

Risks and opportunities of technical standard setting processes for the protection of human rights of migrants in the context of pushbacks at external EU borders

Input for the thematic report to the United Nations High Commissioner for Human Rights on the relationship between human rights and technical standard-setting processes for new and emerging digital technologies at its 53rd session in 2023

Submitted by:
Border Violence Monitoring Network

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I. Reporting organisation

1. The Border Violence Monitoring Network (BVMN) is a coalition of organisations working to document illegal pushbacks, police violence and detention along the European Union's external borders in the Western Balkans, Greece and Turkey since the formal closure of the route in 2016. The collection of data on illegal pushbacks, police violence and detention is done by a consortium of independent voluntary field-experts who are part of or cooperate with humanitarian support groups united through the Border Violence Monitoring Network. Through our work we document uses of border technologies in the apprehension, detention and forcible pushback of migrants in irregular situations.

II. Executive summary

2. BVMN is deeply concerned that current technical standards fail to mitigate against the well-documented human rights violations associated with the design, implementation and (un)intended outcomes of new and emerging technologies in the context of current EU border controls.
3. BVMN has documented extensive evidence of the role of new technologies, including AI-powered tools, in perpetrating human rights violations against migrants at EU borders, which we assert demonstrates the urgency of greater inclusion of human rights assessments, frameworks and oversight within technical standards.
4. We assert that existing standards guidance on risk management and ethical and societal concerns¹ currently fall short in failing to include wider concerns expressed by civil society stakeholders about the human rights implications of new and emerging technologies.
5. Without such safeguards, we are highly concerned that new technologies will continue to be used to locate, track and block the movement of migrants at or near border regions.² Since 2017, our partners have documented the use of new and emerging technologies in the apprehension, arbitrary detention and forcible pushback of migrants in irregular situations.

¹ See, for example: 1. International Electrotechnical Commission. 2021. 'Information technology - Artificial intelligence (AI) - Bias in AI systems and AI aided decision making.' Available at: <https://webstore.iec.ch/publication/71949>; 2. International Electrotechnical Commission. 2022. 'Information technology - Artificial intelligence - Overview of ethical and societal concerns'. Available at: <https://webstore.iec.ch/publication/78464>; 3. International Electrotechnical Commission. 2022. 'Information technology - Artificial intelligence - Guidance on risk management.' Available at: <https://webstore.iec.ch/publication/82914>

² Statewatch. 2022. 'A clear and present danger: Missing safeguards on migration and asylum in the EU's AI Act.' Available at: <https://www.statewatch.org/media/3285/sw-a-clear-and-present-danger-ai-act-migration-11-5-22.pdf>

6. The technologies identified in reports collected by BVMN include drones, specialised sensors for detecting mobile phone signals, thermal imaging sensors, night-vision goggles, tracking devices, and aerial surveillance towers. Additionally, we have documented over 33 testimonies reporting the use of AI-powered drones to facilitate the pushback of an estimated 1,004 people.³

III. Risks to human rights associated with technical standards for new and emerging border technologies

7. Relating to the design of new technologies, BVMN expresses concern at possible grave human rights risks if technical standards do not ensure robust testing mechanisms to mitigate against widely documented risks of inaccurate, unintended or harmful results in the use of AI-powered technologies.⁴⁵
8. In particular, we are deeply concerned about the use of controversial AI-powered technologies such as facial recognition, emotion detection, and risk assessment algorithms in the context of migration and border control:
 - a. **Facial recognition** tools run the risk of racial discrimination as they have been shown to have a lower accuracy rate for darker skin tones.⁶ In the context of BVMN's work at external EU borders, the use of such technologies increase the risk of misidentification of individuals and potential discrimination against certain ethnic groups.
 - b. **Emotion detection algorithms** have been shown to have an insufficient scientific basis and the reliability of the technology has been questioned, due to its inability to account for differences in context and cultural background.⁷ This has the potential to lead to inaccurate and unfair asylum decisions.
 - c. **Risk assessment and profiling algorithms** used to predict migratory movements and profile migrants threaten human rights both directly and indirectly. Such algorithms codify assumptions about the link between personal data and characteristics with particular risks, such that individuals are not judged on individual behaviour or on factors within their control, but rather on predetermined characteristics such as nationality.

³ A full list of testimonies documented by BVMN which report the use of new technologies in apprehension and pushback operations can be seen in the supplementary annex to this submission.

⁴ OHCHR. 2022. 'How AI and New Technologies Reinforce Systemic Racism: Submission to the Study on *Patterns, Policies and Processes Leading Racial Discrimination and on Advancing Racial Justice and Equality* for the 54th Session of the United Nations Human Rights Council.' Available at:

<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/advisorycommittee/study-advancement-racial-justice/2022-10-26/HRC-Adv-comm-Racial-Justice-zalnieriute-cutts.pdf>

⁵ FRA. 2022. 'Bias in Algorithms – Artificial Intelligence and Discrimination.' Available at:

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-bias-in-algorithms_en.pdf

⁶ Harvard University. 2020. 'Racial Discrimination in Face Recognition Technology.' Available at:

<https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>

⁷ European Parliament. 2021. 'Artificial intelligence at EU borders – Publications Office of the EU.' Available at:

<https://op.europa.eu/en/publication-detail/-/publication/a4c1940f-ef4a-11eb-a71c-01aa75ed71a1/language-en/format-PDF/source-280939188>

9. Additionally, BVMN is concerned at the risk of GDPR breaches and other violations of the right to privacy in new and emerging technologies, including those powered by AI, if these are not properly regulated by legislation and voluntary standards. For instance, the current push to create interoperable regional biometric databases in the Western Balkans – which would be made accessible to multiple national asylum and law enforcement authorities – poses grave risks in this respect.
10. BVMN echoes calls from civil society groups⁸ and UN bodies⁹ for greater regulation of such new and emerging technologies, including the contexts in which they can be used, due to the significant risk of human rights violations connected to their use.

IV. Risks to human rights associated with the nature of standards bodies and standards setting processes

11. BVMN echoes concerns expressed by civil society and international human rights bodies that technical standards and the processes by which they are established are inaccessible to civil society groups for several reasons, including the time and material resources required to participate in developing and reviewing standards, the technicality of documents and language, and the lack of fora dedicated to discussing and developing human rights frameworks within standards bodies.
12. We assert that the inclusion of civil society expertise and concerns in the development of human rights frameworks in technical standards is particularly crucial in the context of border control, where technologies are being developed and implemented at pace, without proper consideration of their human rights impact or incorporation of mechanisms for ensuring ongoing fundamental rights compliance.

A. Lack of accountability for private sector entities

13. BVMN is concerned at the lack of accountability for private sector entities responsible for designing new and emerging border technologies within technical standards. It is the responsibility of the private sector to ensure that AI technology does not violate international human rights and domestic legislation. Yet, much of the technological development associated with standard-setting occurs in so-called “black boxes”, where intellectual property laws and proprietary considerations shield the public from fully understanding how the technology functions. Such private sector entities can hide behind intellectual property legislation to obfuscate their responsibility and reduce their accountability.¹⁰

⁸ Access Now. 2022. ‘Joint civil society amendments to the Artificial Intelligence Act: Prohibit emotion recognition in the Artificial Intelligence Act.’ Available at: <https://www.accessnow.org/cms/assets/uploads/2022/05/Prohibit-emotion-recognition-in-the-Artificial-Intelligence-Act.pdf>

⁹ OHCHR. Reports: OHCHR and privacy in the digital age. Available at: <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalReports.aspx>

¹⁰ EDRI. 2020. “The human rights impacts of migration control technologies” <https://edri.org/our-work/the-human-rights-impacts-of-migration-control-technologies/>

14. Without robust governance and accountability mechanisms, there is significant potential for private sector entities to lower or sacrifice human rights standards to accommodate the development and integration of more efficient border technology. Accountability mechanisms for standard-setting bodies that incentivise corporate responsibility are essential to protect against the potential for AI-powered border technology to facilitate the illegal pushbacks of migrants.

B. Lack of contestability, transparency and oversight in standards setting processes

15. BVMN asserts that there is a paucity of mechanisms to involve civil society organisations (CSOs) and other organisations to challenge and contribute to standard setting procedures for border technology. The lack of involvement from CSOs leaves standard-setting open to exploitation by those designing and using the tech. Inequitable public and private sector participation in standards procedures will lead to border tech with migrants' interests and the protection of their human rights unaccounted for in the design, development and deployment of such technology.
16. Furthermore, there are grave concerns that standard-setting processes for border technology are not easily accessible to public bodies and lack transparency. Such issues could undermine the possibility of effectively challenging decisions based on biased outcomes produced by AI systems and may thereby infringe the right to a fair trial and effective remedy.

V. Opportunities for enhancement of human rights through improved technical standards and standards setting processes for new and emerging border technologies

17. BVMN asserts that technical standards have the potential to enhance and protect human rights, through greater inclusion of CSOs at all stages of standards' development, implementation and review, and the incorporation of regulatory frameworks within standards which set out procedures for robust and ongoing human rights impact assessments.
18. Given that international technical standards are often adopted by countries or regions to become national or regional standards,¹¹ or included in national legislation, standards have significant potential to positively influence the impact of new technology implementation on human rights, including through predicting consequences, mitigating risks, avoiding harmful consequences, and facilitating citizen and civil society participation.

¹¹ International Electrotechnical Commission. 'Understanding standards.' Available at: <https://www.iec.ch/understanding-standards>

19. BVMN notes the huge number of existing analyses from civil society¹² and international human rights monitoring bodies, including the UN,¹³ on the potential human rights impacts of new and emerging technology. Standards bodies have the potential to extend the reach of this work through greater inclusion of CSOs and other human rights experts in their decision-making processes.
20. Specifically, technical standards have the potential to help ensure that new technologies are implemented in a manner which ensures: transparency, accountability, non-discrimination, privacy, community involvement in the development of tech, respect for the rule of law, and human-centred design.
21. Transparency and accountability in new technology use may be promoted by standards bodies through stipulating that organisations must publish policy documents, data sets and data practices in open format accessible to the public.
22. Standard setting bodies can further help ensure accountability by incorporating regulations which require users to grant full access to the algorithm code, to report which algorithms are being used, and to develop their own framework for algorithmic auditing.
23. BVMN highlights the importance of regulatory frameworks within standards which outline processes for ethical impact assessments, particularly for new and emerging uses of AI technologies, to facilitate ongoing analysis of the impacts on human rights, including unintended consequences which arise during implementation.
24. In so doing, technical standards should include guidelines on the establishment of oversight mechanisms, including auditability, traceability and explainability, particularly for highly technical and complex technologies such as AI powered tools. Moreover, standards should stipulate that such ethical impact assessments are transparent and fully accessible to the public.

¹² See for example:

1. Forced Migration Review. 2019. 'New technologies in migration: human rights impacts.' Available at: <https://www.fmreview.org/ethics/molnar>
2. Access Now. 2022. 'Human Rights in the Age of Artificial Intelligence.' Available at: <https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf>
3. Human Rights Watch. 'Technology and Rights.' Available at: <https://www.hrw.org/topic/technology-and-rights>
4. Human Rights Watch. 2021. 'How the EU's Flawed Artificial Intelligence Regulation Endangers the Social Safety Net.' Available at: <https://www.hrw.org/news/2021/11/10/how-eus-flawed-artificial-intelligence-regulation-endangers-social-safety-net>

¹³ Intergovernmental Meeting of Experts (Category II) related to a Draft Recommendation on the Ethics of Artificial Intelligence, online. 2021. 'Draft text of the Recommendation on the Ethics of Artificial Intelligence with track-changes (paragraphs 26-134; outcome of the intersessional consultations).' Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000377898?posInSet=2&queryId=N-EXPLORE-690d3930-d6d5-4e7b-9a7a-a551d48fa87f>

A. Greater inclusion of CSOs in standards setting processes relevant to new and emerging border technologies

25. BVMN notes that CENELEC, an important organisation for technical standard setting in the context of European border technologies, has recently organised a workshop in junction with NESTOR,¹⁴ to help produce a preliminary roadmap for standard setting in border management in Europe.¹⁵ The consortium for the project is made up of national border authorities and private companies and would benefit from greater inclusion of civil society organisations and people affected by the use of new technologies in border control.
26. BVMN notes that SC 42 – a joint committee between the International Electrotechnical Commission (IEC) and International Organisation for Standardisation (ISO) – is currently developing international standards for AI-powered technologies. While SC 42 is working to develop context-specific guidance on ethics in addition to international organisations such as OECD, UNESCO and the European Commission,¹⁶ BVMN asserts that there is a lack of CSO involvement in this process, and that the European Commission has commissioned a number of research reports on future uses of AI for border technology which fail to include civil society analysis on the human rights implications of the application of AI.¹⁷

B. Inclusion of positive examples of how new technologies can secure human rights within technical standards

27. BVMN asserts that CSO involvement in the development of border technologies standards could help ensure compliance with existing laws and regulations on fundamental rights, while also improving understanding of how tech can be used by governments and civil society to limit risk of death and secure human rights.
28. Technical standards may support the safe use of new technologies for the protection and fulfilment of human rights. In the context of border control, BVMN asserts that new technologies could be utilised in searches for missing persons and in search-and-rescue efforts.
29. For instance, the surveillance technologies already used within the European Border Surveillance System (EUROSUR) to control external borders, such as CCTV, heat-sensing cameras and drones, as well as surveillance towers, radar and satellite imagery, may assist in the identification of individuals or groups in distress in often inaccessible and remote border regions. Additionally,

¹⁴ NESTOR is a European project focused on using border surveillance technology for providing pre-frontier awareness using Artificial Intelligence Technologies.

https://www.cenelec.eu/news-and-events/events/2023/2023-02-17_workshop-border-management-standardisation-roadmap/targeted-audience/

¹⁵ <https://nestor-project.eu/approach/>

¹⁶ E-tech. 2022. 'IEC and ISO work on artificial intelligence.' Available at: <https://etech.iec.ch/issue/2022-03/iec-and-iso-work-on-artificial-intelligence>

¹⁷ European Commission. 2020. 'Opportunities and Challenges for the use of artificial intelligence in border control, migration and security.' Available at: <https://op.europa.eu/en/publication-detail/-/publication/c8823cd1-a152-11ea-9d2d-01aa75ed71a1/language-en>

drones which are currently used to facilitate pushbacks may be used to save lives in the context of SAR operations.

30. Technical standards may define the conditions under which these technologies are to be put to use and to what ends. These must be in line with international law, including the rights of refugees and migrants, for example the principle of non-refoulement. In this way, technical standards may set a standard for the appropriate use of technologies in full respect of human rights.
31. Examples of the use of new technologies to protect and promote human rights in border control include:
 - a. **Use of drones for Search and Rescue:** There are several positive examples of the use of drones to save lives at sea. For instance, in 2014, operations of the independent SAR organisation Migrant Aid Off Shore (MOAS) used drones to assist their efforts to cover vast areas of ocean and conduct nighttime SAR operations.¹⁸ Further, the non-profit organisation SearchWing is currently developing and building drones for organisations conducting SAR operations.¹⁹ Technical standards on the use of drones could be expanded to include conditions relating to the operator of the drone, areas of their use, as well as standards relating to the processing of data produced by the drone, particularly in border zones.
 - b. **Use of facial recognition to identify missing children:** The US National Center for Missing & Exploited Children has launched a platform to use image and visual analysis tools to detect, analyse, and compare faces in imagery associated with cases of missing children. Including people with lived experience in the standard setting process for facial recognition would help assess the opportunities of processing data for appropriate ends, such as the location of missing children and assess the proportionality of infringement of certain privacy rights for these ends. Guidelines on facial recognition issues by the Council of Europe include recommendations such as impact assessments of the use of facial recognition, as well as proof that its use is proportionate and necessary.²⁰
32. BVMN notes that uses of new technologies which promote human rights and limit risk of death are driven by civil society actors and lack substantial state backing. Moreover, these groups often face repression and criminalisation of their work, due to the severe securitization of migration and the interest of states to use new technologies for restrictive border control.
33. In this context, we assert that incorporating regulations and guidelines on human rights-promoting uses of technologies within standards could give international consensus backing to the activities

¹⁸MOAS. 2015. 'Humanitarian Drones: Bots without Borders.' Available at:

<https://www.moas.eu/humanitarian-drones-bots-without-borders/>

¹⁹ Search Wing. 2021. 'Test mission on Sea-Watch 4.' Available at:

<https://www.hs-augsburg.de/searchwing/seawatch-tests-2021-en/>; Sea Watch. ND. 'SearchWing.org -A model aircraft to safe [sic] lives.' Available at: <https://sea-watch.org/en/searchwing-org-a-model-aircraft-to-safe-lives/>

²⁰ Council of Europe. 2021. 'Guidelines on facial recognition.' Available at:

<https://rm.coe.int/guidelines-on-facial-recognition/1680a134f3>

of groups who use technology to secure human rights. It is thus also essential to open up the standard setting process to CSOs using technologies to promote human rights and prevent and or document violations.

VI. Recommendations

34. BVMN respectfully requests that the following issues and recommendations are included in the report to the 53rd session of the Human Rights Council regarding the relationship between human rights and technical standard-setting processes for new and emerging digital technologies:

35. Involvement of stakeholders:

- a. Include civil society actors, experts, researchers, representatives of groups particularly exposed to the consequences of technology, and other stakeholders, in the development and planning stages of technical standards, as well as in independent monitoring of systems once implemented.
- b. Create a heterogeneous pool of civil society organisations and representatives of communities affected for consultation and participation on projects, able to provide critiques and proposals on the development and implementation.
- c. Involve civil society organisations within standards setting processes to represent the voices of marginalised groups of society.

36. Transparency:

- a. Documentation relating to technical standards including standards design, implementation and review should be published in an open format, accessible to the public.

37. Legibility:

- a. Technical standards should stipulate that new digital systems implemented need to be made legible to the general public (the nature and scope of new technologies implemented, their rights in relation to data collected, etc).

38. Accountability:

- a. Technical standards should require the establishment of independent monitoring mechanisms with the mandate to call for the suspension or changes in systems, if it is shown they contribute to fundamental rights violations.
- b. Standards should require the independent ethical impact assessments of AI systems to predict consequences, mitigate risks, avoid harmful consequences, facilitate citizen participation, and address societal challenges. The assessment should also establish appropriate oversight mechanisms, including auditability, traceability and explainability which enable the assessment of algorithms, data and design processes, as well as include external review of AI systems. Ethical impact assessments should be transparent and open to the public.
- c. Standards should incorporate within project design affirmative steps to actively pre-empt the impact of racial profiling and other forms of structural discrimination.