

PICUM Input to the UN Special Rapporteur on the Human Rights of Migrants Report on Human rights violations at international borders: trends, prevention and accountability

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The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 32 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With nineteen years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

Contents

EU-level legislative proposals increasing risks of human rights violations at international borders	1
Amended Schengen Borders Code	1
Proposals for a Council Decision and a Regulation on the “instrumentalisation of migrants”	3
Criminalisation of migration and solidarity with migrants	4
Recommendations	5

EU-level legislative proposals increasing risks of human rights violations at international borders

In 2021, the European Commission proposed three new legislative files which would severely increase the risks of human rights violations at international borders. These proposals add to other legislative proposals which were proposed by the European Commission in 2020, as part of the EU Pact on Migration and Asylum. The impact of the EU Pact on Migration and Asylum has been analysed in depth in [previous PICUM’s submissions](#) and on our [website](#). Therefore, in this submission we will focus on the analysis of the three most recent proposals.

Amended Schengen Borders Code

In December 2021, the European Commission proposed new rules on internal borders, codified as a reform of the Schengen Borders Code, that aim to further increase surveillance and controls over non-EU citizens crossing internal and external borders. These proposals would increase the use of technology and would

practically legitimise racial and ethnic profiling. More broadly, the proposals reinforce the narrative that irregular migration is a threat to the EU and that it needs to be fought with more policing.

The Schengen Borders Code regulates border controls at the internal and external borders of the Schengen area. The [amended Code](#) proposed by the Commission expands EU member states' powers to carry out checks at the internal borders to prevent undocumented migrants from crossing them, and escalates the use of monitoring and surveillance technologies at the internal and external borders¹.

The proposed revisions to the Schengen Borders Code set a new procedure to “transfer people apprehended at the internal borders”. According to the proposed new rules, if a third country national crosses the internal borders in an irregular way (e.g. from Germany to Belgium, or from Italy to France), if the police manages to apprehend them “in the vicinity of the border area,” they could be directly transferred back to the competent authorities in the EU country where it is assumed they just came from without undergoing any individual assessment (Article 23a and Annex XII). This provision is very broad and can potentially include people apprehended at train or bus stations, or even in cities close to the internal borders, if there is an indication that they have just crossed the border (for instance through documents they may carry on themselves, their own statements, or information taken from [migration or other databases](#)).

Practically speaking, people “transferred” from one EU member state to another would be handed to the police in the receiving member state. The only requirement to carry out this procedure is to for the authorities of the “transferring” state to fill out a simple form which states the person’s identity, the way the person’s identity was established, the grounds for refusal and the date of the transfer. If the undocumented person refuses to sign, it will be enough for the authorities to indicate this in the comments section. The undocumented migrant will be then deported back within 24 hours (during which they can be detained without any safeguards). They would have the right to appeal the decision, but without suspensive effect, which means that they would only be able to appeal from another country, with all the difficulties this entails. The receiving Member State must then issue a return decision to deport them to their country of origin or a third country.

In practice, these procedures would legalise an [extremely problematic practice](#) of “internal pushbacks” which has been broadly [criticised](#) by civil society organisations across the EU and even [sanctioned](#) by higher courts. The new procedures would also apply to children, even though this has been [deemed illegal by courts](#).

Even though the new Schengen Borders Code reiterates that internal border controls are prohibited in the Schengen area, it nonetheless clarifies that police and other powers can lawfully carry out checks in the internal border areas to prevent irregular migration (Recitals 18 and 21 and Article 23). Such provisions will in practice **legalise systematic border controls which target people only based on their racial, ethnic, national, or religious characteristics**, all of [which is in clear violation of European and international anti-discrimination law](#). In fact, it is clear that the new procedure allowing for internal transfers of people crossing borders irregularly will depend, for its implementation, on the borders police’s [practice](#) of deciding who will be subject to document checks based on racial, ethnic, national, or religious characteristics instead of individual behaviour or objective evidence.

¹ Besides the amendments analysed in this blog, the amended proposal introduces further provisions on health-related challenges, amends the procedure for the unilateral reintroduction of internal border controls and introduces the possibility of the Council to reintroduce temporary border controls, on initiative of the Commission.

2021 [research](#) from the EU Fundamental Rights Agency shows that people from an ethnic minority are disproportionately affected by police stops, both when they are walking and when in a vehicle. In addition, [another study](#) from 2014 showed that 79% of surveyed border guards at airports rated ethnicity as a helpful indicator to identify people attempting to enter the country in an irregular manner before speaking to them. The new provisions introduced in the amended Schengen Borders Code are likely to further increase the discriminatory and illegal practice of [racial and ethnic profiling](#), which stands at odds with the European Commission's commitments under the recent [Anti-Racism Action Plan](#).

While the new Schengen Borders Code indicates that internal border controls are prohibited in the Schengen area, it also foresees a provision (Article 25) for a member state to temporarily introduce border controls at all or specific parts of its internal border if it faces "serious threats". Problematically, the code introduces a definition of "serious threat" which includes, alongside terrorism or organised crime, "a situation characterised by large scale unauthorised movements of third country nationals between member states, putting at risk the overall functioning of the area without internal border control" (Article 25). Even though the Schengen Borders Code (both in the 2016 and the amended versions) foresees that the temporary reintroduction of internal border controls should only be a measure of "last resort", this has been done in [more than 300 cases](#) since 2006.

Furthermore, the new Code introduces measures which member states can apply in case of "instrumentalisation of migrants", which is defined as "a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders" (Article 2). In such cases, member states can limit the number of entries and the opening hours of crossing points, and intensify border surveillance including through drones, motion sensors and border patrols (Articles 5(4) and 13(5)).

The proposal also expands the use of monitoring and surveillance technologies to prevent irregular migration including when states have not formally reintroduced internal border controls (Article 2 and 23), despite broad [criticism](#) over the lack of transparency and the risks of technologies replicating biases against specific communities.

In short, the new Code would turn the Schengen area into a tech-controlled space in which racial and ethnic profiling is likely to be further exacerbated to identify potentially undocumented people and facilitate their immediate deportation to another member state, in complete absence of any safeguards.

[Proposals for a Council Decision and a Regulation on the "instrumentalisation of migrants"](#)

On 1 December 2021, the European Commission published a proposal for a [Council Decision](#) establishing "provisional measures for the benefit of Latvia, Lithuania and Poland, in view of supporting them in managing the emergency situation caused by the actions of Belarus, leading to a sudden inflow of third country nationals in the current context of instrumentalisation of migrants at the external borders". The legal basis for this Decision is art. 78(3) of the TFUE, according to which, in situations of "sudden inflow", the European Commission can propose a decision which will be adopted by the Council upon consultation with the Parliament. The text adopts an extremely problematic narrative which refers to a "real and present danger to the security of the Union and member states and their territorial integrity". The purpose of the Decision is to "manage the arrivals in a controlled and swift way".

Only two weeks later, on 14 December 2021, the Commission proposed a [Regulation addressing the situation of instrumentalisation in migration and asylum](#), which was published on the same day as the proposal for a

Schengen Border Code (SBC). This proposal broadly reiterates the same elements as the Council Decision. However, while the Council Decision would have a geographic and time limitation (as it only applies to Latvia, Lithuania and Poland in the current context), this regulation would apply to all future circumstances which are considered to amount to “instrumentalisation of migration”, in all the EU, based on a procedure described below.

Both proposals introduce compulsory border procedures (called “emergency asylum and migration management procedures”) that would in practice imply detention for anyone entering irregularly in the EU for up to 16 weeks, and curtailed safeguards.

These new procedures come as an addition to other border procedures introduced by the 2020 EU Migration Pact: with now seven different return procedures that might apply at the borders², this adds a further layer of complexity and confusion to the whole migration management system.

The proposed Regulation further introduces derogations from current safeguards on returns, reception conditions and asylum, that could apply fairly often as the “instrumentalization of migrants” is broadly defined. For instance, applicants would only have access to services covering their basic needs and a temporary shelter.

While the Council Decision is likely to be dropped due to opposition from Poland, the Regulation addressing the situation of instrumentalisation in migration and asylum will now undergo the ordinary legislative procedure and will have to be negotiated by the European Parliament and the Council. Once approved, the derogations foreseen by the regulation will only enter into force when a member state will consider to be facing a situation of “instrumentalisation of migration”. In this case, for the derogations to be applied the member state’s request will have to be approved by the Commission and by the Council, without any further involvement of the European Parliament, the EU’s largest democratic institution.

Criminalisation of migration and solidarity with migrants

Broad [evidence](#) shows that migrants crossing borders often face severe human rights violations, often on a [repeated](#) basis³.

Besides suffering from human rights violations and violence from state authorities and other actors, migrants also risk being criminalised themselves, for the very fact of migrating.

For instance, on 13 May 2021, a 27-year-old Somali asylum seeker was [sentenced](#) to 146 years in prison on the island of Lesbos for migrant smuggling from Turkey to Greece. Other migrants defended him in the Greek court, saying he started steering their boat to save lives after a capsizing. In April 2021, a Syrian man was [sentenced](#) in Greek court to 53 years in prison, accused of “facilitating illegal entry” and causing a shipwreck after Greek authorities accused him of having been at the helm of a boat that brought his family and as many as 40 people to safety.

² The “emergency return procedure” adds up to the return procedure regulated by the 2008 Return Directive, the simplified norms which apply under art. 2(2) of the same directive, to the two separate return border procedures which would be regulated by art. 22 of the Recast Return Directive and art. 41a of the Asylum Procedure Regulation (both still under negotiation), the different timelines to the return border procedure which can apply in situation of crisis under the proposed Crisis Regulation and the refusal of entry under the Schengen Borders Code.

³ See also [“PICUM Input to the UN Special Rapporteur on the Human Rights of Migrants Report on pushback practices and their impact on the human rights of migrants”](#), February 2021.

In Malta, three teenagers, known as *El Hibli 3*, who [resisted](#) pushbacks to Libya in 2019 are now accused of terrorism. The three teenagers, who at that time were 15, 16 and 19 years old, acted as translators during a collective protest against an attempted pushback of 108 people from Malta to Libya, where they would be facing torture and ill-treatment. Upon arrival in Malta, they were immediately detained for seven months and are now on parole. The case against them is still ongoing, with the first witness summoned only in March 2021.

In Italy almost [one thousand migrants](#) have been accused of smuggling in the past decade, only because they were driving a boat towards the shore. Even if when the process leads to acquittal, the consequences of being arrested as a boat driver has a serious impact on people's lives.

All of this has the impact of **making crossings even more unsafe** because, when a boat is at risk of capsizing, migrants [fear](#) taking the helm because they know this might lead to their criminalisation once they arrive in the EU.

At the same time, over the past year PICUM continued to witness and report on the [ongoing criminalisation](#) of people acting in solidarity with migrants. In recent months [volunteers](#), [doctors](#) and [activists](#) have all been [criminalised](#) for helping people in the context of the ongoing pushbacks at the EU / Belarus borders.

Recommendations

To ensure the respect of human rights at the international borders, PICUM recommends the following measures:

- **Ending the criminalisation of migration and the criminalisation of people acting in solidarity with migrants:**
 - Repeal legal provisions which consider the acts of irregular entry, transit or stay as a criminally-punishable offense.
 - Refrain from xenophobic discourse, which foments a climate of suspicion against migrants and NGOs and volunteers helping them.
 - Narrow the interpretation of the crime of migrant smuggling in line with the UN Migrant Smuggling protocol and fundamental rights, by limiting it to acts carried out to obtain unjust profit and in connection with transnational organised crime.
 - End migration detention: Several [studies](#) indicate that detention is always [harmful](#), and that it places individuals in a situation of vulnerability.
 - Shift the narrative from measures which are primarily focused on border control and criminalisation towards promoting good practices at national level around [regular pathways and regularisation](#).
- **Ensuring accountability for human rights violations at the international borders:**
 - Put in place a strong and independent mechanism that monitors human rights violations at the borders.
 - Set a clear right for NGOs to access border areas, monitor and report on fundamental rights violations at the EU external borders and provide information to migrants.
 - Set an obligation for member states to comprehensively assess fundamental rights considerations (including the right to health, private and family ties, best interests of the child, *non-refoulement* and the protection of stateless people) and whether third country nationals



PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

have the possibility to access an autonomous residence permit or other authorisation granting a right to stay before a return decision is issued. This also requires ensuring that the return decision is taken separately from any decision on the asylum application.

- Monitor all immigration and organized crime legislation and policy for its impact on the rights of migrants. In particular, this should be done through the collection of evidence base from an [intersectional approach](#) by a broad range of stakeholders, including migrant communities.

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