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**STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)**

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**PRELIMINARY DRAFT TEXT FOR THE OUTCOME DOCUMENT CONTAINING  
ELEMENTS FOR A POLITICAL DECLARATION**

## **PRELIMINARY DRAFT TEXT FOR THE OUTCOME DOCUMENT CONTAINING ELEMENTS FOR A POLITICAL DECLARATION<sup>1</sup>**

### **I. Introduction**

1. The decisions adopted by the Ministers' Deputies on follow-up to the Informal Ministerial Conference held in Strasbourg on 10 December 2025 require the CDDH "to prepare elements for a political declaration reaffirming the obligation to ensure the effective enjoyment of the rights and freedoms guaranteed by the European Convention on Human Rights to everyone within the jurisdiction of member States in the context of the contemporary challenges posed both by irregular migration and by the situation of foreigners convicted of serious offences, taking duly into account in particular governments' fundamental responsibility to ensure national security and public safety". The CDDH is invited "to report back before 22 March 2026 to allow for the Ministers' Deputies to finalise the declaration to be submitted, together with the other relevant documents, for adoption at the 135th Session of the Committee of Ministers (Chișinău, 14-15 May 2026)".
2. In response to this mandate, the CDDH held extraordinary plenary meetings, in hybrid format, on 13-15 January, 25-27 February, and 10-12 March 2026. Members, participants, and observers were given the opportunity to make written submissions in advance of the January meeting and to submit written comments on the preliminary draft of the present document in advance of the February meeting.
3. The present document will continue with a general introduction to relevant aspects of the system of the European Convention on Human Rights (the Convention), articulated around the fundamental principle of subsidiarity and the related concepts of the margin of appreciation and the shared responsibility of the States Parties, the European Court of Human Rights (the Court), and the other Convention bodies. It will then identify and examine the specific migration-related issues that fall within its mandate, in each case describing the factual situation, analysing the relationship with the Convention, indicating the views of the CDDH on these issues, and on that basis proposing possible elements for the political declaration, taking inspiration also from previous high-level declarations. It concludes with an appendix containing a compilation of the possible elements that the CDDH has prepared.

### **II. The Convention system**

4. The European Convention on Human Rights (the Convention) is a political symbol and legal guarantor of its State Parties' shared commitment to human rights and fundamental freedoms based on a regional system of mutual obligations and collective enforcement.
5. The principle of subsidiarity is fundamental to the Convention system. It is reflected in the States Parties' primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto,<sup>2</sup> subject to the supervisory jurisdiction of the Court,<sup>3</sup> and to provide effective domestic remedies for allegations of violations.<sup>4</sup> Only when such

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<sup>1</sup> Document prepared by the Secretariat following the extraordinary CDDH meeting on 13-15 January.

<sup>2</sup> Article 1 of the Convention.

<sup>3</sup> Preamble to the Convention, as amended by Protocol No. 15, which was adopted in 2013 and entered into force in 2021.

<sup>4</sup> Article 13 of the Convention. The Court has stated that a remedy for an arguable complaint of a violation of Article 2 (right to life) or Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) following removal must have automatic suspensive effect.<sup>4</sup> A remedy for an arguable complaint of violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion) alone merely requires that the person concerned should have an effective possibility of challenging the expulsion

remedies have been exhausted may an individual bring a case before the Court,<sup>5</sup> whose role is subsidiary to that of the States Parties.<sup>6</sup> The Court, which was established to ensure the observance by the States Parties of their obligations under the Convention,<sup>7</sup> has jurisdiction over all matters concerning the interpretation and application of the Convention and the Protocols thereto.<sup>8</sup> The Court's judgments are binding on a respondent State in the case.<sup>9</sup>

6. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system.<sup>10</sup>

7. The margin of appreciation is subject to careful judicial calibration in the cases decided by the Court.<sup>11</sup> The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Article 8, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention.

8. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law in a manner that gives full effect to the Convention. The Court's role is ultimately to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention.<sup>12</sup> Where the domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and have adequately weighed up the individual interests against the public interest in a case, the Court would require strong reasons to substitute its own view for that of the domestic courts.<sup>13</sup>

9. The principle of subsidiarity reflects the shared responsibility of the States Parties and the Court, along with the other Convention bodies – namely the Committee of Ministers when supervising execution of the Court's judgments, the Parliamentary Assembly when electing the Court's judges, and the Commissioner for Human Rights when intervening in cases as a third party – for the effective implementation of the Convention. In this spirit of shared responsibility, it is crucial that the States Parties and the Court fulfil their respective roles, and that each fully respects the role of the other. It is therefore to be welcomed that all States Parties have incorporated the Convention into their domestic legal systems, often at constitutional level, and that domestic courts increasingly refer to the Court's judgments when applying the Convention.

10. For a system of shared responsibility to be effective, there must be good interaction between the national and European level. This implies, in keeping with the independence of

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decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum.

<sup>5</sup> Article 35 of the Convention.

<sup>6</sup> Explanatory Report to Protocol No. 14 to the Convention, para. 12.

<sup>7</sup> Article 19 of the Convention.

<sup>8</sup> Article 32 of the Convention.

<sup>9</sup> Article 46 of the Convention.

<sup>10</sup> Brighton Declaration, para. 11

<sup>11</sup> CDDH Report on the First Effects of Protocol No. 15 to the European Convention on Human Rights, June 2025, para 15.

<sup>12</sup> *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023, para. 159.

<sup>13</sup> *M.A. v. Denmark* [GC], no. 6697/18, 09 July 2021, para. 149.

the Court and the binding nature of its judgments, a constructive and continuous dialogue between the States Parties and the Court on their respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention. Such interaction may anchor the development of human rights more solidly in European democracies.<sup>14</sup>

11. Member States are provided with a range of opportunities to express their understanding of the interpretation and application of the Convention and its Protocols without prejudice to full respect for the Court's jurisdiction over these matters,<sup>15</sup> its independence, and the binding nature of its judgments.<sup>16</sup> Within the framework of the Convention, States Parties may express their views in the course of proceedings before the Court, either as respondents or through third party interventions. Within the broader framework of the Council of Europe, their positions may be reflected in recommendations and other non-binding instruments of the Committee of Ministers, and in declarations and other texts adopted at summits, conferences, and other high-level events.

12. These expressions of view form part of the dialogue inherent in the Convention system and respect the balance established by the Convention between the national and international levels.<sup>17</sup> The President of the Court has recently stated that "The Court has been receptive to the messages conveyed in [previous political] declarations, which have also as a general rule been helpful to the Convention system", whilst underlining that "the integrity of its judicial role relies on the full respect of the separation of powers and the absence of any kind of political pressure."<sup>18</sup>

13. While the Court communicates its jurisprudence primarily via its judgments, along with advisory opinions delivered in accordance with Protocol No. 16, it also engages in dialogue with other Convention actors in various ways. These include the Superior Courts Network that was launched in 2015 and visits from ministers, other senior officials, and judges from the member States. The Committee of Ministers holds biannual meetings with the President of the Court. The Court's Registry holds regular meetings with the Government Agents of the States Parties, as well as meetings with civil society organisations.<sup>19</sup>

#### Possible elements

14. Possible elements for expressing the essential issues mentioned above in the political declaration, inspired by declarations adopted at previous high-level declarations,<sup>20</sup> are set out in the appendix.

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<sup>14</sup> Copenhagen Declaration, para. 33.

<sup>15</sup> Article 32 of the Convention

<sup>16</sup> Article 46 of the Convention.

<sup>17</sup> In this connection, it may be noted that the frequency of references to the principle of subsidiarity and the doctrine of margin of appreciation increased following the initiation of the Interlaken reform process in 2010, the adoption of the Brighton Declaration in 2012, and peaking in 2014 and 2015. Arguably, the prospect alone of entry into force of Protocol No. 15 already had an impact in terms of influencing their visibility in the case law. See CDDH Report on the First Effects of Protocol No. 15 to the European Convention on Human Rights, June 2025, para. 53.

<sup>18</sup> Reported in "Judicial pragmatism", A Lawyer Writes, 30 January 2026, <https://substack.com/home/post/p-186222351>.

<sup>19</sup> Further information on these practices in 2025 can be found in the Court's Annual Report for 2025.

<sup>20</sup> For further information on the source of these possible elements, see doc. CDDH(2026)01.

### III. Specific migration-related issues

15. On the basis of its terms of reference read in the light of the conclusions of the Informal Ministerial Conference, the CDDH agreed to address the following factual situations, which represent significant, complex challenges in various member States:

- expulsion of foreign nationals convicted of serious criminal offences and extradition of foreign nationals, including issues under Articles 3 and 8 of the Convention;
- mass arrivals of migrants by land and sea;
- instrumentalisation of migration;
- decision-making in migration cases;
- innovative solutions to address migration.

16. On a general level, it should be recalled that States Parties have the undeniable sovereign right to control aliens' entry into and residence in their territory. This right must be exercised in accordance with the provisions of the Convention.<sup>21</sup> Equally, there is broad consensus within the international community regarding the obligation and necessity for the States Parties to protect their borders (which may also be the external borders of the Schengen Area) in a manner which complies with the Convention guarantees.<sup>22</sup> The Court has recognised that States may in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements. It has also acknowledged the right of States to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union.<sup>23</sup> It has observed that the right to political asylum is not contained in either the Convention or its Protocols,<sup>24</sup> and that in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the 1951 Refugee Convention.<sup>25</sup>

17. The Convention and its protocols contain only four provisions relating directly to migration: Article 5, insofar as it permits and provides procedural safeguards for the arrest or detention of an individual for purposes of immigration control; Article 16 (restrictions on political activity of aliens); Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of aliens);<sup>26</sup> and Article 1 of Protocol No. 7 (procedural safeguards relating to the expulsion of aliens).<sup>27</sup> Other articles may also be relevant and the Court has developed their application to migration through its caselaw. The application of these provisions in the factual situations indicated above will be examined in the following sections.<sup>28</sup>

#### Possible elements

*The political declaration could:*

- *Recall that States Parties have the undeniable sovereign right to control aliens' entry into and residence in their territory. This right must be exercised in accordance with the provisions of the Convention*

<sup>21</sup> See e.g. *Amuur v. France*, no. 19776/92, 25 June 1996, para. 41.

<sup>22</sup> *N.D. & N.T. v. Spain* [GC], nos. 8675/15 & 8697/15, 13 February 2020, para. 232.

<sup>23</sup> *Idem.*, paras. 167-168.

<sup>24</sup> See e.g. *Vilvarajah & otrs v. United Kingdom*, no. 13163/87 & otrs, 30 October 1991, para. 102.

<sup>25</sup> *F.G. v. Sweden* [GC], no. 33611/11, 23 March 2016, para. 117.

<sup>26</sup> Protocol No. 4 has been ratified by all member States other than Greece, Switzerland, Türkiye and the United Kingdom.

<sup>27</sup> Protocol No. 7 has been ratified by all member States other than Germany, the Netherlands and the United Kingdom.

<sup>28</sup> For further information, see document CDDH(2026)01 and, more extensively, the various case-law guides to be found on the Court's ECHR-KS Knowledge Sharing Platform.

- *Recall that it is an obligation and a necessity for States Parties to protect their borders in compliance with Convention guarantees*
- *Recall the importance of States Parties' managing and protecting borders, which may include putting arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements*
- *Recall the right of States to establish their own immigration policies, potentially in the context of bilateral cooperation*
- *Note with concern the significant, complex challenges that have arisen in relation to migration, many of which were either unforeseen at the time the Convention was drafted or have evolved significantly since then*
- *Consider that a failure to recognise and respond to these challenges may erode public confidence in the Convention system*

**a. Expulsion of foreign nationals convicted of serious criminal offences and extradition of foreign nationals**

18. States Parties' right to control aliens' entry into and residence in their territory includes the right to expel foreign nationals who have committed serious offences, or to extradite foreign nationals who have been charged with serious offences abroad. These rights must be exercised in compliance with the States' obligations under the Convention. The Court takes the same approach to examining the risk that the individual's Convention rights would be violated, regardless of the legal basis for the removal.<sup>29</sup>

19. The inability to expel or extradite an individual convicted or charged with a serious offence can lead to significant challenges for States, including in relation to their fundamental duties to guarantee their populations' right to live in peace, freedom and security, notably by protecting public safety and national security and preventing disorder and crime. If not clearly explained and understood, an inability to take such action risks undermining public confidence in the Convention system.

20. These complex challenges were either unforeseen at the time the Convention was drafted or have evolved significantly since then. In addressing them, the right balance must be struck between individual rights and interests and the weighty public interests of defending freedom and security in the societies of the States Parties.

21. It may be recalled that where a Contracting State considers that its domestic courts have misapplied the Court's jurisprudence, there is no avenue whereby a State can contest the outcome before the Court. States may, however, bring forward detailed national measures on how relevant Convention rights, including Articles 3 and 8, should be applied in their national legal system in the specific context of expulsion, removals or extradition. This would be a means of giving practical effect to the principles of subsidiarity and shared responsibility, subject to the supervisory jurisdiction of the Court in accordance with the appropriate margin of appreciation.

**Possible elements**

*The political declaration could:*

- *Underline that the inability to expel or extradite an individual convicted or charged with a serious offence can lead to significant challenges for States, including in relation to their fundamental duties to guarantee their populations' right to live in peace, freedom and security, notably by protecting public safety and national security and preventing disorder and crime*

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<sup>29</sup> *Khasanov & Rakhmanov v. Russia* [GC], nos. 28492/15 & 49975/15, 29 April 2022, para. 94.

- *Recall that the right balance must be struck between individual rights and interests and the weighty public interests of defending freedom and security in the societies of the States Parties*
- *Encourage member States to bring forward detailed national measures on how relevant Convention rights, including under Articles 3 and 8, should be applied in their national legal system in the specific context of expulsion and extradition, as a means of giving practical effect to the principles of subsidiarity and shared responsibility, subject to the interpretative control of the Court under Article 32*

### Issues arising under Article 3

22. The prohibition of torture or inhuman or degrading treatment or punishment under Article 3 is absolute. This is reflected in the principle of non-refoulement, codified in other international instruments,<sup>30</sup> and reflective of customary international law. The Court has applied this principle to mean that States Parties may not expel or extradite an individual where substantial grounds have been shown for believing that this would result in a real risk of being subjected to treatment contrary to Article 3 in the receiving country.<sup>31</sup> The assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 must necessarily be a rigorous one.<sup>32</sup>

23. The absolute nature of the right not to be subjected to inhuman or degrading treatment or punishment under Article 3 reflects the fact that it relates to the most serious forms of ill treatment. The ill-treatment an individual alleges he or she will face if expelled or extradited must attain a minimum level of severity if it is to fall within the scope of Article 3.<sup>33</sup> In the context of deprivation of liberty, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention if it is to fall within the scope of Article 3.<sup>34</sup>

24. The Court has set out that the assessment of the minimum level of severity to be met is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects and in some cases, the sex, age, and state of health of the victim.<sup>35</sup> Where treatment is judged to fall below the minimum level of severity, an individual may still be protected by other Convention Rights. These may notably include Article 8, in which case the individual right must be weighed against legitimate public interests, including public safety, national security and the prevention of disorder and crime.

25. The Court has made clear that a high threshold for ill-treatment to be considered as inhuman or degrading applies also in cases involving expulsion or extradition. In 2012, the Court recalled that “it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention”, adding that, “save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law.”<sup>36</sup> The Court has repeatedly stated that “the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States”.<sup>37</sup> In a case concerning assessment of the risk of a sentence of life imprisonment without possibility of parole following extradition to a non-State

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<sup>30</sup> E.g. Article 33 of the 1951 Refugee Convention and Article 3 of the UN Convention Against Torture.

<sup>31</sup> *Soering v. United Kingdom*, no. 14038/88 , 07 July 1989, para. 91.

<sup>32</sup> *Chahal v United Kingdom* [GC], no. 22414/93 , 15 November 1996, para. 96.

<sup>33</sup> *Savran v Denmark* [GC], no. 57467/15, 07 December 2021, para. 122.

<sup>34</sup> *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000, para. 92.

<sup>35</sup> *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000, para. 91.

<sup>36</sup> *Harkins & Edwards v. United Kingdom*, 9146/07 & 32650/07, 17 January 2012, para. 131.

<sup>37</sup> *Harkins & Edwards v. United Kingdom*, 9146/07 & 32650/07, 17 January 2012, para. 129.

Party, the Court noted that “treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case”.<sup>38</sup>

26. The Court has found that the extradition or expulsion of an applicant would violate the prohibition on inhuman or degrading treatment in cases concerning a variety of individual circumstances. The Court’s judgments in these cases have been applied by States Parties’ domestic courts in numerous expulsion and extradition cases involving a range of circumstances. This may give rise to challenges in interpreting and applying the threshold set out in the Court’s case law, in particular where the domestic court is considering circumstances different from those the Court was considering in a particular judgment. In this connection, it is important to recall certain principles set out in the Court’s case-law, whilst noting certain issues relating to the interpretation and application of the case-law by domestic authorities.

27. In the case of extradition, the Court has noted that Article 1 of the Convention cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a State Party may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.<sup>39</sup> Nonetheless, where there is no directly applicable case law from the Court, domestic courts may seek to apply principles taken from judgments concerning the situation in States Parties when determining whether removal to a non-State Party would violate Article 3. For example, in cases concerning prison conditions, domestic courts have sought to apply judgments concerning acceptable cell sizes in a State Party to assess the relevant situation in a case involving expulsion or extradition to a non-State Party.<sup>40</sup> Further guidance may be needed to assist domestic courts when assessing whether local conditions in non-States Parties reach the Article 3 threshold.

28. The Court has found that, in certain very exceptional circumstances, the removal of a seriously ill person may give rise to a violation of Article 3. One such situation is where the person is in the terminal stages of an illness and removal would expose them to “a real risk of dying under the most distressing circumstances”.<sup>41</sup> The Court has clarified that very exceptional circumstances may also exist where the individual is not at imminent risk of dying. This would be so where “substantial grounds have been shown for believing that [an individual] ... would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to serious, rapid and irreversible decline in his or her health resulting in intense suffering or to a significant reduction in life expectancy”.<sup>42</sup> This approach should be applied in such a way that the threshold for inhuman and degrading treatment or punishment is met only in “very exceptional circumstances”,<sup>43</sup> recognising that there is no obligation for the returning State to alleviate the disparities between its own healthcare system and the level of treatment existing in the receiving State.<sup>44</sup>

29. As regards general conditions of detention, the Court has found that a State Party must ensure that a person is detained in conditions “which are compatible with respect for his [or her] human dignity” and “do not subject him [or her] to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical

<sup>38</sup> *Babar Ahmad & otrs v. United Kingdom*, no. 24027/07 & otrs, 10 April 2012, para. 176.

<sup>39</sup> *Soering v United Kingdom*, no. 14038/88, 07 July 1989, para. 86.

<sup>40</sup> See e.g. *Mursic v. Croatia* [GC], no. 7334/13, 20 October 2016.

<sup>41</sup> *D. v. United Kingdom*, no. 30240/96, 02 May 1997, para. 53.

<sup>42</sup> *Paposhvili v. Belgium* [GC], no 41738/10, 13 December 2016, para. 183.

<sup>43</sup> *D. v. United Kingdom*, no. 30240/96, 02 May 1997, paras. 53-54; *Paposhvili v. Belgium* [GC], no 41738/10, 13 December 2016, para. 177.

<sup>44</sup> *Paposhvili v. Belgium* [GC], no 41738/10, 13 December 2016, para. 192.

demands of imprisonment, his [or her] health and well-being are adequately secured".<sup>45</sup> The assessment of whether a state of affairs reaches this threshold may be complicated when it involves a range of different factors – such as shortcomings in access to healthcare and broader social support – that, whilst having a negative impact on the individual's situation, do not each in isolation amount to inhuman or degrading treatment. Further guidance on this point would help to ensure that a high threshold is maintained in practice.

30. The Court has noted that the effect of finding a violation of Article 3 in an extradition case would be that a person would never stand trial and that allowing an individual to escape with impunity is an outcome that would be difficult to reconcile with society's general interest in ensuring that justice is done in criminal cases. It would also be difficult to reconcile with the interest of Contracting States in complying with their international treaty obligations, which aim to prevent the creation of safe havens for those charged with the most serious criminal offences.<sup>46</sup>

31. Where a risk of violation of Article 3 following expulsion or extradition has been shown to exist, it may be obviated by obtaining diplomatic assurances from the receiving State, on condition that they provide a sufficient guarantee that the applicant will be protected against the risk. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.<sup>47</sup> The Court has articulated a number of considerations relevant to assessing the adequacy of diplomatic assurances, and has in a number of cases found that diplomatic assurances did provide sufficient protection against the risk of ill-treatment.<sup>48</sup>

### Possible elements

*The political declaration could:*

- *Emphasise that the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 of the Convention is absolute. It permits no derogation, contains no exceptions, and allows for no legitimate interference*
- *Recall that the absolute prohibition of inhuman or degrading treatment or punishment reflects that it relates to the most serious forms of ill-treatment, and consider that the minimum level of severity of ill treatment that constitutes inhuman or degrading treatment or punishment must therefore remain high and constant, and be clearly and consistently applied at all levels, avoiding unnecessary constraints on decisions to expel or extradite foreign nationals*
- *Note that the Court has rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law*
- *Underline that the Convention does not purport to be a means of requiring the States Parties to impose Convention standards on other States*
- *Underline that where an individual is being expelled or extradited, the quality of accessible healthcare in the receiving State should only give rise to a real risk of Article 3 in very exceptional circumstances*
- *Note that caution must be exercised when applying case-law concerning the situation in a State Party when assessing whether the removal of an individual to a non-State Party would violate a State's obligations under Article 3 of the Convention*
- *Consider that domestic courts and authorities may benefit from further guidance on whether and how to apply the Court's judgments concerning conditions in a State Party*

<sup>45</sup> *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000, para. 94.

<sup>46</sup> *Sanchez-Sanchez v United Kingdom* [GC], no. 22854/20, 03 November 2022, para. 94.

<sup>47</sup> *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012, para. 187.

<sup>48</sup> *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012, para. 189.

*when assessing whether conditions in a non-State Party may amount to a violation of Convention rights, notably under Article 3*

- *Consider that domestic courts and authorities may benefit from further guidance on how cumulative circumstances may, taken together, amount to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, in violation of Article 3*
- *Express concern, as recognised by the Court, that where a person cannot be extradited to face trial or serve a penal sentence for a serious offence, this gives rise to impunity, allowing a person to evade justice in a country in which they have committed an offence, simply by virtue of having left that country; and consider that all possible steps must therefore be taken to avoid this, consistent with Convention obligations*
- *Note the possibility of recourse to diplomatic assurances to obviate a risk of violation of Article 3 following expulsion or extradition*

#### Issues arising under Article 8

32. The right to private and family life under Article 8 the Convention is a qualified right. The second paragraph of Article 8 allows public authorities to interfere with an individual's exercise of this right, so long as such interference is in accordance with the law and necessary in a democratic society in pursuit of the public interest. Amongst the legitimate interests that may justify interference are national security, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others. The test of necessity requires that the interference be proportionate to the public interest being pursued.

33. The Court has set out the criteria that domestic authorities should take into account when assessing the proportionality of the interference with a settled migrant's private or family life to the public interest being pursued by the expulsion order.

34. In the case of expulsion of an individual with an established family life, the relevant criteria are:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of a marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children from the marriage and, if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>49</sup>

35. In the case of the expulsion of young adults who have not yet founded a family of their own, the relevant criteria are fewer and include:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;

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<sup>49</sup> Criteria from *Üner v. the Netherlands* [GC], no. 46410/99, 05 July 2005, paras. 57-58.

- the time that has elapsed since the offence was committed and the applicant's conduct during that period; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>50</sup>

36. The Court will also have regard to the duration of the exclusion order. For a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion.<sup>51</sup>

37. The Court conducts a process-based review of such cases. Where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.<sup>52</sup>

38. For foreigners without settled status, whose family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of the family life within the host State would from the outset be precarious, a violation of Article 8 of the Convention will be likely only in exceptional circumstances.<sup>53</sup>

39. In an age of increasing uncertainty and resulting public anxiety, it is essential that decisions which give lesser weight to the public interest in maintaining safety and preventing disorder and crime than to the individual rights of a convicted criminal are fully and clearly explained. In this connection, it is important that the Court in its judgments provides sufficient detail of any strong reasons for substituting its assessment of proportionality for that of domestic courts. It is also important for the Court to make clear its awareness of the particularities of national legal systems and traditions, including for example the extent to which the length of a sentence of imprisonment reflects the seriousness of an offence.

### Possible elements

*The political declaration could:*

- *Recall that Article 8 allows public authorities to interfere with an individual's right to respect for private and family life, so long as such interference is in accordance with the law and necessary in a democratic society in pursuit of the public interest. Among the legitimate interests that may justify interference are national security, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others. The test of necessity requires that the interference be proportionate to the public interest being pursued*
- *Note that, according to the case law of the Court, where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts*
- *Consider it essential that, in the interests of public understanding, decisions which give lesser weight to the public interest in maintaining safety and preventing disorder and crime than to the individual rights of a convicted criminal are fully and clearly explained*

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<sup>50</sup> Criteria from *Maslov v. Austria* [GC], no. 1638/03, 23 June 2008, para. 71.

<sup>51</sup> *Levakovic v. Denmark*, no. 7841/14, 23 October 2018, para. 37.

<sup>52</sup> *Savran v. Denmark* [GC], no. 57467/15, 07 December 2021, para. 189.

<sup>53</sup> *Alleleh & otrs v. Norway*, 569/20, 23 June 2022, para. 90.

- *Note that it is important that the Court in its judgments provides sufficient detail of any strong reasons for substituting its assessment of proportionality for that of domestic courts and makes clear its awareness of the particularities of national legal systems and traditions, including for example the extent to which the length of a sentence of imprisonment reflects the seriousness of an offence*

### **b. Mass arrivals of migrants by land and sea**

40. Recent years have seen large numbers of migrants arriving in various Council of Europe member States, both by sea and across land borders. Sudden mass irregular arrivals represent a serious challenge for frontline Member States and for their sovereign right to protect national borders and decide who enters their territory; they may also pose a threat to public order and national security and place great strain on reception and asylum systems.

41. Mass arrivals by sea represent a challenging contemporary issue that has significantly developed over recent decades. It is closely connected with the activity of criminal networks involved in smuggling of migrants that take advantage of vulnerable individuals, endangering lives whilst seeking to maximise profits. Smuggling of migrants is a transnational criminal activity that challenges States' sovereign right to control their borders and increases the vulnerability of people on the move.<sup>54</sup> States must endeavour to prevent and disrupt these networks, whose activities are constantly evolving and adapting. In this connection, it may be recalled that the significant reduction in irregular maritime crossings of the Mediterranean seen recently has been matched by a comparable reduction in the loss of lives at sea.

42. Migrants involved in mass arrivals retain their rights under the Convention. States must therefore respond to such situations in conformity with their Convention obligations. In determining these obligations through its case-law, the Court has acknowledged that States on the external borders of the European Union experience considerable difficulties in coping with increasing influxes of migrants and asylum seekers and has expressly recognised the burden and pressure this places on them.<sup>55</sup>

43. The Court has found that the rescue of migrants from vessels in distress on the high seas by a naval ship flying the flag of a State Party and crewed by its military personnel brought the rescued migrants within the jurisdiction of that State for the purposes of Article 1 of the Convention.<sup>56</sup> The State Party was thereafter under an obligation not to remove those migrants to a receiving country in which they would run a real risk of being subjected to treatment contrary to Article 3 of the Convention.<sup>57</sup> The prohibition on collective expulsion under Article 4 of Protocol No. 4 applies to individuals within the extraterritorial jurisdiction of a State Party, including those rescued at sea.<sup>58</sup>

44. The Court has since reaffirmed that the crucial test in establishing extraterritorial jurisdiction is whether the State Party exercises "effective control" over the area where the events in question occurred or over the persons concerned. For example, the provision of financial and technical assistance to another State's coastguard and the coordination of the rescue operations involving that State's coastguard vessel, without the persons concerned

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<sup>54</sup> Parliamentary Assembly Resolution 2568 (2024), *A shared European approach to address migrant smuggling*, para. 1.

<sup>55</sup> *E.A. & H.A.A. v. Greece*, no. 14969/20, decision of 03 July 2025, paras. 45 & 47.

<sup>56</sup> *Hirsi Jamaa & otrs v. Italy* [GC], no. 27765/09, 23 February 2012, paras. 76-82.

<sup>57</sup> *Ibid.*, paras. 122-123.

<sup>58</sup> *Ibid.*, paras. 169-182.

being taken aboard a vessel flying the flag of the State Party or being under the *de facto* control of its agents, has been found insufficient to establish “effective control”.<sup>59</sup>

45. An individual who is admitted to the territory is entitled to the guarantees against refoulement in violation of Article 3, including when arriving as one of a large number of migrants, and against collective expulsion under Article 4 of Protocol No. 4. This requires access to an effective remedy under Article 13.

46. Where individuals gain unauthorised access to the territory of a State Party by participating in a large-scale and forceful breach of a land border and are subsequently removed by the authorities, a lack of individual removal decisions can be attributed to the fact that those individuals did not comply with the requirement to make use of genuinely and effectively accessible official entry procedures that would have allowed them to submit an application for protection against refoulement. In such circumstances there would be no violation of the prohibition on collective expulsion under Article 4 of Protocol No. 4.<sup>60</sup> The Court has since confirmed this approach also in cases that did not involve the use of force to make an unauthorised border crossing.<sup>61</sup>

47. Asylum-seekers are members of a particularly underprivileged and vulnerable population group in need of special protection. It may thus raise an issue under Article 3 if they are not provided with accommodation and thus forced to live on the streets for months, with no resources or access to sanitary facilities, and without any means of providing for their essential needs.<sup>62</sup> While the absolute character of the rights secured by Article 3 means that the challenges posed by mass irregular migration cannot absolve a State of its obligations under that provision, the Court has equally stressed that it would be artificial to assess the facts of individual cases in isolation from the general context. In its assessment, it therefore takes into account, together with other factors, that the hardships endured by individuals stem to a significant extent from the situation of extreme difficulty confronting the authorities of a frontline state at a time of exceptional and sudden increase in migration flows.<sup>63</sup> The Court also takes into account the attitude of the authorities when confronted with such challenges, notably whether they had remained indifferent to a situation of hardship or had taken measures to improve material conditions of reception within a short time, when determining whether the situation reached the minimum level of severity required to amount to a violation of Article 3.<sup>64</sup>

48. As regards confinement of asylum seekers in a land border transit zone, the Court considers that “where ... it was possible for the asylum seekers, without a direct threat for their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come from, Article 5 [the right to liberty and security] could not be seen as applicable to their situation in a land border transit zone where they awaited the examination of their asylum claims, on the ground that the authorities had not complied with their separate duties under Article 3.” In other words, the fact that an individual can leave confinement in a land border transit zone only by returning to the third

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<sup>59</sup> *S.S. v. Italy*, no. 21660/18, 20 May 2025, paras. 91-108. The Court reached this conclusion having reiterated that “problems with managing migratory flows cannot justify having recourse to practices which are incompatible with [States Parties’] obligations under the Convention” and underlined that “the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction” (para. 111).

<sup>60</sup> *N.D. & N.T. v. Spain* [GC], nos. 8675/15 & 8697/15, 13 February 2020, paras. 209-211 and 231.

<sup>61</sup> *A.A. & otrs v. North Macedonia*, no. 55798/16 & otrs, 05 April 2022, paras. 114-115.

<sup>62</sup> *M.S.S. v. Belgium & Greece* [GC], no. 30696/09, 21 January 2011, paras. 235-264.

<sup>63</sup> *E.A. & H.A.A. v. Greece*, no. 14969/20, decision of 03 July 2025, paras. 45 & 47.

<sup>64</sup> *B.G. v. France*, no. 63141/13, 10 September 2020, paras. 88-89.

country from which they crossed that border does not of itself transform the confinement into deprivation of liberty for the purposes of Article 5.<sup>65</sup>

### Possible elements

*The political declaration could:*

- *Recall that the arrival of large numbers of migrants represents a complex and evolving challenge for frontline States, including to their sovereign right to protect national borders and decide who legally enters the territory and their fundamental responsibility to ensure national security and public safety*
- *Recognise that irregular arrivals by sea represent a major risk of life for irregular migrants and that the significant reduction in irregular maritime crossings of the Mediterranean seen recently has been matched by a comparable reduction in the loss of lives at sea*
- *Underline that States Parties must respond to such situations in conformity with their Convention obligations, recalling that the Court has acknowledged that frontline States experience considerable difficulties in coping with increasing influxes of migrants and asylum seekers and has expressly recognised the burden and pressure this places on them*
- *Stress the need to strengthen national measures international cooperation against the human trafficking and migrant smuggling networks involved in mass arrivals, recalling Council of Europe standards in this area, including the Convention on action against trafficking in human beings*

### **c. Instrumentalisation of migration**

49. Instrumentalisation of migration is taken to refer to situations where migratory movements, including unlawful border crossings, are deliberately facilitated, encouraged or exploited by States or other actors, in some cases involving the use of force, with the aim of exerting pressure on, destabilising or undermining a member State and European democracies. Unlike other forms of irregular migration or spontaneous mass influxes, it is characterised by its intentional, externally driven, and strategic nature. As such, it can be seen as a contemporary phenomenon which has emerged in a specific geopolitical and security context.

50. Instances of instrumentalisation may result in acute humanitarian crises, leaving migrants stranded at borders where they may be at significant risk of becoming victims of violence, exploitation, trafficking, smuggling, or inhuman or degrading treatment, without adequate protection or assistance.

51. Migrants involved in instrumentalised migratory movements retain their rights under the Convention and other European and international law. The application of those rights may, in practice, involve a degree of contextual assessment by the States Parties concerned.<sup>66</sup> It may also be recalled that Article 31 of the 1951 Refugee Convention provides that States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened [...], enter or are

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<sup>65</sup> In the case of *Iliaš & Ahmed v. Hungary*, the Court found that the confinement did not amount to deprivation of liberty within the meaning of Article 5. By contrast, in its judgment in *Z.A. & otrs v. Russia*, no. 61411/15 & otrs, delivered on the same day by a Grand Chamber of the same composition applying the same four-part test, the Court found that confinement in an airport transit zone did amount to deprivation of liberty on account of deficiencies in the applicable legal regime, the excessive duration of the confinement and delays in examination of the applicants' asylum claims, the conditions of confinement, and the absence of any practical possibility of leaving the zone (paras. 140-156).

<sup>66</sup> See further *Ždanoka v. Latvia* (no. 2), no. 42221/18, 25 July 2024, para. 55.

present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

52. States Parties have a fundamental duty to protect everyone within their jurisdiction, to protect their borders and to maintain national security and public order. In this connection, the concept of "democracy capable of defending itself," as developed in the case-law of the European Court of Human Rights by reference to the prohibition of abuse of rights under Article 17,<sup>67</sup> may be relevant insofar as the individual rights at issue are susceptible to being balanced against the public interest. States' sovereign right to control aliens' entry into and residence in their territories must be exercised in full compliance with the Convention and other applicable international obligations.<sup>68</sup>

53. The particular characteristics of instrumentalisation of migration may raise new legal and factual issues concerning application of the Convention. The Convention is a living instrument: it must be interpreted in the light of present-day realities and remain applicable in response to novel challenges. It does not operate in a vacuum: the concrete context in which States act forms part of the overall assessment required under the Convention, while fully preserving the essence of the rights guaranteed and ensuring that any measures adopted remain lawful and necessary in a democratic society.<sup>69</sup>

54. Member States have expressed a need for clarity regarding the application of the Convention in the context of instrumentalisation of migration, including on the appropriate balance between individual rights and legitimate public interests. At present, there is no established case-law of the Court on this issue as such. States Parties look forward to receiving guidance from the forthcoming Grand Chamber judgments in the pending cases,<sup>70</sup> in which the applicants have variously invoked Articles 2, 3, 5 and 13 of the Convention, as well as Article 4 of Protocol No. 4.<sup>71</sup>

55. The phenomenon of instrumentalisation of migration has been recognised by various European bodies, including in Parliamentary Assembly Resolution 2404 (2021) on Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus,<sup>72</sup> and in European Union law.<sup>73</sup> Member States have expressed the need for acknowledgement also by the Council of Europe of the phenomenon.

56. Beyond that, the Council of Europe may provide a forum for dialogue among member States to address the challenges emerging in this context, thereby contributing to the coherence, effectiveness and credibility of the Convention system.

### Possible elements

*The political declaration could:*

- Consider that instrumentalisation of migration may be taken to refer to situations where migratory movements, including unlawful border crossings, are deliberately facilitated,

<sup>67</sup> See e.g. *Rodina and Borisova v. Latvia*, nos. 2623/16 and 2299/16, 10 July 2025, para. 104, and *Bradshaw & otrs v. United Kingdom*, no. 15653/22, 22 July 2025, para. 114.

<sup>68</sup> See e.g. *Amuur v. France*, no. 19776/92, 25 June 1996, para. 41.

<sup>69</sup> See further *Communaute Genevoise d'Action Syndicale (CGAS) v. Switzerland* [GC], no.21881/20, 27 November 2023, paras. 162-163.

<sup>70</sup> These cases are *R.A. & otrs v. Poland*, no. 42120/21, *H.M.M. & otrs v. Latvia*, no. 42165/21, and *C.O.C.G. & otrs v. Lithuania*, no. 17764/22.

<sup>71</sup> Reference to Press release of the Court.

<sup>72</sup> See [Res. 2404 - Resolution - Adopted text](#).

<sup>73</sup> See Regulation (EU)2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 ([Regulation - EU - 2024/1359 - EN - EUR-Lex](#)).

*encouraged or exploited by States or other actors, with the aim of exerting pressure on, destabilising or undermining a member State and European democracies. It can be seen as a contemporary phenomenon which has emerged in a specific geopolitical and security context*

- *Note with concern than instances of instrumentalisation may result in acute humanitarian crises, leaving migrants stranded at borders where they may be at significant risk of becoming victims of violence, exploitation, trafficking, smuggling, or inhuman or degrading treatment, without adequate protection or assistance*
- *Underline that migrants involved in instrumentalised migratory movements retain their rights under the Convention and other European and international law*
- *Recall that instrumentalisation of migration creates challenges with respect to States Parties' fundamental duty to protect everyone within their jurisdiction, to protect their borders and to maintain national security and public order*
- *Consider that there is a need for clarity regarding the application of the Convention in this context; note that Member States look forward to receiving guidance from the forthcoming Grand Chamber judgments in the pending cases*

#### **d. Decision-making in migration cases**

57. As noted above, situations of mass irregular arrivals create challenges for national asylum systems, including decision-making processes on claims for international protection. In order to avoid undue delay, States may seek to implement internal general guidance on the assessment of such claims in certain situations, without necessarily examining individual circumstances in every case. This may include the application of rules-based decision-making to certain categories of case. The Court has noted that “the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers.”<sup>74</sup>

58. Some guidance in this area may be found in the 2009 Committee of Ministers Guidelines on human rights protection in the context of accelerated asylum procedures. The explanatory memorandum to these guidelines notes that “accelerated asylum procedures’ abrogate from standard procedural timescales and normally applicable guarantees with a view to accelerating the decision making-process. The general meaning of this expression is to indicate that certain claims are treated faster than others and that, generally, accelerated procedures feature less procedural guarantees. This expression may thus also refer to procedures used in respect of asylum applicants at borders and asylum applicants who have no documents or present false documents or have not respected the deadlines for lodging their application or other procedural rules, etc.” The explanatory memorandum also underlines the importance of creating exceptions from accelerated procedures for complex cases, which should be “examined by means of a careful and individualised determination within the regular asylum procedure and offering full procedural guarantees.”

59. There is no settled case-law of the Court on this particular issue. Possible indications of how the Convention may apply might be discerned from the Court’s approach in the case of *Animal Defenders v. United Kingdom*, concerning general regulation by legislation of political advertising on broadcast television. In that case, the Court determined that the core issue was “whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it”.<sup>75</sup> The Court’s references to the need for “flexibility, promptness and effectiveness” of decision-making in a case concerning family reunification with a beneficiary of international protection may also have

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<sup>74</sup> *Saadi v. United Kingdom* [GC], no. 13229/03, 29 January 2008, para. 80.

<sup>75</sup> No. 48876/08, Grand Chamber judgment of 22 April 2013, para. 110.

some relevance.<sup>76</sup> It should be noted, however, that these judgments concerned quite different contexts and their applicability to the present issue is uncertain.

60. Member States may therefore benefit from further guidance on how such national law and measures on decision-making can be applied consistently with the Convention, including the weight to be accorded to States' legitimate interests in immigration control and public safety, and the relevant factors/ criteria to be assessed.

### Possible elements

*The political declaration could:*

- *Recall that situations of mass irregular arrivals create challenges for national asylum systems, including decision-making processes on claims for international protection*
- *Note that States Parties may seek to implement internal general guidance on the assessment of such claims in certain situations, which may include the application of rules-based decision-making to certain categories of case*
- *Recall in this connection the 2009 Committee of Ministers Guidelines on human rights protection in the context of accelerated asylum procedures*
- *Consider that domestic courts and authorities may benefit from further guidance on how such national law and measures on decision-making can be applied consistently with the Convention, including the weight to be accorded to States' legitimate interests in immigration control and public safety, and the relevant factors/ criteria to be assessed*

### **e. Innovative solutions to address migration**

61. A number of member States have explored and are exploring the possibility of implementing innovative solutions in response to irregular migration, including through cooperation with third countries regarding effective asylum systems and efficient procedures for the return of persons found not to be in need of international protection.

62. States Parties may establish their own immigration policies, which may include cooperation with third countries. The Convention does not prevent this, provided that they continue to fulfil their Convention obligations.<sup>77</sup>

63. Amongst the forms of innovative solution that have been envisaged are processing in a third country of requests for international protection, third country "return hubs", and co-operation with countries of transit.<sup>78</sup>

64. The Court has not yet had the opportunity to rule on cases concerning all forms of innovative solution that have been envisaged. It has, however, examined cases involving removal of an individual to a third country, without the merits of their claim for protection having first been considered by the national authorities.

65. In such circumstances, the State must first determine whether there is a real risk of the individual being removed, directly or indirectly, to a risk of violation of Article 3 in their country of origin without first having access, in the receiving third country, to an asylum procedure that affords sufficient guarantees against that risk. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the individual should not be removed

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<sup>76</sup> *M.A. v. Denmark* [GC], no. 6697/18, 09 July 2021, para. 138.

<sup>77</sup> See *N.D. & N.T. v. Spain* [GC], nos. 8675/15 & 8697/15, 13 February 2020, paras. 167-168.

<sup>78</sup> For present purposes, a "third country" is any country that is neither the individual's country of origin, nationality or former habitual residence nor the country in which they currently find themselves.

to the third country concerned.<sup>79</sup> States must also ensure that the person removed to the third country will not be subject to a real risk of exposure to torture or inhuman or degrading treatment contrary to Article 3 in that country.

66. The Court has identified a number of procedural guarantees in relation to the above issues that should be afforded under the domestic law of the State that is considering whether to remove an individual to a safe third country for examination of their claim to international protection.<sup>80</sup> Committee of Ministers Recommendation No. R(97)22 on application of the safe third country concept provided guidance in this area. The CDDH is currently examining the need for and feasibility of updating this recommendation.

#### Possible elements

*The political declaration could:*

- *Reiterate the importance of innovative solutions to address migration, in particular for countries that are exposed to mass arrivals, and as a potential deterrent for irregular migration*
- *Recall that States Parties may establish their own immigration policies, which may include cooperation with third countries, provided that they continue to fulfil their Convention obligations*
- *Underline the importance of efficient procedures for the return of persons found not to be in need of international protection*

### **IV. Conclusions**

67. Examination of the issues within the CDDH's current mandate have exposed four inter-linked general themes: the importance of context to the Court's decision-making and a proper understanding of the applicability of principles emerging from its caselaw; the clarity and consistency (or, in some situations, the absence) of the Court's case-law in various ways; and the need for effective communication on Convention standards and dialogue between Convention actors. These themes form the basis for practical proposals on how to address some of the issues that have been examined, as set out in the elements mentioned above and compiled in the appendix.

#### **a. Clarity and consistency of the case-law**

68. The importance of clarity and consistency of the Court's caselaw, which was noted in several previous high-level declarations,<sup>81</sup> is relevant also in the context of migration. This is linked to the importance of context, of which the significance and consequences must be clearly apparent in judgments if principles arising from the case-law are to be correctly applied by national authorities. It is also important that when the Court substitutes its own assessment of the merits for that of a national court, its strong reasons for doing so are clearly explained.

#### Possible elements

*The political declaration could:*

- *Reaffirm that the Court authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions*

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<sup>79</sup> *Ilias & Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, para. 134.

<sup>80</sup> *Ilias & Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, paras. 139-141.

<sup>81</sup> See e.g. Interlaken Declaration, para. (4), Brighton Declaration, para. 23, Brussels Declaration, para. A.1., Copenhagen Declaration, para. 27.

- Express continued appreciation for the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner
- Underline the importance of taking into account the case-law of the Court in a way that gives full effect to the Convention
- Recall that the judgments of the Court need to be clear and consistent. This promotes legal certainty, helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application
- Invite the Court to continue having regard to the clarity and consistency of its case law, taking into account the applicability in different contexts and circumstances of principles that it establishes

### **b. The importance of context**

69. The factual context of a case is important on two related levels: it is important that the Court takes the context of a case properly into account when applying the Convention and developing caselaw principles; and it is important that a domestic court considers the context of the case underlying a judgment of the Court when applying principles taken from that judgment in its own case.

70. Indeed, the Court's caselaw reflects its appreciation of the significance of context. For example, when determining whether the threshold of severity for treatment or punishment to be considered as inhuman or degrading has been met, the Court has observed that some element of suffering and humiliation is inevitable in the context of deprivation of liberty.<sup>82</sup> It has also distinguished between the situation in a State Party and that in a non-State Party when applying Article 3 standards,<sup>83</sup> and referred to context when applying various rights in situations relating to mass arrivals of migrants (see further above). This caselaw demonstrates the flexibility of the Convention when applied in the context of unprecedented new circumstances, including through its interpretation as a living instrument.

71. The Court has noted also that the application of Convention rights may, in practice, involve a degree of contextual assessment by the States Parties concerned,<sup>84</sup> which is an expression of the principle of subsidiarity.

#### Possible elements

*The political declaration could:*

- Underline the importance of context to the application of Convention rights
- Recall that in accordance with the principle of subsidiarity and the concept of the margin of appreciation, there may be a range of different but legitimate solutions when applying certain Convention provisions, each of which could be compatible with the Convention depending on the context
- Consider that domestic authorities may benefit from further guidance on how to evaluate the significance of context when applying principles taken from specific judgments of the Court, which could for example be provided in an appropriate form by an intergovernmental committee such as the CDDH and/ or through development of a course under the Human Rights Education for Legal Professionals (HELP) programme

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<sup>82</sup> *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000, para. 94.

<sup>83</sup> See the caselaw on access to medical care and Article 3, in particular *D. v. United Kingdom*, no. 30240/96, 02 May 1997 and *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016; on extradition to a risk of life imprisonment without possibility of parole, *Babar Ahmad & otrs v. United Kingdom*, no. 24027/07 & otrs, 10 April 2012.

<sup>84</sup> *Ždanoka v. Latvia* (no. 2), no. 42221/18, 25 July 2024, para. 55.

**c. Communication on Convention standards and dialogue between Convention actors**

72. In order to ensure variously that national authorities fully appreciate the importance of context when applying principles arising from specific judgments of the Court, that the Court is fully cognisant of the full relevant context when determining a case, that potential issues relating to clarity and consistency of the case-law are brought to the attention of the Court, and that the public is properly informed about the Convention systems and its standards, a range of procedural and institutional avenues exist at both national and European levels.

73. In keeping with the principle of subsidiarity, it is for the States Parties themselves to promote the appropriate application of Convention standards by national authorities, in accordance with the Court's caselaw and subject to the interpretative jurisdiction of the Court. This could be done, for example, through internal administrative policy guidance, whose Convention compatibility may be challenged before domestic courts, or through legislative standards. The Court considers that the quality of the parliamentary and judicial review of the necessity of a general measure is of particular importance when determining its proportionality, including to the operation of the relevant margin of appreciation.<sup>85</sup>

74. For the States Parties, the primary means of engaging with the Court is by making submissions in proceedings on cases before the Court, whether as a respondent State or as a third party. The respondent State in a case may ask for a Chamber judgment to be referred to the Grand Chamber of the Court for further consideration of a serious question affecting the interpretation or application of the Convention.<sup>86</sup> States Parties, as member States of the Council of Europe, can also express their collective views on Convention-related issues through the adoption of instruments of the Committee of Ministers, including recommendations, resolutions, and declarations, and the adoption of declarations or conclusions of high-level conferences. The process of supervision of execution of the Court judgments by the Committee of Ministers also gives States the opportunity to consider the implications and implementation of the Court judgments, and in certain circumstances to refer a matter back to the Court for a ruling on a question of interpretation of a judgment.<sup>87</sup>

75. The highest courts or tribunals of those States Parties that have ratified Protocol No. 16 may, in the context of a concrete case before them, request an advisory opinion of the Court on a question of principle relating to the interpretation or application of Convention rights. Dialogue between the Court and the highest courts and tribunals also takes place through the Superior Courts Network and meetings between the Court's judges and those of national courts.

76. Other Convention actors, including lawyers representing applicants and civil society organisations, are engaged in relation to Convention standards by various means. These include meetings with the Court's Registry, the Council of Europe's Human Rights Education for Legal Professionals (HELP) programme, their involvement in the work of steering committees and other standard-setting bodies and in co-operation projects, their participation in proceedings before the Court as third parties or in relation to supervision of execution of Court judgments under Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, and the organisation of conferences and other events dealing with Convention-related issues.

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<sup>85</sup> *Animal Defenders v. United Kingdom* [GC], no. 48876/08, 22 April 2013, para. 108.

<sup>86</sup> Article 43 of the Convention.

<sup>87</sup> Article 46(3) of the Convention.

### Possible elements

- *Welcome and encourage open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention*
- *Recall that an important way for the States Parties to engage in a dialogue with the Court is through third-party interventions*
- *Invite the Court to facilitate third-party interventions in appropriate cases so that it may be duly informed about the overall implications of a question of interpretation or application of the Convention, including where domestic courts may have inadvertently gone beyond the requirements of the Court's case-law*
- *Encourage the States Parties further to increase coordination and co-operation on third-party interventions, including by building the necessary capacity to do so and by communicating more systematically through the Government Agents Network on cases of potential interest for other States Parties*
- *Recall that by determining serious questions affecting the interpretation of the Convention and serious issues of general importance, the Grand Chamber plays a central role in ensuring transparency and facilitating dialogue on the development of the case law*
- *Reiterate the invitation to the Court to adapt its procedures to make it possible for other States Parties to indicate their support for the referral of a case to the Grand Chamber when relevant, which may be useful to draw the attention of the Court to the existence of a serious issue of general importance within the meaning of Article 43(2) of the Convention*
- *Encourage further strengthening of the comprehensive dialogue between the Court and the highest courts and tribunals of the States Parties, including through the Superior Courts Network and, for designated courts and tribunals in those States that have ratified it, advisory opinions delivered under Protocol No. 16 to the Convention*
- *Consider that the Council of Europe may provide a forum for dialogue among member States to address the challenges relating to migration, thereby contributing to the coherence, effectiveness and credibility of the Convention system*
- *Invite the Court to take such steps as it considers appropriate to support the application of its case law by national authorities, including by:*
  - o *taking note of the manner in which its case law has been applied at national level and the views set out by Contracting States in this Declaration, and taking action to address any misunderstanding or unintended consequence*
  - o *maintaining and strengthening its dialogue, through its judgments and otherwise, with the highest national courts of States Parties*

## Appendix

### ***Compilation of possible elements***

<b>Issues</b>	<b>Elements</b>
<u>Object and purpose of the Convention (preamble)</u>	Recall the extraordinary contribution of the system established by the Convention to the protection and promotion of human rights and the rule of law in Europe, as well as its central role in the maintenance and promotion of democratic security and peace throughout the Continent
	Reaffirm the deep and abiding commitment of the States Parties to the Convention as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention
	Reaffirm the States Parties' rejection of attacks at high political levels on the rights protected by the Convention and the judgments of the Court seeking to safeguard them
<u>Primary responsibility (Article 1)</u>	Underline the primary obligation for all States Parties to the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention in accordance with the principle of subsidiarity
<u>National implementation</u>	Recall that the overall human rights situation in Europe depends on States' actions and the respect they show for Convention requirements, which requires the engagement of and interaction between a wide range of actors to ensure that legislation, and other measures and their application in practice comply fully with the Convention
<u>Subsidiarity/ margin of appreciation</u>	Underline the importance of the principle of subsidiarity and the margin of appreciation for the implementation of the Convention at the national level by the States Parties, which reflect that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions
	Welcome the continuing further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the Court in its jurisprudence
	Recall that where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so
<u>Effective remedies (Article 13)</u>	Recall that a central element of the principle of subsidiarity is the right to an effective remedy under Article 13 of the Convention
	Underline the importance of States Parties providing domestic remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court's case law
<u>Shared responsibility</u>	Underline the importance of the notion of shared responsibility between the States Parties, the Court and the Committee of Ministers, along with the Parliamentary Assembly and the Council of Europe Commissioner for Human Rights, to ensure the proper functioning of the Convention system

	Recognise the role of the Council of Europe Commissioner for Human Rights and of national human rights institutions and civil society organisations in monitoring compliance with the Convention and the Court's judgments
	Underline the need to secure an effective, focused and balanced Convention system, where the States Parties effectively implement the Convention at national level, and where the Court can focus its efforts on identifying serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention
<u>Role of the Court (Article 19)</u>	Recall the important achievements of the Court through its judgments and decisions in supervising compliance with the Convention and defending the values underpinning the Council of Europe
	Recall that the Court acts as a safeguard for individuals whose rights and freedoms are not secured at the national level and may deal with a case only after all domestic remedies have been exhausted. It does not act as a court of fourth instance
<u>Jurisdiction of the Court/ interpretation (Article 32)</u>	Recall that the Court authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions
	Express continued appreciation for the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner
<u>Right of individual application (Article 34)</u>	Reaffirm the States Parties' strong attachment to the right of individual application to the Court as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention
<u>Execution of judgments (Article 46)</u>	Underline the fundamental importance of the full, effective and prompt execution of the Court's judgments and the effective supervision of that process to ensure the long-term sustainability, integrity and credibility of the Convention system
	Underline the States Parties' unconditional obligation to abide by the final judgments of the Court in any case to which they are parties
<u>The Convention and migration</u>	Recall that States Parties have the undeniable sovereign right to control aliens' entry into and residence in their territory. This right must be exercised in accordance with the provisions of the Convention
	Recall that it is an obligation and a necessity for States Parties to protect their borders in compliance with Convention guarantees
	Recall the importance of States Parties' managing and protecting borders, which may include putting arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements
	Recall the right of States to establish their own immigration policies, potentially in the context of bilateral cooperation
	Note with concern the significant, complex challenges that have arisen in relation to migration, many of which were either unforeseen at the time the Convention was drafted or have evolved significantly since then

	Consider that a failure to recognise and respond to these challenges may erode public confidence in the Convention system
<u>Expulsion and extradition of foreign nationals</u>	Underline that the inability to expel or extradite an individual convicted or charged with a serious offence can lead to significant challenges for States, including in relation to their fundamental duties to guarantee their populations' right to live in peace, freedom and security, notably by protecting public safety and national security and preventing disorder and crime
	Recall that the right balance must be struck between individual rights and interests and the weighty public interests of defending freedom and security in the societies of the States Parties
	Encourage member States to bring forward detailed national measures on how relevant Convention rights, including under Articles 3 and 8, should be applied in their national legal system in the specific context of expulsion and extradition, as a means of giving practical effect to the principles of subsidiarity and shared responsibility, subject to the interpretative control of the Court under Article 32
<u>Expulsion &amp; extradition – Article 3</u>	Emphasise that the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 of the Convention is absolute. It permits no derogation, contains no exceptions, and allows for no legitimate interference
	Recall that the absolute prohibition of inhuman or degrading treatment or punishment reflects that it relates to the most serious forms of ill-treatment, and consider that the minimum level of severity of ill treatment that constitutes inhuman or degrading treatment or punishment must therefore remain high and constant, and be clearly and consistently applied at all levels, avoiding unnecessary constraints on decisions to expel or extradite foreign nationals
	Note that the Court has rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law
	Underline that the Convention does not purport to be a means of requiring the States Parties to impose Convention standards on other States
	Underline that where an individual is being expelled or extradited, the quality of accessible healthcare in the receiving State should only give rise to a real risk of Article 3 in very exceptional circumstances
	Note that caution must be exercised when applying case-law concerning the situation in a State Party when assessing whether the removal of an individual to a non-State Party would violate a State's obligations under Article 3 of the Convention
	Consider that domestic courts and authorities may benefit from further guidance on whether and how to apply the Court's judgments concerning conditions in a State Party when assessing whether conditions in a non-State Party may amount to a violation of Convention rights, notably under Article 3
	Consider that domestic courts and authorities may benefit from further guidance on how cumulative circumstances may, taken together, amount to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, in violation of Article 3

	Express concern that where a person cannot be extradited to face trial or serve a penal sentence for a serious offence, this gives rise to impunity, allowing a person to evade justice in a country in which they have committed an offence, simply by virtue of having left that country; and consider that all possible steps must therefore be taken to avoid this, consistent with Convention obligations
	Note the possibility of recourse to diplomatic assurances to obviate a risk of violation of Article 3 following expulsion or extradition
<u>Expulsion &amp; extradition – Article 8</u>	Recall that Article 8 allows public authorities to interfere with an individual's right to respect for private and family life, so long as such interference is in accordance with the law and necessary in a democratic society in pursuit of the public interest. Among the legitimate interests that may justify interference are national security, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others. The test of necessity requires that the interference be proportionate to the public interest being pursued
	Note that, according to the case law of the Court, where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts
	Consider it essential that, in the interests of public understanding, decisions which give lesser weight to the public interest in maintaining safety and preventing disorder and crime than to the individual rights of a convicted criminal are fully and clearly explained
	Note that it is important that the Court in its judgments provides sufficient detail of any strong reasons for substituting its assessment of proportionality for that of domestic courts and makes clear its awareness of the particularities of national legal systems and traditions, including for example the extent to which the length of a sentence of imprisonment reflects the seriousness of an offence
<u>Mass arrivals of migrants</u>	Recall that the arrival of large numbers of migrants represents a complex and evolving challenge for frontline States, including to their sovereign right to protect national borders and decide who legally enters the territory and their fundamental responsibility to ensure national security and public safety
	Recognise that irregular arrivals by sea represent a major risk of life for irregular migrants and that the significant reduction in irregular maritime crossings of the Mediterranean seen recently has been matched by a comparable reduction in the loss of lives at sea
	Underline that States Parties must respond to such situations in conformity with their Convention obligations, recalling that the Court has acknowledged that frontline States experience considerable difficulties in coping with increasing influxes of migrants and asylum seekers and has expressly recognised the burden and pressure this places on them
	Stress the need to strengthen national measures international cooperation against the human trafficking and migrant smuggling networks involved in mass arrivals, recalling Council of Europe standards in this area, including the Convention on action against trafficking in human beings
<u>Instrumentalisation of migration</u>	Consider that instrumentalisation of migration may be taken to refer to situations where migratory movements, including unlawful border

	crossings, are deliberately facilitated, encouraged or exploited by States or other actors, with the aim of exerting pressure on, destabilising or undermining a member State and European democracies. It can be seen as a contemporary phenomenon which has emerged in a specific geopolitical and security context
	Note with concern than instances of instrumentalisation may result in acute humanitarian crises, leaving migrants stranded at borders where they may be at significant risk of becoming victims of violence, exploitation, trafficking, smuggling, or inhuman or degrading treatment, without adequate protection or assistance
	Underline that migrants involved in instrumentalised migratory movements retain their rights under the Convention and other European and international law
	Recall that instrumentalisation of migration creates challenges with respect to States Parties' fundamental duty to protect everyone within their jurisdiction, to protect their borders and to maintain national security and public order
	Consider that there is a need for clarity regarding the application of the Convention in this context; note that Member States look forward to receiving guidance from the forthcoming Grand Chamber judgments in the pending cases
<u>Decision-making in migration cases</u>	Recall that situations of mass irregular arrivals create challenges for national asylum systems, including decision-making processes on claims for international protection
	Note that States Parties may seek to implement internal general guidance on the assessment of such claims in certain situations, which may include the application of rules-based decision-making to certain categories of case
	Recall in this connection the 2009 Committee of Ministers Guidelines on human rights protection in the context of accelerated asylum procedures
	Consider that domestic courts and authorities may benefit from further guidance on how such national law and measures on decision-making can be applied consistently with the Convention, including the weight to be accorded to States' legitimate interests in immigration control and public safety, and the relevant factors/ criteria to be assessed
<u>Innovative solutions to address migration</u>	Reiterate the importance of innovative solutions to address migration, in particular for countries that are exposed to mass arrivals, and as a potential deterrent for irregular migration
	Recall that States Parties may establish their own immigration policies, which may include cooperation with third countries, provided that they continue to fulfil their Convention obligations
	Underline the importance of efficient procedures for the return of persons found not to be in need of international protection
<u>Context</u>	Underline the importance of context to the application of Convention rights
	Recall that in accordance with the principle of subsidiarity and the concept of the margin of appreciation, there may be a range of different but

	legitimate solutions when applying certain Convention provisions, each of which could be compatible with the Convention depending on the context
	Consider that domestic authorities may benefit from further guidance on how to evaluate the significance of context when applying principles taken from specific judgments of the Court, which could for example be provided in an appropriate form by an intergovernmental committee such as the CDDH and/ or through development of a course under the Human Rights Education for Legal Professionals (HELP) programme
<u>Clarity and consistency of the case-law</u>	Reaffirm that the Court authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions
	Express continued appreciation for the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner
	Underline the importance of taking into account the case-law of the Court in a way that gives full effect to the Convention
	Recall that the judgments of the Court need to be clear and consistent. This promotes legal certainty, helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application
	Invite the Court to continue having regard to the clarity and consistency of its case law, taking into account the applicability in different contexts and circumstances of principles that it establishes
<u>Communication and dialogue</u>	Welcome and encourage open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention
	Recall that an important way for the States Parties to engage in a dialogue with the Court is through third-party interventions
	Invite the Court to facilitate third-party interventions in appropriate cases so that it may be duly informed about the overall implications of a question of interpretation or application of the Convention, including where domestic courts may have inadvertently gone beyond the requirements of the Court's case-law
	Encourage the States Parties further to increase coordination and co-operation on third-party interventions, including by building the necessary capacity to do so and by communicating more systematically through the Government Agents Network on cases of potential interest for other States Parties
	Recall that by determining serious questions affecting the interpretation of the Convention and serious issues of general importance, the Grand Chamber plays a central role in ensuring transparency and facilitating dialogue on the development of the case law
	Reiterate the invitation to the Court to adapt its procedures to make it possible for other States Parties to indicate their support for the referral of a case to the Grand Chamber when relevant, which may be useful to draw

	the attention of the Court to the existence of a serious issue of general importance within the meaning of Article 43(2) of the Convention
	Encourage further strengthening of the comprehensive dialogue between the Court and the highest courts and tribunals of the States Parties, including through the Superior Courts Network and, for designated courts and tribunals in those States that have ratified it, advisory opinions delivered under Protocol No. 16 to the Convention
	Consider that the Council of Europe may provide a forum for dialogue among member States to address the challenges relating to migration, thereby contributing to the coherence, effectiveness and credibility of the Convention system
	<p>Invite the Court to take such steps as it considers appropriate to support the application of its case law by national authorities, including by:</p> <ul style="list-style-type: none"> <li>- taking note of the manner in which its case law has been applied at national level and the views set out by Contracting States in this Declaration, and taking action to address any misunderstanding or unintended consequence</li> <li>- maintaining and strengthening its dialogue, through its judgments and otherwise, with the highest national courts of States Parties</li> </ul>