

# LEGAL CONSEQUENCES OF INTERIM MEASURES INDICATED BY THE ECtHR TO POLAND, IN THE 2021 EU-BELARUS BORDER CRISIS\*

\*This paper considers facts and events up to 01.01.2022

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- **ABSTRACT:**

The research is dedicated to exploring the legal consequences of interim measures, indicated by the European Court of Human Rights (“ECtHR”) to Poland, in the context of the 2021 migrant crisis at the Eastern EU border with Belarus. The analysis is based on the Court’s jurisprudence on legally and factually similar cases, with emphasis on the results of ignoring interim measures, in the breach of Article 34 (the right of individual application) of the European Convention on Human Rights. The article proposes an overview and examination of the situation, based on public data, and presents the positions of the parties involved, through the official statements of relevant actors (ministers, charges d'affaires, prominent civil servants). The study of similar cases *M.K. and Others v. Poland* and *D.A. and Others v. Poland* indicates a pattern of ineffectiveness of interim measures as well as one of non-compliance on behalf of Poland, pointing to growing concern over the observance of the human rights of migrants.

- **KEYWORDS:**

interim measures, Article 34, ECHR, ECtHR, jurisprudence, migrants, asylum seekers

## **I. INTRODUCTION**

In the context of the 2021 EU-Belarus border crisis, involving migrants trying to cross the border into Poland, Lithuania and Latvia, the European Court of Human Rights (ECtHR/the Court) indicated interim measures to the states party to the European Convention on Human Rights (ECHR/ the Convention). As of the 3<sup>rd</sup> of December 2021, interim measures indicated by the Court were in force in 28 applications, all of which were lodged against Poland. The case for which most public information is available, and thus represents a good starting point for analysis, is *R.A. and Others v. Poland* (application no. 42120/21).

The present paper aims to examine, based on public information and on the case-law of the ECtHR, the value, the applicability, and the impact of the interim measures with regard to Poland, in relation with the right of individual application (Article 34 of the Convention).

## ***II. RESEARCH METHODOLOGY***

To investigate the legal consequences of interim measures indicated by the ECtHR to Poland in the 2021 EU-Belarus border crisis, a qualitative approach was developed, considering the existing body of interim measures issued by the Court.

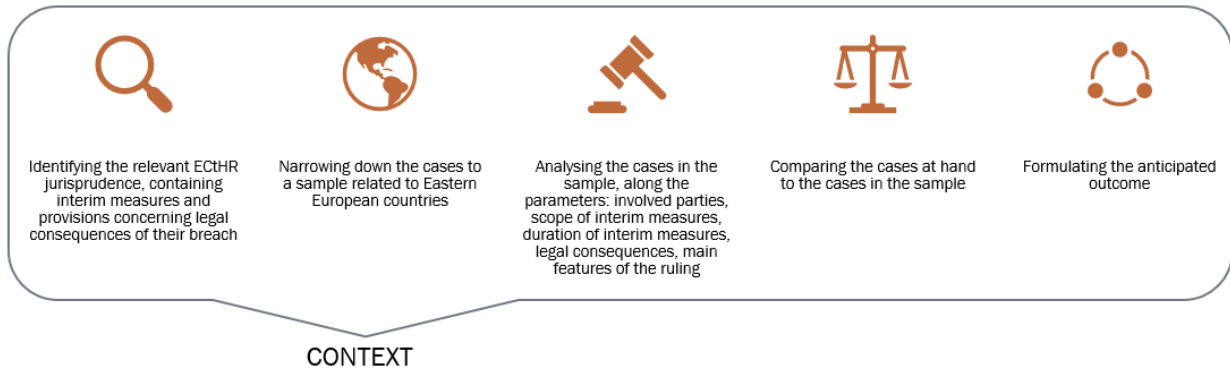
The research strives to have a holistic view of the current context, avoiding “operating in a social, economic and political vacuum.”<sup>1</sup> As such, it starts from a review of the facts and politics which created the setting in which interim measures were indicated to Poland.

The research strategy incorporates the following steps:

- Identifying the relevant ECtHR jurisprudence, containing interim measures and provisions concerning legal consequences of their breach
- Narrowing down the cases to a sample related to Eastern European countries
- Analysis of the cases in the sample, along the parameters: involved parties, scope of interim measures, duration of interim measures, legal consequences, main features of the ruling
- Comparison of the cases at hand to the cases in the sample
- Formulation of the anticipated outcome.

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<sup>1</sup> Andreassen, Bård A.; Sano, Hans-Otto; McInerney-Lankford, Siobhán – *Research Methods in Human Rights - A Handbook*, Edward Elgar Publishing, Cheltenham, UK • Northampton, MA, USA, 2017, p. 49



### ***III. MAIN FINDINGS AND ANALYSIS***

#### ***1. The status quo***

In the summer of 2021, thousands of migrants tried (and sometimes succeeded) to enter Poland, Lithuania, and Latvia, through these countries' borders with Belarus. The situation was prompted by a deterioration in EU-Belarus relations, following situations of international concern.

Following EU sanctions on the diversion of Ryanair Flight 4978, in May 2021, the Belarusian president, Alexander Lukashenko, firmly stated that “*We were stopping migrants and drugs – now you will catch them and eat them yourselves*”<sup>2</sup>. Belarus acted on the menacing promise, as country authorities and tourist agencies began promoting tours to Belarus, increasing flight connections from the Middle East and offering visas, ostensibly for hunting purposes<sup>3</sup>. The President of the European Commission, Ursula von der Leyen herself, pointed out that “[*t*]here are specialised travel agents offering all-inclusive deals: visas, flights, hotels and, somewhat cynically, taxis and buses up to the border.”<sup>4</sup> Various EU member states, including EU officials, are calling the crisis a “*hybrid warfare*” waged by Belarus against the EU. Still, Belarusian officials deny having waged a hybrid war on the EU, calling the accusation

<sup>2</sup> *Defiant Belarus leader slams EU sanctions on plane diversion* - <https://apnews.com/Article/world-news-belarus-europe-business-government-and-politics-450f548007a8146114830ec05b926451>

<sup>3</sup> Kulakov, Dima - *The Belarus–EU Border Crisis*, The Blue and White, Upper Canada College’s Online Publication, 24.11.2021, <https://tbaw.ca/2021/11/24/the-belarus-eu-border-crisis/>

<sup>4</sup> Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the October European Council and the situation in Belarus and at its border with the EU - Strasbourg, 23 November 2021

“ridiculous”.<sup>5</sup> Amid the influx of migrants, in October 2021, Belarus passed legislation allowing the refusal to take back migrants from the EU, suspending the agreement between the Republic of Belarus and the European Union on the readmission of individuals, who stay without permission<sup>6</sup>.

Poland, Lithuania, and Latvia have all declared a state of emergency in the context of the refugee crisis.

Migrants are trapped between borders, being pushed back and forth between Belarus, Poland, Lithuania, and Latvia. The humanitarian tragedy unfolds as winter crept in, while people are stranded in the cold, without shelter, resources, or a resolution in sight.

While protecting its borders, Poland has used tear gas to disperse the migrants<sup>7</sup>, as well as water cannons<sup>8</sup>, in response to migrants throwing stones at security personnel.

It has been speculated that “[f]or Poland’s conservative Law and Justice government, the crisis at the border with Belarus offers a rare opportunity to improve its standing both at home and abroad. It can mobilize its conservative support base by waging a war on migration, and burnish its damaged democratic credentials in the West by posing as a frontline defender of Europe from a hybrid threat from the east. This latter aspect, it hopes, will eclipse both U.S. complaints with regard to media freedoms in Poland, and EU fines over Poland’s legal reforms and unwillingness to decrease its use of coal.”<sup>9</sup> Insofar, the EU, the NGOs, the media have not been kind, and, in the light of the cases pending before the ECtHR, the situation is not about to get any brighter. Win or lose, the mere fact that over 40 applications have been lodged against Poland by migrants involved in the border crisis raises alarm bells.

## **2. Involvement of the European Court of Human Rights – interim measures**

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<sup>5</sup> The Foreign Minister Vladimir Makei mocked the assertion, stating that “[t]hey’re saying in the West nowadays that Belarus unleashed a hybrid war on the European Union. It’s ridiculous to hear. Belarus, of 10 million (population), unleashed a hybrid war on the 500-million European Union” - *EXPLAINER: Why Poland declared state of emergency at border* - <https://apnews.com/Article/europe-middle-east-poland-immigration-migration-453ec6e5c1cdf36237bf2ccd98427dc1>

<sup>6</sup> <https://president.gov.by/en/events/po-resheniyu-prezidenta-v-palatu-predstaviteley-postupit-zakonoproekt-o-priostanovlenii-soglasheniya-s-es-o-readmissii>

<sup>7</sup> *Polish forces fire tear gas at migrants trying to breach border* - <https://www.dailysabah.com/world/europe/polish-forces-fire-tear-gas-at-migrants-trying-to-breach-border>

<sup>8</sup> *Belarus crisis: Poland uses water cannons on migrants* - <https://www.dw.com/en/belarus-crisis-poland-uses-water-cannons-on-migrants/a-59836592>

<sup>9</sup> Samorukov, Maxim - *The EU’s Latest Migrant Crisis: Will Belarus Get Its Way?* - <https://carnegiemoscow.org/commentary/85765>

In the context of the border crisis, the ECtHR has been receiving an alarming number of requests for interim measures concerning the situation at the borders with Belarus, regarding Poland, Lithuania, and Latvia. Most applications relate to persons claiming to be on Polish territory, allegedly with a view to seeking international protection.

The number of applications for interim measures seems to be on the rise. Out of the total of 47 requests processed by the Court between the 20<sup>th</sup> of August – the 3<sup>rd</sup> of December 2021, 13 requests were received between the 20<sup>th</sup> of August – 31<sup>st</sup> of October 2021, and 34 requests were received in November and December. An overwhelming majority of requests (44 out of 47) were lodged against Poland, with one request being lodged against Lithuania and two against Latvia.<sup>10</sup>

As of the 3<sup>rd</sup> of December 2021, interim measures indicated by the Court were in force in 28 applications, all of which were lodged against Poland.<sup>11</sup>

Insofar, in the current crisis, the ECtHR decided to indicate interim measures, concerning immigrants at the Eastern border, in the following publicly known cases:

- ***A.S. and Others v. Lithuania*** (application no. 44205/21)<sup>12</sup> - 5 Afghan nationals who have been attempting to enter Lithuania from Belarus; duration of interim measures: 08.09.2021-29.09.2021.
- ***Ahmed and Others v. Latvia*** (application no. 42165/21)<sup>13</sup> - 41 Kurdish-ethnic Iraqi nationals at the border between Latvia and Belarus; duration of interim measures: 25.08.2021-15.09.2021 – measures lifted on 15.09.2021<sup>14</sup>.
- ***R.A. and Others v. Poland*** (application no. 42120/21)<sup>15</sup> - 32 Afghan nationals at the border between Poland and Belarus; duration of interim measures: 25.08.2021-15.09.2021 – measures extended.
- ***I.A. and Others v. Poland*** (application no. 53181/21), ***A.H.A. and N.A.A.H. v. Poland*** (application no. 53566/21), ***A.R. and O.S. v. Poland*** (application no. 53808/21), ***J.D. and D.M. v. Poland*** (application no. 54016/21), ***D.A.M. and Others v. Poland***

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<sup>10</sup> Press Release issued by the Registrar of the Court - ECHR 372 (2021) 06.12.2021

<sup>11</sup> Press Release issued by the Registrar of the Court - ECHR 372 (2021) 06.12.2021

<sup>12</sup> Press Release issued by the Registrar of the Court - ECHR 265 (2021) 08.09.2021

<sup>13</sup> Press Release issued by the Registrar of the Court - ECHR 244 (2021) 25.08.2021

<sup>14</sup> Press Release issued by the Registrar of the Court - ECHR 272 (2021) 15.09.2021

<sup>15</sup> Press Release issued by the Registrar of the Court - ECHR 244 (2021) 25.08.2021

(application no. 54275/21) and *A.A. v. Poland* (application no. 54849/21) – measures in force until further notice.<sup>16</sup>

In *A.S. and Others v. Lithuania*, five Afghan nationals were stranded at the border between Belarus and Lithuania and had been hiding on Lithuanian territory since the 5<sup>th</sup> of September 2021. The applicants had arrived in Belarus in August 2021. They requested that the ECtHR halt their removal to Belarus and, applying Rule 39 until the 29<sup>th</sup> of September 2021, the Court indicated that the applicants not be removed to Belarus, if they already were on Lithuanian territory. The ECtHR decided not to extend the interim measure, given the fact that the Lithuanian Government has assured the Court that the Afghan nationals would not be expelled from the country until their asylum claims are examined.<sup>17</sup>

In *Ahmed and Others v. Latvia*, the ECtHR applied Rule 39 and requested the Latvian authorities to **“provide the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter”** (emphasis added). The same has been decided in *R.A. and Others v. Poland*. In both cases, the Court stressed that **“this measure should not be understood as requiring that Poland or Latvia let the applicants enter their territories”** and **“this decision was taken in accordance with the fact 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”** (emphasis added).

In *Ahmed and Others v. Latvia*, the ECtHR lifted the interim measures<sup>18</sup>, since 11 persons had been admitted onto Latvian territory for humanitarian reasons (mainly for health problems and the fact that 5 of them were minors), and the other applicants no longer appeared to be at or near the border zone.

In most applications, where the applicants claimed to be on Polish territory and requested not to be pushed back to Belarus, the Court issued interim measures for a set amount of time and ruled that the applicants should not be removed from Poland, if they were indeed on Polish territory. In the cases of *R.A. and Others v. Poland* (no. 42120/21), *I.A. and Others v. Poland*

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<sup>16</sup> Press Release issued by the Registrar of the Court - ECHR 283 (2021) 28.09.2021

<sup>17</sup> No extension of the interim measure for Afghan nationals on the Lithuanian-Belarusian border, 01.10.2021 - <https://www.echr.caselaw.com/en/echr-decisions/no-extension-of-the-interim-measure-for-afghan-nationals-on-the-lithuanian-belarusian-border/>

<sup>18</sup> Press Release issued by the Registrar of the Court - ECHR 272 (2021) 15.09.2021

(no. 53181/21), *A.H.A. and N.A.A.H. v. Poland* (no. 53566/21), *A.R. and O.S. v. Poland* (no. 53808/21), *J.D. and D.M. v. Poland* (no. 54016/21), *D.A.M. and Others v. Poland* (no. 54275/21) and *A.A. v. Poland* (no. 54849/21), the interim measures not to remove the applicants from Poland are in force until further notice.<sup>19</sup>

In *R.A. and Others v. Poland*, pursuant to Rule 54 § 2 (b) of the Rules of Court, the ECtHR has given notice of the application to the Government of Poland, inviting the respondent State to submit written observations on the admissibility and merits of the application. Also, the initial measure was **supplemented by a measure not to remove the applicants from Poland until further notice and to allow the applicants' lawyers to make necessary contact with them**, by either allowing direct contact between the applicants and their lawyers (provided that the applicants are on the Polish territory) or allowing the applicant's lawyers access to the Polish border next to the applicant's whereabouts.

The case concerns a group of 32 Afghan nationals, who reportedly fled Afghanistan after the Taliban came to power. Since around the 8<sup>th</sup> of August 2021 they have been stuck in a makeshift camp at the border between Poland and Belarus, in precarious sanitary and humanitarian conditions. The applicants claim to have crossed Poland's "green border", before being forcibly pushed back by Polish guards into Belarusian territory. They claim that Polish authorities did not consider their asylum applications.

The questions to the parties in *R.A. and Others v. Poland* are indicative of the main issues surrounding the current border crisis, from the standpoint of the relevant ECHR provision:

1. Do the facts alleged by the applicants fall within the **jurisdiction** of Poland?
2. If so, having regard to procedural protection against torture and inhuman or degrading treatment, has the alleged refusal to examine the applicants' request for international protection in the case by the domestic authorities violated Article 3 of the Convention? In particular, have the Polish authorities examined the applicants' allegations, that they would be at risk to be subjected to torture and inhuman treatment if they were returned to Belarus?
3. In view of the applicants' allegations and the elements which have been submitted to the Court, are the persons concerned **likely to be subjected to treatment contrary to Article 3 of the Convention in the event of return to Afghanistan?**

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<sup>19</sup> Press Release issued by the Registrar of the Court - ECHR 283 (2021) 28.09.2021

4. Are the **material and health conditions** in which the applicants have been living since their arrival at the Polish-Belarusian border compatible with **Articles 2 and 3 of the Convention**?

5. Were the applicants subject to a **collective expulsion order, in violation of Article 4 of Protocol No. 4**? Reference is made to the applicants' claim that they entered the territory of Poland but were then **pushed back** to Belarus, by Polish border guards, who **prevented their access to international protection procedures and detained them at the Polish-Belarusian border, without any examination of their respective individual situations**.

6. Did the applicants have at their disposal, in accordance with the requirements of **Article 13 of the Convention, an effective remedy** by means of which they could have lodged their complaints concerning Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention?

7. Having regard to the State's obligation to comply with an interim measure indicated by the Court (see, *Mamatkulov and Askarov v. Turkey* [GC], no.46827 / 99 and 46951/99, ECHR 2005-I), has Poland, in the case, hampered the **effective exercise of the right of individual petition by applicant, guaranteed by Article 34** of the Convention?

Without presuming to guess the direction in which the Court will go, it is useful to analyse the existing jurisprudence around the issues raised, as presented in the questions put to the Parties in the *R.A. and Others v. Poland* case. It is an endeavour that will lay open a field of discussion around the most pressing issues regarding migrants on one hand and states' sovereign rights on the other, in the current crisis, and may trace guidelines as to the expected conduct and consequences.

Considering that the specific claims and facts of the cases against Poland have not been yet made public, for the purpose of the present paper, we shall address the issues which have gained notoriety, namely the interim measures issued by the Court – which generally impose identical measures, Poland's failure to comply, and the possible expected consequences therein, through the lens of ECtHR jurisprudence.

### ***3. Interim measures and consequences of non-compliance – breach of Article 34 ECHR***

Under Rule 39 of its Rules of Court,<sup>20</sup> the ECtHR may indicate interim measures to state parties to the European Convention on Human Rights (ECHR/ the Convention).

As detailed in the Court's Practice Directions, **interim measures are binding** on the State concerned and are only applied in exceptional cases, should the Court assess that the applicant faces "*a real risk of serious, irreversible harm if the measure is not applied*"<sup>21</sup>. The assessment will be based on the review of all relevant information, including the grounds on which the applicant's fears are based, the nature of the alleged risks and the ECHR provisions that have allegedly been violated. If an interim measure has been applied, the applicant must keep the Court informed about the state of any continuing domestic proceedings and, should this obligation not be observed, the case may be struck out of the Court's list of cases.

Interim measures are not limited in their material scope and may serve both a substantive and/or a procedural purpose. Substantive interim measures are granted to avoid an imminent risk of irreparable damage to the rights and freedoms allegedly violated. The Court's jurisprudence reflects a narrow interpretation of what constitutes "*irreparable damage*", in the sense that it entails "*the potential impairment of the life and physical integrity of the individuals concerned*"<sup>22</sup>. From a procedural point of view, interim measures are indicated to ensure the proper conduct of the proceedings before the Court. It is to be noted that some interim measures, specifically such as the stay of expulsion or extradition orders, may simultaneously serve a substantial and a procedural purpose (that of safeguarding the effective participation of the

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<sup>20</sup> Rule 39 reads as follows:

"1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

<sup>21</sup> European Court of Human Rights, *Rules of Court – 18 October 2021*, Registry of the Court, Strasbourg, pp. 57-58

<sup>22</sup> Saccucci, Andrea - *Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges*, in F. M. Palombino et al. (eds.), *Provisional Measures Issued by International Courts and Tribunals*, T.M.C. Asser Press, Springer-Verlag GmbH, The Hague, The Netherlands 2021, [https://doi.org/10.1007/978-94-6265-411-2\\_11](https://doi.org/10.1007/978-94-6265-411-2_11), p. 218

applicant to the proceedings before the Court, which could be hindered by a removal to a unsafe third country)<sup>23</sup>.

Most interim measures concern expulsion and extradition, and usually consist in suspending the applicant's expulsion or extradition for the period in which the application is being examined.<sup>24</sup> All measures taken under Rule 39 are decided in connection with proceedings before the Court, without prejudging any subsequent decisions on the admissibility or merits of the case.

According to ECtHR jurisprudence,<sup>25</sup> if a state does not comply with interim measures (or at least take all reasonably-expected steps in this respect), Article 34 has been breached. Non-compliance by a state with the indicated interim measure “*may, in view of the special nature of Article 3 ECHR (prohibition of torture), lead to a violation of the right of individual complaint (under Article 34 ECHR), as long as the contested act [...] has affected the core of the right of individual application*”<sup>26</sup>.

Pursuant to Article 34 of the ECHR, “[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.” Thus, for the purpose of applying Article 34, two conditions are to be met: (1) the applicant must be a person, NGO, or group of individuals, and (2) the applicant must “*make out a case that he or she is the victim of a violation of the Convention*”<sup>27</sup>. There are no restrictions as to nationality, residency, civil status, or legal capacity.

The relation between interim measures and the right of individual application (Article 34) has been explored and reinterpreted by the Court. The most relevant principles to the current analysis reside in the land-mark cases presented hereunder.

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<sup>23</sup> *Ibidem*, p. 229

<sup>24</sup> European Court of Human Rights Factsheet – Interim measures, April 2021, p. 2

<sup>25</sup> *Paladi v. Moldova*, Application no. 39806/05, Judgment, 2009, § 86, *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99) [GC] Judgment, 2005, § 129

<sup>26</sup> Burbano Herrera, Clara; Haeck, Yves - Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems, *Netherlands Quarterly of Human Rights*, Vol. 28/3 (2010), p. 348

<sup>27</sup> *Vallianatos and Others v. Greece* [GC], no. 29381/09, § 47, ECHR 2013, *apud* Schabas, William - *The European Convention on Human Rights: A Commentary*, Oxford Commentaries on International Law, 2015, DOI: 10.1093/law/9780199594061.001.0001, p. 736

**3.1. *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99 and 46951/99, [GC] Judgment, 2005<sup>28</sup>**

In issuing the interim measures to Poland, the Court pointed out that any failure by a State to comply with a measure indicated under Rule 39 might entail a violation of Article 34 of the Convention, referencing its jurisprudence in *Mamatkulov and Askarov v. Turkey*, §§ 128-129, a case concerning the extradition to the Republic of Uzbekistan of two Uzbek nationals, in violation of interim measures issued by the ECtHR. The applications relied on Articles 2 (Right to life), 3 (Prohibition of torture) and 6 (Right to a fair trial) of the Convention, and Rule 39 of the Rules of Court.

Discussing the right of individual application (Article 34), the Court reaffirmed that the provision is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection. To uphold the effective exercise of the right of individual application, any interference with an applicant's right to effectively present and pursue his complaint before the Court is precluded. Applicants or potential applicants should not be pressured in any way by authorities to withdraw or modify their complaints, as they should be able to communicate unreservedly with the Court. As such, States have the obligation to abstain from exerting pressure on the applicants, as well as from any act or omission which would destroy or remove the subject matter of an application, rendering it pointless, or otherwise preventing the Court from analysing it under its normal procedure.

The Court made an in-depth analysis of the meaning, scope, and application of interim measures and their relation to respecting the effective exercise of the right of application, by making recourse to international law and to the view expressed on this subject by other international bodies, such as the International Court of Justice, the Inter-American Court and Commission, the Human Rights Committee of the United Nations, and the United Nations Committee against Torture. It concluded that regardless of "the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending"<sup>29</sup>.

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<sup>28</sup> *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99) [GC] Judgment, 2005, §§ 99-129

<sup>29</sup> *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99) [GC] Judgment, 2005, § 124

The Court links interim measures not only to the right of individual application (Article 34), but also to the notion of an effective remedy under Article 13. In this context, having remedies with suspensive effect (*i.e.* interim measures) is paramount when ruling on the obligations of the State with regard to the right to an effective remedy in deportation or extradition proceedings. The principle applies not just to national legal systems, but *a fortiori* to the proceedings before the ECtHR. Under the Convention, the right to an effective remedy entails a remedy capable of preventing the execution of measures which are contrary to the Convention, and whose effects are potentially irreversible.

Within the Convention system, the vital role of interim measures is twofold: averting irreversible situations that may prevent the Court from properly examining an application and securing the applicant's practical and effective benefit of the rights invoked under the Convention. Consequently, should a respondent state fail to comply with the interim measures, the effectiveness of the right of individual application (Article 34) and the state's formal undertaking in Article 1 to protect the rights and freedoms provided by the Convention are undermined.

When indicating an interim measure, the Court not only views it as an instrument to secure the possibility of an effective examination of the application but also ensures the effectiveness of the protection afforded to the applicant by the Convention. Subsequently, the Committee of Ministers may supervise execution of the final judgment. Therefore, such measures enable the state to carry out its obligation to comply with the final judgment of the Court, which is binding according to Article 46 of the Convention. Thus, the effects of indicating an interim measure to a state shall be analysed in the light of the obligations which are incumbent on the states by virtue of Articles 1, 34 and 46 of the Convention.

In *Mamatkulov and Askarov v. Turkey*, the Court held that, because of the extradition of the applicants in breach of the interim measures, it was prevented from conducting a proper examination of the applicants' complaints and ultimately from awarding them protection, if need be, against potential violations of the Convention as alleged. This resulted in the hinderance of the applicants' effective exercise of their right of individual application, which the applicants' extradition rendered void.

The Court concluded that "by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an

individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34".<sup>30</sup>

### 3.2. *Paladi v. Moldova*, Application no. 39806/05, [GC] Judgment, 2009<sup>31</sup>

In *Paladi v. Moldova*, the Court expands the examination of the application and scope of interim measures. In this case, Moldavia had ignored the Court's interim measures, which had indicated a stay of the transfer of a prisoner, from the neurological centre within the Republican Clinical Hospital back to the prison hospital, until the Court had had an opportunity to examine the case. The application relied on Articles 3 (Prohibition of torture), 5 § 1, 5 § 3, 5 § 4 (Right to liberty and security), and 34 (Individual applications) of the Convention.

The Court has emphasized that interim measures are indicated in cases where there is a plausible risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention and the object of such measures is the preservation and protection of the rights and interests of the parties in a dispute before the Court, pending the final decision. Given the intrinsic urgency of interim measures, a decision needs to be issued quickly, in order to prevent "imminent potential harm from being done". Thus, the full facts of the case may remain unsettled, until the Court delivers its judgment on the merits of the complaint to which the interim measure is related. But interim measures specifically serve the purpose of conserving the Court's ability to render judgment based on an effective examination of the applicant's complaint. Until delivering a judgment, it is possible, and "*may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a prima facie case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification.*"<sup>32</sup> The Court will not re-examine the validity of its decision to have applied an interim measure, in the context of considering a complaint under Article 34, regarding the alleged failure of a State to comply with such measure.

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<sup>30</sup> *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99) [GC] Judgment, 2005, § 128

<sup>31</sup> *Paladi v. Moldova*, Application no. 39806/05, [GC] Judgment, 2009, §§ 84-92

<sup>32</sup> *Paladi v. Moldova*, Application no. 39806/05, [GC] Judgment, 2009, § 89

Moreover, in assessing whether a State has fulfilled its obligations under Article 34 of the ECHR, it is irrelevant that, despite a State's failure to comply with the indicated interim measures, the damage which such a measure was designed to prevent subsequently turns out not to have occurred.

As such, States may not substitute their own judgment for that of the Court in assessing if there was a risk of irreparable damage to the applicants, at the time when interim measures were indicated, neither may States decide on the time-limits for complying with interim measures, or the extent to which such measures are to be complied with. Should the State consider it possesses information and materials which may persuade the Court to annul the interim measures, the proper conduct is informing the Court accordingly.

Compliance with interim measures falls within the exclusive competence of the Court. In a similar approach with the International Court of Justice, in verifying compliance, the ECtHR shall start with the literal interpretation of the indicated measures, bearing in mind whether the State has observed both the letter and the spirit of the interim measures indicated to it. It falls with the respondent State to prove that the interim measures were complied with. In an exceptional case, the State should prove that there was an objective impediment which prevented compliance, and that the State took all reasonable steps to remove the impediment and to inform the Court about the situation.

**3.3. *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, Judgment, 2020 and *D.A. and Others v. Poland*, Application no. 51246/17, Judgment, 2021<sup>33</sup>**

Both *M.K. and Others v. Poland* and *D.A. and Others v. Poland* concern applications filed by migrants against Poland, pushbacks, violation of core rights (such as those provided by Article 3 of the Convention), collective expulsions, and the disregard of Polish authorities for interim measures issued by the Court, which indicated that migrants were not to be returned to Belarus. The relevance of these cases lay in the striking similarity with the situations which unfurled in 2021.

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<sup>33</sup> *D.A. and Others v. Poland*, Application no. 51246/17, Judgment, 2021, §§ 96-101

In analysing the principles applicable to Article 34 of the Convention and to interim measures, both cases reference the Court's earlier jurisprudence.

In *M.K. and Others v. Poland*, the Court underlines the fact that any laxity on a state's compliance with interim measures "would unacceptably weaken the protection of the core rights in the Convention and would not be compatible with its values and spirit"<sup>34</sup>.

*In both cases*, the Court had indicated interim measures to Poland in 2017, instructing the authorities to refrain from returning the applicants to Belarus. On the very day the interim measures were indicated, the applicants were turned away from the checkpoint. This also happened subsequently, while the applicants were carrying a copy of the letter informing them of the interim measures issued in their case.

Poland continuously questioned the possibility to comply with the interim measure, stating that the applicants could not have been removed, since they were never legally admitted to Polish territory. Also, Poland challenged the legitimacy of the interim measure, submitting that there had not been a sufficient factual basis for the measure and that the applicants had abused this tool in order to force the Border Guard to admit them to Poland. Although the Court dismissed these arguments in rejecting Poland's application to have the measures lifted, Poland persisted in relying on these contentions.

The interim measure issued in the applicant's case had not been complied with at the date of the judgments and remained in force. Therefore, the Court concluded that Poland had failed to carry out its obligations under Article 34 of the Convention and considered that the interim measure should remain in force until the judgment becomes final, or until the Court takes a further decision in this connection.

#### ***4. The 2021 cases against Poland – a sense of déjà vu***

The interim measures indicated to Poland required that the authorities "**provide the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter**" (emphasis added), without requiring that Poland let the applicants enter its territories. The Court stressed 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

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<sup>34</sup> *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, Judgment, 2020, § 231

entry, residence, and expulsion of aliens. In at least one case, the measures were supplemented by a measure **not to remove** the applicants from Poland until further notice and to **allow the applicants' lawyers to make necessary contact** with them.

In the case of *R.A. and Others v. Poland* (application no. 42120/21), on the 29<sup>th</sup> of September 2021, the Polish Ministry of Foreign Affairs issued a response, providing the ECHR with its position on the order for interim measures.<sup>35</sup>

The arguments brought forth by Poland are strikingly similar to those it had presented in the case of *D.A. and Others v. Poland*<sup>36</sup>: scapegoating (shifting the blame to Belarus), lack of territorial jurisdiction (denying that the applicants were on Polish soil), objective impossibility to comply (as a result of international law governing relations between states), and illegitimacy of the interim measures (due to the fact that the migrants do not, in fact, have a valid claim for applying for international protection). Moreover, Poland donned the cape of valiance, invoking that it is the obligation and a difficult task of the Polish authorities to guard the inviolability of the state border which is at the same time the European Union's external border. As such, the Border Guards are performing their duties to protect the state border and prevent illegal migration.

Primarily, Poland stated that all responsibility falls with Belarus, firstly, since the whole situation is a result of Belarussian "cynical use of migrants to exert migratory pressure on the EU Member States", and secondly, because Poland contends that the applicants are on Belarussian soil and therefore, Poland has no jurisdiction over them. The "not out problem" approach has constantly transpired from Polish politics, with such statements from Prime Minister Mateusz Morawiecki as "Belarus is a signatory to the Geneva Convention on Refugees. Refugees and migrants are obliged to submit requests for asylum within Belarus. If someone from Egypt, Afghanistan, Somalia finds themselves in Belarus, they should apply for asylum. From Poland's point of view, they have no right to cross our border without our visa."<sup>37</sup>

With regard to providing "goods and merchandise" (which seems to be a neutral way for Poland to describe food, water and clothing), Poland contends that, since the applicants are on

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<sup>35</sup> Document DPT.432.243.2021/59, available at <https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures>

<sup>36</sup> See *supra*, 3.3.

<sup>37</sup> Prime Minister: Ensuring the safety of the Polish borders and the Polish citizens is a fundamental duty of the Government - <https://www.gov.pl/web/primeminister/prime-minister-ensuring-the-safety-of-the-polish-borders-and-the-polish-citizens-is-a-fundamental-duty-of-the-government>

Belarusian territory, Polish authorities cannot allow such transfers across the border in an unregulated manner, without Belarus' consent. Thus, Poland invokes the objective impossibility of carrying out the indicated measures.

Concerning allowing contacts between the applicants and their lawyers, again, Poland invokes that it does not exercise any control over the applicants, since its jurisdiction does not extend beyond its borders. The fact that Belarus is not a party to the Convention cannot justify forcing the State Party to take actions contrary to law. Any actions taken from the Polish territory in respect of persons staying on the territory of Belarus (without the latter's consent) would constitute an interference into the Belarusian territory. The Border Guard officers cannot allow such contacts by third parties across the border in an unregulated manner.

However, Poland does declare its wish to comply with the interim measure indicated by the Court. As such, the Government offers the applicants' lawyers a possibility to go to the nearest border crossing (in Bobrowniki – app. 29 km, or in Kuźnica – app. 35 km from the applicant's place of stay). Polish authorities would, on their part, facilitate the applicants' lawyers crossing the border on the Polish side.

As to not returning the applicants to Belarus, provided that they are present on the Polish territory, the Government firmly states that the applicants **have not crossed the line** of the Polish state border and **are staying on the territory of Belarus**, rendering the interim measure inapplicable, since the condition envisaged by the Court has not been met.

Clearly, not only does Poland contend that the applicants are not on Polish territory, but also that they never were.

Still, there are two major differences in circumstances between the cases in 2021 and the case of *D.A. and Others v. Poland*<sup>38</sup>: the state of emergency declared by Poland in the border region on the 2nd of September 2021 and the legalisation of pushbacks, enacted by Poland in October 2021. (Both occurred after many interim measures had already been indicated, but they were in place while other interim measures were issued and are in place to date.) Could these have any bearing over observing interim measures? In our opinion, they do not constitute valid grounds for a state's failure in this respect.

The emergency situation does not create an exemption for states to observe the rights granted by the Convention, neither from the standpoint of the provisions of the ECHR or from

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<sup>38</sup> See supra, 3.3

that of general international law. Poland did not notify any derogations from the Convention, pursuant to Article 15, nor could it have, with regard to Articles 2 (Right to life – except in respect of deaths resulting from lawful acts of war), 3 (Prohibition of torture), 4§1 (No one shall be held in slavery or servitude) and 7 (No punishment without law). Any derogation from Article 34 would defeat the purpose of the Convention, in its current form. Also, the circumstances precluding wrongfulness, as provided by the Articles on the Responsibility of States for Internationally Wrongful Acts (consent, self-defence, countermeasures in respect of an internationally wrongful act, force majeure, distress, necessity and compliance with peremptory norms), do not apply.

It remains unclear why Poland invoked the existence of the state of emergency on its territory, in its response to the Court regarding interim measures indicated in *R.A. and Others v. Poland*

On the separate issue of pushbacks, Poland has legalised such actions, sending migrants already on Polish soil back to the border. Persons caught crossing the border illegally may be ordered to leave Polish territory, based on the decision of the local Border Guard chief, without any guarantee for effective recourse for people seeking international protection.<sup>39</sup> Surely no such national legislation could constitute a strong argument for removing applicants in spite of the interim measures in place. Rather, it could be construed as a violation of the *non-refoulement* principle (under Article 3 ECHR) and the prohibition of collective expulsion (Article 4 Protocol No. 4 to the ECHR).

#### **4.1. Was there a failure to comply?**

*Prima facie*, Poland seems to have chosen not to fully comply with the interim measures. In its Motion for a Resolution<sup>40</sup>, the European Parliament noted that there have been several reports of pushbacks at Poland's and Lithuania's borders with Belarus, that the ECtHR had issued multiple interim orders requiring Poland and Latvia to grant the affected individuals access to shelter, food, and lawyers, and has ordered Lithuania and Poland not to expel asylum seekers to Belarus, interim orders which have reportedly been violated. Also, the European

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<sup>39</sup> *Poland passes legislation allowing migrant pushbacks at border* - <https://edition.cnn.com/2021/10/15/europe/poland-border-pushback-legislation-intl/index.html>

<sup>40</sup> No. B9 0488/2021, available at [https://www.europarl.europa.eu/doceo/document/B-9-2021-0488\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2021-0488_EN.html)

Parliament called on these national authorities to immediately implement the interim orders of the ECtHR and to take into account the guidance of the United Nations High Commissioner for Refugees and bodies of the Council of Europe. Furthermore, it called on the Commission, as the guardian of the treaties, to unambiguously condemn the violations by Poland, Latvia and Lithuania and to enforce compliance with relevant EU law. Non-compliance with the interim measures and enforcement of pushbacks by Polish authorities have also been reported by international NGOs.<sup>41</sup>

Still, in *R.A. and Others v. Poland* (application no. 42120/21), it has proven more malleable with respect to offering the applicants' lawyers a possibility to go to the nearest border crossing and providing the applicants' lawyers with all possible facilitation in crossing the border on the Polish side. This seems to be a turn for the better, and away from the absolute intransigency exhibited in the past, in regard to interim measures concerning migrants. Furthermore, the Polish authorities pledged to undertake to use their best endeavours through diplomatic channels to obtain the necessary permits, including visas, for entering the territory of Belarus. The applicants' lawyers will thus be able to cross the Polish-Belarusian border in a lawful manner and go to the site where Poland contends that the applicants are staying. As far as prospects of gaining access to the applicants on the Belarusian territory are concerned, Poland is complacent with the fact that the Belarusian authorities have already allowed such access to third parties, such as representatives of the UNHCR and of the Red Cross.

#### **4.2. *Were there objective impediments to compliance with the interim measures?***

In an exceptional case, the respondent state may argue that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation.<sup>42</sup> For example in *A.N.H. v. Finland*<sup>43</sup>, the Court found that Finland had not received notice of the interim measure due to a technical error, but as soon as the error was discovered, the Finnish authorities acted rapidly to enact its provisions and remedy the situation. Consequently, the Court found that there

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<sup>41</sup> *Poland: Digital evidence indicates Afghan asylum seekers illegally pushed back into Belarus* – Amnesty International, <https://www.amnesty.org.uk/press-releases/poland-digital-evidence-indicates-afghan-asylum-seekers-illegally-pushed-back>

<sup>42</sup> European Court of Human Rights, Practical Guide on Admissibility Criteria, 1 August 2021, §25, p. 23

<sup>43</sup> *A.N.H. v. Finland*, Application no. 70773/11, Decision, 2013, § 27

was no need to investigate the matter any further, since there was no indication of bad faith or culpable conduct on the part of the Finnish Government in complying with the interim measure, by comparison and by contrast with previous cases such as *Paladi v. Moldova* [GC], no. 39806/05, §§ 95-102, 10 March 2009; and the cases referred to in *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 162-166, ECHR 2010 (extracts).

In the case of interim measures indicated to Poland, there is no indication of such objective impediments, although Poland does insist on not being able to carry out obligations due to lack of jurisdiction.

Indeed, should the Court find that Poland did not have jurisdiction over the applicants, the measures would be inapplicable. But given the fact that the applicants were either on Polish territory or, at the very least, at the Polish border, the argument does not stand.

The Court has already ruled in *MK and Others v Poland* (Application Nos. 40503/17, 42902/17, 43643/17) that, in the sense of Article 1 of the Convention, Poland exercised territorial jurisdiction over persons when subjecting them to border checks and rejecting their applications for international protection. As such, when border officials subject a person to inspection at the border, that person falls within the jurisdiction of Poland and is protected by the ECHR. Would it then be out of the realm of logic to assume that it is also within Polish jurisdiction to provide people stranded at the border with food, water, clothing, adequate medical care and, if possible, temporary shelter, without letting the applicants enter Polish territories? Can there be an objective impediment precluding Poland to fulfil this obligation, indicated by the interim measures? Most probably not.

#### ***4.3. Is the concrete situation of the applicants to be taken into account in assessing compliance with Article 34 of the Convention?***

In its position on the order for interim measures<sup>44</sup>, Poland highlighted that “in a conversation with the Polish chargé d'affaires in Minsk, UNHCR expressed the view that the persons staying at the camp on the territory of Belarus do not qualify for international protection, as according to the information obtained, they have been legally staying on the territory of the Russian Federation in the Ural region in recent years”.

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<sup>44</sup> See supra note 35

The argument presented does not bare relevance to non-observance of parties' obligations to comply with interim measures. It may go to the admissibility of claims for international protection made by the applicants, but it does not relate to the interim measures in any way.

At the time of indicating the interim measures, the concern was not whether the applicants had a valid claim, but rather, as pointed out in the Court's jurisprudence,<sup>45</sup> to avert a real risk of serious, irreversible harm if the measure is not applied, to conserve the Court's ability to render judgment based on an effective examination of the applicants' complaint and to ensure the applicants' effective exercise of their right of individual application.

Even if one were to consider that the only damaging consequence to the applicants would be the rejection of their claims for international protection (after having been properly examined), this would still have no bearing in front of the Court, when deciding whether the state has fulfilled its obligations under Article 34 of the ECHR<sup>46</sup>.

#### ***IV. CONCLUSIONS***

While judgment in the cases brought before the ECtHR against Poland is pending, some interim measures are still in effect. Also, more such cases may arise, in the context in which a resolution to the issue of migrants stranded at the Belarusian border is nowhere near. These measures are legally binding on Poland and the consequence for disregarding them is the breach of Article 34 of the Convention. Still, Poland seems to be stuck on arguments the Court has already rejected previously in the cases of *M.K. and Others v. Poland* and *D.A. and Others v. Poland*, raising serious doubts regarding its commitment to the Convention and to human rights in general.

Political rhetoric escalates, determining effective action only in the sense of building walls and raising barbed wire fences, increasing the use of force and creating mechanisms to cover up the states' ineffectiveness in dealing with humanitarian crises. In the midst of this, the standards of the European Convention of Human Rights are being less and less observed.

Based on the presented cases and on the current state of affairs from a political standpoint, it is foreseeable to anticipate that Poland will continue to disregard interim measures relating to

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<sup>45</sup> See *supra*, 3

<sup>46</sup> See *supra*, 3.2

migrants and continue to promote and enforce a policy of pushbacks. Since the substantive point of issuing interim measures is avoiding irreparable harm, the effectiveness of the unobserved measures comes into question. This is even more obvious from the point of view of the procedural safeguard which interim measures should provide. Thus, although the Court may find the state in breach, as long as interim measures are not complied with, they are clearly an ineffective tool for safeguarding human rights.

Although the situation has been condemned by the international community, both by states and by international organisations and NGOs, effective resolutions do not seem to exist at the present moment, nor are any foreseeable.

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