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. 42165/21**

**H.M.M. and Others v. Latvia**

Strasbourg, 11 October 2024

CommHR(2024)44
English only

## Introduction

1. On 13 August 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 *H.M.M. and Others v. Latvia*. 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 Latvia 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 Latvia-Belarus border

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

5. Following an increase in the number of attempts by non-EU nationals to irregularly cross the border from Belarus into Latvia in the summer of 2021, the Latvian Cabinet of Ministers declared a state of emergency in the four administrative entities bordering with Belarus on 10 August 2021.[6] Order No. 518 'On Declaration of Emergency Situation', which entered into force on 11 August 2021, provided powers to the Latvian State Border Guard, the National Armed Forces and the State Police to a) use the means at their disposal to deter persons from irregularly crossing the state border; b) order persons to immediately cease their attempts to cross the border; and c) use physical force and special means to immediately return the person to the country from which they irregularly crossed the border.[7]

6. Paragraph 6 of Order No. 518, as originally formulated,[8] provided that state border guard units and other institutions located in the territory where the state of emergency was declared (including the Daugavpils Immigration Detention Centre), should not accept applications for granting refugee status or other forms of protection. It was thus legally not possible for applicants at the time to gain access to the asylum procedure in Latvia, either on the Latvian-Belarusian border or on the Latvian territory where they were held prior to being returned to Belarus or their countries of origin. The Commissioner's predecessor received credible reports of individuals being beaten and held incommunicado without the possibility of seeking help, their mobile phones having been confiscated, and of returns to Iraq that took place against the clearly expressed wish of the individuals concerned to apply for asylum. The Commissioner's predecessor asked for an independent investigation into these allegations, but to his knowledge this has not taken place.[9]

7. Order No. 518 was amended on 6 April 2022, following decisions by the Rēzekne Administrative District Court in favour of applicants wishing to request asylum in Latvia. As of 6 April 2022, people have been allowed to apply for asylum at the three official land border crossing points with Belarus (road border points "Pāternieki" and "Silene" and railway border point "Indra"), at the border crossing point at Riga Airport, and at the Daugavpils Immigration Detention Centre. Access to these official border points from Belarus is however physically possible only for persons in possession of a valid EU visa. In addition, the operation of Silene border crossing point has been suspended since 19 September 2023.[10]

8. In July 2022, the Commissioner's predecessor addressed a letter to the Latvian Minister of the Interior.[11] The letter highlights reports of asylum seekers and migrants having been violently prevented from entering Latvia, denied access to the asylum procedure and forced into signing voluntary return declarations. In his reply, the Minister of Interior explained that it was possible to cross the border from Belarus into Latvia when humanitarian grounds could be put forward, including through non-verbal conduct, and to subsequently apply for asylum.[12] However, in January 2023, the Commissioner's predecessor noted in another letter that she had continued to receive well-documented reports of violent summary returns across the border.[13] In June 2023, the Commissioner's predecessor furthermore called on the Latvian Parliament to reject amendments to the Law on the State Border and the Law on the State Border Guard, which would legalise the existing practices at the border with Belarus, placing persons in need of international protection at risk of summary returns and ill-treatment.[14] These amendments were nevertheless adopted.

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[6] Cabinet of the Ministers of the Republic of Latvia, Order No 518 of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation, 10 August 2021.
[7] See also the Reply by the Latvian Minister of the Interior to the Commissioner for Human Rights, 27 July 2022.
[8] This version was in force until 5 April 2022.
[9] See, in particular, Letter by the Commissioner to the Latvian Minister of the Interior, 29 July 2022 (published on 9 August 2022).
[10] See Government decides not to reinstate operation of the Silene border crossing point, Press Statement by the Cabinet of Ministers, 6 February 2024.
[11] Letter by the Commissioner to the Latvian Minister of the Interior, 29 July 2022 (published on 9 August 2022).
[12] Reply of the Minister of Interior, 29 July 2022.
[13] Letter by the Commissioner to the Latvian Minister of the Interior, published on 6 February 2023.
[14] Statement by the Commissioner Latvia: Parliamentarians should uphold the human rights of refugees, asylum seekers and migrants - Commissioner for Human Rights (coe.int), 21 June 2023.

9. The Commissioner notes that, since August 2021, successive states of emergencies have hindered the access of representatives of civil society and relevant international organisations to border areas. The states of emergency were replaced by a reinforced border security regime in August 2023. This regime continues to restrict access for non-residents to the areas. It also authorises state border guard and state police officials to enter residential and non-residential premises and land plots to detect possible hiding places of persons who may have irregularly crossed into Latvia and to apprehend them for their immediate return to Belarus.[15]

10. Refugees, asylum seekers and migrants have continued to attempt to cross the border from Belarus into Latvia and to be subjected to summary returns to Belarus. In 2022, attempts from 5,286 people were reported to have been prevented, while 217 people were allowed to enter Latvia on humanitarian grounds.[16] In 2023, 13,863 people were prevented from crossing, while 428 were admitted for humanitarian reasons. Some of the individuals who were granted access for humanitarian reasons subsequently applied for asylum from Daugavpils Immigration Detention Centre. However, official figures indicate that the vast majority of persons who presented themselves at the Latvian-Belarusian border, usually in small groups of families and often with an expressed wish to apply for asylum, were not given access to the procedure. Instead, they were returned, which routinely happened without examination of personal circumstances and without consideration of claims of exposure to violations if returned to Belarus. In this context, the Commissioner also notes that the above-mentioned letters to the authorities specifically draw their attention to risks of ill-treatment of those summarily returned at the hands of the Belarusian authorities. Additionally, others have reported on deaths and disappearances at the Latvian-Belarusian border.[17]

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

11. There have been successive and credible reports of inappropriate material and sanitary conditions in which the applicants and other refugees, asylum seekers and migrants were held on the Latvian territory in different periods since August 2021.[18] As a result of the above-mentioned border regime, which has severely limited access to the border region, representatives of civil society and relevant international organisations have not been able to provide vital humanitarian assistance to refugees, asylum seekers and migrants in need of help at the border.,

12. While the Commissioner welcomes that medical assistance was provided to a group of seven Syrians regarding whom the Court had indicated interim measures on 12 January 2023,[19] he understands that this life-saving treatment was made possible because of the intervention of two civil society actors who had gone to the border area and called the medical services. Even though the reinforced border security regime allows for urgent humanitarian assistance to be provided by the state border guards, such help was not available in other cases, resulting in serious injuries, amputations, and deaths from hypothermia.[20]

13. Following the above incident, an investigation was initiated against the two human rights defenders and criminal proceedings were opened against one of them under Article 20 and Article 284/2 of the Latvian Criminal Code for having organised the illegal movement of a group of persons across the state border.[21] The Commissioner understands that the Prosecutor has demanded a prison sentence of 18 months in this case. The Commissioner recalls the importance of ensuring that laws on smuggling or the facilitation of irregular entry, transit or stay prevent the criminalisation of persons or organisations providing humanitarian assistance or defending human rights. This should include ensuring that any criminal action is limited to cases in which persons accused of criminal conduct obtain a financial or other material benefit, in line with Article 3 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational

[15] Ministry of Interior of Latvia, "The Government announces a reinforced border security regime from 11 August", 10 August 2023; Cabinet of Ministers, "Government extends reinforced border security regime until 31 December of the current year", 11 September 2024.
[16] See All quiet on Latvian-Belarusian border for 10 days, Latvian public broadcaster, 8 January 2024.
[17] Fundacja Ocalenie, No safe passage. Migrants' deaths at the European Union-Belarusian border, 2024.
[18] See, among others, A. Jolkina, Trapped in a Lawless Zone - Forgotten Refugees at the Latvia-Belarus Border, 2 May 2022; Amnesty International: Latvia: Return home or never leave the woods, October 2022.
[19] See Reply of the Minister of the Interior to the letter of the Commissioner, published on 6 February 2023.
[20] Médecins sans Frontières, "MSF calls for stopping migrant rejections at Belarus border", 21 December 2022.
[21] See also the post on the Commissioner's social media channel of 26 February 2024.

Organised Crime (the Palermo Protocol).[22] In this respect, he also reiterates that the Parliamentary Assembly of the Council of Europe has furthermore emphasised the need to explicitly exempt humanitarian assistance and any support to migrants in accessing their fundamental rights from any form of criminal liability, when such acts are conducted without seeking any financial benefit.[23] He further notes that there has been little civil society engagement on behalf of refugees, asylum seekers and migrants at the Belarusian border since January 2023. In addition to being physically prevented from providing humanitarian assistance, civil society actors have also been effectively dissuaded from performing their work because they fear criminal proceedings against them. As a result, refugees, asylum seekers and migrants face inadequate humanitarian conditions in the Latvian border region with Belarus, and they are also left without access to independent legal advice regarding available domestic remedies.

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

14. 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]

15. 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]

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[22] Speech by the Commissioner at the 2nd International Conference on Migrant Smuggling, Strasbourg, 10-11 October 2024; also see Commissioner's Recommendation 'Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe', February 2024, p. 25.

[23] PACE Resolution 2568 (2024) on a shared European approach to address migrant smuggling.

[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.

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

16. 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 (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)

17. 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]

18. 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]

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[28] Applications nos. 8675/15 and 8697/15, judgment [GC] of 13 February 2020.

[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.

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

19. 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 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.

20. 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

21. 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.

22. 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

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

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 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.

23. 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]

24. 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*

25. 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.

[41] *M.A. and Others v. Lithuania*, application no. 59793/17, judgment of 11 December 2018, para 104.
[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.

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

26. 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.

27. 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]

28. 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.

29. 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.

[45] *N.D. and N.T.*, note 28 above, para. 198.
[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.

ii. Genuine and effective access to means of legal entry, including asylum

30. 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.

31. 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

32. 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.

33. 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]

34. 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

[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.

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.

35. 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 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

36. 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.

37. 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 30 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 29 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.