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Oral intervention before the Grand Chamber in the case of[1]

C.O.C.G. and Others v. Lithuania
(application no. 17764/22)

by Michael O'Flaherty

Council of Europe Commissioner for Human Rights

Strasbourg, 12 February 2025

Mr President, Distinguished members of the Court,

Today's cases are of particular importance to me as they will have significant implications for the protection of the rights of individuals as well as for the system of human rights protection more broadly.

Summary returns are widespread and sometimes systemic in a number of Council of Europe member states. Such returns undermine procedural safeguards, including in relation to refoulement, and are sometimes accompanied by further serious human rights violations. Such returns also significantly hinder access to domestic remedies for those who are subjected to them.

What is more, a tendency towards human rights exceptionalism is particularly noticeable in the area of asylum and migration, especially regarding border control. Governments increasingly invoke these contexts to justify circumventing Convention obligations, with far-reaching consequences for the integrity of the Convention system and for the rule of law more generally.

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While there are several rights at stake in the current case, I will centre my remarks on the prohibition of refoulement further to Article 3 of the Convention.

In your case law, the Court has consistently stated that Article 3 demands an absolute prohibition on removing people to a place where they face a real risk of torture or inhuman or degrading treatment or punishment. This refoulement prohibition is non-derogable and your Court has clarified that it cannot be subject to limitation, either in relation to the challenges faced by states to manage migration or for national security reasons. You also established that the person's own conduct, including their crossing of a border in an irregular manner, does not diminish the state's obligations.

Your Court has thus laid the cornerstone for the protection of human dignity of people on the move, and ensured consistency with states' obligations under other international human rights instruments as well as pursuant to customary international law.

[1] By decision of the President of the Court during the hearing, this intervention is submitted in written format only.

In my view, summary return practices – which in the case of the respondent state have been codified in domestic law – are incompatible with these clear principles.
Allow me to address two particular concerns.

First: the framing of the challenges that states face at their borders as being so exceptional that the prohibition of refoulement should be relaxed.

Second: a disturbing interpretation by states of this Court's case law to justify practices that put people at risk of treatment contrary to Article 3.

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On the first point, the instrumentalisation by Belarus of asylum seekers and migrants – enabling, encouraging or even forcing them to cross into Council of Europe member states – provides a backdrop to the claims in the current case. I unreservedly condemn the practice of any state that seeks to exploit asylum seekers and migrants, placing them in a situation of great vulnerability, while at the same time imposing burdens on our Council of Europe member states.

Some years ago, I conducted a visit to the Lithuania-Belarus border in my previous capacity as Director of the EU Fundamental Rights Agency. More recently, as Commissioner for Human Rights, I visited Poland and Finland, which cope with similar issues as the respondent state. During those visits, I had in-depth with the authorities and border guards.

I fully recognise the challenges in addressing irregular arrivals at borders as well as the security concerns, especially in a highly volatile geopolitical situation. I do not intend to diminish these challenges in any way. Yet, I do not see how they can provide a legitimate justification for the violation of rights that the Convention protects in an absolute manner. Nor would I find it logical, desirable, or compatible with the Convention, that individuals be singled out for harsher treatment because they have been subjected to instrumentalisation by another state.

I also observe that, in the case of Belarus, we see an iteration of a long-standing phenomenon. For decades, European states have been confronted with attempts to threaten or manipulate asylum and migration movements to extract political benefits or address geopolitical grievances. Indeed, while the current arrivals from Belarus clearly make operational demands on the respondent state's border control, security, reception and processing capacities, there have been many instances across Europe where states had to deal with much greater flows of arrivals.

I further recall that the Court has a long history of addressing concerns by states as regards serious public order or national security issues, as well as regarding migration flows. You have delivered numerous landmark judgments in this regard, including *Soering*, *Chahal*, and *Hirsi Jamaa*. In those cases, and many more like them, you have without fail rejected the notion that removal of people to a real risk of torture or inhuman or degrading treatment or punishment could be an acceptable way to respond to such concerns.

Allow me to conclude on this point by observing that the discussion of instrumentalisation, of 'hybrid threats' and of 'weaponisation' of migration has prompted a frame that gives the impression that the actions by persons who irregularly cross a border should somehow be equated to the outrageous actions of Belarus. Instead, the issue at hand is whether the rights of the applicants, as individuals who come under the protection of the Convention, have been violated.

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I turn now to the question of the interpretation by states of your case law. In the *N.D. and N.T. v. Spain* judgment, the Court set out circumstances in which the foregoing of an individual assessment before expulsion – which is the rule under Article 4 of Protocol 4 – would nevertheless not lead to a violation. This case is often invoked by states, including in response to concerns expressed by me, to justify summary returns and denial of access to asylum procedures, even when risks relating to Article 3 of the Convention are at issue.

Such justifications invoke the Court's reference to the provision of genuine and effective means of legal entry, especially at border crossing points, in combination with a possibility of refusing entry when people nevertheless cross irregularly elsewhere along the border. This has given rise to an argument that a person can be summarily returned to Belarus without further safeguards because, in order to claim protection, they can be 'redirected' to, or otherwise expected to move to and present themselves at an official border crossing point, or at a diplomatic representation.

From my observations on the ground in different member states, and continuous monitoring of the situation across Europe, I do not consider that this practice of redirecting could in any way provide sufficient safeguards against violations of the principle of non-refoulement.

First, the practice assumes that the returned person can easily and freely find their way to a border crossing of the respondent state. This ignores issues such as inhospitable and inaccessible terrain, adverse weather conditions, as well as well-documented acts by the Belarusian authorities to prevent people from moving – instead forcing them to irregularly cross again into Council of Europe member states.

My position on this point is further reinforced by UNHCR, which has documented a number of cases of individuals being denied entry and access to asylum procedures at Lithuania's official border crossings. UNHCR highlights practical barriers that make reaching and accessing these points extremely difficult, if not impossible, for asylum seekers — particularly during specific periods. Additionally, the Court's judgment in *M.A. and Others v. Lithuania* suggests that the refusal to accept asylum applications at border crossings is a longer-standing issue, predating Belarus's alleged instrumentalisation of migration. This case remains under the supervision of the Committee of Ministers.

Second, this practice does not correspond to the state's positive obligation to protect individuals from treatment contrary to Articles 2 and 3, which are triggered if they could or should have known about specific risks. In the case of Belarus, there has been consistent information of widespread ill-treatment by Belarusian agents of asylum seekers and migrants returned to its territory.

What is more, we have information about the material conditions on the Belarusian side of the border. Reports have identified a lack of assistance, freezing temperatures and other elements as putting people who are summarily returned at grave risk. Indeed, there have been reports of deaths. Risks are aggravated when people are prevented from moving out of the border areas.

Third, the practice of summary returns prevents a member state from observing the requirements, set out in your case law, to consider the risk of chain refoulement by the country to which a person is returned. In this respect, I observe that UNHCR has stated that asylum seekers returned to Belarus

"could not and ought not to be generally presumed to have access to effective protection against the risk of *refoulement* and treatment prohibited under Article 3".

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There are further considerations that distinguish the facts of this case from that in *N.D. and N.T. v. Spain.*

For instance, as I have indicated in my written submissions, the Court may consider that the size of the groups crossing the border are generally incomparable to those in *N.D. and N.T.* and in other cases in which the Court found that the summary return did not violate Article 4 of Protocol 4.

Furthermore, the groups at the Belarus border are routinely brought under control quickly and subsequently transported to a border crossing in a controlled and organised manner. This speaks to the fact that states have an alternative course of action – namely to bring them to a place where their asylum claims or other objections to return could be adequately assessed by trained experts with the necessary safeguards, including access to remedies.

May I also draw the Court's attention to my comments in my written submission, as regards the notion of culpability of a migrant for an irregular border crossing, which is key to the *N.D. and N.T.* judgment. As highlighted there, you may want to consider whether culpability is an appropriate lens through which to view the situation of people who may have been manipulated or coerced by Belarus to cross the border irregularly.

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In conclusion, I recall that your Court has consistently reiterated that protections must be practical and effective and not theoretical and illusory. As such, I am concerned about states invoking instrumentalisation or drawing on the limited exception to the normal requirements emanating from the prohibition of collective expulsions 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.

Mr President, members of the Court, I would encourage you to use the opportunities of today's cases to provide clear guidance on ensuring that non-refoulement obligations are honoured without exception.

Thank you.