**Questionnaire of the UN Special Rapporteur on “Human rights violations at the international borders: trends, prevention and accountability”**

**Submission of the Secretariat of the Council of Europe**

1. **Introduction**

The Secretariat of the Council of Europe extends its gratitude to the UN OHCHR Special Rapporteur on the human rights of migrants, Felipe González Morales, for the opportunity to submit contribution to his forthcoming report to the 50th session of the Human Rights Council, examining recent developments and examples that illustrate effective ways to prevent human right violations at international borders, both land and sea. These comments reflect the views of the Secretariat of the Council of Europe and do not necessarily reflect the official position of its member States.

This contribution has been coordinated by the office of the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees (“the SRSG”).

The [mandate](https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/mandate) of the Special Representative was established in 2016 in response to the humanitarian crisis following the refugee and migration movements, and reiterated in response to the decisions of the Helsinki Ministerial Session in May 2019, where Council of Europe member States recalled the need to continue addressing the challenges arising from global migration. The mandate includes liaison and exchange of information with relevant international organisations and specialised agencies, as well as with national migration authorities, with the aim of enhancing the Council of Europe’s assistance to its member States in fulfilling their obligations under the European Convention on Human Rights (“the Convention”) and other Council of Europe standards.

1. **General provisions**

While exercising border control, which remains within their remit, Council of Europe member States have to comply with the provisions of the Convention. These rights and obligations are stemming from the rich body of case law of the European Court of Human Rights (ECtHR – “the Court”). The Court acknowledged that States enjoy an “undeniable sovereign right to control aliens’ entry into […] their territory”[[1]](#footnote-1), but it emphasised that they must exercise this right in line with the provisions of the European Convention on Human Rights[[2]](#footnote-2).

The Convention does not provide for the right to asylum as such. However, turning away an individual and thereby putting them at risk of torture or other forms of inhuman or degrading treatment or punishment is prohibited by the principle of *non-refoulement*. To be protected from arbitrary removal, people should have access to fair and efficient asylum procedures and get sufficient information on the relevant procedures in a language they understand, as well as a right to legal advice. The Court has also emphasised the importance of interpretation to ensure access to asylum procedures[[3]](#footnote-3).

It is important to note that under Article 15 of the Convention, states can derogate from various provisions of the Convention, but no derogation are possible from Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment). The protection from *refoulement* is an absolute right.

1. **Overview of the Council of Europe standards as regards human rights violations at international borders and thematic work published (including on independent border monitoring and on the safe third country concept)**

The Court requires the individual assessment of protection needs, access to an affective remedy and the safety of a return in order to prevent violation of Article 3 and 13 of the Convention and of the prohibition of collective expulsion under Article 4 of Protocol No. 4 to the Convention[[4]](#footnote-4). A summary of the Court’s case-law on prevention of human rights violations at international borders can be found in the Court’s case-law guides on [Immigration](https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf) and on [Article 4 of Protocol No. 4](https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf) (prohibition of collective expulsion of aliens).

The [Handbook on European law relating to asylum, borders and immigration](https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf) jointly produced by the European Court of Human Rights and the European Union Agency for Fundamental Rights and updated in 2020 includes sections on access to the territory and to procedures, asylum determination, barriers to removal, procedural safeguards, legal support in asylum and return cases, pushbacks and pullbacks at sea and highlights the issue of compatibility with the relevant provisions in the Convention.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its [30th General Report published in May 2021](https://rm.coe.int/1680a25e6b)*,* outlined its standards regarding the criteria which should be met for border monitoring mechanism to be effective and independent.

In March 2020, the CPT issued a [Statement of principles](https://rm.coe.int/16809cfa4b) relating to the treatment of persons deprived of their liberty in the context of the COVID-19 pandemic, in which it emphasised that given the absolute nature of the prohibition of torture and other forms of ill-treatment, protective measures to combat the spread of COVID-19 must never result in ill-treatment of persons deprived of their liberty. Further, States should continue to guarantee access for monitoring bodies to all places of detention, including places where people are kept in quarantine. All monitoring bodies should however take every precaution to observe the ‘do no harm’ principle.

In 2021 the Committee of Ministers adopted [Recommendation CM/Rec(2021)1](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a1f4da) on the development and strengthening of effective, pluralist and independent national human rights institutions. This recommendation concerns national human rights institutions as an important link between government and civil society that help bridge the potential protection gap between rights of individuals and the responsibilities of the State.

In March 2020 a first joint note of the Council of Europe and the European Union Agency for Fundamental Rights was published on the [fundamental rights of refugees, asylum applicants and migrants at the European borders](https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf), summarising some key safeguards of European law (both EU and Council of Europe norms) as they apply at the EU’s external borders. Another Joint Note, was published jointly in July 2021, titled [“European Standards on legal remedies, complaints, mechanisms and effective investigation at borders](https://rm.coe.int/european-standards-on-legal-remedies-complaints-mechanisms-and-effecti/1680a3187b)” completing the procedural safeguards and setting out obligations stemming from the European Convention on Human Rights and EU law that apply to effective remedies for human rights violations at borders.

In its [judgment in Ilias and Ahmed v. Hungary [GC]](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-198760%22]}), the European Court of Human Rights set out the principles under Article 3 of the Convention for cases concerning the removal of asylum-seekers to third intermediary countries, without an assessment, by the authorities of the removing State, of the merits of the asylum claim.

* Where a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the State’s duty not to expose the individual to a real risk of treatment contrary to Article 3 is discharged in a manner different from that in cases of return to the country of origin. In the former situation, the main issue is the adequacy of the asylum procedure in the receiving third country. While a State removing asylum-seekers to a third country may legitimately chose not to deal with the merits of the asylum requests, it cannot therefore be known whether those persons risk treatment contrary to Article 3 in the country of origin or are simply economic migrants not in need of protection. It is the duty of the removing State to examine thoroughly whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement,* namely, against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faces from the standpoint of Article 3 of the Convention. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty not to remove the asylum-seeker to the third country concerned.[[5]](#footnote-5)
* To determine whether the removing State has fulfilled its procedural obligation to assess the asylum procedures of a receiving third State, it has to be examined whether the authorities of the removing State had thoroughly examined the available general information about the receiving third country and its asylum system in an adequate manner and of their own initiative; and whether an applicant had been given a sufficient opportunity to demonstrate that the receiving State was not a safe third country in his or her particular case. In applying this test, the Court indicated that any presumption that a particular country is “safe”, if it has been relied upon in decisions concerning an individual asylum-seeker, must be sufficiently supported at the outset by the above analysis.[[6]](#footnote-6)
* In addition to the main question whether the individual will have access to an adequate asylum procedure in the receiving third country, where the alleged risk of being subjected to treatment contrary to Article 3 concerns, for example, conditions of detention or living conditions for asylum-seekers in a receiving third country, that risk is also to be assessed by

the expelling State[[7]](#footnote-7). It is recalled that the removal of asylum-seekers to a third country may be in breach of Article 3 because of inadequate reception conditions in the receiving State[[8]](#footnote-8) or because they would not be guaranteed access to reception facilities adapted to their specific vulnerabilities, which may require that the removing State obtains assurances from the receiving State to that end.[[9]](#footnote-9)

The Court subsequently applied these principles to cases in which applicants, who had presented themselves at the border seeking to lodge an asylum application and/or communicating fear for their safety, were denied entry to the territory, with border officials refusing to accept their applications and were removed in a summary manner to the third country from which they had sought to enter the respondent State’s territory.[[10]](#footnote-10)

1. **Execution of ECHR judgments concerning migration and asylum including human rights violations at borders**

The European Court of Human Rights has developed a very rich body of case-law concerning migration and asylum and the execution of the relevant judgments by respondent States has advanced the human rights protection of migrants, asylum seekers and refugees at national level, including at borders. [The Thematic Factsheet on Migration and Asylum](https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b), published in November 2021 by the Department for the Execution of Judgments of the European Court, sets out examples of general and, where possible, individual measures adopted and reported by states, in the context of the execution of the Court’s judgments, concerning notably: access to territory and forced returns; reception and protection of migrants and asylum seekers; protection from discrimination and hate crimes; family life and family reunification; detention of migrants and asylum seekers; victims of trafficking in human beings.

It is to be noted that the execution of a number of ECHR judgments concerning human rights violations at borders is currently supervised by the Council of Europe Committee of Ministers:

[*Moustahi v. France*](https://hudoc.exec.coe.int/eng?i=004-56109)*,[[11]](#footnote-11)* concerning notably collective expulsion of migrant children in Mayotte; [*R.R. and Others v. Hungary*,](https://hudoc.exec.coe.int/eng?i=004-58097) concerning asylum seekers’ reception conditions in a transit zone; [*Ilias and Ahmed v. Hungary*](https://hudoc.exec.coe.int/eng?i=004-54279), concerning  authorities’ failure to assess the risks of ill-treatment before removing asylum-seekers to Serbia;[[12]](#footnote-12) [*Sharifi and Others v. Italy*](https://hudoc.exec.coe.int/eng?i=004-15559), concerning *inter alia* collective expulsions by Italy to Greece of migrants intercepted on ferries; [*M.K. and Others v. Poland*](https://hudoc.exec.coe.int/eng?i=004-56535), concerning notably collective expulsions in a wider state policy of refusing entry to foreigners entering Poland from Belarus; [*Kebe and Others v. Ukraine*](https://hudoc.exec.coe.int/eng?i=004-46729)*,* concerning *inter alia d*eficiencies in border-control procedures.

1. **Country visits and other advocacy activities against human rights violations at international borders**

**The Special Representative on Migration and Refugees**

Under the terms of its [mandate](https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/mandate) the SRSG can “seek, collect and analyse information, including though fact-finding missions, on the human rights situation of refugees and migrants and report to the Secretary General” and has conducted [fact-finding missions](https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports) which have included the consideration of human rights situation of migrants and refugees at international borders, the latest in this respect being to Bosnia-Herzegovina and Turkey in 2021.

**The Commissioner for Human Rights**

According to her [mandate](https://www.coe.int/en/web/commissioner/mandate), the Commissioner promotes the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in laws and practices concerning human rights; and provides advice and information regarding the protection of human rights across the region.

In 2021, the Commissioner undertook several visits and mission to member states, which dealt, inter alia, with human rights violations at land or sea borders. She visited Malta in October, where she addressed the rescue, disembarkation and return of migrants at sea, as well as their detention and reception on land (country report available [here](https://www.coe.int/en/web/commissioner/-/malta-high-time-for-justice-for-daphne-caruana-galizia-and-for-reforms-to-safeguard-media-freedom-and-better-protect-the-rights-of-migrants-and-women)). She conducted a mission to Poland, specifically dedicated to the situation at the Polish-Belarusian border in November, which focused on pushbacks and the restrictions on access to the border of humanitarian and human rights actors, as well as the media (key findings [here](https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu)). In December, she visited Austria, particularly focusing on reception and integration practices (press release [here](https://www.coe.int/en/web/commissioner/-/austria-should-step-up-efforts-to-protect-women-s-rights-and-gender-equality-and-improve-the-reception-and-integration-of-refugees-asylum-seekers-and-), full report pending).

Additionally, the Commissioner engaged in dialogue on human rights violations at borders with several member states, including through letters to [Cyprus](https://www.coe.int/en/web/commissioner/-/cypriot-authorities-should-investigate-allegations-of-pushbacks-and-ill-treatment-of-migrants-improve-reception-conditions-and-ensure-an-enabling-envi), [Greece](https://www.coe.int/en/web/commissioner/-/greece-s-parliament-should-align-the-deportations-and-return-bill-with-human-rights-standards), [Lithuania](https://www.coe.int/en/web/commissioner/-/lithuania-safeguards-in-asylum-procedures-and-preventing-pushbacks-should-be-central-to-response-to-migration-challenges), the [United Kingdom](https://www.coe.int/en/web/commissioner/-/safe-and-legal-routes-and-protection-of-human-rights-must-take-centre-stage-in-co-operation-between-the-united-kingdom-and-france-on-channel-crossings) and [France](https://www.coe.int/en/web/commissioner/-/safe-and-legal-routes-and-protection-of-human-rights-must-take-centre-stage-in-co-operation-between-the-united-kingdom-and-france-on-channel-crossings). She also released several statements on developments in Poland ([here](https://www.coe.int/en/web/commissioner/-/poland-should-take-immediate-action-to-protect-the-human-rights-of-people-stranded-at-its-border-with-belarus) and [here](https://www.coe.int/en/web/commissioner/-/new-legislation-perpetuates-restrictions-and-obstacles-to-protection-of-the-human-rights-of-migrants-and-refugees-on-poland-s-eastern-border)) and [Greece](https://www.coe.int/en/web/commissioner/-/greece-s-parliament-should-align-the-deportations-and-return-bill-with-human-rights-standards).

The Commissioner also made interventions before the European Court of Human Rights in relation to pushbacks from [Croatia](https://www.coe.int/en/web/commissioner/-/commissioner-publishes-observations-on-summary-returns-of-migrants-from-croatia-to-bosnia-and-herzegovina) and from [Poland](https://www.coe.int/en/web/commissioner/-/commissioner-intervenes-before-the-european-court-of-human-rights-in-a-case-concerning-the-situation-of-asylum-seekers-and-migrants-stranded-at-the-bo) (the latter on the basis of her above mentioned mission).

As regards cross-cutting issues, the Commissioner published a [follow-up report](https://www.coe.int/en/web/commissioner/-/european-countries-must-urgently-change-their-migration-policies-which-endanger-refugees-and-migrants-crossing-the-mediterranean) to her 2019 Recommendation on the rights and lives of migrants in the Mediterranean, including on the issue of cooperation with third countries in intercepting and returning persons at sea. She also called on member states to meet their human rights obligations, including ensuring access to asylum, towards persons fleeing [Afghanistan](https://www.coe.int/en/web/commissioner/-/in-their-response-to-afghans-seeking-safety-council-of-europe-member-states-should-not-undermine-human-rights-protections), and to resist [attempts to legalise pushbacks](https://www.coe.int/en/web/commissioner/-/european-states-must-stand-up-against-pushbacks-and-the-attempt-to-legalise-them).

In 2022 so far, the Commissioner wrote a [letter to Spain](https://www.coe.int/en/web/commissioner/-/spain-the-review-of-the-2015-law-on-citizens-safety-should-result-in-better-protecting-human-rights) on the legal framework covering returns from Ceuta and Melilla. In March, the Commissioner will publish a Recommendation on ending and preventing pushbacks in the Council of Europe area.[[13]](#footnote-13)

**The Parliamentary Assembly (PACE)**

During the 4th part session 2021, the PACE held urgent affairs debate on the instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus and, as a result, adopted a [Resolution (2404) 2021](https://pace.coe.int/en/files/29537), based on a report by Anne-Mari Virolainen (Finland, EPP/CD). In the Resolution the Assembly said the migration and asylum pressures at the border of Belarus with Latvia, Lithuania and Poland had been “orchestrated by the Belarusian authorities in response to EU sanctions against Belarus imposed for harsh violations of human rights”.

On 26 November 2021, the Standing Committee of the Assembly held a current affairs debate on “The situation of migrants on the border with Belarus”, following which the Chairperson of the Committee on Migration, Refugees and Displaced Persons Mr Pierre-Alain Fridez, and the Rapporteur on the instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus Ms Virolainen, carried out a fact-finding visit to Poland on 18-19 November 2021.

On 21 and 22 February 2022 Ms Stephanie Krisper (Austria, ALDE), rapporteur on safe third countries for asylum seekers together with Mr Pierre-Alain Fridez (Switzerland, SOC), rapporteur on pushbacks on land and sea: illegal measures of migration management visited the border area between Croatia and Bosnia and Herzegovina. The UN HRC Special Rapporteur on the Human Rights of Migrants addressed the PACE Committee and presented his report on pushbacks on 24 November 2021.

Following the respective reports by the PACE Committee on Migration, Refugees and Displaced Persons, the Parliamentary Assembly adopted the following related resolutions:

* [Resolution 2404 (2021)](https://pace.coe.int/en/files/29537) on instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus;
* [Resolution 2356 (2020)](https://pace.coe.int/en/files/28898)on the rights and obligations of NGOs assisting refugees and migrants in Europe;
* [Resolution 2340 (2020)](https://pace.coe.int/en/files/28776) on humanitarian consequences of the Covid-19 pandemic for migrants and refugees;
* [Resolution 2324 (2020)](https://pace.coe.int/en/files/28595)on missing refugee and migrant children in Europe;
* [Resolution 2299 (2019)](https://pace.coe.int/en/files/28074)on pushback policies and practice in Council of Europe member States;
* [Resolution 2195 (2017)](https://pace.coe.int/en/files/24273)on child-friendly age assessment for unaccompanied migrant children;
* [Resolution 2108 (2016)](https://pace.coe.int/en/files/22737) on human rights of refugees and migrants – The situation in the Western Balkans;
* [Resolution 2059 (2015)](https://pace.coe.int/en/files/21788) Criminalisation of irregular migrants: a crime without a victim;
* [Resolution 1521 (2006)](https://pace.coe.int/en/files/17479)on the mass arrival of irregular migrants on Europe’s southern shores;
* [Resolution 2379 (2021)](https://pace.coe.int/en/files/29253) “Role of parliaments in implementing the United Nations global compacts for migrants and refugees”;
* [Resolution 2408 (2021)](https://pace.coe.int/en/files/29573) “70th anniversary of the 1951 Refugee Convention: the Council of Europe and the international protection of refugees”.

1. See, inter alia, *Saadi v. United Kingdom [GC], No. 13229/03, 29 January 2008; ECtHR, Chahal v. the United Kingdom [GC], No. 22414/93, 15 November 1996.* [↑](#footnote-ref-1)
2. *Amuur v. France [GC], No. 19776/92, 25 June 1996, para. 41.* [↑](#footnote-ref-2)
3. *M.S.S. v. Belgium and Greece [GC],* *No. 30696/09, 21 January 2011; M.A. and Others v. Lithuania, No. 59793/17, 11 December 2018.* [↑](#footnote-ref-3)
4. See *Hirsi Jamaa and Others v. Italy* [*GC], 27765/09, 23 February 2012* [↑](#footnote-ref-4)
5. *Ilias and Ahmed v. Hungary [GC], no. 47287/15, 21 November 2019, §§ 130-138* [↑](#footnote-ref-5)
6. *Ilias and Ahmed v. Hungary [GC], §§ 139-141, 148 and 152* [↑](#footnote-ref-6)
7. *Ilias and Ahmed v. Hungary [GC], § 131* [↑](#footnote-ref-7)
8. *M.S.S. v. Belgium and Greece [GC], No. 30696/09, 21 January 2011, §§ 362-368* [↑](#footnote-ref-8)
9. *Tarakhel v. Switzerland [GC], No. 29217/12, 4 November 2014, §§ 100-122* [↑](#footnote-ref-9)
10. *M.K. and Others v. Poland, nos 40503/17 and 2 others, 23 July 2020; D.A. and Others v. Poland, no 51246/17, 8 July 2021.* [↑](#footnote-ref-10)
11. Case hyperlinks contain also the latest decisions adopted by the Committee of Ministers on the execution of the ECHR judgments. [↑](#footnote-ref-11)
12. Another judgment (*[Shahzad v. Hungary](https://hudoc.echr.coe.int/eng?i=001-210853)*) concerning collective expulsion was recently added to the agenda of the Committee of Ministers. [↑](#footnote-ref-12)
13. Once published, this will be shared by the Commissioner for Human Rights with the UN Special Rapporteur directly. [↑](#footnote-ref-13)