

# Pushed beyond the limits

Four areas for urgent action to end human rights violations at Europe's borders



Recommendation



COMMISSIONER  
FOR HUMAN RIGHTS

COMMISSAIRE AUX  
DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



# **Pushed beyond the limits**

## Four areas for urgent action to end human rights violations at Europe's borders

Recommendation  
by the Council of Europe  
Commissioner for Human Rights

All requests concerning the reproduction or translation of all or part of this document should be addressed to the Directorate of Communication ([publishing@coe.int](mailto:publishing@coe.int)).

All other correspondence concerning this document should be addressed to the Office of the Commissioner for Human Rights.

Publications are available on the Commissioner's website: [www.commissioner.coe.int](http://www.commissioner.coe.int)

Cover photo:  
*A girl from Syria at the warehouse in Bruzgi, Belarus. Her family had attempted to cross the nearby border with Poland. 20 December 2021*  
© Alessio Mamo

© Council of Europe,  
April 2022

*Acknowledgements:*

This Recommendation was prepared for the Commissioner's Office by Dr Izabella Majcher (Visiting Fellow at the Global Migration Centre, Graduate Institute of International and Development Studies, Geneva), acting as an independent consultant.

# Contents

---

<b>FOREWORD</b>	<b>5</b>
<b>SUMMARY</b>	<b>7</b>
<b>RECOMMENDATIONS</b>	<b>9</b>
<b>INTRODUCTION</b>	<b>15</b>
<b>CHAPTER 1 - THE PREVALENCE OF PUSHBACKS IN THE COUNCIL OF EUROPE AREA</b>	<b>19</b>
<b>CHAPTER 2 - UPHOLDING LEGAL OBLIGATIONS TOWARDS ASYLUM SEEKERS AND MIGRANTS CROSSING BORDERS</b>	<b>25</b>
<b>CHAPTER 3 - ENHANCING TRANSPARENCY, MONITORING, AND ACCOUNTABILITY</b>	<b>33</b>
<b>CHAPTER 4 - A SHARED PROBLEM: ALL MEMBER STATES MUST TAKE RESPONSIBILITY FOR ENDING PUSHBACKS</b>	<b>41</b>
<b>CHAPTER 5 - TIME FOR PARLIAMENTARIANS TO STAND UP AGAINST PUSHBACKS</b>	<b>47</b>
<b>ENDNOTES</b>	<b>51</b>



## Foreword

---

This Recommendation comes at an incredibly challenging time for human rights protection in Europe. The horrifying war in Ukraine has caused death, destruction and immense human suffering. At the time of writing this foreword, over 4 million people have escaped the war and sought safety elsewhere in Europe. The response of European countries to this enormous exodus has been immediate and heartening. This shows that putting the protection of human dignity and the observance of international obligations at the centre of state action is both necessary and possible even in such a situation.

Yet, as this document shows, the warm and welcoming response to Ukrainians stands in sharp contrast to the widespread human rights violations committed against refugees, asylum seekers and migrants coming from other parts of the world in many Council of Europe member states over several years, especially by subjecting them to pushbacks.

Just as the prevalence of these pushbacks was becoming increasingly visible, they now risk being overshadowed by the consequences of the war in Ukraine. In some cases, member states' authorities have even been using the arrival of people fleeing Ukraine to justify the continuation of their unlawful pushbacks of other refugees, asylum seekers and migrants, including by creating false dichotomies between these groups and the extent to which their human rights should be protected.

But human rights exist to protect us all, in the same way, whatever our national or ethnic origin, colour, or belief. This should be the core principle informing a common response to the current challenges that many member states face. There should be no double standards in upholding the right to asylum and the application of fair procedures to all those who arrive at member states' borders. There is no justification for preventing the return to danger of some, while systematically denying others the opportunity to have their situation assessed fairly and thoroughly, on a case-by-case basis, to establish their eligibility for asylum or the presence of other circumstances that should prevent their expulsion. And there is no justification for being rightly concerned for the lives and well-being of some, while purposefully subjecting others to practices that put their lives at risk or that expose them to torture or ill-treatment.

Pushbacks have no place in Europe, least of all at a time when it is called upon more than ever to stand firm in its commitment to human rights. The show of willingness to share responsibility, the commitment to upholding human dignity, and the emphasis on fair treatment of people fleeing the war in Ukraine, should be extended to all people arriving at member states' borders, regardless of their background or circumstances. Working closely and constructively with NGOs, individual human rights defenders and the media to ensure the best response and to enhance transparency in the treatment of refugees, asylum seekers and migrants should be the norm, not the exception. Most of all, the current situation shows that the serious human rights violations that have become a defining part of many member states' border control practices are cruel, contradictory and counterproductive.

Despite the enormous challenges upon us, the current situation has also provided Council of Europe member states an opportunity to demonstrate their commitment, in a very concrete way, to the standards to which they have bound themselves. It is now up to them to take this opportunity and make it a turning point in their asylum and migration policies.

*Dunja Mijatović*

(April 2022)

## Summary

---

Pushbacks involve the summary return of refugees, asylum seekers and migrants by states without the observance of the necessary human rights safeguards. The fact that pushbacks have become widespread at Council of Europe member states' land and sea borders in recent years is now well documented. Pushbacks often involve the denial of access to asylum, returns at odds with the principle of non-refoulement, the lack of observance of individual safeguards in expulsions, as well as shocking violence and humiliating treatment, or even putting the lives of people at risk. The scale of pushbacks and the rapid backsliding on the protection of the human rights of migrants, asylum seekers and refugees is truly alarming. In several member states, in defiance of the obligations to which they are bound, pushing back refugees, asylum seekers and migrants is now an official policy, even formalised in domestic legislation in some instances. In other states, despite denials by the national authorities, there is consistent and credible evidence of pushbacks being an established practice.

Overall, pushbacks and the serious violations of human rights that they entail now risk becoming a permanent and systemic feature of the way that refugees, asylum seekers and migrants are treated across Europe. The latest challenges faced by member states are only accelerating this trend and giving them new impetus to attempt to limit scrutiny of their border control measures further and to evade responsibility for meeting their human rights obligations.

Given the significance of the phenomenon, pushbacks constitute an urgent, pan-European human rights problem, requiring action from all Council of Europe member states. In this recommendation, the Council of Europe Commissioner for Human Rights draws upon her extensive engagement with the issue, through country visits, dialogue with member states, third party interventions before the European Court of Human Rights, and her thematic work, to set out key elements of the concerted action needed to tackle pushbacks in Europe.

While many actors, including national human rights structures, civil society, the media, and international organisations, have a role to play in addressing pushbacks, the core responsibility – and therefore the focus of

this document – lies with governments and elected officials in Council of Europe member states.

Effectively halting the advance of pushbacks requires, in particular:

1. that member states re-focus on the **implementation, in good faith, of their human rights obligations**, in particular those set out in the European Convention on Human Rights, and on giving practical effect to the enjoyment of those rights by refugees, asylum seekers and migrants in border situations.
2. that member states **enhance transparency** of border control activities, in particular through strengthening **independent monitoring** to prevent and identify violations, as well as **bolstering mechanisms to ensure accountability** when such violations occur.
3. crucially, that member states acknowledge pushbacks as a pan-European problem requiring **collective action by all member states**. This would require that governments speak out loudly and clearly against pushbacks and hold their peers to account when commonly agreed standards and values are not upheld, both bilaterally and in multilateral settings. In addition, this would involve addressing factors incentivising pushbacks practices, such as the lack of effective responsibility sharing across Europe.
4. that **parliamentarians**, acting both as lawmakers and as the cornerstone of democratic oversight, mobilise to stand up against pushbacks, including by holding their governments to account and by preventing the adoption of laws or policies that are not human rights compliant.

Action must no longer be delayed. It is high time for states to demonstrate the political will, individually and collectively, to end pushbacks and violations of human rights at Europe's borders. States can no longer afford to carry out these violations, deny documented incidents and police and border guard wrongdoings, nor to silently condone the normalisation of unlawful practices by others. Such avoidance of responsibility undermines the rule of law in Europe and is likely to set the continent, and the world, on course toward permanently losing hard-won human rights protections and values, not just for refugees, asylum seekers and migrants, but for all of us.

# Recommendations

---

To stop all forms of pushbacks in Europe and prevent their recurrence, the Council of Europe Commissioner for Human Rights issues the following recommendations.

## TO COUNCIL OF EUROPE MEMBER STATES' GOVERNMENTS:

**1. Uphold, in good faith, their legal obligations, in law and practice, towards refugees, asylum seekers and migrants at their borders,**

including by:

- a. refraining from returning persons across borders without an individualised procedure as required to prevent violations of the principle of non-refoulement, the prohibition of collective expulsions, or the right to effective remedies;
- b. refraining from adopting laws and policies that allow returns of persons without an individualised procedure;
- c. issuing clear and mandatory regulations, instructions, rules of conduct and standardised procedures to authorities charged with border control on how to approach people crossing the border in an irregular manner in compliance with human rights and refugee protection standards. This should include clear guidance to the effect that:
  - i. no expulsion decision is taken without individual identification and without an opportunity for the person to put forward reasons against expulsion, and to ensure that remedies to any expulsion decision are available;
  - ii. all persons intending to make a claim for international protection have full access to a fair and efficient asylum procedure surrounded with adequate safeguards (including access to information, interpreters and lawyers);
  - iii. if asylum applications can only be made at designated places, transport is provided to bring persons found at borders or after irregular entry to such places, rather than only informing them of this requirement;

- iv. the circumstances in which persons returned across the border will find themselves in are considered before taking an expulsion decision, including their material circumstances such as food, water and emergency health care, and to refrain from expelling them in case this would leave them deprived of such basic necessities;
  - d. carrying out prompt, effective and independent investigations into all allegations of pushbacks and violence against refugees, asylum seekers and migrants, sanctioning the wrongdoers, and compensating victims.
2. **Take action to enhance transparency and accountability in relation to border control practices,**

including by:

- a. strengthening existing border monitoring activities of national human rights structures such as National Human Rights Institutions, Ombudsman institutions, National Preventative Mechanisms and other relevant bodies, including by enhancing their independence, powers and resources where necessary;
- b. where appropriate, developing new initiatives for independent border monitoring, ensuring key principles on independence, powers and the scope of activities are upheld, and in a way that closely involves or seeks synergies with existing work by national human rights structures and civil society;
- c. committing to full cooperation with national and international bodies carrying out monitoring, including by ensuring their access to all relevant locations, documents and other materials, such as video images and other data; ensuring that no barriers exist to such bodies reporting on their findings, which should include prompt agreement for such publications if this is required, such as in the case of the Committee for the Prevention of Torture, and providing substantive, public responses to the findings of such reports;
- d. promptly implementing the recommendations provided by national and international monitoring bodies by revising legislation, policies and instructions to responsible authorities as required, and by taking appropriate action to ensure accountability for any violations that have been documented by such bodies;
- e. lifting legal, administrative and practical obstacles that unduly restrict or hinder the work of national human rights structures, international bodies, NGOs and media working in border areas and on issues related to border control;

- f. acknowledging the crucial role of civil society, individual human rights defenders or journalists working in border areas and reporting on or engaged in protection of rights of refugees, asylum seekers and migrants, and supporting their work. In particular, member states should immediately cease all judicial, administrative or other harassment against such actors, and act swiftly and decisively on any reports of threats or violence against them.
3. **Collectively take action to end pushbacks in Europe and ensuring inter-state accountability,**

including through:

- a. explicitly recognising pushbacks and associated human rights violations as a pan-European problem, requiring engagement from all member states, including countries of final destination of refugees, asylum seekers and migrants, also when they themselves have not engaged in pushbacks;
- b. speaking out clearly and forcefully, bilaterally and in multilateral fora, against pushbacks and associated human rights violations by member states. And, in this way, ensuring that comments by high-level officials cannot be construed as support for, or silent condoning of, border practices that do not meet the shared standards of Council of Europe member states;
- c. addressing, bilaterally and in multilateral fora, instances of hostile, stigmatising or dehumanising rhetoric against refugees, asylum seekers and migrants;
- d. carrying out reviews of all support given to other states' border control practices, either bilaterally or together with others, for the risk that such support is directly or indirectly facilitating pushbacks or pullbacks and associated human rights violations, and to suspend such support until clear human rights guarantees are in place;
- e. improving responsibility-sharing and solidarity measures between Council of Europe member states, especially as regards countries of first arrival, in particular agreeing, as necessary, to relocate persons to their territories, including following disembarkation resulting from search and rescue operations;
- f. supporting international and regional initiatives that may lead to the establishment of border monitoring mechanisms in member states, while ensuring that these meet the key principles for effective and independent border monitoring and make full use of, and act in complementarity with, the work of existing national human rights structures and civil society actors.

## TO PARLIAMENTARIANS IN COUNCIL OF EUROPE MEMBER STATES:

### 4. **Ensure appropriate democratic oversight and legislative scrutiny of issues related to pushbacks,**

such as:

- a. promptly raising reports of pushbacks or intimidation or harassment of those trying to prevent pushbacks with their governments and insisting on immediate government action;
- b. closely scrutinising proposals for laws, regulations or other guidance for their compliance with human rights standards and refusing to adopt any measures that fail to meet key safeguards in relation to access to asylum, the prevention of refoulement, the prohibition of collective expulsions, access to remedies and other human rights;
- c. promptly reviewing laws, regulations or other guidance already in force which may come into conflict with human rights standards, with a view to amending or withdrawing these;
- d. requesting human rights impact assessment and monitoring of the implementation of funding of border control activities, before approving the necessary budgets, both domestically and when such funding is aimed at supporting border control activities in other states;

### 5. **Lead by example in public debates on issues related to asylum and migration,**

including by:

- a. engaging seriously with allegations of pushbacks in their countries, and taking an autonomous position vis-à-vis their governments in this respect;
- b. refraining from using stigmatising or dehumanising rhetoric against refugees, asylum seekers and migrants;

**6. Insist on strengthening monitoring activities,**

including by:

- a. safeguarding the independence of national human rights structures, ensuring that they have adequate powers set out in law, and that sufficient resources for border monitoring are made available;
- b. immediately raising any obstacles or hindrance faced by such monitoring bodies with the government;
- c. supporting the adoption of international or regional activities to enhance monitoring and accountability at member states' borders;

**7. Fully use the opportunities afforded by their mandates to uncover and address human rights violations associated with pushbacks,**

such as by:

- a. carrying out their own fact finding on the ground, including on the basis of powers they may have of unimpeded access to border regions and detention facilities;
- b. organising hearings and calling inquiries into pushback practices, in particular also to address any systematic issues that underlie specific incidents;
- c. seeking co-operation with counterparts in other member states to better address cross-border issues in relation to pushbacks;

**8. Improve implementation of international judgments and recommendations by their governments,**

including by:

- a. insisting on government reactions to relevant judgments and decisions (both those pertaining directly to their member state and those with potentially implications for their practices more broadly) by international and regional bodies and to recommendations addressed to them by organisations and bodies with fact-finding or monitoring mandates;
- b. discussing such judgments, decisions and recommendations in parliament, and insisting on regular updates from their government on progress in their implementation.



# Introduction

---

## *Pushbacks: a European problem requiring urgent solutions*

“Pushbacks are becoming more normalised and are carried out in an increasingly violent way across Europe”, warned the Council of Europe Commissioner for Human Rights in June 2020.<sup>1</sup> Since then, mounting evidence from reliable sources shows that this practice is turning into a systematically applied measure.<sup>2</sup> Pushbacks are carried out at both land and sea borders and appear to be prevalent across the Council of Europe region. They thus constitute a pan-European problem which should be tackled collectively by all Council of Europe member states. This should be done with great urgency to halt the alarming retreat from the protection of key rights of refugees, asylum seekers and migrants which Council of Europe member states are bound to respect. Such backsliding will not only have dire consequences for refugees, asylum seekers and migrants; it also risks impacting on the overall human rights landscape in Europe, including as regards the accountability of law enforcement agencies and the upholding of the rule of law more generally.

This Recommendation therefore alerts Council of Europe member states and other relevant actors to the widespread nature of pushbacks and to new trends that show how member states are trying to avoid their responsibility in order to continue committing these human rights violations with impunity. It draws on the Commissioner’s extensive work on the issue of pushbacks since the start of her mandate, including country visits, dialogue with member states, third party interventions before the European Court of Human Rights, and her thematic work on the protection of the rights of refugees, asylum seekers and migrants in border situations, supplemented by additional research and analysis for the specific purpose of this document. This has led to the identification of four key areas for action to help stop, remedy and prevent the phenomenon: upholding legal obligations in relation to refugees, asylum seekers and migrants in law and practice; providing for independent and effective monitoring and accountability mechanisms; engaging member states’ collective responsibility to stop pushbacks and hold each other to account for violations; and ensuring that

parliamentarians step up and make full use of their possibilities to address pushbacks. Specific recommendations in relation to each of these areas are presented at the start of this document.

### ***A term of art with real human and legal consequences***

While this document uses the term “pushbacks”, it is important to note that this is not a legal concept as such. Rather, it is a commonly used term of art covering a range of human rights violations in border situations.<sup>3</sup> Indeed, pushbacks can also be described as summary expulsion,<sup>4</sup> summary return of migrants,<sup>5</sup> or summary return without access to or application of any procedural or other safeguards.<sup>6</sup> Returns without the necessary human rights safeguards may occur in different settings. For example, summary returns may be carried out against persons who have already stayed on the territory of a state for longer periods. The current document, however, primarily focuses on instances in which refugees, asylum seekers or migrants are in the process of arriving at member states’ borders, either via land or sea, or are found by states shortly after having crossed onto their territories, and are subsequently pushed back. As discussed in chapter 2, pushbacks generally involve multiple violations of human rights, including the violation of the prohibition of refoulement and collective expulsion, the prohibition of torture or inhuman or degrading treatment or punishment, the right to an effective remedy, and may even affect the right to life as well as other rights, such as the right to liberty and protection of family life. They often also involve violence against those pushed back. Pushbacks are fundamentally aimed at distancing the person from the state’s territory or jurisdiction to deprive them of access to protection and procedural safeguards laid down in international and domestic law.<sup>7</sup>

Victims of pushbacks may be nationals of the country to which they are returned, but pushbacks also frequently occur against persons from third countries, who subsequently run the risk of being subjected to “chain pushbacks”, whereby a person is repeatedly pushed back from one country to another, and may thus involve repetitive violations of the above-mentioned rights at each border.

### ***Shifting political, policy and legal measures by member states***

While the practice of pushbacks is not new, it is not only the growing scale of pushbacks that is of concern. Member states’ reactions have also changed over time, in several ways. In some member states, outright denial of the existence of pushbacks continues to be the main reaction, even in the face of overwhelming evidence gathered by journalists, national human rights structures<sup>8</sup> and NGOs,<sup>9</sup> and growing condemnation by international

organisations.<sup>10</sup> An increasingly prominent feature of this response has been to limit scrutiny, including by attempting to prevent human rights defenders and media from doing their work, or harassing them in different ways when they report on pushbacks.

Other member states, however, have become more forward in providing what they consider legitimate justifications. For example, they may point to the existence of readmission agreements or other arrangements with neighbouring countries, or to supranational rules on border control (such as under Schengen) which they are simply implementing. Or they may appeal more generally to vaguely defined obligations to 'protect Europe's borders'. Pleading 'unprecedented' or 'emergency' situations is another increasingly common response when confronted with questions about pushbacks. Examples of such situations have included increasing numbers of arrivals at member states' borders, the Covid-19 pandemic or, more recently, the 'instrumentalisation' of cross-border movements. This has led to numerous states seeking to amend their domestic legislation to formalise unlawful practices related to pushbacks in national law. Recently, laws with an adverse impact on key human rights protections were approved or proposed in several member states.<sup>11</sup> The justifications for such measures, however, have often overlooked the crucial principle, firmly embedded in international law, including the case law of the European Court of Human Rights (the Court), that any actions related to the control of borders must be carried out fully in line with states' obligations under human rights and refugee law,<sup>12</sup> including when facing challenges related to the arrival of refugees, asylum seekers or migrants.<sup>13</sup>

Such attempts have also come in a context of developments in the case law of the Court, not least its finding in the case of *N.D. and N.T. v. Spain* that the prohibition of collective expulsion had, in that situation, not been violated although no individual assessment had been carried out before expelling individuals.<sup>14</sup> While this finding may be said to have raised certain questions about the scope of member states' obligations, it has also, as discussed later in this document, triggered what appear to be deliberate misinterpretations, through which member states have sometimes falsely suggested that the finding gives them licence to push people back as a general rule.

Member states have been looking for ways to replicate the results of actions that were found to be clearly unlawful. This is particularly evident in relation to member states' actions to deal with attempts to cross the Mediterranean following the finding by the Court that returning persons rescued at sea to Libya, would violate member states' obligations under the European Convention on Human Rights (ECHR).<sup>15</sup> Rather than leading to a reconsideration of such returns, this has become a blueprint for new

practices aimed at evading legal responsibility in a formalistic manner. In particular, we have seen increasingly close and active co-operation with third countries to intercept and return refugees, asylum seekers and migrants trying to reach Europe, leading to what may be termed 'pullbacks'. Such practices, which are closely related to the phenomenon of pushbacks, are also covered by this document, although more specific recommendations on the protection of the lives and rights of refugees, asylum seekers and migrants at sea have already been set out by the Commissioner in her 2019 Recommendation on the Mediterranean and the 2021 follow-up report to this.<sup>16</sup>

## *Chapter overview*

In this fast-changing context, in which pushbacks are on the rise, the human rights protections of refugees, asylum seekers and migrants are rapidly being dismantled and the political and legal landscape is creating uncertainty, an urgent and concerted response is needed. To guide such a response, this Recommendation first outlines the scale of the problem across the Council of Europe area (**chapter 1**). It then places pushbacks within an applicable human rights framework, by outlining the key human rights obligations violated by this practice (**chapter 2**). It subsequently focuses on the importance of transparency, effective and independent monitoring and accountability mechanisms, as well as the key role that national human rights structures and other actors can play in this (**chapter 3**). Pushbacks typically involve actions (or inaction) by more than one state and are based on complex dynamics between member states. To effectively address this pan-European problem, the document sets out how all Council of Europe member states can and must take a principled and rights-based approach to tackle pushbacks, and to hold each other to account for violations (**chapter 4**). Finally, attention turns to what parliamentarians, as legislators and as the persons mandated to exercise democratic oversight of governments, can do to address pushbacks (**chapter 5**).

# Chapter 1

## The prevalence of pushbacks in the Council of Europe area

---

When tackling pushbacks, the first step for member states is to acknowledge these practices as a pan-European problem. While pushbacks and border violence at some borders within the Council of Europe area are now increasingly visible in the public domain, the problem is more prevalent and systemic than is commonly supposed. Over the last few years, the widespread nature of such violations has become better documented.<sup>17</sup> At the end of 2020, the Commissioner's Office carried out its own review of reports (by international organisations, NGOs and media) alleging various human rights violations that would come under the heading of 'pushbacks' (as described in chapter 2), covering the period between 2018 and 2020. For the purpose of this document, this was complemented by new information that has emerged since then. While non-exhaustive, the results provide an insight into the scale of the phenomenon. On this basis, this chapter outlines the situation at some of the borders where pushbacks have already been reported, including situations addressed by the Commissioner. Following an overview of such situations, some observations about the scale and prevalence of pushbacks in the Council of Europe area are presented.

### *Regional overview*

Along the key migration route through the Western Balkans and onwards to neighbouring countries, there are long-standing allegations of pushbacks at multiple borders, and the situation there is one of the best recorded, with various organisations collecting data on pushback incidents and testimonies from victims. The Commissioner has repeatedly addressed pushbacks by **Croatia** to Bosnia and Herzegovina.<sup>18</sup> In many cases, people are reportedly intercepted on Croatian territory, driven close to the border, left in wild terrain, and forced with the use of threats and abuse to walk across the border back into Bosnia and Herzegovina.<sup>19</sup> The Danish Refugee Council was reported to have recorded 30,309 pushback incidents between December 2019 and September 2021. Of the 7,200 cases recorded in the

first nine months of 2021, a quarter were reported to involve “excessive use of violence.”<sup>20</sup> While many of these concern persons crossing from Bosnia and Herzegovina, they have also reportedly involved chain pushbacks, following such practices by Slovenia, Austria and Italy (see below). Although less frequently reported, pushbacks are also carried out by Croatia to Serbia. According to the Office of the UN High Commissioner for Refugees (hereafter UNHCR), in 2020, around 2,000 persons were subject to pushbacks at that border.<sup>21</sup> Hungary and Romania have also been reported to push people back to Serbia. In July 2016, **Hungary** introduced the so-called ‘pushback measures’, authorising collective returns by the police police pushbacks of all potential asylum seekers apprehended within 8 kilometers of the Serbian-Hungarian border. The measure was extended to the whole territory in March 2017. Since then, access to the asylum procedure is no longer possible at the border crossing points, nor within Hungary, but only in the Hungarian embassies in Kyiv and Belgrade. Any person in an irregular situation in Hungary will be escorted to Serbia, whether they have entered from there or not. This has systematically deprived persons seeking asylum from accessing it and has resulted in collective expulsions.<sup>22</sup> According to the weekly statistics by the Hungarian police, from the introduction of these measures in July 2016 until December 2020, when the Court of Justice of the EU found these contrary to EU law, some 50,000 pushbacks took place on this basis. Since then, their number has increased significantly, with a further 71,470 pushbacks from Hungary to Serbia being carried out in 2021.<sup>23</sup> Indicative of a shift in routes across the region, UNHCR furthermore reported that around 13,460 persons were collectively returned from **Romania** to Serbia in 2020, compared with 1,560 in 2019.<sup>24</sup> While **Serbia** experiences frequent pushbacks by its neighbouring countries,<sup>25</sup> it also carries out such pushbacks itself. For example, pushbacks have been reported from Serbia to Bulgaria.<sup>26</sup> Furthermore, at least 360 persons were subjected to automatic return to North Macedonia in 2020. Those persons are then reportedly frequently pushed back by **North Macedonia** to Greece.<sup>27</sup> Similarly, **Bosnia and Herzegovina**, which – as noted above – frequently experiences pushbacks by Croatia, itself also engages in such practices, with at least 735 persons reported as having been pushed back to Serbia in 2020.<sup>28</sup> Furthermore, in 2020, **Slovenia** reportedly returned around 9,950 persons to Croatia on the basis of a readmission agreement, without ensuring access to the asylum procedure,<sup>29</sup> although there was a significant drop of some 40 per cent in reported returns in 2021.<sup>30</sup> These figures likely also include chain pushbacks of persons summarily returned to Slovenia by Austria and Italy.

**Austria** was reported to have refused entry to around 360 persons at the border with Slovenia in 2019, compared with about 490 in 2020.<sup>31</sup> A June 2021 judgment by an Austrian court found that the return of a

Moroccan national to Slovenia and subsequently to Croatia and Bosnia and Herzegovina had deprived him of the right to apply for asylum, and that pushbacks were partially used as a method in Austria.<sup>32</sup> Between May and December 2020, **Italy** was reported to have sent at least 1,300 persons to Slovenia, based on an informal readmission procedure, without individual assessments.<sup>33</sup> At its Adriatic sea borders, Italy is reportedly still sending people back to Greece, despite the *Sharifi* ruling handed down by the European Court of Human Rights.<sup>34</sup> Between January and mid-April 2020, around 400 pushbacks reportedly took place at that border.<sup>35</sup> Pushbacks have also been recorded from Italy to Croatia and to Albania.<sup>36</sup> This is in addition to the frequent pullbacks in the Mediterranean, in particular those to Libya, which are made possible through Italian support (see below). NGOs reported several pushback incidents at **Switzerland's** border with Italy in both 2019 and 2020, including the return of minors, on the basis of a readmission agreement between the countries, but without proper identification, as well as the denial of the possibility to apply for asylum.<sup>37</sup> Reports of pushbacks by **France** to Italy particularly concern the Alpes Maritimes region, with refusals of entry without the assessment of protection needs being condemned by the Council of State.<sup>38</sup> Occurrences of such practices are reportedly frequent, with NGOs recording, for example, between 50 and 130 pushbacks a day up in the summer of 2020, and up to 170 a day in October of that year.<sup>39</sup> Reports of returns without appropriate procedures, involving both adults and children, also pertain to France's border with Spain in the Pyrénées Orientales area.<sup>40</sup> Under an agreement between the **United Kingdom** and France, the latter prevents migrants' boats from crossing the Channel, thus also preventing persons from submitting asylum applications in the UK. Recent announcements by the UK government also indicate it is intending to conduct active pushbacks of those crossing into its territorial waters.<sup>41</sup>

Long-reported refusals of entry and access to asylum procedures at the Terespol border crossing point between **Poland** and Belarus have led to judgments by the European Court of Human Rights, in 2020 and 2021, which found Poland to be in violation of the ECHR's provisions on the prohibition of torture, inhuman or degrading treatment, the prohibition of collective expulsion of aliens, the right to an effective remedy, and the obligation not to hinder the effective exercise of the right of individual application.<sup>42</sup> Since the summer of 2021, when the number of asylum seekers entering Poland from Belarus increased due to actions of the Belarusian regime, pushbacks have become prevalent again. In August 2021, Poland deployed troops and declared a state of emergency covering the border region, which prevents the entry of independent observers and humanitarian actors to assist people trapped there without adequate food, shelter and medical care.<sup>43</sup> During her mission to Poland in November 2021, the Commissioner

received consistent reports of pushbacks from Poland to Belarus.<sup>44</sup> In her third party intervention before the European Court of Human Rights in January 2022, in a case concerning the situation of asylum seekers stranded at the border between Poland and Belarus, the Commissioner observed the practice of pushbacks was repeated and systematic. She also observed that this practice was likely to expose individuals to a risk of torture or inhuman or degrading treatment at the hands of Belarusian state agents.<sup>45</sup> In 2018, the Court found violations by **Lithuania** of the prohibition of torture or inhuman or degrading treatment, as well as the right to an effective remedy, following the refusal to examine asylum applications of a family from Chechnya and their return to Belarus.<sup>46</sup> In August and September 2021, following the increase in arrivals due to actions by Belarus, over 3,000 persons were prevented from entering Lithuania,<sup>47</sup> amid concerns about the safeguards in place in such cases.<sup>48</sup> In turn, **Latvia** reportedly prevented 4,475 entries into its territory between early August 2021 and early January 2022.<sup>49</sup> These specifically occurred in the context of a state of emergency adopted by governmental decree on 10 August 2021, which provided for changes to rules on entry and asylum at the border with Belarus that are contrary to the right to apply for asylum and the prohibition of refoulement, as pointed out by UNHCR.<sup>50</sup> The state of emergency has been prolonged until 10 May 2022.

Notwithstanding the European Court of Human Rights' findings in *N.D. and N.T. v. Spain* – discussed in chapter 2 and which did not deal with Article 3 violations – concerns about **Spain's** practices of returning persons to Morocco are long-standing and remain acute, including as regards the lack of appropriate safeguards against refoulement in the legislation regulating so-called 'hot returns'.<sup>51</sup> This particularly pertains to hot returns at its enclaves in Ceuta and Melilla to Morocco, which involve apprehending people, including minors,<sup>52</sup> who have managed to climb the border fences and immediately returning them to Morocco.<sup>53</sup> Hot returns are also reported at Spain's sea border with Morocco, by intercepting boats and transferring them to the Moroccan navy.<sup>54</sup>

The Commissioner has repeatedly expressed concern about the situation in the Central Mediterranean. While some incidents of pushbacks are sporadically still reported, practices of concern mainly take the form of pullbacks by Libya, which are supported in various ways by different member states, notably **Italy** and **Malta**.<sup>55</sup> According to data from the International Organisation for Migration (IOM), in total, 32,425 people were intercepted and returned to Libya in the Central Mediterranean in 2021,<sup>56</sup> exposing them to serious human rights violations. This represents a threefold increase as compared with the previous year. Despite repeated calls by the Commissioner and numerous other international bodies to end

support to Libya that would enable interceptions and returns of this kind, such support has continued unabated. Since early 2020, there have also been reports of pushbacks by sea from **Cyprus**, prompting an intervention by the Commissioner.<sup>57</sup> People, many of them Syrians, were reportedly prevented from disembarking and returned to Lebanon or Turkey.<sup>58</sup>

There have been numerous and consistent allegations of pushbacks from **Greece** to Turkey for several years now, with the Commissioner joining many other international bodies and civil society in calling on the Greek government to put an immediate end to this practice, which is also frequently accompanied by allegations of violence.<sup>59</sup> Such pushbacks have notably been reported at Greece's land border with Turkey (across the Evros river). In addition, reports of pushbacks across the Aegean Sea have also proliferated, featuring consistent allegations of persons being left adrift at sea in life rafts, potentially putting their lives at risk.<sup>60</sup> **Bulgaria** has also been reported as carrying out pushbacks at its border with Turkey. Reported incidents involved non-admission at border crossing points and summary returns following apprehension within Bulgarian territory. Besides reported pushbacks from Bulgaria to Turkey, similar incidents have been documented at Bulgaria's border with Greece in relation to people who have entered Greece from Turkey.<sup>61</sup> Allegations of pushbacks and violence at **Turkey's** border with Syria are also long standing, including allegations of shooting at persons trying to cross the border.<sup>62</sup> More recent reports also raise concerns about Afghan asylum seekers being pushed back to Iran.<sup>63</sup>

## **Observations**

The above summary shows that reports of human rights violations such as denial of asylum, collective expulsions and ill-treatment associated with pushbacks pertain to at least around half of Council of Europe member states, sometimes covering multiple borders of a particular state. It must be reiterated that the summary is not exhaustive, and it covers only a particular period of time on the basis of readily available reports. It can, however, be assumed that even more member states may be involved in violations, as certain situations may go unreported due to these happening in inaccessible areas, or because of difficulties that national human rights structures, NGOs or international organisations may encounter in collecting evidence. Additionally, some member states may play a particular role as recipients of people pushed back from their neighbouring countries, which may involve their active co-operation. A number of member states are both alleged perpetrators of pushbacks and recipients of persons pushed back by others. In some regions, like the Western Balkans, reports cover chain pushbacks or pushbacks in various directions. While some of the reports

only deal with specific incidents, many of them relate to long-standing and established practices, which were also recorded prior to 2018. This chapter has further shown that pushbacks and related violations are not only widespread geographically, but that they also affect very large numbers of refugees, asylum seekers and migrants travelling to or within the Council of Europe area. Precise and comprehensive figures on this do not exist, but some of the reports discussed above – based either on estimates or official figures – show that in some member states tens of thousands of persons may be affected each year. Extrapolated to the entire Council of Europe area, the scale at which human rights violations against persons crossing borders are occurring is truly alarming.

Overall, then, a picture emerges of pushbacks as extremely widespread. Worryingly, whereas in some member states incidents of violence are reported occasionally, in others the use of violence is an acute and systemic feature of pushbacks. Beyond highlighting in which specific member states concerns about pushbacks have arisen, this chapter also suggests that the phenomenon is part of a complex dynamic between member states, and must be regarded as a pan-European problem. This therefore does not only necessitate action by individual countries, but by all Council of Europe member states collectively too.

## Chapter 2

# **Upholding legal obligations towards asylum seekers and migrants crossing borders**

---

As mentioned in the introduction, the current context in which pushbacks are proliferating is one of uncertainty about the legal obligations involved, combined with attempts to reinterpret or reframe those obligations (including arguably deliberate misinterpretations thereof) and failures to uphold clearly settled principles. Pushbacks violate a number of rights laid down in the European Convention on Human Rights (ECHR) and other relevant international instruments. In order for pushbacks to cease, therefore, member states should implement their obligations in good faith and avoid any misrepresentations of these obligations.

### ***The scope of state responsibilities in border situations***

As discussed in the introduction, member states have increasingly sought to distance themselves from their legal obligations, including by arguing that certain situations related to (attempted) border crossings or persons seeking entry fall outside their responsibilities. For example, states sometimes argue that border areas, in particular so-called transit zones, do not fall within their jurisdiction. According to the European Court of Human Rights, however, refusal of entry at the border triggers the state's jurisdiction.<sup>64</sup> Nor will states be able to avoid exercising their jurisdiction simply by erecting fences. In the *N.D. and N.T.* judgment, for example, the Grand Chamber of the Court rejected arguments that actions by Spain in relation to the apprehension of persons trying to climb the border fence would somehow fall outside its jurisdiction.<sup>65</sup> Even extraterritorial operations such as interceptions on the high seas may constitute an exercise of jurisdiction by the state if effective control has been established.<sup>66</sup> The human rights obligations discussed below generally apply, therefore, to refusal of entry at the border and interception outside of the state's territory, provided the persons concerned were under the effective control of that state.

A related argument sometimes advanced by states is that these obligations only apply to the removal of persons resident within their territory. The Court rejected that line of argumentation, however. According to the Court, the term “expulsion” should be understood in the generic meaning in current use (“to drive away from a place”), as referring to any forcible removal of a migrant from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time they have spent in the territory, the location in which they were apprehended, their status as a migrant or an asylum-seeker and their conduct when crossing the border.<sup>67</sup>

### ***The right to life and the prohibition of torture or inhuman or degrading treatment (Articles 2 and 3 ECHR)***

The protection of the right to life, under Article 2 ECHR, and the prohibition of torture or inhuman or degrading treatment or punishment, under Article 3 ECHR, provide the cornerstones of any human rights-compliant response to border crossings. The fundamental nature of these obligations is clear from the fact that, under Article 15 ECHR, Articles 2 and 3 cannot be derogated from even in time of public emergency. This means that, even in emergency situations governments must uphold their obligations in this respect. It also means that severe challenges faced by member states, including when large numbers of asylum seekers and migrants arrive, or where public health concerns are at play, cannot justify responses that would run counter to their obligations under the ECHR.<sup>68</sup> All persons are entitled to protection of these rights, irrespective of their conduct,<sup>69</sup> meaning that even if a person has crossed a border in an irregular manner, he or she cannot be deprived of that protection. Furthermore, states’ obligations under these provisions of the ECHR cannot be affected by, for example, claims related to existing readmission agreements or other co-operation arrangements, or the existence of domestic<sup>70</sup> or even supranational laws (such as EU or Schengen rules<sup>71</sup>). In all circumstances, member states are bound to implement their obligations fully in line with Articles 2 and 3 ECHR.

When engaging in pushbacks, and thus returning people across borders without any individual assessment of their case, member states run a clear risk of violating the principle of non-refoulement. In addition to the ECHR, this principle is firmly embedded in international instruments, notably Article 33 of the Refugee Convention, which prohibits states from returning refugees (including asylum seekers) to a place where they would risk persecution.<sup>72</sup> The European Court of Human Rights’ case law clarifies that non-refoulement obligations would relate to all situations in which return could violate the right to life or could result in a real risk of being subjected to torture or inhuman or degrading treatment or punishment.<sup>73</sup>

Accordingly, Council of Europe member states may not send any person to a place where their life would be in danger or they would risk being subjected to torture or ill-treatment.

The principle of non-refoulement also encompasses indirect refoulement. According to the Court, removal to an intermediary country does not affect the responsibility of the sending state with regard to its duty not to deport the person if substantial grounds have been shown for believing that such action would expose them, directly (in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3. Removal to a third country must be preceded by thorough examination of the question of whether the person will have access to an adequate asylum procedure in the receiving third country and whether this procedure affords sufficient guarantees to avoid a person being removed, directly or indirectly, to their country of origin without a proper evaluation of the risks they face from the standpoint of Article 3 of the ECHR.<sup>74</sup>

Issues in relation to Articles 2 and 3 do not, however, arise only in relation to the place to which people are returned and whether this involves the risk of (direct or indirect) refoulement. The way in which member states carry out pushbacks may also jeopardise the right to be free from torture or inhuman or degrading treatment and even the right to life. Removals from a state's territory may sometimes involve the use of force by law enforcement officers. To establish whether any action involving force can be justified under Article 2 or Article 3, the Court uses a strict proportionality and necessity test. Even if the use of force was justified for law enforcement purposes, it will violate Article 3 if the degree of force was excessive.<sup>75</sup> As noted in chapter 1, however, many situations have been reported where violence is routinely used and the treatment of refugees, asylum seekers or migrants appears completely unconnected to any action necessary or appropriate in the context of border control operations. Beatings, humiliation, sexual violence, stripping people naked or taking their shoes clearly all raise acute issues under Article 3. Furthermore, practices exposing people to risks to their lives have also been reported in various situations, including making people cross borders in unsafe places (such as wading through rivers or through areas known to be covered by landmines) or abandoning them at sea. Knowingly leaving persons pushed back in a humanitarian emergency likewise may result in risks of violating both Articles 2 and 3 ECHR.<sup>76</sup>

Whenever Article 2 or Article 3 is violated, positive obligations under these provisions mean that states must carry out effective investigations.<sup>77</sup> The essential purpose of investigations being to ensure accountability for death or ill-treatment, they should be capable of establishing the facts (particularly whether the force used was justifiable) and the identification

and punishment of those responsible.<sup>78</sup> Positive obligations under Articles 2 and 3 also include, in combination with Article 13, compensation for the victims or their next of kin.<sup>79</sup> As discussed in chapter 3, accountability mechanisms require an effective investigation into alleged violations. Failure to carry out investigations, including establishing responsibility for human rights violations, imposing sanctions for the wrongdoers, and providing for redress for victims, may thus violate Article 2 or 3, in combination with Article 13.

### ***The prohibition of collective expulsion (Article 4 of Protocol No. 4 ECHR)***

Article 4 of Protocol 4 ECHR prohibits collective expulsions, understood as “any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”<sup>80</sup> While Protocol 4 ECHR has not been ratified by some member states,<sup>81</sup> similar obligations to refrain from collective expulsions also arise out of Article 13 of the International Covenant on Civil and Political Rights.<sup>82</sup> EU member states are likewise prohibited from carrying out collective expulsions under Article 19(1) of the EU Charter.

The prohibition of collective expulsion requires that states put in place sufficient guarantees ensuring that the individual circumstances of each case are the subject of a detailed examination.<sup>83</sup> Each person should be subjected to an identification procedure<sup>84</sup> and have a genuine and effective opportunity to submit reasons against their return and to have those arguments individually and appropriately examined.<sup>85</sup> Member states’ personnel charged with border control should be adequately trained to conduct individual interviews and be assisted by interpreters and legal advisers.<sup>86</sup>

The immediate returns of persons associated with pushbacks prevent them from raising arguments against their expulsion in line with the safeguards set out above, and they make it impossible for the authorities to assess these arguments in an individualised manner. Pushbacks will therefore normally violate the prohibition of collective expulsions. In *N.D. and N.T. v. Spain*, however, the Court set out criteria that may exempt the state from carrying out an individual examination of a person’s objections to being expelled, as a result of their conduct. In that case, the Grand Chamber held that the applicants had placed themselves in an unlawful situation when they deliberately tried to scale the border fence surrounding the Spanish enclave of Melilla on the North African Coast, as part of a large group and at an unauthorised location, taking advantage of their large numbers and

using force, which created a clearly disruptive situation, difficult to control and endangering public safety. As such, they had chosen not to use legal procedures to enter Spain lawfully, meaning that the lack of an individualised procedure was the consequence of the applicants' own conduct.<sup>87</sup>

The ruling, applauded by some states, risks being interpreted and applied as a general license to forego individual identification in cases of unlawful border crossings. A careful reading of the Court's reasoning, however, militates against its wide application.<sup>88</sup> Sea crossings, for example, would seem to fall outside the scope of the judgment altogether, as the Court has not sought to adjust its case law with regard to asylum seekers and migrants arriving by or intercepted at sea. The need to be careful not to apply too widely the Court's findings is evident, moreover, from the fact that the Court has since delivered a number of judgments where violations of the prohibition of collective expulsion were found,<sup>89</sup> including in cases where the respondent state suggested that the '*N.D. and N.T.* exception' should apply. In this regard, of the criteria set out in *N.D. and N.T.*, the Court seems to attach particular importance to applicants' genuine and effective access to means of legal entry, in particular border procedures (alongside the possibility to apply for a visa or other authorisations at a consulate).<sup>90</sup> Such access must go beyond theoretical possibilities. The Court has in several cases found that applicants were denied an opportunity to file asylum claims even when they presented themselves at official border crossing points.<sup>91</sup> Yet even where an attempt was made to cross a border irregularly while circumventing official crossing points, the Court took the actual possibility of applying for lawful entry into account.<sup>92</sup> In a case against Croatia, in which the Court was unable to establish whether the applicants had had genuine and effective access to the territory, including for the purpose of claiming asylum, it did not proceed to examine the question of individual culpability for not having had an individual assessment and simply found a violation of the prohibition of collective expulsion.<sup>93</sup>

Conversely, where genuine and effective access to means of legal entry is deemed to exist but the applicant did not make use of it, the Court will consider whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible.<sup>94</sup> All this will require a detailed consideration of the specific situation at the border in question as well as the circumstances in which the return took place. These situations differ considerably across Europe, and the individual actions of persons trying to enter will also differ. It should be noted that member states are increasingly quick to argue that arrivals at their borders constitute an 'emergency', even when the numbers arriving are manageable and effective solutions, including by making use of assistance provided by other member states, exist. Member states should be particularly careful here

about suggesting that unexpected or increased arrivals would constitute a “clearly disruptive situation which is difficult to control and endangers public safety”, within the meaning of the *N.D. and N.T.* judgment. Furthermore, in the increasingly complex context at European borders, including in view of concerns about the ‘instrumentalisation’ of movements,<sup>95</sup> assumptions about the extent to which actions by persons irregularly crossing borders can be appropriately considered culpable conduct may have to be re-examined, as such crossings may also be the result of manipulation or even force by others, including the state from which they cross.<sup>96</sup>

Beyond the issues mentioned above, it is crucial for member states to note that the *N.D. and N.T.* case concerns the examination of criteria regarding collective expulsion in a situation in which Article 3 issues were already declared inadmissible at the chamber level. Where an arguable claim of the risk of refoulement is presented, however, expulsion cases will enjoy the protection specifically afforded by Articles 2 and 3 too.<sup>97</sup> This would at any rate require an individual examination of the objections to return, which cannot be circumvented on the basis of circumstances such as individual conduct. It bears stressing that pushbacks would fundamentally deprive persons from putting forward such claims, and would thus create a high risk of violating the principle of non-refoulement.

How each of these elements plays out will depend on the specific situation at each border, and will differ, furthermore, according to the specific actions of the individuals trying to enter. An automatic and general application of the exception to the requirement to carry out an individual assessment in all cases in which persons try to enter irregularly does not seem tenable therefore in view of the assessment made by the Court in *N.D. and N.T.* and subsequent cases.

### ***The right to an effective remedy (Article 13 ECHR)***

By preventing persons from submitting arguments against their expulsion, pushbacks also violate the right to an effective remedy under Article 13 of the ECHR. The prohibition of refoulement under Article 2 or 3 in conjunction with Article 13 ECHR obliges states to provide effective guarantees to protect the applicant against refoulement.<sup>98</sup> Remedies must be accessible in practice and not hindered by the acts or omissions of states authorities.<sup>99</sup> Hence, anyone subject to a removal measure whose consequences are potentially irreversible has the right to obtain sufficient information in order to be able to gain effective access to the relevant procedures and to substantiate their complaints.<sup>100</sup> Crucially, given the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13

imperatively requires that the person concerned have access to a remedy with automatic suspensive effect.<sup>101</sup>

### ***Other rights potentially affected during pushbacks***

Pushbacks may affect other rights too, such as the right to liberty, which is protected under Article 5 ECHR. This can be the case, for example, when persons are informally detained in vehicles or facilities, prior to the person's removal.<sup>102</sup> Such practice will often violate the right to liberty under Article 5 of the ECHR because it is not imposed in accordance with a procedure prescribed by law, being itself sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness.<sup>103</sup> Although states would often claim that the impugned measure does not amount to detention, the Court's assessment goes beyond interpretation of domestic law. To distinguish detention from a restriction on the person's freedom of movement (which is itself protected under Article 2 of Protocol 4 ECHR), the Court examines in a cumulative manner restrictions imposed, such as the type of measure, its duration, effects and manner of implementation.<sup>104</sup> As the Committee on the Prevention of Torture (CPT) has highlighted, irrespective of the terminology used by domestic authorities to describe the act of holding persons against their will, including in a police van for instance, the reality of their situation is that they are deprived of their liberty and they must be accorded the fundamental safeguards against ill-treatment commensurate with that status.<sup>105</sup>

Because they can lead to separation of families,<sup>106</sup> pushbacks may also affect the right to family life under Article 8 of the ECHR. They may further impact on states' obligations under the UN Convention on the Rights of the Child, including in view of the special obligation to give primary consideration to the best interests of the child in all their actions under Article 3 of that Convention. Also when, before being pushed back, people have their belongings (such as mobile phones, clothes, footwear, money, and identity and property documents) confiscated,<sup>107</sup> issues in relation to the right to protection of property under Article 1 of Protocol 1 of ECHR may arise.

### ***Individual processing and assessments: a key safeguard for upholding human rights***

The discussion above shows that processing and assessments in each individual case where the question of expulsion may arise remain crucial safeguards for protecting human rights. Individual processing and assessments will be required in all but the most exceptional cases in order for a state to comply with the prohibition of collective expulsions. Not

carrying out such an individual assessment will also lead to acute risks of member states violating their non-refoulement obligations. Whilst these in theory only arise in the case of an arguable claim, in practice states cannot know whether they are pushing people back to danger if they do not give them an opportunity to present their case. Furthermore, such a lack of individual processing and examination also deprives them of effective remedies in relation to the various violations discussed above.

Member states also cannot simply forego such individual examinations because they have rules requiring asylum applications to be submitted only at specific places, such as border crossing points.<sup>108</sup> While such a requirement, in general, may be legitimate, it cannot override member states' obligations under Articles 2 and 3, nor does such a requirement automatically justify foregoing the safeguards inherent in the prohibition of collective expulsions. In practice, there are simple steps that member states can take to ensure that the rights of refugees, asylum seekers and migrants are effectively protected. For example, they should issue instructions to border guards to make sure that anyone found irregularly entering or trying to enter the country is brought to a place where they can be appropriately and formally processed, including filing an asylum claim or otherwise putting forward objections to being returned. This is becoming all the more important as certain member states have already instituted, or may in the future establish, requirements that any such claims are to be presented only at specific places near borders or at specific border crossing points. If states are to comply with their obligations, however, such policies must not lead to persons being pushed back across the border without an individual assessment when they have not crossed or presented themselves at such places.<sup>109</sup> The logical solution would be to transport them to the appropriate place for processing, across the territory of the member state where they are found.

## Chapter 3

# Enhancing transparency, monitoring, and accountability

---

In order to effectively prevent and tackle pushbacks in practice, member states should enhance transparency of border practices and accountability for any violations. This includes ensuring that effective, independent national monitoring mechanisms are in place. That may mean strengthening existing mechanisms or working to establish new ones. Member states should also ensure that activities by NGOs and the media that contribute to documenting pushbacks are possible and that barriers to their work are lifted. In addition to monitoring, effectively addressing pushbacks also requires enhancing accountability structures, so that those who have been affected by them can obtain redress and those ordering pushbacks or carrying them out are held responsible.

### ***Monitoring: a crucial instrument for identifying and preventing pushbacks***

The very first aim of border monitoring is to gather and verify information on human rights violations at the borders.<sup>110</sup> Via their monitoring activities, independent bodies are able to establish whether member states are meeting their human rights obligations. By shedding light on human rights violations, independent border monitoring is a key preventive measure that reduces the risk of pushbacks and violence against asylum seekers and migrants.<sup>111</sup> It is also beneficial for states as it provides data on border management activities and may thus strengthen states' accountability and public trust.<sup>112</sup> To show their commitment to eradicating pushbacks, member states should ensure the proper functioning of independent border monitoring.

### ***Effective monitoring: key principles***

Both strengthening existing systems and deploying new initiatives should be guided by a number of key principles. These have been developed by

various expert international bodies, and several common points from their guidance are set out below.<sup>113</sup>

First of all, in order for monitoring to be effective in recording violations, member states should ensure that the bodies in charge of monitoring have a broad mandate. Monitors should be able to carry out unannounced visits and be granted unimpeded access to places, people, records and files.<sup>114</sup> Monitoring should cover all border management activities, especially when people are apprehended while crossing the border. Monitoring bodies should be allowed to be present as an independent observer during apprehension operations at the border and hear witnesses and alleged victims. Sufficient resources are needed to allow visits to border areas on a regular basis.

Secondly, monitoring should be free from any institutional connection with the ministry or other authorities responsible for policing the borders and involve independent organisations, including National Human Rights Institutions (NHRIs), Ombudsman institutions and civil society. To ensure their independence and autonomy, monitoring arrangements should be afforded adequate capacity, human resources and financial and operational autonomy.

Thirdly, cross-border co-operation is essential for effective monitoring because victims of pushbacks frequently find themselves on the other side of the border. The monitoring bodies should be able to collect and act on information received from individuals and liaise with international organisations and other relevant stakeholders who find themselves outside the state's territory.

Fourthly, monitoring is not an end in itself but part of a system of human rights accountability at the borders.<sup>115</sup> Public reporting is crucial for accountability and public scrutiny. To contribute to accountability for border violations, monitoring bodies should be allowed to submit periodic and ad hoc visit reports with findings and recommendations to the competent authorities and to report on the follow-up on those recommendations by those authorities. They should also be entitled to make referrals to the national prosecution authorities if they discover violations. In turn, member states should co-operate with the monitoring bodies, by responding to the findings and recommendations.

### ***Supporting and strengthening existing monitoring activities by national human rights structures***

In many Council of Europe member states, national human rights structures such as NHRIs, Ombudsman institutions, National Preventive Mechanisms

(NPMs) already carry out border monitoring activities. For instance, based on their broad human rights monitoring powers, such human rights structures are able to monitor crossing points and other places at the borders. They often use the information collected to inform their recommendations to and inquiries with state authorities. They also assist migrants at the borders and support and co-operate with NGOs active at the borders.

Too often, however, monitoring possibilities by national human rights structures remain limited due to lack of resources and capacity to be in remote border situations, limits on their mandates and lack of co-operation from authorities. When such bodies have reported on pushbacks, in many cases there has not been any follow-up by the authorities to address the documented human rights violations. It is therefore crucial that member states consider whether existing arrangements fully meet the key principles set out above. And if they do not, that they take action to bring the arrangements into line with those principles.

Many good examples of the way in which NHRIs have contributed to strengthening transparency and accountability at borders have been collected by the European Network of National Human Rights Institutions (ENNHRI),<sup>116</sup> which itself is also doing commendable work in enhancing the capacity and effectiveness of such institutions in carrying out these tasks. Institutions like the Spanish Defensor del Pueblo<sup>117</sup> or the Croatian Ombudsperson – the latter also in the face of considerable difficulties as regards co-operation by the state<sup>118</sup> – have been at the forefront of documenting and challenging pushbacks for years. During her visit in November 2021, the Commissioner was able to witness the extraordinary engagement of the Polish Ombudsman's office, together with civil society partners, to make immediate interventions to stop pushbacks from happening.<sup>119</sup> To improve data collection on pushbacks, the Greek National Commission for Human Rights (GNCHR), together with NGOs, established a Mechanism for Recording Incidents of Informal Returns (MRIIFR), in order to monitor, record and raise awareness about pushback practices.<sup>120</sup> Many other human rights structures do crucial work to address both emerging situations and structural shortcomings on a daily basis.

At the same time, there are national human rights structures with a mandate to carry out monitoring relevant to the issue of pushbacks and the related human rights violations that may not be making full use of their mandate and the practical opportunities open to them. Some bodies may be reluctant to get involved in this issue, because it may be considered politically sensitive. Again, this illustrates the importance of member states strengthening their roles and facilitating their work, including by ensuring constructive co-operation. It also highlights the need for the international community to fully support national human rights structures carrying out

work in relation to pushbacks, in particular those which may find themselves under pressure from their own governments.

### ***Recognising civil society and the media as crucial partners in addressing pushbacks***

Monitoring in a broader sense is not only carried out by NHRIs, Ombudsman institutions and NPMs or by international bodies. NGOs or individual human rights defenders play a key role in recording and reporting on pushback incidents and addressing structural shortcomings in member states' laws, policies and practices.<sup>121</sup> They are often the first line of defence against human rights violations. Without their work carried out on the ground, neither the efforts of national human rights structures nor those of international bodies can be effective.

Rather than viewing them as crucial partners in addressing human rights violations, however, authorities in some member states have treated them with hostility and taken ever more steps to limit their work. In some cases, NGOs working on issues related to states' border practices have also faced deregistration or other administrative obstacles, or have even been subjected to criminal sanctions for carrying out their work. Harassment of, or even violence against, groups or individuals working with or reporting on refugees, asylum seekers and migrants have also become increasingly common, often fuelled by rhetoric from high-level officials and smear campaigns, and made possible by the lack of effective steps to tackle such actions, leading to a culture of impunity.

Council of Europe member states have committed to providing an enabling environment for human rights defenders. They have a duty to ensure that human rights defenders can operate in a safe and free environment, and building this includes providing for an appropriate legal framework, effectively and constructively co-operating with them in practice, and publicly recognising their important role in a democratic society.

The same is true for the work of the media. In many cases, journalists have brought to light serious human rights violations in border settings. While such media reporting has sometimes prompted action by state authorities, international organisations and NHRIs, including by investigating and establishing accountability, there is also a noticeable trend in some member states towards trying to limit the possibilities for journalists to do their work effectively. Some countries have imposed restrictions on access to border regions, or have put strict limits on freedom of information requests or other tools for making the right to receive and impart information effective. Some journalists working on issues related to refugees, asylum

seekers and migrants have been denied interviews, have been harassed, threatened or assaulted, had their equipment seized or have been expelled. Some journalists have also been prosecuted or detained for their reporting on state operations related to migration. All this is detrimental to the transparency that states must have in relation to their action.

If truly committed to tackling human rights violations in line with their commitments to enable human rights defenders to go about their work, and their obligations to protect media freedom, member states should consider civil society and the media as crucial sources of information and even partners in doing this effectively. They must take proactive steps to end all forms of harassment, whether through criminal law, administrative obstacles or other means, end hostile rhetoric and act decisively against any threats or violence against them.

### ***Co-operation with international bodies***

Different bodies within the Council of Europe, the United Nations and the European Union have their own mandates to carry out fact-finding or other monitoring of issues directly or indirectly related to the practice of pushbacks. With their international mandates, these bodies can lend additional strength to the monitoring of human rights violations at borders, complementing the key work by national human rights structures and civil society. As with national human rights structures, co-operation by national authorities with such bodies is crucial to ensure their effectiveness. Recent cases where such bodies have been prevented from accessing border regions, or granted only limited access to information, for example, are deeply damaging to the ability of such bodies to fulfil their mandates. Member states should thus make every effort to ensure that such bodies can carry out their work in line with their international commitments, and report on them accordingly. Where the publication of findings is generally dependent on the agreement of the member state, as in the case of the Committee for the Prevention of Torture, such consent should be given promptly and as a matter of course, to maximise transparency.

### ***Developing new mechanisms: a delicate balancing act***

Revelations of pushbacks in recent years have given a boost to discussions about establishing new monitoring mechanisms, which may have a positive impact on tackling pushbacks, but also raises questions as to the relationship with existing mechanisms in member states. For example, consistent concerns about pushbacks by Croatia have led to the establishment of a monitoring body there, although questions have been raised about how it would complement existing mechanisms, such as the Ombudsman

institution, and the extent to which the way this new mechanism meets the requirements for independent and effective monitoring.<sup>122</sup> A European Commission demand for a human rights monitoring mechanism in Greece has led to discussions about allocating this task to the National Transparency Authority, again apparently creating a parallel mechanism next to established and existing national human rights structures.<sup>123</sup> At EU level, the publication of the New Pact on Migration and Asylum has likewise provided further impetus for discussions about monitoring. Under the European Commission's proposal for a Screening Regulation, all EU member states would have to set up a border monitoring mechanism. This could potentially create a further opportunity for EU member states to ensure independent border monitoring.

To ensure both effectiveness and independence, any new mechanisms set up (whether as a national initiative or driven by supranational rules) should be based on the key principles already highlighted above, including as regards the scope of the mandate of such mechanisms – covering all border situations, especially when people are apprehended while crossing the border –, their powers, and the adequacy of their staffing and funding. Importantly, where independent and effective structures are already in place, these could provide a platform on which such new mechanisms can be built, or with which they can be integrated. When new mechanisms are developed alongside existing ones, it is particularly crucial that any new initiatives do not displace or sideline the activities of independent national human rights structures or of civil society, but rather help strengthen these and work in full complementarity.<sup>124</sup> What the best way forward is will depend on the specific situation in each member state, but independence and the ability to effectively monitor all relevant situations and contribute to transparency and accountability, in line with the key principles set out above, must be the guiding factor.

### ***Beyond monitoring: strengthening accountability mechanisms***

Strengthening monitoring is an important step, but is not sufficient in itself. Many of the deep-seated problems related to pushbacks and border violations cannot be 'monitored away'. As experience shows, pushbacks and violence against persons trying to cross borders are often carried out in such a way that they remain out of sight of anyone trying to monitor. Furthermore, while monitoring has a preventive function, there needs to be a clear framework for action when violations do nevertheless occur. Such action can and must result from the outcomes of monitoring exercises, but cannot depend solely on them. In addition to strengthening monitoring, therefore, creating more robust accountability mechanisms must be a key

focus in efforts to combat pushbacks. NHRIs have documented existing gaps in accountability, which include a lack of willingness to investigate incidents, or even attempts to hide and deny them, the failure to provide information and legal aid to migrants at the borders to access justice for human rights violations they suffered, and a lack of implementation of the recommendations made by monitoring bodies which could help address structural problems.<sup>125</sup>

As noted in chapter 2, improving accountability includes ensuring that obligations to carry out effective investigations in the case of alleged violations of Articles 2 and 3 ECHR are fully met. These should not only focus on specific incidents, but also follow up on wider, systematic issues that may be revealed by such incidents, including in relation to orders or instructions issued to staff carrying out pushbacks and the wider legal and policy framework. It also means reassessing whether independent complaints and oversight mechanisms in police and border guard structures exist and are fully functional as regards the actions of authorities carrying out border control activities. Member states should also foster a culture of respect for human rights among law enforcement authorities at borders, including through training and clear instructions.

Access to remedies must likewise be guaranteed. This requires further steps to ensure not only that those intercepted in relation to border crossings have the opportunity to submit arguments against their return and lodge appeals against decisions, but also that the basic preconditions for doing so are met, such as access to interpretation and to legal assistance. A particular point of emphasis should be ensuring that access to remedies, including laying claims in courts, can be done effectively across borders, so that those who have become victims of pushbacks and find themselves on the other side of the border of the state that allegedly carried them out are not deprived of opportunities to seek justice.

As such, improving accountability mechanisms must go hand in hand with improving monitoring and reporting. Only concerted efforts in both interconnected areas can ensure that human rights violations occurring in the context of pushbacks are properly addressed.



## Chapter 4

# **A shared problem: all member states must take responsibility for ending pushbacks**

---

The chapters above looked at measures that can and must be taken by and within individual Council of Europe member states. In order to tackle pushbacks effectively, however, collective action by *all* Council of Europe member states is necessary, including states which are not themselves (accused of) engaging in this practice. While pushbacks are inherently a cross-border issue, all too often they are dealt with only in the context of the specific state carrying out such violations. While it is crucial to ensure national-level safeguards are in place, this must not detract from the fact that pushbacks are a European problem. For not only do such practices now appear to be commonplace across much of the Council of Europe area, but there is also an inter-state dynamic at work within Europe, which must be urgently addressed in order to successfully combat pushbacks.

In this respect, it is particularly noticeable that border control practices, including those that raise serious concerns from a human rights perspective, are increasingly justified not only as protecting countries' own national borders but also as serving a common interest, namely the protection of European borders.<sup>126</sup> These practices are furthermore often framed as a way to prevent refugees, asylum seekers and migrants from travelling onward to other countries, especially traditional destination states. As the Commissioner has repeatedly noted, this is also taking place on the basis of a joint approach across the Council of Europe area that favours deterrence over protection.<sup>127</sup> All of this creates a powerful signal that a blind eye can be turned to pushbacks, as long as they fulfil this role effectively.

### ***Breaking the silence: a first step to addressing a pan-European problem***

A simple but nonetheless crucial step that member states should take is to speak out against pushbacks, both in general and when specific incidents

are reported in other member states. Council of Europe member states should call upon each other to uphold common standards, including in situations where they are faced with challenges such as the Covid-19 pandemic or an increase in the number of asylum seekers and migrants arriving.

Unfortunately, even this simple step is often lacking in the current context. While on some occasions member states have spoken out against and condemned measures adopted by their peers,<sup>128</sup> in most cases such steps have been met with silence. In the light of the growing number of reports of pushbacks and human rights violations at borders, silence by high-level officials of member states will increasingly be seen as condoning such practices.<sup>129</sup>

The problem is further exacerbated when member states' officials appear to not only ignore such practices but also explicitly support them.<sup>130</sup> In recent years, there have been several occasions, for example, when high-level government officials visited member states against which serious allegations of pushbacks had been made, and yet appear to have praised border control practices, while human rights concerns remained unaddressed. In this way, European governments legitimise actions that not only violate the human rights and dignity of the people pushed back, but also undermine the values and principles upon which Europe is built.<sup>131</sup>

The need to speak out also relates to the public discussion more broadly, which is all too often characterised by fear-mongering and stigmatising or even racist and dehumanising language against refugees, asylum seekers and migrants. Member states have a joint responsibility to not only stand up against such abuse, but also to find a common, level-headed way to debate issues and solutions which actually lead to human rights-oriented policies and public acceptance of such policies.

### ***Using multilateral platforms to tackle pushbacks***

The willingness of member states to hold each other directly accountable for violations is a powerful indicator of the seriousness with which they tackle this issue. Such opportunities to address pushbacks and call for mutual accountability will often arise in bilateral relations between member states. Additionally, member states have many opportunities to address this problem multilaterally, which are currently not fully utilised.<sup>132</sup>

In this respect, member states can and should step up their efforts to engage within the Council of Europe, including through the opportunities available to them in the Committee of Ministers. The Committee of Ministers plays an important role in addressing pushbacks through its supervision of the

execution of judgments delivered by the European Court of Human Rights as regards human rights violations in the context of pushbacks. These judgments address specific member states but many of the findings by the Court have wider implications for border control practices across the whole Council of Europe area. Pushing for the prompt and full implementation of judgments is thus crucial not only for upholding member states' fundamental obligation to abide by final judgments of the Court in cases to which they are parties, it also impacts on the effective protection of human rights of refugees, asylum seekers and migrants across Europe.

Decision-making within the European Union also has a particular importance for the protection of human rights of refugees, asylum seekers and migrants in Europe. This is the case because EU legislation and policies directly impact on its 27 members, which are all also member states of the Council of Europe. But the impact of asylum and migration-related policies at the EU-level also have distinct consequences for many Council of Europe member states which are not part of the EU, for example through co-operation on border control and readmission agreements and arrangements. Council of Europe member states which are also part of the European Union therefore have particularly ample opportunities to enhance Europe-wide transparency and accountability, to ensure that policies and legislation are human rights-compliant, and to prevent pushbacks. Apart from opposing proposals that raise concerns from the perspective of non-refoulement or other safeguards, member states also have the opportunity to push for positive changes, such as supporting a strong, independent and comprehensive monitoring mechanism as part of discussions under the EU Pact on Migration and Asylum. Other opportunities to improve safeguards against pushbacks also arise in the form of EU states' membership of the Frontex Management Board, where they should ensure that strategic decisions by the Agency are human rights-compliant and guarantee transparency and accountability of the Agency's activities.

The promotion of human rights-compliant border control practices, and the prevention of pushbacks, should also be central in the engagement of member states of the Council of Europe within the context of other regional or international organisations, including the United Nations, or any other multilateral platforms which may have an impact on this issue. Showing that European states are serious about tackling the widespread human rights violations associated with pushbacks is also important from a global perspective, as backsliding by European states on the protection of refugees, asylum seekers and migrants sends a particularly damaging signal to other countries across the globe – many of which face significantly larger challenges than do European ones – as to the extent to which to uphold refugee and human rights law.

## ***Making support for border control human rights-compliant***

Beyond political responsibility, co-operation on border control, when it leads to human rights violations, may also raise the issue of international legal responsibility.<sup>133</sup> As the Commissioner has noted previously, it is crucial that any support to other states in relation to migration control be subject to human rights safeguards, including carrying out human rights impact assessments, ensuring independent monitoring and ensuring that remedies are available for those negatively affected by such support.<sup>134</sup> Such safeguards should be implemented by member states individually, but also when they act collectively, including as regards decisions about funding for border control activities within other member states.

## ***Improving responsibility sharing to avoid a breeding ground for pushbacks***

The lack of solidarity and predictable responsibility sharing also needs to be considered as a factor contributing to the current escalation of pushbacks across Europe. While some forms of material support, especially in border management, are often readily provided by member states to each other, this has not been the case when it comes to the key issue of relieving pressure on states of first arrival. To show solidarity with and relieve pressure on first arrival states, member states should improve, for example, relocation.<sup>135</sup> While relocation efforts have been made between member states, these have often been slow to materialise, even in the face of urgent needs, and have generally been very limited in number.<sup>136</sup> Likewise, member states should participate in disembarkation and distribution efforts, which should involve the participation of as many countries as possible. Whilst coastal states have a responsibility to ensure effective co-ordination of search and rescue operations, including swift disembarkation of the rescued persons in a place of safety, this requires concerted efforts from other states as well.<sup>137</sup> In the Mediterranean, there is an urgent need to agree on a predictable system for swift disembarkation of rescued migrants and refugees, in full compliance with the protection of their human rights, as a factor in preventing pushbacks and related practices, such as pullbacks.<sup>138</sup>

Other ways of ensuring persons in first countries of arrival could move on to member states where they have ties, especially through family reunification, have often been marred by bureaucratic barriers or non-implementation of current mechanisms, such as between countries that are part of the Dublin system,<sup>139</sup> or the lack of any such mechanisms at all.<sup>140</sup> While this cannot be an excuse for engaging in pushbacks, such lack of responsibility sharing is clearly a factor in member states' actions in this respect.

## *Rethinking the common approach*

The system of human rights protection, including at borders, can only function if states collectively commit to implementing it in good faith. While the judiciary, parliamentarians (as addressed in chapter 5) and national and international human rights bodies all have a part to play, at its most fundamental, this is a system of states and between states. The willingness of Council of Europe member states to hold each other to account as peers for violations, especially ones as blatant as those currently being observed at many borders, is crucial in preserving this system.<sup>141</sup> This further requires member states collectively to rethink the basic tenets of their approach to refugees, asylum seekers and migrants, which must shift away from valuing, above all, the prevention of their arrival at almost any cost.



## Chapter 5

# Time for parliamentarians to stand up against pushbacks

---

Parliamentarians can play an important role in preventing pushbacks, in line with their wider role as guarantors of human rights, both as legislators and as those responsible for carrying out democratic oversight of government action.<sup>142</sup> Through various steps, elected representatives can help increase the transparency and accountability of migration control policies implemented by their governments.

### *Ensuring proper oversight of government action*

Firstly, parliamentarians have a crucial role to play in demanding full transparency of and accountability for their governments' actions.<sup>143</sup> They should use their powers to adequately scrutinise their governments' activities in the field of border management and refuse to adopt measures that violate the standards and values of the Council of Europe. For instance, when approving budgets for co-operation activities with other member states or third countries, parliaments should request a human rights impact assessment of the agreement and adequate monitoring of its implementation.<sup>144</sup> Parliamentarians are also particularly well placed to demand government reactions and explanations when instances of pushbacks are reported, or when national human rights structures, civil society or journalists come under attack for their work.

### *Upholding human rights in legislation*

Secondly, as legislators, parliamentarians should ensure that any laws or regulations fully comply with human rights standards. That notably includes not accepting laws or regulations that would allow, in law or practice, pushbacks or denial of access to asylum in any form. There is a growing tendency among states to seek to formalise their pushback measures in domestic law, which must be strenuously resisted by parliamentarians. Parliamentarians should also review whether any current laws or

regulations involve risks of leading to pushbacks, and amend these in line with international standards.

### ***Leading by example***

Thirdly, parliamentarians should be aware of their important role in the public debate. Fostering a responsible debate about issues related to asylum and migration is a key element in tackling abuses. As public representatives, parliamentarians help set the tone for debates on issues around asylum and migration. Parliamentarians should therefore avoid hostile rhetoric towards refugees, asylum seekers and migrants. Unfortunately, recent years have seen several cases in which parliamentarians have verbally attacked those who have tried to raise the problem of pushbacks, or have reinforced their governments' denials of the existence of such practices, even in the face of overwhelming evidence. Instead, parliamentarians should fully use their platform to insist on a human rights-compliant approach to border management, including an end to pushbacks, and to call out hostile rhetoric, including hate speech, against refugees, asylum seekers and migrants or those who assist them.

### ***Strengthening national human rights structures***

Fourthly, as discussed in chapter 3, National Human Rights Institutions, Ombudsman institutions or NPMs play a crucial role in carrying out border monitoring and enhancing accountability. To support these bodies in their work, parliamentarians should ensure that such bodies are vested with wide mandates, powers, capacities – including staffing and budget and safeguards of independence. Parliamentarians should also ensure that their governments co-operate fully with such bodies, by allowing the publication of reports from their monitoring activities and following up on their recommendations and findings.<sup>145</sup> In addition, parliamentarians should use their power to protect the monitoring bodies. In the event of any infringement of the independent bodies' work by the authorities, flagged up in their reports to parliament, the latter should take all the necessary measures to protect them and their mandate and ensure their independent status.

### ***Fact-finding, monitoring and inquiries***

Fifthly, parliamentarians may be able to rely on their own mandate to carry out fact-finding or monitoring visits to the borders and other activities aimed at uncovering the situation on the ground. The specific added value of parliamentarians in visiting immigration detention facilities has

already been explicitly recognised by the Parliamentary Assembly.<sup>146</sup> These activities can also be extended to border situations more broadly. In the light of the cross-border nature of pushbacks, parliamentarians of different member states could co-operate with each other to fully bring pushbacks to light. Parliamentarians can also make use of other powerful tools to establish the facts, including launching inquiries, which often allow them to call witnesses and compel evidence. Such a step would be particularly relevant when there are indications of systemic issues related to pushbacks and widespread human rights violations.

### ***Improving implementation of international judgments and recommendations***

Finally, parliamentarians should use their mandate to scrutinise the implementation of relevant judgments, decisions and recommendations by international bodies to ensure that their governments incorporate human rights safeguards into their migration management policies.<sup>147</sup> They can do so, for example, by insisting that governments respond to such outputs, and demanding periodic updates on implementation, which can then be discussed in parliament. In this context, parliamentarians in Council of Europe member states are particularly encouraged to use their powers to ensure that their governments act on the recommendations set out in this document.



## Endnotes

---

1. Council of Europe Commissioner for Human Rights (hereafter: Commissioner for Human Rights), *Pushbacks and border violence against refugees must end*, 19 June 2020.
2. Parliamentary Assembly of the Council of Europe (PACE), *Pushback Policies and Practice in Council of Europe Member States*, Doc. 14909, 8 June 2019, paragraph 14. PACE has since continued work on this issue, see the motion for a resolution, *Pushbacks on land and sea: illegal measures of migration management*, Doc. 15180, 10 November 2020.
3. The Parliamentary Assembly of the Council of Europe (PACE) refers to pushbacks as “refusals of entry and expulsions without any individual assessment of protection needs,” see PACE 2019, note 2 above, paragraph 1. Pushbacks have also been described as a situation “when a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country without assessing their individual circumstances on a case-by-case basis,” see EU Fundamental Rights Agency (FRA) and Council of Europe, *Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders*, March 2020, p. 4. In contrast to FRA, the UN Special Rapporteur on the Human Rights of Migrants (hereafter SRHRM) uses a definition which includes practices taking place not only within the state’s territory but also before the person has entered a state’s territory, see SRHRM, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, 12 May 2021, paragraph 36. The SRHRM describes pushbacks as “various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border,” see *Ibid.*, paragraph. 34.
4. Commissioner for Human Rights, *Hearing of the Grand Chamber of the European Court of Human Rights in the Cases N.D. and N.T. v. Spain, 26 September 2018: Oral Submission of the Commissioner for Human Rights*, September 26, 2018, p. 1-2.
5. Commissioner for Human Rights, *Third party intervention by the Council of Europe Commissioner for Human Rights: Applications No. 8675/15 and No.8697/15 N.D. v. Spain and N.T. v. Spain* paragraph 7.
6. UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights*, November 15, 2015, paragraph 2.2.1.
7. SRHRM 2021, note 3 above, paragraph 36.
8. The umbrella term “national human rights structures” is used in this paper to designate state-mandated bodies, which are independent from government and fulfil a human rights-related mandate, such as Ombudsman institutions, National Human Rights Institutions (NHRIs), Equality Bodies, and National Prevention Mechanisms (NPMs).
9. For overviews, see, for example, Refugee Rights Europe/End Pushbacks Partnership, *Pushbacks & Human Rights Violations at Europe’s Borders: State of Play in 2020*, July 2020;

Border Violence Monitoring Network, *Black Book of Pushbacks*, Vol. I and II, December 2020; Human Rights Watch, *Submission to the Special Rapporteur's Report on Pushback Practices and their Impact on the Human Rights of Migrants*, 1 February 2021; Amnesty International, *Europe: Pushback practices and their impact on the rights of migrants and refugees – Amnesty International Submission to the UN Special Rapporteur on the Human Rights of Migrants*, 10 February 2021; Protecting Rights at Borders (PRAB), *Pushing Back Responsibility: Rights Violations as a 'Welcome Treatment' at Europe's Borders*, April 2021; PRAB, *Doors Wide Shut: rights violations at borders re-confirmed, while the door for justice and the path to accountability remain closed*, July 2021.

10. SRHRM 2021, note 3 above; PACE 2019, note 2 above.
11. SRHRM 2021, note 3 above, paragraph 80; PIC, *Country Report: Slovenia*, AIDA/ECRE, 2021, p. 18-19; Cabinet of Ministers Republic of Latvia, "Government declares the state of emergency in Latvia's border area," *News*, 11 August 2021; Commissioner for Human Rights, *Letter to Prime Minister of Lithuania*, CommHR/DM/sf 030-2021, 10 August 2021. Commissioner for Human Rights, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights*, 19 November 2021; Commissioner for Human Rights, *New legislation perpetuates restrictions and obstacles to protection of human rights on Poland's eastern border*, 1 December 2021.
12. European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, applications 9214/80, 9473/81 and 9474/81, judgment of 28 May 1985, paragraph 59.
13. European Court of Human Rights, *N.D. and N.T. v. Spain*, applications 8675/15 and 8697/15, judgment [GC] of 13 February 2020, paragraph 170; *Hirsi Jamaa and Others v. Italy*, application 27765/09, judgment [GC] of 23 February 2012, paragraph 179; ECtHR, *Khlaifia and Others v. Italy*, application 16483/12, judgment [GC] of 15 December 2016, paragraph 241.
14. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above.
15. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, note 13 above.
16. Commissioner for Human Rights, *Lives Saved. Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean*, June 2019; Commissioner for Human Rights, *A Distress Call for Human Rights: The Widening Gap in Migrant Protection in the Mediterranean*, March 2021.
17. PACE 2019, note 2 above; SRHRM 2021, note 3 above. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above. See also FRA's *Quarterly Bulletins* and *monthly reports* by the Border Violence Monitoring Network (BVMN).
18. Commissioner for Human Rights, *Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, Paragraph 3, of the European Convention on Human Rights No. 18810/19, 18865/19 and 23495/19 S.B. v. Croatia, A.A. v. Croatia and A.B. v. Croatia*, CommDH(2020)33, 22 December 2020; Commissioner for Human Rights, *Croatian authorities must stop pushbacks and border violence, and end impunity*, 21 October 2020; Commissioner for Human Rights, *Letter to Prime Minister of Croatia*, CommHR/DM/sf 080-2018, 20 September 2018.
19. Committee on the Prevention of Torture (CPT), *Report to the Croatian Government on the Visit to Croatia Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 14 August 2020*, CPT/Inf (2021) 29, December 2021, paragraph 14; Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 39-42.

20. ECRE, *Balkan route: tens of thousands pushed back from Croatia, evidence of pushbacks and border violence presented to UN rights body, 'stonewalling of asylum seekers in Serbia airport'*, 22 October 2021.
21. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 43-48. N. Kovačević, *AIDA Country Report: Serbia*, AIDA/ECRE, March 2021, p. 24.
22. Commissioner for Human Rights, Hungary Should Address Many Interconnected Human Rights Protection Challenges Including Civil Society Space, Gender Equality, Refugee Protection and Independence of the Judiciary, 11 February, 2019; European Court of Human Rights, *Shahzad v. Hungary*, application 12625/17, judgment of 8 July 2021.
23. Court of Justice of the EU, C-808/18, Commission v. Hungary, judgment of 17 December 2020. The weekly statistics are available on the website of the Hungarian police. Also see Hungarian Helsinki Committee, "Hungary's legalization of push-backs in breach of EU law according to the Court of Justice of the European Union", 17 December 2020; SchengenVisaInfo, "Hungarian police to continue to protect borders & prevent illegal entries in 2022", 14 January 2022.
24. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 49-50. M. MacGregor, "Romania: Poor people's route to Europe?," *InfoMigrants*, 31 May 2019; JRS Romania, *AIDA Country Report: Romania*, AIDA/ECRE, April 2021.
25. 25,180 cases from Bosnia and Herzegovina, Croatia, Hungary and Romania, according to UNHCR (see Kovačević 2021, note 21 above, p. 24), but potentially many more in view of the police figures of pushbacks by Hungary set out above.
26. N. Rujevic, "Serbia: Court confirms illegal pushbacks into the EU," *DW*, 22 January 2021,
27. Kovačević 2021, note 21 above, p. 20-22.
28. Kovačević 2021, note 21 above, p. 24.
29. PIC 2021, note 11 above, p. 19-20. See also SRHRM 2021, note 3 above, paragraph 66.
30. STA, "Illegal migration down almost 40% in first ten months", 24 November 2021.
31. Asylkoordination Österreich, *AIDA Country Report: Austria*, AIDA/ECRE, 2021, p. 21-22.
32. Provincial Administrative Tribunal of Styria, 1 June 2021, LVwG 20.3-2725/2020-86. According to information provided to the Commissioner following her December 2021 visit to Austria, the Regional Police Directorate Styria (Landespolizeidirektion) filed an extraordinary appeal against this decision with the Supreme Administrative Court (Verwaltungsgerichtshof–VwGH). These proceedings are still pending. Asylkoordination Österreich, "Gericht bestätigt systematische Menschenrechtsverletzungen durch österreichische Polizei," *Press release*, 5 July 2021.
33. ASGI, *AIDA Country Report: Italy*, AIDA/ECRE, 2021, p. 25-26.
34. European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, application 16643/09, judgment of 21 October 2014.
35. ASGI 2021, note 33 above, p. 32-33.
36. *Ibid.*
37. OSAR, *AIDA Country Report: Switzerland*, AIDA/ECRE, 2021, p. 21-22.
38. Forum réfugiés-Cosi, *AIDA Country Report: France*, AIDA/ECRE, 2021, p. 26.
39. Refugee Rights Europe/ End Pushbacks Partnership 2020, note 9 above, p. 20.
40. Forum réfugiés-Cosi 2021, note 38 above, p. 26-30
41. *Guardian*, "UK and France sign deal to make Channel migrant crossings 'unviable'"

*the Guardian*, 18 November 2020; Joint Committee on Human Rights, *New powers to pushback and criminalise Channel crossings breach UK's human rights obligations*, JCHR finds, 1 December 2021.

42. European Court of Human Rights, *M.K. and Others v. Poland*, applications 40503/17, 42902/17 and 43643/17, judgment of 23 July 2020; *D.A. and Others v. Poland*, application 51246/17, judgment of 8 July 2021.
43. Commissioner for Human Rights, *Poland should take immediate action to protect the human rights of people stranded at its border with Belarus*, 25 August 2021; Council of Europe Commissioner for Human Rights, *Third party intervention before the European Court of Human Rights in R.A. and Others v. Poland (no. 42120/21)*, CommDH(2022)3, 27 January 2022, section I; on interim measures issued by the European Court of Human Rights, see *Requests for interim measures concerning the situation at the borders with Belarus*, press release ECHR 372 (2021), 6 December 2021.
44. Commissioner for Human Rights, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights*, 19 November 2021.
45. Commissioner for Human Rights, *Third party intervention in R.A. and Others v. Poland*, note 43 above.
46. European Court of Human Rights, *M.A. and others v. Lithuania*, application 59793/17, judgment of 11 December 2018.
47. Commissioner for Human Rights, *Letter to Prime Minister of Lithuania*, CommHR/DM/sf 030-2021, 10 August 2021. ECRE, "EU Eastern Borders: Poland Ignores Commission Pressure for Frontex Deployment, Eastern States Move to "Legalise" Pushbacks, Belarus Suspends Return Agreement," *News*, 8 October 2021.
48. Commissioner for Human Rights, *Letter to Prime Minister of Lithuania*, 10 August 2021; UNHCR, *Observations on draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207)*, 27 September 2021.
49. Eng.lsm.lv (Latvian Public Broadcasting), "This weekend 121 people tried to cross Latvia-Belarus border", 10 January 2022.
50. UNHCR, *Observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518)*, 13 October 2021.
51. Commissioner for Human Rights, *Letter to the Presidents of the Congress of Deputies and the Senate of Spain*, 20 November 2018; *Letter to the President of the Interior Committee of the Congress of Deputies and the Presidents of the Congress of Deputies and Senate of Spain*, 8 February 2022; UN Special Rapporteurs on the rights of migrants, on freedom of opinion and expression, on the situation of human rights defenders, and on torture and other inhuman or degrading treatment or punishment, *Communication to Spain*, AL ESP 3/2021, 14 April 2021, in particular its reference to the provision in the Citizens' Security Law sanctioning human rights defenders who take pictures of law enforcement officials and the chilling effect this has on the monitoring work borders.
52. See, for example, UN Committee on the Rights of the Child, *D.D. v. Spain*, communication 004/2016, views of 31 January 2019.
53. SRHRM 2021, note 3 above, paragraph 71. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 60-61. ACCEM, *AIDA Country Report: Spain*, AIDA/ECRE, March 2021, p. 20-38.
54. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 60-61.
55. Commissioner for Human Rights, *Third Party Intervention by the Council of Europe Commissioner for Human Rights: Application No. 21660/18 S.S. and Others v. Italy*, CommDH(2019)29, 15 November 2019), paragraph 13-15; Commissioner for Human

Rights, *A distress call for human rights*, note 16 above, p. 13-14; Commissioner for Human Rights, *Protecting Refugees in Europe: The ECHR and beyond*, June 22, 2020; PACE 2019, note 2 above paragraph 43; SRHRM 2021, note 3 above, paragraph 73. Two legal actions were filed to challenge pullbacks in the Mediterranean, namely *SDG v. Italy*, before the UN Human Rights Committee, and *S.S. v. Italy*, in front of the European Court of Human Rights, see Commissioner for Human Rights, *Letter to Minister of Foreign Affairs and International Cooperation of Italy*, CommHR/DM/sf 006-2020, 13 February 2020; Commissioner for Human Rights, *Commissioner Calls on the Italian Government to Suspend the Co-Operation Activities in Place with the Libyan Coast Guard That Impact on the Return of Persons Intercepted at Sea to Libya*, 31 January 2020. GLAN, "Legal action against Italy over coordination of Libyan Coast Guard pull-backs resulting in migrants"; 8 May 2018; Commissioner for Human Rights, *Letter to Prime Minister of Malta*, CommHR/DM/sf 013-2020, 5 May 2020; Amnesty International, *Malta: Waves of Impunity*, September 2020, p. 6; M. MacGregor, "81 migrants rescued, three dead as NGO claims Malta delayed rescue effort," *InfoMigrants*, 15 July 2021.

56. IOM, *IOM Libya Maritime Update*, 28 December 2021-01 January 2022.
57. Commissioner for Human Rights, *Letter to Minister of Interior of Cyprus*, CommHR/DM/sf 014-2021, 10 March 2021.
58. SRHRM 2021, note 3 above, paragraph 59; Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 70-71.
59. Commissioner for Human Rights, *Letter to Minister for Citizens' Protection, the Minister of Migration and Asylum, and the Minister of Shipping and Island Policy of Greece*, CommHR/DM/sf 019-2021, 3 May 2021; Commissioner for Human Rights, *Time to Immediately Act and to Address Humanitarian and Protection Needs of People Trapped between Turkey and Greece*, 3 March 2020.
60. CPT, *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020*, paragraph 53-60; SRHRM 2021, note 3 above, paragraph 55; B. McKernan, "Greece accused of 'shocking' illegal pushback against refugees at sea", *Guardian*, 26 April 2021; B. Secker, "Adrift in uncertain waters: Migrant pushbacks in the Aegean", *Politico EU*, 21 July 2021; Aegean Boat Report, "Small Children Left Drifting In Life Rafts In The Aegean Sea", 22 February 2021.
61. ECRE, "Bulgaria: Pushbacks Escalate as Government Discusses Reinforcements at Borders," *News*, 10 September 2021. Refugee Rights Europe/End Pushbacks Partnership 2020, note 9 above, p. 37-38.
62. ECRE, *AIDA Country Report: Turkey*, AIDA/ECRE, 2021; Human Rights Watch, "Turkey: mass deportations of Syrians: EU should raise issue, pledge aid at conference", 22 March 2018.
63. HRW, "Turkey: Soldiers Beat, Push Afghan Asylum Seekers Back to Iran," *News*, 15 October 2021,
64. European Court of Human Rights, *M.A. and Others v. Lithuania*, note 46 above, paragraph. 70; *M.K. and Others v. Poland*, note 42 above, paragraph. 129-132.
65. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraphs 187 and 190.
66. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, paragraph 180.
67. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 185; see also European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 243.

68. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 170: "Nevertheless, the Court has also stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto". Also see European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, paragraph 179; European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 241. Member states which are also EU member states do not have a carte blanche either to derogate from EU asylum law under national emergency measures, see ECRE, *Derogating From EU Asylum Law in the name of "emergencies": the legal limits under EU law*, Legal Note 6, June 2020.
69. European Court of Human Rights, *Chahal v. the United Kingdom*, 22414/93, judgment of 15 November 1996, paragraph 80-81.
70. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 171.
71. European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, note 34 above, paragraph 224; European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 241.
72. EU member states are also bound by this obligation under Article 19(2) of the EU Charter of Fundamental Rights and secondary legislation.
73. European Court of Human Rights, *M.A. and Others v. Lithuania*, note 46 above, paragraph 102.
74. European Court of Human Rights, *Ilias and Ahmed v. Hungary*, 47287/15, judgment [GC] of 21 November 2019, paragraph 129, 133, and 137; European Court of Human Rights, *M.K. and Others v. Poland*, note 44 above, paragraph 171 - 173; European Court of Human Rights, *D.A. and Others v. Poland*, note 44 above, paragraph 58-59; European Court of Human Rights, *M.A. and Others v. Lithuania*, note 48 above, paragraph 104.
75. European Court of Human Rights, *Shchukin and Others v. Cyprus*, 14030/03, (July 29, 2010), paragraph 93-94; European Court of Human Rights, *Muradova v. Azerbaijan*, 22684/05, (April 2, 2009), paragraph 133.
76. European Court of Human Rights, see *Requests for interim measures concerning the situation at the borders with Belarus*, press release ECHR 372 (2021), 6 December 2021; Commissioner for Human Rights, *Third party intervention in R.A. and Others v. Poland*, note 43 above.
77. See, in the specific context of pushbacks, the European Court of Human Rights' findings in *M.H. and Others v. Croatia*, application nos. 15670/18 and 43115/18, judgment of 18 November 2011, dealing, inter alia, with the death of a child who was hit by a train when pushed back with her family from Croatia to Serbia and being told to follow train tracks.
78. First, the authorities should act of their own motion once the matter has come to their attention, rather than depending on a complaint from the victim or their next of kin. Second, the investigation must be independent, which entails that persons in charge of it are independent from those involved in the events. Third, the investigation should be thorough, meaning that the authorities should make a serious attempt to find out what happened and the materials and conclusions of the investigation should be sufficiently accessible for the victims or their relatives. Finally, investigation should be expedient and, thus, comply with the requirements of promptness and reasonable expedition, see also FRA and Council of Europe, *European Standards on Legal Remedies, Complaints Mechanisms and Effective Investigations at Borders*, July 2021, p. 4-5; European Court of Human Rights, *Assenov and Others v. Bulgaria*, 24760/94, (October 28, 1998), paragraph 102-103.

79. European Court of Human Rights, *Nikolova and Velichkova v. Bulgaria*, 7888/03, (December 20, 2007), paragraph 62; European Court of Human Rights, *Ergi v. Turkey*, 23818/94, (July 28, 1998), paragraph 92.
80. European Court of Human Rights, *Conka v. Belgium*, 51564/99, (February 5, 2002), paragraph 59; European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 237.
81. Namely, Greece, Switzerland (both neither signed nor ratified), Turkey and the United Kingdom (both signed, but not ratified Protocol No. 4).
82. HRC, *General Comment No. 15: The Position of Aliens under the Covenant*, HRI/GEN/1/Rev.9 (Vol.I), (April 11, 1986), paragraph 10.
83. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, note 13 above, paragraph 185.
84. *Ibid.*, paragraph 185.
85. European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 248.
86. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, note 13 above, paragraph 185.
87. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 231.
88. ECRE, *Across Borders: The Impact of N.D. and N.T. v Spain in Europe*, Legal Note No. 10, (July 2021), paragraph 24-35.
89. European Court of Human Rights, *Moustahi v. France*, 9347/14, judgment of 25 June 2020; European Court of Human Rights, *M.K. and Others v. Poland*, note 42 above; European Court of Human Rights, *D.A. and Others v. Poland*, note 42 above; European Court of Human Rights, *Shahzad v. Hungary*, 12625/17, judgment of 8 July 2021; European Court of Human Rights, *M.H. and Others v. Croatia*, note 79 above.
90. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 212 and 223-228.
91. European Court of Human Rights, *M.K. and Others v. Poland*, note 44 above; European Court of Human Rights, *D.A. and Others v. Poland*, note 44 above.
92. European Court of Human Rights, *Shahzad v. Hungary*, note 22 above.
93. European Court of Human Rights, *M.H. and Others v. Croatia*, note 77 above, paragraph 301-304.
94. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above, paragraph 201.
95. PACE, *Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus*, Resolution 2404(2021), 30 September 2021.
96. Commissioner for Human Rights, *Third party intervention in R.A. and Others v. Poland*, note 43 above.
97. European Court of Human Rights, *N.D. and N.T. v. Spain*, note 13 above. The ruling clarifies that it does not put into question member states' non-refoulement obligations, see paragraph 201 and 232.
98. European Court of Human Rights, *M.S.S. v. Belgium and Greece*, 30696/09, judgment [GC] of 21 January 2011, paragraph 286. See generally, FRA/Council of Europe, note 3 above, p. 2-3.
99. European Court of Human Rights, *M.S.S. v. Belgium and Greece*, note 98 above, paragraph 290.
100. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, note 13 above, paragraph 204.

101. European Court of Human Rights, *M.S.S. v. Belgium and Greece*, note 98 above, paragraph 293.
102. CPT, *Report to the Greek Government*, note 60 above, paragraphs 54-55.
103. European Court of Human Rights, *Soldatenko v. Ukraine*, 2440/07, judgment of 23 October 2008, paragraph 110-111.
104. European Court of Human Rights, *Khlaifia and Others v. Italy*, note 13 above, paragraph 64.
105. CPT, Report to the Croatian Government, note 19 above, paragraph 14.
106. CPT, Report to the Greek Government, note 60 above, paragraph 56.
107. *Ibid.*, paragraph 53, 54, and 56.
108. Commissioner for Human Rights, *Third party intervention in R.A. and Others v. Poland* (no. 42120/21), note 43 above, paragraph 32.
109. In that regard the abovementioned legislative proposals recently published by the European Commission give rise to concerns as they allow the member states applying the emergency measure to merely inform the person of the measure applied, which leaves open the possibility of pushing them back first.
110. Greek National Commission for Human Rights and ENNHRI, *National Report on the Situation of Human Rights of Migrants at the Borders: Greece*, May 2021, p. 9.
111. Commissioner for Human Rights, *Letter to Mr Margaritis Schinas and Ms Ylva Johansson*, CommHR/DM/sf/ 009-2020, 9 March 2020. PACE 2019, note 2 above, paragraph 101. Independent border monitoring is a key activity that can increase human rights compliance during border governance operations, SRHRM 2021, note 3 above, paragraph 89.
112. UNHCR, OHCHR Europe Regional Office, and ENNHRI, *Ten Points to Guide the Establishment of an Independent and Effective National Border Monitoring Mechanism in Greece*, 9 September 2021.
113. Several bodies formulated various recommendations as to how monitoring should be, especially in the context of the European Commission proposal to set up the monitoring mechanism, see FRA, *Migration: Fundamental Rights Issues at Land Borders*, December 2020, p. 36; ENNHRI, *Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum*, March 2021, p. 5-7 and 10. PACE 2019, note 2 above, paragraph 101. CPT, *30th General Report of the CPT*, CPT/Inf (2021) 5, (May 2021), p. 15-16; UNHCR, OHCHR Europe Regional Office, ENNHRI, *Ten Points to Guide the Establishment of an Independent and Effective National Border Monitoring Mechanism in Greece*,. ECRE et al., *Turning Rhetoric into Reality: New Monitoring Mechanism at European Borders Should Ensure Fundamental Rights and Accountability*, November 2020. OHCHR Europe Regional Office and UNHCR, *Note on Joint Consultation on Independent National Monitoring Mechanisms Proposed in the EU Pact on Migration and Asylum*, 23 February 2021. ENNHRI, *The Human Rights of Migrants at Borders: Regional Report*, July 2021, p. 17 and 36.
114. On how crucial is the access by civil society and media to border zones, see Commissioner for Human Rights, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights*, 19 November 2021.
115. Commissioner for Human Rights, *Pushbacks and border violence against refugees must end*, 19 June 2020. Other statements and principles relating to accountability in the context of monitoring activities include ENNHRI, *Protecting Human Rights of Migrants*

- at the Borders: Evidence and Work of European National Human Rights Institutions*, January 2020, p. 12; ENNHRI, *Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum*, March 2021, p. 6-8 and 36-37. PACE 2019, note 3 above, paragraph 101; CPT, *30th General Report of the CPT*, note 115 above, p. 15. ECRE et al., *Turning Rhetoric into Reality: New Monitoring Mechanism at European Borders Should Ensure Fundamental Rights and Accountability*, November 2020; ECRE, *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612*, 2020, p. 37; UNHCR, OHCHR Europe Regional Office, ENNHRI, *Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece*; Greek National Commission for Human Rights, ENNHRI, *National Report on the situation of human rights of migrants at the borders: Greece*, p. 56.
116. ENNHRI, *Protecting human rights of migrants at the borders: Evidence and work of European National Human Rights Institutions*, March 2020.
  117. Defensor del Pueblo, visits to Ceuta and Melilla in June 2021; note on irregular migrants and expulsion (July 2021).
  118. Commissioner for Human Rights, *Croatian authorities must stop pushbacks and border violence, and end impunity*, 21 October 2020.
  119. Commissioner for Human Rights, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of rights*, 19 November 2021.
  120. Greek National Commission on Human Rights (GNCHR), *Submission to the UN Human Rights Committee on the List of Issues Prior to Reporting for the Third periodic examination of Greece under the ICCPR*, September 2021, paragraph 77.
  121. Commissioner for Human Rights, *Commissioner calls on member states to cooperate with NGOs assisting migrants*, 19 June 2018.
  122. A. Fotiadis, "Croatia's new border-monitoring mechanism seen as 'toothless' and 'ineffective'", BIRN, 12 October 2021. <sup>1</sup>
  123. ECRE, "Greece: Government want to keep pushback investigation in-house, pushbacks continue as reports of refoulement from Turkey emerges, food provision and cash assistance in shambles", 22 October 2021. The National Transparency Authority has so far been tasked at least once by the Greek government to conduct an investigation into allegations by different media of pushbacks across the Aegean Sea, see InfoMigrants, "Greek authority finds no evidence of migrant pushback claims", 30 March 2022.
  124. ECRE et al., *Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability*; ENNHRI, *Opinion on Independent Human Rights Monitoring Mechanisms at Borders*.
  125. ENNHRI, *Gaps in human rights accountability at borders*, December 2021.
  126. Commissioner for Human Rights, *Letter to Mr Margaritis Schinas and Ms Ylva Johansson*, CommHR/DM/sf/ 009-2020, 9 March 2020; Council of Europe Commissioner for Human Rights, *Pushbacks and border violence against refugees must end*, 19 June 2020.
  127. Commissioner for Human Rights, *Pushbacks and border violence against refugees must end*, 19 June 2020.
  128. See, for example, ECRE, "Editorial: The JHA Council on Afghanistan: all about the EU", 3 September 2021; O.Towfigh Nia, "Germany slams Croatia's violent migrant pushbacks", *Anadolu Agency*, 11 October 2021.
  129. Council of Europe Commissioner for Human Rights, *Protecting refugees in Europe: the ECHR and beyond*, note 55 above.

130. *Ibid.*
131. Commissioner for Human Rights, *Pushbacks and border violence against refugees must end*, 19 June 2020.
132. Commissioner for Human Rights, *European States Must Stand up against Pushbacks and the Attempt to Legalise Them*, 21 October 2021.
133. Article 16 of the UN International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts sets out that "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." In a recent report, the Dutch Advisory Committee on Migration Affairs, for example, explicitly warns that the support of the Netherlands and other member states for European border control practices that are not compliant with human rights standards entail "legal risks" of incurring their international responsibility, see ACVZ, '*EU grenzen zijn ook onze grenzen: Nederlandse verantwoordelijkheid voor mensenrechten aan de EU-buitengrenzen en effectieve rechtsbescherming*' [EU borders are also our borders: Dutch responsibility for human rights at EU external borders and effective legal protection], January 2022.
134. Commissioner for Human Rights, *Lives saved. Rights protected*, note 16 above, Chapter 4.1.
135. Commissioner for Human Rights, *In Their Response to Afghans Seeking Safety, Council of Europe Member States Should Not Undermine Human Rights Protections*, 30 August 2021.
136. Under the emergency relocation scheme established by the Council of the EU in September 2017, as of May 2018, 21,999 persons have been relocated from Greece (33% of the total number planned) and 12,691 from Italy (32% of the total number planned), see European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Progress report on the Implementation of the European Agenda on Migration*, COM(2018) 301, 16 May 2018, p. 17; European Parliamentary Research Service, *Hotspots at EU external borders: State of play*, June 2018, p. 5. Under the voluntary relocation scheme from Greece, as of October 2021, 4,463 persons have been relocated, see *Voluntary Scheme for the Relocation from Greece to other European Countries*; Commissioner for Human Rights, *Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities*, 31 October 2019; *Time to immediately act and to address humanitarian and protection needs of people trapped between Turkey and Greece*, 3 March 2020; *Commissioner urges Malta to meet its obligations to save lives at sea, ensure prompt and safe disembarkation, and investigate allegations of delay or non-response to situations of distress*, 11 May 2020; *Commissioner calls on the Greek authorities to provide adequate support to all those affected by the fire in Moria*, 9 September 2020.
137. Commissioner for Human Rights, *Commissioner Calls for More Rescue Capacity in the Mediterranean*, 27 March 2019; Council of Europe Commissioner for Human Rights, *States Should Ensure Rescue at Sea and Allow Safe Disembarkation during the COVID-19 Crisis*, 16 April 2020.
138. Commissioner for Human Rights, *Lives saved. Rights protected.*, note 16 above, p. 32-34; Commissioner for Human Rights, *A distress call for human rights*, note 16 above, p. 16-17.
139. On barriers to family reunification in Council of Europe member states more generally, see Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, Issue Paper, 2017.

140. Commissioner for Human Rights, *Letter to Secretary of State of the Home Department of the United Kingdom*, CommHR/DM/sf 050-2021, 1 December 2021; Commissioner for Human Rights, *Letter to Minister of Interior of France*, CommHR/DM/sf 049-2021, 1 December 2021.
141. Commissioner for Human Rights, *European states must stand up against pushbacks and the attempt to legalise them*, 21 October 21; Commissioner for Human Rights, *Protecting refugees in Europe: the ECHR and beyond*, note 55 above.
142. PACE, *National parliaments as guarantors of human rights in Europe: Handbook for parliamentarians*, 2018; PACE, *Role of parliaments in implementing the United Nations global compacts for migrants and refugees*, Resolution 2379, 18 May 2021; IPU/OHCHR, *Human rights: Handbook for parliamentarians No. 26*, 2016, chapter 10.
143. Commissioner for Human Rights, *A distress call for human rights*, note 16 above, p. 6; Council of Europe Commissioner for Human Rights, *Lives saved. Rights protected*, note 16 above, p. 18.
144. Commissioner for Human Rights, *A distress call for human rights*, note 16 above, p. 25.
145. ECRE, *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612*, p. 37.
146. PACE has supported national parliaments in this endeavour which led to publishing a monitoring guide, see Association for the Prevention of Torture (APT) and Parliamentary Assembly of the Council of Europe (PACE), *Visiting Immigration Detention Centres: A Guide for Parliamentarians*, 2013.
147. Commissioner for Human Rights, *A distress call for human rights*, note 16 above, p. 26.

The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by the Council of Europe to promote awareness of and respect for human rights in the member states.

The activities of this institution focus on three major, closely related areas :

- country visits and dialogue with national authorities and civil society,
- thematic studies and advice on systematic human rights work, and
- awareness-raising activities.

The current Commissioner, Dunja Mijatović, took up her functions in April 2018. She succeeded Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Álvaro Gil-Robles (1999-2006).



[www.commissioner.coe.int](http://www.commissioner.coe.int)

ENG

[www.coe.int](http://www.coe.int)

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



COMMISSIONER  
FOR HUMAN RIGHTS

COMMISSAIRE AUX  
DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE