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To the attn. of:

Mr. Dragoş Tudorache, Member of the European Parliament

Mr. Brando Benifei, Member of the European Parliament

Cc:

Members of the Committee on the Internal Market and Consumer Protection (IMCO)

Members of the Committee on Civil Liberties, Justice and Home Affairs (LIBE)

European Parliament

Brussels, 26 April 2023

Dear MEP Dragoş Tudorache,

Dear MEP Brando Benifei,

Dear Members of IMCO-LIBE committees,

OPEN LETTER TO THE RAPPORTEURS ON THE EU ARTIFICIAL INTELLIGENCE REGULATION (AI ACT) TO ENSURE PROTECTION OF RIGHTS OF MIGRANTS, ASYLUM SEEKERS AND REFUGEES

I am writing to you, as co-rapporteurs on the AI Act to urge you to prohibit the use of certain artificial intelligence (AI) systems which are incompatible with human rights, so as to protect the rights of migrants, refugees, and asylum seekers against harmful outcomes of AI deployment.

Civil society organisations, including Amnesty International, have repeatedly called for an EU AI Act which protects and promotes human rights¹. As part of the Protect Not Surveil coalition², Amnesty has stressed that the AI Act must protect all people from harmful uses of artificial intelligence, regardless of their migration status³.

In this regard, Amnesty International welcomes the openness by the European Parliament to expand the list of systems used in the context of migration, asylum, and border control which classify as high-risk, so that these are deployed under strict regulatory measures to safeguard the human rights of impacted people. However, we are deeply concerned by the lack of political will to go further and fully prohibit the use of artificial intelligence incompatible with human rights in this context.

On behalf of Amnesty International, and civil society organisations, I call on you to prohibit:

- 1. Automated risk assessments and profiling systems**, used to determine whether people on the move present a 'risk' of unlawful activity or security threats.

Such systems have proven to be inherently discriminatory⁴, profiling people based on nationality, ethnic and racial background, amounting to racial discrimination as defined in international human rights law⁵ and violating the right to non-discrimination under the EU Charter of Fundamental Rights (hereafter Charter)⁶.

Automated risk assessment systems further pose risks to data protection rights and principles. Even when profiling is not based directly on special categories of personal data under the EU General Data Protection Regulation (GDPR), it may use information that indirectly reveals such data. For example, a traveller's religious beliefs or health data can be inferred from their dietary preferences, violating their right to data protection⁷ and resulting in discriminatory profiling. Given the imbalance of power between refugees, asylum seekers, and migration and border management authorities, information used for profiling systems can also be forcefully and illegally extracted⁸, without the freely given, specific, and informed consent of individuals as prescribed by the GDPR⁹.

Risk assessment tools pose further risks to individuals' right to liberty and security under international human rights law. In an opinion¹⁰ regarding a proposed agreement between the EU and Canada on the transfer and processing of Passenger Name Record ("PNR")¹¹, the European Court of Justice has warned that automated processing of PNR could result in binding decisions affecting a person's rights without proof that the person concerned is a public security risk. A risk assessment tool¹² which was set to always recommend immigration detention in the United States, illustrates how such tools can facilitate arbitrary arrest and detention forbidden by international human rights law¹³.

Given stated risks to the rights to non-discrimination, privacy and data protection, as well as right to liberty and security, **automated risk assessment and profiling systems in the context of migration, asylum, and border control must be prohibited.**

2. Predictive analytic systems used to interdict, curtail and prevent migration.

The EU already uses AI-based tools¹⁴ for "forecasting and assessing the direction and intensity of irregular migratory flows to and within the EU." While predictive systems can be used to facilitate preparedness of Member States to receive and accommodate people arriving at their territories, often such tools are used in the context of punitive border control practices, focusing on preventing "irregular" border crossings¹⁵. The EU and its Member States should never use predictive analytics tools to prevent people from accessing their territory to seek asylum or expose them to a risk of refoulement¹⁶. **The AI Act must ensure a clear prohibition on any use of predictive technologies threatening the right to asylum**, which is guaranteed by the Charter¹⁷ as well as secondary EU asylum law.

3. AI-based "deception detectors" and other emotion recognition tools.

These types of technologies are being supported by the EU¹⁸ and deployed at borders¹⁹, despite evidence of racial bias²⁰ embedded in such tools and their components such as facial recognition technologies (FRT) and questioning by the scientific community of whether these systems can actually do what they claim²¹. The UN High Commissioner for Human Rights has warned that emotion recognition is "susceptible to bias and misinterpretations"²² given that facial expressions vary across cultures and contexts. They further state that use of such technologies "risks undermining human rights, such as the rights to privacy, to liberty and to a fair trial²³." The UN Special Rapporteur on the rights of persons with disabilities has raised similar concerns regarding misinterpretation of facial expressions of some persons with disabilities and has recommended a moratorium on these tools until adequate safeguards to protect human rights are in place²⁴. The European Data Protection Board (EDPB) and Supervisor (EDPS) have recommended a ban on emotion recognition, except in very specific cases²⁵.

Amnesty's own research has concluded that technologies that make inferences about emotions, or deceptiveness, suffer from serious fundamental flaws in their scientific underpinnings²⁶. This means that the inferences they make about us are often invalid, in some cases even operationalizing eugenicist theories of phrenology and physiognomy²⁷, thereby perpetuating discrimination and adding an additional layer of harm as we are both surveilled and mischaracterized. Our research has also revealed how biometric recognition tools, including emotion recognition have been used for indiscriminate mass surveillance programmes in China, including in the Xinjiang Uyghur Autonomous Region, where an estimated up to one million Uyghurs and members of other ethnic groups have been arbitrarily held captive in so-called "re-education camps"²⁸.

Given both the great power imbalance between authorities using emotion recognition technologies and people on the move subjected to these systems, and the immense risk such use poses to the rights to non-discrimination²⁹, privacy³⁰, liberty³¹, and fair trial³², **AI-based emotion recognition tools in the context of migration, asylum, and border control management, as well as in most other contexts, must be prohibited.**

4. Remote Biometric Identification (RBI) in the context of migration and border management.

Amnesty International has documented how facial recognition technologies have facilitated mass and discriminatory surveillance³³. We have therefore called for the prohibition of the development, use, sale, and export of such technologies. In this regard, we welcome the European Parliament's commitment to outlaw the practice of RBI in publicly accessible spaces, given the grave danger it poses to human rights. To ensure that the deployment of these technologies does not incur serious rights violations for people on the move, this prohibition should apply as well to EU borders, and spaces in and around detention facilities. Importantly, **both real-time *and* post RBI should be prohibited, to adequately protect all persons, including migrants, refugees, and asylum seekers, from mass and discriminatory surveillance.** Finally, **export of such technologies should be prohibited, including in the context of cooperation with third countries on migration and border management.** Failing to do so, would risk undermining Member States' obligations to uphold human rights, and specifically in this context, the principle of non-refoulement³⁴.

The European Parliament has taken considerable steps towards strengthening the human rights protections for persons and communities impacted by artificial intelligence systems and practices. However, we regrettably observe that so far, the draft AI Act does not guarantee people on the move the same level of protections against AI-induced harm that are afforded to European citizens. While States have the prerogative to manage their borders, they must do so without violating the human rights of migrants, refugees and asylum seekers. The differential treatment in the protection against the harms associated with the deployment of technology on the grounds of migration status is absolutely unjustified, and would amount to multiple violations of EU's human rights obligations, and the Parliament must strongly oppose such an approach.

The European Parliament has the duty to uphold international law. As systematic punitive and abusive migration policies and practices are carried out by EU and its Member States³⁵, upholding that duty is ever more urgent. The Parliament must ensure that migrants, refugees and asylum seekers are not exposed to further human rights abuses facilitated³⁶ by particularly harmful uses of artificial intelligence technologies. The AI Act provides a unique opportunity to ensure the necessary human rights safeguards. Therefore, I call on you, as members of the European Parliament's committees leading on the Parliament's position on the AI Act, to take a strong stance by prohibiting noted AI-based practices incompatible with the human rights of migrants, refugees and asylum seekers.

Yours sincerely,

Agnès Callamard

Secretary General

Amnesty International – International Secretariat

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⁵ Article 1, United Nations (1965). *International Convention on the Elimination of All Forms of Racial Discrimination*. [online] OHCHR. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

⁶ Article 21, non-discrimination, Charter of Fundamental Rights of the European Union. (2016). *Official Journal C202*; pp.389-405. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT&rid=3>.

⁷ Article 8, Protection of personal data, Charter of Fundamental Rights of the European Union. (2016). *Official Journal*, [online] (C202), pp.389-405. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT&rid=3>; *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*. [online] Europa.eu. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679>.

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⁹ Recital 32, Article 4 (11), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

¹⁰ *Opinion pursuant to Article 218(11) TFEU — Draft agreement between Canada and the European Union — Transfer of Passenger Name Record data from the European Union to Canada — Appropriate legal bases — Article 16(2), point (d) of the second subparagraph of Article 82(1) and Article 87(2)(a) TFEU — Compatibility with Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union*. [2017]eur-lex.europa.eu Case Opinion 1/15 (Court of Justice) Available at: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CV0001\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CV0001(01)) [Accessed 17 Apr. 2023].

¹¹ PRESS RELEASE No 84/17; Opinion 1/15. (2017). *Court of Justice of the European Union*. [online] 26 Jul. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170084en.pdf>.

¹² Achiume, T., UN. Human Rights Council. Special Rapporteur on Contemporary Forms of Racism, R.D. and Secretary-General, U. (2020). Contemporary forms of racism, racial discrimination, xenophobia and related intolerance: note /: by the Secretary-General. *digitallibrary.un.org*. [online] Available at: <https://digitallibrary.un.org/record/3893019?ln=en> [Accessed 17 Apr. 2023].

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