



REPUBLIC OF
SLOVENIA



HUMAN
RIGHTS
OMBUDSMAN

Human Rights Ombudsman
Dunajska cesta 56
1109 Ljubljana

Mr. Felipe González Morales
Special Rapporteur on the human rights
of migrants
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneve 10, Switzerland
migrant@ohchr.org

Number: 0705 - 9 / 2021 - 3 - NAB
Date: 24. 2. 2021

Subject: Questionnaire on pushback practices and their impact on the human rights of migrants

Dear Mr. Morales,

the Human Rights Ombudsman of the Republic of Slovenia (hereafter: the Ombudsman) welcomes the initiative of the Special Rapporteur to investigate ways and means to address the human rights impact of pushbacks of migrants. Please find below information known to us in relation to the situation in the Republic of Slovenia, which will hopefully contribute to your research.

1. Please provide information on any relevant legislation or policy in relation to the right to asylum to seek and enjoy in your country, which guarantees that migrants including asylum seekers' protection needs are examined individually, and they are not pushed back at the international border without access to this assessment and other relevant procedures. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.

The Constitution of the Republic of Slovenia¹ explicitly guarantees the right to asylum only to persons who are persecuted for advocating human rights and fundamental freedoms (Article 48).

In addition to this provision, and the international human rights treaties ratified in Slovenia,² the Slovenian courts ground a broader right to asylum and prohibition of refoulement on Article 18 of the Constitution (Prohibition of Torture).³

Pursuant to Article 42, paragraph 1, of the International Protection Act⁴ a person can declare their intention to apply for asylum to any public authority or self-governing local community authority. In practice, such declaration is most commonly made to the police upon apprehension at the border. Once this is done, the International Protection Act explicitly forbids removal, unless the person does not apply for international protection in due time (Article 36).

Furthermore, the principle of refoulement is laid down in Article 72 of the Foreigners Act.⁵

In our opinion the obligation of the state to refrain from returning asylum seekers without an individual examination of their protection needs is suitably provided for in Slovenian legislation as presented above. However, its implementation in practice is less certain, especially considering that most migrants, who are returned to Croatia and other neighboring countries by the Slovenian authorities, are returned without being issued a return decision and without an access to legal remedy to challenge their return (see Section 3.g).

Additionally, the legal guarantees against refoulement may eventually be negated with amendments to the Foreigners Act, currently under legislative consideration (see Section 3.h).

2. Please provide information on any existing good practices or measures taken (such as screening and referral mechanisms at borders) in your country to ensure that persons crossing international borders in mixed movements are protected according to international human rights law. Please indicate any specific measures aimed at reducing vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as age- and child-sensitive approach.

a) Despite serious allegations of violations occurring in practice, which we describe in subsequent sections, there are several features of the Slovenian border management system that could be described as good practice from the point of view of protection and reducing vulnerabilities of migrants.

¹ Official Gazette of the Republic of Slovenia No. 33/91-I with further amendments. Slovenian text available at: <http://pisrs.si/Pis.web/pregledPredpisa?id=USTAI>. English translation available at: <https://cutt.ly/dkNig9K>.

² Article 8 of the Constitution of the Republic of Slovenia: »Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.«

³ Leading decisions of the Constitutional Court of the Republic of Slovenia: Up-78/00 of 29 June 2000 and U-I-155/11 of 18 December 2013.

⁴ Official Gazette of the Republic of Slovenia No. 22/2016 with further amendments. Original Slovenian text alongside an English translation available at: www.pisrs.si/Pis.web/cm?idStrani=prevodi.

⁵ Official Gazette of the Republic of Slovenia No. 50/2011 with further amendments. Original Slovenian text alongside an English translation available at: www.pisrs.si/Pis.web/cm?idStrani=prevodi.

b) The legal framework, established in the International Protection Act, the Foreigners Act and its by-laws, provides clear directions for the police to refer any person expressing an intention for asylum to the asylum authority, where they can start an asylum procedure. Pursuant to the International Protection Act, Article 42, the role of the police is limited to obtaining basic information on the person's identity, route of arrival and other information pertained in the "registration document"⁶, mentioned in paragraph 2 (i.e. a short statement on reasons for seeking asylum and a list of documents and other personal belongings).

The Foreigners Act also sets out additional protection for unaccompanied minors, who cannot be returned without being appointed a legal guardian, who determines, upon a careful examination of all circumstances, that a return is in the minor's best interest (Article 82).

c) Another feature of the Slovenian border management system that could be mentioned as a good practice is the **Protocol on cooperation between social work centers and the police regarding provision of assistance to unaccompanied minors pursuant to the Foreigners Act**, which has been in operation since August 2012. If the arriving migrant is an unaccompanied minor, the Protocol establishes an obligation for the police to contact the locally responsible social work center, which responds by sending their operative to the police station. Upon arrival, the operative conducts an interview with the minor, provides first social assistance, obtains a statement for appointing a legal guardian and, if necessary, accompanies the minor during transport to an accommodation facility. Pursuant to the Protocol the representative can carry out the interview without the presence of the police, make use of the police interpreter and technical equipment at the police station (telephone, computer, printer...).

The Protocol is considered to be a good approach to securing rights of unaccompanied minors in police registration procedures. To our knowledge, it is also a novel solution, developed independently by Slovenian authorities and other stakeholders.

The Protocol from 2012 is currently under revision and a new updated and improved version is expected to be signed this year. The Ombudsman welcomes this initiative and hopes the new document will close the existing gaps in protection that may still lead to procedures with unaccompanied minors without due consideration of their vulnerabilities.

3. Please provide information on existing restrictions or limitations in law and in practice in relation to the right to claim and seek asylum at international borders in your country (e.g., border controls, restricted access to territory) and elaborate the impact of these restrictions on the protection of the rights of migrants crossing international borders.

- a) Concerns that the Slovenian Police may have started with a practice of illegally returning to Croatia individuals, who have expressed an intention for asylum, have first been raised around mid-2018. Suspicions have been based on the sudden drop in the number of persons declaring their intention to apply for asylum to the police and an increase in the number of persons returned to

⁶ The contents of the registration document are set out in a by-law of the International Protection Act: Rules on the procedure for aliens who wish to apply for international protection in the Republic of Slovenia and on the procedure for accepting applications for international protection, Official Gazette of the Republic of Slovenia No. 29/2017.

Croatia, which occurred around May 2018. The allegations about the Slovenian Police ignoring requests for asylum have also been corroborated with several individual testimonies.

Concerns that asylum requests are ignored by the Slovenian Police have persisted to the present. The Slovenian authorities have so far denied all allegations.

- b) Prior to mid-2018 several shortcomings were already known to affect border procedures in Slovenia, such as inconsistent quality (and sometimes lack) of language interpretation and a lack of access to legal assistance. Over the years the Ombudsman had also detected various allegations of illegality, such as inconsistent application of the protocol for unaccompanied minors described in Section 2.c and cases of unaccompanied minors being returned without a return decision in contravention of Foreigners Act Article 82 (see Section 3.g). However, the circumstances at the time did not exhibit signs of a systemic pattern of denial of access to asylum.
- c) The Ombudsman only rarely detects allegations of physical mistreatment of migrants by the Slovenian police that could result in death or serious injury. However, considering the various reports from credible sources about widespread violations committed by Croatian authorities (including the report by the Special Rapporteur on the human rights of migrants from his official visit to Bosnia and Herzegovina in September 2019), the Ombudsman is additionally concerned with allegations of denial of access to asylum procedure in Slovenia and returns of migrants to Croatia.

The Ombudsman is also concerned that border regimes currently implemented by state authorities (of Slovenia, Croatia and other countries in the region) are pushing migrants into increasingly dangerous methods of travel. In recent years a considerable number of migrants (12 by June 2019, according to news reports) have drowned while trying to cross river Kolpa, which separates Croatia and Slovenia, and several more have died in other incidents connected with crossing the border.

- d) The Ombudsman has investigated the situation at the Slovenian–Croatian border in response to several specific cases. These investigations and its findings are presented in Section 4. Problems, detected in connection with border procedures, are also described in the Ombudsman’s National Preventive Mechanism annual reports.⁷
- e) Testimonies from migrants and other evidence on alleged pushbacks have also been gathered by civil society organizations in several written reports:
 - Amnesty International Slovenia report from June 2018 on border procedures and pushback allegations, based on a field visit to Bosnia and Herzegovina:
www.amnesty.si/media/uploads/files/Slovenia%20-%20Push-backs%20and%20denial%20of%20access%20to%20asylum,%20Amnesty%20International,%20July%202018.pdf

⁷ English translations of the reports available at: www.varuh-rs.si/nc/en/about-us/organisational-units-and-hro-council/ombudsman-as-a-nmp/left-menu/npm-annual-reports/.
www.varuh-rs.si

- Pravno-informacijski center nevladnih organizacij – PIC report from July 2018 on border procedures and pushback allegations, based on a field visit to Bosnia and Herzegovina:

<http://pic.si/wp-content/uploads/2018/07/1.-REPORT-ON-FINDINGS-AND-OBSERVATIONS-ON-THE-IMPLEMENTATION-OF-RETURN-PROCEDURES-IN-ACCORDANCE-WITH-THE-PRINCIPLE-OF-NON-1.pdf>

- Info-Kolpa and Border Violence Monitoring: Report on illegal practice of collective expulsion on Slovene-Croatian border (May 2019):

<https://push-forward.org/sites/default/files/2019-08/Report%20on%20illegal%20practice%20of%20collective%20expulsion%20on%20slovene-croatian%20border.pdf>

- f) Comparison of official statistics shows a significant difference before and after May 2018 in the ratio between the number of migrants apprehended at the border and the number of submitted asylum applications in Slovenia.⁸

In 2017, 1,930 migrants were apprehended at the border and 1,476 persons applied for international protection (a ratio of **76%**). A slightly lower percentage can be observed in the period **between January and April 2018**, when 1,303 migrants were apprehended at the border and 798 persons applied for international protection (**61%**). This was followed by a considerable drop; **between May and December 2018**, 7,846 persons were apprehended at the border and only 2,077 persons applied for international protection (**26%**). Since then, the ratio of asylum applications remains similarly low: In 2019, 16,099 migrants were apprehended at the border and 3,821 persons applied for international protection (**24%**), and in 2020 14,592 migrants were apprehended at the border and 3,548 persons applied for international protection (**24%**).

- g) The majority of migrants, returned from Slovenia to Croatia, are **returned without being issued a return decision**. The authorities are basing this practice on paragraph 1 of Article 64 of the Foreigners Act⁹ in conjunction with paragraph 3 of Article 6 of the Return Directive¹⁰ and the Agreement between the Government of the Republic of Slovenia and the Government of the

⁸ Cited numbers are drawn from official Police and asylum authority statistics available (in Slovenian) at: www.policija.si/o-slovenski-policiji/statistika/mejna-problematika/nedovoljene-migracije-na-obmocju-republike-slovenije and <https://podatki.gov.si/dataset/stevilo-prosilcev-za-mednarodno-zascito>.

The number of asylum applications shown is the total number submitted in the Republic of Slovenia. The applications are mostly submitted by migrants apprehended at the border, however a smaller portion of them are also submitted by other third country nationals (e.g. legally arriving migrants).

⁹ »The police shall issue a return decision to a foreigner who is illegally staying in the Republic of Slovenia, except in cases where a foreigner is apprehended illegally crossing the state border or in connection therewith and has not been granted the right to reside [...]. If after a return procedure under a readmission agreement a foreigner was not admitted to a state party or if a foreigner who is the subject of a return or extradition procedure on the basis of a readmission agreement was not admitted to a state party within 72 hours, he or she shall be issued a return decision.«

¹⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

Republic of Croatia on the Readmission of Persons Whose Entry or Residence is Illegal (hereafter: Bilateral Agreement).¹¹

In view of the Ombudsman, the Bilateral Agreement cannot be viewed as grounds for an exception under paragraph 3 of Article 6 of the Return Directive, and therefore all persons subject to return should be issued a return decision.

The persons returned without a return decision do not participate in the decision-making procedure on return and cannot raise objections, such as considering systemic deficiencies in the country of return, due to which their return could be in contravention of the prohibition of torture and inhuman treatment, or raise other individual circumstances, such as that the return would violate their right to family or private life. No legal remedies against extradition are available for them on the basis of the Bilateral Agreement. The Ombudsman stresses that such actions bear no elements of legality and are authoritative actions in which an individual is merely a subject in the procedure instead of a legal entity or a holder of rights and obligations.

It should be noted that unaccompanied minors are legally excluded from returns without a return decision, since (as mentioned in Section 2.b) they can only be returned with a return decision, issued after an officially appointed legal guardian determines, upon a careful examination of all circumstances, that a return is in the minor's best interest.

The legality of returns without a return decision is currently being challenged in front of the Constitutional Court of the Republic of Slovenia with a constitutional complaint initiated by the Ombudsman on behalf of a returned Moroccan national. At the time of the submission of this questionnaire, the Constitutional Court has not yet decided whether the case will be admitted into in-merit procedure.

Additionally, it should be stressed that even if the Bilateral Agreement met the definition of an agreement from paragraph 3 of Article 6 of the Return Directive and migrants could be legally returned without Slovenia issuing them a return decision, they would still have to be issued a return decision by the receiving state (Croatia). However, based on reports on the situation in Croatia, including reports showing a routine practice of chain refoulement to Bosnia and Herzegovina, there are strong concerns that this obligation is not being applied.

- h) In early 2017, Slovenia adopted **amendments to the Foreigners Act** which allowed for a future restriction on the right to asylum. According to the new Articles 10.a and 10.b the National Assembly (Parliament) could vote on suspending access to asylum procedure in case migration posed "a threat to public order and internal safety in the Republic of Slovenia". The provisions were later declared unconstitutional and annulled by the Constitutional Court in a procedure initiated by the Ombudsman.¹²

At the time of submission of this questionnaire, the Slovenian Government is again attempting to enact similar provisions in a new legislative procedure for

¹¹ Official Gazette of the Republic of Slovenia - International Treaties, No. 33/2006, available in Slovenian and English at: www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2006-02-0040?sop=2006-02-0040.

¹² Decision U-I-59/17 of 18 September 2019, available in Slovenian at: www.us-rs.si/media/u-i-59-17.-odlocba.pdf.

amending the Foreigners Act.¹³ If enacted, the new provisions will make the abolition of access to asylum even easier as under the previously annulled provisions, since this could be done by an act of the Government, not the National Assembly.

4. Please provide information on any concrete instances of pushbacks, including an analysis on the circumstances of the event.

- a) In response to allegations, appearing in the media, on denial of access to asylum in Slovenian border procedures, the Ombudsman carried out unannounced visits to two border Police Stations in June 2018. The findings were presented to the public through an interim report in August 2018 and a final report in February 2019.¹⁴ While the alleged violations had not been conclusively proven, the findings strengthened the concerns that access to asylum had been restricted and the Ombudsman made several recommendations to the authorities on how to better implement and document border procedures. These recommendations have so far not been sufficiently implemented by the Slovenian authorities (National Preventive Mechanism visits show that the quality of border procedures in this respect varies between visited police stations).

The investigation also uncovered internal guidance of the Police Directorate Novo mesto from 25 May 2018, which included an instruction to all police stations within its territory (including the two visited) to hand over to Croatian authorities any individual whose procedure was carried out by a mixed Slovenian–Croatian police patrol, even if they expressed a request for asylum in Slovenia. In view of the Ombudsman such practice is clearly contrary to the law, which guarantees access to asylum procedure to every individual on the territory of Slovenia (as presented in Section 1).

- b) In July 2019, the Ombudsman investigated another case, concerning a police procedure by Police station Ilirska Bistrica with a larger than usual group of apprehended migrants (108 persons).¹⁵ According to the authorities, only seven of them (five of them unaccompanied minors) expressed a request for asylum, while the rest were returned to Croatia. The Ombudsman's investigation uncovered several violations, including a lack of individual examination (only seven minutes were available on average for a procedure with each individual) and inadequate documenting of the procedures, which again raised concerns about accessibility of asylum procedure.
- c) The Ombudsman also detected problems related to access to asylum in connection to his investigation of the situation in the Centre for Foreigners¹⁶ in

¹³ The proposed amendments available in Slovenian at: <https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/7f63e66b6e15af9fdadfc6b1b76f34ef5f8c7c32bee9acbe637f5f1bc09d2570>.

¹⁴ Available in Slovenian at: www.varuh-rs.si/fileadmin/user_upload/word/NOVINARSKE_KONFERENCE/2019_2_15_-_NOVKONE/Koncno_porocilo_o_delu_policije_na_meji_s_Hrvasko_-_VCP_RS_-_februar_2019.doc.

¹⁵ Report available in Slovenian at: www.varuh-rs.si/fileadmin/user_upload/pdf/Stalisca_in_ugotovitve/2020_7_22_-_Koncno_porocilo_o_prijetju_in_vracanju_migrantov_na_Hrvasko.pdf.

¹⁶ National facility for immigration detention, located in Postojna.

2020. The investigation has shown¹⁷ that pursuant to instructions of the acting Director-General of the Police given to Police Directorate Koper, at the time all persons expressing a request for asylum after being apprehended for illegally crossing the border were to be detained in the Centre; according to the Ministry of the Interior the instructions have since been retracted. Additionally, the Ombudsman found that detainees requesting asylum had to wait up to several weeks before they could submit their application.

- d) Apart from the case in front of the Constitutional Court, mentioned under 3.g, another pending case is currently connected with access to asylum in Slovenia. The lawsuit was filed by a plaintiff from Cameroon, who alleges to have been chain-returned from Slovenia, through Croatia, to Bosnia and Herzegovina. The Ombudsman intervened in the proceedings with an amicus curiae submission. In the first trial, the Administrative Court of the Republic of Slovenia found violations of Article 18 and 19 of the Charter of Fundamental Rights of the European Union, ordered the government to allow the plaintiff reentry into Slovenia and apply for asylum, and awarded him 5,000 EUR in damages.¹⁸ The judgment was later reversed by the Supreme Court of the Republic of Slovenia and the case referred back to the first instance,¹⁹ however the Administrative Court in a new trial issued a similar decision as the first time, except without deciding on the damages (referring the plaintiff to civil litigation instead).²⁰ The government again appealed and the case is currently pending in front of the Supreme Court for the second time.

5. Please indicate any specific challenges that your Government has encountered, in the context of the COVID-19 pandemic, on ensuring the human rights of migrants crossing international borders, either by land or by sea.

The Ombudsman detected problems related to the COVID-19 pandemic when investigating detention of migrants in the Centre for Foreigners (see Section 4.c). The measures adopted by the authorities to prevent the spread of the disease between detainees were found to be unsuitable, even contravening the published recommendations of the National Institute of Public Health, which specifically address the situation of migrants.²¹

6. Please indicate any challenges and/or obstacles faced by Governmental institutions or civil society organizations and individuals in protecting the human rights of migrants at international borders, including those in distress at sea and in situations where pushbacks or pullbacks are likely to take place.

- a) The practice of returns without a return decision, as described under 3.g, are making procedures difficult to monitor. Additionally, once a person is removed

¹⁷ Final report in English available at: www.varuh-rs.si/fileadmin/user_upload/pdf/Staliska_in_ugotovitve/2020_11_10_-_Ombudsman_s_findings_and_positions_regarding_the_implementation_of_detention_at_the_Centre_for_foreigners.pdf

¹⁸ Judgment I U 1490/2019 of 22 June 2020, available in Slovenian at: www.sodisce.si/usrs/odlocitve/2015081111441579/.

¹⁹ Decision I Up 128/2020 of 28 October 2020, available in Slovenian at: <http://sodisce.si/vsrs/odlocitve/2015081111441231/>.

²⁰ Judgment I U 1686/2020 of 7 December 2020.

²¹ Available in Slovenian at: www.nijz.si/sites/www.nijz.si/files/publikacije-datoteke/napotki_in_priporocila_covid-19_ranljive_skupine_final.pdf.

from the country, any potential violations are very difficult to address with legal remedies (only one court case, described under 4.d, has so far been successfully initiated in this way).

- b) In recent years, negative discourse in Slovenian media and politics, aimed at civil society, has become much more commonplace than before. Organizations and initiatives whose work is related to migration seem to be under attack with spurious accusations, including that they represent foreign and anti-Slovenian interests,²² that their financing and work is questionable and non-transparent and that they are engaging in criminal activities (such as smuggling of migrants). Organizations and individuals are often named in the media with an apparent attempt to rile up the public against them. The attacks in the media seem to be centered around populist right-wing news outlets. However, negative narratives and spreading of misinformation on NGOs has also been appearing in more main stream media. In May 2019, apparently based on media allegations, a criminal complaint was lodged by a Member of Parliament against the directress of an NGO, responsible for providing legal assistance to asylum applicants (later dismissed as unfounded).

We hope that you will find our contribution helpful to your research on this important topic.

Yours sincerely,

Peter Svetina
Human Rights Ombudsman
of the Republic of Slovenia

²² Similar to what the Ombudsman itself has been accused of: see pages 158–159 of the English version of the Annual Report for the year 2017, available at: http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/LP2017_VARUH_ENG.pdf.
www.varuh-rs.si