

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. 42120/21

R.A. and Others v. Poland

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 to the Grand Chamber concerning the case of *R.A. and Others v. Poland* following the decision of the Chamber to which this case had been allocated to relinquish jurisdiction in favour of the Grand Chamber, which was made public on 26 June 2024. These observations complement the written comments submitted to the Court on 22 January 2022 in the same case, which 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 Poland 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.

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 Poland-Belarus border

5. These observations provide an update on the developments since the submission to the Chamber of 27 January 2022. They draw on two letters sent by the Commissioner in July 2024 to the Prime Minister and the Marshal of the Senate of Poland about the situation on the Polish-Belarusian border and the human rights of refugees, asylum seekers and migrants,⁶ as well as the findings of the mission to Poland carried out by the Commissioner from 16 to 18 September 2024.⁷

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

6. Based on the information gathered in the course of the above-mentioned mission, the Commissioner observes that Poland's practice of summary returns of persons to Belarus without an individual assessment continues to date. This has in some cases included persons who have formally requested asylum on Polish territory. Some persons who have claimed international protection in Poland were returned to Belarus and made multiple further crossing attempts into Poland. The legislation described in the earlier submission⁸ has remained the basis for the actions of the state authorities on the border. Decrees issued by the Minister of Internal Affairs and Administration in March 2020 and in August 2021, introducing provisions restricting cross-border movement of persons and allowing security services to return across the border any person who had crossed it outside of an official and open border crossing point, remain in force. The same is true for the legislation allowing the Polish Border Guard to disregard applications for international protection made by foreigners stopped immediately after crossing the border outside of official border crossing points, unless they arrived directly from a territory where their lives or freedoms are at risk of persecution or serious harm and gave credible reasons for crossing illegally and claimed asylum immediately upon crossing.
7. The Commissioner notes that a problem remains with the actual access to the procedure for international protection, including at official border crossing points. Prior to, during, and after his mission, the Commissioner has received concrete reports of refusals of such access. As an example, on 20 August 2024, an Afghan family of four tried to enter Poland from Belarus through the official border crossing at Terespol. They were summarily returned to Belarus after their claims for asylum in Poland were reportedly ignored by Polish border guards. The Border Guard informed the Commissioner's Office that the initial refusal to allow the family to cross the border had been due to 'limitations in border control at the border crossing' (*ograniczenia w kontroli granicznej*) in Terespol, based on the provisions of the March 2020 ministerial decree on the temporary suspension or restriction of border traffic at certain border crossings, and, moreover, that the family had not sought asylum in Poland at that time. A week later, following media attention and public advocacy by human rights actors, the family made another attempt at crossing and their asylum claims were accepted.⁹ The Commissioner was informed by both the Border Guard and civil society that, based on the provisions of the above-mentioned 2020 decree, foreigners not falling into any of the categories listed in the decree who turn up at an official border crossing are immediately returned back to Belarus ('*non-permission of entry*'). While civil society representatives claimed that such persons often included asylum seekers, the Border Guard argued that no person was returned if asylum was claimed. Border Guard officers with whom the Commissioner spoke informed him that upon receiving requests for asylum, specialised officers often came to the conclusion that the actual aim of the person was merely to transit to another EU country and therefore unrelated to asylum; still, they assured the Commissioner that in every case where the intention to claim asylum was declared, the Border Guard received the request and transferred it to the Office for Foreigners for further processing. However, well-documented details continued to be shared with the Commissioner of cases of alleged summary returns to Belarus of persons claiming that they had requested asylum in Poland at an official border crossing. Civil society organisations further reported to the Commissioner that requests for asylum made by persons who turn up at the 5.5-metre-tall barrier fence built by Poland on parts of the Polish-Belarusian border are ignored by the Border Guard. In this regard, the Commissioner observes that the Border Guard acknowledged in their meeting with him that a strip of land of about 1 metre to 1m20 wide, located on the other side of the fence, is Polish territory.

⁶ [Letters](#) of 17 July 2024 (published 23 July 2024).

⁷ See [end-of-visit statement](#), 23 September 2024.

⁸ [Submission](#) of 27 January 2022, paras. 15-16.

⁹ The Commissioner's Office was informed that on 13 September 2024, the family was struck off the list of residents of the open centre for foreigners in in Biała Podlaska in which they had been placed on account of their unnotified departure from the centre (*samowolne opuszczenie ośrodka*).

8. Civil society informed the Commissioner that, in some cases, asylum seekers have been asked by members of the Polish Border Guard to sign template declarations, made available in several foreign languages, which purport to demonstrate the withdrawal of their prior asylum claims. The Commissioner was informed that some asylum seekers were returned to Belarus without an individual assessment of their case regardless of whether they agreed or refused to sign the declaration. Organisations and persons providing legal assistance to asylum seekers, based on signed powers of attorney, further reported to the Commissioner that Border Guard members sometimes refused to reveal to them the whereabouts of their clients. In some cases, their clients have been returned to Belarus in spite of having been unequivocal in the expression of their intention to request asylum in Poland. The Commissioner notes that this practice was highlighted in recent observations by Poland's Commissioner for Human Rights (RPO) following the RPO's visits to the Polish-Belarusian border. In his observations, the RPO noted that legal representatives of asylum seekers faced restrictions of access to clients and to ongoing proceedings.¹⁰
9. According to official figures obtained by civil society organisations, from December 2023 to 4 June 2024, 7 317 persons were summarily returned to Belarus. From July 2023 to mid-January 2024, the official statistics indicated over 6 000 persons. During the Commissioner's mission to Poland the authorities pointed to an increased number of attempted crossings in the second trimester of 2024.¹¹

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

10. Refugees, asylum seekers and migrants, including vulnerable persons, reportedly continue to be stranded in the woods on the Poland-Belarus border. Those encountered by Polish humanitarian and human rights actors after having crossed the border have reported an escalation in violence by Belarusian authorities. Civil society organisations reported receiving large numbers of requests for humanitarian assistance on the border – over 17 000 requests from individual persons between 2021 and 2023, and almost 4 000 requests during the first half of 2024 only.¹² This situation has led to loss of life and injuries for many migrants and asylum seekers. Civil society organisations have documented 87 migrant deaths at the Polish-Belarusian border since 2021.¹³
11. In June 2024, a buffer zone (*strefa buforowa*) banning public access was established along parts of Poland's border with Belarus. The zone is considerably smaller in size than the 'exclusion zone' described in the third-party intervention submitted previously in the Chamber proceedings. The new zone covers about 60 kilometres of the border line. While most of the buffer zone extends to 200 meters on Polish territory, it is up to 2 km wide in some parts. On 11 September 2024, the zone was extended for an additional 90 days, until 10 December 2024. According to the authorities, the introduction of the buffer zone led to a considerable drop in the number of attempted irregular border crossings. Meanwhile, civil society actors the Commissioner spoke to argued that the drop reflected a seasonal trend and, moreover, that the operation of the buffer zone had resulted in a higher incidence of irregular border crossings along parts of the border to the north of the zone.
12. The Commissioner was informed by the Polish authorities that official search and rescue operations had been taking place and that in addition, non-permanent intervention teams were set up by the Border Guard with the participation of some civil society organisations in early 2024. The civil society organisations signalled an increase in the number of their own rescue interventions and medical assistance in 2024, pointing to the existence of unmet needs in the border zone. A number of expert civil society organisations, who had been involved in human rights monitoring and providing legal assistance and humanitarian aid in the border zone since 2021, informed the Commissioner that they have been refused entry permits, while others reported having been allowed access to certain parts of it and for a limited time only. They have reported that the requirement for entry permits to the zone has resulted in delays in providing vital assistance to people in need in the border areas. The Border Guard informed the Commissioner that by 1 October 2024, local Border Guard commanders in three out of four command posts within the buffer zone had issued 174 entry permits to the zone and refused 35 of them. Of the total of 174 permits issued, 104 were issued to journalists, 30 to civil society organisations, and 40 to other persons. The Border Guard further informed the Commissioner

¹⁰ [Statement](#) of Poland's Commissioner for Human Rights, 2 October 2024.

¹¹ According to civil society and the Border Guard, the majority of persons who attempted to cross in 2024 were nationals of countries affected by conflict, such as Syria, Afghanistan, Yemen, Eritrea, Somalia, Ethiopia and Sudan.

¹² We Are Monitoring, "Gaz pieprzowy w butelce wody. Raport podsumowujący rok 2023 na granicy polsko-białoruskiej", [report](#) (in Polish), August 2024.

¹³ Number of cases recorded since 2021 by the [NGO We are Monitoring](#) (WAM) as of September 2024.

that requests which did not meet formal requirements were neither processed nor accounted for unless their formal shortcomings were remedied. The Commissioner has called on the Polish authorities to set clear and standardised criteria for the granting of entry permits to the buffer zone.

13. The Commissioner has received credible allegations of recent acts of misconduct by members of the Polish Border Guard against asylum seekers and migrants. The cases included, among others: the carrying of an unconscious foreign man into Belarus through an opening in the border fence by alleged Border Guard officers near Białowieża, in May 2024; the case of an Iranian woman on the Belarusian side of the border injured in the eye by a buckshot gun projectile allegedly discharged by a Polish border guard, near Dubicze Cerkiewne, in May 2024; and the summary return to Belarus of a dozen asylum seekers crammed in a border guard vehicle with their wrists bound by cable ties, near Krynki, in September 2024. Civil society representatives showed the Commissioner video and photographic footage in support of some of the above-mentioned allegations. The Commander-in-Chief of the Border Guard assured the Commissioner about zero tolerance of any acts of misconduct by his subordinates. The Commissioner was informed about the setting up of a specialised prosecution unit to investigate cases of alleged misconduct by border guards.
14. The Commissioner was informed about cases of criminalisation of persons involved in providing legal and humanitarian assistance on the border, including a pending case of five activists indicted of smuggling by the District Prosecutor in Hajnówka, and the case of an activist charged with smuggling by the Regional Prosecutor in Siedlce and detained on remand for two weeks in 2023. 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 Organised Crime (the Palermo Protocol).¹⁴ 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.¹⁵

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

15. 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."¹⁶ The coercive nature of many irregular border crossings has also been reiterated by numerous other sources.¹⁷

¹⁴ [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.

¹⁵ PACE [Resolution 2568 \(2024\)](#) on a shared European approach to address migrant smuggling.

¹⁶ OHCHR, [Press briefing notes](#) on Poland/Belarus border, 21 December 2021.

¹⁷ 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.

16. 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.¹⁸ 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.¹⁹

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

17. 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*,²⁰ 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,²¹ and that domestic rules governing border controls do not render inoperative or ineffective the rights guaranteed by the Convention.²²

a. Summary returns and the prohibition of refoulement

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

18. The Commissioner recalls the utmost importance the Court attaches to the protection of Article 3 of the Convention.²³ 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.²⁴ 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

¹⁸ 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.

¹⁹ [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 18 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.

²⁰ Applications nos. 8675/15 and 8697/15, judgment [GC] of 13 February 2020.

²¹ 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 20 above, para. 171

²² *N.D. and N.T.*, note 20 above, para. 171.

²³ *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 is a value of civilisation closely bound up with respect for human dignity.

²⁴ *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 23 above, para. 81.

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.²⁵

19. 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.²⁶

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

20. 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.²⁷ 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.²⁸ 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,²⁹ 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".³⁰ 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.

21. 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

22. 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

²⁵ 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*.

²⁶ *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 20 above, para. 170.

²⁷ *Chahal*, note 24 above, para. 96.

²⁸ *N.D. and N.T.*, note 20 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."

²⁹ *Khlaifia and Others*, application no. 16483/12, judgment [GC] of 15 December 2016, para. 240.

³⁰ *N.D. and N.T.*, note 20 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.

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.³¹ 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.³² The Commissioner submits that this interpretation may render ineffective the Convention's protection against refoulement, for the following reasons.

23. 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.³³ The Court has furthermore set out in detail what such an assessment should entail.³⁴ 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.
24. 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.³⁵ 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.³⁶
25. 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

³¹ *Ibid.*, para. 210.

³² 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).

³³ *M.A. and Others v. Lithuania*, application no. 59793/17, judgment of 11 December 2018, para 104.

³⁴ *Ilias and Ahmed*, note 26 above.

³⁵ *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, judgment [GC] 23 February 2012, para. 133.

³⁶ 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.

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

26. 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

27. 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,³⁷ 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.

28. 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.³⁸ 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.³⁹ 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.⁴⁰

29. 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.⁴¹ 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.⁴² 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.

30. 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,

³⁷ *N.D. and N.T.*, note 20 above, para. 198.

³⁸ *Khlaifia*, note 29 above, para. 240

³⁹ *N.D. and N.T.*, note 20 above, para. 210.

⁴⁰ 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.

⁴¹ See in particular the consideration of such a situation in *Shahzad v. Hungary*, application no. 12625/17, judgment of 8 July 2021, paragraph 61.

⁴² Recommendation ‘Pushed beyond the limits’, note 3 above, p. 32.

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

31. 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.
32. 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

33. 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.
34. 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."⁴³ 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.⁴⁴ 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.⁴⁵

⁴³ [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".

⁴⁴ 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.

⁴⁵ [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.

35. 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.
36. 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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

37. 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.⁴⁹ 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.
38. 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,⁵⁰ 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.

⁴⁶ As regards Belarus, these actions are well-documented and have been asserted by member states.

⁴⁷ In this respect, he also reiterates his comments in paragraph 31 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.

⁴⁸ 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 30 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.

⁴⁹ *El-Masri*, note 24 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 20 above, para. 85.

⁵⁰ See Section I above.