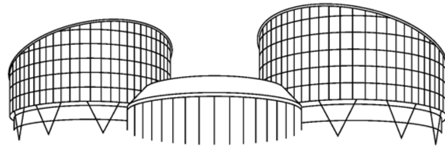

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.A. AND OTHERS v. LITHUANIA

(Application no. 59793/17)

JUDGMENT

STRASBOURG

11 December 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of M.A. and Others v. Lithuania,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Georges Ravarani,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 16 October 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 59793/17) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by seven Russian nationals, Mr M.A. (“the first applicant”), Ms M.A. (“the second applicant”) and their five children (“the remaining applicants”), on 25 July 2017. The Court decided that the applicants’ identities should not be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr M. Matsiushchankau, a human rights activist residing in Minsk. The Lithuanian Government (“the Government”) were represented by their Agent, Ms K. Bubnytė-Širmenė.

3. The applicants alleged that the Lithuanian border authorities had refused to accept their asylum applications and initiate asylum proceedings, and that they had not had an effective remedy against those decisions. They invoked Articles 3 and 13 of the Convention.

4. On 11 October 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1988, the second applicant was born in 1994 and the remaining applicants were born in 2010-2016. According to

the last letter sent by their representative to the Court on 20 May 2018, they currently reside in Poland, where their asylum applications are under consideration.

A. Events in the Chechen Republic and the applicants' first attempts to enter into Poland

6. The applicants used to live in the Chechen Republic. As submitted by them, the events leading to their departure were as follows.

7. In 2005-2006 the first applicant started having problems with the Russian security services. He believed that that was happening because his relatives had participated in the Second Chechen War. Officers from the district police came to his home and questioned him at a police station, and his home was raided by armed people wearing masks. In 2009 he decided to leave Chechnya and applied for international protection in Poland, and later moved to Austria. However, in 2010 he had to return to Chechnya. There, he started working in the State security system, where he participated in counter-terrorism operations and provided security to the highest officials of Chechnya. He quit that job in October 2015, but before that he and his mother were asked if he was planning to join illegal armed groups in Syria. In February 2017 he was taken to the headquarters of the department at which he worked and asked to become an informer; he refused. In March 2017 two police officers came to his home and forcefully took him to a police station, where he was again asked to become an informer and again he refused. Afterwards he was tortured – he was given electric shocks and beaten on the kidneys, head and other parts of his body. After that he agreed to become an informer and was released after five days of detention. Following the beating, the first applicant started suffering from health problems, such as pain in the kidneys and problems with his memory.

8. In April 2017 the applicants left Chechnya and went to Belarus with the aim of crossing into Poland. They submitted that they had attempted to lodge asylum applications several times on the Polish border, but each time the border guards had refused to accept their applications and returned them to Belarus (see *M.A. and Others v. Poland*, no. 42902/17, Statement of Facts and Questions to the Parties; see also paragraphs 22-26 below for further events and the applicants' eventual acceptance into Poland).

B. Attempts by the applicants to enter into Lithuania

1. Medininkai border checkpoint on 16 April 2017

9. On 16 April 2017, around noon, the applicants arrived at the Medininkai checkpoint on the border between Lithuania and Belarus. They

submitted to the Court that they had told the border guards in Russian that they were seeking asylum, but asylum proceedings had not been initiated.

10. The State Border Guard Service (hereinafter "the SBGS") issued decisions on refusal of entry in respect of all seven applicants. The decisions indicated that the applicants had been refused entry on the grounds that they did not have valid visas or residence permits. It was also indicated that the decisions could be appealed against before a regional administrative court within fourteen days. The decisions were written in Lithuanian and English.

11. The applicants were asked to sign the decisions. In the space for a signature on each of the seven decisions, the first and second applicants wrote "azul'" in Cyrillic (*азуль*) – they submitted to the Court that that word was often used by Chechen asylum seekers to mean "asylum".

12. The border officer who was on duty at the Medininkai checkpoint that day submitted the following official report to a senior officer:

> "I hereby inform you that on 16 April 2017, at 12.15 p.m., at the Medininkai border checkpoint ... a Russian national [M.A.] ... who had arrived on foot ... was refused entry into Lithuania.
>
> The reason for refusal of entry – absence of a valid visa or residence permit.
>
> At 12.45 p.m. the alien was returned to Belarus.
>
> His documents were checked by a senior border officer [A.B.]."

Reports with similar wording were drawn up with respect to each of the applicants.

13. The applicants were returned to Belarus on that same day. They did not appeal against the decisions refusing them entry into Lithuania.

2. *Kena border checkpoint on 11 May 2017*

14. On 11 May 2017, around noon, the applicants arrived at the Kena checkpoint on the border between Lithuania and Belarus. They submitted to the Court that they had told the border guards that they were seeking international protection and asylum and that the first applicant had been tortured in Chechnya. However, asylum proceedings were not initiated.

15. The SBGS issued decisions on refusal of entry in respect of all seven applicants, with the same content as before (see paragraph 10 above). The decisions were written in Lithuanian. The first and second applicants signed all seven decisions and wrote that the decisions had been translated into Russian.

16. The border officer who was on duty at the Kena checkpoint that day submitted the following official report to a senior officer:

> "I hereby inform you that on 11 May 2017 ... when I was examining the train [from Moscow to Kaliningrad], at around 12:00 p.m., the following Russian nationals [the applicants] submitted their documents for inspection. None of them had valid visas or residence permits, and therefore they were refused entry into the Republic of

> Lithuania. Seven refusal of entry decisions were issued in respect of these individuals ...
>
> At 3.10 p.m. the individuals were transferred to border officers of Belarus via the Medininkai border checkpoint.”

17. The applicants were detained at the border checkpoint for several hours and then they were returned to Belarus. They did not appeal against the decisions to refuse them entry into Lithuania.

3. *Vilnius railway border checkpoint on 22 May 2017*

18. On 22 May 2017, at around 10.20 p.m., the applicants arrived at the railway border checkpoint in Vilnius. They submitted to the Court that they had had with them a written asylum application in Russian, prepared by a Belarussian human rights organisation, and they had given that application to the Lithuanian border guards. They provided the Court with a copy of that application and a photograph of the application, together with their train tickets, taken on what they claimed to be the premises of the border checkpoint. However, asylum proceedings were not initiated.

19. The SBGS issued decisions on refusal of entry in respect of all seven applicants, with the same content as before (see paragraphs 10 and 15 above). The first and second applicants signed the decisions concerning them, but those concerning the children (the remaining applicants) were not signed. The decisions were written in Lithuanian and it was not indicated on them whether they had been translated into Russian.

20. The border officer who was on duty at the Vilnius railway checkpoint that day submitted the following official report to a senior officer:

> “I hereby inform you that on 22 May 2017 I was on duty at the Vilnius railway border checkpoint.
>
> At around 10.50 p.m. ..., upon the arrival of a passenger train [from Minsk to Vilnius], it was detected that nationals of the Russian Federation did not have valid Schengen visas or residence permits ...
>
> ...
>
> The above-mentioned individuals were returned via the Medininkai border checkpoint on 23 May 2017, at 4.24 a.m.”

The report mentioned the names of the second applicant and three of the children. The Court has not been informed if a similar report was drawn up with regard to the first applicant and the other two children.

21. The applicants were detained at the border checkpoint overnight, and in the morning of 23 May 2017 they were returned to Belarus. They did not appeal against the decisions refusing them entry into Lithuania.

C. Subsequent developments

22. Subsequently, the applicants again attempted to submit asylum applications in Poland, without success, and they lodged an application against Poland before this Court. On 16 June 2017 the Court decided to apply Rule 39 of the Rules of Court, indicating to the Polish Government that the applicants should not be removed to Belarus. However, it appears that they were removed (see *M.A. and Others v. Poland*, Statement of Facts and Questions to the Parties cited above).

23. The applicants' stay in Belarus was legal until 10 July 2017.

24. Between October and December 2017 the first applicant's relatives in Chechnya received several summonses, addressed to him, obliging him to appear before the police. In December 2017 a summons was delivered to the first applicant in Belarus. He went to a police station there and was told that all the applicants had to leave Belarus. They returned to Russia at the end of December 2017. Soon afterwards the first applicant was detained. The second applicant had not been informed about the exact location of the first applicant's detention.

25. In January 2018 the second applicant and the remaining applicants went to Belarus again and managed to submit asylum applications on the Polish border. They were admitted to a refugee reception centre in Poland to await the decision on their asylum applications.

26. In February 2018 the first applicant was released from detention in Russia. He submitted that he had not known where he had been held and that he had been beaten up by the staff at the detention facility. He provided the Court with photographs of bruises on his body which he claimed to have sustained in detention. In March 2018 the first applicant travelled to Belarus and managed to submit an asylum application on the Polish border. He joined the second applicant and the remaining applicants at a refugee reception centre in Poland to await the decision on his asylum application.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Law on the Legal Status of Aliens

27. Article 2 § 18^3 of the Law on the Legal Status of Aliens (hereinafter "the Aliens Law") defines an asylum application as a request to be granted asylum in the Republic of Lithuania, expressed by an alien in any form. Article 2 § 20 defines an asylum seeker as an alien who has submitted an asylum application in line with the requirements set out in the Aliens Law where a final decision in respect of that application has not yet been taken.

28. Article 65 provides that aliens have the right to seek and obtain asylum in Lithuania in line with the requirements set out in the Aliens Law. When there are indications that an alien who is in detention or at a border

checkpoint or in the transit zone may wish to seek asylum, he or she must be informed, in a language that he or she understands, about such a right and the applicable procedures.

29. Article 67 § 1 provides that at border checkpoints and on territory subject to the legal regime relating to borders, an asylum application may be submitted the SBGS, and on any other territory of the Republic of Lithuania it may be submitted to the SBGS or a territorial police agency. Article 67 § 2 provides that an asylum seeker has to submit an application on his or her own behalf, and an application on behalf of minors may be submitted by an adult family member or a representative.

30. Article 69 §§ 1, 3 and 5 provide that an institution to which an asylum application has been submitted must, *inter alia*, note the date, time and place of the submission of such an application, interview the asylum seekers and assess whether they have any special needs, obtain their identity and travel documents, take their fingerprints, inspect their belongings, and within twenty-four hours forward all that information to the Migration Department.

31. Article 76 §§ 1 and 6 provide that the decision on whether to examine an asylum application on the merits is taken by the Migration Department within forty-eight hours of the submission of such an application.

32. Article 8 § 2 provides that a decision to deny an alien entry into Lithuania is taken by the SBGS, but such a decision cannot be taken with regard to an alien who has submitted an asylum application. Article 5 § 3 provides that when an alien submits an asylum application at a border checkpoint, the decision as to whether to allow him or her to enter into Lithuania is taken by the Migration Department.

33. Article 67 § 5 provides that all decisions adopted in accordance with the Aliens Law must take into account the best interests of children and vulnerable persons.

34. Article 86 § 1 provides that refugee status is granted to an individual who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, unless there are reasons, provided in the Aliens Law, for which refugee status may not be granted (for example, when the individual is already receiving protection or assistance from organs or agencies of the United Nations other than UNHCR, or when there are serious grounds to believe that he or she has committed a war crime or a crime against humanity).

35. Article 87 § 1 provides that subsidiary protection is granted to an individual who is outside the country of his or her nationality and is unable to return to it owing to well-founded fear of torture or inhuman or degrading treatment or punishment; the death penalty or execution; or a serious and individual threat to his or her life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

36. Article 130 § 1 provides that an alien cannot be removed to a country in which there is a risk to his or her life or liberty; or where he or she may be persecuted on the grounds of his or her race, religion, nationality, membership of a social group, or political beliefs; or from which he or she may be removed to another such country. Article 130 § 2 provides that an alien cannot be removed to a country in which he or she may be subjected to torture or cruel, inhuman or degrading treatment or punishment.

37. Article 138 provides that decisions taken in accordance with the Aliens Law can be appealed against to a regional administrative court within fourteen days. Article 5 § 5 provides that during the time allowed for such an appeal, aliens have the right to remain in the territory of Lithuania and asylum seekers have the right to remain at the border checkpoint.

38. Article 139 § 1 provides that when an appeal is lodged, the impugned decision is suspended in the following instances: (1) the decision was to revoke an alien's residence permit; (2) the decision was to decline to examine an asylum application submitted by an alien who had arrived in Lithuania from a safe third country; (3) the decision was to reject an asylum application (with some exceptions). Article 139 § 2 provides that, in other instances, an administrative court may order interim measures and suspend the impugned decision.

B. Order on Granting and Withdrawing Asylum

39. The Order on Granting and Withdrawing Asylum in the Republic of Lithuania (hereinafter "the Order") was issued by the Minister of Interior on 24 February 2016 and amended on 31 January 2017. Its point 19 provides that an asylum application is considered to have been submitted when it is submitted to one of the institutions listed in Article 67 § 1 of the Aliens Law and in line with the requirements of Article 67 § 2 of that Law (see paragraph 29 above). An asylum application has to be substantiated and has to present facts which demonstrate the asylum seeker's well-founded fear of persecution or serious harm as defined by the Aliens Law (see paragraphs 34 and 35 above). If an asylum application is unsubstantiated, the reasons for its submission have to be established during the initial interview with the asylum seeker, in accordance with point 22.10 of the Order (see paragraph 43 below).

40. Point 20 provides that if an asylum application is submitted to an institution which is not listed in Article 67 § 1 of the Aliens Law, or if it does not fulfil the requirements of Article 67 § 2 of that Law, within two days of that application being identified as an application for asylum, it is returned to the alien and he or she has to be informed about the procedure of submitting an asylum application. That information is provided to the alien in a language which he or she understands.

41. Point 21 provides that an asylum application is considered accepted when an authorised official of the accepting institution registers the asylum application and the asylum seeker's data in the Aliens Register.

42. Point 22.1 provides that when an asylum application has been submitted in writing, an authorised official must take the application from the asylum seeker and write on it the date, time and place of its submission. Point 22.2 provides that when an asylum application has not been submitted in writing, an authorised official must draw up a written report, indicating the information provided by the asylum seeker, the date, time and place of the submission of the application, and the name of the official who drew up the report. Point 22.7 provides that the authorised official must register the asylum application and the information about the asylum seeker in the Aliens Register.

43. Point 22.10 provides that the authorised official must conduct the initial interview with the asylum seeker and prepare the record of the interview, following the relevant form appended to the Order. The purpose of the initial interview is to collect information about the asylum seeker and his or her family members who have arrived together, their route to Lithuania, and their reasons for seeking asylum, among other things. Before the initial interview, the asylum seeker must be acquainted with, among other things, the purpose of the interview, the rights and duties of an asylum seeker, and the consequences of failing to comply with them.

44. Point 23 provides that the actions listed in points 22.1 to 22.12 (see paragraphs 42 and 43 above) also have to be carried out outside of working hours.

C. Statute of the SBGS

45. The Statute of the SBGS at the Ministry of Interior was adopted by the Government of the Republic of Lithuania on 22 February 2001 and amended several times. At the material time, its point 13.6 provided that the duties of the SBGS included the organisation, coordination and control of the acceptance of asylum applications submitted at border checkpoints or on territory subject to the legal regime relating to borders, in accordance with the Aliens Law.

D. Regulations on Border Control

46. The Regulations on Border Control were adopted by the SBGS on 31 January 2012 and amended several times. At the material time and at present, their points 114.14 and 240.10 provide that the duties of senior shift officers include the duty to accept applications for asylum in Lithuania submitted by aliens.

E. Memorandum of Understanding between the SBGS, the UN High Commissioner for Refugees and the Lithuanian Red Cross

47. On 2 June 2010 the SBGS, the UN High Commissioner for Refugees (UNHCR) Regional Office for the Baltic and Nordic Countries, and the Lithuanian Red Cross signed a Memorandum of Understanding on cooperation when dealing with questions related to asylum seekers. Pursuant to Article 4 of that memorandum, the SBGS undertook to use all means necessary in order to ensure: that aliens who seek asylum have the appropriate conditions to submit asylum applications at border checkpoints; that asylum seekers are acquainted, in a language they understand, with their legal status in Lithuania and their right to State-guaranteed legal aid; that information about asylum proceedings, prepared by UNHCR or non-governmental organisations, is distributed at border checkpoints; that representatives of UNHCR are able to monitor the submission of asylum applications at the border and the ensuing actions of border officials; and that asylum seekers have the possibility to contact representatives of UNHCR.

F. Case-law of the domestic courts

48. On 14 September 2017 four Russian nationals arrived at the border of Lithuania by train from Belarus and were refused entry on the grounds that they did not have valid visas or residence permits; they were returned to Belarus that same day. Their representative lodged a complaint before an administrative court, arguing that the four individuals had submitted asylum applications at the border which the border guards had refused to accept.

49. On 14 December 2017 the Vilnius Regional Administrative Court allowed the complaint in part and ordered the SBGS to allow the four individuals to enter into Lithuania and to submit asylum applications. The court stated:

> "In this administrative case there is no dispute that the appellants clearly expressed their wish to submit asylum applications and that they submitted such applications to officers of the SBGS ... However, the SBGS did not accept [the applications], without providing any reasons. At the court hearing, [the SBGS's] representative explained that the appellants' asylum applications had not been accepted because they had been

unsubstantiated. The court notes that officers of the SBGS have a duty to accept asylum applications, irrespective of whether or not they are substantiated – [if applications are unsubstantiated, officers have to] conduct initial interviews with asylum seekers and clarify their reasons [for requesting asylum] (see points 19 and 22.10 of the Order on Granting and Withdrawing Asylum in the Republic of Lithuania, issued by the Minister of Interior on 24 February 2016). Officers of the SBGS may not remain inactive with respect to asylum seekers, as they did in this case. Accordingly, in this administrative case, having regard to the factual circumstances, it must be concluded that the SBGS did not take the proper action to ensure that asylum applications were accepted and examined, and it thereby breached the principle of good administration, as well as points 19 and 22.10 of the Order on Granting and Withdrawing Asylum in the Republic of Lithuania."

50. On 14 February 2018 the Supreme Administrative Court upheld the lower court's decision in its entirety. The court stated:

"It being demonstrated that the appellants had submitted asylum applications but that [those applications] had not been examined in accordance with law, the Vilnius Regional Administrative Court made a lawful and well-founded conclusion that officers of the SBGS had a duty to accept asylum applications, irrespective of whether or not they were substantiated, and that the SBGS had breached the principle of good administration and points 19 and 22.10 of the Order on Granting and Withdrawing Asylum in the Republic of Lithuania. The appellants submitted their asylum applications to the appropriate institution, but the SBGS refused to accept them, without giving any reasons."

III. RELEVANT INTERNATIONAL MATERIAL

A. The 1951 Geneva Convention relating to the Status of Refugees

51. The 1951 Geneva Convention relating to the Status of Refugees (hereinafter "the 1951 Refugee Convention"), together with the 1967 Protocol relating to the Status of Refugees, was ratified by Lithuania on 28 April 1997. The relevant parts of it provide:

Article 1. Definition of the term "refugee"

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it ..."

Article 31. Refugees unlawfully in the country of refuge

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or

freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence ...”

Article 33. Prohibition of expulsion or return (“*refoulement*”)

“1. No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

B. Recommendations of the UN High Commissioner for Refugees (UNHCR)

52. The UNHCR Executive Committee, at its twenty-eighth session held in October 1977, adopted the following recommendations:

“[P]rocedures for the determination of refugee status should satisfy the following basic requirements:

(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.

(ii) The applicant should receive the necessary guidance as to the procedure to be followed.

(iii) There should be a clearly identified authority – wherever possible a single central authority with responsibility for examining requests for refugee status and taking a decision in the first instance.

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR ...”

53. In 2016, during the second cycle of the Universal Periodic Review in respect of Lithuania, UNHCR provided the following submissions to the Office of the High Commissioner for Human Rights:

“**III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS**

Issue 1: <u>Admission to the territory and access to asylum procedures</u>

As result of the implementation of the Memorandum of Understanding on border monitoring activities, authored by the SBGS, UNHCR and the Lithuanian Red Cross in 2010, a greater number of persons seeking international protection have been

identified at the Lithuanian border. Nevertheless, some concerns regarding access to the territory and asylum procedure remain. For example, in a non-pecuniary damage case, the Supreme Court of Lithuania has established that, despite sufficiently clear articulations of protection related reasons for their flight, two Afghan nationals were denied access to the asylum procedure. Instead they were prosecuted and placed in pre-trial custody in relation to irregular border crossing.

UNHCR is aware of other similar instances whereby delays in accessing asylum procedures have occurred.

...

UNHCR emphasizes that a wish to apply for protection does not need to be expressed in any particular form and that the word "asylum" does not need to be used expressly. Any expression of fear of return to one's home country is enough to indicate a possible need for asylum. Therefore, where there are indications that third-country nationals or stateless persons fear return to their home countries or countries of prior habitual residence, the representatives of the SBGS must provide them with information on asylum procedures, register their asylum applications without delay, and refer those cases to the central determining authority.

Recommendation:

UNHCR recommends that the Government of Lithuania:

a. Ensure that persons who may seek international protection are proactively identified, including at border-crossing points and detention facilities, provided with information about the asylum procedure, registered as asylum-seekers, and referred to the determining asylum authority without delay."

IV. RELEVANT COUNCIL OF EUROPE DOCUMENTS

54. The relevant parts of Recommendation No. R (81) 16 of the Committee of Ministers to member States on the harmonisation of national procedures relating to asylum, adopted on 5 November 1981 at the 339th meeting of the Ministers' Deputies, provide:

"1. All asylum requests shall be dealt with objectively and impartially.

2. The decision on an asylum request shall be taken only by a central authority.

3. Clear instructions for dealing with asylum requests with a view to their being forwarded to the central authority shall be given to the authorities responsible for frontier control, as well as to local authorities called upon to deal with such requests. These instructions shall in particular:

i. draw the attention of the said authorities especially to the obligation to respect the principle of *non-refoulement*;

ii. require these authorities to provide the central authority with all possible information with a view to the examination of the request;

iii. emphasise the need to take into consideration the particular situation in which the asylum seeker finds himself, including, as the case may be, difficulties he might experience in presenting his request.

4. As long as the central authority referred to in paragraph 2 has not taken a decision on the asylum request, the applicant shall be allowed to remain in the territory of the

state, unless the competent central authority has established that the request is manifestly based on grounds having no connection with asylum, in particular that it is fraudulent or is related neither to the criteria for the granting of refugee status laid down in Article 1.A(2) of the 1951 Geneva Convention nor to other criteria justifying the granting of asylum.

...”

55. The relevant parts of Recommendation No. R (98) 15 of the Committee of Ministers to member States on the training of officials who first come into contact with asylum seekers, in particular at border points, adopted on 15 December 1998 at the 652nd meeting of the Ministers’ Deputies, provide:

“...

Bearing in mind that, in order to fulfil their important tasks in an effective manner and to prevent *refoulement* and the turning away of the asylum seeker at the border as well as to ensure unimpeded access to the asylum procedure by those seeking asylum, officials who first come into contact with asylum seekers, in particular those fulfilling their duties at border points, need appropriate and adequate, initial and in-service training on how to recognise requests for protection and handle specific situations in connection with asylum seekers;

...

Recommends to member states that officials who first come into contact with asylum seekers should receive training on how to recognise requests for protection and handle specific situations in connection with asylum seekers.

1. For those of such officials who are required to refer these asylum seekers to the competent asylum authority, their training should lead to the acquisition of:

1.1. basic knowledge of the provisions of national legislation related to the protection of asylum seekers and refugees, including the relevant administrative issues and knowledge of internal instructions, wherever applicable, on how to deal with asylum seekers;

1.2. basic knowledge of the provisions of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees and general principles of refugee protection as provided by international law, in particular the prohibition of *refoulement* and the situation of refugees staying unlawfully in the country of refuge;

1.3. basic knowledge of the provisions relating to the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in the European Convention on Human Rights;

1.4. basic knowledge concerning limitations under national and international law to the use of detention;

1.5. skills to detect and understand asylum requests even in cases where asylum seekers are not in a position clearly to communicate their intention to seek asylum, as well as basic communication skills concerning how to address asylum seekers, including those with special needs;

1.6. the skill to make the correct choice and use of an interpreter when necessary.

...”

V. RELEVANT EUROPEAN UNION LAW

56. Relevant provisions of the Charter of Fundamental Rights of the European Union read:

Article 18. Right to asylum

"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')."

Article 19. Protection in the event of removal, expulsion or extradition

"...

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

57. The relevant parts of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ("the Schengen Borders Code") provide:

"...

(36) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States' obligations as regards international protection and *non-refoulement* ..."

Article 3. Scope

"This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

...

(b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*."

Article 4. Fundamental Rights

"When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis ..."

Article 14. Refusal of entry

"1. A third-country national who does not fulfil all the entry conditions ... shall be refused entry to the territories of the Member States. This shall be without prejudice to

the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

2. Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately.

...

3. Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.

Lodging such an appeal shall not have suspensive effect on a decision to refuse entry ...”

Article 16. Implementation of control

“1. The border control ... shall be carried out by border guards in accordance with the provisions of this Regulation and with national law.

...

Member States shall ensure that the border guards are specialised and properly trained professionals ... Training curricula shall include specialised training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking. Member States ... shall encourage border guards to learn the languages necessary for the carrying-out of their tasks ...”

58. The relevant parts of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (“the Qualification Directive”) provide:

Article 2. Definitions

“...

(f) ‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country; ...”

Article 15. Serious harm

“Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Article 21. Protection from *refoulement*

"1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations ..."

59. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 ("the Dublin Regulation") establishes the criteria and mechanisms for determining the member State responsible for examining an application for international protection lodged in one of the member States by a third-country national or a stateless person.

Its Chapter III sets out the rules of establishing the member State responsible for examining asylum applications submitted by the following categories of individuals: unaccompanied minors; those whose family members have been granted or have applied for international protection in a member State; those who have a valid visa or a residence permit in a member State; those who have irregularly crossed the border into a member State; those for whom the requirement to have a visa has been waived in a member State; and those who have applied for international protection in an international transit area of an airport.

Article 3 § 2 provides that where no member State responsible can be designated on the basis of the criteria set out in Chapter III, the first member State in which the application for international protection was lodged shall be responsible for examining it.

60. The relevant parts of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection ("the Asylum Procedures Directive") provide:

Article 6. Access to the procedure

"1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged ..."

Article 8. Information and counselling in detention facilities and at border crossing points

“1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible ...”

VI. RELEVANT COUNTRY INFORMATION

A. The Chechen Republic, Russian Federation

61. In its annual report on the state of the world’s human rights in 2017, Amnesty International stated:

“Reports continued of serious human rights violations, including enforced disappearance, unlawful detention, torture and other ill-treatment of detainees, and extrajudicial executions in the North Caucasus. The situation in Chechnya was further deteriorating. Impunity remained for past violent incidents against human rights defenders in Chechnya.

...

Novaya Gazeta reported the unlawful detention of dozens of people, starting in December 2016, and secret execution of at least 27 captives by the security forces on 26 January. No one was known to have been investigated or held accountable for these incidents by the end of the year.”

62. In its annual report on the human rights situation in 2017, Human Rights Watch stated:

“Early in 2017, Chechen security officials illegally detained and tortured presumed jihadists. Novaya Gazeta reported that in December 2016 and January 2017, Chechen police extrajudicially killed 27 detainees; Human Rights Center Memorial stated that, based on their investigation, 23 of the people on Novaya Gazeta’s list disappeared and two died following abduction-style detentions by local security officials.”

63. In its report entitled “Russian Federation – State actors of protection”, finalised in December 2016 and published in March 2017, the European Asylum Support Office (EASO) stated (footnotes omitted):

“...

HRW reported that the Chechen government has engaged in a campaign to stifle any opposition to Kadyrov, through physical attacks, unlawful detention, disappearances, and harassment. These violations intensified at the end of 2015 after the population became more critical of its leadership in the wake of a drop in oil prices and the floundering economy. According to HRW, ‘residents of Chechnya who show dissatisfaction with or seem reluctant to applaud the Chechen leadership and its policies are the primary victims of this crackdown’.

...

According to several sources, authorities actively threaten persons who assert their rights against the government or influential persons. The Danish Immigration Service learned from Memorial that ‘people are deterred from filing complaints’ with the European Court of Human Rights, and their lawyers are threatened.

...

... HRW mentions under-reporting of cases of abuse against local critics as abuses may never be reported due to the overwhelming climate of fear, and residents ‘have been largely intimidated into silence’. Several sources told Landinfo that they will not go public with information where the family fears repercussions. The tools of the government to subdue victims of human rights violations into silence are manifold: reports mention death threats, threats to rape female relatives, denunciation as prostitute or drug addict, fabricated charges and physical assault ...

...

According to several sources, ill-treatment to force confessions is commonplace in Chechnya. The Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe stated in June 2016 that he ‘was informed throughout [his] mandate [...] that policemen still routinely apply torture in order to obtain confessions, which remain the principle basis of guilty verdicts by courts’.

... According to Memorial quoted in a DIS report, police and investigators will make sure no evidence of beating is left on the body once the suspect has seen by a judge, either by using methods of ill-treatment that leave no traces or by delaying presentation of an accused to his or her lawyer and the court. They also threaten doctors not to record any signs of ill-treatment in their medical reports.”

B. Belarus

64. In its annual report on the state of the world’s human rights in 2017, Amnesty International stated that Belarus lacked a functioning asylum system and repeatedly handed over individuals seeking international protection to the authorities of countries where they were at real risk of torture or other ill-treatment.

65. In its annual report on the human rights situation in 2017, Human Rights Watch stated:

“Belarus failed to provide meaningful protection to hundreds of asylum seekers, mostly from the Russian republic of Chechnya, who arrived in Belarus with the aim of crossing the border into Poland and requesting asylum. Belarus lacks a functioning

asylum system. During 2017 it returned at least two asylum seekers from Chechnya back to Russia, which authorities view as a safe country of origin, putting them at grave risk of ill-treatment."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

66. The applicants complained that the Lithuanian authorities had refused to initiate asylum proceedings and returned them to Belarus, thereby exposing them to a real risk of torture or inhuman treatment in Russia. They relied on Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. *Compatibility* ratione personae

(a) The parties' submissions

67. The Government submitted that since the applicants had been allowed to enter into Poland and their asylum applications were being considered by the Polish authorities (see paragraphs 25 and 26 above), "Lithuania should not be required to institute asylum proceedings with regard to the same individuals". They contended that Lithuania "no longer exercise[d] jurisdiction over the applicants" and the application was thus incompatible *ratione personae* with the provisions of the Convention.

68. The applicants did not comment on this point.

(b) The Court's assessment

69. The Court notes that the applicants complained that Lithuanian border officials had refused to accept their asylum applications and denied them entry into Lithuania on three occasions in April and May 2017. From the Government's submissions, it is not clear if they intended to contest the applicants' victim status or the responsibility of the Lithuanian authorities for the grievances raised by the applicants. The Court will thus address both of those aspects.

70. With regard to the Lithuanian authorities' responsibility, the Court observes that there is no dispute that all the decisions complained of by the applicants in the present case were taken by Lithuanian border officials. It is therefore evident that the actions complained of by the applicants were imputable to Lithuania and thereby fell within its jurisdiction within the

meaning of Article 1 of the Convention. Nor is there any dispute that at the time when the applicants were refused entry into Lithuania (April and May 2017), their asylum applications were not yet under consideration in Poland – asylum proceedings in Poland were only initiated at the beginning of 2018 (see paragraphs 25 and 26 above). Accordingly, there are no grounds to exclude the responsibility of Lithuania for examining the applicant's asylum applications lodged in April and May 2017 (see the relevant EU law in paragraph 59 above).

71. With regard to the applicants' victim status, the Court reiterates that a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012, and the cases cited therein). The Government did not argue that any such measures had been taken by Lithuanian authorities with respect to the applicants, and the Court does not consider that subsequent asylum proceedings in Poland could have remedied the grievances relating to the applicants' treatment by the Lithuanian authorities.

72. Accordingly, the Court dismisses the Government's objection of incompatibility *ratione personae*.

2. *Exhaustion of domestic remedies*

(a) The parties' submissions

(i) The Government

73. The Government submitted that the applicants had failed to appeal against any of the decisions to refuse them entry into Lithuania. They contended that the applicants had been informed about the possibility to appeal because that information had been included in the text of the decisions, and on one of the three occasions (11 May 2017) the applicants had explicitly acknowledged that the decisions had been translated into Russian (see paragraph 15 above).

74. The Government argued that an appeal before an administrative court would have been an effective remedy in respect of the applicants' complaints. They submitted that, under domestic law, administrative courts had an active role in the proceedings, and thus their analysis would "presumably" not have been limited to formalities (that is, whether the applicants had had valid visas or residence permits), but would have considered all the relevant circumstances of the applicants' situation.

75. The Government provided the following examples of domestic case-law which they considered relevant:

- In six cases dating from 2007 to 2017, the Vilnius Regional Administrative Court and the Supreme Administrative Court examined refusals of entry issued against various foreign nationals on grounds related to national security. The appellants' complaints were dismissed in all those cases.

- In three cases dating from 2016 and 2017, the Vilnius Regional Administrative Court examined refusals of entry on the grounds that the aliens in question had been unable to justify the purpose of their intended stay in Lithuania. It dismissed the appellants' complaints in all those cases.

- In one case dating from 2007, the Klaipėda Regional Administrative Court found that an individual who had been refused entry on the grounds of not having a valid visa had actually been exempt from the requirement to have a visa. That individual was subsequently awarded compensation in respect of pecuniary and non-pecuniary damage.

- In one case dating from 2013, the Vilnius Regional Administrative Court found that an individual who had been refused entry on the grounds of being included on a list of foreign nationals banned from entering Lithuania had not actually been on that list.

The Government submitted that even though not all the appellants in the above-mentioned cases had succeeded in their appeals, it was important to emphasise that the administrative courts had carried out an independent analysis of the relevant circumstances and had not simply repeated the reasons provided by the border authorities.

76. The Government also referred to the decisions of the Vilnius Regional Administrative Court of December 2017 and the Supreme Administrative Court of February 2018, in which claimants who had been in a similar situation to that of the applicants in the present case had had their complaints upheld by the courts (see paragraphs 48-50 above).

77. The Government further contended that the absence of automatic suspensive effect of an appeal against a removal decision was in line with the Schengen Borders Code (see Article 14 of that Code, cited in paragraph 57 above). Nonetheless, the Government argued that the applicants had had the right to request the suspension of their removal, in line with the domestic law concerning interim measures (see paragraph 38 above). The Government also submitted that, in any event, cases concerning the removal of aliens were typically given priority by administrative courts, so the examination of the appeal would not have taken too long. As an example, they referred to a case in which aliens had lodged a complaint in September 2017, they had been given time to correct the complaint until October 2017, the first-instance decision had been adopted in December 2017, and the final decision by the Supreme Administrative Court had been adopted in February 2018 (see paragraphs 48-50 above).

(ii) The applicants

78. The applicants firstly submitted that the possibility to appeal against the SBGS decisions to refuse them entry into Lithuania had not been explained to them on two of their three attempts to cross the border – the decisions taken on 16 April and 22 May 2017 had not been translated into Russian and had only been available in Lithuanian and English, but the applicants did not understand either of those languages.

79. They further submitted that an appeal before administrative courts would not have been an effective remedy, because such an appeal did not have automatic suspensive effect and would not have precluded their being returned to Belarus.

80. The applicants also submitted that after they had been returned to Belarus they had only had the right to stay there for a few more months – until 10 July 2018. They submitted that the proceedings before Lithuanian administrative courts would have taken longer than that, and thus would not have been effective, as they would have had to either return to Russia or stay in Belarus illegally, under the threat of deportation.

81. The applicants lastly submitted that the cases referred to by the Government (see paragraph 75 above) were not relevant to their situation, because none of those cases concerned an application for international protection.

(b) The Court's assessment

82. The Court observes at the outset that when the applicants attempted to enter into Lithuania on 16 April and 22 May 2017, decisions to refuse them entry were written in Lithuanian and English and there is no indication that they were translated into Russian (see paragraphs 10 and 19 above). Accordingly, on those two occasions the applicants were not informed of the possibility to appeal against those decisions and could not have reasonably been expected to avail of it.

83. In any event, the Court has held in numerous previous cases that where an applicant seeks to prevent his or her removal from a Contracting State, a remedy will only be effective if it has automatic suspensive effect (see, among other authorities, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011; *L.M. and Others v. Russia*, nos. 40081/14 and 2 others, § 100, 15 October 2015; and *Kebe and Others v. Ukraine*, no. 12552/12, § 101, 12 January 2017).

84. In the present case, there is no dispute that under Lithuanian law, an appeal before an administrative court against a refusal of entry does not have automatic suspensive effect (see paragraphs 38, 77 and 79 above). Therefore, even if the applicants had lodged such an appeal, in line with Lithuanian law they would have been immediately returned to Belarus rather than allowed to wait for the outcome of that appeal at the border or in a reception centre for aliens. Accordingly, it cannot be considered an

effective domestic remedy within the meaning of Article 35 § 1 of the Convention which the applicants were obliged to exhaust.

85. Although the Government argued that the lack of automatic suspensive effect was in line with the Schengen Borders Code (see paragraph 77 above), the Court considers this immaterial for its assessment of the effectiveness of the remedy within the meaning of the Convention. In any event, it observes that Article 14 § 1 of the Schengen Borders Code provides that its rules on refusal of entry "shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection" (see paragraph 57 above).

86. The Court therefore dismisses the Government's objection concerning exhaustion of domestic remedies.

3. Conclusion

87. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

88. The applicants firstly submitted that there was sufficient evidence that they had asked for asylum at the Lithuanian border. On 16 April 2017 they had written "azul'" on each of the seven decisions on refusal of entry (see paragraph 11 above) – they argued that that term was commonly used by asylum seekers from Chechnya, and thus border guards with proper training should have recognised it. Meanwhile, the fact that they had asked for asylum on 22 May 2017 was proved by the copy of their written asylum application and the photograph of that application next to their train tickets which they had provided to the Court (see paragraph 18 above). The applicants further submitted that neither the decisions on refusal of entry nor the border guards' official reports to their superiors had contained any information about the content of the communication between the applicants and the border guards (see paragraphs 10, 12, 15, 16, 19 and 20 above). The official reports had not been presented to the applicants and they had not been given the opportunity to comment on them. Accordingly, the applicants argued that those reports could not serve as evidence that they had failed to ask for asylum.

89. The applicants also submitted that situations similar to theirs, when border guards refused to accept asylum applications, had occurred in the

past – they referred to, *inter alia*, the comments of UNHCR with regard to Lithuania (see paragraph 53 above), as well as a case before Lithuanian administrative courts concerning denial of access to the asylum procedure (see paragraphs 48-50 above). The applicants therefore argued that denial of access to international protection procedures at the Lithuanian border might be of “a systematic character”.

90. The applicants further contended that, even in the absence of explicit asylum requests, Lithuanian law obliged border guards to take a “proactive approach” in identifying potential asylum seekers and informing them about their rights and the relevant procedures (see paragraph 28 above). The applicants argued that such an approach was required by the Court as well, and referred in particular to the judgment in *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, § 157, ECHR 2012). They also submitted that, according to the available statistics, a significant percentage of all asylum seekers in Lithuania were of Chechen origin (see paragraph 98 below), and that in itself should have been an indication to the border guards that the applicants might wish to seek asylum.

91. The applicants further submitted that refusing to examine their asylum applications and returning them to Belarus had been contrary to the principle of *non-refoulement* enshrined in various international law instruments. They contended that Belarus had no functioning international protection mechanism and was known for returning Chechen individuals to Russia.

92. They lastly submitted that the first applicant had been subjected to torture in Chechnya and that he was at high risk of being tortured again, were he to return there. Various human rights organisations regularly reported on serious human rights violations in Chechnya, such as extrajudicial executions, forced disappearances, torture, ill-treatment and illegal detention, and the violations of human rights in Chechnya were demonstrated by more than 200 judgments issued by the Court against Russia. The applicants therefore argued that the Lithuanian authorities’ refusal to examine their asylum applications had exposed them to a real risk of serious harm in Chechnya.

(b) The Government

93. The Government firstly submitted that there was no “direct evidence” that the applicants had “in any way expressed willingness to apply for asylum in Lithuania”. In response to the applicants’ submission that on 16 April 2017 they had written “azul’” on the decisions to refuse them entry instead of their signatures (see paragraph 88 above), the Government argued that the border guards should not have been expected “to doubt the validity of the signatures” and interpret that as a request for asylum. The Government stated that knowledge of the Russian language was not obligatory for border guards in Lithuania, and that someone

unfamiliar with that language would not have been able to understand what the applicants had written in Cyrillic script. The Government also pointed out that the applicants had not written anything similar on the decisions to refuse them entry on the other two occasions (see paragraphs 15 and 19 above). The Government argued that the applicants should have asked for asylum "in a more straightforward way".

94. They also submitted that the official reports drawn up by border guards on each of the three occasions when the applicants had attempted to enter into Lithuania contained the details of the applicants' attempts to enter into the country and the reasons for refusing entry (see paragraphs 12, 16 and 20 above). It was clear from those reports that "the border guards had not noticed any indications of the applicants' willingness to ask for asylum". The Government submitted that the applicants had not been able to comment on the reports because these had been internal documents which had not been addressed to the applicants. Nonetheless, had the applicants appealed against the decisions to refuse them entry before the administrative courts, they would have been able to familiarise themselves with the officers' reports.

95. The Government further contended that UNHCR, in its submissions to the Office of the High Commissioner for Human Rights (see paragraph 53 above), had not included any data on refusals to accept asylum applications at the border and had only referred to a single case of two Afghan nationals; that case had been examined by Lithuanian courts, which had acknowledged the violation of the appellants' rights and provided them with redress. The Government submitted that the applicants had not provided any reliable evidence of asylum applications having been refused at the Lithuanian border. In the only case to which the applicants had referred (see paragraphs 48-50 and 89 above), the courts had obliged the domestic authorities to allow the appellants to submit asylum applications. In the Government's view, that case demonstrated the effectiveness of the domestic remedy which the applicants had failed to exhaust (see paragraphs 73-77 above).

96. The Government further submitted that Lithuanian law was in full compliance with international human rights standards relating to asylum, including the principle of *non-refoulement*. The Aliens Law required border guards to take a proactive approach and to inform aliens at the border, in a language which they understood, about the right to seek asylum and the relevant procedures (see paragraph 28 above). The Government submitted that information about asylum seekers' rights was provided at all border checkpoints – there were leaflets in several languages prepared by UNHCR and the Lithuanian Red Cross, distributed in places accessible to asylum seekers (see paragraph 47 above).

97. Furthermore, the status and duties of border officials were subject to strict regulations and a system of supervision, which allowed higher-ranking

officials to identify any deficiencies in border control procedures and thereby prevented errors in the application of the law. All border guards received training on human rights, including the right to seek asylum, and the actions to be taken when an asylum application was submitted at the border. In addition, following the Memorandum of Understanding signed between the SBGS, UNHCR and the Lithuanian Red Cross in 2010 (see paragraph 47 above), representatives of UNHCR had the right to monitor the reception of asylum seekers at the border, providing additional safeguards to ensure that asylum applications were properly registered and transferred to the competent authorities for examination.

98. The Government stated that during the first nine months of 2017, the Lithuanian authorities had received 428 asylum applications (up from 257 such applications during the same period in 2016, and 205 applications in 2015). Twenty-one of the asylum applications submitted in 2017 were by individuals of Chechen origin.

99. The Government therefore argued that the applicants had had the possibility to submit asylum applications at the border, but had not done so. In this connection, the Government submitted that Lithuania, being a country on the external border of the Schengen area, was perceived by prospective asylum seekers as "a transit country on the way to destinations in Western Europe", which might explain "the applicants' unwillingness to submit their asylum applications in Lithuania, aiming to other destinations instead".

100. They further argued that "in the absence of any indications of the applicants' willingness to ask for asylum", the border guards had been obliged to apply the relevant domestic and EU legal instruments on border control, and the domestic authorities had not had any reason to conduct an investigation into the potential risks which the applicants might have faced if returned to Russia.

101. The Government lastly submitted that since the applicants had been allowed to legally stay in Belarus until 10 July 2017, returning them there in April and May 2017 had not exposed them to any risk related to their return to Russia.

2. *The Court's assessment*

(a) Relevant general principles

102. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. Nevertheless, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or

degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Paposhvili v. Belgium* [GC], no. 41738/10, §§ 172-73, 13 December 2016, and the cases cited therein; see also the international material cited in paragraphs 51, 56 and 58 above, and the relevant domestic law in paragraph 36 above).

103. As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention. Accordingly, in cases of this kind, the authorities' obligation under Article 3 to protect the integrity of the persons concerned is fulfilled primarily through appropriate procedures allowing such examination to be carried out (ibid., §§ 184-85, and the cases cited therein).

104. The Court also reiterates that indirect *refoulement* of an alien leaves the responsibility of the Contracting State intact, and that State is required, in accordance with the well-established case-law, to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Article 3 in the event of repatriation. It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his or her country of origin without an assessment of the risks faced. That obligation is all the more important when the intermediary country is not a State Party to the Convention (see *Hirsi Jamaa and Others*, cited above, §§ 146-47, and the cases cited therein).

(b) Application of the above principles in the present case

105. In the present case, the applicants argued that they faced a risk of torture in Chechnya and that Belarus could not be considered a safe third country (see paragraphs 91 and 92 above). The Court takes note of the publicly available information about the human rights situation in Chechnya and the deficiencies of the asylum system in Belarus (see paragraphs 61-65 above). However, in the circumstances of the present case, it considers that the central question to be answered is not whether the applicants faced a real risk of ill-treatment in Chechnya, but whether the Lithuanian authorities carried out an adequate assessment of the applicants' claim that they would be at such a risk before returning them to Belarus on 16 April, 11 May and

22 May 2017 (see *Babajanov v. Turkey*, no. 49867/08, § 43, 10 May 2016; *Amerkhanov v. Turkey*, no. 16026/12, § 52, 5 June 2018; and *Batyrkhairov v. Turkey*, no. 69929/12, § 46, 5 June 2018).

106. The Court notes that Lithuanian law explicitly provides for the SBGS and its officers being obliged to accept asylum applications submitted at the border (see paragraphs 45 and 46 above). The law does not allow the SBGS to refuse entry into Lithuania to aliens who have submitted asylum applications, and the decision on whether to examine an asylum application on the merits is taken by the Migration Department, not the SBGS (see paragraphs 31 and 32 above). The domestic law does not provide for any instances when border guards may refuse to accept asylum applications, and domestic courts have explicitly held that even unsubstantiated applications have to be registered and the reasons for those applications clarified (see paragraphs 48-50 above).

107. The major disagreement between the parties in the present case was whether the applicants had actually submitted asylum applications at the border (see paragraphs 88, 93 and 94 above). The Court observes at the outset that on each of the three occasions the applicants presented themselves before border guards, provided their identity documents and did not attempt to hide the fact that they did not have visas or other documents giving them the right to enter into Lithuania (see paragraphs 12, 16 and 20 above). It considers the applicants' behaviour consistent with their claim that the purpose of their presence at the Lithuanian border was to ask for asylum (compare and contrast *R.H. v. Sweden*, no. 4601/14, § 72, 10 September 2015).

108. As concerns 16 April 2017, the applicants claimed that they had firstly expressed their wish for asylum to border guards orally – a claim contested by the Government (see paragraphs 9 and 93 above). However, it is not disputed that they also wrote "azul'" in Cyrillic – a word often used by Chechen asylum seekers to mean "asylum" – on all the seven decisions refusing them entry into Lithuania (see paragraphs 11 and 88 above). The Government argued that the border guards had not been required to know the Russian language or understand Cyrillic script, nor had they been obliged to verify what had been written in the place of the signature (see paragraph 93 above). The Court firstly observes that the Government have not provided any information on whether any of the border guards who were on duty at the Medininkai border checkpoint on that day could actually speak Russian or read Cyrillic. It also observes that the Medininkai checkpoint is located on the border with Belarus, where Russian is one of the official languages, and that according to the Schengen Borders Code, member States shall encourage border guards to learn the languages necessary for carrying out their tasks (see Article 16 § 1 of the Code, cited in paragraph 57 above). In any event, assuming that none of the border guards at the Medininkai checkpoint spoke Russian, the Court then cannot

accept the Government's argument that the applicants "had not in any way expressed willingness to seek asylum" (see paragraph 93 above), as those border guards would not have been able to understand the applicants' oral requests made in Russian. In this connection, the Court underlines the importance of interpretation in order to ensure access to the asylum procedure (see *M.S.S. v. Belgium and Greece*, cited above, § 301). It also refers to the requirement under the Asylum Procedures Directive for the authorities to make arrangements for interpretation (see paragraph 60 above), and the UNHCR recommendations to the same effect (see paragraph 52 above). The Government did not argue that finding a Russian to Lithuanian interpreter would have been particularly difficult.

109. The Court further observes that UNHCR, in its submissions to the Office of the High Commissioner for Human Rights regarding Lithuania, emphasised that a wish to apply for asylum did not need to be expressed in any particular form (see paragraph 53 above). Similarly, the Committee of Ministers of the Council of Europe has recommended that member States provide border officers with training to enable them to detect and understand asylum requests, even in cases where asylum seekers are not in a position to clearly communicate their intention to seek asylum (see paragraph 55 above). In the light of these factors, the Court considers that the word "azul'" being written on the seven decisions refusing the applicants entry into Lithuania should have been sufficient indication for the border guards at the Medininkai checkpoint that the applicants were seeking asylum.

110. The Court will next examine the events at the Vilnius railway border checkpoint on 22 May 2017. The applicants provided to the Court a copy of a written asylum application and a photograph of that application next to their train tickets from Minsk to Vilnius – they claimed that the photograph had been taken at the border checkpoint and that they had submitted that application to the border guards (see paragraphs 18 and 88 above). The Government did not challenge the authenticity of the asylum application or the photograph, nor did they dispute the applicants' claim that that photograph had been taken at the border checkpoint. In such circumstances, the Court sees no grounds to doubt the applicants' claim that on 22 May 2017 they submitted a written asylum application at the Vilnius railway border checkpoint.

111. As for 11 May 2017, the Court does not have any direct proof that the applicants asked for asylum. They claimed to have done so orally (see paragraph 14 above) and the Government contested that claim. The Government also pointed out that on that occasion the applicants had not written "azul'" or anything similar on the decisions refusing them entry (see paragraph 93 above). In the Court's view, the applicants cannot be reproached for not writing down their asylum request on the decisions refusing them entry, as they had previously done so at the Medininkai

border checkpoint but to no avail (see paragraphs 9-12 above). It further observes that the details provided by the applicants, such as the date and time of their arrival at the Kena border checkpoint, corresponded to those contained in the border guards' official reports (see paragraphs 14 and 16 above), and the applicants' account of their attempt to submit an asylum application at that checkpoint was consistent with their accounts of the other two attempts, which the Court has found to be credible on the basis of the available documents (see paragraphs 108-110 above). In such circumstances, the Court also accepts as credible the applicants' submission that on 11 May 2017 they orally informed the border guards at the Kena border checkpoint that they were seeking asylum (compare and contrast *M.O. v. Switzerland*, no. 41282/16, § 75, 20 June 2017).

112. In addition, the applicants' version of events is consistent with the submissions of UNHCR to the Office of the High Commissioner for Human Rights regarding Lithuania, in which it stated that there were "some concerns regarding access to the territory and asylum procedure" and that it was aware of "instances whereby delays in accessing asylum procedures [had] occurred" (see paragraph 53 above; see also *Kebe and Others*, cited above, § 105).

113. Accordingly, the Court is satisfied that the applicants submitted asylum applications, either orally or in writing, at the Lithuanian border on 16 April, 11 May and 22 May 2017. However, border guards did not accept those applications and did not forward them to a competent authority for examination and status determination, as required by domestic law (see paragraph 30 above; see also the Asylum Procedures Directive cited in paragraph 60 above). Furthermore, border guards' reports to their senior officers did not make any mention of the applicants' wish to seek asylum on any of the three occasions (see paragraphs 12, 16 and 20 above) – there were no references to the writing of "azul'" on the decisions, nor to the written asylum application. There was also no indication either in those reports or in any other documents submitted to the Court that the border guards had attempted to clarify what was the reason – if not seeking asylum – for the applicants' presence at the border without valid travel documents. Nor does it appear that there was any assessment at all of whether it was safe to return the applicants – a family with five very young children – to Belarus, which is not a Contracting Party to the European Convention on Human Rights and, according to publicly available information, cannot be assumed to be a safe third country for Chechen asylum seekers (see paragraphs 64-65 above).

114. As a result, the applicants were returned to Belarus without there being any assessment of their asylum claims (see, *mutatis mutandis*, *Hirsi Jamaa and Others*, § 147; *Amerkhanov*, § 57; and *Batyrkhairov*, § 50, all cited above). It is therefore evident that measures which the Government claimed constituted adequate safeguards against the arbitrary removal of

asylum seekers – such as the supervision of border guards by superior officers or the monitoring of borders by non-governmental organisations (see paragraphs 96 and 97 above) – were not effective in the present case.

115. The Court therefore concludes that the failure to allow the applicants to submit asylum applications and their removal to Belarus on 16 April, 11 May and 22 May 2017, in the absence of any examination of their claim that they would face a real risk of return to Chechnya and ill-treatment there, amounted to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

116. The applicants complained that they had not had an effective remedy against the decisions refusing them entry into Lithuania. They relied on Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

117. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

118. The parties submitted essentially the same arguments as those in their observations concerning the exhaustion of domestic remedies with regard to the applicants' complaint under Article 3 of the Convention (see paragraphs 73-81 above).

2. The Court's assessment

119. The Court has already held that an appeal before an administrative court against a refusal of entry was not an effective domestic remedy within the meaning of the Convention because it did not have automatic suspensive effect (see paragraphs 83-86 above). The Government did not indicate any other remedies which might satisfy the criteria under Article 13 of the Convention. Accordingly, the Court finds that there has been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

(a) The applicants

121. The applicants claimed 5,540 euros (EUR) in respect of pecuniary damage for living expenses incurred in Belarus and the costs of travelling to the Lithuanian border. They did not submit any documents in support of that claim.

122. The applicants also claimed EUR 175,000 in respect of non-pecuniary damage:

- EUR 15,000 per person (EUR 105,000 in total) for the denial of access to the asylum procedure, repeated removals to an unsafe third country and the absence of an effective remedy;
- EUR 10,000 per person (EUR 70,000 in total) for unsuitable living conditions in Belarus and inappropriate conditions of detention at the Lithuanian border.

(b) The Government

123. The Government submitted that the applicants' living expenses in Belarus related not only to their attempts to enter into Lithuania but also Poland (see paragraphs 8 and 22 above) and were therefore not related to the violations found in the present case. They also submitted that the applicants had not provided any supporting documents to prove the amount claimed.

124. The Government further submitted that the applicants' claim in respect of non-pecuniary damage was excessive and unsubstantiated.

2. The Court's assessment

125. The Court firstly notes that the applicants did not submit any documents to confirm the expenses which they claimed in respect of pecuniary damage. It therefore rejects this claim.

126. The Court further observes that, in the present case, it has found a violation of the applicants' rights under Article 3 of the Convention on account of the fact that on three occasions border guards refused to accept their asylum applications and they were returned to Belarus, and also on

account of their rights under Article 13 of the Convention in view of the lack of an effective domestic remedy with regard to their Article 3 complaint. It considers that the applicants' claim in respect of non-pecuniary damage for their living conditions in Belarus and their conditions of detention at the Lithuanian border is not related to the violations found; it therefore rejects this part of the claim.

127. On the other hand, the Court is convinced that the applicants suffered distress and anxiety as a result of the violations found. However, it considers the amount claimed by them to be excessive. Making its award on an equitable basis, the Court awards the applicants EUR 22,000 jointly in respect of non-pecuniary damage.

B. Costs and expenses

128. The applicants did not submit any claim in respect of costs and expenses. The Court therefore makes no award under this head.

C. Default interest

129. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by four votes to three, that there has been a violation of Article 3 of the Convention in respect of all seven applicants;

3. *Holds*, by four votes to three, that there has been a violation of Article 13 of the Convention in respect of all seven applicants;

4. *Holds*, by four votes to three,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, jointly EUR 22,000 (twenty-two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Pinto de Albuquerque;

(b) Joint dissenting opinion of Judges Ravarani, Bošnjak and Paczolay.

G.Y.
A.N.T.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. There is surely no more burning issue in European politics today than the *refoulement* of migrants at land borders or in transit zones and the resulting State liability for human-rights breaches during immigration and border-control operations.[1] Until now, the European Court of Human Rights ("the Court") has remained faithful to its role as guarantor of Convention rights in this regard and the present judgment has the merit of reinforcing this role in a case concerning the collective denial of access to the territory of the Lithuanian State, at its land borders, to a family of seven Russian nationals. Hence, I agree with the majority that there has been a violation of Article 3 of the European Convention on Human Rights ("the Convention"), due to the refusal of entry without an examination of the individual situation of the applicants, which resulted in the real risk of a return to Chechnya and ill-treatment there, as well as of Article 13 due to the lack of an effective remedy, namely a remedy with automatic suspensive effect.

2. Nonetheless, I would like to take this opportunity to complement the reflexions already developed in my concurring opinions in *Hirsi Jamaa and Others v. Italy*[2] and *De Souza Ribeiro v. France*,[3] in view of the current attacks on this case-law being waged by certain Governments and political parties. For that purpose, I will expand on the respondent State's exercise of jurisdiction at its land borders and its obligation to protect the Convention rights of those asylum-seekers who come under its jurisdiction, and, in particular, asylum-seekers' right of access to the international protection procedure.

Jurisdiction at land borders under the Convention

3. It is the case-law of the Court that the exercise of jurisdiction is a *condition sine qua non* for engaging the responsibility of the State.[4] In

[1] For the purposes of this opinion, the notions of *refoulement*, refugee and asylum-seeker are to be understood with the meaning given in my separate opinion in *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.

[2] *Hirsi Jamaa and Others*, cited above. On the *Hirsi* case, see, among others, Papastavridis, "European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?" in Fitzmaurice and Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Leiden: Brill, 2013; Giuffré, "Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy (2012)" (2012) 61 *International and Comparative Law Quarterly* 728; and Moreno-Lax, "Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?" (2012) *Human Rights Law Review* 574.

[3] *De Souza Ribeiro v. France [GC]*, no. 22689/07, 13 December 2012.

Hirsi Jamaa and Others, the Court reiterated that, "[w]henever the State through its agents ... exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual".[5] The Court concluded that in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Remarkably, the Court considered that Italy could not circumvent its jurisdiction under the Convention by describing the events in issue as rescue operations on the high seas.[6] To be clearer, the *Hirsi Jamaa and Others* case-law to the effect that Article 4 of Protocol No. 4 is not limited to territorial removal, but also includes the extraterritorial removal of migrants, aims at closing any gap in protection: for the Court there is no "area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."[7]

4. If the removal of aliens on the high seas in the circumstances of the *Hirsi Jamaa and Others* case constitutes an exercise of jurisdiction, *a fortiori* the non-admission or rejection of migrants at the land border also constitutes such exercise of jurisdiction. To put it differently, the Convention and its Protocols apply to migrants who (lawfully or unlawfully) have crossed a borderline, since territorial jurisdiction starts at the borderline and there is no reduction or waiver of a State's jurisdiction depending on any physical border. Any other interpretation, which would limit jurisdiction by artificially moving the border inwards and creating a gap in protection, would breach the obligation to interpret the Convention and its additional protocols in good faith, in the light of their object and purpose and in accordance with the principle of effectiveness.[8] As I have argued elsewhere, the "excision" of a part of a State's territory from the migration zone in order to avoid the application of general legal guarantees

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[4] For example, *Al Skeini and Others v. the United Kingdom*, no. 55721/07, § 130, 7 July 2011.

[5] *Hirsi Jamaa and Others*, cited above, § 74. The Inter-American Court of Human Rights has taken a similar approach. See, for instance, IACrtHR, 16 February 2017, *Favela Nova Brasilia v. Brazil*, Series C no. 333, § 174; IACrtHR, 29 July 1988, *Velásquez Rodriguez v. Honduras*, Series C no. 4, § 164.

[6] It is highly significant that in *Sharifi and Others v. Italy*, no. 16643/09, 21 October 2014, the Italian Government did not even raise the issue of jurisdiction.

[7] *Hirsi Jamaa and Others*, cited above, § 178. This is not a new concern for the Court. In *Sargsyan v. Azerbaijan [GC]*, no. 40167/06, § 148, 16 June 2015, the Court recognised the respondent State's jurisdiction over a militarily disputed area, "taking into account the need to avoid a vacuum in Convention protection".

[8] *Hirsi Jamaa and Others*, cited above, § 179.

to people arriving in that part of the "excised" territory represents a blatant circumvention of a State's obligations under international law.[9] This was precisely the issue again in *N.D. and N.T v. Spain.*[10]

5. In *N.D. and N.T. v. Spain*, the Court rightly persevered in the footsteps of the *Hirsi and Jamaa and Others* case-law, by highlighting that, "where there is control over another this is *de jure* control exercised by the State in question over the individuals concerned ..., that is to say, effective control by the authorities of that State whether those authorities are inside the State's territory or on its land borders".[11] For that reason, the Court flatly rejected the respondent Government's view that, even supposing that "the border fence were inside Spain's land borders", the actions of the law-enforcement authorities in apprehending the applicants, handcuffing them and sending them back to Morocco did not come within Spain's jurisdiction for the purposes of Article 4 of Protocol No. 4.[12] The crucial point for the Court was that Spanish jurisdiction is also exercised on the land between the fences at the Melilla border crossing, and not just beyond the protective structures of that crossing. From the point at which the applicants climbed down from the border fences they were under the continuous and exclusive control, at least *de facto*, of the Spanish authorities.[13] This confirms my view that "immigration and border control is a primary State function and all forms of this control result in the exercise of the State's jurisdiction".[14]

Jurisdiction at land borders under international refugee law

6. The acknowledgement of the State's exercise of jurisdiction at its borders is all the more important in that it makes it possible to consider fully the relationship between human rights and refugee law[15] and more precisely to ensure the respect of the principle of *non-refoulement,*[16] which constitutes the "cornerstone of international refugee protection".[17]

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[9] My separate opinion in *Hirsi Jamaa and Others*, cited above.
[10] *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, 3 October 2017.
[11] *N.D. and N.T.*, cited above, § 54.
[12] *N.D. and N.T.*, cited above, § 52.
[13] This is in line with the ICJ, 9 July 2004, Adv. Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, which did not consider those parts of the wall that were built by Israel inside its own territory, thereby implicitly recognising it as an internal matter of the State of Israel.
[14] See my concurring opinion in *Hirsi Jamaa and Others v. Italy* [GC], cited above.
[15] In this regard, the Committee on the Rights of the Child states that "when assessing refugee claims..., States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention" (25 January 2018, *I.A.M. v. Denmark*, no. 3/2016, § 11.3).
[16] With regard to the principle of *non-refoulement*, see Article 33 of the 1951 Geneva

7. Indeed, the very definition of the French term “*refoulement*”, such as endorsed by Gerard Cornu – who states that it is a “*mesure par laquelle un État interdit le franchissement de sa frontière à un étranger qui sollicite l’accès à son territoire*”[18] – as well as by Denis Alland and Catherine Teitgen-Colly – according to whom this notion means both “*l’éloignement du territoire*” and “*la non-admission à l’entrée*”[19] – warrants the inclusion of border checks within the scope of the jurisdiction of States Parties.[20] Besides, the principle of *non-refoulement* would be purely fictional if the State could prevent the application of the principle by means of push-back policies or non-admission or rejection at the border.[21] In this sense, the UNHCR Executive Committee clearly emphasised the “fundamental importance of the observance of the principle of *non-refoulement* - both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees”[22]. This principle of international refugee law has also been enshrined in European Union law,[23] and recognized by the Parliamentary Assembly[24] and

Convention relating to the Status of Refugees.

[17] UNHCR, 26 January 2007, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, p. 2, part I) A) 1) i) 5).

[18] *Dictionnaire juridique*, Gérard Cornu. – 11e ed. – Paris: Quadrige/ PUF, 2016, p. 877.

[19] *Traité du droit de l’asile*, Alland and Teitgen-Colly. – Paris: Lgdj, 2002, p. 229.

[20] In this regard, see Lauterpacht and Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion”, in Refugee Protection in International Law – UNHCR’s Global Consultation on International Protection, Cambridge, 2003, 97-149, sp. p. 111: “It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.”. See also the *Commentary to Draft articles on the expulsion of aliens* (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), Article 2 (5) .

[21] In this regard, see for example Article 3.1 of the Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967): “No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution”.

[22] UNHCR, Executive Committee, 12 October 1977, *Non-refoulement*, No.6 (XXVIII)-1977 (c); see also UNHCR, Executive Committee, 23 August 1977, *Note on Non-Refoulement*, EC/SCP/2.

[23] A combined reading of Articles 2(2)(a), 4(4) and 5 of Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals shows indeed that the principle of *non-refoulement* applies in the event of a refusal of entry at the border. In this regard, see, for example, the FRA report, December 2016, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (http://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-

Committee of Ministers of the Council of Europe[25], and by the Inter-American Commission on Human Rights[26].

8. In its *Report on the Human Rights Situation of Refugees and Migrant Families and Unaccompanied Children in the United States of America* (2015), the Inter-American Commission has specifically stated that a State's jurisdiction "include[s] its international borders or any place a State executes border governance actions"[27]. That is, all border governance actions are within the State's jurisdiction, with a strong presumption of the State's effective control at its borders.[28] Such an interpretation was also advocated by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when he stated that "it is essential to ensure that there is no vacuum of human rights protection that is due to inappropriate and artificial limits on territorial jurisdiction".[29] In this regard, one should always recall that, "from the perspective of people

border-management-evolving-areas-law), 15-16 and 38-39.

[24] See, for example, PACE, 21 June 2011, Resolution 1821 (2011), *The interception and rescue at sea of asylum-seekers, refugees and irregular migrants*, sp. §§ 7-9.12; PACE, 25 January 2000, Recommendation 1440 (2000), *Restrictions on asylum in the member states of the Council of Europe and the European Union*, sp. §§ 5-6.6.

[25] See, for example, CM, Resolution 67 (14), 29 June 1967, *Asylum to persons in danger of persecution*.

[26] In this regard, see *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, OEA/Ser.L./V/II.95, Doc. 7 rev., 13 March 1997, § 157; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev. (2000), 28 February 2000, § 25: "The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily requires that such persons cannot be rejected at the border or expelled without an adequate, individualized examination of their claim" and, recently, IACHR, OAS/Ser.L/V/II. 155 Doc. 16. In this report the Commission affirms firstly that "[t]he principle of *non-refoulement* also applies to asylum-seekers and refugees whose status has not yet been determined; refugees who have not yet been recognized officially as such; as well as by those who assert their right to seek and receive asylum and who are either on an international border or have crossed it without being admitted officially or legally into the territory of the State" (p. 48, § 101). Interestingly, the Commission also points out that it "shares the view of the European Court on Human Rights expressed in *Hirsi Jamaa and Others v. Italy* that the prohibition on collective expulsions applies to any measure which has the effect of preventing migrants from reaching the borders of States or to push them to another State" (p. 49, § 105). Lastly the Commission points out that this can even involve extraterritorial exercise of jurisdiction "when this means that [the persons concerned] are prevented from presenting a claim for asylum or *non-refoulement*" (ibid).

[27] IACHR, OAS/Ser.L/V/II. 155 Doc. 16, 24 July 2015, p. 29, §39, footnote 22.

[28] The European Court of Human Rights has already retained such a presumption regarding the exercise of jurisdiction throughout the State's territory. See *Al Skeini and Others*, cited above, §131; in this sense, see also *Assanidze v. Georgia*, no. 71503/01, § 139, 8 April 2004.

[29] UN, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, (doc. A/70/303, 7 August 2015), § 13.

applying for protection, the content given to *non-refoulement* can be a question of life and death”.[30]

Jurisdiction in the case at hand

9. In the present case, the respondent State did not dispute that it had exercised jurisdiction at its borders when the State Border Guard service issued decisions on refusal of entry in respect of the applicants on 16 April 2017 and returned them to Belarus;[31] issued new decisions on refusal of entry in their respect on 11 May 2007, detaining the applicants at the border checkpoint for several hours and returning them to Belarus;[32] and issued again new decisions on refusal of entry in respect of the applicants on 22 May 2007, detaining them at the border checkpoint overnight and returning them to Belarus.[33] In view of these facts, the applicants were undeniably under the effective control of the Lithuanian border officials. Thus, I fully agree with the majority, which state that it is “evident that the actions complained of by the applicants were imputable to Lithuania”[34].

10. In other words, the approach adopted by the Chamber in the present case avoids a situation in which the Lithuanian State circumvents its jurisdiction and thus escapes its obligations under the Convention. Such an interpretation of the notion of a State’s jurisdiction is indeed not only the necessary prerequisite to ensure the effective access of the applicants to international protection, but also and more broadly guarantees the effective protection of their fundamental rights and consequently makes it possible to avoid a situation in which the Lithuanian State’s borders become a “no man’s land”. It is indeed essential that “all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court”[35].

Immediate refusal and return of migrants at land borders

11. In *Hirsi Jamaa and Others*, the Italian Government submitted that Article 4 of Protocol No. 4 was not applicable to that case, since the guarantee provided by the above provision came into play only in the event of expulsion of persons who were on the territory of a State or who had crossed the national border illegally and, in the relevant case, the measure in

[30] Jari Pirjola, “Shadows in Paradise – Exploring *Non-Refoulement* as an Open Concept” (2007) 19 *International Journal of Refugee Law* 656.
[31] Paragraph 10 and 13 of the present judgment.
[32] Paragraph 15 and 17 of the judgment.
[33] Paragraph 18 and 21 of the judgment.
[34] Paragraph 70 of the judgment.
[35] See my concurring opinion in *Hirsi Jamaa and Others*, cited above.

issue was a refusal to authorise entry to national territory rather than "expulsion". The applicants argued that such a prohibition should also apply to measures to push back migrants on the high seas, carried out without any preliminary formal decision, in so far as such measures could constitute "hidden expulsions". A teleological and "extraterritorial" interpretation of that provision would render it practical and effective rather than theoretical and illusory.

12. The Court defined the legal issues at stake as follows: "[T]he Court must, for the first time, examine whether Article 4 of Protocol No. 4 applies to a case involving the removal of aliens to a third State carried out outside national territory."[36] To this question, the Court gave a straightforward answer: "the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of 'territory'."[37] Furthermore, the Court added that "according to the drafters of Protocol No. 4, the word 'expulsion' should be interpreted '"in the generic meaning, in current use (to drive away from a place)'."[38] Most importantly, a purposeful interpretation of the said provision, in the light of the principle of effectiveness, implies that,

> "If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land."[39]

13. Hence, the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.[40] Consequently, the Court found a violation of Article 4 of Protocol No. 4, since "the removal of the applicants was of a collective nature".[41] Drawing all the consequences from this reasoning, it is legitimate to state that

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[36] *Hirsi Jamaa and Others*, cited above, § 169.
[37] *Hirsi Jamaa and Others*, cited above, § 173.
[38] *Hirsi Jamaa and Others*, cited above, § 174.
[39] *Hirsi Jamaa and Others*, cited above, § 177.
[40] *Hirsi Jamaa and Others*, cited above, § 180.
[41] *Hirsi Jamaa and Others*, cited above, § 186. With regard to Article 4 of Protocol No. 4,

"The purpose of the provision (Article 4 of Protocol No. 4) is to guarantee the right to lodge a claim for asylum which will be individually evaluated, regardless of how the asylum-seeker reached the country concerned, be it by land, sea or air, be it legally or illegally. Thus, the spirit of the provision requires a similarly broad interpretation of the notion of collective expulsion which includes any collective operation of extradition, removal, informal transfer, "rendition", rejection, refusal of admission and any other collective measure which would have the effect of compelling an asylum-seeker to remain in the country of origin, wherever that operation takes place."[42]

14. In spite of the unanimous finding of the Grand Chamber in *Hirsi Jamaa and Others* on the broad meaning of "expulsion" for the purposes of Article 4 of Protocol No. 4, some States continued to ignore, and occasionally impugn, this case-law. In *N.D. and N.T.*, the respondent Government argued that Article 4 of Protocol No. 4 to the Convention was not applicable to that case. In their submission, the facts of the case did not amount to a "collective expulsion of aliens", just as the Italian Government had maintained in *Hirsi Jamaa and Others*[43] and again in *Sharifi and Others*.[44] Since the applicants had not succeeded in getting past the land border protection structures of three successive fences, the Spanish Government argued that they had not entered Spanish territory and that the conduct of the police forces was aimed only at lending them assistance to climb down from the third fence. This was exactly the same line of reasoning as that used by the Italian Government, which claimed to have been assisting people on the high seas while boarding them onto Italian vessels in the Mediterranean and taking them to Africa.

15. In the Spanish case, the Court used a logically impeccable *a fortiori* argument to counter the Government's position: "Given that even interceptions on the high seas come within the ambit of Article 4 of Protocol No. 4 (see *Hirsi Jamaa and Others*, cited above), the same must also apply to the allegedly lawful refusal of entry to the national territory of persons arriving in Spain illegally."[45] Since the applicants were removed and returned to Morocco against their wishes, this clearly amounted to an "expulsion" within the meaning of Article 4 of Protocol No. 4.[46] That expulsion was also a "collective" one, in that the number of aliens made

the Court used interchangeably the word "removal" in paragraphs 169, 176, 180, 204 and 205, the word "return" in paragraphs 201-203 and the word "expulsion" in paragraphs 166, 168, 169, 172-174, 177, 178, 183 and 184. The Court also referred to the principle of *non-refoulement* in paragraphs 134, 135 and 146 under the Article 3 evaluation.

[42] My separate opinion in *Hirsi Jamaa and Others*, cited above.

[43] *Hirsi Jamaa and Others*, cited above, § 160.

[44] *Sharifi and Others*, no. 16643/09, § 193, 21 October 2014. The High Commissioner for Refugees expressed his concern with the Italian policy of refusal of admission to the territory and "immediate *refoulement*" in the Adriatic ports regarding persons coming from Greece (ibid., § 205).

[45] *N.D. and N.T.*, cited above, § 104. Exactly the same argument had already been used in *Sharifi and Others v. Italy*, § 212,

[46] *N.D. and N.T.*, cited above, § 105.

subject to such decisions is irrelevant, the important question being whether there had been an individual assessment of each migrant's claims. In *N.D. and N.T.*, there had been no such individual assessment of the applicants' claims. Furthermore, the Court noted that the applicants were turned back immediately by the border authorities and had no access to an interpreter or to any official who could provide them with the minimum amount of information required with regard to the right of asylum and/or the relevant procedure for appealing against their expulsion. No requirement was made regarding the national, racial, ethnic, religious or otherwise homogeneity of the members of the group targeted by the expulsion. In view of the "immediate nature of their *de facto* expulsion", the Court found that there had been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.[47]

16. In view of the present adverse political climate in respect of asylum-seekers and migrants in general and towards African migrants arriving in Europe in particular, and of the attendant mounting pressure on the Court on the part of some Governments, the Court's firmness in the Melilla case must be emphasised.[48] The Court did not abandon its principled position on the purposeful interpretation of the concept of "expulsion" for the purposes of Article 4 of Protocol No. 4, which includes any "immediate ... *de facto* expulsion", or to use the words of the drafters of Protocol No. 4, any form of driving a person away from a place, such as non-admission, rejection and return of migrants at the land border. With regard to the respondent Government's arguments concerning Spain's duty as a sovereign State to

[47] *N.D. and N.T.*, cited above, § 121. In other words, the Court equated the immediate return of the applicants to a "*de facto* expulsion".

[48] On the situation on the ground in Melilla and the Spanish response to the migration pressure, see the astonishing reports of the Committee for the Prevention of Torture (CPT/Inf (2015) 19), 9 April 2015, and of Amnesty International, *Fear and Fences, Europe's approach to keeping refugees at bay*, 2015. In 2015 the CPT recalled that "States are obliged to screen intercepted migrants with a view to identifying persons in need of protection, assessing those needs and taking appropriate action. In order to prevent persons from being exposed to the risk of ill-treatment, the CPT recommends that adequate guarantees to this effect be provided in national legislation and that Spanish law enforcement officials be instructed accordingly…; [that] the Spanish authorities take the necessary steps to ensure that MAF officials do not enter Spanish territory to apprehend and forcibly return irregular migrants to Morocco, outside any legal framework, and also that no foreign national is handed over to these forces in light of the risk of ill-treatment". The UNHCR was also concerned that practices applied in the Spanish autonomous cities of Ceuta and Melilla resulted in an increasing number of persons potentially in need of international protection who did not lodge applications and that, in addition, those who did apply increasingly withdrew their asylum applications, often resulting in prompt and automatic transfers to the mainland (A/HRC/WG.6/21/ESP/2, 11 November 2014, paragraph 74). The situation is not new (see the CPT report of March 2006, CPT/Inf (2007) 30), referring to the "practice of direct return of Moroccan nationals from Spain to Morocco, without application of the procedures otherwise applying to the return of foreign nationals.").

protect its borders against attempts to enter the country unlawfully,[49] it should be recalled that the Court has already stated that problems with managing migratory flows or with the reception of asylum-seekers could not justify having recourse to practices that were incompatible with States' obligations under the Convention.[50]

17. The fact that migrants attempted to enter Spanish territory unlawfully by crossing a land border is irrelevant, since the applicability of Article 4 of Protocol No. 4 is not conditional on the lawful entry of migrants into State territory. It is obvious that the Chamber decision did not legitimise the unlawful conduct of migrants climbing over three consecutive fences, let alone find that maintaining a system of border protection at unauthorised crossing points, as in Melilla case, constituted a human-rights violation. The Court merely decided, and did so in perfect coherence with the *Hirsi Jamaa and Others* judgment, that when migrants come under the Contracting Parties' jurisdiction, as they did when they were apprehended, handcuffed and returned by the Guardia Civil, they have a right not to be removed or, to use again the words of the drafters of Protocol No. 4, not to be "driven away" without an individual assessment of their claims. The Chamber certainly did not decide that migrants have a right to enter at any point along the border without undergoing checks. Hence, the Spanish Government's argument that a finding for the applicants would create an undesirable "suction effect" and result in a migration crisis with devastating consequences for human-rights protection[51] was a pure *ad terrorem* fallacy, with no legal value. This kind of argument, using extraordinary migratory pressure as an excuse for human-rights-unfriendly policy choices, was already made in the *De Souza Ribeiro v. France* case and was duly rejected by the Court.[52] In this regard, it is highly relevant that, in the framework of the Working Group on the Universal Periodic Review,[53] the Austrian Government and other like-minded Governments have asked Spain to review the current deportation practices for migrants in Ceuta and Melilla, and also the proposed amendment of Spain's national security law to ensure the right of an individual to seek asylum.

18. If the Court flatly rejected the Italian Government submission to the effect that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in *Hirsi Jamaa and Others*, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term[54], the Court must

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[49] *N.D. and N.T.*, cited above, §§ 76 and 77.

[50] *Hirsi Jamaa and Others*, cited above, § 179, and *Sharifi and Others*, cited above, § 224.

[51] *N.D. and N.T.*, cited above, § 72.

[52] See my separate opinion in *De Souza Ribeiro*, cited above,

[53] Report of the Working Group on the Universal Periodic Review, A/HRC/29/8, 15 April 2015, page 25.

also today accept that the meaning of "collective expulsion" includes *a fortiori* any form of removal at, around, along, or in connection with border barriers and, evidently, any form of removal from international zones or transit zones or areas otherwise "excised" for immigration purposes under the respondent State jurisdiction. This also includes the practice of rejecting persons at the border, the so-called "hot expulsions" or "expulsions *in caliente*" as is the case in Melilla, which has been criticised by the Committee against Torture, the Human Rights Committee, the Committee for the Elimination of Discrimination against Women and the Special Rapporteur on the Human Rights of Migrants.[55] To pretend that Article 4 of Protocol No. 4 does not encompass non-admission or rejection at the border would not only depart from the unanimous and recent findings in *Hirsi and Others* and *Sharifi and Others*, but would also represent a severe breach of the principle of interpretation of the Convention and its Additional Protocols in good faith, in the light of their object and purpose and in accordance with the principle of effectiveness.[56]

State obligation to respect and protect human rights at land borders

19. Contracting Parties to the Convention have the right to control the entry, residence and expulsion of aliens, subject to their customary and treaty obligations. In the system of human-rights protection established by the Convention, "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [the European Convention on Human Rights and the Geneva Convention]".[57] Under this perspective, the following two principles are to be retained in the Court's case-law on border control. On the one hand, it is indisputable that no person under the authority and control of a State, regardless of the circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights".[58] On the other hand, "States shall respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including

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[54] *Hirsi Jamaa and Others*, cited above, § 172.

[55] See the references in CEDAW, Concluding observations on the 7th and 8th report of Spain, CEDAW/C/ESP/CO/7-8 (2015), paragraphs 36-37; Human Rights Committee, Concluding observations on the 6th periodic report of Spain, CCPR/C/ESP/CO/6 (2015), paragraph 18; CAT, Concluding observations on the 6th periodic report of Spain, CAT/C/ESP/CO/6 (2015), paragraph 13; and the Communications report of special procedures, 2 June 2015, A/HRC/29/50.

[56] *Hirsi Jamaa and Others*, cited above, § 179.

[57] *Amuur v. France*, no. 19776/92, 25 June 1996, § 43, and *M.S.S. v. Belgium and Greece [GC]*, no. 30696/09, 21 January 2011, § 216. In this sense, see *also Khlaifia and Others v. Italy [GC]*, no. 16483/12, 15 December 2016, §162.

[58] UN, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, prec., § 17.

where they exercise authority or control extraterritorially" and, to be more precise, "States shall ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration ..., are in accordance with the principle of *non-refoulement* and the prohibition of arbitrary and collective expulsions.[59] Therefore, "State jurisdiction over immigration and border control naturally implies State liability for any human rights violations occurring during the performance of this control".[60] In other words, recognition of a State's jurisdiction at its borders goes hand-in-hand with the applicability of human-rights treaties, which includes "affirmative measures to guarantee that individuals subject to their jurisdiction can exercise and enjoy [their] rights".[61] The acknowledgment of the applicability of the principle of *non-refoulement*[62] and, more broadly, human rights[63] at a State's borders, is recognised at the European and international level.

20. This approach has been confirmed by the Inter-American Court of Human Rights[64] as well as, at European level, within the European Union

[59] OCHR, Recommended principles and Guidelines on Human Rights at international borders/ https://www.ohchr.org/en/issues/migration/pages/internationalborders.aspx, pt. 22.

[60] Ibid. For further considerations regarding this issue, see also *Complaint mechanisms in border management and expulsion operations in Europe. Effective remedies for victims of human rights violations?,* S. Carrera and M. Stefan. – Brussels: Centre for European Policy Studies, 2018.

[61] *Report on the Human Rights Situation of Refugees and Migrant Families and Unaccompanied Children in the United States of America*, prec., p. 30, § 42. In the *decision on precautionary measures concerning persons detained by the United States in Guantanamo Bay*, *Cuba* (IACHR, 12 March 2002, (PM 259/02)), the Commission asserted more broadly, that "International and regional jurisprudence clearly indicates that, whenever a State exercises effective control over a territory, area, place or person outside its borders, it is required not only to abstain from unlawful acts but also to ensure a broader range of positive human rights obligations. States have positive obligations to protect individuals against infringement of their rights and preventive obligations to ensure that actors over whom they have jurisdiction, including extraterritorially, do not engage in or contribute to acts of torture." (§ 35)

[62] IACrtHR, 19 August 2014, Advisory Opinion OC-21/14, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Series A No. 21. §§ 81 and 210; IACHR, 13 March 1997, *Haitian Boat People (United States of America)*, Merits Report No. 51/96, Case 10.675, §§ 156-157. See also the *Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders*, 19 September 2001, CommDH(2001)19, § 2.

[63] See, for instance, the Report of the International Law commission on the work of its fifty-ninth session, (A/62/10), § 253; IACHR, 12 March 2002, *Decision on precautionary measures concerning persons detained by the United States in Guantanamo Bay*, *Cuba* (PM 259/02), §35.

[64] IACrtHR, *Vélez Loor v. Panama*, 23 November 2010, Series C no. 218, § 97: "in the exercise of their authority to set immigration policies, States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention. Indeed, although States enjoy a margin of

law[65] and in the Court's own case-law.[66] For instance, the Court of Justice held, in *Zakaria*, that "it must be noted that border guards performing their duties, within the meaning of Article 6 of Regulation No. 562/2006 [Schengen Borders Code], are required, *inter alia*, to fully respect human dignity" (§ 40) and the ECJ further added that if a situation "is not governed by European Union law, it must [be] examine[d] ... in the light of national law, taking into account also the European Convention for the Protection of Human Rights and Fundamental Freedoms ... to which all the Member States are party".[67] Indeed, State obligations in this context include specific obligations for border guards, which are a constituent part of the common asylum policy.[68]

21. In the case at hand, the decisions on refusal to entry concerned seven people, the first applicant, his wife and their five children. They benefited from the full array of human rights protected by the Convention and the Additional Protocols. Had the applicants complained of a violation of Article 4 of Protocol No. 4, a finding of a violation would have been inevitable, because their situation was not individually assessed by the domestic authorities. In addition, when there is "a real risk" for the individuals involved "of being subjected to torture or inhumane or degrading treatment or punishment in the receiving country ..., Article 3 implies an obligation not to expel the individual to that country".[69] Thus,

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discretion when determining their immigration policies, the goals of such policies should take into account respect for the human rights of migrants".

[65] The report on the *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, which was published by the European Union Agency for Fundamental Rights, highlights, for its part, that "The Charter applies to the ... Member States when they act within the scope EU law" and that "this includes also conduct at the border" (FRA, December 2016, prec., p. 8).

[66] For an example in this sense: the Court has already affirmed the applicability of the Convention concerning the international zone of Paris-Orly Airport (see *Amuur v. France*, no. 19776/92, §§ 43 and 52, 25 June 1996).

[67] CJEU, 17 January 2013, *Zakaria*, C-23/12.

[68] In this regard, see Article 6 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1): (1) "Border guards shall, in the performance of their duties, fully respect human dignity. …"; (2) "While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". See also Article 4 of Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, which is entitled "Protection of fundamental rights and the principle of *non-refoulement*". This approach is also contained in EU soft law: See, for example, European Commission, 27 September 2017, C(2017) 6505, Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Annex I.

States have a fundamental obligation to "ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion".[70] To prevent such a risk of irreparable harm from materialising, the State has indeed to assess not only "the situation in the receiving country",[71] but also the individual situation of the person seeking asylum. Therefore, it is particularly important that the prohibition of *refoulement* is applicable to any form of non-admission at borders and that the effective protection of the asylum-seeker's rights is ensured. To this end, such individuals must be allowed, already at the border, effective access to the international protection procedure.[72]

The right of access to the international protection procedure

22. At a time when many Governments have stepped up their punitive approach towards migrants from sub-Saharan Africa, including registered asylum-seekers, the UNHCR recently stated that "[t]he principle of *non-refoulement* ... requires, as a general rule, that States grant individuals seeking international protection access to the territory and fair and efficient asylum procedures ...".[73] As long as the State has not performed an effective review which takes into account the personal circumstances of each migrant, the concerned individual can neither be removed, expelled or extradited, nor be the subject of a refusal of entry to the State's territory.

23. This approach has been confirmed by the *Recommended principles and Guidelines on Human Rights and international borders*, issued by the UN High Commissioner for Human Rights,[74] by European Union law[75] as

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[69] Paragraph 102 of the judgment.

[70] See CM, Resolution 67 (14), 29 June 1967, *Asylum to persons in danger of persecution*, pt. 2.

[71] Paragraph 115 of the judgment.

[72] In this regard, see for example PACE, 29 January 2004, Recommendation 1645 (2004), *Access to assistance and protection for asylum-seekers at European seaports and coastal areas*.

[73] For a recent confirmation, see UNHCR, Executive Committee, 4 June 2018, *Note on international protection*, EC/SC/69/CRP.8, § 21. Special Representative of the Secretary General on migration and refugees - Tomáš Boček (*First report on the activities of the Secretary General's Special Representative on Migration and Refugees* (available on the website of the Council of Europe, https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees), sp. p. 21, § 58) affirms for its part, that it is necessary to "continue to uphold the right to apply for asylum for all who seek international protection and increase our efforts to ensure that this right is effectively secured in practice. This means zero tolerance towards pushbacks at our member States' borders and simplified access to asylum procedures, in accordance with human rights obligations".

[74] OCHR, Recommended principles and Guidelines on Human Rights at international

well as by the Court's own case-law.[76] As stated in the Grand Chamber judgment in *F.G. v. Sweden*, there are several specific obligations incumbent on States in respect of the procedural aspects of Articles 2 and 3 of the Convention.[77] These imply the assessment of risk, that is, an examination of the general situation in the destination country and of the particular circumstances of the applicant's situation.

24. In accordance with the principle of effectiveness, it would be inconceivable that the Court ensures these procedural guarantees without first protecting "that which alone makes it in fact possible to benefit from such guarantees"[78], namely access to the procedure.[79] Considering that, by definition, the materialisation of a risk of irreparable harm leads to a situation that the State can no longer rectify[80], it is essential to ensure access to the asylum procedure. In order to do so, the States must firstly provide education and raise awareness among border-control authorities, since the fact that the persons concerned did not expressly apply for asylum does not relieve the State of its obligations under Article 3 of the Convention.[81] The border-control authorities should be able to identify an asylum request as such and subsequently to act according to their function, which involves relevant language skills. Furthermore, the State should ensure that asylum-seekers are guaranteed access to interpreters.[82] Finally, the Court[83] as well as the Court of Justice[84] not only require that every asylum-seeker be entitled

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borders, https://www.ohchr.org/en/issues/migration/pages/internationalborders.aspx. See, specifically, point 22.7): "The right to due process of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction or effective control. This includes the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal".

[75] In this regard, see, for example, Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 26 June 2013, points 25 and 26.

[76] *F.G. v. Sweden* [*GC*], no. 43611/11, §§ 119-127, 23 March 2016.

[77] Ibid., §§ 119-127.

[78] For an example of this approach, see *Golder v. the United Kingdom* (plenary), no. 4451/70, § 35, 21 February 1975.

[79] Concerning the right of access to asylum procedures, see also Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 26 June 2013, point 8: "people indeed must be ensured access to legally safe and efficient asylum procedures". Chapter II of the Directive also applies to border crossings.

[80] The applicant must indeed demonstrate a "foreseeable, real and personal risk" (Committee against Torture, *J.B. v. Switzerland*, 17 November 2017, no. 721/2015, § 7.4) or a "real risk of irreparable harm" (CCPR, 8 November 2017, *N.D.J.M.D. v. Canada*, no. 2487/2014, § 11.2).

[81] *Hirsi Jamaa and Others*, cited above, § 133, and *M.S.S. v. Belgium and Greece [GC]*, no. 30696/09, § 359, ECHR 2011.

[82] Paragraph 108 of the judgment.

[83] Paragraph 83 of the judgment and *M.S.S. v. Belgium and Greece* [*GC]*, no. 30696/09, § 293, 21 January 2011.

to appeal against a decision refusing international protection, but also that, where a return decision is issued, such a remedy must have an automatic suspensive effect.

25. In the present case, the central question was whether "the Lithuanian authorities carried out an adequate assessment of the applicants' claim that they would" face a real risk of ill-treatment.[85] I share the majority conclusion that the Lithuanian border guards did not meet the procedural obligations arising under the Convention. Furthermore, the situation is all the more serious in that it involves a family with five very young children, that is, applicants belonging to one of the most vulnerable groups. The domestic authorities not only failed to take into account that "the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".[86] As a matter of principle, immigrants are "the most vulnerable to potential or actual violations of their human rights".[87] Worse still, they failed to consider the situation of the applicants' children in the light of the principle according to which "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant".[88]

Conclusion

26. In the wake of a new and dangerous "post-international law" world, this opinion is a plea for building bridges, not walls, for the bridges required by those in need of international protection, not walls arising from the fear that has been percolating in recent years through global sewers of hatred. Although justified as an attempt to curb illegal immigration, human trafficking or smuggling, these physical barriers reflect an ill-minded isolationist policy and represent, as a matter of fact, the prevailing malign political *Weltanschauung* in some corners of the world, which perceives migrants as a cultural and social threat that must be countered by whatever means necessary and views all asylum claims as baseless fantasies on the part of people conniving to bring chaos to the Western world. The culture of fear, with its delirious ruminations against "cosmopolitan elites" and

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[84] CJEU, 19 June 2018, *Gnandi (GC)*, C-181/16, § 54.

[85] Paragraph 105 of the present judgment.

[86] *Tarakhel v. Switzerland [GC]*, no. 29217/12, § 97, 4 November 2014.

[87] IACrtHR, 23 November 2010, *Vélez Loor v. Panamá*, Series C no. 218, § 98. Furthermore the Inter-American Court stated in this case that in "application of the principle of effectiveness and given the need to provide protection for individuals or groups in situations of vulnerability, the Court shall interpret and give content to the rights enshrined in the Convention, in accordance with the international *corpus juris* in relation to the human rights of migrants" (ibid, § 99).

[88] Ibid, § 99.

"foreign" multiculturalism, and its most noxious rhetoric in favour of "our way of life" and "identity politics", has burst into the mainstream.

27. In order to remain the "conscience of Europe", the Court must ensure the effective protection of migrants and especially of asylum-seekers, which requires scrutiny of States' actions at their land borders and, more specifically, the guarantee of a right of access to international protection procedure. Land borders are not zones of exclusion or exception from States' human-rights obligations, and this observation also applies to the intermediate zones between border fences and to transit zones. Jurisdiction under both refugee and human-rights law is presumed to be exercised within a State's territory, including its land borders, international zones, transit zones or areas that are otherwise excised for immigration purposes.

28. Furthermore, the Court must resist two temptations, regardless of how insistently it has been and will continue to be lured towards them. Denying jurisdiction when migrants are *de facto* and *de iure* in the hands and at the mercy of border-control authorities, when, for example, they are netted, apprehended, handcuffed or detained in order to be returned, would be a blatant circumvention of the legal force of the Convention and its Additional Protocols, by means of the fraudulent creation of an intolerable legal vacuum at the border of the Contracting Parties.

29. Accepting jurisdiction at the border, but rejecting the principle that migrants who come under the Contracting Parties' jurisdiction have the right not to be returned or removed without an individual evaluation of each migrant's claim, would be a hypocritical, self-defeating interpretation of the Convention and its Additional Protocols. To allow people to be rejected at land borders and returned without assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this.

30. Neither of these two options – denial of jurisdiction or of the right to an individual assessment of each migrant's claims, and non-admission or rejection at the border through a restrictive interpretation of "expulsion" as not including non-admission or rejection at the border, the so-called "hot expulsions" or "expulsions *in caliente*" – would honour the Court. As the present judgment accepted neither option, and instead remained faithful to the unanimous and recent findings of *Hirsi Jamaa and Others* and *Sharifi and Others*, it deserves to be commended.

JOINT DISSENTING OPINION OF JUDGES RAVARANI, BOŠNJAK AND PACZOLAY

1. With due respect to our colleagues, we unfortunately cannot agree with the majority that there has been a violation of Articles 3 and 13 of the Convention.

2. It is undisputed that in the present case, the applicants presented themselves at different border points between Belarus and Lithuania on three occasions and that on all three occasions they were refused entry to the territory of Lithuania. The parties are in dispute as to whether the applicants, as they affirm, presented an asylum request or, as the Government hold, they did not present such a request and simply tried to enter Lithuanian territory. As a matter of fact, the impugned decisions did not consider them as asylum-seekers.

3. As far as we understand the Lithuanian legal system, the law distinguishes between ordinary entry to the territory and a request for asylum.

In the event of entry without an asylum request, the competent border authorities – the SBGS – are empowered and obliged to check whether the alien has a valid visa or residence permit. In the event of refusal of entry, the alien has the right to appeal the decision before the administrative courts. Whereas during the period allowed for appeal aliens have the right to remain on the territory of Lithuania, the appeal in itself is not suspensive but the competent court can confer such effect on its decision (see paragraphs 37 and 38 of the judgment).

Where an asylum request is lodged, the decision as to whether to allow the asylum-seeker to enter Lithuania is taken by the Migration Department. Refusal decisions can be appealed against, and during the time allowed for lodging such an appeal and, moreover, during the appeal itself, asylum-seekers are entitled to remain at the border checkpoint (ibid.).

4. In the present case, the applicants did not lodge an appeal against the decisions, which, considering them as "ordinary" aliens seeking entry to Lithuania who had failed to present the necessary documents, refused them entry to the territory. They considered that, since such an appeal did not have an automatic suspensive effect, it could not be considered an effective remedy preventing them from being returned to the country they had come from and, eventually, their country of origin, with the risk of ill-treatment.

It seems undisputable that if the applicants were "ordinary" aliens seeking entry, the remedy available under Lithuanian law did not fall short of the Convention requirements, as the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016, and *Üner v. the Netherlands* [GC], no. 46410/99,

ECHR 2006-XII) and, in consequence, the provision and mechanism of remedies in the event of refusal of entry remain in the discretion of the domestic authorities.

The question remains whether in the case of an alleged risk of ill-treatment the available domestic remedies were effective. In the event of a request for asylum, be it oral or in writing, pursuant to Lithuanian law the decision on whether to examine an asylum application on the merits is taken by the Migration Department within forty-eight hours of the submission of such an application. Although it is not expressly stated in the judgment, we infer from paragraph 28 that until such time as a preliminary decision is taken, the alien will remain at a border check-point or in a transit zone. If the asylum-seeker's request has been rejected, he or she can appeal and during the period for lodging an appeal and while the appeal is pending, he or she cannot be removed from Lithuanian territory (see point 3 above).

5. In that context, it is noteworthy that the present judgment relies on the Court's case-law concerning remedies against decisions of *removal* from a contracting State to a country where there is a risk of ill-treatment, which are considered effective only when they have automatic suspensive effect (see paragraph 83 of the judgment). In such cases indeed, the Contracting States are bound by the requirements, both substantive and procedural, stemming from Articles 2 and 3 of the Convention and must ensure that an applicant's request is duly examined before he or she is removed from their territory. In the judgments in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011, and *L.M. and Others v. Russia*, nos. 40081/14 and 2 others, 15 October 2015, the Court examined situations where the applicants had entered the territory of the respective respondent States but had later been the subject of expulsion orders. In the present case, the applicants were *refused entry* to Lithuanian territory. The Convention system makes a clear distinction between expulsion and the right to enter a territory (compare the first and second paragraphs of Article 3 of Protocol No. 4 to the Convention). While the right of entry is reserved for the nationals of each High Contracting Party (see Article 3 § 2 of Protocol No. 4), there are a number of Convention guarantees applicable in the area of expulsion of aliens, either expressly provided for by the Convention (see Article 4 of Protocol No. 4) or developed through the case-law of the Court. The distinction between "expulsion" on one hand and "refusal of entry" or "non-admission" on the other is also well-grounded in international law, according to which the term "expulsion" applies only to aliens present on a territory of or inside a returning State. For example, Article 2 of the International Law Commission's Draft Articles on the Expulsion of Aliens distinguishes between "expulsion" and "non-admission". The term "expulsion", used in this sense, does not encompass rejection at the border or other refusal to allow entry to the national territory.

6. In the absence of well-established case-law or at least unequivocal authorities in the Court's case-law governing situations such as that in the present case, we believe that the present judgment should have taken a clear position as to what are the precise Article-3 obligations of the authorities in situations where an alien presents himself or herself at a border and submits a claim for asylum, including the prima facie assessment to be made, the legal status of the alien during this period and the decisions – refusal of entry or removal from territory – that can be taken if the authorities deem that the asylum-seeker did not have, at least, an arguable claim that – either in the country of origin or in the country where he or she risks *refoulement* (a question which also deserved a cumulative, alternative or exclusive answer by the Chamber) – there would be a risk of ill-treatment.

7. Be that as it may, apart from the issue of non-exhaustion of an effective legal remedy and the lacunas in the assessment of the authorities' legal obligations once an alien presents himself or herself at the border claiming asylum, we cannot agree with the factual assumptions underlying the majority's decision. It must be underlined that it has not even been established by the Court that the applicants ever submitted a claim to the authorities of the respondent State alleging that, in the event of refusal to grant entry, they would run the risk of being returned to Russia, where in turn they would face the risk of ill-treatment. Furthermore, it appears that the applicants themselves do not assert that they have ever presented such a claim to the Lithuanian authorities.

8. In respect of the applicants' attempt to enter the territory of the respondent State on 11 May 2017, they did not provide the border authorities with any reasons whatsoever as to why they thought they were entitled to enter.

Previously, on 16 April 2017 the applicants had written the word "azul" (which, according to the applicants, was commonly used by asylum-seekers from Chechnya) in Cyrillic script on the decisions refusing them entry, at the place indicated for and instead of their signatures. We believe that in the absence of any other indications, and taking into account the fact that the Russian language and the Cyrillic script are not in official or even widespread use in Lithuania, the border guards cannot be expected to master colloquial terms from a region within a third country. Given that the applicants' surnames begin with the letter A, the border authorities had no reason to doubt that the word written by the applicants was not their signature.

In respect of the applicants' attempt of 22 May 2017, they assert that they submitted a written asylum application in the Russian language and in Cyrillic script to the Lithuanian authorities. They provided the Court with a photograph of that application, together with the train tickets, which they claim was taken at the premises of the border checkpoint. However, the photograph shows nothing conclusive apart from the train tickets and the

application. It cannot be regarded as evidence that the request was actually remitted to the authorities. In sum, similarly to the situation of 16 April 2017, there is no indication that the applicants actually presented any claim to the Lithuanian authorities referring to the risk of ill-treatment in the event of refusal of entry.

9. According to the Court's well-established case-law, where an applicant claims that a Contracting State has violated its obligations under Articles 2 or 3, he or she must unequivocally establish that there was a claim that in the event of return to the country of origin or a third country, there was a real risk of ill-treatment, thus putting the domestic authorities in a position to comply with their Convention obligations (see *F.G. v. Sweden*, cited above, § 125).

The majority, apart from conferring decisive importance on the word "azul" apposed *in lieu* of their signatures in the decisions on refusal of entry, omitting any discussion of the consequences to be drawn when this word is apposed in a field reserved for signatures and the applicants' names begin with the letter "A", did not address the Government's arguments, such as the applicants' failure to make use of the available remedies – irrespective of their suspensive character – against such refusal decisions, in which they could have unequivocally raised the asylum issue and brought their request to the knowledge of the authorities, which could not then have disregarded their request. Moreover, the judgment itself refers to domestic case-law showing that, in cases where a genuine request for asylum was made, the competent authorities were ordered by the courts to allow the individuals concerned to enter Lithuanian territory (see paragraphs 48-50 of the judgment).

10. In short, it is our view that, in spite of a lack of any convincing evidence in this respect, the majority accepted an assumption that the applicants had applied for asylum at the Lithuanian border. Furthermore, the majority failed to address several fundamental questions pertaining to the interpretation of Article 3 of the Convention, namely whether the present situation is to be distinguished from the situation of expulsion and what precise obligations apply to it. This made it impossible for us to vote with the majority and to find a violation of Articles 3 and 13 of the Convention.