance transfer will not cause serious violations of, or interferences with privacy or other fundamental rights.³² They may not only result in impeding transparency and public scrutiny but may also seriously undermine the rights and freedoms of both EU and non-EU citizens, including human rights defenders and journalists.

While the transfer of surveillance capabilities to third countries will very often involve extremely intrusive forms of surveillance that without the proper (prior) assessments could be left prone to abuse by regimes that fail to respect human rights, our findings based on the documents disclosed to us and relevant desk-research suggest that, in most of these cases, no human rights risk and impact assessments seem to have been carried out prior to the engagement with authorities of third countries.

VI. The lack of prior human rights risk and impact assessments in EEAS's transfer of surveillance capabilities to third-country authorities

By equipping and training third country authorities, influencing laws, and developing mass-scale biometric databases in neighbouring countries, the EU is providing authorities with digital tools of surveillance in the hope they will use them to stop people reaching the Union's borders.³³ These same tools, however, are being used around the world to entrench political control through the tracking and surveillance of entire populations, activists, journalists, and opposition movements.

²⁹ European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations (17 March 2021), https://www.ombudsman.europa.eu/en/decision/en/139418#_ftnref16.

³⁰ Ibid.

³¹ Ibid.

³² On biometric data, see Dr. Krisztina Huszti-Orbán and Prof. Fionnuala Ní Aoláin, 'Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?' – Report prepared under the aegis of the Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2020), <https://www.law.umn.edu/human-rights-center/research/use-biometric-data-identify-terrorists>.

³³ PI, Borders Without Borders: How the EU is Exporting Surveillance in Bid to Outsource its Border Controls (10 November 2020), <https://privacyinternational.org/long-read/4288/borders-without-borders-how-eu-exporting-surveillance-bid-outsource-its-border>.

Various EU projects and bodies also promote or provide assistance in some for to other countries to promote specific laws or amendments aimed at migration and border control. Such assistance can be highly influential in regulating security powers or promoting the rule of law, particularly in post-conflict or other fragile states.

For example, a document aimed at EU civilian missions in non-EU countries providing guidance for drafting legislation (EEAS(2017)189) describes how some countries lack a basic library of laws, some of which are never published in public or even disseminated (Annex 5). An annex in the same document lists examples of legislative drafting supported by EU missions and describes several laws relevant to surveillance and intelligence gathering, including a draft law on police in Palestine, the law on Police in Afghanistan, the Law on Interception of Telecommunications as well as the Law Protection of Personal Data in Kosovo, and a law against human trafficking in Niger (Annex 5).

Similarly, a 2016 aid project partially aimed at fighting human trafficking networks in countries in the EU's southern border (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, Tunisia) aims to "*contribute to the drafting of policies, harmonised and effective legislation*" tackling cybercrime (Annex 6). Under a "Risks and Assumptions" section, the aforementioned aid project identifies the possibility of "law enforcement authorities benefiting from training on investigative techniques in cybercrime without the necessary rule of law and human rights safeguards" as a high risk. Yet, as part of their mitigating measures they prioritize Algeria, Morocco, Tunisia and Jordan as countries that will benefit from the full support provided the human rights and rule of law safeguards are present.

EEAS has failed to identify and mitigate human rights risks, even in countries like Jordan where their cybercrime law (developed with further support from the Council of Europe) is used to infringe upon fundamental rights. For example, in February and March 2022, several activists, including peaceful protesters, were reportedly arrested and detained, under the charge of "spreading false news" under article 15 of the Cybercrime Prevention Law and for "inciting strife" under article 150 of the Penal Code.³⁴ According to the UN Office of the High Commissioner for Human Rights, these arrests appear "to be part of a deliberate campaign to silence dissent".³⁵

Moreover, Article 11 of Jordan's cybercrime law, which penalizes "anyone who intentionally sends, resends, or publishes data or information through the information network or the website or any information system that involves defamation, slander, or humiliation of any person...", has provided authorities with the power to arrest and detain journalists who have sought to express dissenting views or expose incidents of public interest.³⁶

We believe that EU bodies and agencies are under an explicit obligation to promote and safeguards human rights and the rule of law in all their dealings with third countries. Nevertheless, the responses received by EEAS show a lack of prior human rights risk and impact assessments, including any privacy and data protection impact assessments, in order to mitigate the risks described in the section above.

VII. Applications/Remedy

³⁴ UN OHCHR, Detention of activists in Jordan (29 April 2022), <https://www.ohchr.org/en/press-releases/2022/04/detention-activists-jordan>.

³⁵ Ibid.

³⁶ Beatrice Zemelyte, Jordan: Two journalists detained under cybercrime law (International Press Institute, 15 March 2022), <https://ipi.media/jordan-two-journalists-detained-under-cybercrime-law>.

For the reasons set out above, the Complainants submit that EEAS has been and continues to transfer surveillance capabilities to third countries, in absence of the required prior human rights risk and impact assessments, including any privacy and data protection impact assessments.

The Complainants therefore ask the European Ombudsman to examine the present complaint and open an inquiry into whether the lack of prior human rights risk and impact assessments, including any privacy and data protection impact assessments, by EEAS, in the context of the transfer of surveillance capabilities to third countries constitutes maladministration under EU law. Should the European Ombudsman find that EEAS's failure to carry out said assessments constitutes maladministration, we invite her to issue recommendations to effectively address the matter that could potentially have implications for millions of people located both within and outside the EU.

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