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ACCESS TO PROTECTION: A HUMAN RIGHT

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This report was written as part of the project “Access to Protection: A Human Right”, funded by the European Programme for Integration and Migration (EPIM) – Network of European Foundations.

The content of this report is the responsibility of CEAR and does not necessarily reflect the views of the EPIM, the NEF or the Partner Foundation.

Executive summary

On 23 February 2012, the European Court of Human Rights issued an important ruling in the case of *Hirsi Jamaa and others v. Italy*. In the same case, the Court declared the extraterritoriality of the European Convention on Human Rights by establishing its application and the obligation to respect it in any place – including on a ship at sea – where a Member State exercises control. As a result of this extraterritoriality, there are a number of principles that must be observed when intercepting boats in national or international waters and combating illegal immigration. As such, the ruling once again recalls the principle of non-refoulement, i.e. the prohibition on returning a person to country where he or she would be at risk of torture or inhuman or degrading treatment. Equally, it establishes, for the first time, the prohibition on collective expulsions at sea. It also sets out a series of procedural guarantees (legal assistance, the assistance of an interpreter, the right to information, access to effective remedies against refoulement and the obligation of Member States to assess the treatment to which the person would be subjected in the country of destination), which are instrumental in respecting the fundamental rights of migrants.

The *Hirsi* case had an immediate impact on the media and Spanish academia, but not so much on our legislation and jurisprudence. Professor Carillo Salcedo¹ emphasises the relevance of this ruling for the protection of the fundamental rights of illegal immigrants, describing it as ‘historic’ in a line of case law that is clearly favourable to the protection of the rights of human beings who should not be left in limbo: “The Court has sent a clear message to Member States of the Convention because although the ruling only has the force of *res judicata* with respect to Italy, its interpretation of applicable law must be taken into account by legislators, courts and the administrative authorities in all States bound by the European Convention on Human Rights, i.e. the 49 Member States of the Council of Europe.”

For her part, Professor Carmen Pérez² highlights the consequences of the *Hirsi* case on common European Union immigration policy and joint patrols off the coast of Africa aimed at preventing boats from leaving and eventually arriving on European territory.

M^a Dolores Bollo Arocena³ also stresses the idea that “the EU and its Member States must reflect on the control of migration flows by sea, at least the way in which it has been applied in recent years, because we do not believe it fully respects international human rights law, the rights of refugees or

¹ Carillo Salcedo, Juan Antonio: *Derechos de los inmigrantes en situación irregular en España. Reflexiones a la luz de la sentencia del Tribunal Europeo de Derechos Humanos en el caso Hirsi Jamaa y otros contra Italia (sentencia de 23 de febrero de 2012)* [*The Rights of Illegal Immigrants in Spain: Reflections in Light of the Judgment of the European Court of Human Rights in the Case of Hirsi Jamaa and Others v. Italy (Judgment of 23 February 2012)*]. Session 27 of September 2012 of the UNED-EJ Seminar on Leading Cases on Fundamental Freedoms and Rights.

² Pérez González, Carmen: Review “Europe of Rights. A Compendium on the European Convention of Human Rights”, Javier García Roca and Pablo Santaolaya (eds.), 2012, Martinus Nijhoff Publisher, Leiden, Boston, p. 674, published in *Eunomia*. Reviewed in *Cultura de la Legalidad [Culture of Legality]* no. 3, September 2012-February 2013, pp. 263-269.

³ Bollo Arocena, M^a Dolores: “Push back, expulsiones colectivas y non refoulement. Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia (2012)” [Push Back, Expulsions and Non-Refoulement: Reflections on the Judgment Issued by the Grand Chamber of the ECHR in the Case of Hirsi Jamaa and Others v. Italy (2012)] in *El Derecho internacional en el mundo multipolar del siglo XXI: obra homenaje al profesor Luis Ignacio Sánchez Rodríguez I* [*International Law in the Multipolar*

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even the EU's own Charter of Fundamental Rights. For the moment, however, we cannot be too optimistic".

This report specifically aims to analyse the gap between the principles established in the case of Hirsi Jamaa and the legislation and practices carried out in Spain to combat illegal immigration, and how the latter affects access to protection.

The number of applications for international protection in Spain in 2012 was the lowest recorded for twenty-five years, with only 2580 applications. This places Spain once again amongst the countries with the lowest number of international protection applications in the EU27⁴, despite being one of its borders with Africa.

Following the entry into force of the current Asylum Act, access to protection requires prior access to territory. The adverse effects of border externalisation and militarisation put at risk any person attempting to reach Europe, fleeing from armed conflict or another life-endangering situation. The routes are becoming more and more dangerous and maritime operations to intercept boats that arrive on our shores often violate the minimum standards of Art. 3 of the ECHR, as defined in the case of Hirsi Jamaa. As such, in 2011 Spain was condemned by the United Nations Committee Against Torture for inhuman or degrading treatment of a Senegalese immigrant who died after being returned to Morocco in one of these operations.

The pressure of maritime control has increased attempts to enter Ceuta and Melilla by land, mainly through the latter's border fence; entries increased by 700% in 2012. Various human rights organisations have denounced summary and de facto repatriations, via small gates along the Melilla border fence, with no refoulement process⁵, handing over immigrants who managed to jump the fence directly to Moroccan authorities.

In these cases, the Spanish authorities often invoke the Bilateral Readmission Agreement signed with Morocco, a country with a dubious history of respect for human rights. However, the case of Hirsi Jamaa reminds us that Member States "cannot evade their own responsibility by invoking their obligations under bilateral agreements [...]", as they are obliged not to return any person to a third country, even a signatory to a Bilateral Readmission Agreement, where he or she may be subjected to torture or inhuman or degrading treatment.

In addition to strict border controls, there is also a prohibition on travel to the Peninsula for asylum seekers in Ceuta and Melilla, a factor that explains the decrease (of up to 63.5% in Ceuta) in applications for international protection. Ceuta and Melilla are thus becoming large detention centres or prison cities, as many people cannot leave whilst their expulsions or asylum applications

World of the 21st Century: A Tribute to Professor Luis Ignacio Sánchez Rodríguez I, coord. by Santiago Torres Bernáñez, 2013, pp. 647-666.

⁴ Eurostat Press Release: *Asylum in the EU27*, 22 March 2013: http://europa.eu/rapid/press-release_STAT-13-48_en.pdf

⁵ APDH [Permanent Assembly for Human Rights]: *Human Rights on the Southern Border 2013*, p. 69.

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are processed. Asylum seekers are subject to exceptional measures such as a prohibition on freedom of movement, a right to which they are entitled pursuant to Article 19 of the Spanish Constitution and the Asylum Act. This is an unprecedented retrograde step in international protection in Spain.

Despite repeated legal rulings against this practice, and complaints from the Ombudsman, the UNHCR and the Special Rapporteur against Racism and Xenophobia, the situation persists, causing some asylum seekers to withdraw their application and others to risk their lives trying to cross the straits hidden on ferries making the journey.

Access to protection for persons arriving at our ports as stowaways hidden on cargo ships is also severely hampered by the police action protocol: an initial interview without the presence of a lawyer, where the stowaway is rarely given information. Only if he or she unequivocally expresses the intention to enter Spanish territory is he or she taken off the boat for processing of the application for international protection or denial of entry, this time with legal assistance.

The right to information, as well as legal assistance, the assistance of an interpreter and access to effective remedies, are minimum guarantees established in the Hirsi Jamaa case and govern all procedures of the Immigration Act. However, the lack of appropriate assistance to stowaways, the inadequate regulations in Readmission Agreements and the lack of information on the right to asylum in CIEs, to which social organisations have unequal access, are just a few examples of the gap between these guarantees and the reality.

One of the major novelties in the Hirsi Jamaa case is the territorially unlimited prohibition on collective expulsions established in Art. 4 of Protocol 4. However, some months after this important ruling, Spain handed over to Moroccan authorities a group of seventy-three persons of sub-Saharan African origin who had arrived on Isla de Tierra, a small islet of Spanish sovereignty located a few metres from the Moroccan coast. These facts amounted to a violation of Spanish law by making it impossible for the migrants to access asylum procedures and the guarantees of the Immigration Act, which establishes an individualised identification procedure and, where appropriate, refoulement, with legal assistance and the assistance of an interpreter. Equally, it was a violation of international law, in particular the prohibition on collective expulsions of Protocol 4 of the European Convention on Human Rights. Furthermore, the expulsion was to a country, Morocco, that systematically violates the human rights of migrants and refugees, and that, according to the information to which CEAR had access, immediately transferred the immigrants to the Algerian border. After several months of investigation, the Spanish organisations belonging to Migreurop (ACSUR, Andalucía Acoge, APDHA, CEAR, Elín, Mugak and SOS Racismo), in collaboration with the Moroccan Association for Human Rights (AMDH), were able to find in Rabat two of the immigrants from Isla de Tierra, who had managed to return to Moroccan territory following their expulsion to Algeria. Once interviewed and informed of their rights, they decided to bring a claim against the Kingdom of Spain at the European Court of Human Rights, in which the Hirsi case is undoubtedly an important precedent.

The Hirsi case not only paved the way for the protection of these immigrants in particular, but also established principles that have undoubtedly changed the practices of the Spanish authorities in combating illegal immigration.

Introduction

Access to protection means access to safe territory.

Asylum is a physical place where persons in need of protection can find safety. But how can they get to this safe place? There are barriers; physical and virtual borders.

The situation of persons in need of international protection has become a mess since crossing European borders was made more difficult, even impossible, by the Schengen System, which erected an insurmountable wall around the exterior borders of the European Union.

The reason given for erecting this 'wall' was the political, economic and social need to prevent illegal immigration.

It is a fact, from the point of view of international law, that States have the right to determine who may enter their territory, with the exception of their own nationals, who always have the right of return to their countries.

States may establish rules and conditions, for example, through visa requirements.

Through the Schengen Visa Code of 2009, in continuity with the policy carried out for the previous 20 years, European Union Member States have delegated EU institutions to establish these regulations, sacrificing part of their national sovereignty.

At the same time, Member States have adopted a wide range of measures with the aim of ensuring that these regulations are respected, as well as to avoid unauthorised persons crossing the borders.

These measures involve not only control of physical borders and surveillance of territorial and international waters, but also interventions in third countries, countries of origin or transit countries of migrants and refugees, including the provision of technical assistance at airports of origin, ports and maritime areas. This externalisation of control systems has developed primarily over the past decade.

Policies to combat illegal immigration face restrictions imposed by international and European law on the protection of refugees, in particular the principle of non-refoulement, and human rights, in primis, the right of all persons not to be exposed to the risk of torture or inhuman or degrading treatment or punishment.

The obligation of States to respect these rights leads to the obligation to admit immigrants, at least temporarily, to their territory even if they do not meet the requirements for crossing the border. The historic ruling of the European Court of Human Rights in the case of *Hirsi v. Italy*, of February 2012, not only condemns Italy for having returned migrants, intercepted at sea, to Libya in 2009, but also establishes some principles relating to border control and surveillance. These principles must be observed to ensure compliance with the obligations established by the European Convention on Human Rights.

These principles have had some impact on the new Directive on procedures for the recognition of international protection, adopted in June 2013, as well as reform of the regulations of the European agency Frontex and reform of the Schengen Borders Code.

Project Leader: Italian Council for Refugees - **Project Partners:** Spanish Commission for Refugees (Spain), Greek Council for Refugees (Greece), Hungarian Helsinki Committee (Hungary), The People for Change Foundation (Malta), Proasyl (Germany).

The main objective of the project “Access to protection: a human right” is to analyse how the principles established by the Strasbourg Court and EU law are implemented in the six European States involved in the project, and to put forward recommendations based on research, interviews with experts and round tables organised in several countries in 2013.

As regards methodology, we believe it is important that the project has facilitated and opened up dialogue between border control authorities and rescue operations, international organisations and NGOs dedicated to the protection of migrants, refugees and human rights in general.

September 2013

Christopher Hein. Director of the CIR.

Project Leader: Italian Council for Refugees - **Project Partners:** Spanish Commission for Refugees (Spain), Greek Council for Refugees (Greece), Hungarian Helsinki Committee (Hungary), The People for Change Foundation (Malta), Proasyl (Germany).

Description of the project

The main objective of the project “Access to procedure: a human right”, funded by the Network of European Foundations as part of the European Programme for Integration and Migration (EPIM), is to adjust national and European policies and practices to the obligations established by European human rights instruments, in particular the Strasbourg Court in the Hirsi case, concerning access to territory and protection.

The Italian Council for Refugees, as the project leader, is carrying out this project in collaboration with the Hungarian Helsinki Committee (Hungary), the Proasyl Foundation (Germany), the People for Change Foundation (Malta), the Greek Council for Refugees (Greece) and the Spanish Commission for Refugees (CEAR) (Spain). The Portuguese Council for Refugees, although not a member of the project, has carried out an analysis of the legislation and practices in place since 2011.

The CIR and partner organisations have benefited in the implementation of project activities from the valuable support of the UNHCR’s Europe Bureau (International Protection Division) and the Parliamentary Assembly of the Council of Europe’s Commission for Migration, Refugees and Displaced Persons.

The CIR has also received legal advice from lawyers Anton Giulio Lana and Andrea Saccucci from the Forensic Union for the Protection of Human Rights, who drafted the claim in the Hirsi case before the European Court of Human Rights.

The project seeks to achieve a ‘cultural change’ from a vision focused mainly on security and combating illegal immigration flows to a perspective that balances these demands with respect for human rights, in particular the principle of non-refoulement and access to protection, through the adoption, if necessary, of specific reforms to national and European legislation, directives and regulations (for example, FRONTEX).

The project aims to promote good practice, in particular relating to information and legal assistance at the border. Furthermore, it aims to facilitate the access of the UNHCR and other organisations to potential applicants for international protection and promote a plan to train authorities, especially those working at the border, in human rights and the rights of refugees.

The project began in September 2012 and will finish in February 2014. During this time, the CIR and its partners will carry out research and analysis into border control legislation and practice, access to national territory and asylum procedures in their respective countries. The results of this research and recommendations will be included in national reports.

The project “Access to protection: a human right” also includes a study at the European level of the compliance with EU legal instruments, policies, practices and security mechanisms of the obligations derived from the rights of refugees and human rights.

This European report will be presented at a conference that will take place in February 2014, to which representatives from international organisations, NGOs, researchers and journalists will be invited.

From a methodological point of view, the project includes research on legislation and practice, and interviews with institutional experts, members of the Navy and other maritime border control

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forces, border police, international organisations and NGOs working in the field of asylum and migration.

Furthermore, we have organised round tables with institutions, civil society representatives, lawyers and researchers in Italy and member countries with the aim of discussing the main issues related to the control of illegal immigration and access to protection, identifying and highlighting good practice. The main objective of these meetings is to gather recommendations and improvements in national legislation and practice.

Each member country has published a report on the compliance of national legislation and practice with the principles established by the Hirsi case at the ECHR, which will be presented at the conference.

Italian Council for Refugees

CHAPTER 1

Respect for the principle of *non-refoulement*

Non-refoulement is a jus cogens principle by which no person shall be returned to a country in which his or life or integrity would be in danger, or he or she would be subjected to torture or inhuman or degrading treatment. This principle is the cornerstone of the right to asylum and, as such, was codified in the Geneva Convention of 1951. Subsequently, other treaties have also recognised this principle, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights, all of which have been ratified by Spain.

However, this principle clashes in many cases with policies to combat illegal immigration in the European Union carried out, by Spain, making it enormously difficult for persons in need of international protection to access the right to asylum. Instruments such as Bilateral Readmission Agreements, international maritime interception operations, the Nouadhibou detention centre, and the situation of thousands of immigrants in Ceuta and Melilla are some of the examples we will analyse.

Strict border controls and their externalisation, in cooperation with migrants' countries of origin and transit, have led to a significant decrease in the number of boats reaching Spanish shores. In 2006, the year of the so-called 'crisis of the canoes', 39,180 persons reached Spain by boat. In 2012 the number was 3,804, of whom only 173 arrived on the Canary Islands. These figures demonstrate changing trends in the migration routes chosen to reach Spanish shores, with an increase in the summer of 2012 and 2013 in the number of boats reaching the Strait of Gibraltar⁶ and the small islets of Spanish sovereignty located a few metres from the Moroccan coast.⁷

In addition to the decrease in entries, another obstacle to access to international protection is the systematic practice of repatriation; in 2012, 26,457 persons were repatriated. This figure is the result of the implementation of the various mechanisms included in the Immigration Act to 'expel' undocumented immigrants from the country: 1,409 persons were readmitted, 6,271 were returned to their countries of origin, 8,647 were denied entry and 10,130 were expelled.⁸

It should be noted that in a context of fewer arrivals of foreigners in Spain, only readmissions, carried out according to bilateral readmission agreements with third countries, increased compared to the previous year.

⁶ ABC: "Crece por primera vez en años el número de inmigrantes que cruza el estrecho" [Number of immigrants crossing the strait increases for the first time in years], 5 December 2012: <http://www.abc.es/espana/20121204/abci-inmigrantes-aumento-estrecho-201212041804.html>

⁷ El Faro Digital: "Cinco inmigrantes entran en Melilla en el rechazo de una nueva avalancha" [No new flood of immigrants as five reach Melilla], 21 May 2013: <http://www.elfarodigital.es/melilla/sucesos/123660-cinco-inmigrantes-entran-en-melilla-en-el-rechazo-de-una-nueva-avalancha.html>

⁸ Ministry of the Interior: 2012 report on combating illegal immigration.

READMISSIONS

Persons expelled from Spain according to readmission agreements with third countries.

DENIAL OF ENTRY

Persons who do not meet the requirements for entering Spain through official border posts (ports and airports). Denial of entry involves return to the country of origin or continuation of the journey to somewhere else where they will be admitted.

REFOULEMENT

Persons who attempt to enter Spain illegally or those who have been expelled for violating the prohibition on entry.

EXPULSIONS

Sanctions that may be applied following administrative procedures to persons who commit various offences provided for in the Immigration Act. The expelled person shall also be prohibited from entering Spain for up to 5 years.

1. Bilateral Readmission Agreements

Although the first bilateral agreements were signed at the beginning of the 90s, the Africa Plan I (2005-2008) was a turning point, giving these agreements a more holistic approach including mechanisms for development cooperation, encouraging legal migration flows and combating illegal immigration. As such, we can distinguish between specific readmission agreements, signed before the Africa Plan (Morocco, Algeria, Mauritania, Guinea-Bissau and Ghana) and agreements within the framework of cooperation (Cape Verde, Gambia and Guinea), in the context of this new migration policy. Alongside these are other, less formal but no less important, instruments such as memoranda of understanding (Senegal and Mali).

*In any case, all of these agreements “are characterised by an almost exclusive focus on policing and security, with very few and ‘expeditious’ procedural and administrative tools that make it as difficult as possible to defend the fundamental rights of foreign nationals in the processes of entry, detention and refoulement/rejection at the border”.*⁹ As an example of this assertion, these agreements neither

⁹ MIGREUROP: *The protection of migrant rights in Europe: Spain*. Report of Migreurop Spain for the Human Rights Commission of the Council of Europe, November 2012.

mention nor regulate the basic procedural guarantees governing these readmission procedures, such as legal assistance, the assistance of an interpreter, information on the grounds for denial of entry and transfer, and effective remedies against the same.

In the Spanish-Moroccan agreement of 1992, which considers both the readmission and transit of non-nationals, there is no mention of respect for human rights in the countries of destination. Only in regulating transit for the expulsion of foreign nationals does it establish that this may be denied where the foreign national risks being subjected to ill treatment in the country of destination. However, this refusal is not considered in the readmission of non-national foreigners.

The agreement with Algeria, of 2002, introduces a generic compatibility clause.¹⁰ More explicitly, the agreements with Guinea-Bissau and Mauritania establish the prohibition on the use of undue force, torture and inhuman or degrading treatment.¹¹

However, the agreement with Mauritania, which regulates the readmission of non-nationals, does not consider respect for human rights in the countries of destination. Common practice is that, once returned to Mauritania, nationals of Mali are repatriated to various points along the common border and other nationalities to the Rosso border post, on the border with Senegal.

This is just one example of how, in many cases, these bilateral readmission agreements serve as a 'legal parapet' to hide refoulement to countries that put the foreign national at serious risk of torture or inhuman or degrading treatment and collective returns, all without the minimum procedural guarantees.

READMISSION AGREEMENTS

COUNTRY	DATE OF SIGNATURE	EFFECTIVE DATE	READMISSION OF
ALGERIA	31 July 2002	18 February 2004	Nationals
GHANA	6 July 2005	Non-entry into force	Nationals
GUINEA-BISSAU	7 February 2003	9 March 2003	Nationals
MOROCCO	13 February 1992		Non-nationals
MAURITANIA	1 July 2003	31 July 2003	Nationals Non-nationals
NIGER	10 May 2008	9 June 2009	Nationals
NIGERIA	12 November 2011	Pending ratification	Nationals

¹⁰ Art. 8 of the Protocol: "This Protocol is signed in strict compliance with the commitments made with regard to the protection of human rights and shall not affect the obligations derived from the international Agreements and Conventions entered into by the Parties."

¹¹ "1. The Contracting Parties shall not use undue force, torture or cruel, inhuman or degrading treatment in the implementation of this Agreement. 2. Each Contracting Party undertakes:
i) immediately to inform the Embassy of the other Party of the detention of a national from that country due to an infringement of immigration rules and/or regulations;
ii) not to subject the detainee to undue force, torture or cruel, inhuman or degrading treatment;
iii) to allow unlimited access to officials of the Embassy of the other Contracting Party to visit the nationals of that Contracting Party who are in its custody and to hold private conversations with them".

COOPERATION AGREEMENTS

COUNTRY	DATE OF SIGNATURE	EFFECTIVE DATE	READMISSION OF
CAPE VERDE	20 March 2007	19 January 2008	Nationals
GAMBIA	9 October 2006	8 November 2006	Nationals
GUINEA	9 October 2006	7 January 2007	Nationals

MEMORANDA OF UNDERSTANDING

COUNTRY	DATE OF SIGNATURE	EFFECTIVE DATE	
MALI	23 January 2007	22 February 2008	
SENEGAL	5 December 2006		

2. Maritime surveillance: Interception of boats and push-back operations

Alongside readmission agreements, Spain has signed memoranda of cooperation with the same countries for joint maritime coastal surveillance patrols, under the umbrella of FRONTEX, as well as offering financial, material and technological support to these countries to improve surveillance of their own coasts.

It has also created its own surveillance operations, such as operation Indalo, which includes helicopter and light aircraft surveillance, and the Integrated Exterior Surveillance System (SIVE), which is part of the European Border Surveillance System (EUROSUR). The main functions of this system, which is currently deployed along practically the whole Spanish coast and developed and managed by the Civil Guard, are the long-distance detection and identification of boats approaching the Spanish maritime border, and coordination with other relevant services, such as Maritime Rescue, for the monitoring and interception of the boat, and rescue and relief for illegal immigrants.

These maritime surveillance operations may operate in Spanish territorial waters, where there is no doubt that Spanish law applies with regards to immigration, human rights and asylum; at sea, where national law does not apply, but international law does; or in the territorial waters of a third country, subject, in principle, to the jurisdiction of that State. The importance of the Hirsi case is its emphasis on enforcing the principle of non-refoulement and the prohibition on torture and inhuman or degrading treatment included in the ECHR in operations at sea and in the waters of a third State, from the moment migrants find themselves under the effective control of the authorities of a Member State participating in these joint surveillance operations.

However, there are several examples of how, in the interceptions of boats, whether as part of joint operations or the actions of the Spanish authorities in conjunction with the authorities of these countries, the principle of non-refoulement is being undermined on many occasions.

On 15 March 2013, a dinghy with 12 persons on board was intercepted near the coast of Melilla by a Civil Guard patrol, which immediately towed away the boat, put the immigrants on motorboats and transferred them to Moroccan territorial waters. There they were handed over to the Moroccan

Auxiliary Forces, who subsequently returned them to Algeria.¹² The NGO Prodein recorded this, took photographs and submitted a complaint to the Ombudsman, alleging that the dinghy was in Spanish territorial waters.¹³ The Government Delegation claims that the interception occurred at sea, and that the hand-over to the Moroccan Auxiliary Forces was carried out in the context of the Bilateral Readmission Agreement.¹⁴

In November 2011, an important declaration by the Committee Against Torture condemned Spain for cruel, inhuman or degrading treatment of a Senegalese citizen during a push-back operation carried out by a Civil Guard Maritime Service patrol as part of its surveillance and rescue duties.

The events occurred during the night of 25-26 September 2007, when four migrants attempted to enter the autonomous city of Ceuta by swimming. According to statements from the Civil Guard itself, a Maritime Service patrol intercepted the four migrants, put them on the Civil Guard boat, took them a few metres from the Moroccan shore and threw them into the water. One of them, Laucling Sonko, sought help as he was having great difficulty reaching the shore, so one of the Civil Guard officers dove into the water and, after carrying Mr Sonko to the beach, attempted in vain to resuscitate him. Laucling Sonko died in the early hours of 26 September 2007.

According to CEAR-Sur, alongside Mr Sonko, who was from Cassamance, a region immersed in armed conflict for years, were three migrants from the Ivory Coast and Cameroon, who were therefore likely to be in need of international protection. When they were taken on board the Civil Guard patrol boat, the officers did not address them in French or strike up any conversation with them, but proceeded to immediate and de facto refoulement without carrying out any identification process or administrative refoulement procedure, as regulated by the Immigration Act.

CEAR-Sur's legal service had knowledge of these events and of the identity of the deceased, and informed the Ombudsman, who brought the events to the attention of the Attorney-General on the grounds that they may constitute a crime, but criminal proceedings were eventually discontinued.

On 23 October 2008, Mrs Fatuo Sonko (mother of Laucling) submitted a communication before the United Nations Committee Against Torture for inhuman and degrading treatment by the authorities in the denial of entry to the territory, which was resolved on 25 November 2011.

In this judgment, the Committee states that the prohibition on ill treatment 'is absolute and its prevention must be effective and imperative' in any territory where the authorities exercise effective control, de jure or de facto, directly or indirectly, total or partial, as in the specific case where "the Civil Guard maintained control over the persons on board and was therefore responsible

¹² Periodismo Humano: *La Guardia Civil entrega a Marruecos a los ocupantes de una patera que ya había llegado a Melilla* [Civil Guard hands over to Morocco the occupants of a dingy that had already reached Melilla], 15 March 2013: <http://periodismohumano.com/migracion/la-guardia-civil-entrega-a-marruecos-a-los-ocupantes-de-una-patera-que-ya-habia-llegado-a-melilla.html>

¹³ <http://www.diariosur.es/v/20130317/melilla/denuncia-ante-defensor-pueblo-20130317.html>

¹⁴ El País: *Una NGO denuncia la entrega ilegal de inmigrantes desde Melilla a Marruecos* [NGO denounces illegal hand-over of immigrants from Melilla to Morocco], 16 March 2013: http://politica.elpais.com/politica/2013/03/16/actualidad/1363460075_730690.html

for their integrity”. It concludes that “the Committee believes that the imposition of physical and mental suffering before his death, aggravated by his particular vulnerability as a migrant [...] reaches the threshold of cruel, inhuman or degrading treatment or punishment, pursuant to Article 16 of the Convention.”

3. Nouadhibou Detention Centre

Bilateral cooperation with Mauritania began in March 2006 with the construction of the Nouadhibou Detention Centre by the Spanish army, funded by the Agency of International Cooperation for Development, with the express aim of returning to that country migrants intercepted en route to Spain.

In October 2008, at the request of Spain’s Ministry of Foreign Affairs and Cooperation, CEAR carried out an evaluation of the centre. As a result, CEAR wrote a report¹⁵ on the state and suitability of its facilities, its regulatory framework, the administrative procedures applied and the treatment of migrants.

It emphasised that although Mauritania has ratified several United Nations, African Union and International Labour Organization documents and conventions on human rights, it lacks a regulatory framework consistent with these mandates. This is reflected in the absence of formalised procedures applying to detainees, the inexistence of administrative decisions and the impossibility of appealing to administrative or judicial authorities. It also does not provide for the right to legal assistance or the assistance of an interpreter, or judicial supervision of the detention. Furthermore, it can be deduced from the study of the regulations and statements by the authorities themselves that the Nouadhibou detention centre has no legal basis.

After observing the facilities at the Nouadhibou detention centre and carrying out interviews with officials, migrants and social organisations, CEAR was able to confirm its deficiencies, the deterioration of its facilities due to lack of maintenance and the poor condition of services provided at the centre. It therefore concluded that the centre does not meet the minimum conditions guaranteeing proper treatment of persons subject to repatriation procedures as it represents a threat to their physical and psychological integrity.

With regards to repatriations, according to information gathered from various sources, migrants are not informed of when and how they shall be taken to the border with Senegal (Ross) and Mali (Gogui). In the interviews, many of them expressed concern about how to get from the place where they are left at the border to their place of origin. One stated that he had to travel over a thousand kilometres from the place where they left him to his village with no resources (transport, food and drink, etc.). The general perception of migrants, the authorities and social organisations is that, once the expulsion has been carried out, the most popular option is a new migration attempt.

¹⁵ CEAR: *Informe de Evaluación del Centro de Detención de Migrantes en Nouadhibou (Mauritania)* [Assessment Report on the Nouadhibou Immigration Detention Centre (Mauritania)], Madrid, 10 December 2008.

4. Ceuta and Melilla

In 2012, according to data supplied by the Ministry of the Interior¹⁶, 2841 persons entered the cities of Ceuta and Melilla illegally, 15% fewer than the year before and a 42.8% decrease over the last decade. In the years since 2005, only 2011 saw an increase in illegal entries: 3343 persons, 1778 more than the previous year.

The impenetrability of the border perimeter means that the majority of entries to the city of Ceuta happen by swimming or taking a small raft from the Bahía Sur through the breakwater of Tarajal and onto the beach. This ‘modus operandi’, which led to a significant increase in entries to the city in 2011, was made possible not just because of good weather, as is the case every year, but also by a change in cross-border coordination between the Moroccan and Spanish security forces.¹⁷ In September 2011, this coordination was restored and access by sea was no longer possible for immigrants attempting to enter the city. Since then, entries have happened when groups have simultaneously attempted to overwhelm the surveillance services.

In Melilla, entries by sea decreased from 755 in 2011 to 431 in 2012.¹⁸ However, in 2012 there was an increase of more than 700% in entries through the border fence¹⁹, despite ‘improvements’²⁰ in the border perimeter and two 6 metre fences with a three-dimensional barrier between them.²¹

¹⁶ 2011 report: Combating illegal immigration. 2012 report: Combating illegal immigration.

¹⁷ El País, 09/07/2011: “Migratory pressure by sea on Ceuta and Melilla has increased sharply since late spring to a record level, probably because of the arrival of good weather and the Moroccan refusal to allow the Civil Guard to enter its waters to intercept undocumented immigrants and return them on the spot”. El Faro, 03/06/2011: “Civil Guard denies entry through Tarajal breakwater to 40 sub-Saharan Africans”.

¹⁸ ABC: *La entrada por la valla de Melilla aumentaron más de un 700% en 2012 [Entries through the Melilla border fence increased by more than 700% in 2012]*, 15 January 2013: <http://sevilla.abc.es/espasa/20130115/rc-entradas-valla-melilla-aumentaron-201301151824.html>

¹⁹ In 2012, 486 persons entered by jumping the fence (out of between 3500 and 4000 persons who attempted it) compared to the 63 persons who entered through the fence in the previous year.

²⁰ El diario: Interior acometerá mejoras en la valla de Melilla [*Ministry of the Interior to improve Melilla border fence*], 14 December 2012: http://www.eldiario.es/politica/Interior-acometera-mejoras-frontera-Melilla_0_79442527.html

²¹ 20 minutos: *En la frontera de la desesperación: diez claves sobre la valla de Melilla [On the border of desperation: ten key facts about the Melilla border fence]*, 28 July 2013: <http://www.20minutos.es/noticia/1882764/0/valla/melilla/claves/#xtor=AD-15&xts=467263>

“The Melilla border fence, built with the aim of hindering illegal immigration and commercial smuggling, is a double barrier of six metres in height stretching 12 kilometres along the border between Morocco and the Spanish city. Made of wire and topped with spikes, the fence is also equipped with high-intensity lights and automatic surveillance cameras, as well as night vision equipment. Underground cables connect a network of electronic noise and movement sensors, and there are several surveillance posts and roads between the fences for the passage of vehicles. All information is centralised in a single point of management. The fence

Several human rights organisations have denounced summary and de facto returns through the small gates in the Melilla border fence without first instituting refoulement procedures²², handing over immigrants who have managed to jump the fence directly to Moroccan authorities. Doctors Without Borders has denounced the treatment that these immigrants receive from the Moroccan police: beatings, theft of their few belongings, physical assaults and transfers to the no man's land between Morocco and Algeria.²³

All these practices demonstrate how the Spanish authorities prioritise what they call 'combating illegal immigration' over fulfilling their human rights commitments, violating the right to international protection and the principle of non-refoulement that protects any individual from being returned to a country in which he or she could be subjected to torture or inhuman or degrading treatment.

The regulations of our immigration laws are wholly insufficient, establishing only that expulsions²⁴ or refoulement²⁵ shall not be carried out, and shall be suspended, in the case of pregnant women, where there is a risk to the unborn baby or the mother; the ill, where there is a risk to health; and where an application for international protection is submitted, until it is resolved.

However, as we have seen, the principle of non-refoulement is not limited to cases of international protection or risk to health, but prohibits the return of any person (not just refugees or applicants for international protection) to countries where there are legitimate grounds for believing that he or she would be subjected to torture or cruel, inhuman or degrading treatment. This is established in Article 3 of the European Convention on Human Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as Article 19 of the European Union Charter of Fundamental Rights. All these international treaties have been ratified by Spain, and therefore the actions of the Spanish authorities must be scrupulously adjusted to them.

surrounds the entire perimeter of the city, even extending into the sea, and its construction cost some 33 million euros".

²² APDH: *Human Rights on the Southern Border 2013*, p. 69.

²³ Doctors Without Borders: *Violence, Vulnerability and Migration: Trapped at the Gates of Europe*, March 2013.

²⁴ Art 57.6 and 64.5 of the Immigration Act and Art. 246.7 of the Regulations.

²⁵ Art. 58.4 of the Immigration Act and Art. 23.6 b) of the Regulations.

RECOMMENDATIONS:

- Immediate assistance and rescue of any person whose life is in danger at sea, pursuant to international sea treaties.
- Suspend forced returns of all persons from countries in conflict or serious humanitarian crisis, facilitating their access to international protection.
- Include in Readmission Agreements clauses to protect human rights and procedural guarantees.
- Implement the Directive on minimum standards for granting temporary protection in the event of a mass influx of displaced persons.

CHAPTER II

Right to access to protection and procedural guarantees

The number of applications for international protection in Spain in 2012 was the lowest recorded for twenty-five years, with only 2580 applications. This places Spain once again amongst the countries with the fewest applications for international protection in the EU27²⁶, despite being one of its borders with Africa.

Problems in accessing asylum procedures are recurrent. In addition to the harmful consequences of border externalisation and militarisation policies, which put at risk any person fleeing from armed conflict or another life-endangering situation and attempting to reach Europe, there are also some bad national practices. The violation of the principle of non-refoulement through mass indiscriminate expulsions, the lack of information on the right to asylum in CIEs and the unequal access of social organisations to the same, the lack of adequate assistance to stowaways, and the violation of the right to movement of asylum seekers confined to Ceuta and Melilla are some of the most serious practices.

As a result of the entry into force of the current Asylum Act in 2009, access to the Peninsula is restricted for applicants for international protection whose applications are admitted for processing in the cities of Ceuta and Melilla.

This action constitutes a flagrant violation of the constitutional right enshrined in Article 19 of the Constitution with regards to freedom of residence and movement within the national territory. There are no legal limitations or exclusions restricting access to the Peninsula for applicants for international protection whose applications are admitted for processing in the autonomous cities of Ceuta and Melilla.

This administrative situation is not only clearly unconstitutional in nature, but such an interpretation of the legislation in force is also an unprecedented retrograde step in international protection in Spain, directly violating applicable and mandatory legislation and international treaties.

²⁶ Eurostat Press Release: *Asylum in the EU27*, 22 March 2013: http://europa.eu/rapid/press-release_STAT-13-48_en.pdf

Despite the fact that courts²⁷, national bodies such as specialist associations and even the Ombudsman²⁸, and international bodies such as the UNHCR²⁹, have spoken out clearly against this administrative measure, the Government continued in 2012 and 2013 to prohibit access to the Peninsula for asylum seekers whose applications are admitted for processing in the autonomous cities of Ceuta and Melilla.

The main effect of this measure is to limit access to asylum procedures by deterring individuals from exercising their right to seek and enjoy asylum. Applying for asylum puts them in a discriminatory and unequal situation compared to other immigrants. Consequently, there has been a very significant decrease in asylum applications.

Ceuta has until now been characterised by the fact that the majority of individuals who arrived there applied for international protection.³⁰ In 2011, barely 36% of persons who arrived in the city applied for international protection. In 2012, there were 209 asylum seekers out of 584 entries.

Although Melilla has not traditionally been a place where large numbers of applications for asylum are submitted, the decrease has never been so high.³¹ It is even more significant if we take into account the considerable increase in the number of entries to the city compared to previous years. The numbers have increased from 922 entries and 91 applications in 2010 to 1940 entries and 42 applications in 2011 and 2241 entries and 48 applications in 2012.

With regards to reception, alongside the standstill at certain times in scheduled departures to the Peninsula and the increase in entries, there has been worrying overcrowding at reception centres in

²⁷ The High Court of Andalusia has endorsed this legal position, declaring null and void the administrative retention measures used in Ceuta against asylum seekers whose applications are admitted for processing. Examples include, amongst many others, STSJA no. 398/2010, of 25 October 2010; STSJA no. 437/2010, of 28 October 2010; STSJA no. 525/2010, of 10 February 2011; and STSJA no. 527/2010, of 13 January 2011.

²⁸ The Spanish Ombudsman, in response to complaints received with regards to the prohibition on access to the Peninsula for asylum seekers in Ceuta and Melilla, urged the Administration to act, finally considering that (Ombudsman, file no. 10003229, 20/04/2010, 07-4CG-MJLR):
“From the point of view of this institution, the explanation provided in the report received is not sufficient to prevent free movement within the national territory for asylum seekers whose applications have been admitted”.

²⁹ It is in this context that the UNHCR expressed its opinion, in its position of May 2010, on “the situation of applicants for international protection whose applications are admitted for processing in Ceuta and Melilla and their access to the Peninsula”, considering:
“It seems clear, however, that there is no legal limitation or exclusion (especially taking into account the aforementioned declarative nature of refugee status) on the right of asylum seekers to freedom of movement. This being fully applicable to them, any delimitations should be derived from the application of a legal regulation, irrespective of their geographical location”.

³⁰ In 2010, of the 526 persons who entered the city, 304 applied for asylum. In 2009, of the 420 entrants, 339 applied for international protection.

³¹ Source: OAR. There were 167 asylum applications in 2008, 87 in 2009, 91 in 2010 and 42 in 2011.

both cities. This overcrowding distorts the purpose of reception in CETIs, which aim to integrate residents over time.

The UN Special Rapporteur on Racism and Xenophobia highlighted this during his recent visit to Spain:

The situation of migrants and asylum seekers in Ceuta and Melilla requires greater attention. During my trip, I visited Temporary Stay Centres (CETIs) for illegal immigrants and asylum seekers in the Spanish cities of Ceuta and Melilla. Several sources spoke of the problem of overcrowding in these centres. Asylum seekers face long delays in the processing of their applications for international protection. Furthermore, differences in the approaches taken with regards to asylum in mainland Spain and in Ceuta and Melilla have led to a situation where people in one of these two cities do not apply for asylum or withdraw their applications in order to apply on the Peninsula, sometimes risking their lives attempting to cross the Strait of Gibraltar illegally.

1. Right to information

Spanish law links access to information on asylum procedures to the time of application for international protection.³² Thus, Art 17.3 of the Asylum Act regulates the content of this information:

“At the time of submitting the application, the foreign national shall be informed, in a language they understand, about:

- a) the procedure they must follow;*
- b) their rights and obligations during processing, especially with regards to the time-frame, and the means at their disposal to comply with these;*
- c) the option to contact the United Nations High Commissioner for Refugees and legally recognised Non-Governmental Organisations whose objectives include providing help and advice to persons in need of international protection;*
- d) the possible consequences of breaching their obligations or failing to cooperate with authorities; and*
- e) the rights and social benefits to which they have access in their status as applicants for international protection”.*

Pending regulations of the current Asylum Act of 2009, the previous Regulations apply, which establish in Art 5.1 that *“the Administration, in collaboration with the UNHCR and Non-Governmental Organisations whose objectives include helping refugees, shall produce a leaflet with useful information for asylum seekers in several languages. This document shall be available from the*

³² Only in the case of unaccompanied foreign minors is there an obligation to inform all minors, whether or not they have expressed a wish to apply for international protection, at the time of hand-over to child protection services. Art. 190.5 of the Immigration Regulations establish: *After receiving the minor, child protection services shall inform him or her, reliably and in a language he or she understands, of the basic content of the right to international protection and the application procedure, as well as the child protection legislation in force. There shall be a written record of this conversation.*

places cited in the previous article [Asylum and Refugee Office, Foreign Nationals' Offices, police stations, diplomatic missions and border posts] and shall be given to applicants at the time of submitting their application so that they may contact organisations as they see fit."

Pursuant to this provision, the Ministry of the Interior has produced an informative leaflet on international protection procedures, and the rights and responsibilities of asylum seekers and refugees, in Spanish, English, French and Arabic, available on its website.

Common practice at the border is to distribute this leaflet when a foreign national expresses a wish to apply for international protection, although in some detention centres it is given out at the same time as the application is submitted, when the foreign national is also informed orally, in the presence of an interpreter, of their rights and responsibilities as an applicant for international protection.

Of particular cause for concern is the protocol followed by police headquarters in Melilla. When a foreign national arrives illegally, in order for him or her to be admitted to a CETI, he or she must first go to the police station to be identified. There expulsion procedures shall be initiated against him or her, with no information on the possibility of accessing international protection procedures, thereby leaving him or her at risk of being returned to a country where his or her life or liberty would be in danger. Opening a sanctions procedure in this way may also harm the viability of any subsequent application for international protection.

These practices hinder access to asylum procedures for persons in need of international protection who are not aware of the possibility of applying for asylum at the border or in detention centres. Thus, the Ombudsman, in its annual report in 2012, compiled the checks carried out on his visits to centres at which there may be persons in need of international protection. *"On some visits, some persons claimed not to have been informed of the possibility of applying for international protection and, in fact, expressed a wish to submit an application".*³³

2. Legal assistance and the assistance of an interpreter

Art 22.2 of the Immigration Act is crystal clear in establishing that *"foreign nationals in Spain have the right to legal assistance in administrative procedures that may lead to their denial of entry, refoulement, or expulsion from Spanish territory and in all procedures related to international protection, as well as the assistance of an interpreter if they do not understand or speak the official language in use. This assistance shall be free where they lack sufficient financial resources according to the criteria established in the regulations governing the right to free legal assistance."*

Art. 26 of the Immigration Act and Art. 13 of the Regulations establish that this right *"shall commence at the time checks are carried out at the border post"*. Therefore, all foreign nationals on Spanish territory or at any of its border posts have the right to legal assistance and the assistance of an interpreter in procedures of denial of entry, refoulement, expulsion and international protection.

³³ Ombudsman: *Annual Report to Parliament 2012*, p.172.

These services are offered by a rota of duty solicitors from the Bar Association and NGOs specialising in international protection, such as CEAR.

The problem lies in de facto returns in which no administrative procedure is initiated, such as those carried out on board boats in maritime operations, readmissions in accordance with Bilateral Agreements that do not include this procedural guarantee or in the case of stowaways.

Joint instructions from police and Civil Guard headquarters, the Directorate-General for Domestic Policy and the Directorate-General for Immigration of the Ministry of the Interior, dated 28 November 2007, on the treatment of foreign stowaways, do not guarantee legal assistance in the stowaway's initial interview with police on board the boat. Only if the stowaway expresses a wish to enter Spanish territory is he or she permitted the presence of a lawyer. In the vast majority of cases, the police state that the stowaways wish to 'continue their journey' and only, very reluctantly, permit access where the stowaway unequivocally expresses his or her intention to apply for international protection in Spain which, without appropriate advice and support, is very difficult to do. Thus, according to Government data, between 2008 and 2012, of the 95 stowaways detected, excluding minors, only five stowaways of legal age entered Spain.³⁴

On 17 December 2012, the ship *Smaragd*, travelling from Algeria and flying the flag of Antigua and Barbuda, docked at the port of Valencia and announced its arrival with five stowaways on board, found in a container.³⁵ These persons declared themselves of Syrian nationality and two of them claimed to be minors. After taking them out of the container and giving them medical care, they were all returned to the ship because the police deemed their nationality unproven and medical tests did not confirm their status as minors.

Given this situation, which made access to asylum procedures impossible, CEAR asked the Government Sub-Delegation to guarantee legal assistance to these persons, seeking access to the ship for their lawyers. However, the ship left for Barcelona, where the legal service of the Catalan Commission for Refugees informed the OAR, the UNHCR and the Government Sub-Delegation in Barcelona, once again requesting assistance for these persons. It was informally reported that the stowaways had been given a questionnaire which, in the police's opinion, did not satisfactorily prove their nationality. This was an irregularity, since protection procedures had never been initiated. Finally, the boat left the port of Barcelona with the stowaways on board. These irregularities triggered the filing of a complaint with the Ombudsman, whose investigation is still ongoing. The latter insisted, in its annual report to Parliament, on the need to improve and unify the various administrative practices with the aim of preventing situations that make it difficult or impossible for applications for international protection to be assessed fairly.

³⁴ El diario: *Un centenario de polizones ha desembarcado en España desde 2008, la mitad de ellos menores y la mayoría en Barcelona* [A hundred stowaways have reached Spain since 2008, half of them children and the majority in Barcelona], 17 March 2013: http://www.eldiario.es/politica/centenar-polizones-desembarcado-Espana-Barcelona_0_111988899.html

³⁵ Las Provincias: <http://www.lasprovincias.es/v/20121218/sucesos/cinco-polizones-llegan-puerto-20121218.html>

3. Staff training

The Third Additional Provision of the Asylum Act establishes that “the Public Administration shall ensure that public sector employees and other persons who look after international protection applicants, refugees and persons enjoying subsidiary protection receive appropriate training. To this end, the relevant Ministries shall develop training programmes to equip them with the necessary skills to carry out their duties.”

National law enforcement and security services in charge of the surveillance and control of illegal immigration (national police and Civil Guard) have specialist courses at their own training centres³⁶ in border control, human trafficking, minors and human rights with practical activities for police inspectors (videos, case studies, analysis of media coverage, etc.).³⁷

Border control staff have to take a specialist course on the subject. Furthermore, in 2012, the Asylum and Refugee Office organised training sessions on access to asylum procedures for the relevant authorities in border areas and immigration detention centres.³⁸

4. Effective remedies

Art. 20 of the Immigration Act recognises the right to effective legal protection for all foreign nationals, with Art. 21 covering the right to appeal against administrative acts.³⁹

More specifically, the regulations prohibiting entry (Art 26.2 of the Immigration Act and Art. 15 of the Regulations), refoulement (Art. 58 of the Immigration Act and Art. 23 of the Regulations) and expulsions (Art 57.9 of the Immigration Act and Art. 245.1 of the Regulations) specifically cite that decisions shall contain information on the appeals that can be brought against them, the appropriate body and the deadlines for submission. These appeals do not in themselves have a suspensive effect; the precautionary measure of a stay of removal must be applied for, in addition to lodging the appeal.

However, there are various obstacles to exercising these rights in border procedures, due to the fixed time limits, and in rescue and salvage operations at sea, where administrative procedures are omitted and the intercepted persons returned.

³⁶ Service charter of the National Police Centre for Specialist and Refresher Courses: http://www.policia.es/org_central/division_forma_perfe/doc_matriz_ac.pdf

³⁷ FRA: *Fundamental rights at Europe’s southern border*, August 2013, p.108.

³⁸ EASO: *Annual Report on the Situation of Asylum in the EU*, 2012.

³⁹ “1. The administrative acts and decisions adopted in relation to foreign nationals shall be appealable pursuant to the law. 2. The enforceability of the administrative acts adopted with regards to foreign nationals shall be that established generally in the legislation in force, except as provided in this Law for expulsion procedures on a preferential basis.”

In this respect, the High Court judgment of 17 February 2010⁴⁰ did not recognise the violation of the right to effective legal protection of the 23 passengers of the ship *Marine I* rescued in international waters, alleging that these persons were abroad, outside the scope of Spanish jurisdiction, and therefore “the Spanish Administration’s refusal to carry out the transfer cannot be considered to have caused for these persons an obstacle that did not already exist to access to the Spanish courts or applying for asylum.” However, the United Nations Committee Against Torture⁴¹ considers that Spain did exercise control over the passengers of the *Marine I* during their rescue at sea and identification and repatriation activities on Mauritanian territory; therefore, there were subject to Spanish jurisdiction and had the right of access to the courts.

5. Positive obligations of States when returning foreign nationals

The *Hirsi Jamaa* case made it clear that, irrespective of whether they have expressed a wish to apply for international protection, States must individually identify immigrants who attempt to enter illegally, assess their personal circumstances, such as possible vulnerabilities, and analyse the treatment to which they would be subjected in the country of destination on their return.

In the event of denial of entry at an official border, this identification takes place as part of denial of entry procedures. In the event of entry through unofficial borders, according to Art. 23.2 of the Immigration Regulations, “national law enforcement and security services responsible for guarding the coasts and borders who have intercepted foreign nationals attempting to enter Spain illegally shall transfer them as quickly as possible to the relevant police station to identify and, if appropriate, return them”.

The current Immigration Act establishes various protection mechanisms for particularly vulnerable individuals, such as trafficking victims or minors.

Art. 59bis of the Immigration Act lays down a specific procedure for foreign nationals who may be victims of human trafficking, including detection and identification of the possible victim, the granting of a period of restoration and reflection, and the possible granting of a residence and work permit due to exceptional circumstances.

According to the Framework Protocol for the Protection of Victims of Human Trafficking, where an alleged human trafficking victim has been detected at the border, the police unit in charge of immigration control shall immediately inform the relevant Provincial Bureau for Immigration. The latter shall, as soon as possible, adapt appropriate measures for specially trained agents to identify him or her and, if appropriate, grant a period of restoration and reflection. Whilst this procedure is ongoing, any expulsion, refoulement or return of the alleged victim shall be suspended. The latter shall stay on border premises (normally an airport if he or she entered through an official border) or a CIE (if he or she was intercepted attempting to enter through an unofficial border and was ordered

⁴⁰ High Court Judgment, Administrative Chamber, Section 7a, 17 February 2010 (appeal no. 548/2008).

⁴¹ UN Committee Against Torture: *J.H.A v. Spain*, 21 November 2008.

to be detained) until he or she is informed of whether or not the period of restoration and reflection has been granted.

However, it is precisely during procedures at the border and in CIEs that detection and identification is the most difficult, due to the rapidity of border procedures and the imprisonment and vulnerability of the alleged victims (very young women, many of whom are pregnant and have suffered human rights violations on their journey, who have little information about their alleged traffickers). For example, in the first six months of 2013, 8 human trafficking victims were identified at CIEs.⁴² The Ombudsman has warned that “in a worrying number of cases, border police, despite the evidence, have not identified the foreign national as a possible trafficking victim, who may sometimes be deserving of international protection”.⁴³

In the case of undocumented and unaccompanied minors, law enforcement and security services must inform the Public Prosecutor’s Office, which shall order tests to determine age. If the individual is a minor, he or she shall be handed over to child protection services. If not, return or refoulement procedures shall continue.

As regards the obligation to assess whether the State of destination has an acceptable standard of human rights and whether, in the specific case, the individual is at risk of inhuman or degrading treatment or torture, Spain is bound by various international treaties⁴⁴, as the ECHR recently reinforced in the case of *Hirsi Jamaa v. Italy*: “*In any case, the Court considers that it was the responsibility of national authorities, in a situation where human rights were systematically violated, as described above, to assess the treatment to which claimants would be subjected following their return*”.

None of this is covered by our immigration law, which establishes only that, in the event of denial of entry, the individual shall be returned to his or her State of origin or the State that issued the travel document. Only if the individual is returned to a third State does it mention half-heartedly that this State shall “guarantee his or her admission and treatment compatible with human rights”⁴⁵, a precaution that is clearly insufficient.

⁴² Response of 16 July 2013 to a written question in the Congress of Deputies [Lower House of the Spanish Parliament] by Rosa Delia Blanco Terán, BOCG [Official Gazette of the Spanish Parliament] D.350, p.752.

⁴³ Ombudsman: *Human Trafficking in Spain: Invisible Victims*, 20 September 2012, p.153.

⁴⁴ Art 3.2 of the UN Convention Against Torture establishes the following: “For the purposes of determining whether these grounds exist, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a general pattern of gross, blatant or mass human rights violations”. The same goes for settled ECHR case law.

⁴⁵ Art. 66.3 of the Immigration Act and Art. 18.1 of the Immigration Regulations.

RECOMMENDATIONS

- Guarantee access to the peninsula for asylum seekers whose applications are admitted for processing in Ceuta and Melilla, and do not restrict their free movement within the national territory.
- Improve the joint instructions of police and Civil Guard headquarters, the Directorate-General for Domestic Policy and the Directorate-General for Immigration on the treatment of foreign stowaways to guarantee access to legal assistance and asylum procedures in cases where international protection is needed.
- Improve the information and access of unaccompanied minors to international protection procedures through effective coordination between child protection services, the Asylum and Refugee Office and border posts.
- Establish more reliable procedures and measures to promote the access of Non-Governmental Organisations to border premises, immigration detention centres and boats, in cases where stowaways are detected, pursuant to Article 19.4 of the Asylum Act, to facilitate identification and advice to persons likely to apply for international protection in our country.
- Include a separate assessment of the human rights situation in the country of destination in denial of entry, refoulement and expulsion procedures.
- Improve the training of national law enforcement and security services in charge of immigration control in the identification of persons in need of international protection, victims of human trafficking and other vulnerable groups.

CHAPTER III

Prohibition on collective expulsions

Spanish law prohibits collective expulsions, establishing an individualised identification and, where applicable, refoulement, procedure for foreign nationals attempting to enter Spanish territory illegally.⁴⁶

Thus, the law obliges us to study on a case-by-case basis whether each immigrant meets the requirements established in law to enter Spanish territory and to identify particularly vulnerable individuals, such as persons in need of international protection, trafficking victims or other humanitarian grounds that justify entry to Spanish territory. Otherwise, refoulement procedures must be initiated, which guarantee legal assistance, the assistance of an interpreter⁴⁷ and notification of the decision and appeal system.

However, Spanish authorities often invoke bilateral readmission agreements to ignore these proceedings, in clear breach of national and international law, such as the European Convention on Human Rights and ECHR case law.

An example of these practices was the expulsion on the night of 3 to 4 September 2012 of 73 persons of sub-Saharan African origin who had arrived on the small island of Isla de Tierra, of Spanish sovereignty, 50 metres from the coast of Morocco.

On 28 August 2012, a boat carrying 19 persons of sub-Saharan African origin (ten men, six women and three children) arrived on Isla de Tierra, part of the Peñón de Alhucemas archipelago. On the same day, a Civil Guard ship arrived on the islet and took the three children and three of the women (one pregnant woman and the mothers of the children), leaving the rest of the group where they were. However, despite the fact that the Spanish authorities were aware of their presence, they received no medical care or humanitarian assistance until 31 August, three days after their arrival. This is unjustifiable, considering that a Spanish military detachment is based nearby, on Peñón de Alhucemas, and the Government Delegation of Melilla had been informed by several NGOs from the Migreurop Spain network, who were in telephone contact with the persons on the islet and knew that they needed water, food, blankets and medical care. On 1 September, another boat with 68 persons on board arrived on Isla de Tierra. Added to the previous group, this made a total of 81. Although they received humanitarian assistance, they were never informed of their legal status on Spanish territory or the rights and responsibilities derived therefrom. They were expelled on the night of 3-4 September.

Representatives of the mainstream Spanish media witnessed the expulsion from Isla de Tierra and gave a pretty complete account of events.⁴⁸ In the early hours of Tuesday 4 September, the Civil

⁴⁶ Art. 23.3 of the Immigration Regulations.

⁴⁷ Art. 23.3 of the Immigration Regulations.

⁴⁸ El País: *Marruecos expulsa a Argelia a los inmigrantes de Isla de Tierra [Morocco expels immigrants from Isla de Tierra to Algeria]*, 4 September 2012: http://politica.elpais.com/politica/2012/09/04/actualidad/1346787691_331460.html

Guard handed over to Moroccan security forces the 73 sub-Saharanans who were still on Isla de Tierra (some women and children had already been transferred to CETIs or children's centres in the city of Melilla). They travelled in Zodiac boats, the majority of them in handcuffs. They were forced to get off the boats and walk through the water for the last 20 or 30 metres to the shore, on Moroccan territory, where agents from the Moroccan security services were waiting for them. Civil Guard officers did not leave the boats on any of the journeys or touch Moroccan soil. As is common practice in Morocco, the persons from Isla de Tierra were taken by bus to the border with Algeria, near Oujda, and expelled to Algeria.

CEAR denounced as a violation of national⁴⁹ and international law the collective refoulement of 73 persons from Isla de Tierra without respecting the procedural guarantees established in the Immigration Act to provide legal assistance, the assistance of an interpreter and access to legal protection and to identify vulnerable groups who could not be expelled on humanitarian grounds, potential refugees and trafficking victims. Leaving aside the mothers and children who were sent to Melilla rather than being expelled, given the sub-Saharan African origin of the majority of the immigrants, the Spanish authorities should have checked, on a case-by-case basis, that they did not come from a country in conflict or with gross human rights violations.

They were also handed over to security services that have been repeatedly accused of beatings and ill treatment of immigrants. When the persons from Isla de Tierra were handed over, the Moroccan authorities already had the buses commonly used to expel persons of sub-Saharan African origin via the border with Algeria, where they are abandoned in the middle of the desert. This could have happened on the same night as the expulsion, according to an article in the El País newspaper.⁵⁰

The seriousness of these events led Spanish organisations belonging to Migreurop, including CEAR, to file a joint complaint to the Ombudsman. This complaint caused the latter to seek information from the Security Ministry on the actions of the Spanish authorities. The information provided by the Ministry detailed diplomatic efforts with the Government of Morocco for the readmission of immigrants and the humanitarian assistance whilst they were on Spanish territory. It also mentioned the 'spatiotemporal circumstances' that prevented initiation with each person of an individualised procedure pursuant to the law. Finally, it reported that none of the persons on Isla de Tierra requested asylum or legal assistance.

The Ombudsman considered as sufficient the explanations provided by the Spanish authorities, being "aware of the difficulties in controlling migratory flows in these geographical circumstances", although it also considered that the laws in force⁵¹ had been broken, reminding the Security Ministry

⁴⁹ CEAR statement: *The Government has broken Spanish law by handing over immigrants from Isla de Tierra to Morocco*, 4 September 2012: <http://cear.es/el-gobierno-ha-violado-la-legislacion-espanola-al-entregar-a-los-inmigrantes-de-isla-de-tierra-a-marruecos>

⁵⁰ See the El País article: http://politica.elpais.com/politica/2012/09/04/actualidad/1346787691_331460.html

⁵¹ Ombudsman: *Annual Report to Parliament*, 2012.

of “the need to respect in all cases the procedure provided in Organic Law 4/2000 (Immigration Act) for the interception of foreigners attempting to access national territory illegally”.⁵²

In light of the case of *Hirsi Jamaa v. Italy*, the arguments employed by the Spanish State to justify the expulsion from Isla de Tierra, based on exceptional circumstances, such as the islet’s location mere metres from the Moroccan coast and the bilateral readmission agreement with the Kingdom of Morocco, are invalid and reprehensible in the eyes of international law.

But it not only violated the principle of non-refoulement and obligations with regards to protection against torture and inhuman or degrading treatment; it also violated the prohibition on collective expulsions of foreign nationals. This prohibition obliged the Spanish State to study on a case-by-case basis the situation of each person on the islet, identifying those who may be in need of international protection or, where appropriate, may meet the requirements established by the Immigration Act for accessing Spanish territory.

Recommendations

- Immediate assistance and rescue of any persons whose life is in danger at sea, pursuant to international sea treaties.
- Suspend forced returns of all persons from countries in conflict or serious humanitarian crisis, facilitating their access to international protection.
- Include in Readmission Agreements clauses on the protection of human rights and procedural guarantees.
- Implement the Directive on minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons.
- Guarantee access to the Peninsula for asylum seekers whose applications are admitted for processing in Ceuta and Melilla, and do not restrict their free movement within the national territory.
- Improve the joint instructions of police and Civil Guard headquarters, the Directorate-General for Domestic Policy and the Directorate-General for Immigration on the treatment of foreign stowaways to guarantee access to legal assistance and asylum procedures in cases where international protection is needed.

⁵² The Ombudsman’s Charter, which was sent to the organisations that signed the joint complaint on 31 December 2012.

- Improve the information and access of unaccompanied minors to international protection procedures through effective coordination with child protection services, the Asylum and Refugee Office and border posts.
- Establish more reliable procedures and measures to promote the access of Non-Governmental Organisations to border premises, immigration detention centres and boats, in cases where stowaways are detected, pursuant to Article 19.4 of the Asylum Act, in order to facilitate identification and advice to persons likely to applying for international protection in our country.
- Include a separate assessment of the human rights situation in the country of destination in denial of entry, refoulement and expulsion procedures.
- Improve the training of national law enforcement and security services responsible for immigration control in the identification of persons in need of international protection, human trafficking victims and other vulnerable groups.

Project Leader: Italian Council for Refugees - **Project Partners:** Spanish Commission for Refugees (Spain), Greek Council for Refugees (Greece), Hungarian Helsinki Committee (Hungary), The People for Change Foundation (Malta), Proasyl (Germany).

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Key

AI: Amnesty International.

ASYLUM ACT: Law 12/2009, of 30 October, governing the right to asylum and subsidiary protection.

ASYLUM REGULATIONS: Regulations implementing Law 5/1984, of 26 March, governing the right to asylum and refugee status, modified by Law 9/1994, of 19 May, approved by Royal Decree 03/1995, of 10 February, modified by Royal Decree 1325/2003, of 24 October, modified by Royal Decree 2393/2004, of 30 December. In force provided it does not contravene the new Asylum Act and until the approval of new regulations.

CETI: Immigrant Temporary Stay Centre. Run by the Ministry of Labour and Immigration. There are two: one in Ceuta and one in Melilla.

CIAR: Interministerial Commission on Asylum and Refugees. Made up of the Ministries of the Interior, Labour and Immigration, Justice, Equality and Social Affairs.

CIE: Immigration Detention Centre. Run by the Ministry of the Interior.

COI: Country of Origin Information.

ECHR: European Court of Human Rights.

ECHR/EUROPEAN CONVENTION ON HUMAN RIGHTS: Convention for the protection of human rights and fundamental freedoms, signed in Rome on 4 November 1950.

EU: European Union.

FRONTEX: European agency that controls the exterior borders of the European Union.

GENEVA CONVENTION: Convention of 28 July 1951 on refugees. The Convention was developed under the Protocol on refugees approved in New York on 31 January 1967.

IMMIGRATION ACT: Organic Law 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their integration into society, modified by OL 8/2000, of 22 December, modified by OL 11/2003, of 29 September, modified by OL 14/2003, of 20 November, modified by OL 2/2009, of 11 December.

IMMIGRATION REGULATIONS: Regulations implementing Organic Law 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their integration into society, modified by OL 8/2000, of 22 December, modified by OL 11/2003, of 29 September, modified by OL 14/2003, of 20 November, modified by OL 2/2009, of 11 December, approved by Royal Decree 2393/2004, of 30 December.

REPEALED ASYLUM ACT: Law 5/1984, of 26 March, governing the right to asylum and refugee status, modified by Law 9/1994, of 19 May, and by Organic Law 3/2007, of 22 March, on effective equality between men and women.

UNHCR: United Nations High Commissioner for Refugees.

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UNITED NATIONS CONVENTION AGAINST TORTURE: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on 10 December 1984.

Annex: Brief description of asylum procedures

Applications for international protection may be submitted in Spain or on Spanish territory (Asylum and Refugee Office in Madrid, Foreign Nationals' Offices or provincial police stations), at border posts (mainly ports and airports) and at Immigration Detention Centres. The 2009 Act removed the possibility of applying for asylum at embassies or consulates, limiting the power of diplomatic staff to granting exceptional visas permitting an individual to travel to Spain to apply for international protection.

In 2011¹, there were 3422 applications for international protection in Spain. Of those, 344 were submitted at border posts, 261 at Immigration Detention Centres, 120 applied for a visa at an embassy, and the rest (2697) were made on Spanish territory. In 2012, there was a significant decrease in applications to 2565², of which 402 were submitted at border posts, 160 at CIEs and 177 at embassies³. Figures for the first six months of 2013 almost exceeded the number of asylum applications for the whole of the previous year⁴, reaching 2480.

Spanish asylum procedures have two distinct phases: permission/refusal to proceed and investigation. As such, there are significant procedural differences according to the place of application.

If the application for international protection is submitted on Spanish territory, the deadline for granting permission or refusal to proceed is one month. The decision granting permission to proceed shall indicate whether the investigation phase shall be subject to ordinary proceedings (6 months) or urgent proceedings (3 months).

Where the application for international protection is submitted at a border post or CIE, permission/refusal to proceed is handled differently. Firstly, the initial phase of the procedure at a border post (or CIE) can include not only granting or refusing permission to proceed, but also rejecting the application on the grounds set out in Art. 21 of the Asylum Act. Secondly, the deadline for making one of these three decisions (permission to proceed, refusal to proceed or rejection) is shorter; the Asylum and Refugee Office must make a decision within 4 days (72 hours in the case of an airport). In the event of a negative decision (refusal to proceed or rejection), the applicant has the right to request a review of his or her application by the OAR within 2 days, which shall also be resolved within 2 days. Throughout the first phase of the proceedings, the applicant must remain at the CIE or the premises designated for this purpose at the border post. If the application is allowed to proceed (following the initial application or the review), the individual shall enter Spanish territory to continue with her or her application for international protection (the investigation phase). If his or

¹ Ministry of the Interior: Asylum figures 2011.

<http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2011+%28NIPO+126-12-011-9%29.pdf/aed61e93-988e-44c1-b6d0-4d83036805e7>

² Eurostat press release: *Asylum in the EU27*, 22 March 2013 (48/2013).

³ Own source.

⁴ 20 Minutos: *Los conflictos de Malí y Siria disparan las solicitudes de asilo político en España [Conflicts in Mali and Syria trigger an increase in applications for political asylum in Spain]*, 3 July 2013: <http://www.20minutos.es/noticia/1861800/0/solicitudes-asilo/espana-2013/siria-mali/>

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her application is rejected or prevented from proceeding further, he or she has a period of 2 months to apply for a judicial review, which has no suspensive effect on return/refoulement. To counter this, it is possible to apply, alongside the judicial review, for a precautionary measure to suspend return. However, in 2012, the National Court suspended refoulement on only two occasions.

Diagram of asylum procedure in Spain

1 mes entrada = 1 month entry

Vigencia estancia o residencia = Length of stay or residence

Frontera y CIEs = Border and CIEs

Territory = Territory

Acceso diplomático = Diplomatic access

72 horas frontera 4 días CIEs = 72 hours border 4 days CIEs

Solicitud de asilo = Asylum application

Admisión = Permission to proceed

1 mes = 1 month

Inadmisión = Refusal to proceed

Denegación = Rejection

3 meses = 3 months

6 meses = 4 months

2 días hábiles = 2 working days

Instrucción urgencia = Urgent proceedings

Ministerio Interior = Ministry of the Interior

Instrucción ordinaria = Ordinary proceedings

Recurso reposición = Appeal for reversal

Recurso contencioso administrativo = Judicial review

Reexamen = Review

2 días hábiles + = 2 working days +

10 días hábiles = 10 working days

ACNUR: causas exclusión y denegación = UNHCR: grounds for exclusion and rejection

Posible suspensión = Possible suspension

Protección susidiaria = Subsidiary protection

Estatuto de refugiado = Refugee status

Razones humanitarias LOEX = Humanitarian grounds Immigration Act

Convenciones = Key

Plazos = Deadlines

Acceso indirecto = Indirect access

Órganos administrativos = Administrative bodies

Project leader:

CIR

ITALIAN COMMISSION
FOR REFUGEES

Partner organisations:

THE
**PEOPLE
FOR
CHANGE**
FOUNDATION

GREEK
COUNCIL
FOR
REFUGEES

PRO ASYL
DER EINZELFALL ZÄHLT

CEA(R)
Spanish Commission
for **Refugees**

With the collaboration of:

CPR

This project was funded by the European Programme for Integration and Migration (EPIM), a collaborative initiative by the Network of European Foundations.

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