



Between administrative and criminal law: An overview of criminalisation of migration across the EU

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Executive Summary

This briefing discusses the conflation of criminal and administrative law in the context of migration. These two branches of law serve different purposes, but this distinction is blurred when it comes to migration policy, where on the one hand, migration law, which should be administrative, is used to pursue criminal law objectives, and on the other hand, states increasingly use criminal law as a migration enforcement instrument. This briefing explores these growing trends along three lines of research, taking into account policy and legislative developments at the EU level and in European countries, with a focus on Bulgaria, Cyprus, France, Greece, Hungary, Italy, Poland, Spain and the United Kingdom.

The first line of research focuses on the detention of migrants for reasons related to 'national security' or 'public order'. In recent years, there has been a convergence towards accepting the detention of migrants on these grounds at the EU level, as exemplified by the Commission's 2018 proposal to amend the Return Directive. At the national level, interviews have shown that in Bulgaria, Cyprus, Greece, Hungary and Poland, it is particularly difficult to challenge detention decisions related to national security, because of a lack of procedural safeguards and limited access to classified information. In Italy and France, recent laws and proposals have prioritised deportation and detention for people considered to be a threat to public order or public security, even though the concept is not clearly circumscribed. From this perspective, immigration detention is used to pursue criminal law objectives. This has the effect of creating double standards in terms of access to fair trial guarantees, depending on the nationality and the migration status of the suspect, and of fostering harmful narratives which equate migrants with criminals.

The second line of research focuses on the use of criminal law to manage migration, with the purpose of preventing and deterring people's mobility. Alongside the criminalisation of irregular entry or stay, there has been a growing role of smuggling-related charges targeting both civil society actors and migrants. This trend is particularly evident in Greece, Italy and the UK, where criminal proceedings against boat drivers have sharply increased in recent years, resulting in the systemic detention of migrants, their exclusion from asylum procedures, and violations of procedural safeguards in administrative proceedings. This approach ignores the harms that people suffer as a direct consequence of counter-smuggling policies and that smuggling is a reaction to border control rather than a cause of migration itself.

The third line of research focuses on the use of digital technologies and artificial intelligence (AI) for migration control and surveillance purposes. The collection and processing of migrants' personal data by national authorities and EU databases are central to this trend, with data used not only for administrative purposes but also for crime control operations and prevention. At the EU level, recent legislative proposals include several elements that will pave the way for an increased use of AI and border technologies in the context of migration enforcement. At the national level, at least 15 European countries have implemented highly intrusive facial and biometric recognition systems for mass surveillance, and these systems are often used to reinforce existing border controls and limit migrants' freedom of movement.

By highlighting emerging trends and specific case studies, this briefing aims at exploring different issues related to the conflation of administrative and criminal law, uncovering their impact on migrants' human rights and suggesting further lines of research.

Scope and methodology

This briefing was produced in the context of PICUM's project 'A Three-Fold Strategy Against Immigration Detention in the EU', which aims to identify knowledge gaps in the area of immigration detention and develop recommendations for further research and actions in this field. This paper focuses on the growing trend of conflation between criminal and administrative law. It focuses on under-researched issues related to the ways in which administrative detention is turning into a 'security device', within a context where migration itself is being portrayed as a threat to the security of EU countries.

This briefing is based on desk research and information gathered through semi-structured interviews conducted with representatives of PICUM members and other stakeholders. The research includes an analysis of laws, policies and practices related to immigration detention and the criminalisation of migration, focusing in particular on the European Union framework. It also includes interviews that analyse the legal developments and practices carried out in member states, with a focus on Bulgaria, Cyprus, France, Greece, Hungary, Italy, Poland, Spain and the United Kingdom.

Introduction

The conflation of criminal and administrative law in the context of migration refers to the use of one body of law for purposes that should fall under the other, and vice versa.

Administrative law regulates the relationship between the state and individuals and does not usually entail punitive features¹ Immigration law is a subset of administrative law, aiming at regulating the powers of states towards those who are not nationals of such states.

Criminal law is “the body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders”.² It is based on concepts of prevention, deterrence, punishment, and rehabilitation of offenders.

While administrative law focuses on the migration status of the individual (e.g., regular migrant, undocumented migrant, asylum seeker), criminal law can only be applied when the specific actions of a particular individual are framed as criminal: punishment is related to what the person does, and not to their migration status. In the case of current immigration policies, this distinction is blurred.

The convergence of criminal law and administrative law in the field of migration and border control has taken place over the last 30 years. US scholars have developed the concept of *crimmigration*³ to describe this trend, which was later applied in the European

context.⁴ *Crimmigration* is based on two intertwined processes. On the one hand, immigration infractions (such as irregular entry or stay) have increasingly been punished under criminal law: this reflects a ‘strict criminalisation’ approach, under which migrants are sanctioned due to their administrative status. In addition, the migration status of individuals will often determine the consequences of non-migration related, minor criminal charges (e.g. sleeping rough, begging - which is criminalised in some countries, shoplifting, resisting arrest), as third country nationals are much more frequently prosecuted and detained on these grounds, while EU nationals are more likely to see the charges dropped or to be applied alternative sanctions (e.g. fines).⁵

Migrants are then further criminalised under a counter-smuggling framework, a body of laws that puts forward a criminal response to the phenomenon of facilitation of irregular entry, transit or stay and that is increasingly used as a tool for border control. On the other hand, third country nationals accused of criminal offences are increasingly facing, for the same act, both a criminal law response and consequences regulated under immigration law (e.g., deportation). Under immigration law, migrants are subjected to a ‘less guaranteed’ form of criminal enforcement: they are not subject to the same rules and safeguards as EU nationals suspected or accused of committing a crime, but to alternative, ad hoc procedures in which the overlap between criminal and administrative law allows for a greater discretion by state authorities and fewer guarantees.⁶

1 It must be noted, however, that in recent years there has been a widespread trend to include punitive elements in administrative law. This has happened, for instance, in areas related to economic and financial crime (e.g. Tax law and competition law), where administrative law does include punitive features in particular sanctions. The European Court of Human Rights identified in *Engel* the criteria to be applied to distinguish criminal from administrative sanctions, pointing out to the fact that the nature and of offence and the severity of the penalty are more important than the formal classification in domestic law. ECtHR, 8 June 1976, *Engel and others v. the Netherlands*, app n. 5370/72.

2 The definition can be found at: <https://www.britannica.com/topic/criminal-law>.

3 J.P. Stumpf (2006), *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, in *American University Law Review*, 56(2), pp. 367–419.

4 M. Van der Woude, J. Van der Leun, V. Barker (2017), *Special issue on crimmigration in Europe*, in *European Journal of Criminology*, 14(1).

5 Interview with Laure Baudrihaye-Gérard, *Fair Trials*, on 8 December 2022.

6 Although this falls outside the scope of this briefing, it should be noted that the expansion of the criminal law system has also been criticised by civil society organisations which noted that, if used at all, criminal prosecution should be a measure of last resort, and that several social problems could instead better be addressed through social measures, including investments in poverty alleviation, housing and support. See *Fair Trials*, [Criminalisation](#) (accessed 5 April 2024).

More generally, trends across EU member states show that crime control and border control procedures have been merging. For instance, tools traditionally used under criminal law, such as detention or surveillance technologies, have been incorporated into the field of migration enforcement. In this respect, **administrative immigration detention** is the most evident manifestation of the (asymmetrical) cross-pollination between administrative and criminal law⁷, as criminal law guarantees are not fully incorporated into the administrative detention regime.⁸ In theory, immigration detention should not be conceived as a punitive measure. In practice, however, the underlying objectives of immigration detention are often punitive, as are the conditions and regime of detention. PICUM has repeatedly underlined that immigration detention is always harmful, disproportionate and ineffective, and has called on states to end it.⁹ There is also growing consensus, including at the international level, that detention should be progressively ended.¹⁰ Several features of immigration detention reinforce its harmful and punitive nature. For instance, in a number of states in Europe, migrants subject to

return orders are detained together with people in criminal detention.¹¹ The length of detention also contributes to the perception of punishment. The longer the person is detained without evidence that the time spent in detention is proportionate to its objective (e.g., the implementation of the return order), the more the measure loses its justification and takes on punitive implications.¹² In addition, people usually do not know for how long they will be in detention, contrary to what is normally prescribed for detention under criminal law.¹³

Detention is not the only critical tool used in both criminal and immigration enforcement: **digital technologies** are also increasingly used by law enforcement agencies for border control purposes, in a context of reduced safeguards regarding the use and collection of personal data.¹⁴ More generally, the tendency to blur the line between immigration control and the security agenda permeates the recent policy and legislative developments in the EU. Irregular migration has often and in many member states been depicted as a security issue.¹⁵ This trend is reflected in the recent legislative proposal at the EU level, the revision of the Schengen Borders

7 I. Majcher (2014), [Crimmigration in the European Union, the case of immigration detention](#).

8 S.H. Legomsky (2007), [The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms](#), Washington & Lee Law Review, 64 (2), pp. 469-528.

9 PICUM (2022), [Immigration detention and de facto detention: what does the law say?](#)

10 Objective 13 of the Global Compact on migration mentions the prioritisation of non-custodial measures instead of detention. [Global Compact for Safe, Orderly and Regular Migration](#) (2018). See also UN Working Group on Arbitrary Detention (2018), [Revised Deliberation No. 5 on deprivation of liberty of migrants](#), Special Rapporteur on the human rights of migrants (2012) [Report of the Special Rapporteur on the human rights of migrants](#), François Crépeau, A/HRC/20/24, para. 72.

11 European Commission (2014), [Communication from the Commission to the Council and the Parliament on the return Policy](#). The European Parliament Implementation Report on the Return Directive mentions that in only 9 member states immigration detention takes place in dedicated detention facilities: although there is no clear data on this point, this might suggest that in several states, migrants are still detained in prisons. European Parliament (2020), [The Return Directive 2008/115/EC. European Implementation Assessment](#).

12 In many member states the extension of the maximum detention period has resulted in a punitive measure as the return rates did not increase.

For instance, in **Italy**, the period of detention was extended every time a far-right government replace the previous one (up to 18 months in 2011; up to 6 months in 2018): in these years, there were no signs that maintaining people for a longer period in detention would lead to increase return numbers. CILD (2021), [Buchi neri. La detenzione senza reato nei CPR](#).

The detention period was extended in **France** in 2019 (from 45 to 90 days), which meant an increase in the medium average of detention remained (22 days in 2021), even though the vast majority of removals are carried out during the first few days of detention. La Cimade (2022), [Rapport 2021 sur les centres et locaux de rétention administrative](#).

In **Greece**, the maximum period of detention was extended up to 36 months in 2020 (because of the possibility to detain irregular migrants for 18 months and, consequently, asylum seekers for a further 18 months (or the other way around), despite the low return rate related to the pandemic situation as well as to the lack of readmission agreements with third countries. Mobile Info Team (2023), ["Prison for Papers": Last Resort Measures as Standard Procedure Researching Pre-removal Detention Centres on Mainland Greece](#).

13 However, this is not always the case for pre-trial detention, which can also be extended at regular intervals and in some countries for unlimited periods of time.

14 PICUM (2019), [Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status](#).

15 For a historical perspective, see : D. Bigo (1995), *Grands Débats Dans Un Petit Monde*, in Cultures & Conflicts, 1995 (19-20), pp. 1- 29. For a more recent overview of the securitisation process ongoing in the EU, see: V. Bello, *The spiralling of the securitization of migration in the EU: from the management of a 'crisis' to a governance of human mobility?*, in Journal of Ethnic and Migration Studies, 48(6), pp. 1327-1344.

Code.¹⁶ The amendments suggest to include “large scale” irregular migration in the definition of what constitutes a “serious threat”¹⁷ which would justify the reintroduction of internal border controls within the Schengen Area.

Against this background, this briefing aims to explore some of the recent trajectories along which the conflation between criminal and administrative law in the context of migration has manifested itself, resulting in both the criminalisation of migration enforcement policies and the ‘immigrationisation’ of penal policies.¹⁸

The focus is placed on:

- 1. The use of administrative detention for security-related purposes;**
- 2. The use of criminal law as a deterrent for migration;**
- 3. The use of technology for immigration enforcement purposes.**

16 European Commission (2021), [Proposal for a Regulation of the European Parliament and the Council amending Regulation \(EU\) 2016/399 on a Union Code on the rules governing the movement of persons across borders](#), Article 25. This has confirmed in the interinstitutional agreement on the revision of the Schengen Borders Code found by the European Parliament and the Council in February 2024 and expected to be adopted in April 2024. See [Provisional agreement resulting from interinstitutional negotiations](#) on the Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across border.

17 Idem.

18 J.A. Brandariz (2022), *Criminalisation or instrumentalism? New trends in the field of border criminology*, in *Theoretical Criminology*, 26(2), pp. 285-303.

Converging objectives: administrative detention on public policy grounds¹⁹

Immigration detention is understood as deprivation of liberty for migration-related reasons, based on the person's migration status.²⁰ EU member states may resort to immigration detention in three instances:

- before entry (pre-admittance detention), to decide on the right of the person to access the territory;
- during the examination of the asylum procedure, including to execute a so-called Dublin transfer;²¹
- during a return procedure to carry out the repatriation (pre-removal detention).

Such detention applies only to migrants and is not triggered by criminal charges. In theory, therefore, it should not be linked to the prevention or repression of crimes.

These principles are partly reflected in the European legal framework and jurisprudence. According to Article 5 of the European Convention on Human Rights, foreigners may only be deprived of their liberty when states decide upon their entry into the State's territory and to carry out their removal. The European Court of Human Rights (ECtHR) has therefore held that immigration detention cannot be justified solely on public security reasons: if there is no reasonable prospect of removal, migrants who

are considered to be a threat to national security or public order cannot be held in administrative detention.²²

Under the 2008 EU Return Directive,²³ detention may only be used to prepare or carry out or carry out someone's removal if there is a risk of absconding or if the third-country national is obstructing their return. The Court of Justice of the EU (CJEU) has clarified that the Directive does not allow for detention based on grounds of public order or public safety.²⁴

In recent years, however, there has been a convergence at the EU level towards accepting the detention of migrants for reasons related to 'national security' or 'public order'. For example, the 2018 Commission proposal to amend the 'Return Directive'²⁵ included a new ground for detention, which would allow states to detain people if they "pose a risk to public policy, public security or national security". The legislative review process for this revised directive is currently ongoing, as the European Parliament, Council and Commission have not yet come to an agreement on the revised directive. If adopted, however, this amendment would greatly expand the circumstances in which undocumented migrants can be detained. In addition, under the 2013 EU Reception Conditions Directive, which established common rules for the accommodation and detention

19 The definition refers to both public order/public security and national security grounds.

20 PICUM (2022), [Immigration detention and de facto detention: what does the law say?](#).

21 The 'Dublin procedure' is a procedure regulated by EU law (Regulation 603/2013/EU) to establish the competent member state to examine an asylum application made in one EU State, and to transfer the asylum seekers accordingly.

22 ECtHR, 19 February 2009, *A. and Others v United Kingdom*, App no 3455/05. However, the Court found that it is compatible with Article 5 to detain an asylum seeker for reasons of public security if a return procedure has been initiated. ECtHR, 18 March 2019, *K.G. v Belgium*, App no 52548/15.

23 Directive 2008/115/CE on common standards for returning irregular migrants.

24 CJEU, *Kadzoev*, 30 September 2009, C- 357/09. A few years later, in *El Dridi*, the Court also clarified that the effectiveness of a return procedure shall not be jeopardised by the application of measures with criminal law objectives. CJEU, *El Dridi*, C-61/11, 28 April 2011.

25 European Commission (2018), [Proposal for Directive on common standards and procedures in member states for returning illegally staying third-country nationals \(recast\)](#).

of asylum seekers,²⁶ it is possible to detain asylum seekers “when protection of national security or public order so requires”. Several member states transposed the Reception Conditions Directive by including the possibility to detain asylum seekers who are considered a threat to national or public security, often without further clarifying what constitutes such a threat.²⁷ These concepts are also widely used in the legislation adopted under the EU Migration Pact²⁸. In the new Asylum Procedures Regulation and Return Border Procedures Regulation,²⁹ people identified as posing a “risk to national security” or “public order”, including unaccompanied children, will be automatically channelled into “border procedures” with fewer safeguards for the processing of their

asylum applications and a higher risk to be subject to detention.³⁰

The objectives of immigration detention on public policy grounds are similar to those of criminal proceedings: to prevent ‘dangerousness’, to deter, to neutralise threats. Ultimately, they serve the functions of ‘social defence’.³¹ From this perspective, immigration detention is used to pursue criminal law objectives. This has the effect of creating double standards in terms of access to fair trial guarantees, depending on the migration status of the suspect, and of fostering harmful narratives which equate migrants with criminals.

What can really be considered a public order or public security threat?

The risks associated with the use of detention on public security grounds are exacerbated by the lack of a common understanding of what represents a threat to ‘public security’, ‘public order’ or ‘national security’. This is common to both the EU and national law. However, the Court of Justice has clarified that these grounds must be interpreted narrowly and on a case-by-case basis.³² The Court further specified that the concept of ‘public order’ entails the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one

of the fundamental interests of society. The concept of ‘public security’ refers to a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or peaceful coexistence of nations, or a risk to military interests. These concepts do not cover all criminal behaviour, but only the most serious infringements of the law. Finally, the Court held that the mere presence of a previous conviction cannot be considered to justify a threat to public order.

26 Detention of asylum seekers is regulated by Articles 8 to 10 of the Directive, which established that detention cannot be justified by the sole purpose of examining the asylum application and sets a list of exhaustive circumstances in which asylum seekers can be detained. See [Directive 2013/33/UE of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection \(recast\)](#). While the Reception Conditions Directive was subject to a legislative revision (finalised in April 2024), the possibility to detain applicants only on the basis of a list of exhaustive circumstances did not change. See the [final text](#) on the recast Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, Articles 10-12.

27 For instance, Italy expanded the grounds for the detention of asylum seekers in 2015 (D. Lgs. 142/2015), when implementing the 2013/32/UE and 2013/33/UE Directives; Greece introduced amendments to its national framework on asylum seekers detention in 2019, supposedly to transpose some of the elements of the same Directives (L. L.4636/2019).

28 The EU Pact on Migration and Asylum is a set of legislative proposals and recommendations which was [proposed](#) by the European Commission in September 2020 and [adopted](#) in 2024.

29 European Parliament (2024), [MEPs approve the new Migration and Asylum Pact](#).

30 PICUM et al. (2024), [The EU Migration Pact: a dangerous regime of migrant surveillance](#) ; PICUM (2021), [PICUM Recommendations on the Asylum Procedures Regulation](#).

31 G. Campesi, G. Fabini (2020), *Immigration detention as social defense: policing dangerous mobility in Italy*, in *Theoretical Criminology*, 24(1), pp. 50-70. According to the authors, the ‘dangerous’ migrant is usually someone who has a criminal record, or a formal contact with the criminal justice. This is the case even though the vast majority of the crimes linked to migrants are petty offences commonly related to subsistence. Their analysis was conducted with regard to the Italian case but can be applied to other national contexts.

32 CJEU, *J.N. v. Staatssecretaris van Justitie en Veiligheid*, 15 February 2016, C-601/15 PPU.

Detention on national security grounds: member states' practices

However, practices in member states show that public policy grounds cover a wide range of situations and are often applied automatically without a case-by-case assessment. These practices were raised by interviewees in **Cyprus, Poland, Hungary, Bulgaria** and **Greece**. In some of these countries, public policy grounds are also used to detain migrants who cannot be removed, which is against Article 15 of the Return Directive.³³

Common to the Cypriot, Polish and Hungarian national contexts are the lack of procedural safeguards to effectively challenge a decision finding that a person represents a threat to national security, the lack of reasoning for the finding, and limited powers for the applicants and for their lawyers to have access to the classified information.³⁴ In Hungary and Poland, there is no possibility for the courts to review and determine the lawfulness of this classification. In **Hungary**, different cases have been brought before the ECtHR³⁵ and the CJEU. The CJEU clarified that asylum seekers must be able to express their views on the classified information that leads to rejection or withdrawal of the refugee status based on national security reasons.³⁶ This issue is also relevant in the context of detention, as when there

is a national security concern, asylum seekers may be detained pending the exam of their application. Additionally, they may have their refugee status applications rejected because of national security grounds and they can be maintained in detention for the purpose of return, unless it is proven that there is a risk of *refoulement*. The impossibility to challenge a finding of a threat to national security might imply a prolonged period of detention and the risk of deportation.

In **Cyprus**, like in Poland and Hungary, files concerning procedures related to national security are classified. Until recently, the Supreme Court did not find a violation in the right to defence in these cases. At the end of 2022, the Courts adopted a different stance and complied with the CJEU decision in *GM*.³⁷ Similarly, in **Bulgaria**, people detained on national security grounds are not given sufficient reasons for such a finding. To decide on these cases, the courts merely rely on statements from the national security services, issued in the context of decisions on the rejection or withdrawal of the asylum status and the subsequent return order. In the context of those cases, courts do not accept the lawyers' requests for evidence from the national security services.³⁸

33 Directive 2008/115/CE on common standards for returning irregular migrants.

34 In Cyprus, Courts often align with the administrative authorities and confirm that the applicant cannot have access or can have very limited access to the files. In addition, according to national case law on administrative authorities' powers, the courts cannot interfere with the authorities' discretionary powers which are very wide on issues of national security i.e. to ensure that this information and evidence exist and that they were eventually investigated properly to verify their accuracy. Interview with Nicoletta Charalambidou, KISA, Malta, 30 November 2022. See also Matevžič, G. (2021), [The Right to Know – Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland](#).

35 ECtHR, *L. v Hungary*, No. 6182/20, communicated 20 April 2021.

36 CJEU, *GM*, 22 September 2022, Case C-159/21. The case concerned the right of asylum seekers to an effective remedy in national security cases. The Court held that asylum-seekers must be able to effectively express their views regarding classified information that led to the deprivation of refugee status on ground of national security and the determining authority must be able to carry out its own assessment of the circumstances. See also ELENA (2022), [CJEU: Asylum-seekers must be able to effectively express their views regarding classified information that led to the deprivation of refugee status on grounds of national security and the determining authority must be able to carry out its own assessment of the circumstances](#).

37 Supreme Court, *Mustafa El Hussein v The Republic of Cyprus*, 17 November 2022, C-15/22. The case regarded a habeas corpus application made by a Syrian national detained in Lakatamia Police detention centre. It concerned the legality of the duration of detention and during the first instance case the applicant also filed a request for disclosure of documents, which was initially denied. The Supreme Court granted the habeas corpus while simultaneously recognising that the applicant was entitled to the delivery of documents.

38 Interview with Diana Radoslavova, [Center for legal aid - Voice in Bulgaria](#), Bulgaria, on 25 November 2022.

Detention on public order grounds: member states' practices

Along with the trend towards the detention of undocumented people depicted as posing a security threat, there has been a growing effort to increase detention on **public order grounds**: as explained by the CJEU (see the case *J.N.* above) the two concepts are related but differ. Public order is a wide concept used by administrative and law enforcement authorities to ensure the 'safety of society'.³⁹ As a typical administrative law concept, it gives authorities discretion over the definition of what may constitute a threat to public order.⁴⁰

In **Greece**, art. 30, par 1c L. 3907/2011 explicitly provides national security concerns as a ground for pre-removal detention, contrary to what is established in the Return Directive. In practice, vaguely motivated public order grounds are frequently applied to justify the detention of asylum seekers. This practice has been on the rise since 2019, resulting in the widespread detention of asylum seekers.⁴¹ Moreover, after amendments introduced in 2020 and 2021, national law provides that detention is imposed as a rule against persons in return procedures (unless it can be shown that there is no risk of absconding, no lack of cooperation and that they are not a threat to national security).⁴² This reversal of the burden of proof is contrary to art. 15 of the Return Directive and amounts to blanket detention with no individual assessment. When migrants are charged with minor

offences that do not allow for pre-trial detention (such as theft, or offences related to their migration status, i.e. irregular entry or the use of false document), they are more likely to be administratively detained on public order grounds. In one case, administrative detention was maintained despite the fact that no criminal charges were eventually pressed, and even though it was not possible to carry out the deportation⁴³.

In **Italy**, researchers have claimed that detention on public order grounds has been used selectively with the purpose of "removing from the public sphere some categories of migrants"⁴⁴ because of their perceived "dangerousness".⁴⁵ The 2020 reform of immigration law confirmed this attitude, by explicitly prioritising the detention of migrants considered to be 'dangerous' because of a previous criminal conviction or because they are involved in an ongoing police investigation.⁴⁶

On a similar note, in **France**, migrants with a previous criminal conviction are frequently detained in immigration detention centres once their criminal sentence has been completed, according to an informal policy.⁴⁷ Return orders are frequently issued on public order grounds⁴⁸ including in situations of destitution or social exclusion but with no connections with previous or ongoing criminal proceedings.

39 As an example, see the UK Public Order Act of 1986, which defines public order as "the prevention of disorder, or crime, or of threats to public safety".

40 According to the definition of the Global Encyclopaedia of Public Administration, [Public Policy and Governance](#), "administrative discretion allows agencies to use professional expertise when making decisions or performing official duties, as opposed to only adhering to strict regulations. Thus, an administrator has administrative discretion when he or she has the freedom to make a choice among potential courses of action" (accessed April 2024).

41 Interview with Manon Louis, Mobile Info Team/Border Violence Monitoring Network, Greece, on 8 February 2023. See Mobile Info Team (2023), [Prison for Papers: Last Resort Measure as Standard Procedure](#).

42 Law 4686/2020 of 12.05.2020 which modified Article 30 of Law 3907/2011 on the grounds for detention of undocumented migrants. An analysis of the legislative reform can be found here: PICUM (2020), [Immigration detention becomes the rule in new Greek law](#).

43 The case happened in Lesbos in 2020. Interview with a representative from the legal NGO HIAS, Greece, on 7 April 2023.

44 G. Campesi, G. Fabini (2020), *Immigration detention as social defense: policing dangerous mobility in Italy*, in *Theoretical Criminology*, 24(1), pp. 50-70, p.51.

45 *Ibid.*

46 D.L. 130/202 converted into L. 173/2020, Article 3.

47 Interview with Anna Sibley, [Gisti/Migreurop](#), France, on 6 February 2023. In 2021, nearly one fourth of detainees (23%) were transferred to administrative detention centres directly from prison.

48 Undocumented migrants can be returned under two procedures: the adoption of a return order, which implies that migrants are entitled to voluntary repatriation; and the coercive expulsion. The second procedure is activated when the person is deemed to be a 'serious threat to public order' (*lorsque sa présence en France constitue une menace grave pour l'ordre public*) and it is normally executed through detention. The law does not define what constitutes a serious threat.

Based on these orders, migrants⁴⁹ can be detained even when there is no reasonable prospect of removal (as was the case in 2020 and 2021 during the pandemic). In 2023, a reform to amend the asylum and immigration law was presented in France.⁵⁰ According to several French NGOs, one of the concerns of the new proposal is the expansion of the cases in which expulsion and detention orders can automatically be issued on public order grounds,

without a case-by-case assessment of the individual circumstances. This approach was anticipated by an internal Decree ("*circulaire*") of the Ministry of the Interior issued in November 2022, which requires enforcement agencies to apply the same return methods, based on prioritisation of forced deportation over voluntary return, to undocumented migrants apprehended in the street and to migrants with criminal convictions.⁵¹

Double jeopardy and discriminatory treatment

Detention on public policy grounds blurs the line between immigration enforcement and criminal procedures and allows states to apply lower safeguards particularly in relation to fair trial **guarantees** and the **principle of habeas corpus**, such as the **right to presumption of innocence**, **to strict review of detention and to immediate access to an effective remedy**⁵². It also introduces a formal ground for **discrimination** between migrants and EU nationals, as people facing the same circumstances (e.g., being suspected of crimes such as terrorism, smuggling, or human trafficking) will be treated under two completely different sets of laws depending on whether or not they are EU nationals and their migration status. Moreover, it creates a "**double jeopardy**" for migrants who are sanctioned under both criminal law and migration law for the same act. To the extent that administrative detention is highly punitive, this treatment violates the principle of 'ne bis in idem', according to which no one should be punished twice for the same offence.

This trend has been vividly demonstrated in **Spain**, especially between 2008 and 2015, when the immigration authorities prioritised the expulsion and detention of those who were serving or had served a criminal sentence, thus neutralising the supposedly rehabilitative function of criminal proceedings⁵³. Moreover, even when the person has not been charged for a crime, it is the Spanish national security and police forces that initiate the proceeding for expulsion. This entails treatment comparable to the one in the criminal proceeding, but without the guarantees required in the Criminal Procedure Law, such as the presumption of innocence and due process. Once the expulsion procedure begins, the person is held in immigration detention centres (*Centros de Internamiento de Extranjero – CIE*), where they are deprived of their freedom without the guarantees that are included in penitentiary rules.⁵⁴

49 Moreover, according to Article L742-4 of the French 'Code on immigration and asylum', migrants' detention can be extended for 'particularly serious threat to public order'.

50 In case the person is considered a threat to public order ("*menace grave à l'ordre public*") the protection against the return orders so far accorded by the law to certain categories would not apply anymore. Interview with Anna Sibley, [Gisti/Migreurop](#), France, on 6 February 2023; Gisti, [Projet de loi 2023: tout savoir sur le future loi d'asile et immigration](#); La Cimade (2023), [Décriptage du projet de loi asile et immigration](#); Amnesty International (2023), [Pourquoi la criminalisation des migrants étrangers ne règlera pas la question migratoire?](#). See also Défenseur des droits, [Avis n. 32-02 du 23 Février 2023](#), according to which "L'ensemble de ces dispositions signent une extension inquiétante de l'ordre public, au détriment de la protection des droits fondamentaux des étrangers".

51 Fédération des acteurs de la solidarité (28 November 2022), [En réponse à la circulaire portant sur l'exécution des obligations de quitter le territoire \(OTQF\) et le renforcement des capacités de rétention](#).

52 According to the principle of habeas corpus the person in detention shall have the measure reviewed by a Court, in order to avoid arbitrary detention.

53 J. A. Brandariz, *Criminalisation in Spain*, in G.L. Gatta, V. Mitsilegas, S. Zirulia (2021), *Controlling Immigration through Criminal Law*, pp. 119-140.

54 Written communication with PICUM member [Asociación Por Ti Mujer](#), Spain, 18 January 2024.

In the **Netherlands**, undocumented people in criminal detention cannot be granted an early release, unless they cooperate with their expulsion. This is valid also people who cannot return or be deported, for example due to a risk of serious harm in their own countries.⁵⁵

Administrative detention on public policy grounds, and in particular on national security grounds, provides the authorities with a more flexible tool to pursue **typically criminal law objectives**, such as the prevention and repression of crime. This issue becomes even more pronounced when migrants initially arrested for criminal purposes are subsequently administratively detained for immigration-related reasons.

In **Cyprus**, for instance, the blurring of administrative and criminal procedures has led to confusion as to whether detainees are being questioned in the context of an administrative procedure or a criminal investigation. In several cases, migrants have been placed in administrative detention, while it later emerged that a criminal investigation was also ongoing, without any information being given to the detained person about their rights and in the absence of a lawyer. Legally, statements made in the context of a criminal investigation in violation of procedural rights should not be admitted as evidence. However, when lawyers raised the inadmissibility of these statements in the context of administrative procedures, the courts denied the link with criminal law and indicated that the proceedings were administrative.⁵⁶

In **Greece**, the prosecution of very minor infringements such as selling cigarettes on the street, even if the sentence is suspended, has been used to continue administrative detention under the guise of public order. When criminal courts decide to suspend the execution of the prison conviction, or to release someone after the execution of part of the sentence, their release from prison is often followed by administrative detention on public order grounds. This is for example the case of several people charged for irregular entry in March 2020 (see below), who after being released from criminal detention, have been administratively detained on public order grounds based on the initial criminal conviction.⁵⁷ Accordingly, *any* connection with criminal law is used as a basis for immigration detention on public order grounds.

Against this background, lawyers and NGOs have been actively involved in court litigation to challenge: a) the non-disclosure practices within national security cases and the limited safeguards in such proceedings; b) the discretion enjoyed by administrative and police authorities in defining what constitutes a threat to public order/public security. The above-mentioned case law of the Court of Justice⁵⁸ has so far contributed to providing a basis to advocate for additional safeguards and narrower interpretation of public policy clauses at the national level, as in the case of Hungary and Cyprus described above, but a paradigm shift is needed to reverse the securitisation trend in this area.

55 Written communication of PICUM member [Stichting Los](#), 9 January 2024.

56 Interview with Nicoletta Charalambidou, [KISA](#), Cyprus, on 30 November 2022.

57 Interview with a representative from the [Greek Council for Refugees](#), Greece.

58 CJEU, *J.N.* (see footnote 29); CJEU, *GM* (see footnote 33).

Criminal law as a migration enforcement tool

While administrative law, particularly immigration detention, is increasingly used as a tool to pursue criminal law objectives in the field of crime prevention and deterrence, **states also use criminal law as an instrument to deter migration**. This is characteristic, for instance, of the criminalisation of irregular entry and stay in the EU, to which states have traditionally resorted for at least 10 to 15 years. A 2014 study by the EU Fundamental Rights Agency showed that in 16 of the 27 EU member states, people who enter or stay irregularly, or both, can be sentenced to imprisonment and/or to pay a fine. In another nine EU member states, at least one of these circumstances is still punishable with a fine, which can however, in certain circumstances, lead to a custodial sentence as well.⁵⁹

According to the case law of the European Court of Justice, undocumented migrants shall not be sentenced to imprisonment under criminal law during a return procedure.⁶⁰ Nonetheless, undocumented people frequently face disproportionately heavy penalties and imprisonment when they arrive on states' territories.

For instance, in **Bulgaria**, criminal charges are regularly brought against people who cross the border irregularly or use false documentation. Under criminal law, individuals should not be held liable for irregular entry if they entered the country for the purpose of seeking asylum. However, in several cases, people who have been charged on these grounds have been imprisoned from 6 up to 12 months, because they had left the country after registering for asylum. This was considered a breach of the bail conditions. It included people in situations of vulnerability and led to women having to give birth in prison.⁶¹

In **Greece**, since 2020 judicial authorities began to regularly convict migrants on charges of irregular entry, applying disproportionately heavy penalties.⁶² The number of convictions for irregular entry increased after the outbreak of Covid-19 pandemic and the tensions at Greek/Turkish border which took place in the first months of 2020. In the first 15 days of March 2020, courts convicted 103 people for irregular entry, applying prison sentences without

59 As of 2014, irregular stay was punished with a fine in Austria, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Sweden; and with a fine and/or imprisonment in Belgium, Croatia, Cyprus, Denmark, Estonia, Germany, Ireland, Luxembourg, the Netherlands. In Austria, the Czech Republic, Hungary, Italy, the Netherlands, Poland, Slovakia and Slovenia, irregular entry is punished with a fine, while in Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania and Sweden it is punished with imprisonment and/or a fine. Only two countries, Portugal and Malta, did not criminalise either irregular entry or stay. See EU FRA (2014), [Criminalisation of migrants in an irregular situation and of persons engaging with them](#). The report from FRA is the most recent comparative analysis of criminalisation of irregular stay in the EU. However, since its publication there might have been legislative changes in member states. For example, a 'irregular migration' was reintroduced as an offence punishable by a fine in the new French immigration law in December 2023. Prior to that, people found to be staying irregularly could be detained only in the context of return procedures. In the Netherlands, there is no punishment for irregular entry nor for irregular stay as such. There is a fine possible for not-reporting with the authorities, and a criminal charge can be applied if someone with an entry ban stays in the Netherlands. Le Monde, 20 December 2023, [What's in France's controversial immigration law?](#) [last access on 5 April 2024]; written communication of PICUM member [Stichting Los](#), The Netherlands, 12 February 2024.

60 CJEU, *El Dridi*, C-61/11, 28 April 2011; CJEU, *Achugbabian*, C-329/11, 6 December 2011.

61 Interview with Diana Radoslavova, [Centre for Legal Aid](#) (CLA), Bulgaria, 25 November 2022.

62 HumanRights 360 (2020), [Defending human rights in times of border militarization](#).

suspension to 80 people.⁶³ Sentences for irregular entry ranged up to four years' imprisonment. On 2 May 2020, the Greek government closed the border,

strengthened measures to prevent border crossings in Evros and suspended all asylum applications made upon entry.

The human rights' cost of counter-smuggling policies

In recent years, states have also increasingly turned to smuggling-related offences as a way to deter migration. The Facilitators' package, introduced at the EU level in 2002,⁶⁴ has been used to criminalise civil society solidarity, search and rescue operations by NGOs at sea, and activists assisting migrants in Europe.⁶⁵ Arrests and prosecution of migrants for smuggling-related charges have serious impacts on their lives. This is happening particularly at the EU external borders, as well as in the UK,⁶⁶ and leads to the systemic detention of migrants, their exclusion from accessing asylum and the violation of procedural safeguards in administrative proceedings.

In the **United Kingdom**, since the number of people crossing the Channel in small boats began to increase in 2019, hundreds of people have been arrested and dozens convicted for smuggling offences⁶⁷. In **Greece**, 7,000 people were arrested between 2015 to 2019, with a 100% increase in convictions for smuggling

reported between 2016 (951 convictions) and 2019 (1,905 convictions).⁶⁸ Recently, NGO members who have officially informed or attempted to inform the Greek authorities of the presence of third country nationals on the Greek territory and their will to apply for asylum have been charged for facilitation⁶⁹ - despite the fact that informing the authorities had been previously presented as an obligation. This has been applied both against human rights defenders⁷⁰ and migrants themselves. According to information provided by HIAS, this practice took place was observed in Kos and other islands and, at least in one case, it involved an unaccompanied minor.⁷¹ The practice is still in place, even though it conflicts with a previous CJEU decision which had found that the criminalisation of assistance in Hungary in respect to the process of filing an asylum application was not in line with the EU law.⁷²

In **Italy**, between 2015 and 2021, more than 2,000

63 Interview with a representative of the [Greek Council for Refugees](#), Greece. See also [CPT](#) (2020), Report to the Greek Government on the visit to Greece carried out from 13 to 17 March 2020. The CPT recalled that Between 28 February and 14 March 2020, the single-member Misdemeanours Court in Orestiada sentenced 103 persons to imprisonment under the above-mentioned regulation. In 19 cases which concerned women, the sentences were suspended and the administrative procedure for deportation was applied (the delegation met many of them at Filakio). In the remaining 84 cases, 79 men were sentenced to periods of up to four years of imprisonment and a fine of 10,000 Euros and five women were sentenced to three or three and a half years of imprisonment and a fine of 5,000 Euros.

64 The 'Facilitators' package' is a set of EU law according to which any person who intentionally assists the unauthorised entry, transit, or residence of a non-EU national into the EU, or, for financial gain, to reside there is to be sanctioned unless they are doing so for humanitarian reasons.

65 On this issue, M. Gionco, J. Kanics (2022), *Resilience and Resistance. In defiance of the criminalisation of solidarity across Europe*; and [PICUM](#) (2023), *More than 100 People Criminalised for acting in solidarity with migrants in 2022*. The report recalled that in 2022 migrants were criminalised for driving a boat about to capsize, driving a car across an EU external border, being on a boat that irregularly crossed a border, turning on a mobile phone's GPS when lost at sea, and resisting pushbacks at sea. For these acts, they were charged with irregular entry, facilitation of irregular entry, acting for profit, involuntary manslaughter, causing an accident at sea, endangering the life of another (including of a child), violent resistance, and membership of a criminal organisation.

66 O. Spaggiari, I. Thompson and I. Papangeli (2022), *How European courts are wrongfully prosecuting asylum seekers as smugglers*, The New Humanitarian.

67 Idem.

68 V. Hänsel, R. Moloney, D. Firla, R. Serkepkanı (2020), *Incarcerating the marginalized. The fight against alleged smugglers on the Greek Hotspot Islands*.

69 Special Rapporteur on the situation of human rights defenders (2023), [Visit to Greece, A/HRC/52/29/Add.1](#).

70 OMCT (18 October 2022), [Smear campaign against Panayote Dimitras for defending migrants' rights](#).

71 Interview with a representative of [HIAS Greece](#), on 7 April 2023.

72 CJEU, 16 November 2021, Commission v. Hungary, C-821/19.

asylum seekers and migrants were detained on smuggling charges.⁷³ This kind of criminalisation particularly affects boat drivers (so-called 'scafisti'), who have been the constant scapegoats of tragedies in the Mediterranean Sea and are now the main target – along with NGOs – of the repressive far-right policies in Italy.⁷⁴ However, while in Italy, as of February 2023, the criminalisation of members of NGOs rescuing and assisting migrants not yet led to a final conviction, hundreds of migrants have been sentenced to several years of prison for smuggling.⁷⁵ This happens despite the fact that boat drivers are often migrants themselves fleeing countries with a history of human rights abuses, such as Libya, who are either forced to drive the boats by other people or do it out of necessity. Migrants can also be criminalised for sharing their GPS position and for calling for help,⁷⁶ or through aerial photographs taken by law enforcement authorities of migrants on boats: those holding a phone are more likely to be investigated as smugglers.

In both Italy and Greece, migrants' criminal trials are characterised by multiple infringements of procedural rights, including the impossibility to contact their families when in pre-trial detention, a lack of translation of official legal documents and difficulties in accessing adequate defence⁷⁷. Moreover, translation and interpretation services are not provided for when the lawyers have to confer with their clients, thus undermining the effectiveness of the defence⁷⁸. In Greece, interpretation is not even provided during the trial and, in practice, people are expected to secure their own interpreters.⁷⁹ There

have been several cases of migrants held in pre-trial criminal detention for years pending the results of the criminal trial before eventually being acquitted.⁸⁰ Finally, criminal detention is often followed by administrative immigration detention, as migrants accused of smuggling are considered 'dangerous' and issued return orders based on national and public security grounds.⁸¹ This creates a spiral of detention, in which migrants are trapped without proper access to adequate procedural rights, due to the blurring of criminal and administrative law.

The case of **Italy** reflects a more general trend, common in other EU member states, of migration policies increasingly prioritising enforcement over access to rights. The identification of potential smugglers and boat drivers seems to be the first and foremost concern of national and EU authorities during search and rescue operations at sea, as well as during migrants' initial reception. The EU Border and Coast Guard Agency (Frontex) invests significant resources to identify boat drivers through videos and photos taken during aerial surveillance. Frontex is present in the Italian hotspots⁸² to interrogate survivors immediately after arrival and investigate potential criminal activities.⁸³ A recent example of this trend is the Cutro shipwreck on 26 February 2023, during which at least 87 people died.⁸⁴ Just before this tragedy, Italian authorities deployed law enforcement authorities (Guardia di Finanza) instead of the Coast Guard, activating a criminal response instead of a search and rescue (SAR) mission. Between 2019 and 2023, 75 % of the operations in which migrants were intercepted and rescued at

73 Arci Porco Rosso and Alarm Phone (2021), [From Sea to Prison. The Criminalization of Boat Drivers in Italy](#).

74 Interview with Chiara Denaro, Alarm Phone, Italy, on 8 February 2023. To put the blame on drivers and to increase penalties for smugglers has been the only answer of the Italian government following the deadly shipwreck that occurred in Cutro on 26 February, in which 73 migrants died. [The Government refused to face scrutiny over the tragedy](#), while responsibilities remain to be ascertained.

75 Interview with Luca Masera, [ASGI](#), Italy, on 7 February 2023.

76 Arci Porco Rosso and Alarm Phone (2021), [From Sea to Prison. The Criminalization of Boat Drivers in Italy](#). See also PICUM (2024), [Cases of criminalisation of migration and solidarity in the EU in 2023](#).

77 V. Hänsel, R. Moloney, D. Firla, R. Serkepani (2020); Arci Porco Rosso and Alarm Phone, *Ibid*.

78 Interview with a representative of [HIAS Greece](#), 7 April 2023.

79 *Ibid*.

80 Arci Porco Rosso and Alarm Phone (2021).

81 Interview with Luca Masera, [ASGI](#), Italy, on 7 February 2023. The organisation Arci Porco Rosso reported the case of a Libyan national that, despite being acquitted from all accusations, was detained in a repatriation centre on grounds of his "dangerousness". Arci Porco Rosso (2023), [Finché Puoi Ascoltare: La Criminalizzazione Dei Cosiddetti Scafisti Nel 2022](#).

82 The term *hotspot* refers to both a physical area, located on islands or near disembarkation locations, and both to an approach implemented in such areas. The hotspot approach was envisaged in the [2015 European Agenda on Migration and Asylum](#) and led to the development of a number of centres, located on EU external borders, where the registration, identification, fingerprinting and debriefing of asylum seekers took place, and return proceedings were carried out.

83 Interview with Chiara Denaro, Alarm Phone, Italy, on 8 February 2023.

84 ANSA, 18 March 2023, [Cutro shipwreck, death toll rises to 87](#) [Last access: 5 April 2024].

sea, or autonomously disembarked at Italian coasts have been classified as 'law enforcement' instead of 'search and rescue'.⁸⁵

The focus on deterring and criminalising migration is also reflected in the Commission's proposal for new legislation to 'prevent and combat migrant smuggling', presented in November 2023.⁸⁶ This package focuses almost exclusively on the need to strengthen the criminal response to smuggling, despite evidence pointing to the fact that counter-smuggling legislation often harm, rather than protect, migrants' safety and their rights.⁸⁷ The proposals assume, without presenting significant evidence, that smuggling is one of the main causes of irregular migration and sets forth to combat it, among others, to protect "the migration management objectives of the EU".⁸⁸ The same reasoning is also used to justify proposals such as higher prison sentences for smuggling, or expanding the policing powers of the EU's law enforcement agency Europol.⁸⁹ This narrative hides the harms that people are suffering as a direct consequence of counter-smuggling policies and ignores the fact that smuggling is a reaction to border control rather than a cause of migration itself.⁹⁰

85 Altreconomia, 14 April 2023, [Soccorsi in mare classificati come operazioni di polizia: i dati 2019-2023 certificano la prassi](#) [Last access: 5 April 2024].

86 [European Commission](#), 2023, Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework.

87 PICUM (2022), [Migrant Smuggling. Why we need a paradigm shift](#).

88 [European Commission](#), Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM/2023/755 final, Explanatory Memorandum.

89 [European Commission](#), Proposal for a Regulation of the European Parliament and of the Council on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, COM/2023/754 final. For a more detailed analysis of the proposal, see PICUM's [website](#).

90 H. De Haas (2013), [Smuggling is a reaction to border control, not the cause of migration](#).

The use of technology for immigration enforcement purposes

The tendency to blur the line between administrative and criminal methods and objectives is deeply embedded in the use of **digital technologies and artificial intelligence (AI)** for migration control and surveillance purposes. In recent years, scholars have explored the so-called 'digitalisation of European migration policy', drawing attention to the use of tools such as automated decision-making, biometric data collection, facial recognition and iris scanning in order to enhance European border surveillance.⁹¹ New technologies are also increasingly used in the context of detention and alternatives to detention. The use of digital tools is closely linked to the large-scale processing of migrants' personal data. These data, collected by national authorities and stored in transnational and EU databases (under a new legal framework on interoperability⁹²) are used not only for administrative purposes but also in the context of crime control operations and prevention. As a result, digital technologies are being developed and used to control migration in discriminatory ways, often in breach of basic principles and safeguards.⁹³

At the EU level, recent legislative proposals include several elements that risk to pave the way for an increased use of AI and border technologies in the context of migration enforcement:⁹⁴

- The 2021 Commission proposal to reform the **Schengen Borders Code** would extend the powers of states to carry out identity checks targeting people based on their racial, ethnic, national, or religious characteristics.⁹⁵ The underlying aim of controls is to prevent migrants from crossing borders. Police authorities can resort to monitoring and surveillance technologies.⁹⁶ A political agreement that confirms these elements has been reached by EU legislators in February 2024.⁹⁷
- The new **Screening Regulation**, part of the EU Pact on Migration, introduces a new screening procedure at EU external borders and emphasises the need to immediately collect biometric data for security purposes when third-country nationals enter the EU.⁹⁸ This reflects practices already implemented in the Greek and Italian hotspots, where migrants' biometric data are regularly collected by Europol, the EU law enforcement agency, as part of anti-smuggling operations.

91 M. Besters and F. Brom (2010), "'Greedy" Information Technology: The Digitalization of the European Migration Policy', in *European Journal of Migration and Law*, 12(4) and, more recently, N. Vavoula (2021), *Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism*, in *European Journal of Migration and Law*, 23(4), pp. 457-484.

92 The EU Regulations on interoperability established a new centralised database (the Common Identity Repository), fed by data collected through already existing databases (EES, ETIAS, Eurodac, SIS, CIS and ECRIS-TCN). On this point, see PICUM (2019), [What the EU's Regulations on Interoperability Mean for People with Irregular Status](#).

93 PICUM and Statewatch (2019), [Data protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulation on Interoperability Mean for People with Irregular Status](#).

94 In 2021 the European Commission proposed the adoption of a [new Regulation on artificial intelligence](#). The regulation is expected to be adopted in April 2024. According to several NGOs the proposal does not adequately regulate the use of AI in migration context to ensure that that migrants' are protected against dangerous and potentially manipulative applications of AI. EDRi (2024), [EU's AI Act fails to set gold standard for human rights](#).

95 For a comment on the Proposal, See also PICUM et al. (2022), [Joint civil society statement on the Schengen Borders Code](#).

96 PICUM (2022), [Digital technology, policing and migration – what does it mean for undocumented migrants?](#).

97 Council of the EU, 6 February 2024, [Schengen: Council and European Parliament agree to update EU's borders code](#).

98 European Parliament (2024), [MEPs approve the new Migration and Asylum Pact](#).

- The EU agencies Europol and FRONTEX have also been accused of the collection and transfer of migrants' data within the **PeDRA programme** ('Processing of Personal Data for Risk Analysis'). As reported by Balkan Insight,⁹⁹ under the PeDRA programme, FRONTEX has shared the personal data, including names, personal descriptions and phone numbers, of more than 11.000 people with Europol between 2016 and 2021. Migrants' data ended up

being unlawfully stored in criminal databases even though people were not involved in open investigations.

Law enforcement access to immigration databases for 'security' purposes is one of the most prominent manifestations of the conflation of administrative and criminal purposes at the EU level,¹⁰⁰ reinforcing what has been defined as an "(in)security continuum".¹⁰¹

National level practices on mass surveillance

According to the NGO European Digital Rights (EDRi), at least 15 European countries have piloted or implemented highly intrusive facial and biometric recognition systems for mass surveillance.¹⁰² Such systems are often implemented as a means of reinforcing existing border controls at both EU external and internal borders and are usually directly connected with the deprivation or limitation of migrants' freedom of movement.

In **Spain**, surveillance cameras and facial recognition technologies have been deployed since 2019 in the enclaves of Ceuta and Melilla at the border with Morocco. Additional technology has been put in place by Morocco with EU funding.¹⁰³

In **Italy**, the government's plans to deploy a facial recognition system (the Automatic Image Recognition System - SARI) in *hotspots* to monitor arrivals of migrants and asylum seekers on the Italian coasts and related activities were only stopped by the intervention of the National Data Protection Guarantor, which issued an expert opinion challenging the legal basis authorising the collection

of personal data through this system.¹⁰⁴

In **Greece**, drones and cameras are used to monitor migration, as well as to deter and target migrants and human rights defenders who witnessed or monitored pushbacks at the Evros border.¹⁰⁵ The Border Violence Monitoring Network (BVMN) has documented the use of surveillance technologies in the apprehension and subsequent pushback of people at the Greek-Turkish, Croatian-Bosnian, Serbian-Hungarian, and Bulgarian-Turkish borders. The technologies identified in testimonies collected by BVMN include drones, cameras, thermal imaging sensors, night-vision goggles, specialised sensors for detecting mobile phone emissions, tracking devices and aerial surveillance towers.¹⁰⁶ The new 'closed camps' situated in the Greek Aegean islands (where the *hotspot* approach is implemented) are fully equipped with cameras, loudspeakers and various technologies that are designed to monitor migrants, who experience feelings of imprisonment because of the permanent and unescapable control they are subjected to.¹⁰⁷ To enter and exit the camp,

99 L. Stavinoha, A. Fotiadis and G. Zandonini (7 July 2022), [EU's Frontex tripped in its plan for 'intrusive' surveillance of migrants](#), Balkan Insight.

100 Interview with Laure Baudrihaye-Gérard, Fair Trials, on 8 December 2022. See also Fair Trials (2022), [Fair Trials raises serious concerns about increasing mandates of Europol and Frontex](#).

101 V. Mitsilegas (2020), [Interoperability as a rule of law challenge](#), Robert Schuman Centre Blog.

102 EDRi (2020), [Ban biometric mass surveillance!](#).

103 BVMN (2021), [Border violence, pushbacks and containment in Ceuta and Melilla](#).

104 National Data Protection Guarantor, [Decision n. 127 of the 25 March 2021. According to the authority, the government did not present sufficient evidence to establish that there is a clear legal basis that authorise the collection of personal data during the implementation of the SARI Real Time system](#).

105 Interview with Hope Barker, Border Violence Monitoring Network, 8 February 2023.

106 Ibid. See also BVMN (2023), [EU Member States' use of new technologies in enforced disappearance](#). On the use of drones by Greek Police, see also: Homo Digitalis (2020), [Open Letter to the Ministry of Citizen Protection for the use of drones by Hellenic Police](#).

107 Interview with Manon Louis, Mobile Info Team/Border Violence Monitoring Network, Greece, 8 February 2023.

residents have to go through turnstiles, magnetic gates, x-rays and pass through a two-factor access control system (electronic card and fingerprint). In addition, each time camp residents return, they are subjected to body and bag searches and pass again through a metal detector. This also applies to children attending school, who are forced to undergo this screening twice a day.¹⁰⁸

Similar criticisms were raised by the NGO Privacy International (PI) regarding the situation in the **United Kingdom**, where the surveillance industry has fuelled migration control both at the border and within the country. The most critical practices pertained to the use of GPS ankle tags applied as a migration enforcement tool,¹⁰⁹ and the seizure of mobile phones to extract migrants' personal data. The latter policy, which began in 2020, was challenged by lawyers and civil society actors and was found to be contrary to Article 8 of the ECHR on the right to privacy and family and private life.¹¹⁰ As for the former practice, GPS ankle tags are now indiscriminately used in the context of administrative detention. Since 2021, the UK Home Office began electronically monitoring everyone released from immigration detention on bail and who had previous criminal convictions turning a case-by-case assessment solution into a blanket policy.¹¹¹ In the same year, radio frequency tags, which only measured the distance from a particular station to the location of the person's home, were replaced by GPS technology, which collects location data 24 hours a day, 7 days a week. This technology has a huge impact on the mental health of migrants, increasing their anxiety and stress due to constant monitoring.¹¹²

A new pilot scheme implemented in 2022 requires the use of GPS tags on anyone arriving at the UK 'by unnecessary and dangerous routes', thus essentially applying it to all migrants arriving through the

English Channel on small boats, who are either held in detention or released and monitored through electronic tagging. Moreover, new fingerprint scanner devices have been deployed as an alternative to ankle tags. Migrants are required to carry them at all times and have to submit fingerprint scans up to five times a day, often having only a one-minute window to submit it.¹¹³ Although the UK Home Office considers these measures less invasive because they are not attached to the person's body, PI has found that they are perceived as highly invasive, traumatising, and disproportionate to the objectives pursued.

PI, together with migration-focused NGOs, has promoted litigation against the indiscriminate use of GPS tagging, which has been implemented beyond the limits set by the law in 2016, which requires a case-by-case assessment of the situation.¹¹⁴ The courts have not issued a final decision yet. The fact that immigration-related GPS tagging is regulated under administrative rather than criminal law implies less strict procedural guarantees (e.g. no maximum time limit of the measure) and greater administrative discretion. Just as in the case of administrative detention, criminal law instruments are being transposed into the migration field, with fewer safeguards for the people involved. The rights of migrants are curtailed solely on the basis of their status, undermining the principle of the universality of human rights.

108 According to the General Regulation on the operation of Islands' CCACs, residents are only allowed to exit and enter the camp during a specific window of time. In case of absences or delays, they can be punished with a decision of termination of residence and the material reception conditions provided (cash assistance and food). See: OHCHR, [UN human rights experts call on Greece to strengthen oversight of private security industry](#) (16 December 2022) and GCR and Oxfam (7 March 2022), [Lesbos Bulletin Update on Lesbos and the Aegean Islands](#).

109 Privacy International (2022), [Electronic monitoring using GPS tags: a tech primer](#).

110 [UK High Court](#), 25 March 2022; [UK High Court](#), 14 October 2022.

111 Interview with Lucie Audibert, Privacy International, United Kingdom, on 2 February 2023. Between 31 December 2021 and 31 December 2022, the number of individuals monitored using a GPS tag increased from 3.188 people to 5.694. As on 31 December 2022 GPS immigration bail accounted for 40% of all individuals with a GPS tag ([UK Government statistics](#), 2022).

112 M. Bhatia (2021), *Racial surveillance and the mental health impacts of electronic monitoring on migrants*, in *Race & Class*, 62(3), pp. 18-36.

113 New Scientist (2022), [UK Home Office will use fingerprint scanner to track people facing deportation](#).

114 Privacy International (2022), [Privacy International files complaints against GPS tagging of migrants in the UK](#).

Conclusion

This briefing explored three lines along which the conflation of criminal and administrative law in the field of migration manifests itself. While *crimmigration* is not a new phenomenon, some of its trajectories are still underexplored and need further research. Many new trends are related to immigration detention: first, the use of administrative detention as a multi-functional tool deployed for security reasons, such as public order and national security; second, the combination of pre-trial detention, applied in relation to counter-smuggling charges, and administrative detention along a continuum of deprivation of liberty; and, thirdly, the use of monitoring technology at borders and in detention sites, or as alternatives to detention.

The three trajectories explored in the briefing are fully intertwined. Migrants charged with smuggling offences can be later administratively detained because they are framed as 'dangerous'. Monitoring technologies deployed at the EU internal and external borders are used to deter smugglers and identify them. AI (artificial intelligence) systems are gaining a role in predicting the 'dangerousness' of migrants, resulting in their detention. Further research would be useful to explore in which ways

and to what extent these trends interact: for instance, the use of technologies in deportation and detention procedures would require advanced investigation.

The increased militarisation of borders has led to the acceptance of pushbacks, the dismantling of search and rescue (SAR) operations, and the criminalisation of solidarity with undocumented people. The fundamental rights to life, liberty, private and family life and effective remedies as well as the rights to be protected from torture, persecution and *refoulement* are increasingly disregarded. The response of civil society organisations, lawyers, and researchers has included monitoring and reporting on human rights violations, assisting individuals through legal and social support, calling for states' accountability and pursuing strategic litigation to challenge unlawful practices at the EU and national levels. The more the merging of administrative and criminal law becomes pervasive, the more independent scrutiny of human rights violations (conducted by national and international monitoring bodies) and effective access to judicial legal remedies for migrants becomes key. However, member states and EU actors are those primarily responsible for ensuring respect for human rights.

A shift of paradigm is needed, so that 'security' is understood as a process of securitising human rights, rather than as a justification for undermining them.



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