

## **OHCHR: Call for inputs with a view to issuing a joint statement on the notion of short-term enforced disappearance**

### **Commentary by AsyLex regarding Switzerland**

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#### **A. About the commenting organization**

AsyLex is an independent, Switzerland-based association providing legal assistance and representation to asylum seekers in Switzerland and beyond. Our work is performed primarily by volunteers, who provide legal counseling and court representation in cases involving Swiss asylum procedure and immigration detention.

We share the concern of the Committee on Enforced Disappearances ("the Committee") and the Working Group on Enforced or Involuntary Disappearances ("the Working Group") about violations of the right to liberty and security of the person. We would like to focus on enforced disappearances that occur in the context of forced migration, in particular in the context of asylum-seeking, refoulement and deportation, and to bring to the attention of the Committee the issues set out below.

#### **B. Responses to the Committee and the Working Groups' questions**

##### **Questions a & b: Contexts in which 'short-term enforced disappearances' occur, legal frameworks and practices that may lead to 'short-term enforced disappearances' and legal framework and practices that might prevent them**

In the course of our representation of asylum seekers since 2017, AsyLex has repeatedly observed that asylum seekers in the attempts to seek asylum in Europe are indeed frequently subjected to incidents that can amount to short-term enforced disappearances, as they are effectively placed outside the protection of the law and deprived of their liberty, even if only for a few hours, without anyone knowing their whereabouts.

Asylum seekers are particularly vulnerable to the risk of short-term disappearance because they often have no one to trace them. They are often in an extremely precarious situation, having fled war, conflict and persecution and arriving in a new country where they do not know the language or the system, have no access to translation services and legal aid, and are thus exposed to the arbitrariness of border controls. In this context, the ICRC points out that the likelihood of migrants going missing is also particularly high when they are forced to hide in transit and destination countries for fear of being arrested, detained or deported. When people enter or stay in a country irregularly, they tend to remain outside the system. Not only do they have limited access to basic services and assistance, but they are also afraid to ask for help in contacting their families if they do not have their own means of communication.<sup>1</sup>

AsyLex is concerned that the legal framework of the Dublin III Regulation is particularly conducive to short-term enforced disappearances. This is precisely because it stipulates which Member State is responsible for the assessment of the asylum procedure and, as a result, those in need of protection cannot choose for themselves in which country they seek protection. Although this mechanism is quite complex and takes into account various factors, in practice the country in which the asylum seeker first entered is often responsible for his or her asylum application. In order not to be pushed into a state where the asylum

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<sup>1</sup> ICRC (2017), Missing Migrants and their families the ICRC's Recommendations to Policy-Makers, available at: [https://www.icrc.org/sites/default/files/document/file\\_list/missing-migrants-and-their-families.pdf](https://www.icrc.org/sites/default/files/document/file_list/missing-migrants-and-their-families.pdf), p.11, [last accessed 15.08.2023]

seekers see no chance of protection or, at best, have already experienced inhumane treatment in the past, they are often pushed into illegality. This carries the risk that they will be apprehended, detained or directly deported by the authorities if apprehended.<sup>2</sup>

In addition, refoulements and deportations under this system are often deliberate measures, often orchestrated by authorities to manage migration flows in an illegal manner and to enforce border control. These measures expose asylum seekers to risks, including potential threats to their safety and lives, limited access to legal protection, and violations of their basic human rights under international law. Various sources report how EU policies prevent migrants and asylum seekers from reaching Europe, and that they also lead to extreme forms of human rights violations against those who manage to cross.<sup>3</sup> It can therefore be observed that these border countries are increasingly introducing stricter border controls to prevent asylum seekers from entering the country, or conducting pushbacks in parallel, with the risk of exposing asylum seekers to a renewed violation of the protection of Article 17 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICED). In this context, the European Council even speaks of a need to protect EU borders from illegal immigrants, gradually shifting the focus towards preventing irregular migrants from entering the EU territory.<sup>4</sup>

***Evidence in legal-practice: Observations based on reports from AsyLex's clients who have traveled through European Union (EU) border countries to Switzerland***

AsyLex is concerned that these illegal practices are also observed in our daily legal work. AsyLex is aware of border guard practices in EU border countries that do not include proper documentation and conduct in accordance with the rule of law. In particular, AsyLex clients who have traveled through **Croatia, Romania and Bulgaria** report being detained by border guards or state police and held for several hours to days in unknown locations. Places of detention are described as ranging from containers, underground sheds, to trucks where it was dark and oxygen-deprived, as well as being held in the woods or outdoors where they were exposed to extreme weather conditions such as blazing sun, rain, or freezing cold. This does not exclude vulnerable persons, such as sexual and gender-based violence (SGBV) and torture victims or children. In connection with arrest and detention, victims report inhumane treatment, insults, beatings, forced disrobing, sexual harassment, or even rape. In almost all cases, asylum seekers did not know the location where they were detained or the location to which they were taken by a truck or a police vehicle. If the detention took place in a vehicle, clients report harsh driving, being transferred to different vehicles, and being in close quarters with other asylum seekers. In addition, our clients report that during this detention in EU border countries, which is often secret and incommunicado, they are often forced to sign documents in a foreign language without knowing their contents (usually an agreement to return or to leave the country). In numerous cases, asylum seekers in transit are also forced to provide their fingerprints. The giving of fingerprints or the signing of documents is usually forced through the use of severe violence, which may extend to torture. Because of the violence they experienced, our clients report having been unable to seek help, nor did they know of their right to challenge their deprivation of liberty in countries such as Croatia, Romania and Bulgaria. It was not uncommon for our clients, as well, to eventually be returned to the external EU border from which they had come and forced to return outside of the EU, without any documentation or decision.

These illegal practices which are carried out by border guards in countries such as Croatia, Romania and Bulgaria involve deprivation of liberty, a failure to disclose the person's whereabouts to family members, the inability of the person to obtain information about his or her exact whereabouts and the reason for the

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<sup>2</sup> See also: Kritik an der Praxis des Dublin Verfahrens, available at:

[https://www.frsh.de/fileadmin/schlepper/schl\\_dubII/sdub\\_9-19.pdf](https://www.frsh.de/fileadmin/schlepper/schl_dubII/sdub_9-19.pdf), [last accessed 15.08.2023]

<sup>3</sup> See also: Nourhan Abdel Aziz (2022). Managing Migration in the Eastern Mediterranean: Challenges and Opportunities, available at: <https://www.iemed.org/publication/managing-migration-in-the-eastern-mediterranean-challenges-and-opportunities/> [last accessed 15.08.2023]

<sup>4</sup> See also: European Parliament (2017). Countering irregular migration: better EU border management, available at: <https://www.europarl.europa.eu/news/en/headlines/society/20170627STO78419/countering-irregular-migration-better-eu-border-management>, [last accessed 15.08.2023]

deprivation of liberty, including the inability to obtain legal counsel. As a result, asylum seekers are not covered by the protection of the law when trying to reach safety or during transit. AsyLex therefore considers that such deprivation of liberty, as well as the failure to communicate their whereabouts, in combination with pushbacks of asylum seekers, amounts to enforced disappearance within the meaning of Article 2 CED, in violation of Articles 17 and 18 CED, regardless of the duration of these incidents.

Consequently, it appears that the current legal framework, through its shortcomings, may lead to facilitation of violations and short-term enforced disappearances. Inadequate protection and monitoring mechanisms allows authorities to detain asylum seekers without proper notification to families or legal representatives, leaving them in a state of uncertainty about their whereabouts and well-being, sometimes without any legal basis. Detaining migrants, and especially asylum seekers, in secret facilities or unofficial locations away from the public eye can effectively render them invisible and increase the likelihood of their disappearance. Moreover, lack of access to legal help and effective remedies can exacerbate the situation. Therefore, asylum seekers who are detained or arrested without the ability to communicate with legal representatives or without access to due process may find themselves in a precarious position where they are at higher risk of short-term disappearance.

***Assessment of encountered evidence in regard to question b.***

One could argue that ambiguous or permissive border control laws can create an environment conducive to pushbacks. When legal provisions give border control authorities discretion without clear guidelines, there is a possibility that these authorities will interpret and implement their actions in a way that leads to pushbacks. Short-term disappearance of migrants and asylum seekers therefore requires a critical examination of legal frameworks and practices that can avoid the risk of short-term enforced disappearance, pushback, and repatriation risk.

Another factor is the lack of comprehensive international and national mechanisms to identify and address pushback. Inadequate reporting and accountability mechanisms can enable border officials to conduct pushbacks without adequate oversight, reducing the likelihood of consequences for such actions. As mentioned before, the lack of effective legal recourse for migrants who are turned back or disappear can exacerbate the situation. When migrants have no legal recourse to address pushback incidents, it complicates efforts to hold authorities accountable and obtain justice.

Regarding the legal framework and practices that could prevent pushbacks and thus short-term disappearances, the creation of effective oversight mechanisms, therefore could curb pushbacks. Second, establishing independent bodies to monitor and report on border control and migration management practices can promote transparency, accountability, and compliance with legal standards. Finally, a human rights-based approach to migration management is critical. The Global Compact for Safe, Orderly and Regular Migration (GCM), endorsed by the United Nations in 2018, outlines guiding principles for migration governance and emphasizes the importance of human rights, non-discrimination, and international cooperation.<sup>5</sup>

**Question c: Main procedural questions that may arise for domestic authorities, the Committee and the Working Group when dealing with ‘short-term enforced disappearances’**

- How can the Committee identify refugees who have been subjected to enforced disappearance and what means can be used to identify them?
- What action can the Committee take against States that have violated the right to liberty by subjecting migrants, and in particular asylum-seekers, to short-term enforced disappearance?

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<sup>5</sup> Global Compact for Safe, Orderly and Regular Migration (GCM), (A/RES/73/195), (2018), available at: <https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm>, [last accessed 15.08.2023]

- Within what time frame should the families of "detainees" be informed?
- What mechanism should be used to monitor States to ensure that they provide official data on deportations and returns and do not conceal them?
- What steps should the Committee take to make recommendations to States to address short-term enforced disappearances, and how can the Committee ensure that States implement its recommendations?
- How can the Committee ensure that victims of short-term enforced disappearances receive the needed support, assistance and reparation?

### **C. Recommendations**

- States are urged to conduct regular reviews of their migration-related policies and laws to prevent (short-term) enforced disappearances among migrants. This evaluation should prioritize the protection of migrants' rights and safety
- In accordance with their obligations under international law, states are urged to strictly adhere to the principle of non-refoulement
- Authorities are recommended to actively facilitate a safe and accessible asylum application process for migrants in need of international protection. This includes providing clear information, removing obstacles, and ensuring their security throughout the process
- Transit and destination countries are called upon to establish, facilitate, and support humanitarian rescue operations in areas with a high risk of migrant distress or fatality. These efforts should prioritize saving lives and preventing disappearances
- In situations where search, rescue, and relief capabilities are insufficient, states are strongly advised to collaborate with international organizations and neighboring countries to ensure effective collective action and response
- States are urged to uphold the dignity and rights of detained migrants by ensuring their proper registration and accommodation in recognized facilities. Adequate living conditions and humane treatment must be maintained
- Authorities must recognize and respect the right of detained migrants to maintain contact with their families. States are encouraged to provide mechanisms that enable regular communication while in detention.