

SCHENGEN: A CLUB WHERE FUNDAMENTAL RIGHTS (DO NOT) MATTER?

ECRE'S assessment of shortcomings in addressing fundamental rights violations within Schengen processes, with a focus on Croatia's accession to the Schengen area, and its recommendations to support fundamental rights compliance

I. INTRODUCTION

Human rights violations, including individual or collective expulsions often referred to as “push-backs”, occur frequently at the EU’s internal and external borders. Violations with widespread violence have been widely documented, including by reports of the Asylum Information Database (AIDA) managed by ECRE and by NGOs in the region. The Parliamentary Assembly of the Council of Europe investigated the issue and adopted recommendations in June 2019.

This Policy Note will focus on the extent to which fundamental rights compliance at the EU’s external border is addressed by the Schengen framework, using the example of recent discussions on Croatia’s readiness to join the Schengen area. It argues that any further consideration of Croatia’s Schengen membership should be conditional on an end to violence at Croatia’s borders and the setting up of a mechanism to prevent, address and remedy human rights violations. It makes recommendation on how the Schengen Evaluation and Monitoring Mechanism should be improved to ensure it supports fundamental rights compliance, as well as on the use of EU funding.

II. ANALYSIS

1. WIDESPREAD PRACTICE OF HUMAN RIGHTS ABUSE AT EU BORDERS

Refusing people entry into a country's territory or pushing them back to neighbouring countries without providing them with the opportunity to make an asylum claim is commonplace in Europe, both at the external and internal borders of the EU. Some governments have attempted to "legalise" these practices of refusal of entry. Nevertheless, they remain a violation of fundamental rights, including the prohibition of refoulement under Article 3 of the European Convention on Human Rights (ECHR) and the prohibition of collective expulsions under Article 4 Protocol 4 ECHR and Article 19 of the EU Charter of Fundamental Rights (CFR). Other Member States may not have formalised the practice, but nonetheless use it as an integral part of their border management.

Addressing these practices, which are in violation of EU and international law, requires a combination of approaches ranging from monitoring to enforcing compliance and litigation. The European Commission should monitor and assess failure to implement or comply with the recast Asylum Procedures Directive (2013/32/EU) and where necessary start infringement procedures. Numerous litigation efforts both at the national and international level are ongoing, and the European Court of Human Rights has passed down judgments on this practice based on cases brought against *inter alia* Lithuania and Spain. In addition, other EU policies and tools not directly related to asylum are relevant. EU funding for border management should be made conditional on EU Member States respecting fundamental rights and include stringent oversight mechanisms. The Schengen *acquis* provides another opportunity to promote fundamental rights compliance.

2. THE CASE OF THE BORDER BETWEEN CROATIA AND BOSNIA HERZEGOVINA

There is extensive evidence of violations at the border between Croatia and Bosnia and Herzegovina which have been documented by the Asylum Information Database (AIDA) (2019), Human Rights Watch (2018), Amnesty International (2019) and the Border Violence Monitoring Network (2019). Organisations have warned that the EU has become complicit in violence and abuse against people seeking refuge and entry into Europe. The situation is also documented in a report on "push-backs" by the Parliamentary Assembly of the Council of Europe (2019).

As yet, there has been no response to the Croatian Ombudswoman's request to the Croatian authorities to conduct appropriate, efficient and independent investigations into the alleged illegal police treatment of migrants following a complaint received from inside the Croatian border police on treatment ordered by superiors. Recent research by academics based at Aston, Liverpool and Nottingham universities concluded that violence is systematic and organised and causes injuries that, due to a lack of medical care, go untreated (2019).

These practices have given rise to court proceedings. Litigation efforts regarding individual cases of people who have experienced expulsions are being explored. National courts, such as in Switzerland, have suspended Dublin transfers to Croatia due to the current practices of summary returns. An important case, M.H. and others v Croatia concerning an Afghan family which entered Croatia from Serbia, were stopped by the Croatian police and summarily returned to Serbia, is pending before the European Court of Human Rights. One of the children was hit by a train and died while the family was being expelled.

3. CROATIA'S ACCESSION TO SCHENGEN: DO FUNDAMENTAL RIGHTS MATTER?

The Schengen Borders Code, which consolidates rules related to border management for Schengen members, includes various provisions aiming at reconciling border controls performed on behalf of all Member States with obligations under international human rights and refugee law, in particular the principle of non-refoulement. Article 4 of the Schengen Borders Code stipulates that Member States have to comply with the Charter of Fundamental Rights of the EU, relevant international law and the Geneva Convention when applying Schengen rules related to crossings of the external borders.

Croatia expressed its interest in becoming a Schengen member in 2015 and has since then made efforts to transpose the different elements of the Schengen *acquis*, a process which is regularly assessed by the European Commission. In the area of external border management, the European Commission, together with Member State representatives, has conducted three evaluation missions to Croatia (May 2016, November/December 2017 and May 2019). The first two of these missions resulted in finding non-compliance while the last found that Croatia was compliant but that further improvement is necessary. As these reports are not publicly available, it is difficult to judge the extent to which compliance with Article 4 was evaluated.

The May 2019 mission and the related report contributed to the European Commission's Communication of October 2019 which stated that "protection of human rights of asylum seekers and other migrants, and the allegations of denial of access to the asylum procedure and the use of force by law enforcement officials at the border remain a challenge" while at the same time coming to the conclusion that "Croatia continues to fulfill its commitment in relation to protection of human rights". With this Communication, the European Commission gave the green light for Croatia's accession to Schengen, thereby suggesting that a Member State can be in compliance with the Schengen Borders Code despite evidence in the public domain demonstrating systematic violations of rights perpetrated by government officials.

There are three possible explanations as to why the European Commission's findings jar with the reality of what is happening at the Croatia/ Bosnia and Herzegovina border. The first relates to the political determination to declare Croatia ready to accede to Schengen, a promise made by Commission President Jean-Claude Juncker earlier this year. The second is deficiencies of the Schengen Evaluation and Monitoring Mechanism related to how it uses and leads to action on information from third party sources - even where that information is corroborated and in the public domain. Third, it could be argued that Croatia's actions reflect the policy of most EU Member States. There is tacit approval – and in some cases open endorsement – of Croatia's actions.

The arrival of the new European Commission provides an opportunity to address the first of these issues and it is hoped that the incoming Commissioner for Migration and Home Affairs grounds any further movement on Croatia's Schengen accession on the realities at the border including making membership conditional on an end to violations. The latter requires a review of the Schengen Evaluation and Monitoring Mechanism.

4. THE NEED TO REVIEW AND STRENGTHEN THE SCHENGEN EVALUATION AND MONITORING MECHANISM

Given the end of the first multiannual Schengen evaluation cycle 2014-2019, the European Commission will have to undertake a review of the operation of the Schengen evaluation and monitoring mechanism and submit a report to Council and the European Parliament within the first six months of 2020. The European Commission will also have to revise the Schengen Standard Questionnaire, which form part of the evaluation, and establish and adopt a new multi-annual evaluation programme (2020-2024).

It is essential that this review addresses the shortcomings of the current mechanism. First, evidence collected by UN institutions and bodies, National Human Rights Institutions and civil society organisations that is available during the time of the visit should be systematically considered in evaluations. Second, the Schengen Standard Questionnaire should be reviewed to ensure that relevant information regarding fundamental rights and compliance with the non-refoulement principles is recorded. Third, findings related to fundamental rights compliance and recommendations for Member States should be made publicly available to support transparency and increased accountability of Member State practice.

III. RECOMMENDATIONS

Ensuring compliance with European and international legal obligations at the EU's borders:

- Member States should refrain from any pushbacks, expulsions or other violations of EU and international law at their borders. They should also desist from encouraging or tacit approval of the actions leading to violations carried out by other Member States and potential Member States.
- Member States should grant civil society and international organisations access to the border and all related information necessary to support independent border monitoring, as well as provision of legal aid and provision of information.
- DG HOME should monitor compliance with the relevant EU law and publish the report on the implementation of the recast Asylum Procedures Directive (2013/32/EU) which is long overdue.
- DG HOME should launch infringement procedures against Member States which consistently violate EU law.

Making Schengen accession conditional on upholding fundamental rights at the EU's external borders, in accordance with the Schengen Borders Code:

- The European Commission, the Council of the EU and the European Parliament should make any further consideration of Croatia's Schengen membership conditional on an end to the violence at Croatia's borders and an investigation into alleged violations.

- DG HOME and DG JUST should develop specific recommendations to investigate allegations of human rights violations at the borders and to set up a mechanism to prevent, address and remedy any human rights violations at the Croatian border as part of the Action Plan for Croatia's Schengen accession.
- In assessing Croatia's responses to recommendations related to fundamental rights, the European Commission, the Council of the EU and the European Parliament should consider information about the situation from UN institutions and bodies, National Human Rights Institutions and civil society organisations.

Revising and strengthening the Schengen Evaluation and Monitoring Mechanism:

- DG HOME and DG JUST should put forward concrete recommendations as to how the monitoring of fundamental rights compliance can be improved in the next Schengen multiannual evaluation cycle.
- Evidence collected by UN institutions and bodies, National Human Rights Institutions and civil society organisations which is available at the time of evaluations or missions should be systematically included in evaluations.
- Findings related to fundamental rights compliance and recommendations for Member States should be made publicly available.
- DG HOME and DG JUST should revise the Schengen questionnaire to ensure that future evaluations consistently assess compliance with obligations on access to asylum and non-refoulement.
- The European Parliament should hold to account the European Commission and Member States for addressing the shortcomings of the Schengen Evaluation and Monitoring Mechanism in next year's review.
- DG HOME should schedule a thematic evaluation of fundamental rights compliance under the next Schengen multi-annual evaluation programme (2020-2024) and make the findings publicly available.

Guaranteeing that EU funding is promoting fundamental rights compliance and addressing risks of complicity in violations and unintended support for violations:

- DG HOME and DG JUST should verify that all Member States have independent systems in place to prevent, address and remedy violations of EU and international commitments related to their border management activities before making future funding decisions.
- DG HOME should launch an investigation of past spending, analysing the use and impact of EU funding granted to Croatia. In particular, the EC should analyse whether emergency assistance under the Internal Security Fund (ISF) – Borders and Visa has contributed to the human rights violations later denounced by NGOs, and make the findings available.
- DG JUST should ensure that an effective mechanism is put in place to monitor the application and implementation of the EU Charter of Fundamental Rights. CFR application and implementation is now included as an "enabling condition" in the Common Provisions Regulation and as such will become a prerequisite for EU funding on border management for the Member States in the next funding period (2021-2027).
- In the negotiations of the Integrated Border Management Fund (2021-2027) (IBMF), the Council of the EU and the European Parliament should agree that civil society organisations and national human rights institutions can participate in the preparation, implementation, and monitoring of EU funded projects on border monitoring; increased transparency and fundamental rights compliance mechanisms should be added to the fund; the IBMF should include a minimum quota of civil society funding to promote independent monitoring of border management practices.