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Putting an end to collective expulsions of aliens

Report[1]
Committee on Migration, Refugees and Displaced Persons
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1. Reference to committee: Doc. 15903. Reference 4790 of 7 March 2024.

A. Draft resolution[2]

1. The Parliamentary Assembly recalls that collective expulsions of foreigners are formally prohibited under Article 4 of Protocol No. 4 to the European Convention on Human Rights (ETS No. 46), a prohibition which is also enshrined in the law of the European Union in accordance with Article 19 of the Charter of Fundamental Rights of the European Union. In this context, the Assembly is concerned about the growing divergence between international law and member States' practice.

2. The Assembly considers that the practice of collective expulsions poses a major challenge to respect for the rule of law and fundamental human rights standards, including the principle of *non-refoulement* and the absolute prohibition of torture. It points to the principles by which the Council of Europe member States are bound, their legal obligations in this respect, and stresses the need for increased action by the Organisation to support them in this area.

3. The Assembly points out that pursuant to the judgment of the European Court of Human Rights ("the Court") in *Khlaifia and Others v. Italy*, "collective expulsion" is to be understood as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".

4. Welcoming the case law of the Court, particularly the *Čonka v. Belgium* judgment, in which it was held that all expulsion procedures must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account, the Assembly is alarmed at the widespread practice of collective expulsions in Europe without the individual examination of each person's situation.

5. The Assembly emphasises the importance of an individual examination of each person's situation in preventing collective expulsions. In line with Assembly Resolution 2461 (2022) and Recommendation 2238 (2022) "Safe third countries for asylum seekers", it points out the importance of avoiding the use of lists of safe countries as grounds of inadmissibility for asylum claims, and welcomes the decision of the Committee of Ministers to look into the possibility of revising its Recommendation No. R (97) 2 to member States containing guidelines on the application of the safe third country concept.

6. The Assembly also expresses its deep concern at the spread of the notion of "legal fiction of non-entry", whereby persons are considered not to have entered European territory, and the use of which will be facilitated by the implementation of the European Union Pact on Migration and Asylum (the Pact), which may make it more difficult for people to seek asylum. It refers in this context to the extraterritorial application of Article 4 of Protocol No. 4 established in the *Hirsi Jamaa and others v. Italy* judgment, and the fact that the "legal fiction of non-entry" does not exempt States from their obligations, particularly those of *non-refoulement* and the absolute prohibition of torture and ill-treatment.

7. In its Resolution 2462 (2022) "Pushbacks on land and sea: illegal measures of migration management", the Assembly highlighted the intrinsic link between the prohibition of collective expulsions, the principle of *non-refoulement* and the absolute prohibition of torture. Breaching these fundamental principles can expose individuals to tragic consequences for which those responsible should be held accountable.

8. In its Resolution 2555 (2024) "Ensuring human rights-compliant asylum procedures", the Assembly highlighted the following legal obligations, and stresses here the binding nature of these obligations: only through a fair and effective individual examination, including of asylum applications, can a State meet its obligation not to expose, directly or indirectly, anyone falling under its jurisdiction to a risk of torture, or inhumane or degrading treatment. Furthermore, in case of an appeal, the remedy must be accompanied by automatic suspensive effect on expulsion measures should the applicant complain of a risk under Article 2 or 3 of the European Convention on Human Rights (ETS No. 5, "the Convention"). These procedural safeguards are required for the appeal to be considered effective and in compliance with Article 13 of the Convention, and with the consistent case law of the European Court of Human Rights.

9. Conscious of the requirements of internal security and border management incumbent on States in a geopolitical context that is sometimes complex, the Assembly invites Council of Europe member States nonetheless not to fall into the trap of invoking exceptions to human rights principles on the pretext of meeting these challenges. In this respect it refers to Resolution 2404 (2021) "Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus", in which it condemned "any instrumentalisation of migrants, refugees and asylum seekers by States for political purposes".

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2. Draft resolution adopted by the committee on 11 March 2025.

10. The Assembly underlines that the main victims of what it called "hybrid attacks" in Resolution 2404 (2021) are the migrants themselves. The response of States targeted by such attacks punishes migrants, increases their vulnerability rather than holding to account or sanctioning the States that are guilty of this instrumentalisation. This twisted logic is a trap, and migrants will no longer be exposed to situations of extreme vulnerability and subject to human rights violations if European States refuse to fall into it.

11. The Assembly deeply regrets that the drive to protect national security and ensure a total protection of borders seems to be used to justify the relaxing of the rules in force which were built up and agreed to by the States themselves. The concept of instrumentalisation does not provide a basis for a general derogation from asylum and human rights norms, including the absolute nature of the principle of *non-refoulement* and Article 3 of the Convention, and the obligation to conduct an individual assessment of a person's situation before returning them. The Assembly urges member States not to derogate from their obligations, even in difficult situations as the Court of Justice of the European Union recalled in the case C-72/22 PPU - *Valstybės sienos apsaugos tarnyba*.

12. Regretting that no European country on the migration routes taken by those seeking refuge and a decent life in Europe is exempt from the practice of collective expulsions of foreigners, the Assembly calls on the Council of Europe member States to work together to establish legal migration pathways which will both avoid human tragedies and respond to labour shortages, in keeping with the spirit of Assembly Resolution 2586 (2025) "Immigration, one of the answers to Europe's demographic ageing".

13. To make it possible to document any infringements of rights at the border, to hold those responsible accountable, and to guarantee access for migrants to legal assistance and information on their rights, border areas must be accessible at all times, including areas where and in procedures during which the "legal fiction of non-entry" applies and/or where migrants are deprived of their freedom. Access should be granted, in law and in practice, not only to the Frontex Fundamental Rights Officer but also to national and Council of Europe monitoring mechanisms, the United Nations High Commissioner for Refugees, national human rights institutions, parliamentarians, civil society organisations, health professionals, lawyers and journalists.

14. In this context, the Assembly welcomes the fact that the European Union member States are required to set up independent national monitoring mechanisms by June 2026 to guarantee respect for human rights at borders during the "screening" procedures and accelerated asylum procedures at the border provided for in the Pact. The Assembly strongly encourages member States to take account of the guidance provided by the Fundamental Rights Agency of the European Union in its "Guide on national independent mechanisms", especially the recommendation to adopt national legislation to extend the scope of monitoring to all the aspects of border management including return procedures.

15. The Assembly recognises that the adoption of the Pact is a sign of the political will among European Union member States to take a consistent approach to these issues. With a transitional period that runs until 2026 and implementing measures yet to be adopted, however, the Assembly stresses that proper safeguards need to be established when devising the national plans for the implementation of the Pact so as to avoid the occurrence of collective expulsions.

16. To guarantee access to an individual assessment of the situation of each migrant, particularly when crossing borders, in the context of asylum or return procedures, the Assembly strongly encourages the member States to:

16.1. adopt national action plans for the implementation of the Pact in line with the 1951 Convention relating to the Status of Refugees of the United Nations (the 1951 Convention) and the European Convention on Human Rights, making explicit reference to these treaties;

16.2. provide for the systematic assessment and guarantee of the legality of expulsion orders, including those following a decision of inadmissibility with regard to an asylum application, by a court with jurisdiction in the territory concerned, before any return operation, including in fictional "non-entry" situations;

16.3. provide appropriate training based on respect for international human rights law standards, including the 1951 Convention and the European Convention on Human Rights, intended for border guards and other stakeholders such as lawyers, judges and prosecutors, interpreters and administrative staff. In this context, the Assembly encourages the use of the Council of Europe Programme on Human Rights Education for Legal Professionals (HELP) to devise such programmes;

16.4. provide access to a lawyer and interpretation services, including when migrants intercepted at sea disembark, and ensure compliance with official note taking procedures, particularly so as to avoid the misinterpretation of statements made in the context of applications for international protection;

16.5. for those member States that are members of the European Union, allocate sufficient material and human resources for the proper implementation of national plans for the application of the Pact while respecting human rights, particularly with regard to the implications in terms of procedural guarantees.

17. Noting the high number of applications pending before the Court concerning collective expulsions and of judgments which are still under supervision of the Committee of Ministers of the Council of Europe, the Assembly urges the Council of Europe member States concerned to execute these judgments promptly and fully, in particular by:

17.1. taking all the necessary measures to ensure that migrants are treated in accordance with the Convention, particularly with regard to collective expulsion, and that they are systematically given genuine and full access to legal entry procedures;

17.2. ensuring that asylum seekers are not expelled without being identified or having their individual situations assessed;

17.3. avoiding any distortion of foreigners' statements as to whether they wish to request international protection;

17.4. offering migrants effective remedies, including, in particular, sufficient time to take their case to court before expulsion orders are executed;

17.5. ensuring that the suspensive effect of remedies against decisions to refuse applicants admission to the country applies in law and in practice;

17.6. benefiting from the process of execution of Court judgments in order to develop a comprehensive approach to the challenges posed by large-scale arrivals of migrants, aiming thereby to resolve any complex structural problems identified by the Committee of Ministers.

18. The Assembly welcomes the political will of those States which choose to receive migrants in accordance with international law standards despite the challenges raised by substantial numbers of arrivals.

19. Noting that the countries in which migrants first arrive are those that shoulder most of the responsibility for reception and integration policies, the Assembly calls for a co-ordinated and coherent European approach to reception of migrants, in law and in practice, across territories at both national and European levels.

20. The Assembly points out that the prohibition of collective expulsions applies at all borders including internal borders of the European Union. Hasty returns within the Schengen area cannot be justified without due regard for applicable procedural guarantees and an individual decision, in keeping with the case law of Court of Justice of the European Union. The Assembly also draws attention to the extended re-establishment of controls within the internal borders of the Schengen Area, which runs counter to this spirit of solidarity.

21. The Assembly points out how essential it is for the best interests of the child to be protected under all circumstances and strongly regrets instances of political instrumentalisation of the situation of unaccompanied children. Where large numbers of such children arrive in particular geographical areas, the Assembly strongly encourages stakeholders to seek a solution which will enable the relocation, settlement and integration of these children to and into other regions of the same country. This would foster a consistent approach where it comes to their due prospects of being welcomed and integrated, including support through guardianship systems in keeping with Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration.

22. The Assembly strongly encourages an overhaul of asylum legislation in countries where it is no longer fit for the purpose of coping with increases in migration and does not comply with European law.

23. Recognising the importance of providing legal assistance to migrants to make the assessment of their individual situation effective, the Assembly considers it critical that more lawyers specialising in the law on foreigners are available at points of arrival. It strongly recommends the provision of specific training in maritime law and asylum law to support these efforts. It also recommends improved access to interpreters, particularly at the point when migrants disembark.

24. The Assembly is concerned about the sexual and gender-based violence to which women and children are subjected during their journey, and the risks of trafficking afterwards. It recalls that if the competent authorities consider that there are reasonable grounds to believe that a person is a victim of trafficking in human beings, they must not be removed from the country until the process of identifying them as a victim is complete. It recommends the introduction of special protection measures to guarantee their safety including:

24.1. specific training for lawyers to help them recognise and assist victims of sexual and gender-based violence, with earmarked funding;

24.2. save in cases of family ties or friendships predating the journey, the separation of men and women in reception centres for foreigners or the transfer of women to separate centres to protect them from pressure from the men with whom they travelled.

25. The Assembly welcomes the creation of a new Division on Migration and Refugees at the Council of Europe, established with a view to consolidating and intensifying the Organisation's efforts to address urgent matters related to migration and asylum, and invites the member States to take full advantage of this new structure.

26. Convinced of the Council of Europe's key role in supporting member States in their efforts to honour the commitments they have entered into in joining the Organisation and ratifying its international treaties, particularly the European Convention on Human Rights, the Assembly encourages the member States and European Union bodies to refer systematically to Council of Europe standards when devising national and European public policies on migration and asylum. More generally, it considers that the updating of the "Twenty guidelines on forced return" adopted by the Committee of Ministers (CM(2005)40) and the development by the Council of Europe of a toolkit of good practices concerning the implementation of its standards in the management of migration and asylum by its member States would be very useful.

27. The Assembly is convinced that the complex situation of Council of Europe member States' overseas territories, which requires a humane and transparent policy response respecting individual rights, would merit further consideration, and recommends that this issue be addressed in a future report.

B. Draft recommendation[3]

1. The Parliamentary Assembly, referring to its Resolution ... (2025) “Putting an end to collective expulsions of aliens” and noting the challenges posed by the practice of collective expulsions to the rule of law and fundamental human rights standards, including the principle of *non-refoulement* and the absolute prohibition of torture, points to the principles by which the Council of Europe member States are bound, their legal obligations in this respect, and stresses the need for increased action by the Organisation to support them in this area.

2. The Assembly welcomes the creation within the Council of Europe of a new Division on Migration and Refugees aimed at consolidating and intensifying the Organisation's efforts to tackle pressing issues related to migration and asylum and invites the Committee of Ministers to fully support these efforts by all available means.

3. Convinced of the role of the Council of Europe in supporting its member States with regard to the fulfilment of the commitments they have entered into in joining the Organisation and ratifying its international treaties, particularly the European Convention on Human Rights (ETS No. 5), the Assembly invites the Committee of Ministers to actively encourage the systematic reference to Council of Europe standards in the development of national and European public policies on migration and asylum. To this end, it calls on the Committee of Ministers to facilitate the development of a toolbox on good practices concerning the implementation of Council of Europe standards in the management of migration and asylum by its member States. The Assembly also invites the Committee of Ministers to update document CM(2005)40 “Twenty guidelines on forced return.”

3. Draft recommendation adopted by the committee on 11 March 2025.

C. Explanatory memorandum by Mr Pierre-Alain Fridez, rapporteur

1. Introduction

1. After tabling a motion for a resolution entitled "Putting an end to collective expulsions of aliens", which the Parliamentary Assembly referred to the Committee on Migration, Refugees and Displaced Persons for report on 7 March 2024, I was appointed rapporteur on 16 April 2024.

2. Collective expulsions are prohibited by international law and yet they are carried out by States and "a sense of impunity prevails".[4] Worse still, some of those States are seeking to use the current context as an excuse to overturn international law and, specifically, the prohibition.

3. The issue of refoulement, which is inextricably linked to the subject of this report, is one I have addressed before, in the report entitled "Pushbacks on land and sea: illegal measures of migration management" (Doc. 15604) debated by the Assembly in October 2022. To date, more than 20 cases of collective expulsions involving different countries are pending before the European Court of Human Rights ("the Court"), including in overseas territories such as Mayotte (France). Even as many of the Court's rulings remain unenforced by the States concerned, new cases concerning allegations of collective expulsions of foreigners continue to be filed.

4. Now that the European Union (EU) has adopted a new Pact on Migration and Asylum ("the Pact"), with its attendant challenges around respect for the right to asylum and related procedural safeguards, it is vitally important to remind ourselves of what international human rights law requires in terms of prohibiting collective expulsions of foreigners.

5. The aim of this report is to reflect on current practices in Europe that give rise to collective expulsions of foreigners and on their consequences for the latter, with a view to making recommendations to prevent such practices and to facilitate implementation of the Court's judgments in this area. It is my firm belief that the imperatives of maintaining national security and public order are not incompatible with respect for human rights. Quite the contrary.

6. The whole problem with collective expulsions stems from the fact that a person arrives in another country, seeking help or assistance, or even asylum, and that there is no individual assessment of their personal circumstances. It is important to emphasise the word "individual" and to refrain from treating individuals as a group, so as to avoid at all costs the possibility of people being pushed back or expelled with others before their case has been individually assessed. Those concerned have the right to such an assessment, just as they have the right to be protected against any form of pushback or expulsion while their application is being processed, whatever the outcome. This is a key element of the European Convention on Human Rights (ETS No. 5, "the Convention"), enshrined in Article 4 of Protocol No. 4 (ETS No. 46).[5]

7. Without wishing to downplay the fact that the subject encompasses situations of a special nature which raise complex issues, it is important to note that collective expulsions lead to human tragedies that are a disgrace to our continent in the 21st century. As a doctor and a member of this Assembly, I will always endeavour to bring individual tragedies to the fore and do everything possible to ensure that everyone can live a dignified life and have their rights respected. Whenever we start to treat a group as a whole entity and stop treating each person as an individual, we lose a little of our humanity, and risk forgetting the lessons that history has taught us and to which we should remain true.

2. Legal framework

8. According to the Convention and the case law of the Court, "collective expulsion" is to be understood as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".[6] A number of international standards prohibit collective expulsions of foreigners. Although the terms "collective expulsion" and "refoulement" are often used interchangeably, they are not identical.

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4. European Union Agency for Fundamental Rights (FRA) (2024), "Guidance on investigating alleged ill-treatment at borders", p. 34.
5. Not signed by Greece and Switzerland and not ratified by the United Kingdom and Türkiye.
6. *Khlaifia and Others v. Italy* [GC], 2016, § 237.

9. Based on the fundamental principle of *non-refoulement* and the absolute nature of the prohibition of torture, the 1951 Convention relating to the Status of Refugees of the United Nations ("the 1951 Convention"), the United Nations Convention against Torture,[7] the Global Compact on Refugees,[8] and the Global Compact for Safe, Orderly and Regular Migration,[9] constitute branches of the United Nations (UN) legal framework, along with the case law of the Human Rights Committee in its interpretation of Article 13 of the International Covenant on Civil and Political Rights.[10] Another branch concerns the protection of migrant workers and their families, who are protected from collective expulsions by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[11]

10. In recent years, the Court has increasingly been called upon to examine cases of pushbacks at sea, at land borders and shortly after people had entered the territory of a State Party. Its examination has been based on various provisions (Articles 1, 3, 13 of the Convention and, of course, 4 of Protocol No. 4) and has given rise to numerous judgments and decisions. The Court has been asked to examine a wide variety of situations, including cases of people being returned to their country of origin[12] or to a third country.[13] Article 4 of Protocol No. 4 constitutes the legal basis for the Court's judgments and the Court has been called on to interpret this article since its judgment in *Čonka v. Belgium*, in which it held that an expulsion procedure against Slovak nationals of Roma origin had not afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.[14]

11. The extraterritorial application of Article 4 of Protocol No. 4 was established in *Hirst Jamaa and Others v. Italy*, in which the Court examined for the first time the applicability of this article to a case involving the removal of aliens to a third State carried out outside the national territory.[15] The case concerned a group of migrants (Somali and Eritrean nationals) from Libya, who were arrested at sea and then pushed back to Libya by the Italian authorities. The Court ruled that, exceptionally, Italy had exercised continuous and exclusive control over the applicants, and hence exercised its jurisdiction outside its national territory, and accepted that the exercise of extraterritorial jurisdiction had taken the form of collective expulsion. Accordingly, interceptions on the high seas by the respondent State's coastguard and the events that took place on board military ships belonging to that State constituted extraterritorial exercise of the State's jurisdiction within the meaning of Article 1 of the Convention and engaged the responsibility of the State in question under Article 4 of Protocol No. 4 where the effect of such actions was to prevent migrants from reaching the borders of the State or even to push them back to another State.[16] The Court also found a violation of Article 3 of the Convention because the applicants had been exposed to the risk of being subjected to ill-treatment in Libya and of being repatriated to their countries of origin. Through this judgment, it reiterated the intrinsic link between collective expulsions and the attendant risk of being subjected to ill-treatment, the prohibition of which is absolute. In *Kebe and Others v. Ukraine*, the Court held that a border control carried out by the respondent State's border guards on board a vessel anchored in one of its ports for the purpose of granting leave to enter fell within the jurisdiction of that State for the purposes of Article 1.[17]

12. The judgment in *N.D. and N.T. v. Spain* concerned 600 people who had attempted to breach, en masse, the fence separating the Spanish enclave of Melilla from the Kingdom of Morocco, hoping to evade border controls by taking advantage of their large numbers.[18] In its judgment, the Court applied a two-pronged test. It sought to establish firstly whether the State had made available genuine and effective access to means of legal entry, in particular border procedures, to allow all persons who faced persecution to submit an application for protection. And, secondly, where the respondent State had provided such access but an applicant had not made use of it, whether they had had cogent reasons not to use the genuine and effective border procedures available at the designated crossing points or not to apply for a visa at an embassy, and whether the lack of individual removal procedures was a consequence of the applicant's own conduct. In the case in question, the Court found no violation of Article 4 of Protocol No. 4 or of Article 13 of the Convention.

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7. Adopted on 10 December 1984 by United Nations (UN) General Assembly Resolution 39/46.
8. UN Global Compact on Refugees, 2018.
9. A/RES/73/195.
10. Adopted on 16 December 1966 by UN General Assembly Resolution 2200A (XXI).
11. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
12. D v. Bulgaria, 20 July 2021.
13. M.K. and Others v. Poland, 23 July 2020.
14. Čonka v. Belgium, 5 February 2002.
15. Hirsi Jamaa and Others v. Italy [GC], 23 February 2012.
16. Ibid., §§ 76-82 and §§ 169-182.
17. Kebe and Others v. Ukraine, 12 January 2017, §§ 75-77.
18. N.D. and N.T. v. Spain, 13 February 2020.

13. In this case, the Court set out the circumstances in which failure to conduct an individual assessment prior to expulsion – which is the rule under Article 4 of Protocol No. 4 – would nevertheless not result in a violation. The judgment in question is often relied on by States to justify summary returns and denial of access to asylum procedures, even when the circumstances are not comparable (presence of risks related to Article 3 of the Convention, no possibility of seeking asylum in an embassy or at the border of the country in question). Nor can we ignore the fact that this ruling has been criticised for its restrictive approach, which limits the scope of the prohibition of collective expulsions and, by extension, the principle of *non-refoulement*. It has also been criticised for placing the responsibility for accessing effective means of legal entry on the individuals themselves, when in practice such means are difficult to access or non-existent.

14. In February 2025, the Court held Grand Chamber hearings in three cases against Latvia, Lithuania and Poland concerning alleged collective expulsions at the borders with Belarus, which will hopefully provide guidance to member States on how to comply with the principle of *non-refoulement* without exception (see below paragraphs 49 to 53).[19]

15. The EU's competence in matters of asylum, subsidiary protection and temporary protection is based on Article 78, paragraph 1, of the Treaty on the Functioning of the European Union, according to which the Union "shall develop a common policy on asylum ... with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement."[20]

16. In addition to Article 19 of the Charter of Fundamental Rights of the European Union ("the Charter"), other EU law instruments protect against refoulement and, by extension, against collective expulsions.[21] This is case of the Schengen Borders Code ((EU) 2016/399) requiring Member States to "act in full compliance" with the Charter and the 1951 Convention, and of Article 4, paragraph 3, of the EU Regulation on the surveillance of external sea borders ((EU) No. 656/2014) which requires intercepted or rescued persons to be questioned prior to disembarkation in order to "give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*."[22]

17. The Court of Justice of the European Union (CJEU) has only referred to Article 19 of the Charter around 30 times. It has repeatedly held that return procedures must include an individual and separate assessment of the principle of *non-refoulement* in asylum cases. This rather slim body of case law is partly explained by the fact that the provision is closely linked to Article 4 (right to integrity) and Article 18 (right to asylum) of the Charter and that there is also secondary case law on the subject. Yet it is of vital relevance because, even though violations are typically committed by States, it is essential that the EU and its competent body in this area, Frontex, do not become complicit.[23]

18. The Pact formally adopted on 14 May 2024 overhauls the rules managing migration and establishing a common asylum system. Its objective is to ensure that the European Union "has strong and secure external borders, that people's rights are guaranteed, and that no EU country is left alone under pressure".[24]

19. The various elements of the Pact are as follows: the introduction of a screening procedure at external borders aimed at identifying in seven days persons subject to asylum or return procedures and introducing rules for the collection of personal information; the updating of the Eurodac database so that it can store the necessary biometric data, with the minimum age for fingerprinting being lowered to six years; the introduction of two asylum procedure channels: the conventional procedure or the accelerated procedure at the border; the introduction of a new mandatory solidarity mechanism to which each member State will have to contribute either by relocating asylum seekers, or by making a financial contribution for each applicant it refuses to relocate, or through alternative solidarity measures such as deploying staff or providing operational support to other countries; and the introduction of a crisis management system providing for more stringent emergency measures in the event that the EU asylum system should be confronted with particular challenges such as a sudden and drastic increase in the number of migrants arriving or a health crisis.[25]

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19. Grand Chamber hearings concerning Latvia, Lithuania and Poland – European Court of Human Rights.
20. Consolidated version of the Treaty on the Functioning of the European Union.
21. Article 19 – Protection in the event of removal, expulsion or extradition, FRA.
22. The 19th of all EU-r rights: protection against expulsion and how the Charter contributes, post of Gabriel N. Toggenburg, LinkedIn.
23. Ibid.
24. Pact on Migration and Asylum – European Commission.
25. Ibid.

20. Although the Pact aims to provide new legal guarantees to ensure that each individual's case is properly assessed, it raises serious concerns. With the introduction of screening and the accelerated procedure, many fear that it will become more difficult to lodge asylum applications in the EU. During the screening procedure and the asylum or return procedure at the border, according to the so-called principle of the "legal fiction of non-entry" or of extraterritoriality, people would be considered as not having entered the European territory. While EU officials believe that the accelerated procedure will help to clarify applicants' expectations in terms of timelines and reduce authorities' administrative backlog, there is legitimate concern as to whether this will prevent people in need of international protection from having a proper individual assessment of their case, potentially increasing the likelihood of them being expelled. The extension of the "legal fiction of non-entry" adds to concerns that "[d]espite assurances in the regulation that human rights will be protected by Member States through independent monitoring mechanisms, the restricted access to asylum and abbreviated asylum processes risk refoulement. Further, the use of the fiction of non-entry in the Regulation restricts asylum seeker access to formal asylum procedures. Because the asylum seeker has not legally crossed a territorial border, the host Member State may claim no obligation to provide access to such formal procedures."[26] There is also a danger that the new rules could undermine the effective right to legal counsel, especially since legal assistance during screening is not explicitly provided for. At the same time, there is a major question mark over the right to appeal, with the automatic suspensive effect being withdrawn in certain circumstances and the ordinary asylum procedure suspended in cases of instrumentalisation of migration. Lastly, the guarantees relating to procedural rights are rather weak and their implementation requires significant resources from the member States, which will doubtfully be forthcoming.

21. The adoption of the Pact is a sign of the political will among EU member States to take a consistent approach to these issues. With a transitional period that runs until 2026 and implementing measures yet to be adopted, however, much remains to be done in terms of delivering the Pact in a way that respects human rights. I would emphasise the importance of putting safeguards in place during implementation to avoid collective expulsions.

3. Human rights violations arising from collective expulsions

3.1. Persons affected

22. The available data suggest that "violations are not only widespread geographically, but that they also affect very large numbers of refugees, asylum seekers and migrants travelling to or within the Council of Europe area (...) in some member states tens of thousands of persons may be affected each year", as noted by the Council of Europe Commissioner for Human Rights (2018-2024).[27]

23. Of the 28 600 people recorded by the Danish Refugee Council (DRC) in 2023 as having reported pushbacks, almost half were of Afghan nationality, followed by Moroccan, Syrian, Pakistani and Bangladeshi nationals.

24. While adult men and adolescents are more likely to be subjected to physical violence – hit with batons, slapped, kicked and punched – during pushbacks, women and girls are more likely to be subjected to gender-based sexual abuse or harassment. There have been pushbacks against pregnant women and other people with reduced mobility, disabilities or health problems.[28]

25. 14% of those reporting pushbacks were children.[29] The United Nations International Children's Emergency Fund (UNICEF) believes that in Europe, "children have suffered physical abuse, abusive and degrading treatment, theft, extortion and destruction of property" during pushbacks.[30]

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26. European Council on Refugees and Exiles, "An analysis of the fiction of non-entry as appears in the Screening Regulation", Dr Kelly Soderstrom, September 2022.
27. Council of Europe Commissioner for Human Rights, 2022, "Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe's borders", p. 24.
28. Human Rights Watch (HRW), 2023, "'Like We Were Just Animals' – Pushbacks of People Seeking Protection from Croatia to Bosnia and Herzegovina".
29. Danish Refugee Council, 2024, "Protecting Rights at Borders (PRAB) in 2023".
30. United Nations International Children's Emergency Fund (UNICEF), 2021, "Pushback Practices and their Impact on the Human Rights of Migrants – UNICEF Submission to the Thematic Report of the United Nations Special Rapporteur on the Human Rights of Migrants".

26. According to the Court, the legal situation of a minor is linked to that of the accompanying adult, in the sense that the requirements of Article 4 of Protocol No. 4 might be deemed to be met if that adult was able to raise, in a meaningful and effective manner, their arguments against their joint expulsion.[31] The Court frequently receives applications from unaccompanied minors in this connection.

3.2. Summary practices that are difficult to document

27. The EU's external border seems to be an area where human rights violations often go unchallenged. Since collective expulsions are prohibited, they take place outside the usual structures and are facilitated in cases where there are no witnesses. Generally speaking, therefore, judicial reviews of the legality of collective expulsions take place post-factum and access to legal counsel is not guaranteed at the time when alleged violations come to light. The national human rights institutions that should have a monitoring role do not always have access to the border areas where most collective expulsions take place, and NGOs are also hampered in their actions.

28. Despite the large number of credible reports, many incidents go uninvestigated. For instance, the EU Fundamental Rights Agency has found that there are few national investigations and very few national court proceedings leading to convictions.[32] The cases that the Court has adjudicated so far point to "systemic gaps in national investigations".[33]

29. The Frontex Fundamental Rights Officer, whose tasks include monitoring Frontex's implementation of its fundamental rights obligations in accordance with EU and international law, has addressed this matter in the opinions issued concerning the situation in several EU member States, such as Greece, Hungary and Lithuania.[34]

30. As noted by the European Network of National Human Rights Institutions, ENNHRI, the cross-border nature of collective expulsions poses an additional challenge to achieving accountability. "As the individual concerned is no longer in the same jurisdiction where the violations took place it is difficult for them to reach the appropriate channels to file complaints that would serve to hold perpetrators to account".[35] Because of a "lack of awareness or understanding of the process through which they can submit complaints and access justice",[36] migrants are also less likely to report collective expulsions and to seek redress.

31. Civil society, including human rights defenders and journalists, continues to play an essential role in documenting and collecting evidence on pushbacks and collective expulsions and, consequently, in holding States to account.[37] Its activities, however, have been progressively hampered by obstacles imposed by States in recent years: physical barriers, as in border areas where access has been restricted, administrative obstacles in the form of fines or deregistration, and even legal proceedings.[38] Cases of physical harassment and intimidation by law enforcement agencies are not uncommon.[39]

32. Access to immigration detention centres and other places of deprivation of liberty such as "hotspots", from which collective expulsions have also taken place, is restricted in many countries, making it difficult to identify and document potential collective expulsions.[40]

3.3. The consequences of collective expulsions

33. The principle of *non-refoulement* and the prohibition of collective expulsions are inextricably linked. The procedural safeguards enshrined in Article 4 of Protocol No. 4 play a crucial role in preventing people from being pushed back to places where they are liable to be persecuted or ill-treated. Where asylum seekers do not have a genuine opportunity to put forward arguments against their expulsion and to have them examined

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31. *Moustahi v. France*, 2020, §§ 134-135.
32. "Guidance on investigating alleged ill-treatment at borders", FRA.
33. Ibid, p. 27.
34. Fundamental Rights Office.
35. ENNHRI, 2022, "Strengthening Human Rights Accountability at Borders", p.9.
36. Ibid., p.13.
37. PICUM, 2021, "PICUM Input to the UN Special Rapporteur on the Human Rights of Migrants Report on pushback practices and their impact on the human rights of migrants".
38. PICUM, 2022, "Resilience and resistance in defiance of the criminalisation of solidarity across Europe".
39. Ibid.
40. PICUM, 2024, "Working together to end immigration detention: A collection of noteworthy practices", Association for Juridical Studies on Immigration (ASGI), 2024, "ECRE Asylum Information Database – Italy – Hotspots", and ibid.

in an appropriate manner, there is a serious risk that they will not receive the protection they need and to which they are entitled.[41] A person's vulnerability varies depending on whether they are expelled to a transit country, their country of origin or to a country they have never set foot in.

34. People who have been subject to collective expulsion or pushed back – often in a chain – to a country of which they are not nationals often find themselves in a legal vacuum, undocumented, without access to asylum procedures, without legal representation and with no avenues of appeal against their expulsion.[42] This lack of legal status makes it all the more difficult for such people to assert their rights, communicate a need for security, or even register a claim for protection under international law. They may also be unable to continue their journey, finding themselves stranded in limbo. Documented examples can be found at the border between Poland and Belarus and in the United Nations buffer zone in Cyprus.[43] The "legal fiction of non-entry" that often already applies in the border areas in question creates a paradoxical situation in which people are geographically on the territory of a State, but are not considered as such from a legal point of view. This situation is to be distinguished from collective expulsions to the country of origin, of which people are nationals and where the possible consequences are return to a country where there is a tangible risk of being subjected to persecution or inhuman and degrading treatment, or prosecuted for leaving the country without official consent, as happens in Algeria.

35. Cases of violence, torture and even death, as a direct or indirect consequence of collective expulsions and (chain) pushbacks, have been documented at the Polish-Belarusian border, at the border between Croatia and Bosnia and Herzegovina and during pushbacks from the Mediterranean to Libya. Humiliation, strip searches and intrusive body searches during pushbacks have been reported.[44] The Court ruled against Croatia after a girl died because the Croatian police ordered an Afghan family to return to Serbia, following railway tracks on which trains were operating.[45] Collective expulsions are often accompanied by arbitrary detention in inhumane conditions, as is the case with expulsions to Libya and Tunisia.[46]

36. The violence that people suffer during and after collective expulsions has a clear detrimental effect on their physical and mental health. Their vulnerability is exacerbated by often substandard living conditions, and by other traumatic events experienced during or before migration. Collective expulsions prevent people from accessing the medical assistance and psychological support they often desperately need. Pushbacks also put women at greater risk of sexual violence and make it difficult for them to access specialist care.[47] In the case of children, pushbacks increase the time they spend in dangerous living conditions, out of school, and without access to international protection.[48]

37. After being pushed back, the individuals concerned often end up in highly vulnerable situations because they have lost their usual social networks and have no resources, putting them at increased risk of exploitation and trafficking. Without access to food, water and shelter, in life-threatening situations, or when separated from family members and friends, they can find themselves living in squalor in informal camps, exposed to the risk of trafficking or forced into situations of labour exploitation while trying to continue their journey.[49] Many experience psychological violence and illegal or violent confiscations of money or personal property.[50] Women and young girls travelling alone, "especially those who are single, have disabilities, and/or identify as from a sexual minority", are at greatest risk of being subjected to sexual violence and exploitation. Investigative journalists have noted that "migrant women who have fled sexual assault are likely to end up in a cycle of sexual violence, at the hands of different perpetrators including smugglers, human traffickers, border guards and others."[51] Unaccompanied children are also at increased risk of falling victim to traffickers and smugglers.[52]

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41. European Court on Human Rights, *N.D. and N.T*, §§ 170-171.
42. BVMN, 22 January 2021, "Italian Court Ruling on Chain Pushback" (press release); United Nations High Commissioner for Refugees (UNHCR), 12 June 2024, "UNHCR alarmed about the plight of those trying to access asylum in Cyprus" (press release).
43. HRW, "Violence and Pushbacks at Poland-Belarus Border", and ibid.
44. Doctors without borders (MSF), 2023, "In plain sight: the human cost of migration policies and violent practices at Greek sea borders".
45. M.H. and Others v. Croatia,18 November 2021.
46. "'Les noirs sont la cible principale': de la Tunisie à la Libye, la traite de migrants au cœur d'un rapport accablant", Libération.
47. MSF, 2023, "In plain sight: the human cost of migration policies at Greek sea borders", pp. 14, 28 and 13.
48. HRW, 2023, "'Like We Were Just Animals' – Pushbacks of People Seeking Protection from Croatia to Bosnia and Herzegovina".
49. Doc. 15930.
50. BVMN, 2023, "Submission to the European Commission for the Have Your Say initiative on fighting human trafficking", pp. 2-3.

38. Another tragic consequence of collective expulsions is that families become separated. For example, the Croatian NGO "Are You Syrious" has reported cases of women allowed to seek asylum in Croatia with children while their husbands were pushed back to Bosnia and Herzegovina.[53] This situation echoes the case of *Moustahi v. France*, in which two children were expelled from Mayotte even though their father lived there.

39. In Algeria, Morocco, Mauritania and Tunisia, migrants from sub-Saharan Africa are systematically rounded up, arrested and transported to remote desert areas near, or even beyond, the border with neighbouring countries so that they can be sent back there.[54] These collective expulsions leave people, many of them already destitute and extremely vulnerable, in a perilous position, without access to food, water and shelter.[55] Between December 2023 and March 2024, at least 29 people died in the Libyan desert, at the border with Tunisia.[56] An in-depth investigation conducted by various European media outlets[57] found that European funds and EU logistical support had contributed directly or indirectly to these operations.[58] Further, the European Court of Auditors has criticised the use of the EU Emergency Trust Fund for Africa, citing a lack of formal procedures for reporting and monitoring human rights violations in relation to migration management projects. financed by this Fund[59] A report by the European Ombudsman (2013- 024) likewise raised concerns about the use of funds made available under the Memorandum of Understanding between the EU and Tunisia in connection with human rights violations.[60] Recognising that co-operation with partner countries could be challenging, the European Commission has not announced any tangible measures to address this situation, other than reviewing its funding to Tunisia and guaranteeing respect for human rights.[61]

40. At Europe's borders, various technologies based on automated decision making – a form of artificial intelligence – are used for border surveillance and security, and consequently for keeping people out of the territory. Their use and consequences for the individuals concerned remain unclear, and there are few regulations or mechanisms for redress and control. With the report on "artificial intelligence and migration" currently in the pipeline, I will refrain from commenting further on this subject.

4. Concern at challenges to international public law

41. No European country on the migration routes taken by those seeking refuge and a decent life in Europe is exempt from the practice of collective expulsions of foreigners.[62] Pushbacks and collective expulsions take place along Europe's land and sea borders, mainly at the EU's external frontiers, but also between EU countries.[63] They also occur in territories of member States outside geographical Europe such as the French overseas *département* of Mayotte[64] and the Spanish enclave of Ceuta and Melilla.[65] Belgium, Croatia, France, Greece, Hungary, Italy, Poland and the Russian Federation have all been found by the Court to have infringed Article 4 of Protocol No. 4 to the Convention.[66] The execution of many of these judgments is still pending.

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51. Sandra Abdelbaki, Benjamin Hindrichs and Helena Rodríguez (Middle East Eye), 11 February 2024, "Women asylum seekers in Europe caught between pushbacks and smuggler abuse".
52. European Council on Refugees and Exiles (ECRE), 2020, "Moustahi v. France: Multiple violations in the Collective Expulsion of Unaccompanied Children to the Comoros".
53. HRW, 2023, "'Like We Were Just Animals' – Pushbacks of People Seeking Protection from Croatia to Bosnia and Herzegovina".
54. *Le Monde*, 21 May 2024, "How EU funds enable North African countries to push back Europe-bound migrants into the desert" and "Le chef des droits de l'homme de l'ONU appelle l'Algérie à cesser l'expulsion de migrants subsahariens", ONU Info (in French only).
55. See footnotes 38 and 39.
56. UN Security Council, 9 April 2024, "United Nations Support Mission in Libya – Report of the Secretary-General (S/2024/301)".
57. *Lighthouse Reports*, *Washington Post*, *Enass*, *Der Spiegel*, *El Pais*, *IrpiMedia*, *ARD*, *Inkyfada* and *Le Monde*.
58. *Lighthouse Reports*, 21 May 2024, "Desert Dumps".
59. The European Court of Auditors, 25 September 2024, "Auditors step up criticism of EU migration fund for Africa".
60. European Ombudsman, 23 October 2024, "Ombudsman criticises Commission failure to inform public how it assessed human rights risks in EU-Tunisia agreement".
61. InfoMigrants, 22 May 2024, "Left to be forgotten: EU accused of being complicit in migrant 'dumping' in North Africa" and *the Guardian*, 24 January 2025, "Europe overhauls funding to Tunisia after Guardian exposes migrant abuse".
62. UN Human Rights Council, 2021, "Report on means to address the human rights impact of pushbacks of migrants on land and at sea – Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales (A/HRC/47/30)."
63. Council of Europe Commissioner for Human Rights, 2022, op. cit., and ibid.
64. European Court of Human Rights, Moustahi v. France (in French only)
65. European Court of Human Rights, N.D. and N.T v. Spain.
66. Press Unit of the European Court of Human Rights, 2024, "Factsheet – Collective expulsions of aliens."

42. According to the Council of Europe Commissioner for Human Rights (2018-2024), some Council of Europe member States "are both alleged perpetrators of pushbacks and recipients of persons pushed back by others. In some regions, like the Western Balkans, reports cover chain pushbacks or pushbacks in various directions".[67]

43. In this already fraught context, the question of protecting national security and the total protection of borders has opened a door to arguments in favour of relaxing the rules in force although they were built up and agreed to by the States themselves.

4.1. Geopolitical context

44. The instrumentalisation of migration by Belarus and the Russian Federation in recent years has exacerbated the situation still further. By encouraging illegal crossings of their borders with their EU neighbours, these two pariah States have provoked an unprecedented defensive reaction in response to this blackmail including the construction of walls and barbed wire fences in Europe's last primeval forest. The Assembly addressed this highly sensitive issue in Resolution 2404 (2021) "Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus", in which it considered that migration and asylum pressures on Belarus' borders with Latvia, Lithuania and Poland had been "orchestrated by the Belarus authorities in response to European Union sanctions against Belarus for harsh violations of human rights". The situation has not improved since November 2023, with the Russian Federation – which is already threatening global security through its war against Ukraine – using the same methods to destabilise neighbouring States, including Finland. The main victims of this "hybrid war" are the migrants themselves, who have been drawn into this pernicious trap – a trap which could have been avoided if the European States had not fallen into it themselves. Pushbacks, collective expulsions and other infringements of human rights, particularly the right to life, have been documented in numerous reports, including ones by the association of NGOs Fundacja Ocalenie, a representative of which spoke before the Committee on Migration, Refugees and Displaced Persons.[68]

45. The United Nations High Commissioner for Refugees (UNHCR) points out that the concept of instrumentalisation does not provide a basis for a general derogation from asylum, refugee protection and human rights norms.[69] In particular, while Article 15 of the European Convention on Human Rights authorises derogations from some rights in exceptional circumstances, it categorically rules out any derogation from Article 3. Likewise, neither the 1951 Convention nor EU law provide a legal basis to derogate from the principle of *non-refoulement* in emergencies or in so-called situations of instrumentalisation. The CJEU recently specified that even emergencies or threats to public order or internal security resulting from a mass influx of third-party nationals are no justification for denying asylum seekers the right to request international protection.[70] EU Regulation 1359/2024, which describes how EU member States may react in situations of instrumentalisation, requires compliance with the principle of *non-refoulement* and does not allow national authorities to refuse access to their territory and asylum procedures in such situations.[71]

46. The recent practice of externalising asylum claims processing, such as the aborted agreement between the United Kingdom and Rwanda and that between Italy and Albania, has raised many questions concerning its compatibility with international law standards, with doubts expressed in particular by the Council of Europe Commissioner for Human Rights.[72] Such agreements are symptomatic of a trend to try to externalise the examination of asylum claims by various means with the idea that this will make their management more efficient, both from a procedural viewpoint and in terms of limiting the number of arrivals outside "lawful" migration channels. However, such measures considerably increase the risk that these people will have their rights infringed, particularly through collective expulsions. As pointed out by the UN High Commissioner for Human Rights, Volker Türk, externalisation of migration management without adequate human rights safeguards is a "perilous precedent", which raises complex questions relating to collective expulsions.[73] The

67. Council of Europe Commissioner for Human Rights, 2022, "Pushed beyond the limits", op. cit., p. 23.
68. "Poland-Belarus Border: How Many Migrant Bodies Lie Undiscovered in the Forests?", Balkan Insight.
69. "Legal considerations on asylum and non-refoulement in the context of 'instrumentalization'."
70. M.A. v Valstybės sienos apsaugos tarnyba.
71. "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."
72. "Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures" and "Serious human rights concerns about United Kingdom's Rwanda Bill."
73. "UK's newly passed 'Safety in Rwanda' bill is anything but safe: UN officials."

Court has already been called on to examine a case against the United Kingdom concerning a removal to Rwanda in which the applicant ultimately withdrew his application because he was given access to the UK asylum system.[74]

47. There has been a shocking trend in recent years for migrants to be used as scapegoats for the problems States face in fulfilling their duties vis-à-vis their populations. For instance, there has recently been talk of Mayotte "drowning in migrants".[75] Because of its particular location in the middle of the Indian Ocean, this overseas *département* of France attracts many Comorans, Madagascans and nationals of East African States, fleeing poverty and conflicts and coming in search of a decent life in France. For several months, the situation in Mayotte made the news headlines, particularly in relation to the impact of Operation Wuambushu and the devastation caused by Cyclone Chido. Statements were made on these events by the Committee on Migration, Refugees and Displaced Persons and its Chair.[76] The Court has also found against France with regard to the situation in Mayotte a violation of Article 4 of Protocol No. 4 because of the conditions in which two children, apprehended when they unlawfully entered Mayotte, were placed in administrative detention together with adults, arbitrarily associated with one of them and hurriedly returned to the Comoros without a careful and individual examination of their situation, which amounts to a collective expulsion. The execution of this judgment, which highlights a complex structural problem identified by the Committee of Ministers, the Council of Europe body tasked with supervising the execution of Court judgments, is still pending.[77] In a decision of 14 June 2024,[78] the Committee of Ministers stressed how important it is to execute the Moustahi judgment fully and rapidly despite the migratory pressures on Mayotte and the challenges this raises for the French authorities. Although clear efforts were made in 2022 and 2023 to improve the treatment and assessment of these unaccompanied minors, there have been no tangible steps forward since.[79] Similarly, no progress has been reported regarding the measures taken to reunite children with their parents. Recent decisions[80] confirm that administrative checks are still inadequate and that minors are still expelled with adults with whom they have no proven family tie.

48. Alongside the tragedy which struck Mayotte when it was swept by Cyclone Chido, the island has been facing the drama of deaths at sea, which the French authorities have been dealing with firmly but without tackling the root problem.[81] Civil society may be unwaveringly raising problem issues and judges may be applying the law, but the proper groundwork is not being done. It is when children are first apprehended that extra checks should be carried out, through a more thorough and individual examination. Exchanges of views held by the Committee of Migration, Refugees and Displaced Persons have highlighted the shortcomings where it comes to the general circumstances of unaccompanied minors, access to care, detention of foreigners and expulsion procedures. The new French Immigration Law of 2024 provides for an end to the detention of minors in administrative detention centres but the possibility of detaining minors in Mayotte has been retained up to 2027. What do we do until 2027? What are the plans for when the detention of minors is prohibited? The risk of even more expeditious expulsions is real. These questions will continue to arise until a comprehensive solution to deal with migration to Mayotte is worked out. Clearly, continuing to use expulsion as a deterrent has no effect. The process of executing the Moustahi judgment could help to find a comprehensive approach.

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74. ECHR 112 (2023), 11 April 2023.
75. "Drowning in migrants", Article in *Le Monde* on the President of the French National Assembly's discomfort at PM Bayrou's words (in French only)
76. "PACE Migration Committee calls for the respect of fundamental rights during Operation 'Wuambushu' in Mayotte" and "Upholding solidarity and dignity for all in the aftermath of Cyclone Chido in Mayotte".
77. CM/Notes/1501/H46-12.
78. CM/Del/Dec(2024)1501/H46-12.
79. The application of the Law of 26 January 2024, which prohibits the administrative detention of minors, even when they are accompanied, has been postponed to 2027 in Mayotte despite the fact that the island accounts for most of the detentions of minors in France.
80. In two decisions in February 2024 (Nos. 2400322 and 2400321 on the removal to Madagascar of minors of nine and thirteen years of age with a French father and a mother in Mayotte), the Court of Mayotte found that there was no evidence that the prefect checked insofar as possible what their links with M. were, whereas their birth certificate and the clarifications made showed the lack of any legal or family tie between them. This court has also found in other cases that the authorities have failed to take the requisite steps and paid no heed to evidence brought to their attention (decisions Nos. 2303517 of 29 August 2023, 2304011 of 13 October 2023 and 2304735 of 30 December 2023).
81. "I thought we were all going to drown", article in *Le Figaro* on the experiences of migrants smuggled in boats between the Comoros and Mayotte (in French only).

4.2. International law at the crossroads

49. On 12 February 2025, the Grand Chamber of the European Court of Human Rights held hearings in the cases of C.O.C.G. and Others v. Lithuania, H.M.M. and Others v. Latvia and R.A. and Others v. Poland, which relate to allegations that each of these States conducted summary returns of asylum seekers over the border with Belarus.[82] Eleven member States, represented by Finland on the day of the hearing, intervened as third parties and made submissions in support of the arguments of the respondent States, while an equally impressive number of NGOs, also intervening as third parties, supported the applicants' arguments along with the Council of Europe Commissioner for Human Rights and the UNHCR.[83]

50. In his oral submissions, the Commissioner pointed to the particular importance of these cases as they would have significant implications for the protection of the rights of individuals and for the system of human rights protection more broadly. He pointed out that summary returns undermined procedural safeguards, including in relation to refoulement, and were sometimes accompanied by further serious human rights violations. They also significantly hindered access to domestic remedies for those who were subject to them.[84]

51. The Commissioner also deplored a tendency towards human rights exceptionalism, which was particularly noticeable in the area of asylum and migration, especially regarding border control. Governments increasingly invoked these contexts to justify circumventing Convention obligations, with far-reaching consequences for the integrity of the Convention system and the rule of law more generally.

52. Whereas the Court had consistently reiterated that protections should be practical and effective and not theoretical and illusory, it was a cause for concern that States invoked "instrumentalisation" or drew on the limited exception to the normal requirements emanating from the prohibition of collective expulsions under Article 4 of Protocol No. 4, in order to engage in practices that put at risk a person's right to be protected from torture or inhuman or degrading treatment or punishment.[85]

53. The judgments the Court is scheduled to deliver in these cases should clarify Council of Europe member States' obligations under the Convention when they face irregular arrivals at their borders, including in the context of the "instrumentalisation" of migration by other States such as Belarus. Without prejudging the outcome of these proceedings and the Court's position, I sincerely hope that it will not make an unprecedented interpretation of its own case law and validate the current practice of member States, which interpret the criteria established by the Court in its case law in a manner which may allow them to derogate from the absolute nature of the principle of *non-refoulement* and of Article 3 of the Convention, and dispense them from having to conduct an individual examination of a person's situation before sending them back.

5. Fact-finding visit to Spain

54. I carried out a fact-finding visit to Spain (Tenerife and Madrid) from 13 to 17 January 2025 to talk with stakeholders about how the Spanish authorities manage the major arrivals of migrants on the Canary Islands seemingly without making collective expulsions – a fact I was able to ascertain on the spot and which all the people I spoke to confirmed.

55. Although the sea route to the Canaries is one of the most dangerous in the world, these islands have become a major entry point for migrants trying to reach Europe, with a 60% increase in irregular arrivals in 2024.[86] In 2024, they recorded the arrival of 46 843 persons,[87] which accounts for nearly 76% of arrivals in Spain by sea. Despite Spain's outstanding efforts to improve rescue operations, over 10 500 migrants are reported to have lost their lives trying to reach these islands in 2024.[88]

82. Grand Chamber hearings concerning Latvia, Lithuania and Poland, European Court of Human Rights.
83. Oral intervention before the Grand Chamber in the case of R.A. and Others v. Poland – Commissioner for Human Rights
84. Ibid.
85. Ibid.
86. Source: Spanish delegation to the Assembly.
87. Source: Defensor del Pueblo.
88. Caminando Fronteras.

5.1. Entities involved in the rescue and support of migrants

56. Many of the institutional bodies and humanitarian organisations involved in the management of migration in the Canary Islands are able to carry out their tasks because of a well-oiled system of co-ordination between public bodies at State and regional level and private-sector organisations. Thanks to the political commitment of the State and the Autonomous Region of the Canaries, migrants are received in the best possible conditions despite the complicated circumstances and situations and procedures which have room for improvement.

57. The Ministry of the Interior supervises border control, arrivals on Spanish soil, identification of persons, asylum procedures and ultimately any expulsions. The Ministry of Inclusion, Social Security and Migration ("Ministry of Inclusion") is tasked with managing reception centres and the integration of migrants. It also provides support for asylum seekers throughout procedures.

58. At the same time, many non-governmental organisations play a key humanitarian role. The Spanish Red Cross provides initial humanitarian aid and identifies vulnerable situations. Other associations such as ACCEM and CEAR manage accommodation centres and assist asylum seekers. The Ministry of Inclusion allocates the responsibility for centres and care among the relevant associations.

59. The Spanish sea rescue services (*Salvamento Marítimo*) conduct rescue operations at sea for boats crossing to the Canary Islands. Their priority is respect for humanitarian obligations although they are confronted with logistical and legal challenges, particularly with regard to the demarcation of areas of responsibility between Spain and Morocco during rescues in international waters. In 2024, over 667 rescue operations were carried out,[89] illustrating the scale of the problem.

60. The Tenerife Bar Association plays a key role in the legal support of migrants, particularly when removal orders are issued. However, its actions are hampered by a lack of interpreters and specialists in the law on foreigners. Lawyers also ensure respect for the rights of asylum seekers, particularly with regard to access to justice and appeals against removal orders.

5.2. Support for arrivals and reception

61. The Canary Islands and, in particular, Tenerife and El Hierro, are the first reception point for migrants arriving by sea from West Africa after a perilous journey which can last up to 7 days. Each rescue operation is followed by co-ordination with the Spanish emergency services, the Red Cross and the law enforcement agencies so as to ensure that the survivors are given the best possible support on arriving at port. Migrants arrive in highly alarming states of health, suffering from burns and extreme dehydration and requiring immediate medical treatment. Once they have been assisted by the *Salvamento Marítimo*, they are dropped off at the port of Los Cristianos. Boats arriving on their own disembark on the island of El Hierro, where humanitarian support measures are immediately set in motion, albeit under difficult conditions in view of the small size of the island and its remoteness from Tenerife, where all the main facilities are located. First aid is provided by the local health services with the support of the Red Cross, before the arrivals are dispatched to the temporary reception centres (*Centros de Atención Temporal de Extranjeros – CATEs*) run by the Ministry of the Interior.[90] Minors are dealt with directly by the regional authorities, which have responsibility for them until adulthood.

62. CATEs make it possible to identify persons, notify them of their rights and inform them that they may express their intention to claim asylum. During my visit, the Tenerife CATE, which is an annex to the police station, was empty, but a few days earlier over 200 people had been accommodated there. Arrivals spend no more than 72 hours in CATEs.[91]

63. These people are then transferred to accommodation centres managed by NGOs. The accommodation centres I visited (*Las Raices*, which mainly houses men, and *Casa de Madrés*, which is reserved for women, families and the sick) provide board and lodging, medical treatment, legal assistance and integration workshops teaching languages and the rules of life in Spain and providing vocational training. At *Las Raices*, about 450 workers provide round-the-clock support for a total of 4 000 people, accommodated in 90 tents, each of which can hold 72 people and is supervised by a liaison officer. The *Casa de Madrés* has a theoretical

89. Source: Salvamento Marítimo.
90. Some migrants arrive on their own on beaches or in ports. In such cases, the police takes them to CATEs, where they undergo the same identification and referral procedure.
91. CATE: Centros de Atención Temporal de Extranjeros | Seguridad.

capacity of 165 places, but this is often exceeded when large groups arrive in El Hierro. Some ill and vulnerable residents are given special attention with rooms adapted to their needs. The average length of stay before being sent to the mainland is 18 to 25 days for men and three months for families.

64. Particular attention is paid to minors and vulnerable persons, especially victims of trafficking. To prevent trafficking of minors, DNA tests are carried out to identify family ties, although a broader definition of family does make it possible to include relatives playing a parental role. As trafficking is a major problem, the centre plays a crucial role in detecting cases and reporting them to the relevant authorities.

5.3. Unaccompanied minors

65. In 2024, the Canaries received over 5 800 unaccompanied minors,[92] amounting to nearly a third of migrant minors in Spain. One of the major problems is determining the age of unaccompanied minors, who often arrive without any identity papers. This is done through medical tests and one-to-one interviews. In case of doubt, it is presumed that the person is a minor. The public prosecutor orders such tests and takes the requisite decisions.

66. One of the priorities is to regularise the residence of unaccompanied minors so that they can be given a residence permit and authorisation to work when they reach adulthood. However, regularisation of their status is complex because it is so difficult to obtain identity documents. Sometimes, these simply do not exist, which makes regularisation impossible. To remedy this situation, they are issued with a provisional document giving them three years' protection. In practice, many minors reach adulthood without having any clear status, but the authorities assured me that they take the necessary measures for their regularisation.

67. Guardianship of unaccompanied minors arriving in the Canaries is provided by the regional government. Spanish legislation does not authorise transfers to other regions unless the regions themselves propose to take these minors in. With over 5 000 unaccompanied minors under its supervision, the government of the Canaries cannot cope. Allocating minors to other regions is politically sensitive. The regional authorities request equitable relocation, but this solution has been thwarted by political disagreements at national level.

5.4. Poor access to asylum procedures

68. Spain's law on asylum, adopted in 2009, has been widely criticised for its shortcomings in the light of the increase in migration and for not complying with European law. It has not been updated to incorporate EU Directive 2013/32/EU on asylum procedure, and this has contributed to increased complexity of procedures and a lack of harmonisation with European standards.

69. In theory, persons may claim asylum immediately on arriving in Spain, whether at the border or in the CATE. However, the system is severely stretched. In 2024, only 7 667 of the 46 843 persons arriving in the Canaries formally lodged an asylum request even though most initially ask to do so.[93] Many abandon their claim because of excessive waiting times. On average it takes two years to process a claim.[94] These delays are exacerbated by the breakdown of the administrative system because of the huge influx of claims, mainly from Latin America. During the procedure, asylum seekers are covered by international protection and may not be expelled while their claim is being investigated.

70. In reality, a large majority of people fall outside the asylum system, not because they cannot claim a form of international protection but because they have not lodged an official request. As a result the presence of all these people on Spanish territory without a residence permit, except for unaccompanied minors, is "tolerated" pending their regularisation. This hybrid practice outside the legal framework gives *de facto* protection from expulsions which could expose those concerned to the risk of a violation of their rights, which it is impossible to establish without registering them and hence individually and thoroughly examining asylum claims.

5.5. Challenges and prospects

71. The specific location of the Canary Islands makes it *de facto* impossible to conduct collective expulsions of migrants without infringing the right to life because pushing back boats would certainly result in deaths. As things currently stand, a large majority of people who arrive in Spain having crossed the Spanish

92. Source: Deputy delegate to the government.
93. Source: Defensor del Pueblo.
94. Source: Spanish Red Cross.

border illegally by sea are regularised after three years (soon to be two), while some continue on to other European countries, particularly Germany and France, and it is only for a tiny minority that expulsion procedures are completed.

72. Therefore, as the result of a clearly stated political commitment, Spain succeeds in absorbing a large majority of persons from sub-Saharan Africa who arrive via the Canaries, while also taking in nationals from Latin American countries, mainly Venezuela and Colombia, who arrive via legal channels. With an increasing number of arrivals, which is not likely to decrease given the geopolitical situation in many regions of the world and climate change forcing people into exile, this situation will only be tenable for as long as the economic situation in Spain enables the integration, accommodation and regularisation of migrants.[95] Once again, we are confronted with the lack of solidarity of European States which do not have an external EU border. For Spain to be able to continue being the host country it wishes to be, it is important for it to be able to rely on other European States for a fairer apportionment of the work of looking after migrants seeking refuge on our continent.

73. Spain faces structural challenges deriving from the inadequacy of reception facilities, the slow pace of administrative procedures and political disagreements. The complexity of procedures means that migrants often remain in a vulnerable situation, prey to undeclared work and exposed to the risks of trafficking, which particularly affects women. The highly active Tenerife Bar Association co-operates with several public bodies and NGOs to assist women with formalities and prevent pressure from being exerted on them. Nonetheless, a lack of volunteers and specialist training for lawyers slows down efforts to this effect.

74. In response to labour shortages and an ageing population, the government has set up regularisation pathways which will enable some 900 000 to regularise their situation within three years.[96] Furthermore, Spain does not use a list of safe countries of origin, thus ensuring that asylum claims are treated fairly.

75. In the Canaries, all the persons involved in migration management we met on the spot and especially the *Defensor del Pueblo*, the ombudsman, confirmed that there are no collective expulsions from these islands. Individuals are expelled from the mainland though, with about 2 000 orders issued following criminal proceedings per year. However, the enforcement of these decisions depends on agreements between Spain and the countries of origin, and this limits their effectiveness. The result is that only to 4 to 5% of expulsion orders are actually implemented.

76. Nonetheless, the *Defensor del Pueblo* recently reported collective expulsions from Ceuta and Melilla, highlighting the fragility of good practices where it comes to protecting migrants' rights, which are apt to change according to the political climate. He also reported cases of expulsions of minors without a proper procedure, including in 2021 and 2022. Lastly, although there have been no expulsion flights to countries of origin in the last two years, the situation could change depending on future political decisions.

77. The management of unaccompanied minors, which is the regions' responsibility, is a major challenge. Legislative reform would enable a fair apportionment of the burden between regions, but the lack of political agreement is preventing any progress in this respect. The Ministry of Inclusion has already made some proposals, but these were immediately dismissed without even being debated in parliament. Furthermore, as is the case everywhere in Europe, the subject is widely manipulated by certain political parties and media outlets, and this hinders the necessary reforms. As a result, the Region of the Canaries has to deal with some 5 800 unaccompanied minors on its own. According to the President of the Region, the total cost of this was €185 million in 2024 while only €50 million was accorded by the government. European funds, which could help relieve the pressure, are not fully exploited.

78. Migration is a structural phenomenon which will continue and has many causes. The situation must be addressed at European level. However, the lack of solidarity from other European countries with the countries in which migrants arrive is increasingly clear. Despite the existence of the Schengen Area, some countries are stepping up their internal border controls and increasing the number of refoulements of migrants arriving from Spain, thus leaving Spain to shoulder the responsibility of welcoming and integrating these people alone. Having been faced for many years with continuing arrivals of migrants in large numbers, Spain at any rate has shown that a path other than collective expulsion is possible.

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95. An article in Le Monde, (in French only), on Spain's policy to regularise tens of thousands of migrants more per year and another in Libération, also (in French only), on how Spain's policy of regularisation for economic and demographic reasons contrasts with the approach in the rest of Europe.
96. Source: Ministry of the Interior.

6. Conclusions and recommendations

79. Although international law prohibits collective expulsions of migrants, it is a practice engaged in by many Council of Europe member States. The consequences can be disastrous for the victims. The necessity of preserving national security and public order is no excuse for derogating from human rights.

80. Spain's policy of allowing the very large majority of persons arriving in the Canary Islands to travel to the mainland facilitates access to genuine regularisation pathways under certain conditions. While this practice does not protect migrants from the risks of expulsion further down the line and in many cases it is just a means of coping with the congestion of the asylum system, the Spanish Government's current policy deserves to be highlighted, as other States facing similar situations have opted for almost immediate expulsion.

81. It is important to recognise that it is not always easy for States to honour their commitments, and mere political will is not enough. The legal and practical prerequisites must be established to guard against the risk of a finding by the Court against the State for breaching the various relevant provisions of the Convention. These prerequisites include effective access to an individual examination of each person's situation, systematic judicial review of the legality of all expulsion orders and the provision of sufficient resources for procedures to be respected, including access to professional legal counsel, interpretation, and full and effective means of appeal. Appropriate training applying a rights-based approach, for border guards, lawyers, prosecutors and other public officials involved in border control and migration management, is also key.