



3rd UPR CYCLE – SUBMISSION FOR THE 35th UPR WORKING GROUP SESSION ON SPAIN’S SUMMARY RETURNS IN CEUTA AND MELILLA

ECCHR (the European Center for Constitutional and Human Rights e.V.) is a not-for-profit NGO based in Berlin (Germany), whose work specialises in legal interventions to address grave human rights violations. In the field of migration, ECCHR focuses on the unlawful character of push backs at Europe’s borders. ECCHR has ECOSOC Consultative status.

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Executive Summary

This report addresses summary automatic returns at the fenced land borders of the Ceuta and Melilla enclaves with Morocco and the need for Spain to reform this border regime.

I. Background and Framework

1. The border fence structures of Ceuta and Melilla were built in 1995 and 2005 respectively and are each constituted of three high fences with anti-climbing technology and thermal cameras. Both border fence structures are entirely within Spain's territory¹ and exclusive control. Since the fences construction, Spain has implemented an automatic summary returns regime from its territory for people found in, on or near the border fence structures, referred to as *devoluciones en caliente* ("hot returns"). In summer 2015, this practice was grounded into law under the regime of "*rechazos en frontera*" ("border rejections").

2. Until then, this regime was solely regulated by internal *Guardia Civil* documents (*Orden de Servicio* and *Protocolo Operativo*²) at the margin of the normative framework, as noted by Spanish Courts.³ This was in direct violation of Spanish law. As highlighted by Spanish Courts,⁴ the Spanish Ombudsperson⁵ and the Council of Europe ("CoE") Human Rights Commissioner ("CoE HRs Commissioner"),⁶ individuals caught on Spanish territory in or around the border fence structure should have faced a procedure of *devolución*.⁷ This

¹ In relation to Melilla, please refer to Defensora del Pueblo ("DdP"), *Informe 2005*, p.292, available at <https://www.defensordelpueblo.es/informe-anual/informe-anual-2005/> (accessed on 16.07.19); ABC Nacional, *Melilla pide a Zapatero firmeza para recuperar los terrenos situados tras la valla*, 16 February 2006, available at https://www.abc.es/espana/abci-melilla-pide-zapatero-firmeza-para-recuperar-terrenos-situados-tras-valla-200602160300-132312357846_noticia.html (accessed on 16.07.19).

² *Orden de Servicio* 6/2014 of 11 April 2014; *Protocolo Operativo de Vigilancia de fronteras* of the 26 July 2014, as mentioned in *ND and NT v. Spain* (ECtHR Application Numbers 8675/15 & 8697/15), judgment of the Third Section, 3 October 2017, §17, available at <https://www.refworld.org/cases,ECHR,59d3a7634.html> (accessed on 16.07.19).

³ See the decisions of first and second instance in the *procedimiento ordinario* n° 27-2014 which followed CEAR's administrative challenge against the decision of the *Dirección General de la Guardia Civil* to approve this *Protocolo Operativo: Juzgado Central de lo Contencioso-administrativo* n° 9, *Auto* n° 107/2014 of 7 of November 2014; Fifth Section of the Contentious-Administrative Chamber (*Sección Quinta de la Sala de lo Contencioso-administrativo*) of the *Audiencia Nacional*, decision of 22 April 2015 [ECLI:ES:AN:2015:1707]. See also the decisions of first and second instance in the *procedimiento ordinario* n° 16/2014 which followed a judicial challenge against the *Orden de Servicio: Juzgado de lo Contencioso-administrativo* n° 2 of Melilla, *Auto* n° 422/2014 of 17 December 2014; Third Section of the Contentious-Administrative Chamber (*Sección Tercera de la Sala de lo Contencioso-administrativo*) of the *Tribunal Superior de Justicia de Andalucía (sede de Málaga)* of 29 May 2015, *recurso de apelación* n° 522/2015 [ECLI:ES:TSJAND:2015:6129].

⁴ Judge 1A of Investigation and Instruction n°2 of Melilla, Decision of 17 November 2014 in the case 866/2014, p.15.

⁵ *Supra* footnote 1, Defensor del Pueblo, *Informe 2005*, 6.3;

Defensor del Pueblo, *Informe 2012*, 4.5.1, available at <https://www.defensordelpueblo.es/informe-anual/informe-anual-2012/> (accessed on 16.07.19);

Defensor del Pueblo, *Informe 2013*, 4.5.1, available at <https://www.defensordelpueblo.es/informe-anual/informe-anual-2013/> (accessed on 16.07.19), where the DdP indicates she made a number of recommendations to the MoI on this point;

Defensor del Pueblo, *Informe 2014*, 4.5.1, available at <https://www.defensordelpueblo.es/informe-anual/informe-anual-2014/> (accessed on 16.07.19), where DdP indicates that her recommendations were not accepted.

⁶ CoE HR Commissioner, *Third Party Intervention*, 2015, CommDH (2015), §21, available at <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/16806dac25> (accessed on 08.07.19).

⁷ This procedure is regulated by article 58(3) to (7) of the *Ley Orgánica 2/2000* (otherwise known as the "*Ley de Extranjería*") and article 23 of the connected *Real Decreto 557/2011*.

entails identifying them in a police station⁸ and issuing a return decision⁹, subject to judicial review with free legal assistance and interpretation.¹⁰

3. However, the Ceuta and Melilla border regime is grounded in the theory that the applicability of laws can be suspended at the border zone, between the actual borderline (as defined by international treaties) and a fictitious unfixed location called the “operative border.” The suspension of national law was explicitly foreseen in the above-mentioned *Protocolo Operativo*.¹¹ Spain elucidated that such suspension also applied to regional and international legal obligations in front of the European Court of Human Rights (ECtHR).¹²

B. Normative Framework

a) National law

1. Despite unanimous criticism, this border regime was further strengthened through legal reform. The *Ley Orgánica 4/2015 de protección de la seguridad ciudadana* of 30 March 2015 provides,

“Tenth additional provision. Special regime for Ceuta and Melilla.

1. Foreigners who are detected on the border line of the territorial demarcation of Ceuta or Melilla while attempting to overcome the elements of border containment in order to cross the border irregularly may be rejected in order to prevent their illegal entry into Spain.

2. In any case, the rejection will be carried out in compliance with the international human rights and international protection standards to which Spain is a party.

3. Applications for international protection shall be formalised in the places set up for this purpose at border crossings and shall be processed in accordance with the provisions of the regulations on international protection.”¹³

⁸ Article 23(2) of the *Real Decreto 557/2011*.

⁹ *Resolución de devolución*.

¹⁰ Article 23(3) of the *Real Decreto 557/2011*.

¹¹ *Protocolo Operativo de Vigilancia de fronteras* of the 26 July 2014, p.2, as transposed in *ND and NT v. Spain* (ECtHR Application Numbers 8675/15 & 8697/15), judgment of the Third Section, 3 October 2017, §17, *supra* footnote 2.

¹² *Supra* footnote 2, *ND and NT v. Spain* (ECtHR Application Numbers 8675/15 & 8697/15), judgment of the Third Section, 3 October 2017, §44, “However, [the Government] adds that, ‘assuming that the border fence is situated within Spain’s land borders, the exercise of jurisdiction, even within the territory of the Member States, may have a variable object and purpose in relation to each of the rights protected by the Convention’”. See also, *idem*, §52, “The Court notes that, in the Government’s view, the facts of the present case occurred outside the jurisdiction of the respondent State as the applicants did not enter the Spanish territory (paragraphs 17 and 44 above) and as, even assuming that ‘the border fence is located within Spain’s land borders’, the action of the law enforcement authorities preventing the entry of migrants would not fall within the jurisdiction of the Spanish authorities under Article 4 Protocol 4.” (courtesy translation).

¹³ Courtesy translation of the original text, “*Disposición adicional décima. Régimen especial de Ceuta y Melilla.*
1. Los extranjeros que sean detectados en la línea fronteriza de la demarcación territorial de Ceuta o Melilla mientras intentan superar los elementos de contención fronterizos para cruzar irregularmente la frontera podrán ser rechazados a fin de impedir su entrada ilegal en España.
2. En todo caso, el rechazo se realizará respetando la normativa internacional de derechos humanos y de protección internacional de la que España es parte.
3. Las solicitudes de protección internacional se formalizarán en los lugares habilitados al efecto en los pasos fronterizos y se tramitarán conforme a lo establecido en la normativa en materia de protección internacional.”

2. The law includes a provision on compliance with international human rights which states, “*the rejection will be carried out in compliance with international human rights and international protection standards.*” Yet the Spanish government refuses to take implementing measures. When probed on this point by the Spanish Senate, Spain’s former Interior Minister Mr. Zoido answered that these were not needed, as the border regime is in compliance with Spain’s legal obligations.¹⁴ This confirmed that the provision on compliance with international human rights is a self-proclamation rather than a commitment. Yet as noted by the CEAR,¹⁵ “*the mere addition of a reference to international human rights law ... does not, in itself, mean effective respect for human rights.*”¹⁶

3. Further, Spain clarified¹⁷ that the essence of this border regime is to deny individuals apprehended between the real borderline and the fictitious “operative border” any legal procedure or safeguards. Spain specified¹⁸ that the provision on compliance with international human rights exclusively refers to the theoretical possibility of accessing the border asylum offices since fall 2014.¹⁹ Thus under the current regime, the only permitted action of the border authorities between the actual borderline and the “operative border” is to impede crossings of the latter, to the explicit exclusion of considering protection claims and risks of *refoulement*.

b) EU Law

4. As highlighted by the UNHCR²⁰ and the CoE HRs Commissioner,²¹ EU law applies in the autonomous cities of Ceuta and Melilla.²² In 2014 the EU Interior Commissioner stated that the border regime in Ceuta and Melilla, “*constitutes a violation of EU legislation.*”²³

5. First, the EU Asylum Procedures Directive²⁴ obliges Member States to facilitate access to their asylum procedure to individuals, “*who can be understood to seek refugee*

¹⁴ Europapress, *Zoido cree que la Guardia Civil no necesita instrucciones para la valla de Melilla porque ya cumple*, 7 February 2017, available at <https://www.europapress.es/sociedad/noticia-zoido-cree-guardia-civil-no-necesita-instrucciones-valla-melilla-porque-ya-cumple-derechos-humanos-20170207170957.html> (accessed on 17.07.19), “*Si la Guardia Civil cumple con todos los requisitos respecto de los ejercicios de los derechos humanos, ¿Qué instrucción es la que necesitan?*”

¹⁵ *Comisión Española de Ayuda al Refugiado*.

¹⁶ *ND and NT v. Spain* (ECtHR Application Numbers 8675/15 & 8697/15), judgment of the Third Section, 3 October 2017, §92, *supra* footnote 2 (courtesy translation). Referring to CEAR, Third Party Intervention, 13 November 2011.

¹⁷ *Supra* footnote 10.

¹⁸ The hearing is available at https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=867515_26092018&language=lang&c=&py=2018

¹⁹ UNHCR, *Third Party Intervention*, 2015, 2.3.1, available at <https://www.refworld.org/type,AMICUS,UNHCR,ESP,59d3a81f4,0.html> (accessed on 07.09.19), “*Until November 2014, when authorized asylum border posts were created by the Spanish authorities, there was no mechanism for persons in need of international protection to safely and legally access the territory and apply for asylum.*”

²⁰ *Idem*, 2.1.

²¹ *Supra* footnote 6, CoE HR Commissioner, *Third Party Intervention*, 2015, §17.

²² The only reservations to the Schengen Border Code made by Spain as to the cities of Ceuta and Melilla concern internal border controls within the Schengen Zone, more specifically articles 20 and 21 of the Schengen Border Code, and not external borders control.

²³ Reported in El País, *Brussels accuses Spain of violating EU border laws in Ceuta and Melilla*, 31 October 2014, available at https://elpais.com/elpais/2014/10/31/inenglish/1414750844_552185.html (accessed on 05.07.19).

status”,²⁵ including “*at the border, in the territorial waters or in transit zones*”,²⁶ thus expressly not only at official border crossings. This obligation entails providing information on asylum procedures, access to lawyers and interpreters,²⁷ and registering individual asylum claims.²⁸

6. Obligations to protect external borders under the Schengen Border Code (“SBC”) were used by the Spanish government to justify the Ceuta and Melilla border regime.²⁹ Yet this regime is in fact also in violation of article 4 SBC³⁰ which provides, “*decisions under this Regulation shall be taken on an individual basis*”. It also stipulates that when applying the SBC, States shall act in compliance with the Geneva Convention and their international protection obligations as well as the EU Charter of Fundamental Rights, including *non-refoulement* and the prohibition of collective expulsions (article 19), the prohibition of torture, inhuman or degrading treatment (article 4) and rights to asylum (article 18) and to an effective remedy (article 47). A detailed analysis of relevant EU law aspects was provided by ECRE and others in front of the ECtHR.³¹ As they stressed, this border regime also violates the right to be heard.³²

c) The European Convention on Human Rights

7. The current legal framework – alike the past systematic policy – is incompatible with Spain’s legal obligations under the European Convention on Human Rights (ECHR), including the prohibition of torture and cruel, inhuman or degrading treatments (article 3), the prohibition of collective expulsions (article 4 protocol 4) and the right to an effective remedy (article 13).

²⁴ Directive 2013/32/EU. See Defensor del Pueblo, *El asilo en España*, June 2016, p.101, available at https://www.defensordelpueblo.es/wp-content/uploads/2016/07/Asilo_en_Espa%C3%B1a_2016.pdf (accessed on 17.07.19)

²⁵ Directive 2013/32/EU, article 2(b).

²⁶ *Idem*, article 3 (1).

²⁷ *Idem*, article 8.

²⁸ *Idem*, article 8(2).

²⁹ See for example the Spanish Secretary of State for Security Francisco Martínez Vázquez’ declaration that such summary automatic returns constitute an “exquisite manner” in which the Spanish authorities reconcile their obligations to protect the borders with the migrants and refugees’ rights. In *La Vanguardia*, *El Gobierno niega devoluciones en caliente sino rechazos en frontera*, 19 September 2014, available at <https://www.lavanguardia.com/politica/20140919/54415204455/gobierno-niega-devoluciones-caliente-rechazos-frontera.html> (accessed on 05.07.19).

³⁰ Formerly article 3,

“*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.”

³¹ ECRE and others, *Third Party Intervention*, 2015, §§23-43, available at <https://www.asylumlawdatabase.eu/en/content/en-nd-and-nt-v-spain-appl-no-867515-and-869715-third-party-intervention-aire-centre-amnesty> (accessed on 08.07.19)

³² For more details, see *idem*, §27. See also *Khlaifia and others v. Italy* (ECtHR 16483/12), Grand Chamber judgment of 15 December 2016, §§43 ff.

8. This issue was put to the consideration of the ECtHR in the case of *ND and NT v. Spain*.³³ The many organisations intervening as Third Parties shows the importance of the issue, including the OHCHR,³⁴ the UNHCR,³⁵ joint interventions by Amnesty International, ECRE, the Aire Center and the ICJ³⁶ as well as CEAR and the CoE HRs Commissioner.³⁷ All shared the view that these automatic summary returns are incompatible with the ECHR.

9. The CoE HRs Commissioner highlighted, “*Such returns, which affect Sub-Saharan Africans in particular, take place outside of any formal procedure and without identification of the persons concerned or assessment of their individual situation. This practice, to which the legal amendments adopted in Spain in March 2015 aim at providing legal underpinning, prevents the persons concerned from effectively exercising their right to seek international protection.*”³⁸ The Commissioner recommended that instructions be given to, “*explicitly prohibit summary and collective expulsions and refoulement. They should highlight procedural guarantees that have to be respected, including the right to be identified, to have one’s international protection needs assessed, and to have access to an interpreter, a lawyer and medical assistance as appropriate.*”³⁹

10. On access to asylum by Sub-Saharan persons through the Beni Enzar border asylum office in Melilla, the Commissioner stated, “*in practice only asylum-seekers from Syria can access the asylum office through the Moroccan border*”, and yet “*no person intercepted on or near the fence has until now been transferred to the asylum offices in order to be able to make an asylum claim.*”⁴⁰ He also expressed his disapproval of the new legal provisions several times, stating “*Spain cannot legalize what is illegal.*”⁴¹

11. The Third Section of the ECtHR unanimously agreed in its first judgment in *ND and NT*, confirming that jurisdiction cannot be excluded and concluding that the summary automatic returns were in violation of article 4 protocol 4 (prohibition of collective expulsions) and article 13 (the right to an effective remedy) ECHR.⁴² At Spain’s request, the case was referred to the Grand Chamber (“GC”), where Third Party Interveners reiterated their positions, including the CoE’s HRs Commissioner⁴³ and the UNHCR,⁴⁴ who both

³³ *Supra* footnote 2.

³⁴ OHCHR, *Third Party Intervention*, 9 October 2015, available at <https://www.ohchr.org/Documents/Issues/Migration/ThirdPartyIntervention.pdf> (accessed on 08.07.19).

³⁵ *Supra* footnote 19. Also UNHCR, *Third Party Intervention in front of the Grand Chamber*, 5 April 2018, available at <https://www.refworld.org/type,AMICUS,UNHCR,ESP,5b92533f4,0.html> (accessed on 08.07.19).

³⁶ *Supra* footnote 34. See also ECRE and Others, *Third Party Intervention in front of the Grand Chamber*, 5 April 2018, available at <https://www.amnesty.org/download/Documents/EUR4191102018ENGLISH.PDF> (accessed on 08.07.19).

³⁷ *Supra* footnote 6. See also CoE HR Commissioner, *Third Party Intervention in front of the Grand Chamber*, 2018, CommDH(2018)11, available at <https://rm.coe.int/third-party-intervention-n-d-and-n-t-v-spain-by-nils-muiznieks-council/1680796bfc> (accessed on 08.07.19).

³⁸ *Idem*, §36.

³⁹ *Idem*, §33.

⁴⁰ *Idem*, §30.

⁴¹ Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, *Spain cannot legalize what is illegal*, 10 December 2014, available at <https://www.coe.int/en/web/commissioner/-/spain-cannot-legalise-what-is-illegal> (accessed on 08.07.19).

⁴² *Supra* footnote 2.

⁴³ *Supra* footnote 40.

⁴⁴ *Supra* footnote 38.

intervened. A final judgment is pending. Two further cases, which include claims of article 3 ECHR violations against Spain, are also pending.⁴⁵

12. Meanwhile the CoE's Special Representative on migration and refugees confirmed, "*Foreigners who attempt to enter into Melilla and Ceuta by jumping the fences along their land borders and are intercepted at and near the borders, are randomly returned to Morocco without being identified, having their needs assessed or being given the possibility to apply for asylum.*"⁴⁶ He underlined that compliance with "*basic international human rights obligations*" requires "*every person arriving in Spain should be protected against refoulement and collective expulsion with a real possibility to gain access to an effective and fair asylum procedure. This is essential to making sure that the right to seek asylum is guaranteed effectively and does not become a mere theoretical possibility.*"⁴⁷ He concluded that, "*While the Spanish Law on Aliens contains a general guarantee that the returns described above will be carried out in compliance with international human rights standards, in practice the Guardia Civil does not yet have a protocol on screening foreigners who irregularly cross the borders in Melilla and Ceuta which would provide instructions to its officers on identifying persons in need of international protection and taking necessary action regarding their access to a fair and efficient asylum procedure. As international bodies, including the Commissioner for Human Rights, the CPT and the UNHCR, have called for the issuance of such instructions for some years it is now necessary that Spain takes action.*"

13. As for article 3 ECHR, during a 2014 visit in Melilla the CoE Committee for the Prevention of Torture noted allegations of severe ill-treatment of migrants and refugees by both Spanish and Moroccan forces.⁴⁸

d) UN Treaty obligations

The Convention for the Rights of the Child

14. The current border regime does not allow for the identification of (unaccompanied) minors and their consequential protection.⁴⁹ Thus it is incompatible with Spain's obligations under the Convention, in particular articles 3 (best interest), 20 (the protection of unaccompanied minors), 37 (the prohibition of torture, inhuman and degrading treatment), 8 (right to identity), 12 (right to be heard) and 2 (non-discrimination).

⁴⁵ *Doumbé Nnabuchi v. Spain* (ECtHR Application Number 19420/15) and *Balde and Abel v. Spain* (ECtHR Application Number 20351/17). The former addresses facts which occurred after the enactment of the *rechazos en frontera* legal provisions. Both cases are mentioned in the European Court of Human Rights, Factsheet on collective expulsions, September 2018, available at https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf (accessed on 17.07.19).

⁴⁶ Council of Europe Special Representative of the Secretary General on migration and refugees, *Report of the fact-finding mission to Spain of 18-24 March 2018*, SG/Inf(2018)25, 3 September 2018, Executive Summary; available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808d2c31#_Toc521315633 (accessed on 05.07.19).

⁴⁷ *Ibidem*.

⁴⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Spanish Government on the visit to Spain from 14 to 18 July 2014*, CPT/Inf (2015) 19, 9 April 2015, p.5, available at <https://rm.coe.int/1680697f02> (accessed on 17.07.19).

⁴⁹ *Supra* footnote 49, §§14.5 to 14.8.

15. This is also the view of the Committee on the Rights of the Child (CmRC), which recommended in its combined 5th and 6th Periodic Report on Spain the end of this border regime and the effective application of *non-refoulement* and the best interest of the child.⁵⁰ In its Views in *D.D. v. Spain*⁵¹ the CmRC found that this indiscriminate expulsions regime was in violation of article 20 (unaccompanied minors protection) and 3 (best interest). It ruled that Spain had failed to assess the risk of treatment contrary to article 37 CRC and that the very way that the return was executed constituted a violation of article 37 CRC. This is the first final decision on the summary expulsions of unaccompanied minors at the Spanish-Moroccan border. It clearly condemns such automatic returns and underlines the importance of an individualised procedure.

16. The CmRC recommended, “*it is imperative and necessary that, in order to comply with its obligations under Article 20 of the Convention and in order to respect the best interests of the child, the State conducts an initial evaluation process, prior to any transfer or return, that includes the following stages: a) the determination, as a matter of priority, of the condition of an unaccompanied minor and, in case of uncertainty, the individual is granted the benefit of the doubt, so that, in the hypothesis that it is a minor, they be treated as such; b) the identification of the minor after an initial interview and c) the understanding of the specific situation of the minor and the evaluation of particular aspects of vulnerability if there are any.*”⁵² The CmRC ruled that Spain should amend its law accordingly, in order to no longer authorise “*the indiscriminate practice ... of automatic deportations*”.⁵³ To our knowledge Spain has taken no measure in that direction.

The Convention on Civil and Political Rights

17. In its latest Periodic Review the Human Rights Committee (HRCm) strongly criticised legal reforms aiming at legalising summary automatic returns in Ceuta and Melilla. The HRCm specifically highlighted that non-Syrian asylum seekers were denied access to asylum because of this border regime.⁵⁴

18. Indeed this border regime is incompatible with article 7 (the prohibition of torture or cruel, inhuman or degrading treatment or punishment), 2(1) (non-discrimination) and article 16 CCPR (right to be recognised as a person before the law), as “*one of the constitutive elements*” of this policy is to place “*the person ‘outside of the protection of the law’*” thus leaving them, “*in a legal limbo, in a situation of total defencelessness.*”⁵⁵

19. In its latest Periodic Review the HRCm recommended that Spain reviews its border regime to ensure that all have access to “*personalized assessment procedures*” and international protection through a non-discriminatory independent mechanism and the

⁵⁰ CmRC, *Concluding observations on the combined fifth and sixth periodic reports of Spain*, CRC/C/ESP/CO/5-6, 5 March 2018, pp.12-14, available at https://digitallibrary.un.org/record/1476613/files/CRC_C_ESP_CO_5-6-EN.pdf (accessed on 17.07.19).

⁵¹ *D.D. v. Spain* (CAT 4/2016), Views adopted on 1 February 2019, CRC/C/80/D/4/2016, §15.

⁵² *Idem*, §14.2.

⁵³ *Idem*, §15.

⁵⁴ Human Rights Committee, *Concluding observations on the sixth periodic report of Spain*, 20 July 2015, §18, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqX7R5nHBFqJOu4nx7MjbHJAiPJpixsP8%2Bk%2BsXvixZUFiczzygBcJ%2B9knj92Cy1WTuvIoN4F6vBJkOvaB%2BidSeWRB SH8MwA14T87JaN2JRGby> (accessed on 08.07.19).

⁵⁵ General comment on the right to recognition as a person before the law in the context of enforced disappearances (2011), Working Group on Enforced or Involuntary Disappearances, A/HRC/19/58/Rev.1.

possibility of suspensive measures.⁵⁶ Spain not only ignored this recommendation but did the exact opposite, by enacting on summary and automatic returns.

The Convention against Torture

20. The current border regime is incompatible with Spain's obligations under articles 3, 16 and 14 CAT. In February 2018 the Committee against Torture (CmAT) published a General Comment on the implementation of article 3 in the context of article 22 CAT in which it confirmed the close connection between the requirement to examine each case individually (prohibition of collective expulsions) and the principle of *non-refoulement* under article 3 CAT.⁵⁷

The UN Refugee Convention

21. The Melilla and Ceuta border regime is incompatible with Spain's legal obligations under the Refugee Convention. This was addressed at length by the UNHCR, including in its interventions in the case of *ND and NT*.⁵⁸

Anti-Discrimination

22. The Working Group of Experts on People of African Descent stressed, "*the urgent need to modify the working criteria of the agents in charge of border control in Ceuta and Melilla, so that they can hand over to the national police those persons who try to gain access to Spanish territory to carry out the procedures established by immigration regulations and can inform interested parties about the possibility of requesting international protection.*"⁵⁹

C. Institutional and Human Rights Infrastructures

23. Up until now, all mechanisms provided by institutional human rights infrastructures have failed to compel Spain to revise its border regime.

Defensor del Pueblo

24. The Spanish Ombudsperson is the National Preventive Mechanism under the UN OPCAT, Monitoring Body under the UN CRPD and under the EU Return Directive. The Ombudsperson raises its concerns as to the automatic summary returns in Ceuta and Melilla yearly, since the beginning of this practice.⁶⁰ In 2013 she made specific recommendations to the Spanish Ministry of Interior on this point,⁶¹ which he officially refused.⁶²

⁵⁶ *Supra* footnote 57, §18.

⁵⁷ Committee Against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, §§13 and 18.

⁵⁸ Footnotes 19 and 38.

⁵⁹ Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its mission to Spain*, A/HRC/39/69/Add.2, 14 August 2018, §32, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/249/75/PDF/G1824975.pdf> (accessed on 05.07.19).

⁶⁰ *Supra* footnote 5.

⁶¹ Defensor del Pueblo, *Informe 2013*, 4.5.1, *supra* footnote 5, where the Ombudsperson indicates she made a number of recommendations to the Ministry of Interior on this point.

Constitutional Court

25. The current law is the subject of a constitutional challenge,⁶³ which was ruled admissible in 2015⁶⁴ but remains pending. The challenge is based on an incompatibility with article 9.3 of the Spanish Constitution (“SC”) regarding the arbitrariness of the border regime, article 106 SC because it excludes any judicial overview and article 24.1 as it denies individuals an effective legal remedy. It also stresses the fact that the current border regime hinders minors’ identification.

Previous Universal Periodic Reviews

26. The 2nd UPR Cycle concluded with Spain fully accepting recommendations on the effective application of *non-refoulement*, entailing a change in its border regime in Ceuta and Melilla.⁶⁵ Spain also fully accepted a recommendation specifically to, “[e]nsure respect for procedural guarantees, including access to a lawyer and an interpreter, for migrants that are detected entering irregularly the autonomous cities”.⁶⁶ Spain partially accepted recommendations to end its regime of summary returns in Ceuta and Melilla⁶⁷ and recommendations on unaccompanied minors’ rights that implied a change in said border regime.⁶⁸ Spain did not honour its pledges but simply declared by law that the border regime complies with its international human rights obligations.

II. A. Implementation of international human rights obligations

Administration of justice, including impunity and the rule of law

27. The suspension of legal obligations and safeguards in the border zone between the actual borderline and the operative border attacks the rule of law at its core, by purposefully creating a lawless zone.

⁶² Defensor del Pueblo, *Informe 2014*, 4.5.1, *supra* footnote 5, where Ombudsperson indicates that her recommendations were not accepted.

⁶³ *Recurso de inconstitucionalidad* n.º 2896-2015.

⁶⁴ Tribunal Constitucional, decision of 9 June 2015 in Boletín Oficial del Estado, Núm. 143, Sec. I. Pág. 50083, 16 June 2015, available at <https://www.boe.es/boe/dias/2015/06/16/pdfs/BOE-A-2015-6641.pdf> (accessed on 17.07.19).

⁶⁵ These are recommendations on the effective applicability of the principle of *non-refoulement*, such as recommendations 131.176 (Canada), 131.177 (Norway), 131.178 (Sweden) and 131.179 (Uruguay).

⁶⁶ This was recommendation 131.173 (Israel). See “[Corrected] View on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review” (HRC/29/8/Add.1/Corr.1), §1, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/248/48/PDF/G1524848.pdf> (accessed on 05.07.19).

⁶⁷ These are recommendations 131.180 to, “[r]eview the current deportation practices for migrants in Ceuta and Melilla as well as the proposed amendment of Spain’s national security law to ensure the right of an individual to seek asylum” (Austria), 131.181 to, “[e]nsure that the Spanish legal framework concerning migrants, refugees and asylum seekers, with particular attention to the autonomous cities of Ceuta and Melilla, complies with its international human rights obligations, including with regard to procedural safeguards” (Canada) and 131.182 to, “[e]nsure that the immigration law and its proposed amendments are in compliance with the principle of *non-refoulement* and the prohibition of inhuman or degrading treatment, most importantly the provisions allowing for summary return of migrants and refugees without due process” (Czech Republic).

⁶⁸ These are recommendations 131.183 (Phillipines), 131.184 (Islamic Republic of Iran), 131.185 (Togo) and Northern Macedonia (131.186).

28. In a 2017 Joint General Comment the CmRC and the CMW stated, “[Conventions’ obligations] cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory”.⁶⁹

Migrants, refugees and asylum-seekers

29. Since the last UPR conclusions and the enactment of the legal provisions on *rechazos en frontera* in summer 2015, summary automatic returns have continued in Ceuta and Melilla,⁷⁰ with over 600 of them being executed in 2018 alone, according to the Spanish government.⁷¹

30. Conditions for Sub-Saharan migrants and refugees in Morocco have always raised concerns as to the principle of *non-refoulement*, as confirmed by the UN CAT in *Mopongo and others v. Morocco*⁷² and the UN CRC in *D.D. v. Spain*.⁷³ These conditions have now worsened, in what Amnesty International (AI) qualified as a relentless and unlawful crackdown on Sub-Saharan migrants and refugees.⁷⁴

31. Yet these still have no opportunity to access any type of protection, even if they are on Spanish territory, between the real borderline and the operative border. As for claiming protection from the border asylum office - as the Spanish government says they should⁷⁵ - it is now established that because of racial profiling on either side of the border, this is impossible. In Ceuta according to the Spanish state, no asylum claim has ever been registered at the border asylum office.⁷⁶ In Melilla, from the onset UNHCR⁷⁷, the CoE HR Commissioner⁷⁸,

⁶⁹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and Committee on the Rights of the Child (CRC), *Joint General Comment No. 3 and No. 22 on the general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC/3-CRC/C/GC/22, November 2017, §12.

⁷⁰ Defensor del Pueblo, *Informe 2016*, p.21, §4.4.1, “*Por otro lado, han continuado los intentos de acceso irregular a territorio nacional a través de los vallados fronterizos de Ceuta y Melilla. La mayoría de las quejas recibidas hacen referencia a que las denominadas «devoluciones en caliente» no permiten conocer si las personas afectadas son menores de edad o se encuentran en necesidad de protección internacional.*”, available at <https://www.defensordelpueblo.es/informe-anual/informe-anual-2016/> (accessed on 17.07.19); CEAR, *Informe 2019: Las personas refugiadas en España y Europa*, p.122, available at: https://www.cear.es/wp-content/uploads/2019/06/INFORME_CEAR_2019.pdf (accessed on 17.07.19).

⁷¹ El Diario, *El Gobierno central cifra por primera vez las devoluciones en caliente: 658 en 2018 en las fronteras de Ceuta y Melilla*, 13 January 2019, available at: https://www.eldiario.es/andalucia/devoluciones-caliente_0_854964586.html (accessed on 17.07.19).

⁷² CAT 321/2007, Views adopted on 7 November 2014, CAT/C/53/D/321/2007.

⁷³ *Supra* footnote 54.

⁷⁴ Amnesty International, *Morocco: Relentless crackdown on thousands of sub-Saharan migrants and refugees is unlawful*, 7 September 2018, available at <https://www.amnesty.org/en/latest/news/2018/09/morocco-relentless-crackdown-on-thousands-of-sub-saharan-migrants-and-refugees-is-unlawful/> (accessed on 09.07.19).

⁷⁵ See in particular the argumentation of the Spanish government in its oral intervention in front of the Grand Chamber, *supra* footnote 18.

⁷⁶ CEAR, *Informe 2017: Las personas refugiadas en España y Europa*, p.68, available at <https://www.cear.es/wp-content/uploads/2017/06/Informe-Anual-CEAR-2017.pdf> (accessed on 17.07.19).

⁷⁷ UNHCR Spain, “España: gestión fronteriza vinculada al respeto de las obligaciones internacionales.” 13 March 2015, available at <https://www.acnur.org/noticias/press/2015/3/5b0c1ea01c/espana-gestion-fronteriza-vinculada-al-respeto-de-las-obligaciones-internacionales.html> (accessed on 17.07.19).

⁷⁸ *Supra* footnote 6, §30.

AI⁷⁹, the Spanish Ombudsperson⁸⁰ and national NGOs⁸¹ confirmed that the Beni Enzar border asylum office remains wholly inaccessible to Sub-Saharan individuals, whose only option is to attempt to climb the border fence structure or to enter by boat,⁸² despite the fact that individuals from Sub-Saharan countries are highly likely to be asylum seekers and refugees.⁸³ Data from the Spanish Ministry of Interior confirms that between 2015 and 2017, only two Sub-Saharan individuals accessed the Melilla border asylum office,⁸⁴ both being women covered under a full burka in order to escape racial profiling.⁸⁵

Equality and non-discrimination

32. As addressed above, the border regime of automatic summary return and the ensuing impossibility for those who enter the territory irregularly to be afforded protection exclusively concerns and affects Sub-Saharan migrants and refugees.

Recommendations

- 1) **The legal provisions on *rechazos en frontera* shall be repealed and the normal framework as to refusal of entry – namely the devolución process under article 58 of the Law on Foreigners – shall apply;**
- 2) **Until then, the government shall immediately issue instructions to the Guardia Civil – such as an *Orden de Servicio* and/or *Protocolo Operativo* – so that persons apprehended between the real borderline and the “operative border” be,**
 - (a) **identified**
 - (b) **registered**
 - (c) **have their protection needs assessed individually**
 - (d) **have access to an effective remedy, including to access to an interpreter and a lawyer before being returned.**

⁷⁹ AI, *Fear and Fences: Europe’s approach to keeping refugees at bay*, 2015, p.40, available at https://amnesty.org.pl/wp-content/uploads/2016/02/fear_and_fences_2015.pdf (accessed on 17.07.19).

⁸⁰ *Supra* footnote 5, Defensor del Pueblo, *Informe 2015*, pp.254-257 and 288; *supra* footnote 24, Defensor del Pueblo, *El asilo en España*, 2016, p.54.

⁸¹ CEAR, *Informe 2016: Las personas refugiadas en España y Europa*, p.63, available at https://www.cear.es/wp-content/uploads/2016/06/Informe_CEAR_2016.pdf (accessed on 17.07.19); Migreurop and others, *Ceuta & Melilla: centres de tri á ciel ouvert aux portes de l’Afrique*, December 2015, pp.48 to 52, available at http://www.migreurop.org/IMG/pdf/fr_rapportconjoint_ceutamelilla_decembre2015.pdf (accessed on 17.07.19); *supra* footnote 82, CEAR, *Informe 2017*, p.66; La Frontera Sur, *Accesos terrestres*, April 2017, p.42, available at <http://ddhhfronterasur2017.org/assets/frontera-sur.pdf> (accessed on 17.07.19); APDHA, *Droits d’homme à la frontière sud*, April 2016, pp.17 ff., available at <https://www.apdha.org/media/rapport-frontiere-sud-2016.pdf> (accessed on 17.07.19).

⁸² *Supra* footnote 40, CoE HR Commissioner, *Third Party Intervention*, 22 March 2018, §30; *supra* footnote 5, DdP, 2015 Report, 4.10.1.

⁸³ *Supra* footnote 6, CoE HR Commissioner, *Third Party Intervention*, 2015, §7, which indicates that Mali is the second asylum seekers country of origin in Spain in 2014.

⁸⁴ Spanish Senate, Government’s Response to Question on the Nationality of Registered Asylum-Seekers at the Beni Enzar border asylum office in Melilla (“*en frontera*” as opposed to “*en territorio nacional*”) since 2014, 20 June 2017, available at <http://www.senado.es/web/expedientdocblobServlet?legis=12&id=59129> (accessed on 17.07.19).

⁸⁵ El Diario, *La ONU y los datos de Interior desmontan el último discurso de Zoido para defender las devoluciones en caliente*, 13 October 2017, available at https://www.eldiario.es/desalambre/Solo-subsafricanos-asilo-inauguracion-Melilla_0_696780496.html (accessed on 17.07.19).