

IN THE EUROPEAN COURT OF HUMAN RIGHTS

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

Written Third Party Submissions

on behalf of

AMNESTY INTERNATIONAL

Pursuant to the Deputy Section Registrar's notification dated 29 March 2023 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

26 APRIL 2023

INTRODUCTION

1. This written submission is provided by Amnesty International pursuant to the leave to intervene as a third party in the Court's proceedings granted by the President of the Section under Rule 44 § 3 of the Court. With this brief, Amnesty International undertakes to assist the Court by submitting an analysis of relevant international and regional human rights law and standards and by summarizing research findings in relation to the impact of legislative measures, policies and practices introduced by Lithuanian authorities since 2021 and affecting the situation of refugees and migrants crossing the border into Lithuania from Belarus.
2. Since mid-2021, Lithuania, Latvia and Poland recorded an increase in the arrivals of refugees and migrants of various nationalities at their land borders with Belarus, whose government recklessly facilitated irregular crossings. Subsequently, Amnesty International documented how the same countries – albeit with some variations – responded to those arrivals by declaring states of emergency and adopting legislative amendments, in attempts to provide legal justification to border pushbacks (i.e. summary forced returns) towards Belarus, to remove or restrict access to asylum procedures, and to impose automatic detention, often without consideration of individual circumstances. Whilst legislative measures adopted by Lithuania and relating to limits imposed on the right to seek asylum and the right to liberty have been found not to be in line with fundamental rights obligations by the Court of Justice of the European Union (CJEU),¹ relevant pushback practices have not been at the centre of the decision of any supra-national court. For this reason, this submission focuses on the legal significance and consequences of pushback practices.
3. This submission consists of two parts. **Part I** focuses on Art. 3 of the Convention and the principle of non-refoulement by contributing a summary of relevant case-law and information about the impact of relevant legislation, policies and practices introduced by the Lithuanian government since 2021. **Part II** engages with Art. 4 of Protocol 4, summarising the evolution of the relevant jurisprudence by the Court, providing critical observations on the Court's case-law initiated with the *N.D. and N.T. v. Spain*² judgment, before contributing contextual elements on practice and legislation adopted by Lithuania which demonstrates how the mentioned case-law can be subjected to abusive usages by a contracting state seeking to circumvent Art. 4 of Protocol 4 obligations. Amnesty International also has concerns relating to the fulfilment of other obligations arising from the Convention, including under Art. 5, which are not covered in this brief submission but detailed in separate documents.³

I. THE PRINCIPLE OF NON-REFOULEMENT AND ITS VIOLATIONS IN LITHUANIA

i. The principle of non-refoulement and the case-law of the Court

4. The principle of non-refoulement is a fundamental principle of customary international law and international human rights and refugee law.⁴ It prohibits the transfer of individuals to another country or jurisdiction where there are 'substantial grounds for believing that the individual would be at risk of irreparable harm, such as death, torture or cruel, inhuman or degrading treatment or punishment, persecution, enforced disappearance or other serious human rights violations in the place to which they are to be transferred or removed, or of further transfer to a third state where there would be a real risk of such violations.'⁵ The United Nations (UN) Special Rapporteur on the human rights of migrants has explained that the principle of non-refoulement is absolute, must be applied without any exception and applies to all persons, including all migrants, at all times, irrespective of their citizenship, nationality, statelessness, migration status, gender, sexual orientation and gender identity.⁶ The Special Rapporteur has further explained that states cannot justify the presence of exceptional or disproportionate operational challenges, including high migratory movements, or the existence of a public health emergency, among others, to justify pushbacks that violate the principle of non-refoulement.⁷

¹ CJEU, Judgment, *M.A. v Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, 30 June 2022, ECLI:EU:C:2022:505.

² ECtHR, *N.D. and N.T. v. Spain* [GC], app nos. 8675/15 and 8697/15, 13 February 2020.

³ Amnesty International, *Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned*, 27 June 2022, EUR 53/5735/2022, [amnesty.org/en/documents/eur53/5735/2022/en](https://www.amnesty.org/en/documents/eur53/5735/2022/en).

⁴ UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: www.refworld.org/docid/437b6db64.html. The principle originates in international refugee law, under which it applies to refugees and asylum-seekers (1951 Geneva Convention relating to the Status of Refugees, Art. 33). The principle has been further developed in other areas of law, for example through Art. 3 of the Convention Against Torture and the International Covenant on Civil and Political Rights, as explained in CCPR, General Comment no. 31 on the Nature of the General Legal Obligation Imposed on states parties to the Covenant, para. 12. At the European regional level, several EU instruments prohibit refoulement, including the Charter of Fundamental Rights of the European Union (EU), Art. 19 and the Schengen Border Code, Art. 4, Regulation (EU) No. 2016/399.

⁵ Report on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants, (A/HRC/47/30) [EN/AR/RU/ZH], available at reliefweb.int/report/world/report-means-address-human-rights-impact-pushbacks-migrants-land-and-sea-report-special (accessed on 24 April 2023).

⁶ Report on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants (previously cited).

⁷ Report on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants, para 46 (previously cited).

5. This Court has developed long-standing jurisprudence on the principle, derived from the wider and absolute prohibition of torture and inhuman or degrading treatment or punishment. The Court found that Art. 3 of the Convention implies an obligation not to remove an individual where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Art. 2 or 3 in the receiving country.⁸ The principle also applies where persons are intercepted on the high seas.⁹ The absence of a claim for asylum or failure to describe the risks one faces due to the lack of an asylum system in the relevant third country do not exempt contracting states from complying with their obligations under Art. 3.¹⁰ The Court has held that the assessment of the existence of a real risk must necessarily be “a rigorous one”¹¹ and inevitably involves an examination by the national authorities of the conditions in the receiving country against the standards of Art. 3.¹²
6. In a number of cases, this Court has found states to be in breach of ECHR obligations for summarily returning people at a border without an assessment of their circumstances.¹³ The Court has also clarified that relevant guarantees apply in cases of non-admission and rejection at the border,¹⁴ and when individuals are apprehended after unauthorised crossings into the territory of a contracting state.¹⁵ In particular, where there is no guarantee that an asylum application would be seriously examined by the authorities in the neighbouring third country and that return to the country of origin could violate Art. 3, a contracting state must allow relevant individuals to remain within its jurisdiction until such time that their claims have been properly reviewed by a competent domestic authority.¹⁶ In practice, the removing state must thoroughly examine whether or not there is a real risk of the asylum-seeker being denied access in the receiving country, to an adequate asylum procedure protecting him or her against refoulement; and if it is established that the existing guarantees are insufficient, Art. 3 implies a prohibition to remove the asylum-seeker to the third country concerned.¹⁷ Similarly, a state cannot deny access to its territory to persons presenting themselves at a border checkpoint who allege that they may be subjected to ill-treatment if they are returned to the state from which they are seeking to enter unless adequate measures are taken to eliminate such a risk.¹⁸ All contracting states are required to ensure that the receiving country offers sufficient guarantees to prevent a third country national from being removed to his or her country of origin without an assessment of the risks faced – an obligation that is particularly important when the intermediary country is not a state party to the ECHR, such as Belarus.¹⁹ In a previous case, the Court found that Lithuania had violated Art. 3, when its border guards did not accept the asylum applications of a Chechen family at the border with Belarus and forcibly removed them to Belarus without conducting any assessment of whether it was safe to return the applicants.²⁰
7. In addition, this Court has assessed whether there had been substantial grounds for believing that applicants, if removed, would face a real risk of being subjected to treatment contrary to Art. 2 or 3 in the destination country.²¹ Relevant risk assessments focused on the foreseeable consequences of the applicant’s removal to the country of destination, in the light of the general situation there and of their personal circumstances. This Court ruled that the applicant’s removal would necessarily breach Art. 3, if the existence of such a risk was established – with reference to facts which were known or ought to have been known by the contracting state at the time of the expulsion²² – irrespective of whether the risk emanated from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.²³ The Court also acknowledged factors affecting the ability of an applicant to present their case, in particular not being assisted by a legal representative, not having access to an interpreter and not speaking the language in which the proceedings were conducted.²⁴ Importantly, the Court also established that the general situation in another state, including the ability of its authorities to provide protection, had to be established *proprio motu* by the competent domestic authorities.²⁵

⁸ ECtHR, *Paposhvili v. Belgium* [GC], app no. 41738/10, §§ 172-73, 13 December 2016.

⁹ ECtHR, *Hirsi Jamaa and Others v Italy* [GC], app no. 27765/09, 23 February 2012, § 76-82.

¹⁰ ECtHR, *Hirsi Jamaa and Others v Italy* (previously cited) § 133 and 156-8, where the Court found that the applicants’ failure to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya did not exempt Italy from its obligations under Article 3, considering that “it was for the national authorities, faced with a situation in which human rights were being systematically violated... to find out about the treatment to which the applicants would be exposed after their return”.

¹¹ ECtHR, *M.K. v Poland*, app nos. 40503/17 and 2 others, 23 July 2020, § 169, referring to *F.G. v. Sweden* [GC], app no. 43611/11, 23 March 2016, § 113

¹² ECtHR, *Ilias and Ahmed v. Hungary*, [GC], app no. 47287/15, 21 November 2019, § 127.

¹³ Among others: *Ilias and Ahmed v. Hungary* [GC], (previously cited).

¹⁴ ECtHR, *D.A. and Others v. Poland*, app no. 51246/17, 8 July 2021, §66; *N.D. and N.T. v. Spain* [GC], §§ 175-181

¹⁵ ECtHR, *D. v. Bulgaria*, app no. 29447/17, 20 July 2021, §121-122.

¹⁶ ECtHR, *M.K. and Others v. Poland*, (previously cited) §§ 173-179.

¹⁷ *M.K. and Others v. Poland*, (previously cited) § 173, *Ilias and Ahmed v. Hungary*, (previously cited) § 134.

¹⁸ ECtHR, *M.K. and Others v. Poland*, (previously cited) §§ 178-179.

¹⁹ See *Hirsi Jamaa and Others v. Italy*, (previously cited), §§ 146-147.

²⁰ ECtHR, *M.A. and Others v. Lithuania*, app no.59793/17, 11 December 2018, §113-115.

²¹ E.g. ECtHR, *F.G. v. Sweden* ([GC], §§ 110-127), *J.K. and Others v. Sweden* ([GC], §§ 77-105) and *Khasanov and Rakhmanov v. Russia* ([GC], §§ 93-116).

²² ECtHR, *F.G. v. Sweden* [GC], § 115, *Khasanov and Rakhmanov v. Russia* [GC], § 113.

²³ *Khasanov and Rakhmanov v. Russia* [GC], § 95, and *Vilvarajah and Others v. the United Kingdom*, § 108.

²⁴ *M.D. and Others v. Russia*, (previously cited) § 92.

²⁵ *J.K. and Others v. Sweden* [GC], § 98, *B and C v. Switzerland*, and *M.D. and Others v. Russia*, §§ 97-101.

ii. The impact of legislation, policies and practices adopted by Lithuanian authorities

8. Amnesty International has conducted in-depth research on the situation of people who attempted to cross into EU countries from Belarus in 2021/22.²⁶ The findings were presented in different documents, including two focusing on actions carried out by Belarus and Poland,²⁷ and two extensive reports focusing on Lithuania and Latvia.²⁸ Having regard to the case-law of the Court, Amnesty International considers the following findings relevant in the assessment of the case under consideration.
9. Starting in early 2021, Belarusian authorities relaxed visa requirements,²⁹ while “tour operators” and other actors facilitating the journey to Belarus for a fee began advertising attractive “packages” that included regular entry into Belarus and the promise of safe and easy access to EU countries, including Lithuania, where people seeking asylum hoped to eventually find a safe haven. However, in testimonies collected by Amnesty International between late 2021 and early 2022, people who had travelled to Belarus through this scheme recounted that once at the border, Belarusian authorities exposed them to violence, coercion, and extortion and pushed them out of Belarus and towards the borders of EU countries, including Lithuania, Poland and Latvia. Amnesty International has documented how Belarusian border guards have beaten and forced people to cross, including by torturing and/or otherwise ill-treating them with batons and other weapons. People often reported that even after authorities of EU countries had returned them to Belarus, the Belarusian authorities would apprehend them and push them back towards Europe, leaving them in a limbo between the countries.³⁰ Amnesty International received several reports that, when attempting to access the asylum system in Belarus and particularly in Minsk, people were detained and forcibly returned after they were made to sign “voluntary repatriation” papers.³¹ The lack of effective avenues to claim asylum in Belarus, and the perspective of facing unlawful forcible deportations there, contributed to migrants’ and refugees’ situation and behaviours at the border, with many having no viable alternative but attempting to cross into the EU.³²
10. Amnesty International interviewed 47 refugees and migrants who crossed or attempted to cross into Lithuania from Belarus between 2021 and 2022. Virtually all of them reported that they intended to seek international protection in Lithuania. Many presented compelling reasons for their fear of persecution and/or the real risk of serious human rights violations if returned to their country of origin. Among others, Amnesty International interviewed Tamil women reporting fleeing persecution by Sri Lankan authorities in view of their perceived association with the Liberation Tigers of Tamil Eelam,³³ Syrian nationals reporting fleeing military conscription, an Iraqi journalist who reported having been arbitrarily arrested and tortured for his activities, and a gay man from a West African country who reported having been previously detained in his home country because of his sexual orientation. While some people requesting protection in Lithuania feared persecution or other serious human rights violations upon return to their own country, *all of them expressed a well-founded fear of falling victim to torture or other ill-treatment by Belarusian authorities* if forced to return to Belarus, as Belarusian authorities made systematic use of violence and inhumane treatment against the refugees and migrants they found near the borders with Lithuania. Belarusian authorities also did not provide adequate assistance to people in need of urgent care, who risked dying or facing serious health issues as a result of spending several days and nights in the forest, exposed to the elements and freezing temperatures.
11. Since July 2021, Lithuanian authorities have adopted legislation, policies and practices which have had the effect of preventing people from seeking asylum in Lithuania and imposing automatic detention on those who crossed the Lithuanian borders irregularly from Belarus. Reforms to the Law on the Legal Status of Foreigners adopted that month restricted the possibilities for people to apply for asylum at specific locations, while a decision of the Ministry of Interior of 2 August 2021, linked to the declaration of an “extraordinary situation”,³⁴ indicated that people seeking asylum who crossed the border irregularly should be pushed back (“not allowed

²⁶ Research activities involved visits to Poland, Lithuania and Latvia. In the specific case of Lithuania, activities included visits to two detention centres in the country (Medininkai and Kybartai) in March 2022, in-person and remote interviews with 47 refugees, asylum-seekers and migrants who had been either detained in Lithuania and/or pushed back to Belarus by Lithuanian authorities, meetings with several representatives of international and national organizations operating in Lithuania, as well as interviews with representatives of the Lithuanian state Border Guard Service and analysis of data provided by the Ministry of Interior.

²⁷ 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.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/](https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/); Amnesty International, *Poland: Cruelty Not Compassion, at Europe's Other Borders*, EUR 37/5460/2022, [amnesty.org/en/documents/eur37/5460/2022/en/](https://www.amnesty.org/en/documents/eur37/5460/2022/en/).

²⁸ Amnesty International, *Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned*, 27 June 2022, EUR 53/5735/2022, [amnesty.org/en/documents/eur53/5735/2022/en/](https://www.amnesty.org/en/documents/eur53/5735/2022/en/); Amnesty International, Latvia: Return home or never leave the woods: Refugees and migrants arbitrarily detained, beaten and coerced into “voluntary” returns, 12 October 2022, EUR 52/5913/2022, [amnesty.org/en/documents/eur52/5913/2022/en/](https://www.amnesty.org/en/documents/eur52/5913/2022/en/).

²⁹ See for example Ministry of Foreign Affairs of the Republic of Belarus, Visa-free travel to Brest-Grodno, mfa.gov.by/en/visa/freemove/brest_hrodna/ (accessed on 26 April 2023).

³⁰ Amnesty International, *Latvia: Return home or never leave the woods*, cited above, EUR 52/5913/2022.

³¹ Amnesty International, *Poland: Cruelty Not Compassion, at Europe's Other Borders*, EUR 37/5460/2022.

³² Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU*, (previously cited); Amnesty International, *Poland: Cruelty Not Compassion, at Europe's Other Borders*, (previously cited).

³³ The Liberation Tigers of Tamil Eelam (LTTE) is an armed group long involved in Sri Lanka’s internal armed conflict with the Sri Lankan government forces. Since the end of the conflict in 2009, individuals belonging to the Tamil ethnic minority continue to face systematic discrimination in Sri Lanka, and Tamils with real or suspected affiliations with the LTTE have been subjected to prolonged arbitrary detention, torture and other ill-treatment.

³⁴ Government of the Republic of Lithuania, Resolution No 517 of the of 2 July 2021, Dėl valstybės lygio ekstremaliosios situacijos paskelbimo ir valstybės lygio ekstremaliosios situacijos operacijų vadovo paskyrimo (On the Declaration of the Extraordinary situation and the Appointment of the State Commander of National Emergency Operations), TAR, 30/07/2021, No. 15235, e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad73a4c1dc0011eb866fe2e083228059?jfwid=-1cefbqu9c8.

- into the country's territory").³⁵ This policy applied at borders with Belarus as well as to people found or apprehended further within Lithuanian territory. Since then, Lithuanian border guards have engaged in summary forced returns of refugees and migrants who had reached Lithuania's borders from Belarus. These pushbacks are routinely carried out without any individual assessment of asylum claims presented to the authorities, nor of the risks faced by individuals upon return to Belarus, including their access to adequate asylum procedures in Belarus.
12. The practice of pushbacks has been officially acknowledged by the Lithuanian government, which have presented it as an exercise of emergency powers in response to a "hybrid aggression" by Belarus,³⁶ although relevant obligations under Art. 3 of the Convention, including the prohibition of *refoulement*, are non-derogable even at times of emergency.³⁷ Lithuanian authorities referred to it as a practice of "redirections" or "turn arounds", as they maintain that people apprehended are told that they could only seek protection at official border crossing points or at Lithuania's diplomatic missions abroad. However, people interviewed by Amnesty International who had been pushed back were not redirected to such official border crossing points through the Lithuanian territory, but were instead forced to return to Belarusian territory, where they were exposed to serious risks of ill-treatment as well as to other risks related to being exposed to the elements for prolonged periods in the forest, and were generally unable to access effective procedures to claim international protection.³⁸ As of April 2023, the Lithuanian authorities maintained that, since August 2021, nearly 20,000 people trying to cross the border from Belarus had been refused entry into Lithuania.³⁹
 13. Amnesty International considers that Lithuanian authorities knew, or ought to have known, that refugees and migrants summarily returned to Belarus would be at risk of treatment incompatible with Art. 3, and that they would not have any opportunity to have their asylum claims adequately considered in Belarus. Since 2020, Belarus has experienced a dramatic crack-down on human rights. A report issued on 4 May 2021 by the UN Special Rapporteur on the situation of human rights in Belarus provided "evidence of massive violations".⁴⁰ In presenting the report before the UN Human Rights Council, the Special Rapporteur highlighted that "the authorities seemed to have launched a full-scale attack on civil society as a whole, targeting people from all walks of life", and that "[t]ens of thousands of Belarusians had fled to seek refuge abroad."⁴¹ The representative of Lithuania at the Human Rights Council thanked the Special Rapporteur for her report, "which... reflects the long-standing chronic patterns of systemic human rights violations in the country, unprecedented in scope and gravity."⁴²
 14. On 20 December 2021, Amnesty International published an international press release summarizing findings based on 75 interviews with people who had been pushed back to Belarus from EU countries, including Poland and Lithuania (accounting for a total of 192 affected people, including their families). Amnesty International released an updated report on 11 April 2022, following telephone interviews with people who remained trapped in Belarus (representing 18 people) in March-April 2022. Both documents detailed how refugees and migrants in the areas of Belarus on the border with EU countries were being "subjected to horrific torture or other ill-treatment, inhumane conditions, extortion and other abuse at the hands of Belarusian forces", as harrowing testimonies had revealed how "people including families with children, often in need of immediate help, have been beaten with batons and rifle butts and threatened with security dogs by Belarusian forces, as well as being forced to repeatedly cross the border in dangerous conditions by both Belarussian and Polish authorities, including through a fast-flowing river".⁴³ Amnesty International's subsequent research confirmed that people who had been pushed back from Poland, Lithuania and Latvia to Belarus reported that Belarusian authorities would then similarly summarily force people back towards Poland, Lithuania or Latvia.⁴⁴

³⁵ Ministry of Internal Affairs of the Republic of Lithuania, Decision 10V-20, 02 August 2021, e-seimas.lrs.lt/portal/legalAct/lt/TAD/6c0ea3a0f42811ebb4af84e751d2e0c9?fwid=zh18cwy1m.

³⁶ *Lithuania to push undocumented migrants back to Belarus, divert to border checkpoints*, LRT - Lithuanian Radio and Television, 3 August 2021, lrt.lt/en/news-in-english/19/1461707/lithuania-to-push-undocumented-migrants-back-to-belarus-divert-to-border-checkpoints.

³⁷ The Convention prohibits torture and inhuman or degrading treatment or punishment in absolute terms. Article 3 makes no provision for exceptions, and no derogation from it is permissible under Article 15 § 2 – even in the event of a public emergency threatening the life of the nation; see *M.K. and Others v. Poland* (previously cited), § 166, *Saadi v. Italy* [GC] (previously cited), § 138, *Selmouni v. France* [GC] (previously cited), § 95, and *Assenov and Others v. Bulgaria* (previously cited) § 93.

³⁸ In this sense, the practice bears resemblances with that implemented by Hungarian authorities and considered by the Court in *Shahzad v Hungary*, § 49.

³⁹ The same document details that "8106 attempts to cross the border illegally were recorded in 2021, and, in 2022, there were as many as 10,599 of such attempts." The numbers refer to pushbacks, while the number of people who actually attempted to cross into Lithuania was likely to be considerably lower, as the same people were summarily returned to Belarus multiple times; Lithuanian Ministry of Interior, Lithuania will seek for the accountability of the Belarusian regime for migrants smuggling, 6 April 2023, vrm.lrv.lt/en/news/lithuania-will-look-for-the-accountability-of-the-belarusian-regime-for-migrants-smuggling.

⁴⁰ A/HRC/47/49: Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Anais Marin, 4 May 2021, ohchr.org/en/documents/country-reports/ahrc4749-report-special-rapporteur-situation-human-rights-belarus-anais.

⁴¹ OHCHR, Over the Past Year, More than 35,000 People Have Been Arbitrarily Detained in Belarus, Special Rapporteur on Belarus Tells Human Rights Council, 5 July 2021, ohchr.org/en/2021/07/over-past-year-more-35000-people-have-been-arbitrarily-detained-belarus-special-rapporteur.

⁴² 47th Session of United Nations Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Belarus - Intervention by the Nordic – Baltic states delivered by the Vice-Minister of Foreign Affairs of Lithuania, Dr Mantas Adomėnas, 5 July 2021, norway.no/en/missions/wto-un/nig/statements/hr/hrc/hrc47/hrc47belarus/.

⁴³ Amnesty International, Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU, (previously cited).

⁴⁴ Amnesty International, Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU, (previously cited); Amnesty International, *Latvia: Return home or never leave the woods: Refugees and migrants arbitrarily detained, beaten and coerced into "voluntary" returns*, 12 October 2022, Index Number: EUR 52/5913/2022, p.18.

15. Other reputable media and human rights organisations publicly reported the risks faced by people returned to Belarus.⁴⁵
16. Similar findings were published by the Office of the High Commissioner for Human Rights of the United Nations on 21 December 2021. Following interviews with refugees and migrants who had crossed the border between Belarus and Poland, a representative of the office stated: “The majority said that, while in Belarus, they had been beaten or threatened by security forces, and also alleged that the 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 (the capital) Minsk.”⁴⁶
17. Public statements of the Lithuanian government repeatedly affirmed that persons arriving in Belarus were being “used to organize [an] hybrid aggression at the border with Lithuania.”⁴⁷ Already in July 2021, Lithuania's Foreign Minister, Gabrielius Landsbergis, stated that migrants and refugees were “being sent on a compulsory basis as a weapon against us”.⁴⁸ In August 2021, the Ministry of Interior reported that “Belarusian force structures armed with shields and riot control equipment have forcibly pushed a group of 35 irregular migrants into the Republic of Lithuania and have entered the territory of Lithuania themselves.”⁴⁹ In November 2021, the Minister of Interior, Agnė Bilotaitė, stated that “[m]igrants have become hostages and are being used to achieve political goals” and acknowledged the risks they faced on Belarusian territory, by emphasizing that “people who have left their countries of origin may now die on the Belarusian border as the cold weather approaches.”⁵⁰
18. Finally, Amnesty International notes that Belarus does not offer a genuine opportunity to claim and receive asylum for people in need of international protection. While it acceded to the 1951 Refugee Convention in 2001, local organisations report that the country has had a barely functioning asylum system since that time.⁵¹ This Court has previously considered the adequacy of the Belarusian asylum system, finding no guarantee that asylum applications presented by Russian citizens would be seriously examined by Belarusian authorities.⁵² The OSCE has also reported that, in October 2021, Belarus passed legislation allowing it to refuse taking back any asylum-seekers entering from the EU.⁵³ Amnesty International has documented how Belarus regularly extradites and deports people in need of international protection to states where they are at real risk of serious human rights violations, including torture and execution.⁵⁴ Amnesty International received credible reports that, in 2022, Belarusian authorities adopted as routine practice the unlawful detention and deportation of people attempting to seek asylum. People interviewed by the organisation reported that, when attempting to access the asylum system in Belarus and particularly in Minsk, people were detained and forcibly returned after they were made to sign “voluntary repatriation” papers.⁵⁵

II. THE PROHIBITION OF COLLECTIVE EXPULSIONS AND ITS VIOLATIONS IN LITHUANIA

i. **Article 4 of Protocol 4 and its interpretation in the case-law of the Court**

19. Art. 4 of Protocol 4 prohibits collective expulsions, preventing states from removing “certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority”.⁵⁶ This Court has stated that collective expulsions are “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien

⁴⁵ E.g. Info Migrants, 'Lies, lies, lies!': For migrants trapped on the Belarus-Polish border, no easy way back to Minsk, 15 November 2021, infomigrants.net/en/post/36446/lies-lies-lies-for-migrants-trapped-on-the-belaruspolish-border-no-easy-way-back-to-minsk; Loveday Morris, At center of Europe's migrant crisis, tales of how Belarus clears the way — and punishes ‘pawns’ sent back, 13 November 2021, [washingtonpost.com/world/2021/11/13/belarus-migrants-europe-lukashenko-poland/](https://www.washingtonpost.com/world/2021/11/13/belarus-migrants-europe-lukashenko-poland/); Claudia Ciobanu, *Fate of Migrants at Belarus-EU Border Risks Taking Darker Turn*, Balkan Insight, 16 August 2021, balkaninsight.com/2021/08/16/fate-of-migrants-at-belarus-eu-border-risks-taking-darker-turn/. See also Human Rights Watch, “Die Here or Go to Poland” - Belarus' and Poland's Shared Responsibility for Border Abuses, 24 November 2021, [hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses](https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses).

⁴⁶ UN News, *End ‘appalling’ Belarus-Poland border crisis, UN rights office urges*, 21 December 2021, news.un.org/en/story/2021/12/1108502

⁴⁷ Lithuanian Ministry of Interior, The state border protection and deterrence regime is being strengthened | Ministry of the Interior of the Republic of Lithuania (lv.lt).

⁴⁸ BBC News, *Lithuania votes to curb influx of migrants from Belarus*, 13 July 2021, [bbc.com/news/world-europe-57830158](https://www.bbc.com/news/world-europe-57830158).

⁴⁹ Lithuanian Ministry of Interior, In response to provocations in Belarus, Lithuania is strengthening vigilance at the border | Ministry of the Interior of the Republic of Lithuania, 18 August 2021, <https://vrm.lrv.lt/en/news/in-response-to-provocations-in-belarus-lithuania-is-strengthening-vigilance-at-the-border>

⁵⁰ Lithuanian Ministry of Interior, A. Bilotaitė: it is necessary to prevent tragedy and deaths of people, 11/13/2021, <https://vrm.lrv.lt/lt/naujienos/a-bilotaitė-butina-uzkirsti-kelias-tragedijai-ir-zmoniu-mirtims>.

⁵¹ Human Constanta, “Humanitarian Crisis in Belarus and at the Border with the EU June 2021 – February 2022”, March 2022, humanconstantat.org/humanitarian-crisis-en-2021-2022/. Human Constanta is one of the few human rights organizations able to operate in Belarus.

⁵² ECtHR, *M.K. and Others v. Poland*, §§ 172-178.

⁵³ OSCE Parliamentary Assembly, *Migrants and locals are victims as human rights challenged in Belarus-Poland border area, say OSCE parliamentary leaders*, 18 October 2021, [osce.org/parliamentary-assembly/501340](https://www.osce.org/parliamentary-assembly/501340).

⁵⁴ Amnesty International Report 2017/2018: The state of the world's human rights (Index: POL 10/6700/2018), 22 Feb 2018, pp 91; Amnesty International: Human Rights in Eastern Europe and Central Asia – Review of 2019 (Index: EUR 01/1355/2020), 16 April 2019, pp 13.

⁵⁵ Amnesty International, *Poland: Cruelty Not Compassion, at Europe's Other Borders*, (previously cited).

⁵⁶ *Sharifi and Others v. Italy and Greece* (previously cited) § 210, *Hirsi Jamaa and Others v. Italy* (previously cited) § 177, and *M.K. v. Poland* (previously cited) § 201.

- of the group”.⁵⁷ This Court has also clarified that the domestic legal classification is not decisive to a conduct constituting “expulsion” under Art. 4 of Protocol 4, and that “refusals of entry” fall under the scope of the provision.⁵⁸ Collective expulsions are prohibited in an absolute manner under general international law,⁵⁹ including by all major human rights treaties.⁶⁰ This prohibition has assumed the status of customary international law⁶¹ and, therefore, is binding on all states.
20. In a series of cases, beginning with *Čonka v. Belgium*,⁶² this Court has considered whether Art. 4 of Protocol 4 has been engaged and if so, whether it has been violated. Discussing relevant claims in the context of migration control measures aimed at the prevention of unauthorized border crossings, the Court has maintained that “problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the state’s obligations under the Convention”.⁶³
21. The Court has also clarified that the prohibition protects everyone within a state’s territory or under its jurisdiction, irrespective of whether or not they arrived in the respondent state regularly.⁶⁴ Indeed, the Court has also applied Art. 4 of Protocol 4 to individuals who had been apprehended while attempting to cross a border by land and who had been immediately removed from the respondent state’s territory.⁶⁵
22. The Court has established that the decisive criterion, in order for an expulsion to be characterised as “collective”, is the absence of “a reasonable and objective examination of the particular case of each individual alien of the group”.⁶⁶ The Court has stated that the fact that a number of aliens may have been subjected to similar decisions does not in itself lead to the conclusion that there has been a collective expulsion, as it is possible that each person concerned has been given the opportunity to put arguments against their expulsion and to have them considered on an individual basis.⁶⁷ Conversely, the Court has clarified that the fact that a person may have received a specific expulsion order does not in itself lead to the conclusion that their removal may not be of a collective nature, as it is possible that their individual circumstances were not adequately considered.⁶⁸
23. In some cases, the Court has ruled out a violation of Art. 4 of Protocol 4 on account of the applicant’s “own conduct”, including actions that had allegedly affected the capacity of relevant authorities to comply with their obligations under that provision.⁶⁹ In the case of *N.D. and N.T. v. Spain [GC]* (hereafter *N.D. & N.T.*), the Court considered that the exception should also apply to situations in which the conduct of persons who crossed a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force, was such as to create a “clearly disruptive situation which was difficult to control and endangered public safety”.⁷⁰ The Court added that in such situations, it should be taken into account whether, in the particular case, the contracting state had provided genuine and effective access to means of legal entry, and if it did, whether there were cogent reasons for the applicants not to make use of it which were based on objective facts for which the respondent state was responsible.⁷¹
24. In its jurisprudence, the Court has established a fundamental principle according to which “[...] it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory”.⁷² Upholding this principle demands an interpretation of the obligations arising from Art. of Protocol 4 that ensures that guarantees against collective expulsions are “practical and effective”, rather than formalities that disregard practical realities and allow states to circumvent their obligations.⁷³ Amnesty International considers that the “own conduct” test introduced in *N.D. & N.T.* does not keep faith

⁵⁷ See *Sultani v. France*, (previously cited) § 81, *Georgia v. Russia (I) [GC]*, (previously cited) § 167, and *M.K. v. Poland*, (previously cited) § 197.

⁵⁸ *Hirsi Jamaa and Others v. Italy* (previously cited) § 174, *Khlaifia and Others v. Italy* (previously cited) § 243, *N.D. and N.T. v. Spain*, (previously cited) § 185, and *M.K. v. Poland*, (previously cited) § 198.

⁵⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at refworld.org/docid/453883fd1f.html, para 13(d).

⁶⁰ Treaty prohibitions on collective expulsions are contained in Article 4 of Protocol 4 to the ECHR, Article 12.5 of the African Charter, Article 22.9 ACHR, Article 26.2 of the Arab Charter on Human Rights, and Article 22.1 ICRMW. Although no express ICCPR provision prohibits collective expulsions, the Human Rights Committee has been clear that “laws or decisions providing for collective or mass expulsions” would entail a violation of Article 13 ICCPR: UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at refworld.org/docid/45139acfc.html. See also: “Guideline 3. Prohibition of collective expulsion. A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited”, Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, available at refworld.org/pdfid/42ef32984.pdf.

⁶¹ The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law. See UN General Assembly, Third report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur, 19 April 2007, *AVCN.4/581*, available at refworld.org/docid/49997af527.html, § 115.

⁶² ECtHR, *Čonka v. Belgium*, app no. 51564/99, 5 February 2002.

⁶³ *Shahzad v. Hungary*, (previously cited), § 51.

⁶⁴ *Hirsi Jamaa and Others v. Italy*, (previously cited) § 182, *Shahzad v. Hungary*, (previously cited) § 48.

⁶⁵ *N.D. and N.T. v. Spain*, (previously cited) § 187, and *Shahzad v. Hungary*, (previously cited) § 48.

⁶⁶ *N.D. and N.T. v. Spain*, (previously cited) § 195, *Hirsi Jamaa and Others v. Italy*, (previously cited) § 185, *Shahzad v. Hungary*, (previously cited), § 58.

⁶⁷ See, among others, *M.A. v. Cyprus*, (previously cited), §§ 246 and 254, and *Khlaifia and Others v. Italy*, (previously cited), § 239.

⁶⁸ ECtHR, *J.A. and Others v. Italy*, app no. 21329/18, 30 March 2023, § 115.

⁶⁹ *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), app no. 18670/03, 16 June 2005, and *Dritsas v. Italy* (dec), app no. 2344/02, 1 February 2011.

⁷⁰ *N.D. and N.T. v. Spain* (previously cited) § 201.

⁷¹ *N.D. and N.T. v. Spain*, (previously cited) § 201; *Shahzad v. Hungary*, (previously cited) § 59.

⁷² *Hirsi Jamaa and Others v. Italy*, (previously cited) § 175, referring to *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey [GC]*, app no. 44774/98, § 136, ECHR 2005-XI.

⁷³ *Shahzad v. Hungary* (previously cited) § 50.

with this principle and that Lithuanian laws and practices show how a contracting state may take advantage of the test to circumvent their obligations.

ii. **General observations on the Court's decision in *N.D. and N.T. v. Spain***

25. **First**, the prohibition of collective expulsion is a principle of customary international law which must be applied in an absolute manner. Collective expulsions are prohibited in an absolute manner by all major human rights treaties and their prohibition has been codified in absolute terms in the International Law Commission's Draft articles on the expulsion of aliens.⁷⁴ As such, obligations under Art. 4 of Protocol 4 should be complied with by states at all times, independent of the conduct of relevant applicants.
26. **Second**, according to the principle of legality, subordinating a human rights guarantee to a requirement not expressly foreseen in international law jeopardizes the protection afforded to individuals and is incompatible with international human rights law. As clarified by the Siracusa Principles in relation to the International Covenant on Civil and Political Rights, no limitations to the enjoyment of human rights should be permitted other than those contained in the Covenant itself, while any limitation clauses should be interpreted strictly and in favour of the rights at issue.⁷⁵ These principles apply, among others, to Article 13 of the Covenant, which "would not be satisfied with laws or decisions providing for collective or mass expulsions".⁷⁶
27. **Third**, obligations under the Convention must be read consistently with other obligations under international law, including the obligation of non-refoulement and the principle of non-penalization, which requires states not to impose upon refugees any penalties "on account of their illegal entry or presence" on their territory.⁷⁷ The latter principle is called into question by the approach taken by the Court in *N.D. and N.T.*, which places weight on individuals crossing in an "authorised" manner, in contrast with the established principle of non-penalization, also considering the longstanding practice across different countries whereby people seeking safety regularly engage in irregular crossings (see also below para 40). The procedural obligations arising from the prohibition of collective expulsions are significantly interlinked with procedural obligations arising from the principle of non-refoulement. While the Court has stated that there is not "a general duty for a contracting state under Article 4 of Protocol No. 4 to bring persons who are under the jurisdiction of another state within its own jurisdiction",⁷⁸ contracting states must refrain from removing persons without a previous assessment of their individual circumstances, and such assessment, applicable to all individuals without distinction, can be considered instrumental to the fulfilment of obligations arising from the principle of non-refoulement.⁷⁹ As authoritatively stated by UNHCR, "the procedural guarantees protecting the persons concerned against collective expulsion are therefore essential also to prevent possible violations of the non-refoulement obligation under the 1951 Convention".⁸⁰ Therefore, we argue, the strict and consistent observance of relevant procedural obligations is necessary when assessing claims under Art. 3 of the Convention or Art. 4 of Protocol 4, with a view to protecting any individuals from being removed to countries where they would be at risk of facing treatment not in line with the Convention (see also below para 34).
28. **Fourth**, Amnesty International considers that the proposed "own conduct" test does not hold sufficient guarantees in relation to the right to access to remedy, as protected by Art. 13 of the Convention, especially when invoked in the context of claims alleging violations of Art. 4 of Protocol 4 in conjunction with violations of Art. 2 and 3. According to the case-law of this Court, where individuals have an arguable complaint that their removal would expose them to treatment contrary to Art. 2 or 3, they must have access to an effective remedy at the domestic level, requiring an independent and rigorous scrutiny and automatic suspensive effect.⁸¹ Yet, in *N.D. and N.T.* the Court concludes that the lack of an effective remedy against the applicants' removal was the consequence of them "plac[ing] themselves in an unlawful situation", and not using the legal procedures available to enter the country. On these grounds, the Court infers that the "lack of an individualised

⁷⁴ Draft articles on the expulsion of aliens, with commentaries, 2014, Adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf.

⁷⁵ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

⁷⁶ Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant, § 10.

⁷⁷ 1951 Refugee Convention, Article 31.

⁷⁸ *N.D. and N.T. v. Spain* (previously cited) § 221.

⁷⁹ In the words of the Advocate General of the Court of Justice: "[T]he obligations on states to respect the principle of non-refoulement, as guaranteed in Article 19(2) of the Charter, apply irrespective of the conduct of the person concerned. The judgment in *N.D. and N.T. v. Spain*, relied on by the Lithuanian Government, does not, in my view, demonstrate the contrary. That judgment does not concern the principle of non-refoulement, as protected by Article 3 ECHR, and, moreover, it concerns very specific circumstances (the applicants had taken part in a collective assault in an attempt to enter Spanish territory by forcing their way through the border fence using violence), which differ substantially from those in the present case. In any event, even if that judgment is to be understood as meaning that, according to the European Court of Human Rights (ECtHR), the fact that an asylum applicant has illegally entered the territory of a state, in the context of a mass influx of migrants, allows that state not to consider his or her application for asylum, which I very much doubt, it would simply follow that EU law therefore provides, in Article 18 and Article 19(2) of the Charter, more extensive protection than the ECHR, as is expressly permitted by Article 52(3) of the Charter"; Advocate General of the CJEU, Nicholas Emiliou, *Conclusions de l'avocat général M. N. Emiliou, présentées le 2 juin 2022*, ECLI:EU:C:2022:431, 2 June 2022, eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CC0072, para. 142-143, footnotes omitted.

⁸⁰ On this point see: UN High Commissioner for Refugees (UNHCR), UNHCR's oral intervention before the European Court of Human Rights Grand Chamber hearing in the case of *N.D. and N.T. v. Spain* (app nos. 8675/15 and 8697/15), 26 September 2018, page 6.

⁸¹ *M.S.S. v. Belgium and Greece* [GC], (previously cited) § 293.

procedure for their removal was the consequence of the applicants' own conduct" and that "it cannot hold the respondent state responsible for not making available there a legal remedy against that same removal". Such reasoning can lead to unacceptable consequences in terms of human rights compliance, as it penalizes individuals, depriving them of their right to a remedy against violations of their rights. This approach conflicts with the principle of legality, discussed above, and has no grounds in Art. 13.

29. **Fifth**, the test set out in *N.D. and N.T.* is such that even where asylum applicants were unable to make use of legal means of entry due to "cogent reasons based on objective facts", the contracting state where they crossed may not be held liable of breaching Art. 4 of Protocol 4 as long as it is not responsible for such reasons. This could lead contracting states to claim that they are not liable for violations, because people's failure to access official entry procedures was hampered by the conduct of a third country. This approach would create a gap in protection and leave people exposed to continued abuse by the third-party or third country itself (see also below para 40).

iii. Observations on Lithuania's attempt to circumvent obligations arising from Article 4 of Protocol 4 in light of the N.D. and N.T. jurisprudence.

30. In this section of the brief, Amnesty International makes submissions on the shortcomings of the *N.D. and N.T.* jurisprudence and provides some alternative arguments that we believe will best protect the rights of those affected and is consistent with the state's obligations under international law.
31. Amnesty International notes that the "own conduct" test introduced with *ND & NT* may enable contracting states to adopt policies and practices to circumvent obligations deriving from Art. 4 of Protocol 4 and expel individuals in a summary manner, e.g. by intentionally taking advantage of known practices of third countries that are not bound by Convention obligations. In the case of Lithuania, since July 2021, and while consistently pursuing its practice of summary returns, the country introduced measures whereby people could apply for asylum at official border crossing points or at diplomatic missions. In practice, however, these measures turned out to be largely theoretical, in that they do not offer people at this border practical and effective means to seek international protection in Lithuania. To the contrary, Amnesty International submits that these measures were introduced as a means of nominally complying with the Court's test under *N.D. and N.T.*, while taking advantage of Belarus' abusive practices.
32. Lithuania's legislation restricting the possibility to lodge asylum applications only at specific locations (at official border crossing points or transit zones or at Lithuania's diplomatic missions abroad) or under specific conditions (within Lithuania only for foreign nationals who entered the country "legally") was adopted about a year after the *N.D. & N.T.* judgment, in July-August 2021. The Ministry of Interior instructed that "[p]ersons who have crossed the state border at places other than those specified {above} and are in the border section and seeking asylum in the Republic of Lithuania will not be allowed into the country's territory and will be directed from the country's territory (required to go) to the nearest operating international border control point or the Republic of Lithuania's diplomatic representation".⁸² Only exceptionally, at the discretion of the State Border Guard Service, asylum applicants could be allowed to stay in Lithuania based on a person's vulnerability or other specific circumstances.⁸³
33. When assessing the collective nature of an expulsion, the Court has considered certain factors, such as whether, before being subjected to "automatic returns", applicants had had any effective possibility of seeking asylum,⁸⁴ or the fact that governmental actions were part of a "routine of expulsions" following a recurrent pattern.⁸⁵ In the case of the Lithuanian policy, the collective nature of the measure is made evident by the fact that a general ministerial decision *a priori* excludes from the territory all individuals who seek asylum after crossing the border irregularly. The circumstance that admission to territory is allowed as an exception, rather than offering sufficient guarantees, confirms that the general rule is a collective decision of expelling all other irregular entrants seeking asylum. Moreover, the decision to admit asylum applicants exceptionally on humanitarian grounds is discretionary: the Lithuanian Supreme Administrative Court noted that border guards' discretion in this respect is unspecified, and it is impossible to determine its limits and effectiveness.⁸⁶ As pointed out by the CJEU, the relevant provision under Lithuanian law, "which allows the competent authority a discretion to consider the applications of only some illegally staying individuals, in light of their particular vulnerability, does not satisfy the requirements laid down in Article 7(1) of Directive 2013/32."⁸⁷ The Lithuanian government has explicitly used the *N.D. & N.T.* jurisprudence to justify its measures, including

⁸² Unofficial translation. Ministry of Internal Affairs of the Republic of Lithuania, Decision 10V-20, 02 August 2021, e-seimas.lrs.lt/portal/legalAct/lt/TAD/6c0ea3a0f42811ebb4af84e751d2e0c9?jfwid=zh18cyw1m.

⁸³ Art. 140¹² (2) LSoF. Republic of Lithuania, Law on Legal Status of Foreigners (LSoF), IX-2206.

⁸⁴ *Sharifi and Others v. Italy and Greece*, (previously cited) §§ 214-25.

⁸⁵ *Georgia v. Russia (I)* (previously cited), §§ 170-78.

⁸⁶ Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), C-72/22 PPU – 1, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, 4 February 2022, §11.

⁸⁷ CJEU, Judgment, *M.A. v Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, 30 June 2022, ECLI:EU:C:2022:505, § 67

- before the Court of Justice of the EU,⁸⁸ and in the context of its proposed amendments to the domestic legislation.⁸⁹ Other countries have increasingly engaged in border pushbacks, as recently highlighted by the Committee for the Prevention of Torture of the Council of Europe.⁹⁰ Amnesty International notes that the line of argument introduced with *N.D. & N.T.* has been co-opted by several contracting states to attempt to justify the introduction of policies or practices of summary returns of any individuals considered to have crossed their borders irregularly, making the guarantees against collective expulsions largely notional.
34. In the words of three Judges of the Court, “the judgment in *N.D. and N.T. v. Spain* must be confined to its proper context in order to avoid depriving the right secured by Article 4 of Protocol No. 4 of its very essence.”⁹¹ Indeed, the incident at the core of that decision had specific characteristics making it very dissimilar to other irregular crossings documented across contracting states, and those specific characteristics were highlighted by the Court as reasons for its decision. On this basis, “[i]t is vital that the limited scope of the Grand Chamber’s judgment in *N.D. and N.T. v. Spain* be respected. It is our submission that an overly broad interpretation of the judgment would damage the “broad consensus within the international community” concerning compliance with “the Convention guarantees, and in particular ... the obligation of non-refoulement” (see *N.D. and N.T. v. Spain*, cited above, § 232).”⁹²
35. While reaffirming that the “own conduct” test introduced in *N.D. & N.T.* is not adequate to protecting rights recognized by the Convention, as it enables contracting states to circumvent relevant obligations, Amnesty International wishes to share that it is not aware of cases where the attempts to cross into Lithuania from Belarus in recent years may have been carried out through the individuals’ deliberate decision to take advantage of large numbers and using force in such ways as to create a clearly disruptive situation which was difficult to control or endangered public safety. Instead, in the cases observed, people reached the border in small groups, including single families with children, often exhausted and in need of urgent medical and humanitarian assistance, in reason of the days spent in the forest without access to food, water and shelter. If public safety was endangered, this was a result of actions by Belarusian and Lithuanian authorities, who insisted on pushing individuals back and forth across the other country. In this game with human life, at least two people are believed to have lost their lives while stranded on the border and exposed to the elements, while others have suffered serious health conditions leading to the amputation of their limbs.⁹³
36. As previously stated, pushbacks would be unlawful even under a state of emergency. In addition, Lithuania’s characterisation of its pushback policy as a measure used only in “extraordinary situations” justified by a “mass influx” of foreigners does not stand up to scrutiny. Lithuania has applied this “emergency” policy since 2 August 2021 to date. This is despite a relatively modest average number of arrivals from Belarus. During the peak (July 2021), 93 daily arrivals from Belarus were detected on average; by mid-2022, those numbers had already plummeted to approximately 12 daily arrivals (including multiple pushbacks suffered by the same persons).⁹⁴ The emergency legislation continued to be applied in 2023, despite Lithuania recording no attempts to cross the border over consecutive days.⁹⁵ Yet, in March 2023 the government further extended the state of emergency, stating that “[t]he state of emergency is designed to manage threats, and its legal regime allows for the implementation of the necessary solutions, such as tighter control over citizens of the Russian Federation and the push-back of illegal migrants.”⁹⁶
37. While Lithuanian authorities maintain that it is possible for any individuals in Belarus to seek asylum at official border crossing points with Lithuania and at the Lithuanian diplomatic representation in Minsk, this appears not to be a viable option. Data provided by the Lithuanian government to Amnesty International indicates that, between July 2021 and 6 June 2022, only 15 non-Belarusians had been able to request asylum at the Lithuanian embassy in Minsk.⁹⁷

⁸⁸ Advocate General of the CJEU, Nicholas Emiliou, *Conclusions de l’avocat général M. N. Emiliou, présentées le 2 juin 2022*, ECLI:EU:C:2022:431, 2 June 2022, eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CC0072, § 143.

⁸⁹ See UNHCR, Observations on the Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIVP-2385)1 and the Draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383)2, March 2023, p. 4, at: refworld.org/pdfid/6419b0ee4.pdf, and Explanatory Letter accompanying the Resolution regarding the Lithuanian Law No. VIII-1666 Law amending Chapters I and III, Articles 4, 10, 16, 18, 23, 26 and supplementing the law with Article 23-1 and a new Chapter IX and Law No. VIII-729 on the submission of drafts of the law on the amendment of Article 10 to the Seimas of the Republic of Lithuania, 12 January 2023, p. 2, e-seimas.lrs.lt/portal/legalAct/lt/TAD/9d395ef4925d11edb55e9d42c1579bdf?jfwid=epzldd106

⁹⁰ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 32nd General Report of the CPT, 30 March 2023, rm.coe.int/1680aabe2b.

⁹¹ *Asady and Others v Slovakia*, Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland, § 7.

⁹² *Asady and Others v Slovakia* (previously cited) § 25.

⁹³ First migrant death reported on Lithuanian border, Lithuanian Radio and Television (LRT), 12 January 2023, www.lrt.lt/en/news-in-english/19/1865184/first-migrant-death-reported-on-lithuanian-border; Body of suspected migrant found close to Lithuania’s border with Belarus, Lithuanian Radio and television (LRT), 7 April 2023, lrt.lt/en/news-in-english/19/1958415/body-of-suspected-migrant-found-close-to-lithuania-s-border-with-belarus; Joshua Askew, Third migrant loses leg to frostbite at Lithuania-Belarus border: Reports, Euronews, 10.12.2022, euronews.com/2022/12/10/third-migrant-loses-leg-to-frostbite-at-lithuania-belarus-border-reports

⁹⁴ Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, (previously cited), p. 15

⁹⁵ Greta Zulonaitė, *Lithuanian border guards want state of emergency extended despite drop in migrant flows* (27 February 2023), Lithuanian Radio and Television (LRT), lrt.lt/en/news-in-english/19/1924647/lithuanian-border-guards-want-state-of-emergency-extended-despite-drop-in-migrant-flows; Delfi, *Illegal migrants did not attempt to cross from Belarus to Lithuania for 9 days straight*, 27 February 2023, delfi.lt/en/politics/illegal-migrants-did-not-attempt-to-cross-from-belarus-to-lithuania-for-9-days-straight.d?id=92652759.9

⁹⁶ Government of the Republic of Lithuania (My Government portal), *Government extends state of emergency on borders with Belarus and Russia*, 8 March 2023, lv.lt/en/news/government-extends-state-of-emergency-on-borders-with-belarus-and-russia.

⁹⁷ Ministry of Interior, email to Amnesty International, 6 June 2022, email on file with Amnesty International.

38. As for the possibility of being “redirected” to apply at official border crossing points (BCPs),⁹⁸ the organisation spoke with at least 16 people who had been pushed back to Belarus by Lithuanian authorities after 2 August 2021, in separate incidents, often repeatedly. None of them reported being “redirected” by Lithuanian authorities towards the official BCPs, or being informed of the possibility to seek asylum at BCPs. Instead, interviewees consistently recounted how Lithuanian authorities used deceptive methods, violence and ill-treatment, including with tasers and batons, while carrying out their summary returns. Reports include the summary return of an unconscious man within a group of six Syrians – the man had lost consciousness after being stunned with a stun baton by a Lithuanian officer – and cases where Lithuanian border guards deceived people by telling them that they were taking them to Poland, only to force them to cross back into Belarus.⁹⁹
39. Amnesty International’s research also revealed that Belarusian authorities greatly limited refugees and migrants’ movements within Belarus and always forcibly directed them to cross into the EU through places different from the official border crossing points. They regularly forced people to cross the border in dangerous conditions, beating people with batons and rifle butts and threatening them with security dogs. Belarusian authorities regularly held people in “collection sites” in a “buffer zone” on the Belarusian territory contiguous to the border EU countries, where they were not allowed to leave or go back towards unfenced areas, and where they were often trapped in inhumane conditions for days or weeks, with inadequate access to food and water, and no shelter or sanitation. From there, people were then transported, often against their will, to areas where they were forced to cross into the EU. People interviewed by Amnesty International consistently reported that, when found by Belarusian officers, the latter would beat and threaten them, and would prevent them from going back to Minsk (or other areas within Belarus) (see above paras 9, 16 and 18). The reasonable fear of being subjected to torture, ill-treatment or other treatment contrary to the Convention, at the hands of authorities in a third Country, should be recognized in itself as a cogent reason forcing many to cross borders irregularly.
40. Whereas international law specifies that the irregular entry of refugees should not be penalised, provided that they show “good cause” for their irregular entry,¹⁰⁰ it should be noted that the concept of “good cause” for irregular entry is understood to also apply to those entering irregularly from countries of transit where asylum applicants are also at risk or in which generally effective protection is not available, such as Belarus.¹⁰¹ Conversely, whereas individuals follow orders of the national authorities of third countries, instructing them on the path to take to cross into a contracting state, their actions cannot be regarded as “culpable conduct” legitimising any restriction in their access to rights on account of their irregular entry,¹⁰² nor can Lithuania claim that access to means of legal entry was barred by cogent reasons for which it was not responsible. Lithuanian authorities were aware of the violent practices operated by Belarusian forces at the border prior to and after adopting legislation restricting the possibility to apply for asylum at Lithuania’s border crossing points, as demonstrated by countless statements denouncing Belarus actions.¹⁰³ In fact, the Lithuanian measures were adopted precisely as a response to what Lithuanian policymakers extensively described as a “hybrid” attack by Belarus. While Lithuania may not be directly responsible for the actions of the Belarusian forces, Lithuanian authorities forced people back to Belarus and adopted measures limiting the locations where asylum seekers could lodge their claims, knowing that Belarusian authorities, operating in the “buffer zone” near the border, were forcing people’s movements across the border and preventing them from applying for asylum at Lithuania’s BCPs.

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⁹⁸ Amnesty International did not receive data on how many non-Belarusians have been allowed to apply for asylum at official BCPs.

⁹⁹ Amnesty International, *Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned*, (previously cited), pp. 18-19.

¹⁰⁰ Article 31, Geneva Convention of the 1951 Convention Relating to the Status of Refugees.

¹⁰¹ Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, ‘Refugee protection in international law: summary conclusions: Article 31 of the 1951 Convention (3.2), Geneva, 8–9 Nov. 2001, para. 10. Also: “To come directly from the country in which the claimant has a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To ‘come directly’ from such a country via another country or countries in which he or she is at risk or in which generally effective protection is not available, is also accepted as ‘good cause’ for illegal entry” Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003) available at: refworld.org/docid/470a33b10.html.

¹⁰² See *Shahzad v. Hungary*, (previously cited) § 56.

¹⁰³ See, for example, the BBC reporting on Lithuania’s Foreign Minister G. Landsbergis saying that the migrants were “being sent on a compulsory basis as a weapon against us” (bbc.com/news/world-europe-57830158); BBC also reported similar statements by the Lithuanian Prime Minister Ingrida Simonyte, a statement by the Ministry of Interior saying that 35 migrants had been “forcibly pushed by the Belarusians” and a video released by the Lithuanian State and Border Guard Service (bbc.com/news/world-europe-58255448).