

Third Party Intervention



**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

R.A. and others v. Poland (no. 42120/21)

Introduction

1. On 16 December 2021, the Council of Europe Commissioner for Human Rights (hereinafter: ‘the Commissioner’) informed the European Court of Human Rights (hereinafter: ‘the Court’) of her decision to intervene as a third party in the Court’s proceedings, in accordance with Article 36, paragraph 3, of the European Convention on Human Rights (hereinafter: ‘the Convention’), and to submit written observations on the case of *R.A. and others v. Poland* (no. 42120/21) concerning the situation of migrants and asylum seekers stranded on the border between Poland and Belarus.
2. According to her [mandate](#), the Commissioner promotes the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in laws and practices concerning human rights; and provides advice and information regarding the protection of human rights across the region.¹
3. The present intervention aims to draw attention to several aspects of the situation of persons stranded on Poland’s border with Belarus, in particular the issue of their access to humanitarian assistance and legal aid; their humanitarian, material and sanitary conditions; their summary returns (“pushbacks”) to Belarus; and their treatment by Polish and Belarusian authorities and security forces. More generally, it aims to place the instant case in the wider context of pushbacks of persons attempting to cross the borders of Council of Europe members states in an irregular manner outside of official border crossing points. The intervention is based on the Commissioner’s [work](#) on Poland and her continuous monitoring of the human rights situation in the country, as well as her extensive [thematic work](#) on the issue of migration and human rights, in particular devoted to the issue of pushbacks by member states.² In particular, it draws on the mission carried out by the Commissioner from 15 to 18 November 2021 (“the mission”) and her statements published on 19 November and 1 December 2021.³
4. Section I contains the Commissioner’s observations on the limited availability of humanitarian assistance and legal aid to migrants and asylum seekers stranded on Poland’s border with Belarus and the pattern of intimidation and harassment of persons involved in the provision of such help to migrants and asylum seekers. Section II provides an overview of the situation regarding the migrants’ and asylum seekers’ access to procedures for international protection, focusing on the evolution of Poland’s legal framework, the repeated and systematic practice of summary returns and the unavailability of adequate legal safeguards. In Section III, the Commissioner shares her observations on the humanitarian situation and the human rights of persons trapped on Poland’s border with Belarus. Section IV contains the Commissioner’s observations on Poland’s laws and practices in view of its obligations under the Convention and stresses the importance of the case in relation to the wider issue of pushbacks occurring on Europe’s borders. The four sections are followed by the Commissioner’s conclusions.

I. Lack of access to humanitarian assistance and legal aid, and its practical implications

State of emergency, ban on access to border areas, and the practical implications for the availability of humanitarian and legal assistance on Poland’s border with Belarus

5. On 2 September 2021, a state of emergency was declared in Poland by the President of the Republic upon a request from the Polish government, motivated by possible threats to security and public order in part of the territory of Poland. The President’s decree was approved by the lower house of the Polish parliament, the Sejm, on 6 September 2021. The state of emergency, initially

¹ [Resolution \(99\) 50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

² This has included written dialogue on the issue of summary returns with at least eight member states; four country visits in which summary returns and related issues of access to asylum were addressed; two thematic publications on the prevention of unlawful returns of persons crossing the Mediterranean; the submission to the Court of observations in three cases; and numerous statements and other interventions; all based on the monitoring of this issue, carried out by the Commissioner across the Council of Europe area on a continuous basis.

³ “Commissioner calls for immediate access of international and national human rights actors and media to Poland’s border with Belarus to end human suffering and violations of human rights”, [statement](#) by the Commissioner, 19 November 2021; “New legislation perpetuates restrictions and obstacles to protection of human rights on Poland’s eastern border”, [statement](#) by the Commissioner, 1 December 2021.

put in place for a period of 30 days, was extended once on 1 October 2021 by another 60 days – the maximum duration allowed under Poland’s Constitution. Restrictions imposed as part of the state of emergency, set out in more detail in a [decree](#) adopted by the government, meant that humanitarian and human rights actors, civil society organisations and independent human rights monitors, with the exception of the Office of the Polish Ombudsman, were not allowed to access the so-called “exclusion zone” (hereinafter: ‘exclusion zone’ or ‘zone’) which covered 183 municipalities located adjacent to Poland’s border with Belarus. The state of emergency expired on 1 December 2021.

6. On 30 November 2021, the Sejm passed a set of amendments to Poland’s Border Protection Act. The new rules authorised the Minister of Internal Affairs and Administration to impose restrictions on freedom of movement similar to those imposed by the state of emergency, in areas located within 15 kilometres of Poland’s external border of the Schengen zone. The new rules authorised local border guard commanders to allow persons and “in particular, the media”, into the restricted area, but there are no explicit provisions on access by humanitarian organisations. Although the Polish Senate’s legislation bureau deemed those amendments to be unconstitutional, they were eventually adopted by the Sejm. Poland’s President signed the law on the evening of 30 November, allowing the new rules to enter into force as soon as the state of emergency expired. On the basis of the new rules, the Minister of Internal Affairs and Administration immediately adopted a new decree extending the above-mentioned restrictions for three months.
7. Although, since early December 2021, selected media were given access to the exclusion zone after obtaining prior accreditation from local commanders of the Border Guard, this access remains strictly regulated.⁴ In particular, the journalists are closely accompanied and driven around in Border Guard cars along pre-determined routes.
8. The lack of transparency and public scrutiny of the situation in the exclusion zone since it was instituted has limited opportunities to assess the Polish authorities’ own efforts to meet the immediate humanitarian needs of persons at its borders and on its territory. While the Polish government has itself reported having prepared humanitarian assistance, it has repeatedly claimed that it was unable to deliver the assistance due to the persons involved being on the territory of Belarus. The Commissioner notes that although in August 2021, the Polish government sent to the border with Belarus a truck filled with humanitarian assistance intended for migrants and asylum seekers stranded there, it has made clear that the assistance would only be delivered if it were allowed onto the territory of Belarus. After several days of waiting and unsuccessful diplomatic demarches requesting permission of the Belarusian authorities to cross into Belarus, the truck was eventually recalled from the border.⁵ In this context, when visiting two local border guard stations located just outside the exclusion zone, the Commissioner was shown storage rooms filled with donated humanitarian aid items, which appeared to have remained largely unused despite the clear humanitarian emergency in the border region.
9. While the Commissioner heard several stories of individual Polish border guards providing migrants and asylum seekers with some limited assistance, such as small food items or water, such examples were invariably framed as instances of border guards acting on their own initiative and out of their own sense of moral duty, and in contrast to, rather than as part of, an official policy. More generally, the Commissioner was informed by various people she spoke with that the overall approach was one in which the denial of humanitarian assistance was part of the broader policy of deterrence, leaving people stuck – as discussed in section III – in a dire humanitarian situation at the Polish-Belarusian border.
10. The ban on access to the exclusion zone means that despite repeated requests, organisations and actors providing humanitarian assistance, including the Polish Red Cross, as well as organisations and actors providing legal aid and carrying out human rights monitoring, have been deprived of access to people in need of help in that zone. An emergency response team from the international NGO Doctors without Borders (Médecins Sans Frontières, MSF), present near the border since October 2021, ended up pulling out from the border area in early January 2022 citing the repeated

⁴ See also, “Safari”, czyli dziennikarska w izytacja granicy pod ścisłym nadzorem” (“A „safari”, or the strictly controlled media visit to the border”), [press article](#) (in Polish), Gazeta Wyborcza, 4 December 2021.

⁵ “Ciężarówka z pomocą humanitarną wycofana z granicy. Poczeka na zmianę decyzji Mińska” („Truck with humanitarian aid withdrawn from the border pending Minsk’s authorisation to enter”), [press article](#) (in Polish), Onet, 29 August 2021.

refusal by the Polish authorities to allow it access to the exclusion zone as the reason for its decision.⁶

11. While some large humanitarian and charity organisations as well as local communities have collected and made available a considerable amount of humanitarian assistance, their lack of direct access to the exclusion zone means that much of this help cannot reach its intended recipients. The burden of delivering assistance to migrants and asylum seekers on the fringes of, and within, the exclusion zone has therefore fallen almost exclusively on the shoulders of local residents in the zone, activists and volunteers, who collect and deliver warm clothes, drinking water, food and first aid kits, summon medical assistance for those in need, and facilitate their safe exit from the woods.⁷ The Commissioner met and discussed with several such persons, many of whom had been involved in the provision of humanitarian aid and legal assistance near Poland's border with Belarus since August 2021.

Intimidation and harassment of persons defending the human rights of migrants and asylum seekers

12. The limited availability of humanitarian and legal assistance to migrants and asylum seekers trapped in the woods on Poland's border with Belarus is further compounded by the chilling effect of harassment and intimidation targeting organisations and people, including local residents, providing such help. Some of the persons the Commissioner spoke with complained to her about having been intimidated by members of the Polish Border Guard, including in areas located outside of the exclusion zone. Such intimidation involved, for example, being verbally abused for helping migrants and asylum seekers, subjected to lengthy and intrusive questioning and personal searches, or held at gunpoint during ID checks by members of the Polish security services. Legal representatives of migrants and asylum seekers claimed that the Border Guard attempted to discourage them from filing asylum claims on behalf of their clients or pressured them to withdraw claims already made. Some volunteers told the Commissioner that criminal proceedings had been instituted against them in connection with the help they had provided to migrants and asylum seekers. Volunteers also alleged that vigilante far-right groups roamed the woods in search of migrants, robbing and harassing any migrants or asylum seekers they found along their way.
13. During her mission, the Commissioner herself witnessed the verbal harassment of volunteer activists by members of the Border Guard. The Commissioner was also dismayed to hear that on the night of 13 November 2021, unidentified assailants had vandalised cars belonging to a group of volunteer medics providing first aid to persons in need on the border. On 25 November 2021, a volunteer interpreter working with a coalition of Polish humanitarian and human rights NGOs was manhandled and [intimidated](#) by unidentified armed men in uniform. On 15 December 2021, several dozen police officers armed with automatic weapons conducted an all-night search of the premises of a humanitarian help point operated by a civil society organisation, questioned the volunteers present and confiscated their equipment; the police action was allegedly in connection with an ongoing investigation concerning a case of assistance in illegal border crossing. On 10 January 2022, volunteer activists from another organisation who were assisting a young migrant with a medical condition were reportedly threatened by unidentified armed men in uniform, who confiscated their equipment.⁸ The Commissioner considers that the pattern of incidents such as the ones described above is restricting the provision of vital humanitarian assistance and legal aid to migrants and asylum seekers trapped in the woods on Poland's border.

Stigmatisation of migrants and refugees

14. The Commissioner notes that stigmatising anti-migrant and anti-refugee narratives have been used in the past by high-ranking government figures and public officials in Poland, in particular in the

⁶ "MSF leaves Polish border after being blocked from assisting people", [press statement](#), Médecins Sans Frontières (MSF), 6 January 2022.

⁷ See, in particular, "Humanitarian crisis at the Polish-Belarusian border", [report](#), Grupa Granica, 10 December 2021.

⁸ "Poland-Belarus Border. Unknown Men in Military Uniforms Threaten Human Rights Activists with Firearms", [press article](#), Gazeta Wyborcza, 12 January 2022; "Ciężko chorego 18-latkę z Syrii straż zabiera ze szpitala i wyrzuca nad ranem na Białoruś" ("Border Guard takes seriously ill 18-year-old Syrian from hospital, pushes him back to Belarus"), [press article](#) (in Polish), OKO.press, 11 January 2022.

context of parliamentary elections.⁹ She was dismayed to hear a similarly stigmatising narrative used again at a joint press conference held on 27 September 2021 by Poland's Minister of Internal Affairs and Administration, Minister of Defence, and Commander-in-chief of the Border Guard. During the conference, violent and pornographic photos and videos said to be found on phones confiscated from migrants and asylum seekers were put on display, with the apparent aim of associating migrants and refugees with religious extremism, zoophilia and paedophilia.¹⁰ The Polish public broadcaster TVP later aired parts of the conference in its evening news programme, with the title "He raped a cow and wanted to enter Poland? Details on migrants at the border", conflating irregular migration with zoophilia in the eyes of the audience.¹¹ The government media coverage of the situation at the border has been characterised by the use of bellicose language and military terminology, contributing to the stigmatisation of the people stranded at the border, reinforcing the public sentiment of danger and contributing to an atmosphere of fear.

II. Access to procedures for international protection

Evolution of the relevant legislation and the availability of legal safeguards

15. A [decree](#) issued by Poland's Minister of Internal Affairs and Administration on 20 August 2021 amended an earlier decree on the temporary suspension or restriction of border traffic at certain border crossing points, by adding a provision allowing Poland's security services to remove any person who had crossed the border outside of an official and open border crossing point. The amended decree, which entered into force on 21 August 2021, did not provide for any exceptions for persons seeking international protection, thereby significantly limiting the possibility of applying for international protection by foreigners entering Poland's territory in an irregular manner.¹²
16. A set of amendments to Poland's 2013 Foreigners' Act, passed by the Sejm on 14 October 2021, cemented these changes in the form of a statute by empowering Border Guard unit commanders to order the removal of any person having crossed the border outside of an official border crossing. Although such removal orders are liable to appeal, the appeal does not have a suspensive effect; as a result, orders are immediately enforceable and come with a ban on re-entry into Poland and the entire Schengen area for a set period of between six months and three years. The new legislation further amended Poland's 2003 Act on granting protection to foreigners in Poland by allowing the authorities to disregard applications for international protection made by foreigners stopped immediately after having crossed the border outside of an official border crossing, unless they arrived directly from a territory where their lives or freedoms are at risk of persecution or serious harm, gave credible reasons for crossing the border illegally and claimed asylum immediately upon crossing the border. The amendments, which had been criticised by, among others, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the UN High Commissioner for Refugees (UNHCR), entered into force on 26 October 2021.¹³

Summary returns at Poland's border with Belarus

17. The Commissioner observes that the Polish Border Guard, assisted by other armed formations deployed by Poland on its eastern border, has been repeatedly and systematically pushing migrants and asylum seekers found in Polish territory back over the border to Belarus. Figures [made available](#) by the Polish Border Guard in early 2022 accounted for 39,697 "attempts to cross

⁹ See, for example, "Migrants carry 'parasites and protozoa,' warns Polish opposition leader", [press article](#), Politico, 14 October 2015; "Poland's president warns of refugees bringing epidemics", [press article](#), Aljazeera, 18 October 2015; see also, *M.K. and others v. Poland*, applications nos. 40503/17, 42902/17 and 43643/17, judgment of the European Court of Human Rights, 23 July 2020, in para. 115.

¹⁰ "Polish Minister of Interior Presents False Evidence Framing Refugees for Bestiality", [press article](#), Gazeta Wyborcza, 29 September 2021.

¹¹ "An Asylum Seeker's Wrenching Choice: Stay on the Run or Save His Child's Life", [press article](#), the New York Times, 6 October 2021. See also, <https://www.tvp.info/56071419/zoofilia-w-srod-imigrantow-z-gwalcil-krowe-chcial-dostac-sie-do-polski-szczegoly-ujawniaja-polskie-sluzby-konferencja-mon-i-mswia-27092021>

¹² While marking the formal continuation of an existing practice, see paragraph 17 below.

¹³ Urgent opinion on draft amendments to the Foreigners' Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and ministerial regulation on temporary suspension of border traffic at certain border crossings, [opinion](#), OSCE Office for Democratic Institutions and Human Rights (ODIHR), MIG-POL /428/2021, 10 September 2021; UN High Commissioner for Refugees (UNHCR), UNHCR [observations](#) on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 16 September 2021.

the border with Belarus in an irregular manner, outside of the official border crossing points” recorded in the course of 2021. In their meetings with the Commissioner, local and regional commanders of the Border Guard argued that the legislation adopted by Poland in October 2021 had provided a legal basis for such actions. From her exchanges with the Border Guard commanders, civil society actors and other reliable sources, however, the Commissioner understands that the practice of pushing back migrants and asylum seekers had been occurring systematically even before the new legislation was adopted.

18. Thus, many persons crossing the Polish border, including those who made clear to the Polish authorities their intention to apply for international protection, have been pushed back and made to cross the border again multiple times. As an example, the two groups of people who emerged from the exclusion zone in the Commissioner’s presence on the night of 16 November 2021 told her that they had by then spent several weeks in the woods on both sides of the border. A couple of Afghan asylum seekers, who had fled Afghanistan in August 2021, told the Commissioner that the Polish Border Guard had pushed them back into Belarus 13 times, despite them clearly stating their intention to request asylum in Poland to the Polish border guards on each occasion. Another group of asylum seekers from Ethiopia’s conflict-torn Tigray region told the Commissioner that they had been pushed back to the border 5 times. Many other examples of repeated pushbacks have been documented by international human rights NGOs, such as Human Rights Watch, as well as civil society organisations active near the border area.¹⁴ The repeated and systematic nature of pushbacks on Poland’s border is further corroborated by the findings of the team from the Office of the UN High Commissioner for Human Rights (OHCHR) which visited Poland from 29 November to 3 December 2021. The UN OHCHR team interviewed 31 migrants and asylum seekers, documenting recurring cases of individual persons and groups of people, including children and persons who said they had requested international protection, being immediately and automatically returned to or across the border with Belarus.¹⁵
19. The Commissioner was informed by reliable sources that pushbacks are especially rife within the exclusion zone, where members of the Border Guard or of other armed formations often simply escort intercepted persons back to the border with Belarus without initiating any legal procedure or issuing any decision. While many migrants and asylum seekers are found outside of the exclusion zone, most – especially the weakest or the infirm – often do not make it that far before being summarily returned to the border. The lack of access by humanitarian actors and the media to the exclusion zone and the resulting lack of public scrutiny means there is little clarity as to how many migrants and asylum seekers have been intercepted within the zone and pushed back in this manner.¹⁶ According to reports by civil society actors, border guards also routinely confiscate migrants’ and asylum seekers’ phones and chargers or damage them in order to prevent them from communicating or to destroy evidence of pushbacks.
20. On some occasions, the actions of the Polish border guards led to the separation of families of migrants and asylum seekers. In one reported case, a mother with children was pushed back across the border to Belarus while her husband was being treated in a local hospital; the family was reunited several days later after its members were again made to cross the border into Poland. Activists met by the Commissioner told her that migrants and asylum seekers with health problems were sometimes reluctant to seek medical treatment for fear of being pushed back to Belarus or separated from loved ones. One asylum seeker met by the Commissioner just outside the exclusion zone refused to receive treatment at a local hospital out of fear of being separated from her spouse. Several distraught migrants and asylum seekers met by the Commissioner at a local hospital told her that they had been separated from family members, did not know their whereabouts and were worried about their fate.

¹⁴ “Die Here or Go to Poland. Belarus’ and Poland’s Shared Responsibility for Border Abuses, [report](#), Human Rights Watch, 24 November 2021; see also, “Humanitarian crisis...” [report](#) by Grupa Granica, cited above in footnote 7.

¹⁵ Press [briefing notes](#) on Poland/Belarus border, Office of the UN High Commissioner for Human Rights (OHCHR), 21 December 2021.

¹⁶ For an analysis and estimates of the possible numbers of persons pushed back to Belarus, as well as stories of the persons affected, see the “Humanitarian crisis...” [report](#) by Grupa Granica, cited above in footnote 7.

III. Humanitarian and human rights situation of persons stranded on Poland's border with Belarus

The humanitarian, material and sanitary situation of the persons stranded near Poland's border with Belarus

21. The Commissioner considers that the combination of the lack of access to asylum, pushbacks, the failure of the Polish authorities to provide humanitarian assistance and the prevention by Poland of access by providers of humanitarian assistance and legal aid has significantly contributed to many migrants and asylum seekers being trapped in the cold and swampy woods on Poland's border with Belarus for extended periods of time – several weeks or even months in some cases. This has resulted in extensive loss of life and severe damage to health among many migrants and asylum seekers. According to several reports, at least 21 people, adults and children alike – including a one-year-old boy – lost their lives in the woods in 2021.¹⁷ The identity and profiles of some of the victims have since been publicised in the media.¹⁸ Humanitarian actors, human rights activists and local residents met by the Commissioner told her they routinely encountered thirsty, hungry, sick and exhausted persons showing signs of hypothermia who had spent many nights in sub-zero temperatures in the woods without access to clean drinking water, food and warm clothes or cover. Interviews conducted with migrants and asylum seekers by the UN OHCHR team contained accounts of the “dire conditions suffered by them on both sides of the border, with no or limited access to food, clean water and shelter, often amid freezing temperatures.”¹⁹ One migrant woman reportedly gave birth in the woods, only to be pushed back into Belarus with the new-born child just hours after delivery.
22. During her mission, the Commissioner visited the hospital in Hajnówka, one of several hospitals in the region that treats migrants and asylum seekers found in the border area, and exchanged with its deputy director and duty staff. The Commissioner learned that the hospital had treated about 200 migrants and asylum seekers to date. Twenty-three people, including three patients in a critical condition, had been admitted to the hospital's emergency ward in the week preceding the Commissioner's mission. One of those treated in the emergency ward during the Commissioner's visit, a 38-year-old mother of five, had suffered a miscarriage; despite the hospital staff's best efforts, she died in the hospital's emergency ward on 5 December 2021 after suffering severe organ failure.²⁰ The Commissioner noted that migrants and asylum seekers treated at the hospital bore clear signs of their ordeal, such as wounds, frostbite on limbs and exhaustion. A small number of migrants and asylum seekers admitted to the hospital tested positive for Covid-19. Most of those admitted were in urgent need of hydration, food and warm shelter. As soon as the patients' condition improved, they would usually be taken away by the border guards who, as the Commissioner herself observed, kept guard on the hospital wards. The Commissioner was extremely impressed with the professionalism and dedication of the hospital's staff and direction.
23. In addition to her encounters at the hospital, the Commissioner also spoke with migrants and asylum seekers in a local border guard unit, and in the wooded area on the verge of the exclusion zone near the border town of Czeremcha. One family of asylum seekers with many young children – the youngest being a four-months-old baby – had spent several weeks in the woods in the border area. They told the Commissioner they had been enticed into travelling to Belarus by ads placed by travel agencies on local TV and social media, promising legal entry through Belarus into the Schengen area. Each person was charged fees of several thousand dollars for the service, which covered a flight to Minsk, the Belarusian visa and transportation to the Polish border. They were then forced to cross by the Belarusian state agents, who used physical force, beatings and threats and set guard dogs on them.

¹⁷ “One-year-old Syrian child dies in forest on Poland-Belarus border”, [press article](#), the Guardian, 18 November 2021. See also, “MSF leaves Polish border”, [press statement](#), cited above in footnote 6.

¹⁸ “Mama, Pray for Us. A Chronicle of Refugee Deaths along the Border Between Poland and Belarus”, [press article](#), Spiegel / Lighthouse Reports, 22 December 2021.

¹⁹ See OHCHR [briefing notes](#) cited above, in footnote 15.

²⁰ “Kurdish woman who miscarried after crossing Belarus border dies in Polish hospital”, [press article](#), Notes from Poland, 5 December 2021.

24. While a decrease in the number of crossings from Belarus was reported towards the end of 2021,²¹ civil society activists working on the border estimate that up to 1,000 people may still be present in borderland woods. The Commissioner regrets that, due to the information blockage resulting from the official ban imposed by Poland on access to the exclusion zone, these estimates cannot be independently verified.
25. The volunteers working on the border also relayed to the Commissioner migrants' and asylum seekers' reports of having suffered brutality at the hand of Belarusian border guards, including beatings and setting guard dogs on them, in order to coerce them into entering or re-entering Poland. The Commissioner was informed that one of the migrants claimed to have been raped when in Belarus. Such information is consistent with that collected by others. OHCHR, for example, reported that the majority of persons interviewed said that, while in Belarus, they had been beaten or threatened by security forces, with several saying that Belarusian security forces had demanded extortionate sums for food and water.²² Similarly, Human Rights Watch reported hearing first-hand accounts of violence, abuse, theft and extortion by Belarusian border guards.²³ Amnesty International also reported beatings and other serious torture or other ill-treatment, including cases of people being deprived of food, water, shelter and sanitation, as well as theft of phones and money or extortion by members of Belarusian forces.²⁴ The Commissioner notes that concerns about the treatment of persons on the Belarusian side of the border, including those pushed back by Poland, are long-standing.²⁵ She further notes that the Polish government itself has frequently alluded to the brutality of the actions of Belarusian authorities in directing persons towards the border and forcing them to cross, thus expressing awareness of such treatment from an early stage.²⁶ In a TV [interview](#) given on 24 August 2021, the Polish President stated that "the brutal use of these people by the Belarusian authorities cries out to heaven for vengeance" and called their treatment "absolutely merciless".²⁷

IV. Observations on Poland's laws and practices in view of its obligations under the Convention

26. In this section, the Commissioner's observations above are discussed further in connection to Poland's specific obligations under the ECHR and the Court's case law. In this respect, the Commissioner first makes the general observation that the situation at Poland's border with Belarus has attracted Europe-wide attention, raising questions about the way in which Poland but also other member states should appropriately respond to challenging situations of irregular arrivals at their borders, now and in the future. On the basis of her extensive work on the issue of summary returns by member states (see above, in footnote 2), the Commissioner notes with concern that summary returns of persons arriving in an irregular manner are becoming an increasingly systematic practice in Europe, which is sometimes formalised in domestic law, such as in the case of Poland. International bodies, national human rights structures, civil society actors and investigative journalists have reported pushback-related practices in more than half of all Council of Europe member states from 2018 onwards. These developments have coincided with the proliferation of arguments by member states that such practices can be justified in view of the Court's case-law, especially since the Grand Chamber's judgment in *N.D. and N.T. v. Spain*.²⁸ This has not only involved, in the Commissioner's view, very expansive readings of the limited and exceptional

²¹ "MSF leaves Polish border", [press statement](#) cited above in footnote 6. Statistical [data](#) made available by the Polish Border Guard noted that the number of recorded attempts to cross the border from Belarus in an irregular manner peaked in October 2021 (17,447 recorded attempts) but later dropped in November (8,917) and December 2021 (1,740).

²² See OHCHR [briefing notes](#) cited above, in footnote 15.

²³ "Die Here or Go to Poland...", [report](#), cited above in footnote 14.

²⁴ "Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU", [report](#), Amnesty International, 20 December 2021.

²⁵ "Trapped between Poland and Belarus, 32 Afghans — and their cat — have become symbols of Europe's new border crisis", [press article](#), Washington Post, 3 September 2021; "Syrians in Polish forest accuse Lukashenko's forces of brutality", [press article](#), Politico, 9 December 2021.

²⁶ See, for example, the [tweet](#) by the Polish Ministry of Defence of 10 November 2021. See also, "MON pokazał nowe nagranie z migrantami. Tak traktują ich Białorusini" (the Ministry of Defence shows new footage with migrants. This is how Belarusians treat them", [press article](#) (in Polish), TVP.info, 12 November 2021; "Strzały na granicy. Tak białoruskie służby terroryzują migrantów" ("Shots fired at the border. This is how Belarusian forces terrorise migrants"), [press article](#) (in Polish), PolskieRadio24, 10 November 2021.

²⁷ "Wywiad Prezydenta RP dla "Gościa Wiadomości" TVP" ("The President's interview for TVP news guest") (in Polish), 24 August 2021.

²⁸ *N.D. and N.T. v. Spain*, application nos. 8675/15 and 8697/15, judgment [GC] of 13 February 2020.

circumstances, set out by the Grand Chamber, in which not making an individual assessment before expulsion may be compatible with Article 4 of Protocol No. 4 ECHR due to the person's own conduct. It has also led to member states sometimes justifying summary returns which have, in the view of the Commissioner, clearly failed to observe those member states' fundamental and non-derogable obligations, especially under Article 3 ECHR. In this context, it is paramount to ensure that the protection of the rights of asylum seekers and migrants under the Convention remains practical and effective, even in clearly challenging situations, with the current case playing a potentially important role in how such protection will be seen across Europe in the future.

Obligations under Articles 2 and 3 ECHR

27. In the view of the Commissioner, the legal framework in place in Poland, and the practice of summarily returning persons who have entered irregularly across the border with Belarus – whether carried out within or outside that legal framework – raise acute concerns as to the compatibility with Poland's obligations under Article 3 ECHR. In this respect, she firstly notes that, in other cases, the Court has already had occasions to deal with questions of denial of asylum applications by Polish authorities at official border crossing points,²⁹ which occurred before the recent tightening of their approach in relation to Belarus' actions to direct migrants and asylum seekers to Poland's borders. In these cases, in which the applicants claimed that Belarus was not a safe third country, the Court was satisfied that there was no guarantee that their asylum applications would be seriously examined by the Belarusian authorities in order to prevent onward return to their country of origin.³⁰
28. Secondly, the Commissioner notes that the serious ill-treatment by Belarusian state agents of persons returned across the Polish-Belarusian border, as outlined in paragraph 25 above, would, in her view, clearly meet the threshold of severity under Article 3 ECHR. Furthermore, as set out above, concerns about such treatment have been repeatedly raised and widely documented, with the Polish authorities themselves showing awareness of such concerns and condemning the actions of the Belarusian authorities in this regard. As such, the Commissioner considers that the policy of summary returns to Belarus, without an individualised assessment of the risks involved, has resulted in the Polish authorities knowingly subjecting persons pushed back to treatment contrary to Article 3 ECHR.
29. Thirdly, with some reported exceptions which appear to be mainly the result of exceptional decisions taken by local border guards or commanders, the policy of blanket and summary returns does not take into account the dire humanitarian situation in which people find themselves, often for prolonged periods, as a result of repeated pushbacks by Poland and being blocked on the Belarusian side, as described in paragraphs 21 to 24 above. This, in the view of the Commissioner, has led to persons being knowingly left without access to basic necessities, such as food, drinking water and shelter, while measures to alleviate this situation – either by the Polish authorities directly, or indirectly by allowing other actors' access to persons in need – are generally lacking, as has also been described above. Based on the discussions with persons who have spent prolonged periods in the border region, as well as the reports of others, the Commissioner considers that such situations pose a clear threat to their rights and freedoms under the Convention, including under Article 3 and, in some cases, the right to life under Article 2 ECHR.

Obligations under Article 4 of Protocol No. 4 ECHR

30. The Commissioner considers that both the legal framework in place and the associated practice of summary returns, as set out in paragraphs 15-18 above, do not provide for the individual identification or a reasonable and objective examination of the particular case of each individual person or a group that is expelled, as required by Article 4 of Protocol No. 4 ECHR.³¹ The Commissioner notes that summary returns without such individualised examination cannot be

²⁹ Including the concerning "systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard", see *M.K. and Others v. Poland*, applications nos. 40503/17, 42902/17 and 43643/17, judgment of 23 July 2020, paragraph 174; see also, *D.A. and Others v. Poland*, application no. 51246/17, judgment of 8 July 2021, paragraph 60.

³⁰ *M.K. and Others v. Poland*, judgment of 23 July 2020, cited above, paragraph 178; *D.A. and Others v. Poland*, judgment of 8 July 2021, cited above, paragraph 64.

³¹ *N.D. and N.T. v. Spain*, judgment [GC] of 13 February 2020, cited above, paragraph 195; *Hirsi Jamaa, and Others v. Italy*, application no. 27765/09, judgment [GC] of 23 February 2012, paragraph 185.

disconnected from the wider apparent objective of the Polish authorities to prevent migrants and asylum seekers from entering Poland from Belarus. However, at least formally, Poland's legal framework, as described in paragraphs 13 and 14 above, is focused on ensuring that requests for entry, including in relation to seeking protection, should be made at official border crossing points. In this regard, the Commissioner notes that the Court has already found that the mere existence of such a possibility on paper may not be sufficient to consider that 'genuine and effective access' to legal means of entry actually exist.³² In addition to her comments above about the Court's earlier findings on denial of asylum applications at official border crossings, the Commissioner notes that the situation at the Polish-Belarusian border since August 2021 has been dynamic and that the Polish authorities have often suspended traffic at border crossings or closed some of them in response to this, casting doubt on the possibilities of legal entry at all times and in all cases.

31. However, to the extent that, in individual cases, seeking entry at an official border crossing point may have been theoretically possible, the Commissioner further observes the following. Firstly, the immediate return of a person who crossed the border in an irregular manner, often without further formal notice or procedure, prevents that person from presenting cogent reasons for not having made use of an official entry point, and such reasons from being considered at the moment of expulsion.³³ Secondly, she observes that, especially in the context of the current situation at Council of Europe member states' borders with Belarus, the place and manner of attempted entry, as well as the numbers involved, may not always be deliberate choices of migrants and asylum seekers, but rather the result of coercion, instructions or other circumstances external to their will. In particular, the Commissioner notes that the Polish authorities, the authorities of some other member states and European Union institutions, have regarded arrivals of migrants and asylum seekers at Poland's borders as an element of so-called 'hybrid attacks' orchestrated by Belarus. The Parliamentary Assembly of the Council of Europe has noted that these arrivals constituted an 'instrumentalisation' of migration movements by Belarus.³⁴ Such actions have reportedly been characterised by misinformation and people being directed to specific places on the border by Belarusian authorities, and even the use of threats and physical violence to make persons cross.³⁵ Therefore, the Commissioner finds it doubtful that, in this complex situation where many persons found themselves the victims of the circumstances created by the reprehensible conduct of the Belarusian authorities, the manner of their entry into Poland can appropriately be considered within the context of their own conduct, much less culpability, that would, under the criteria set out by the Court, potentially allow member states not to conduct an individualised assessment before expelling them.

Interplay between obligations under Article 4 of Protocol no. 4 and Articles 2 and 3 ECHR

32. The Commissioner notes that the application of any exceptions to the normal safeguards to uphold the prohibition of collective expulsion must be without prejudice to states' obligations under Articles 2 and 3 ECHR,³⁶ which must be observed even in the face of significant challenges or times of emergency. In light of the observations on Poland's Article 2 and 3 obligations, in particular in paragraphs 25 and 27-29 above, the Commissioner notes that risks associated with ill-treatment by the Belarusian authorities, and those emanating from the dire humanitarian situation in which people are left in the border area, arise as soon as they are returned across the border. As such, an approach in which persons crossing the border irregularly are immediately returned and simply informed that they can only apply for entry at an official border crossing (or otherwise redirected to such a crossing) does not provide a safeguard against such risks in the general situation as set out in sections 1-3 above. These risks will affect such persons from the moment when they are returned across the border until at least the theoretical moment at which they would be able to present themselves at such a crossing.³⁷ The Commissioner further notes that, if the objective is to ensure that applications for entry, including protection, are appropriately processed at places designated

³² *N.D. and N.T. v. Spain*, judgment [GC] of 13 February 2020, cited above; *Shahzad v. Hungary*, application no. 12625/17, judgment of 8 July 2021; *M.H. and Others v. Croatia*, applications nos. 15670/18 and 43115/18, judgment of 18 November 2021.

³³ *N.D. and N.T. v. Spain*, judgment [GC] of 13 February 2020, cited above, paragraph 201.

³⁴ Parliamentary Assembly, [Resolution 2404\(2021\)](#) on instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus, 30 September 2021.

³⁵ See, e.g., the references made in footnotes 23-27 above.

³⁶ *N.D. and N.T. v. Spain*, judgment [GC] of 13 February 2020, cited above, in paragraph 201.

³⁷ Where, for reasons discussed above, possibilities of access may be theoretical rather than genuine and effective at any rate, in particular for persons returned to the border with a ban on re-entry referred to in paragraph 16 above.

for this, which may include official border crossing points, then the Polish authorities had concrete and practical means of ensuring this without resorting to immediate expulsion. In particular, they could have facilitated the transport of such persons across Poland's territory to places where their situation could be appropriately assessed in light of all necessary safeguards and where requests for entry, including asylum requests, could be presented and properly processed.

Conclusion

33. In conclusion, the Commissioner considers that:

- there exists in Poland a clear practice of pushing migrants and asylum seekers back to Belarus, regardless of their individual situation and in particular, regardless whether they may be entitled to protection;
- the practice of pushing migrants and asylum seekers back to Belarus, enabled by new rules adopted in August 2021 and legislation adopted in October 2021, is repeated and systematic in nature;
- changes in Poland's regulatory framework introduced in October 2021 have made the exercise of the right of access to individual procedures and to apply for protection in Poland largely illusory for migrants and asylum seekers who cross the border from Belarus in an irregular manner;
- expelling migrants and asylum seekers to Belarus is likely to put them at risk of torture or inhuman or degrading treatment, which are incompatible with Article 3 ECHR, at the hands of Belarusian state agents, a situation that is well-documented and is, or should be, known to the Polish authorities;
- the Polish authorities' failure to provide humanitarian assistance to migrants and asylum seekers, and restrictions put in place by Poland on access to the border zone for persons and organisations providing humanitarian help and legal assistance, has contributed to the aggravation of the already dire humanitarian, material and sanitary conditions affecting many migrants and asylum seekers trapped on Poland's border with Belarus, which resulted in severe damage to health among many of them and, tragically, extensive loss of life among those most unfortunate.