Third Party Intervention

COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

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

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

Application no. 17764/22

C.O.C.G. and Others v. Lithuania

Strasbourg, 11 October 2024

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English only

Introduction

1. On 3 July 2024, the Council of Europe Commissioner for Human Rights (hereinafter the Commissioner) informed the European Court of Human Rights (hereinafter the Court) of his 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 concerning the case of *C.O.C.G. and Others v. Lithuania*. This case relates to allegations of summary returns across the border with Belarus.

2. According to his mandate, the Commissioner fosters 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 the law and practice concerning human rights; and provides advice and information on the protection of human rights across the region.[1] As stated by the Explanatory Report to Protocol No. 14 to the Convention, his experience may help enlighten the Court on certain questions, particularly in cases that highlight structural or systemic weaknesses in the respondent or other High Contracting Parties.[2]

3. The present intervention is based on the extensive engagement of the Commissioner and his predecessors with Council of Europe member states on the question of border controls and the occurrence of summary returns.[3] Since the summer of 2021, this engagement has also included an increased focus on summary returns and other violations in the context of the so-called instrumentalisation of migration at Europe's eastern borders. A significant part of this work has focused on Council of Europe member states sharing a border with Belarus, including the respondent state.[4] Since taking up his mandate in April 2024, the Commissioner has already had several occasions to exchange with member states on human rights issues arising in the context of instrumentalisation, in particular through written exchanges and visits to Poland and Finland.[5] Through these activities, the Commissioner has had the opportunity to observe states' practices in managing the arrival of asylum seekers and migrants irregularly entering their territories, including in cases of instrumentalisation, the human rights challenges that arise in such situations, and the way that states have interpreted the Court's case law.

4. Section I outlines the Commissioner's observations on the practices of Lithuania at its border with Belarus. Section II presents the Commissioner's observations on states' interpretation of the Court's case law on the protection of human rights in the context of summary returns. Section III provides further observations on the human rights issues emerging in relation to the specific phenomenon of the instrumentalisation of migration. Finally, Section IV provides observations on the question of evidence in cases of alleged summary returns.

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[1] Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.
[2] Explanatory Report to Protocol No. 14 to the Convention, 13 May 2004, para. 87.
[3] This has involved numerous country visits, several emergency visits to border areas, written exchanges with the governments and parliaments of member states, as well as thematic publications, such as the Recommendation 'Pushed beyond the limits: four areas for urgent action to end human rights violations at Europe's borders', 2022.
[4] Letter to the Prime Minister of Lithuania, 10 August 2021 (published 24 August 2021); statement on the humanitarian situation at the Poland-Belarus border, 25 August 2021; statement following a visit to the Poland-Belarus border, 19 November 2021; statement on Poland's legislation providing for the continuation of a buffer zone along the border with Belarus, 1 December 2021; letter to the Minister of Interior of Latvia, 29 July 2022 (published August 2022); letter to the Minister of Interior of Latvia, 27 January 2023 (published 6 February 2023); statement on the debate in the Parliament of Lithuania on amendments to the Law on the State Border and its Protection, 24 April 2023; statement on the debate in the Parliament of Latvia on amendments to the Law on the State Border and the Law on the State Border Guard, 21 June 2023.
[5] Letter to the Parliament of Finland, 11 June 2024 (published 17 June 2024); letter to the Prime Minister of Poland, 17 July 2024 (published 23 July 2024); letter to the Marshal of the Senate of Poland, 17 July 2024 (published 23 July 2024); statement following mission to Poland, 23 September 2024; statement following mission to Finland, 27 September 2024.

I. Observations on summary returns at the Lithuania-Belarus border

a. Lack of access to the asylum procedure and summary returns

5. Following an increase in irregular crossings of third country nationals entering Lithuania from Belarus, the Lithuanian Government declared a state-level emergency on 2 July 2021.[6] Based on this, on 2 August 2021 the Minister of Interior issued an order allowing border guards to carry out summary returns at the border.[7] On 13 July 2021 Parliament adopted amendments to the Law on the Legal Status of Aliens and other legislation, to be applied in particular in 'extraordinary situations due to a mass influx of foreigners'.[8] The amendments modified existing border procedures, including i) the scope of application, to cover persons who applied for asylum within the territory shortly after the irregular border crossing, ii) the locations where asylum seekers would be placed, including in 'temporary accommodation', and iii) the time limits for detention of asylum seekers.

6. On 10 August 2021, the Commissioner's predecessor wrote to the Prime Minister of Lithuania to express concern about the situation at the country's border with Belarus and the human rights impact of Lithuania's response.[9] The letter noted reports of summary returns to Belarus and other violations, and emphasised that emergency provisions removing individual assessments and other safeguards might lead to violations of Lithuania's obligations to prevent refoulement and collective expulsions.

7. Parliament adopted additional amendments in August[10] and December 2021.[11] These restricted the places where asylum applications could be lodged in case of a mass influx of foreigners (border crossing points or transit zones; the territory of the Republic of Lithuania, *provided that a foreigner entered legally*; and diplomatic missions or consulates abroad). The Law stipulated that a foreign national's application for asylum should not be accepted after apprehension at the border, except at official border crossing points. At the same time, it was indicated that border guards may still accept such applications on account of the vulnerability or other circumstances of the person.

8. In practice, the changes made in 2021 codified the practice of summary returns at Lithuania's border with Belarus, the denial of access to asylum procedures for people who entered the country in an irregular manner and a policy of automatic detention both for people seeking asylum and those considered to be irregular migrants.

9. In June 2022, the Court of Justice of the European Union (CJEU) found that the above-mentioned amendments adopted in July 2021 were incompatible with EU law, including the EU Charter of Fundamental Rights[12]. The CJEU found, inter alia, that restrictive measures applied in Lithuania and referred to by authorities as 'temporary accommodation' or 'alternative to detention' in fact constituted detention.[13] In order to address the ruling of the CJEU, in April 2023 Parliament amended the Law on the Legal Status of Aliens,[14] reinstating the possibility to lodge an asylum application regardless of the person's mode of entry. However, at the same time Parliament also adopted amendments to the Law on the State Border and its Protection, which again enabled border guards not to admit to Lithuania foreigners who intend to cross or have crossed the border outside border crossing points or in violation of the established procedure. On 24 April 2023, the Commissioner's predecessor published a statement regarding the amendments to the Law on the State Border and its Protection, pointing out that they would legalise in domestic law summary returns of people in need of international protection.[15]

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[6] Government of the Republic of Lithuania decision of 2 July 2021 No. 517 declaring a state-level emergency due to mass influx of migrants.
[7] Minister of Interior and the Head of State-Level Emergency Operations decision of 2 August 2021 No. 10V-20 regarding the management of the mass influx of foreigners and the strengthening of state border protection.
[8] Amendments to the Law on the Legal Status of Aliens.
[9] Letter of 10 August 2021 (published 24 August 2021).
[10] Law of 10 August 2021 No. XIV-515 amending the Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206, 67 para. 11, sub-para. 2.
[11] Law of 23 December 2021 No. XIV-816 amending the Law of the Status of Foreigners.
[12] Case C-72/22 PPU, Valstybės sienos apsaugos tarnyba, judgment of 30 June 2022.
[13] The same conclusion had been made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its report on Lithuania, CPT/Inf(2023)01, 23 February 2023.
[14] Law Amending Articles 1, 2, 4, 10, 11, 14, 15, 16, 18, 23, 26 of Law No VIII-1666 on the State Border and the Guard thereof and supplementing the Law with Article 23-1 and Section IX, No. XIV-1891, 25 April 2023.
[15] Statement of 24 April 2023.

10. In June 2023, the Constitutional Court found that provisions of the Law on the Legal Status of Foreigners, introduced in 2021 and April 2023 and providing for the automatic detention of asylum seekers and those considered irregular migrants, violated Article 20 of the Constitution, protecting liberty. In December, Parliament passed legislation to reintroduce some guarantees against arbitrary detention and limit the maximum length of detention to five months.

11. The Commissioner observes that since August 2021, a practice of summary removals of persons who had entered or attempted to enter Lithuania irregularly from Belarus has been applied extensively by Lithuanian authorities. The official statistics published by the State Border Guard Service report that 22 545 persons were subjected to 'denied entry' up to date (585 in 2024 as of 16 September, 2 643 in 2023, 11 211 in 2022 and 8 106 in 2021).[16]

12. While the new legislation provides for the possibility for people to seek asylum at official border crossing points, information from the UN High Commissioner for Refugees (UNHCR) indicates that the number of asylum applications made at such locations has been consistently low: 12 asylum applications in 2021, 90 in 2022, and 7 in 2023.[17] The number of active border crossings has also been reduced over time, with two of the six crossings on the Belarus border having been closed on 18 August 2023, and another two on 1 March 2024.[18]

13. The vast majority of refugees, asylum seekers and migrants entering from Belarus were not given effective access to an asylum procedure, but summarily and forcefully returned, without examination of their personal circumstances and without consideration of any claims that, if returned to Belarus, they would be exposed to ill-treatment.

b. Human rights and humanitarian situation of persons stranded on the border with Belarus

14. The Commissioner notes that, from 2021 onwards, people crossing irregularly from Belarus into Lithuania in many cases were returned to dire conditions for considerable periods of time. In the absence of any effective opportunity to seek asylum, they were often trapped between the border guards of Lithuania and Belarus. The UN Committee Against Torture, the UN Committee on Economic, Social and Cultural Rights, and the Lithuanian Ombudsperson expressed concerns about collective expulsions by Lithuania, which also involved children and people in need of urgent medical and humanitarian assistance, and their impact.[19]

15. Conditions are compounded by the lack of access to humanitarian assistance on Lithuanian territory, since access to border areas is heavily limited and civil society organisations, UNHCR and journalists have been excluded from it.[20] As a result, refugees, asylum seekers and migrants are also left without access to independent legal advice.

16. People apprehended in Lithuania in early 2021 were reported to have been subjected to prolonged arbitrary detention, often in poor conditions. In November 2021, the UN Committee against Torture expressed concern about restrictions imposed on foreigners, in particular their prolonged de facto detention without access to procedural guarantees, including legal aid and the possibility to challenge detention.[21] Conditions of detention, amounting to inhumane or humiliating treatment, and

[16] State Border Guard Service, Statistics of illegal migrants denied entry, 25 September 2024.
[17] Submission by UNHCR in the case of *A.S. and Others v. Lithuania* (application no. 44205/21), 14 March 2024., para. 2.2.11.
[18] Ministry of Interior, "The operation of the Lavoriškės and Raigardas border crossing points will be terminated from 1 March", 22 February 2024.
[19] Concluding observations UN Committee against torture 21.12.21. Concluding observations on the third periodic report of Lithuania, UN Committee on Economic, Social and Cultural Rights; Seimas Ombudsman, "the Government and the Seimas Committee on Human Rights were informed about asylum procedure problems faced by migrants back in June", 14 October 2021.
[20] Submission by UNHCR in *A.S. and Others v. Lithuania*, see note 17 above.
[21] OHCHR, "Experts of the Committee against Torture Welcome Lithuania's Holistic Approach on Promoting Human Rights and Fighting Torture, and ask about the State of Emergency on the Border with Belarus", 18 November 2021.

serious shortcomings in the provision of legal aid, were reported by Amnesty International[22] and the Seimas Ombudsman.[23]

c. Belarus' treatment of asylum seekers and migrants at the border

17. The Commissioner notes that the role played by Belarus in directing asylum seekers and migrants to Council of Europe member states' borders, often captured by the term 'instrumentalisation', has been well documented. This has involved, among other activities, enticing people to travel to Belarus as a gateway to other countries via advertising on TV and social media, offering travel packages and visas, but also coercion and threats. International bodies have documented allegations that Belarusian authorities played a key role in deciding where and how individuals would irregularly cross a border. For example, in December 2021, the Office of the High Commissioner for Human Rights (OHCHR) reported on its interviews with asylum seekers and migrants who had arrived in Poland who "alleged that Belarusian security forces forced them to cross the border, instructing them when and where to cross, and prevented people from leaving the border area to return to Minsk."[24] The coercive nature of many irregular border crossings has also been reiterated by numerous other sources.[25]

18. These same sources also documented that asylum seekers and migrants often are subjected to ill-treatment at the hands of Belarusian authorities, both when being coerced across the border and when returned to Belarus by Council of Europe member states. The Commissioner notes that abuse and violence by Belarusian border guards have been reported from the earliest stages of the instrumentalisation of cross-border movements. As early as the summer of 2021, several high officials of relevant member states expressed their awareness that Belarus' instrumentalisation of migration included the use of force and abuses.[26] The Commissioner's predecessor visited the region in November 2021 and collected testimonies from people who recounted having been subjected to ill-treatment, sexual violence and other abuse by Belarusian state agents. On this basis, she publicly warned that returns to Belarus could expose people to torture or inhuman or degrading treatment.[27]

II. Observations on states' interpretations of the Court's case law on summary returns

19. The Commissioner draws the Court's attention to certain practical and conceptual issues that have arisen from member states' interpretations of the Court's case law on summary returns. The interpretation of elements of *N.D. and N.T. v. Spain,*[28] in particular, has facilitated a weakening of the effectiveness of the prohibition of refoulement, as encompassed by Articles 2 and 3 of the Convention

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[22] Amnesty International, *Lithuania: Forced out or locked up - Refugees and migrants abused and abandoned*, 27 June 2022.
[23] Seimas Ombudsman, "For the first time in history, the Seimas Ombudspersons' Office presented a position to the European Court of Human Rights regarding the detention of migrants in Lithuania", 30 October 2023; Seimas Ombudsman Report from Kybartai Foreigners' Registration Center, Seimas Ombudsman Report from Medininkai Foreigners' Registration Center.
[24] OHCHR, Press briefing notes on Poland/Belarus border, 21 December 2021.
[25] Human Rights Watch, "'Die here or go to Poland': Belarus' and Poland's shared responsibility for border abuses", 24 November 2021; "Amnesty International, "Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU", 20 December 2021; Amnesty International, *Poland: Cruelty Not Compassion, at Europe's Borders*, 11 April 2022; Amnesty International, *Lithuania: Forced out or locked up – refugees and migrants abused and abandoned*, 27 June 2022; Human Rights Watch, "Violence and pushbacks at Poland-Belarus border", 7 June 2022; UN Special Rapporteur on the human rights of migrants, end of visit statement on Poland and Belarus, 28 July 2022; Human Constanta, *2022 Humanitarian crisis in Belarus and at the border with the European Union*, 22 March 2023; Report of the UN Special Rapporteur on the human rights of migrants, visit to Belarus, A/HRC/53/26/Add.2, 18 May 2023, paragraph 30.
[26] See, for example, the Commissioner's third party intervention with the Court in *R.A. and Others v. Poland*, 27 January 2022 (published 4 February 2022), paragraph 25, including its reference to an interview by the Polish President on 24 August 2021, in which he talked about Belarus' "brutal use of people" and their treatment being "absolutely merciless". Also see Amnesty International, written third party submission in the case of *C.O.C.G. and Others v. Lithuania*, 26 April 2023, paragraph 17, highlighting several public statements by the Lithuanian authorities acknowledging the forceful nature of the instrumentalisation by Belarus.
[27] Statement following a country visit, 19 November 2021. Also see further elaboration of information received from asylum seekers and migrants in Poland, as well as volunteers: third party intervention in *R.A. and Others v. Poland*, note 26 above, paragraphs 23 and 25. The Commissioner notes that he observed similar issues in his engagement with states around the same time, in his role as Director of the Fundamental Rights Agency of the European Union.
[28] Applications nos. 8675/15 and 8697/15, judgment [GC] of 13 February 2020.

(point a. below). Additionally, interpretations of certain elements of the Court's case law may have also led to a reduction of the protection provided by the prohibition of collective expulsion under Article 4 of Protocol No. 4 of the Convention (point b. below). The Commissioner provides these observations to assist the Court in ensuring that the Convention guarantees rights that are practical and effective, rather than theoretical and illusory,[29] and that domestic rules governing border controls do not render inoperative or ineffective the rights guaranteed by the Convention.[30]

a. Summary returns and the prohibition of refoulement

i. The absolute nature of the prohibition of refoulement (Article 3 of the Convention)

20. The Commissioner recalls the utmost importance the Court attaches to the protection of Article 3 of the Convention.[31] The Court has repeatedly held that the prohibition of torture and inhuman or degrading treatment or punishment is absolute, no derogation from it being permissible under Article 15(2) of the Convention even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, including in managing migratory flows or in the reception of asylum seekers.[32] Importantly, in the current context, this obligation of states to uphold the prohibition of treatment contrary to Article 3 of the Convention is also irrespective of the conduct of the person concerned. As the obligation of non-refoulement is derived from the same provisions of the Convention, the obligation not to expel a person if this would expose them to treatment contrary to Article 3 of the Convention is similarly absolute and not affected by the conduct of that person. The same is true for expulsion to treatment contrary to Article 2. The absolute and non-derogable nature of this obligation under the Convention is aligned with the same principle under other international instruments, including the International Covenant on Civil and Political Rights, the Convention Against Torture Against Torture and Other Cruel, Inhuman or Degrading Treatment, and EU law, as well as customary international law.[33]

21. The absolute nature of the prohibition of refoulement constitutes the bedrock of the protection that the Convention provides to asylum seekers and migrants who find themselves under the jurisdiction of states bound by the Convention. It is at the core of the Commissioner's engagement with those states to ensure that, in the exercise of their right to control the entry, residence and expulsion of aliens, they do not have recourse to practices that are incompatible with the Convention.[34]

ii. The importance of individual examinations in upholding Article 3 obligations

22. The Court has found that the assessment whether there are substantial grounds for believing that a person faces a real risk of being subjected to treatment in breach of Article 3 of the Convention must necessarily be a rigorous one and inevitably involves an examination by the competent national authorities of the conditions in the receiving country.[35] Article 4 of Protocol No. 4 also requires as a

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[29] See, among others, *Airey v. Ireland*, application no. 6289/73, judgment of 9 October 1979, para. 24; *Leyla Şahin v. Turkey*, application no. 44774/98, judgment [GC] of 10 November 2005, para. 136; *Hirsi Jamaa and Others*, application no. 27765/09, judgment [GC] of 23 February 2012, para. 175; *Ibrahim and Others v. the United Kingdom*, application nos. 50541/08 and 3 others, judgment [GC] of 13 September 2016, para. 272*; N.D. and N.T.*, note 28 above, para. 171

[30] *N.D. and N.T.*, note 28 above, para. 171.

[31] *Bouyid v. Belgium*, judgment [GC] of 28 September 2015, para. 81 (and references contained therein) emphasising that Article 3 enshrines one of the most fundamental values of democratic societies, and that its prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity.

[32] *Chahal v. the United Kingdom*, application no. 22414/93, judgment [GC] of 15 November 1996, para. 79; *Labita v. Italy*, application no. 26772/95, judgment [GC] of 6 April 2000; *El-Masri v. the former Yugoslav Republic of Macedonia*, application no. 39630/09, judgment [GC] of 13 December 2012, para 195; *Mocanu and Others v. Romania*, application nos. 10865/09, 45886/07 and 32431/08, judgment [GC] of 17 September 2014, para. 316; *Bouyid*, note 31 above, para. 81.

[33] See, for example, Human Rights Committee, General Comment No. 20, paras. 3 and 9; Convention Against Torture, Article 2, paragraph 2 and Article 3; Court of Justice of the EU, Case C-353/16, *MP*, judgment [GC] of 24 April 2018, para. 36; UN International Law Commission, Draft articles on the expulsion of aliens, with commentaries, 2014, Article 24. The prohibition of torture is furthermore widely recognised as jus cogens.

[34] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application nos. 9214/80, 9473/81 and 9474/81, judgment of 28 May 1985, para. 67; *Ilias and Ahmed v. Hungary*, application no. 47287/15, judgment [GC] of 21 November 2019, para. 125; *N.D. and N.T.*, note 28 above, para. 170.

[35] *Chahal*, note 32 above, para. 96.

rule that an individual examination of objections to return is made, and an individualised expulsion decision taken. This requirement thus interacts with the protection against refoulement, as acknowledged by the Court.[36] Refraining from an individual examination may not lead to a violation of Article 4 of Protocol No. 4 if this is due to the applicant's own conduct,[37] with certain criteria for this elaborated in *N.D. and N.T. v. Spain*. However, the Court has also held that consideration of such conduct must be "without prejudice to the application of Articles 2 and 3".[38] The Commissioner notes that some member states have nevertheless refrained from carrying out an individual examination even when Article 2 or 3 concerns were at issue, and that this risks fundamentally undermining the rigorous examination that is required in such cases.

23. The Commissioner observes that the Court, in *N.D. and N.T. v. Spain*, was able to disconnect the questions of refoulement and of obligations under the prohibition of collective expulsion to some extent. In that case, the applicants' complaints in relation to Article 3 had already been declared inadmissible by the Chamber. But in practice it may be much more difficult, and perhaps impossible, to disentangle these aspects. When a person is apprehended crossing a land border irregularly, it will generally be impossible for the authorities of the state to rule out, *prima facie*, that the person may be at a real risk of treatment contrary to Article 3 of the Convention if returned. If then, drawing upon the criteria in *N.D. and N.T. v. Spain*, that person is returned without an individual examination on the assumption that this is compatible with Article 4 of Protocol No. 4, they would be prevented from putting forward any objections in relation to Articles 2 and 3, and deprived of a rigorous assessment thereof.

iii. Article 3 obligations and the possibility of applying for asylum at an official border crossing

24. The Commissioner notes that a specific issue in relation to non-refoulement arises in the context of the refusal of entry of an applicant trying to enter along the so-called 'green border' when they could have applied for asylum at an official border crossing point. In *N.D. and N.T. v. Spain*, the Court notes that states are not prevented from requiring that applications for protection are to be made at existing border crossing points if states provide genuine and effective access to such arrangements for making such applications. In addition, states may refuse entry to their territory to aliens, including potential asylum seekers who have failed, without cogent reasons, to comply with such arrangements by seeking to cross the border at a different location.[39] The Commissioner notes that this element of the Court's case law has been interpreted by some member states as justifying certain summary returns across the border even when Article 2 or 3 issues are at stake.[40] The Commissioner submits that this interpretation may render ineffective the Convention's protection against refoulement, for the following reasons.

25. Firstly, the Commissioner notes that when applicants try to lodge an asylum application or otherwise communicate fear for their safety if returned, a state should ascertain whether such a return would be compliant with its obligations under the Convention. This includes assessing any risks associated with so-called onward or chain refoulement, if the state to which a person is returned may further remove them to their country of origin. The Court has considered that it is a matter for the state carrying out the return to ensure that the intermediary country offers sufficient guarantees in this respect. It has also found that such an obligation is all the more important when the intermediary country is not a state party to the Convention.[41] The Court has furthermore set out in detail what such

[36] *N.D. and N.T.*, note 28 above, para. 198: "It is apparent … that Article 4 of Protocol No. 4, in this category of cases, is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk."
[37] *Khlaifia and Others*, application no. 16483/12, judgment [GC] of 15 December 2016, para. 240.
[38] *N.D. and N.T.,* note 28 above, para. 201. In para. 232, the Court has furthermore emphasised that its findings in *N.D. and N.T. v. Spain* case do not call into question the obligation to protect borders in compliance with the obligation of non-refoulement.
[39] *Ibid*., para. 210.
[40] In his reply of 3 February 2023 to a letter addressed to him by Commissioner Mijatović on 27 January 2024 expressing concerns about summary returns at the border with Belarus potentially violating the prohibition of refoulement, the Minister of Interior of Latvia makes reference to *N.D. and N.T v. Spain*, stating that: "…it should be noted that in the absence of the relevant objectively justified circumstances relating to the need for immediate entry, states are entitled, where appropriate, to refuse entry to the state, *which does not constitute a breach of the principle of non-refoulement*." (emphasis added).
[41] *M.A. and Others v. Lithuania*, application no. 59793/17, judgment of 11 December 2018, para 104.

an assessment should entail.[42] If a state does not carry out any examination of the asylum application, this undermines these guarantees under the Court's case law. In this connection, the Commissioner also submits that the violation of the Convention obligation occurs immediately upon the removal of that person to the intermediary country, irrespective of whether the applicant could subsequently make their way to an official border crossing point.

26. Secondly, breaches of Articles 2 and 3 of the Convention can also arise in cases where an individual does not attempt to claim asylum. The Court has already found that the fact that applicants have not asked for asylum or described risks they face upon return does not necessarily exempt the state from complying with its non-refoulement obligations.[43] The Commissioner notes that such obligations could be violated if it is foreseeable that persons who are removed across a border could be subjected to ill-treatment at the hands of the authorities of the neighbouring state. This would particularly be the case if the Contracting party knew or ought to have known about the occurrence of such ill-treatment, based on media reporting, information from civil society, reports of international organisations, or through the observations of the authorities on the ground, including border guards who may have witnessed the occurrence of such incidents directly or heard evidence from victims.[44]

27. Breaches of the Convention can furthermore occur if the material conditions in which persons find themselves following a summary return reach the level of inhuman or degrading treatment or even present a risk to the right to life. The Commissioner believes it is of particular importance to consider the possibility that people subjected to summary returns are left in perilous situations in border areas, including in view of the weather conditions, the terrain, access to food, water and sanitation, adequate shelter and appropriate clothing, as well as any vulnerabilities, including age or health conditions, or risks related to gender. Again, the availability of information from different sources, as well as the authorities' own experiences, may make the consequences of a summary return from the perspective of material conditions foreseeable. In the view of the Commissioner, consideration of such circumstances should not only be limited to the immediate situation following return. They should also take into account the possibility of material conditions worsening over time. This might be affected by the inability of people summarily returned to extricate themselves from such situations, including if stopped from doing so by the authorities of the neighbouring state. More fundamentally, when removing a person across the border and outside its jurisdiction, the respondent state can no longer influence whether a person is able to reach a border crossing point without facing violations of their rights under the Convention, or even at all.

b. Summary returns and the prohibition of collective expulsions

28. In view of the observations above, the Commissioner believes that the criteria set out in *N.D. and N.T. v. Spain*, under which not carrying out an individual examination may not result in the violation of Article 4 of Protocol No. 4, should not be applied to situations that also engage Articles 2 or 3 of the Convention. Nevertheless, should the Court decide to examine these criteria, the Commissioner provides in the paragraphs below further observations on the interpretation of these criteria by member states.

i. Interpretation of a clearly disruptive situation which is difficult to control

29. Carrying out an individual examination of any objections to return, accompanied by an individualised decision on expulsion, forms the core of the guarantees comprised by Article 4 of Protocol No. 4. Not only do these guarantees play an important role in preventing returns in violation of Articles 2 and 3, but they may also provide a safeguard against other human rights violations,[45] and facilitate the detection of any vulnerabilities. Furthermore, they ensure the basic procedural fairness of any expulsion procedure. Not carrying out an individual examination constitutes an exception to the general rule, and as such the Commissioner believes that this should be applied as restrictively as possible, especially since Article 4 of Protocol No. 4 contains no explicit limitation clause.

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[42] *Ilias and Ahmed*, note 34 above.
[43] *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, judgment [GC] 23 February 2012, para. 133.
[44] In respect of Belarus, the Commissioner points to his observations in Section I, part c above, referencing multiple reports of various forms of abuse and violence against persons at the border, both when coercing them to cross into Council of Europe member states and when returned to Belarusian territory.
[45] *N.D. and N.T.*, note 28 above, para. 198.

30. Not conducting an individual examination may be compatible with Article 4 of Protocol No. 4 if this is due to the applicant's own conduct.[46] In *N.D. and N.T. v. Spain*, the Court found that this same principle should apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety.[47] Whether this is the case depends on the specific circumstances. However, when concerns have been raised about summary return practices, Council of Europe member states have often referred to the *N.D. and N.T. v. Spain* judgment without further consideration of the material differences between the circumstances of that case and the situation at their own borders.[48]

31. The Commissioner observes that the mere fact that states face irregular border crossings does not necessarily make the situation difficult to control. The Commissioner understands that in many cases, persons crossing the border with Belarus are intercepted promptly, possibly temporarily detained, and then transported or escorted to the border quickly and efficiently. Such situations may not warrant being considered difficult to control within the sense of the *N.D. and N.T*. v. Spain judgment.[49] In particular, his predecessor has highlighted that in such situations, there is nothing preventing a member state from bringing an individual, following their apprehension, to a place on their territory where their situation can be examined individually.[50] This would be the most effective in securing in full the rights of persons found at the border under the Convention – both as regards the prohibition of collective expulsion and the assessment of any risks related to refoulement.

32. What constitutes "large numbers" in this context may also be subject to considerable differences in interpretation, which risk being driven more by what state authorities find politically acceptable than by practical exigencies. In the Commissioner's experience, and as shared with him by organisations assisting asylum seekers and migrants in states bordering Belarus, persons entering irregularly tend to travel in small groups, often a handful of individuals or single families. Even in such situations, states have refrained from carrying out an individual examination. However, in *N.D. and N.T. v. Spain*, the applicants had been part of a group comprising hundreds of individuals. Statistics provided by member states to indicate the challenges they face often refer to the overall number of border crossings detected in a specific period. But these do not shed light on whether the crossing of a specific group of individuals at a specific time creates a situation that is difficult to control. Also, where summary returns happen frequently or are systemic, the official numbers of detected border crossings may be much higher than the number of individuals involved, since people will often make repeated attempts to cross and thus show up in statistics multiple times.

ii. <u>Genuine and effective access to means of legal entry, including asylum</u>

33. In assessing the individual's conduct, the Court will take account of whether, in the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures, and whether there were cogent reasons for not using these legal means, based on objective facts for which the respondent State was responsible. However, the Commissioner submits that a practical gap in the protection afforded by Article 4 of Protocol No. 4 may arise if the examination of genuine and effective access is limited only to elements for which the respondent state is responsible. Lack of access may also result from circumstances in the state from which the individual enters. This may include physical barriers preventing access to a border post, or individuals having to cross long distances and/or inhospitable terrain to arrive at such a border post. Thus, individuals may be unable to use an official border crossing post due to circumstances that are neither within their control, nor the responsibility of the respondent state.

[46] *Khlaifia*, note 37 above, para. 240
[47] *N.D. and N.T.*, note 28 above, para. 210.
[48] The Commissioner notes, for example, that the same reasoning as in *N.D. and N.T. v. Spain* has been applied to situations that have strongly differed, in relation to the situation in Melilla, in terms of the length of borders, the distances between border crossing points and thus the practical accessibility of them, as well as other factors. Furthermore, in some cases border crossing points were repeatedly opened and closed, providing for a very dynamic situation and a lack of clarity where and when individuals could have applied for legal means of entry.
[49] See in particular the consideration of such a situation in *Shahzad v. Hungary*, application no. 12625/17, judgment of 8 July 2021, paragraph 61.
[50] Recommendation 'Pushed beyond the limits', note 3 above, p. 32.

34. As regards cogent reasons for not using legal means of entry, the Commissioner notes that, in *N.D. and N.T. v. Spain* and subsequent cases, the Court was able to assess these with the benefit of hindsight. However, state authorities faced with a specific situation of an irregular border crossing, having to decide on expulsion there and then, cannot rely on such hindsight. Expelling a person without any individual examination automatically also prevents them from putting forward cogent reasons. Therefore, the Commissioner discerns a key question of how the assessment of cogent reasons for not using a legal means of entry can take place not only during a post-fact judicial review, but also at the moment of the detection of an irregular crossing of the border.

III. Observations on human rights issues emerging from 'instrumentalisation' of migration

35. The question of summary returns in the case before the Court may be affected by the specific context of the respondent state's relationship with Belarus, especially in view of allegations of instrumentalisation of migration by the latter. The Commissioner recognises the challenge posed by actions by Belarus that encourage or coerce asylum seekers and migrants to move to Council of Europe member states, and enter their territories irregularly. Such actions may exploit migrants and put them in a situation of great precarity or even in a humanitarian or human rights emergency, whilst also placing burdens on states who are the targets of instrumentalisation.

36. The question of instrumentalisation has led to calls for certain derogations from existing obligations, including under EU law, especially by reframing instrumentalisation "as a security issue, not a migration issue, requiring different types of solutions."[51] This could lead to certain protections of asylum seekers and migrants being undermined. The Commissioner observes, however, that situations of states directing or manipulating movements of migrants or asylum seekers to Council of Europe member states have existed for many years.[52] Such challenges have been addressed within the limits of those states' obligations under the Convention, and the current situation would need to be addressed likewise, in line with the long-standing principles set out by the Court. The Parliamentary Assembly of the Council of Europe has similarly called on member states to ensure full compliance with their obligations in the face of instrumentalised migration pressure.[53]

37. The question of instrumentalisation is sometimes framed as a 'hybrid war' against Council of Europe member states, and asylum seekers and migrants referred to as 'human weapons'. This narrative provides a context in which both public opinion and others (including law enforcement officers) are made more receptive to practices that fall short of states' obligations under the Convention. It presents asylum seekers and migrants as de facto threats, implying that they do not deserve the full protection of their rights. It also ignores that the practice of instrumentalising migration may also put asylum seekers and migrants in a particularly vulnerable position, which only corroborates the need to fully protect their rights in this complex and challenging situation. In this respect, he believes it would be helpful for the Court to reiterate that states' efforts to address instrumentalisation should be without prejudice to their obligations under Articles 2 and 3 of the Convention, including in view of their non-derogable nature which does not allow exceptions even in cases of emergencies or war, 'hybrid' or otherwise. The Court may also consider restating the obligation to ensure genuine and effective access to a possibility to apply for protection, notwithstanding the challenges posed by instrumentalisation.

38. As regards Article 4 of Protocol No. 4 and the possibility to refrain from carrying out an individual examination, the Commissioner observes that states seeking to instrumentalise the movement of asylum seekers and migrants routinely resort to a mix of actions that may include incentivising, directing, facilitating and coercing individuals. Therefore, individuals may have moved towards and across Council of Member states' borders because of specific actions by the instrumentalising state. For example, they may have been transported there, led there through mis- or disinformation, or even

[51] Letter from the governments of Lithuania, Latvia, Poland, Estonia, Sweden, Norway, and Denmark to the European Commission, 7 June 2024. This follows a letter by 15 EU member states to the European Commission, dated 15 May 2024, noting that current challenges require thinking "outside the box".

[52] See, for example, K.M. Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion and Foreign Policy*, Cornell University Press, 2010, outlining a range of examples of states manipulating movements of refugees and migrants (or using threats thereof) to serve their foreign policy goals, including actions by and aimed at various European countries, over the course of several decades.

[53] Resolution 2404 (2021) of the Parliamentary Assembly of the Council of Europe on Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus.

been faced with threats or with physical violence.[54] Due to the actions of the instrumentalising state, individuals may be unable to make a free and informed choice about where and how to cross a border, and whether to use an official border crossing point.[55] As such, the Commissioner respectfully requests the Court to consider that the 'own conduct' test should not be applied to situations in which an instrumentalising state directs the movement of asylum seekers and migrants across the borders of the respondent state.[56]

IV. Observations on evidentiary issues in the context of summary returns

39. The Commissioner would like to draw the Court's attention to some particular difficulties that arise in the provision of evidence of summary returns. Summary returns without any individualised procedure and without the issuing of documents attesting to the expulsion decision fundamentally put those subjected to them in a disadvantaged position as regards the provision of evidence. If taking place in remote areas, in woods and/or at night, the availability of video or photographic images or other evidence by third parties is much less likely. This is aggravated when media, humanitarian actors and human rights actors have limited or no access to areas where summary returns take place. This would limit the prima facie evidence that applicants are able to furnish.[57] The destruction of phones, by the expelling state or the state of return, may further complicate the provision of evidence. In such cases, reports of international bodies and civil society about the scale of and frequency with which such summary returns are conducted may be of particular importance.

40. In this respect, the Commissioner refers to the observations he has already made on the systemic nature of summary returns by the respondent state at its border with Belarus,[58] as well as on questions of accessibility of independent observers. The Court may consider these observations in addressing any matters of the satisfaction of the burden of proof and of necessary levels of persuasion.

[54] As regards Belarus, these actions are well-documented and have been asserted by Council of Europe member states.
[55] In this respect, he also reiterates his comments in paragraph 33 above on the risk of unduly restricting cogent reasons to facts for which the respondent state is responsible. In the case of instrumentalisation, this may put the individual in a particularly disadvantaged position.
[56] This also goes for specific elements to assess this 'own conduct'. For example, it may be questioned whether the question of 'large numbers' (discussed in paragraph 32 above) should be considered if it is the instrumentalising state that controls or manipulates who gets to cross at what time. Similarly, the issue of the use of force during the border crossing may need to be assessed differently in instrumentalisation cases, including in view of individuals possibly being coerced to breach border structures, or the authorities of the instrumentalising state even destroying border structures (such as cutting fences) to enable asylum seekers and migrants to pass through them.
[57] *El-Masri*, note 32 above, para. 151, ECHR 2012, § 152, and *Baka v. Hungary*, application no. 20261/12, judgment [GC] of 23 June 2016, para. 149; *N.D. and N.T.*, note 28 above, para. 85.
[58] See Section I above.