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The Strasbourg Court Judgement *N.D. and N.T. v Spain*  
*A Carte Blanche to Push Backs at EU External Borders?*

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## **Abstract**

This Paper examines the *N.D. and N.T v Spain* judgment by the European Court of Human Rights (EtCHR) of 13 February 2020. The Grand Chamber of the Strasbourg Court concluded that expedited expulsions to Morocco (pushbacks or ‘hot returns’) by Spanish authorities at the border fences in Melilla did not amount to a violation of the prohibition of collective expulsions under Article 4 Protocol 4 of the European Convention of Human Rights (ECHR). Counterintuitively, the Court’s ruling is not a *carte blanche* for states to engage in automatic expulsions or push backs of irregular immigrants and asylum seekers at EU external borders. The Grand Chamber has confirmed that the notion of expulsion for ECHR purposes covers non-admission border management policies, and it applies to every individual irrespective of seeking asylum or not. It has also held that governments must not instrumentally frame certain parts of their territory through law as ‘non-territory’ to escape from their ECHR obligations in the context of border policies. The Grand Chamber has also demanded that States provide genuine and effective access to legal entry mechanisms for purposes of asylum and employment.

The *N.D. and N.T v Spain* judgement is, however, fraught with legal inconsistencies and factual inaccuracies. It denies justice to voiceless victims of human rights violations. The ruling’s inconsistent legal argumentation leaves crucial nuances to avoid arbitrariness and rule of law violations in states’ border policies. By focusing on the individuals’ *own conduct* instead of the Spanish authorities’ compliance with the ECHR, the judgement displaces the individual from the heart towards the periphery of the ECHR system. It wrongly applies an ‘own conduct doctrine’ to human rights which are absolute in nature and accept no exception. The judges’ arguments are also factually wrong, chiefly in respect of the practical accessibility by the applicants to legal channels for admission to Spain. The Grand Chamber’s choice to first assess whether the individual is worthy of human rights contradicts Article 1 ECHR and the Strasbourg Court mandate to impartially and independently supervise States parties’ compliance with everyone’s human rights within their jurisdiction. The ruling provides an inequivalent level of human rights calling for lower protection standards in contradiction to those required by United Nations human rights bodies. It is also incompatible with the Spanish government’s obligations under EU law to comply with human rights in border control and surveillance policies, and the fundamental right to asylum.

## **Keywords**

European Union; Migration; Asylum; European Convention on Human Rights; Pushbacks; Border Fences; Hot Returns; Ceuta and Melilla; Right to Asylum; Prohibition against Collective Expulsions; *Non-Refoulement*





*I cannot accept that humans can treat humans like that. When my rights were violated by Spain, harm was done to me. What I would like for this Court is that measures are taken to stop such harm from being done to other people. I would like that justice exists even for those who are poor, vulnerable and don't have a voice*

Oral Statement by Mr. N.D. Lawyer before the Grand Chamber of the European Court of Human Rights, Hearing, Strasbourg, 16 September 2018.

## Introduction\*

On 13 February 2020 the Grand Chamber of the ECtHR in Strasbourg delivered the much awaited judgement *N.D. and N.T. v Spain*.<sup>1</sup> By a unanimous vote, the judges ruled in favour of the Spanish government and that the automatic expulsions of the two applicants to Morocco did not amount to a violation of Article 4 Protocol 4 and Article 13 of the European Convention of Human Rights (ECHR). Since 2005, the Spanish government has implemented a systematic official policy of ‘push backs’ or ‘hot returns’ (*devoluciones en caliente*) of people entering irregularly through the border fences barriers in Melilla and Ceuta.<sup>2</sup> This policy has been subject to widespread criticism by international and regional human rights actors,<sup>3</sup> particularly since it became part of the Organic Act 4/2015 *on safeguarding the security of citizens* or Public Security Act of 30 March 2015.<sup>4</sup>

The case before the Strasbourg Court dealt with one applicant from Mali and another from Ivory Coast, who together with other individuals tried to cross the Spanish border fence in Melilla.<sup>5</sup> They alleged that they were subject to disproportionate violence and expedited expulsions by the Spanish authorities (*Guardia Civil*) who reportedly handcuffed them and handed them over to the Moroccan

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<sup>1</sup> ECtHR, Case of *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, Grand Chamber, Strasbourg, 13 February 2020.

<sup>2</sup> However, investigative journalism has reported that Spanish authorities had implemented this practice as an unofficial policy since 2001. Refer to El Diario (2013), *España lleva 12 años expulsando ilegalmente inmigrantes en Melilla*, 19 November 2013; Available at [https://www.eldiario.es/desalambre/inmigrantes-expulsados-ilegalmente-Melilla-ultimos\\_0\\_198430239.html](https://www.eldiario.es/desalambre/inmigrantes-expulsados-ilegalmente-Melilla-ultimos_0_198430239.html)

<sup>3</sup> A. López-Sala (2020), Keeping up Appearances: Dubious legality and migration control at the peripheral borders of Europe. The cases of Ceuta and Melilla, in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights, pp. 26-42. See also I. Barbero and M. Illamola-Dausa (2020), Deportations without the right to complaint: cases from Spain, in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights, pp. 43-63.

<sup>4</sup> Ley Orgánica 4/2015 de protección de la seguridad ciudadana or ‘Ley Mordaza’, BOE núm. 77, 31/03/2015. According to the Tenth Additional Provision (Special Rules for Ceuta and Melilla). ‘1. Aliens attempting to penetrate the border containment structures in order to cross the border unlawfully, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their unlawful entry into Spain. 2. Their return shall in all cases be carried out in compliance with the international rules on human rights and international protection recognized by Spain. 3. Applications for international protection shall be submitted in the places provided for that purpose at the border crossings; the procedure shall conform to the standards laid down concerning international protection’. P. Garcia Andrade (2015), *Devoluciones en caliente* de ciudadanos extranjeros a Marruecos, *Revista Española de Derecho Internacional* 67, pp. 214- 220; I. Gonzalez García (2017), *Rechazo en las Fronteras Exteriores Europeas con Marruecos: Inmigración y Derechos Humanos en las Vallas de Ceuta y Melilla 2005-2017*, *Revista General de Derecho Europeo* 43 (2017), pp. 17-57; J. Sanchez-Tomás (2018), *Las devoluciones en caliente en el Tribunal Europeo de Derechos Humanos*, *Revista Española de Derecho Europeo* 65, pp. 101-135.

<sup>5</sup> The border fence includes three successive fences: two six-metre-high outer fences, and a three-meter high inner fence.

authorities without undergoing any identification procedure or being given the opportunity to explain their personal circumstances and be assisted by a lawyer, interpreters or medical staff. This, in their view, constituted a violation by the Spanish government of the prohibition against collective expulsions enshrined in Article 4 Protocol ECHR, in conjunction with Article 13 ECHR guaranteeing a right to an effective remedy.

There were high expectations about the Grand Chamber's final ruling. In a previous ruling issued on October 2017,<sup>6</sup> a Strasbourg Court Chamber had found the Spanish government 'push backs' to contravene the prohibition against collective expulsions and the guarantee of an effective remedy (Article 13 ECHR) before the forced removal of the same applicants to Moroccan authorities without an individual assessment.<sup>7</sup> However, the Spanish Government appealed that judgement, which was referred to the Grand Chamber in early 2018.

This Paper critically examines the *N.D. and N.T v Spain* ECtHR Grand Chamber judgment. It argues that it is not a *carte blanche* for states to engage in automatic expulsions or push backs of irregular immigrants and asylum seekers at EU external borders. The ruling is, however, full of incoherencies, including contradictory lines of argumentation leading to legal uncertainty and manifestly factual mistakes, which makes it peculiar in comparison to previous ECtHR jurisprudence. It puts forward a mix of protective and restrictive contributions to human rights protections in the context of states' border management policies, in particular the following four:

First, the judgement advances some rule of law and human rights guarantees in the context of expulsions of irregular immigrants and asylum seekers, and at the same time nuances the need to ensure effective access to justice and complaint mechanisms by *all* individuals irrespective of their status and subject to border control and surveillance practices (*Section 1 of this Paper*);

Second, it presents a contradictory stance between its recognition of states' competences to manage borders and migration, and the Court's request for them to ensure *genuine and effective* access to means of legal entry for asylum and other purposes such as employment by non-nationals (*Section 2*);

Third, the ruling displaces the individual from the heart towards the periphery of the ECHR system. It wrongly applies an 'own conduct doctrine' to absolute human rights. It is also factually wrong, particularly as regards the practical accessibility by the applicants to legal channels and tools of regular admission to Spanish territory (*Sections 3 and 4 of this Paper*); and

Fourth, it provides an inconsistent view calling for a lower level of protection to the ones advanced and required by related Council of Europe (CoE) actors and parallel United Nations (UN) human rights bodies and special procedures. It also advances an approach that is incompatible with the Spanish government obligations under EU law and the EU Charter of Fundamental Rights (*Section 5*).

## 1. Rule of Law Upheld and Blurred

One of the first steps taken by the Grand Chamber in the judgment was to place the scope and relevance of Article 4 Protocol 4 in the context of its previous case law on migration and asylum.<sup>8</sup> In doing so, the

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<sup>6</sup> ECtHR, Case of *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, Third Section, Strasbourg, 3 October 2017.

<sup>7</sup> C. Gortazar and N. Ferré (2017), *A cold shower for Spain-hot returns from Melilla to Morocco: N.D. and N.T. v Spain ECtHR*, 3 October 2017, eumigrationlawblog.eu, available at <http://eumigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/>; See also L. Imbert (2018), *Refolements sommaires: la CEDH trace la « frontière des droits » à Melilla*, *La Revue des droits de l'homme* [En ligne], Actualités Droits-Libertés, mis en ligne le 28 janvier 2018; J.M. Sánchez Tomás (2018), *Las devoluciones en caliente en el Tribunal Europeo de Derechos Humanos*, *Revista Española de Derecho Europeo* 65 (Enero-Marzo 2018).

<sup>8</sup> Refer to paragraph 167.

judges delivered an interpretation of the United Nations International Law Commission (ILC) draft articles *on expulsions of aliens*.<sup>9</sup> In response to the Spanish government claim that the applicants had never entered the Spanish territory and therefore had not been ‘expelled’, the Court disagreed and concluded that in light of the ILC provisions the generic term of ‘expulsion’ included also that of ‘non-admission’.<sup>10</sup>

Despite expectations to the contrary,<sup>11</sup> according to the Court,<sup>12</sup> the ILC draft articles apply to *all aliens* within the State’s territory with no distinction as to whether they qualify as ‘migrants’ or ‘refugees’.<sup>13</sup> Therefore, in a welcome step, the Grand Chamber confirmed that the safeguards foreseen in Article 3 ECHR<sup>14</sup> and those in Article 4 Protocol 4<sup>15</sup> apply to these situations and to *any foreigner*.<sup>16</sup> This represented a point of disagreement with the only Partly Dissenting Opinion issued by the Finnish Judge Koskelo in the ruling. She argued that individualised procedures should only be limited to the obligation of *non-refoulement* and not to ‘any persons about to penetrate their external borders...in the absence of any indication that they are seeking international protection’.<sup>17</sup>

Judge Koskelo’s restrictive interpretation of the notion of ‘expulsion’ would have artificially created a linkage between the *non-refoulement* principle in the scope of international refugee law<sup>18</sup> and the prohibition of collective expulsion envisaged in Article 4 Protocol 4 ECHR. It would have advanced the

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<sup>9</sup> See the 2014 Annual Report of the ILC on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, 17, para. 45 (2014). See also Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session, available at [https://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_617.pdf&lang=EX](https://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_617.pdf&lang=EX)

<sup>10</sup> According to paragraph 181 ‘the ‘non-admission’ of a refugee is to be equated in substance with his or her ‘return’ (*refoulement*), it follows that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not realise that State from its obligations toward the person concerned arising out of the prohibition of *refoulement* of refugees’. See also paragraph 184 ‘...the protection of the Convention cannot be dependent on formal considerations such as whether the persons to be protected were admitted to the territory of a Contracting State in conformity with a particular provision of national or European law applicable to the situation in question’.

<sup>11</sup> L. Riemer (2019), *The ECtHR as a drowning ‘Island of Hope’ Its impending reversal of the interpretation of collective expulsion is a warning signal*, *Verfassungsblog*, 19 February 2019, available at <https://verfassungsblog.de/the-ecthr-as-a-drowning-island-of-hope-its-impending-reversal-of-the-interpretation-of-collective-expulsion-is-a-warning-signal/>

<sup>12</sup> Refer to ECtHR cases *Khlaifia and Others v. Italy*, Application no. 16483/12, 15 December 2016, paragraph 243; and *Hirsi Jaama and Others v. Italy*, Application no. 27765/09, paragraph 174.

<sup>13</sup> Paragraph 185 states that ‘ These reasons have led the Court to interpret the term ‘expulsion’ in the generic meaning of its current use, as referring to any forcible removal of an alien from a State’s territory, irrespective of...his or her status as migrant or an asylum seeker and his or her conduct when crossing the border’. Here the Court referred to Paragraph 2 of the commentary on Article 1 of the ILC draft articles.

<sup>14</sup> Article 3 (Prohibition of torture): ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

<sup>15</sup> Article 4 (Collective Expulsions) of Protocol 4 states that ‘Collective expulsion of aliens is prohibited’. ‘Collective Expulsion’ has been defined as ‘any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’. Refer to [https://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_Protocol\\_4\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf). The ECtHR defined collective expulsions in its 2002 case *Čonka v. Belgium* where it stipulated that it corresponds with ‘any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’. For an overview of ECtHR cases on Article 4 Protocol 4 refer to [https://www.echr.coe.int/Documents/FS\\_Collective\\_expulsions\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf)

<sup>16</sup> Refer to paragraph 187 of the judgment.

<sup>17</sup> See paragraphs 26 and 23 of the Opinion. See also, in agreement with this legal argument, D. Thym (2020), *A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR’s N.D. and N.T. judgement on ‘Hot Expulsions’*, *eumigrationlawblog.eu*, available at <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/>

<sup>18</sup> The 1951 Geneva Convention prohibits in Art. 33.1 States to ‘expel or return (*‘refouler’*) a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

view that only people with a legitimate claim of international protection - that is *refugees* in light of the narrow definition foreseen in 1951 Geneva Convention - are worthy of ECHR protection against collective expulsions. This conclusion would have been legally misleading as it would have negated the human right of any individual – irrespective of administrative status or international protection claim – to effectively challenge on personal grounds her/his expulsion in all border surveillance activities falling under the responsibility and control of states’ authorities.

The Third Chamber 2017 *N.D. and N.T.* ruling had emphasized that ‘Given that even interceptions on the high seas come within the ambit of Article 4 of Protocol No. 4, the same must also apply to the allegedly lawful refusal of entry to the national territory of persons arriving in Spain illegally.’<sup>19</sup> In his Opinion in the previous case 2018 *M.A. and Others v. Lithuania*, Judge Pinto de Albuquerque had also argued for the inclusion of ‘non-admission’ in the notion of ‘expulsion’.<sup>20</sup> He underlined, referring back to the 2017 Chamber judgment, that

In view of the present adverse political climate in respect of asylum-seekers and migrants in general and towards African migrants arriving in Europe in particular, and of the attendant mounting pressure on the Court on the part of some Governments, the Court’s firmness in the Melilla case must be emphasized. The Court did not abandon its principled position on the purposeful interpretation of the concept of “expulsion” for the purposes of Article 4 of Protocol No. 4, which includes any “immediate ... *de facto* expulsion”, or to use the words of the drafters of Protocol No. 4, any form of driving a person away from a place, such as non-admission, rejection and return of migrants at the land border.<sup>21</sup>

The linkage between *non-refoulement* under Article 33.1 of the 1951 Geneva Convention<sup>22</sup> and the protection against collective expulsions in the context of expulsions would have been seriously problematic in a number of ways, not least as regards the rule of law. The essence of the prohibition against collective expulsions in international and regional human rights law is to prevent arbitrariness by states’ authorities in their migration and border policies, and to ensure fair trial guarantees – access to effective remedies – to individuals who are victims of forced returns without having received an individualised assessment or a minimum screening procedure. This individualised approach aims at securing access to essential protections such as legal representation, interpretation, appropriate medical and psychological treatment or care, best interests of the child assessments, etc.

The protection against collective expulsions places at its premise legal certainty, the prohibition of arbitrariness by state authorities and access to justice by every individual – not just those seeking asylum, as key components of the close intersection and cross-pollination between the concepts of the rule of law and human rights, having, as their core foundation, human dignity.<sup>23</sup> Effective complaint mechanisms (of both internal and external nature), which do not always correspond with a right of appeal, are also crucial in cases of disproportionate use of violence or mistreatment by States authorities in the scope of border surveillance operations such as those at the Ceuta and Melilla border fences.

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<sup>19</sup> Paragraph 104; a similar argument was put forward by the Strasbourg Court in *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014, paragraph 212.

<sup>20</sup> ECtHR Case *M.A. and Others v. Lithuania*, Application no. 59793/17, 11 December 2018.

<sup>21</sup> Judge de Albuquerque eloquently added that ‘the meaning of ‘collective expulsion’ includes *a fortiori* any form of removal at, around, along, or in connection with border barriers and, evidently, any form of removal from international zones or transit zones or areas otherwise ‘excised’ for immigration purposes under the respondent State jurisdiction.’

<sup>22</sup> Article 33.1 prohibits States to ‘expel or return (“*refouler*”) a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

<sup>23</sup> On the concept of ‘the rule of law’ in the European context refer to the European Commission for Democracy Through Law (Venice Commission) Report on the Rule of Law, Study No. 512 / 2009, Strasbourg, 4 April 2011, which states that ‘53. Everyone should be able to challenge governmental actions and decisions adverse to their rights or interests’.

Whether or not individuals are refugees cannot be regarded as the connecting factor unlocking Article 4 Protocol 4 protection. There are other equally sound reasons why any person must not be automatically expelled by state authorities irrespective of international refugee law. These include other legitimate claims not defined by the more limited scope of asylum, where a prior individual assessment constitutes a *sine qua non* before the expulsion to the destination country. They may relate to situations falling within the scope of Article 3 ECHR, i.e. where expulsions would lead to serious risk of inhuman and/or degrading treatment, or serious acts of violence, which is reflected in other non-refugee related international human rights instruments.<sup>24</sup> Other situations where individual assessments are essential cover cases involving minors (see Section 5 of this Paper below) or human trafficking victims' even where there are no international protection claims involved.

The crucial role played by a thorough examination of the merits of all asylum applications by state authorities before expelling individuals to intermediary unsafe third countries was confirmed by the Grand Chamber in the previous ruling *Ilias and Ahmed v. Hungary* of November 2019.<sup>25</sup> Here the Court held that only by means of a legal procedure involving a detailed examination of the merits of asylum applications, even if later on these asylum claims prove to be unfounded, Article 3 ECHR could be meaningful.<sup>26</sup> The Grand Chamber added that an expulsion without such a procedural duty would dismantle the guarantees against the prohibition of ill-treatment under the Convention. It concluded that the Hungarian government had violated Article 3 ECHR by expelling the applicants to unsafe Serbia without sufficient guarantees about the practical accessibility and reliability of Serbian' asylum system.<sup>27</sup>

Therefore, the Grand Chamber was right in confirming that irrespective of whether individuals qualify as 'refugees' or as 'migrants', they are all entitled to individualised procedures under Article 4 Protocol 4 protections. This in turn debunks the argument that the ECtHR judgement 'legalises' Spanish push back policies in Ceuta and Melilla, or in any other European country engaging in similar malpractices, such as Croatia,<sup>28</sup> or more recently Greece.<sup>29</sup>

A key legal incoherency emerges however in ruling. The Court's subsequently argues that the ECHR does not prevent States from obliging individuals to apply these rule of law protections, including submitting asylum claims, only at existing 'border crossing points', and which they may refuse entry to their territory 'including potential asylum seekers, who have failed to comply with these arrangements'.<sup>30</sup>

The resulting scenario of this statement is one where the rule of law is blurred. The external reader is left to wonder how this argument stands compatible with the *erga omnes* and absolute nature - not accepting any derogation - of the *non-refoulement* principle. That principle applies *anywhere* states'

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<sup>24</sup> Refer to Article 7 UN International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee General Comment 31; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 3; or UN Convention on the Elimination of All Forms of Racial Discrimination, Art. 5.b.

<sup>25</sup> ECtHR Case of *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019.

<sup>26</sup> Paragraph 137.

<sup>27</sup> The Court held that "a post-factum finding that an asylum seeker did not run a risk in his or her country of origin, ..., cannot serveto absolve the State retrospectively of the procedural duty" to examine the merits of the asylum applications. Paragraphs 137 and 138 of the judgement.

<sup>28</sup> For other examples such as push backs from Croatia to Bosnia and Herzegovina see T. Strik (2020), Mechanisms to Prevent Pushbacks, in S. Carrera and M. Stefan (eds.), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights, pp. 234-258.

<sup>29</sup> UNHCR (2020), UNHCR statement on the situation at the Turkey-EU border, 2 March 2020. Reuters (2020), Greece blocks 35,000 migrants, plans to deport arrivals after March 1, 5 March 2020, available at <https://www.reuters.com/article/us-syria-security-greece/greece-plans-to-deport-migrants-who-arrived-after-march-1-idUSKBN20S0RJ>

<sup>30</sup> Paragraph 210 of the ruling.

exercise jurisdiction or control in the scope of ‘border management’ activities, irrespective of whether states artificially or legally frame a specific point of their land frontiers as a ‘border crossing point’ or not. The argument advanced by the Grand Chamber seems to leave irregular entries through areas not qualifying as ‘entry points’ outside the rule of law, which could be read as justifying arbitrariness by state authorities when conducting border surveillance activities across their wider range of frontiers.

This interpretation does not hold in light of the Grand Chamber conclusions on human rights territorial jurisdiction and border management policies by states. Indeed, the role that ‘law’ has in demarcating what is and what is not national territory was in fact one of the most important aspects behind this case. In its submissions before the Court, the Spanish government argued that the facts had occurred *outside* Spanish territorial jurisdiction. The 2017 ECtHR judgement had concluded that the alleged ECHR violations came within Spanish government jurisdiction because, in line with previous ECtHR case law,<sup>31</sup> it was not necessary to determine whether the border fence between Morocco and Spain was located inside the Spanish territory. The Third Chamber concluded that ‘from the point at which the applicants climbed down the border fences they were under the continuous and exclusive control, at least *de facto*, of the Spanish authorities’.<sup>32</sup>

The ECtHR Grand Chamber went a step further. It rejected the Spanish government’s argument of ‘exception of jurisdiction to part of its territory’ and concluded that ‘the existence of a fence located some distance from the border does not authorise a state to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border’. It added ‘The Convention cannot be selectively restricted to only parts of the territory of a state by means of an artificial reduction in the scope of its territorial jurisdiction’.<sup>33</sup> The Court’s finding that states parties cannot arbitrarily reframe their territory via legislative or administrative action as ‘non-territory’ and thus fabricate legal exclusions to escape human rights jurisdiction is certainly a welcomed one. However, it is uncertain why the Grand Chamber did not consider that a similar instrumental usage of the law by states can take place at times of framing what constitutes or not a ‘border crossing point’, as we now examine.

## 2. An Ultra-Statist Approach? Border Control Points and Legal Pathways

An additional incongruence characterizing the 2020 Grand Chamber ruling relates to the relationship between its general proclamation of states’ sovereign claim ‘to control the entry, residence and removal of aliens, and establish their immigration policies’, and the accompanying Courts’ demand for CoE states to establish *effective* legal pathways of entry.

On the one hand, the Grand Chamber unanimously celebrates and openly promotes what it qualifies as a ‘sovereign right’ to manage migrations and the importance of ‘managing and protecting borders’ by states.<sup>34</sup> On the other, the Court advances a view that takes us directly to the heart of states’ competences to regulate entry by foreigners. The Court requires from states party to make ‘available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border’, including to submit an asylum application.<sup>35</sup> It also demands that CoE states guarantee ‘a sufficient number of such crossing points’, because, otherwise – the Grand Chamber argues – it would render the ECHR ineffective.

Therefore, the new ‘legal pathways’ requirement nuances the view that the Grand Chamber judgment represents an ultra-statist approach of the application of the ECHR to migration-related cases. It is moreover legally uncertain how CoE states will from now onwards duly ensure ‘genuine and effective

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<sup>31</sup> In particular, ECtHR *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 2012.

<sup>32</sup> Paragraph 54 of the 2017 ruling.

<sup>33</sup> Paragraphs 109 and 110.

<sup>34</sup> Paragraph 167.

<sup>35</sup> Paragraph 209.

access' to legal entry mechanisms, and the extent to which the Court will be in a position to assess this requirement in a timely and accurate manner (See Section 4, below). It is unclear what a 'sufficient number' of crossing points actually may be in practice. As advanced above, this new criterion may trigger some states holding the external EU land and sea borders to strategically limit the number of 'border crossing points' to a minimum that is deemed sufficient so as to limit the scope of application of Article 4 Protocol 4 ECHR obligations.

Crucially, the ECtHR misses the point that states border management polices go beyond mere border control checks in specific and territorially well-defined 'border crossing points'. They also include border surveillance activities. This is expressly acknowledged in the scope of EU border law and the Schengen Borders Code (SBC) applicable to border management across EU external borders.<sup>36</sup> According to Article 14 SBC, a third country national who does not comply with the conditions of entry shall be refused entry into the Schengen territory 'without prejudice to the application of special provisions concerning the right of asylum and to international protection'. The same provision requires Schengen member countries to guarantee all individuals being refused entry to receive a substantiated decision stating the precise reasons for the refusal and a right to appeal.

While it is true that Article 5 SCB requires borders to be crossed at 'border crossing point's, when applying the SBC, Article 4 clearly stipulates that both border control *and* border surveillance activities are subject to human rights and the EU Charter of Fundamental Rights, including at land and sea borders. The applicability of human rights jurisdiction beyond 'border crossing points' was confirmed when examining the legality of interceptions of asylum seekers and migrants in international waters and pushbacks to Libya by Italian authorities in the European Court of Human Rights (ECtHR) ruling *Hirsi Jamaa and Others v. Italy* of February 2012.<sup>37</sup> One also wonders how the notion of border crossing point applies to frontiers at sea.

In light of the above, the judgement fails to consider that contemporary *bordering* policies and practices by states may be found *anywhere*, irrespective of where the actual territorial border and dedicated 'crossing points' may actually supposed to be. There is nothing consistent or existentially inherent to the very existence of a 'crossing point' in any given map. The literature has showed how 'borders' are not so much about specific physical places or clearly demarcated territorial lines or points. Bordering practices are increasingly aimed at re-territorialising, delocalising, externalising or outsourcing the management and surveillance of mobile individuals profiled as risky or qualified as undesirable.<sup>38</sup> One of the most decisive challenges pertaining to these changing borders is the right of individuals to know where these borders are and have access to effective remedies when their human rights are at stake.<sup>39</sup>

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<sup>36</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1-52. According to Article 2.12 of the Schengen Borders Code 'border surveillance' means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks.'

<sup>37</sup> See footnote 13 above.

<sup>38</sup> S. Carrera and M. Stefan (2020), Introduction: Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies, in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights, pp. 1-21. T. Basaran (2011), *Security, Law and Borders: At the Limits of Liberty*, Routledge Studies in Liberty and Security, London: Routledge.

<sup>39</sup> E. Guild (2001), *Moving the Borders of Europe*, Inaugural Lecture, Radboud University of Nijmegen, Faculty of Law, Issue 14, The Netherlands. On the role of visa policies as 'policing at a distance' see D. Bigo and E. Guild (2005), *Controlling Frontiers: Free Movement into and within Europe*, Aldershot: Ashgate. On extraterritorial bordering policies and the notion of 'remote control' refer to V. Guiraudon, V. (2002), *Before the EU Border: Remote Control of the 'Huddled Masses'*, in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders*, Kluwer International Law, pp. 191-214.

Therefore, the *de jure* or *de facto* (direct and indirect) control criterion previously used by the Strasbourg Court continues to be of utmost relevance at times of unlocking ECHR jurisdiction and recapture states' human rights violations. In addition, as we have argued elsewhere, the EU legal system provides a parallel or extra-layer of fundamental rights protection. Whenever EU Member States expulsion policies fall within the scope of EU law, they are subject to portable responsibility and portable justice under the EU Charter of Fundamental Rights.<sup>40</sup> These two concepts present potentials to recapturing states' responsibilities regardless of *where or what* border management practices and technologies are.

The application of the EU Charter of Fundamental Rights under the SBC applies beyond border checks in border crossing points and extends to any border surveillance action or inaction.<sup>41</sup> This was for instance confirmed by the European Commission submission to the ECtHR in the *Hirsi Jamaa* case. The Commission concluded that 'border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone, the exclusive economic zone or on the high seas, fall within the scope of application of the Schengen Borders Code (SBC)', and the EU notion of border surveillance laid down in Article 12 of the SBC.<sup>42</sup> Therefore, and contrary to the views put forward by other EU governments intervening as third parties in the *N.D. and N.T.* case,<sup>43</sup> it would be illogical and hard to imagine why *any* border surveillance activities would not benefit from the same protection framework.

### 3. Individuals Own Conduct: Are You Worth of Human Rights?

One of the most relevant weaknesses of the Grand Chamber ruling relates to the way in which it has not placed at the centre of judicial scrutiny the extent to which the state party has observed or violated their engagements under the ECHR and its Protocols, including the disproportionate use of force and violence by Spanish authorities against the applicant. Instead, the judges decided to focus on whether the individual's conduct is one *deserving* ECHR protection. The Strasbourg Court's point of departure is not whether Spanish authorities had violated human rights, including the human dignity of the applicants, but rather the extent to which the lack of individual expulsion decision was in fact attributable to the *applicants' own conduct*. The main challenge with such an approach is that it adopts a point of departure running against the ECHR person-centric mandate to primarily safeguard individuals' human rights in their interactions with states.

The applicants' own conduct – as subjectively interpreted by the judges – has been used as the decisive 'connecting factor' unlocking ECHR and Article 4 Protocol 4 protection. The ECtHR view dispenses from an individualised procedure and a decision on expulsion if the lack of such a tool 'can be attributed to the applicants' own conduct'.<sup>44</sup> Why would an applicant's own conduct determine in

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<sup>40</sup> S. Carrera et al. (2018), *Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US*, Open Society European Policy Institute, Brussels, page 72; S. Carrera and M. Stefan (2020), Introduction: Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies, in S. Carrera and M. Stefan (eds.), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights, pp. 1-21.

<sup>41</sup> S. Carrera and R. Cortinovis (2019), *Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?*, CEPS Liberty and Security in Europe Series, Brussels.

<sup>42</sup> Paragraph 34 of the *Hirsi* judgment, referring to a letter of 15 July 2009 from Mr Jacques Barrot, Vice-President of the European Commission. The letter also stated that the obligation to respect the non-refoulement principle 'must be fulfilled when carrying out any border control in accordance with the SBC, including border surveillance activities on the high seas'.

<sup>43</sup> See for instance the argument put forward by the Belgian government in paragraph 145 of the judgement, according to which 'allowing persons who circumvented the rules on crossing borders to enter the territory, when they did not report to an authorized crossing point and did not have the necessary documents to enter and remain in the country, would be wholly contrary to the European rules on border controls and the crossing of the borders, depriving those rules of any purpose and encouraging human trafficking'.

<sup>44</sup> Paragraph 200 of the ruling.



any way or form the extent to which a State has violated human rights? The answer to that question becomes most pertinent when looking at the previous ECtHR judgments where the ‘own conduct doctrine’ was applied. Indeed, in *N.D. and N.T.*, the Grand Chamber loosely quotes back the previously mentioned *Hirsi* judgment against Italy where it was held that there would not be a violation of Article 4 Protocol 4 ‘if the lack of an expulsion decision made on an individual basis is the consequence of the person’s own culpable conduct’.<sup>45</sup> Here the Court used as a justification of this doctrine a quote from two previous ECtHR rulings that actually dealt with completely different human rights, some of which are of a non-absolute nature such as family life.<sup>46</sup>

As explained in Section 1 above, there are legitimate reasons why any person must not be automatically and arbitrarily expelled by state authorities based on non-derogable or absolute rights, such as violations of Article 3 ECHR and human dignity in cases of disproportionate use of violence by border or security authorities. Therefore, the automatic application of the own conduct doctrine to human rights which are absolute in nature and accept no derogation is manifestly unfounded and legally misleading, and should be abandoned by the Court.

The Grand Chamber did not either enter into assessing the proportionality of the very use of border fences by the Spanish authorities,<sup>47</sup> which function as a magnifying glass of human rights violations. The academic literature has underlined how border fencing practices unlock well-documented cases of physical violence and mistreatment to individuals by public or private officials in the name of migration management (See Section 4 below), or accentuate cases of discrimination and marginalisation over certain communities based on grounds such as national and ethnic origins.<sup>48</sup>

Shifting the focus towards the individual constitutes a clear example of another ‘statist move’ by the Court. The influences by the Spanish and other governments are evident across the ruling.<sup>49</sup> While the Grand Chamber reminded the Spanish government that even in times of emergency or ‘crisis’,

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<sup>45</sup> Paragraph 184 in *Hirsi* the Court stated that ‘the Court has ruled that there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the [applicants’] own culpable conduct’.

<sup>46</sup> See specifically ECtHR *Berisha and Haljiti* Application No. 948/12, 20.1.2014. Neither it is comparable to the situation in *Dritsas v. Italy* (dec, no. 2344/02, 1 February 2011), where eight hundred Greek nationals belonging to the Greek anti-G8 protest committee were sent back to Greece by Italian authorities - there was no Article 3 ECHR issue involved.

<sup>47</sup> Sorel, J. M. (2014), *Is the Wall Soluble into International Law?*, in E. Vallet (ed), *Borders, Fences and Walls: State of Insecurity?*, Routledge: London, pp. 131-141.

<sup>48</sup> A. C. Diener and J. Hagen (eds.) (2010), *Borderlines and Borderlands – Political Oddities at the Edge of the Nation-State*, Lanham: Rowman and Littlefield; S. Carrera and M. Stefan (eds) (2020), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights.

<sup>49</sup> Riemer (2019) makes reference to pressures that the Court has been exposed by governments on migration-related cases and the failing states’ attempt to limit the ECtHR jurisdiction over migration and asylum topics in the so-called ‘Draft Copenhagen Declaration’ which was discussed at the High Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe. The Draft Declaration included a provision, which was deleted in its final form, saying that ‘26. When examining cases related to asylum and immigration, the Court should assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, avoid intervening except in the most exceptional circumstances.’

governments must uphold their ECHR obligations,<sup>50</sup> the influence of the Spanish government position are reflected in several passages of the Court's own argumentation.<sup>51</sup>

Several paragraphs of the ruling made use of an uncomfortable language referring to the applicants 'deliberately take advantage of their large numbers and use force...to create a clearly disruptive situation which is difficult to control and endangers public safety'.<sup>52</sup> The Concurrent Opinion by Judge Pejchal is particularly worrying, putting forward the argument that only citizens from Europe would be entitled to ECHR protection as in his view they are the only taxpayers, and that the Court should not waste its time covering issues raised by citizens from African states. This sits very uneasily with, and runs counter to, the absolute prohibition of discrimination based on race and national and ethnic origin in international and regional human rights instruments.<sup>53</sup>

The approach adopted by the Court in this ruling is incompatible to the ECtHR mandate envisaged in Article 19 of the ECHR, which requires it to primarily and solely assess the extent to which the 'High Contracting Parties' observe their engagements under the ECHR and its Protocols, so that all States parties secure everyone's human rights within their jurisdiction (Article 1 ECHR). It opens questions regarding the impartiality and independence of the judges composing the Grand Chamber in this judgement, which is contrary to the Rules of the Court.<sup>54</sup>

#### 4. Getting Facts Right

The judge-made choice in this case to assess the applicants' own conduct<sup>55</sup> led the Court to enter into a rocky territory, subjectively waiving the individual's merits and evidence presented before it in a way that risked being, and actually was, factually wrong. It also revealed the Court's lack of understanding of the inherent challenge that hot returns pose to access to justice by victims of disproportionate use of violence or force.

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<sup>50</sup> The ECtHR states in paragraph 170 that '...the Court has also stressed that the problems which States may encounter in managing migration flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocol thereto'. Refer also to ECtHR *M.S.S. v Belgium and Greece*, paragraph 223; *Hirsi Jamaa*, paragraphs 122 and 176; and *Khlaifa*, paragraph 241. Moreover, the Court dismissed the troubling argument by the Spanish government according to which the applicants' entry justified the state right to 'collective self-defence' which applies in cases of an armed attack. In paragraph 166 of the ruling the Grand Chamber stated that 'Spain has not indicated that it has referred the matter to the Security Council of the United Nations, as anticipated in Article 51 of the UN Charter'.

<sup>51</sup> The Spanish government used expressions such as the applicants taking part on 'illegal storming of the border fences' and 'the proliferation of networks of smugglers organising repeated, large-scale and violent assaults on the fences', paragraph 128. It argued that 'a decision by the Court legitimatising such illegal conduct would create an undesirable "calling effect" and would result in an migration crisis with devastating consequences for human rights protection', paragraph 129.

<sup>52</sup> Paragraph 201.

<sup>53</sup> He argues that 'The European Court of Human Rights should not inquire into the alleged consequences (in this case the climbing of the fence) of an allegedly inhuman situation (the alleged conditions in the home countries of both applicants) in a situation where another international human rights court clearly has jurisdiction'. Additionally, this argument misses the point that it was the compatibility of Spanish authorities actions what was actually at stake. Moreover, the ECtHR jurisdiction *ratione persona* is not limited to European nationals as it would be a clear case of prohibited discrimination of people having African origin. This Concurrent Opinion provides in my view written evidence of the lack of impartiality of this judge and the applicability of Rule 28.2.d and e (Inability to sit, withdrawal or exception) of this judge in any upcoming cases related to migration and asylum. Refer to European Court of Human Rights, Rules of the Court, Registry of the Court, 1 January 2020.

<sup>54</sup> In particular Rule 3 (Oath or solemn declaration) and Rule 28 (Inability to sit, withdrawal or exemption). Refer to European Court of Human Rights, Rules of the Court, Registry of the Court, 1 January 2020, available at [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

<sup>55</sup> It also contradicts paragraph 174 of Hirsi judgement where the Court stated that 'irrespective of his or her conduct when crossing the border'.

Several passages of the judgement show how the Grand Chamber has consciously disregarded, and even discredited, the testimonies by the victims as well as the wealth of evidence, research and views provided by relevant Council of Europe (CoE) monitoring actors, United Nations human rights human rights bodies and civil society actors. This is a diametrically opposed position to the one upheld by the previous ECtHR Third Chamber in its previous 2017 ruling, where the Court attached ‘particular weight to the applicants’ version because it is corroborated by a large number of witness statements’.<sup>56</sup>

The United Nations High Commissioner for Refugees (UNHCR), the Office of the High Commissioner of Human Rights (OHCHR), the CoE Commissioner for Human Rights and a group of civil society actors, as ‘third party interveners’ in the case, provided a wealth of witness statements and evidence showing three main findings: First, the lack of available legal mechanisms for Sub-Saharan African nationals to enter regularly into Spanish territory; second, the disproportionate degree of force and violence used by Spanish authorities in the border fences; and third, the unsafety and racialized violence suffered by those expelled to Morocco.

The Grand Chamber failed to give weight and assess the evidence-based allegations of use of violence and mistreatment of the applicants by the Spanish authorities. In April 2016 a court in the Spanish province of Málaga (Andalucía) decided to archive and close a case against eight representatives of the Spanish Guardia Civil accused by several NGOs of having used a disproportionate degree of violence against an individual attempting to cross the Melilla border fence in October 2014. The authorities were realised without charges.<sup>57</sup> The main legal reason advanced by this Spanish provincial Court was that it had no direct access to the applicant due to his automatic expulsion to Morocco. The Strasbourg Court Grand Chamber not only disregarded this reality. It also failed to address the *by-design denial of justice* and lack of complaint mechanisms to victims of state violence that are inherent to border fencing practices.

Instead, the judges first assessed the extent to which the Spanish government provided ‘genuine and effective access to means of legal entry’. The Court declared that ‘Spanish law afforded the applicants several possible means of seeking admission to the national territory, either by applying for a visa, or by applying for international protection, in particular at the Beni Enzar border crossing point, but also at Spain’s diplomatic and consular representations in their countries of origin or transit, or else in Morocco’.<sup>58</sup>

No serious consideration was given to the qualitative information showing the practical impossibility in accessing all these legal entry tools and points. The Grand Chamber held that it was ‘not persuaded that these additional legal avenues existing at the time of the events were not genuinely and effectively accessible to the applicants...the Spanish consulate in Nador is only 13.5 km from Beni Enzar and from the location of the fences’.<sup>59</sup> The judges were of the opinion that the applicants ‘could have travelled there...’ without any particular problem. Similarly, they expressed the view that they could have applied for a working visa in their country of origin.<sup>60</sup> Therefore, the Grand Chamber reached the conclusion that the applicants had not demonstrated that they had been unable to enter Spanish territory legally, and that ‘they had never tried to enter Spanish territory by legal means’.<sup>61</sup>

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<sup>56</sup> Refer to paragraph 119 of the Third Chamber judgement.

<sup>57</sup> See El Diario (2016), *Carpetazo definitivo al caso contra los guardias civiles que apalearon a un migrante en Melilla*, 3 May 2016, available at [https://www.eldiario.es/desalambre/Carpetazo-definitivo-investigacion-Guardia-Civil\\_0\\_511999486.html](https://www.eldiario.es/desalambre/Carpetazo-definitivo-investigacion-Guardia-Civil_0_511999486.html) Refer also to El Diario (2014), *VÍDEOS | La Guardia Civil deja inconsciente a palos a un inmigrante y lo devuelve atado de pies y manos*, 16 October 2014, available at [https://www.eldiario.es/desalambre/VIDEOS-Guardia-Civil-ilegalmente-inmigrante\\_0\\_314268729.html](https://www.eldiario.es/desalambre/VIDEOS-Guardia-Civil-ilegalmente-inmigrante_0_314268729.html)

<sup>58</sup> Paragraphs 212 and 214.

<sup>59</sup> Paragraph 227.

<sup>60</sup> Paragraph 228.

<sup>61</sup> Paragraphs 165 and 220. Refer to paragraph 220.

That conclusion is surprising even from a pure quantitative viewpoint. Annex 1 of this paper shows a clear trend characterized by a very low number of asylum applications Melilla. This was even so despite the opening of new ‘asylum offices’ in the crossing border point at Beni-Enzar in September 2014. From a total of 33 applications in 2012 and 41 in 2013, asylum applications experienced a slow increase in 2014 to 543, with the most visible increase taking place in 2015, with a total of 6,335 applications, mainly due to the increase of applications of nationals from Syria. Since then, the number of applications decreased almost by half during 2016 and 2017, reaching a total of 3,400 in 2018. The total number of applications continues to be low. For the purposes of this paper, as illustrated in Annex 1, it is worth highlighting that the asylum applications from nationals of Ivory Coast moved from 1 in 2012 to about 30 in 2018, and for nationals of Mali from 0 in 2012 to about 140 in 2018.

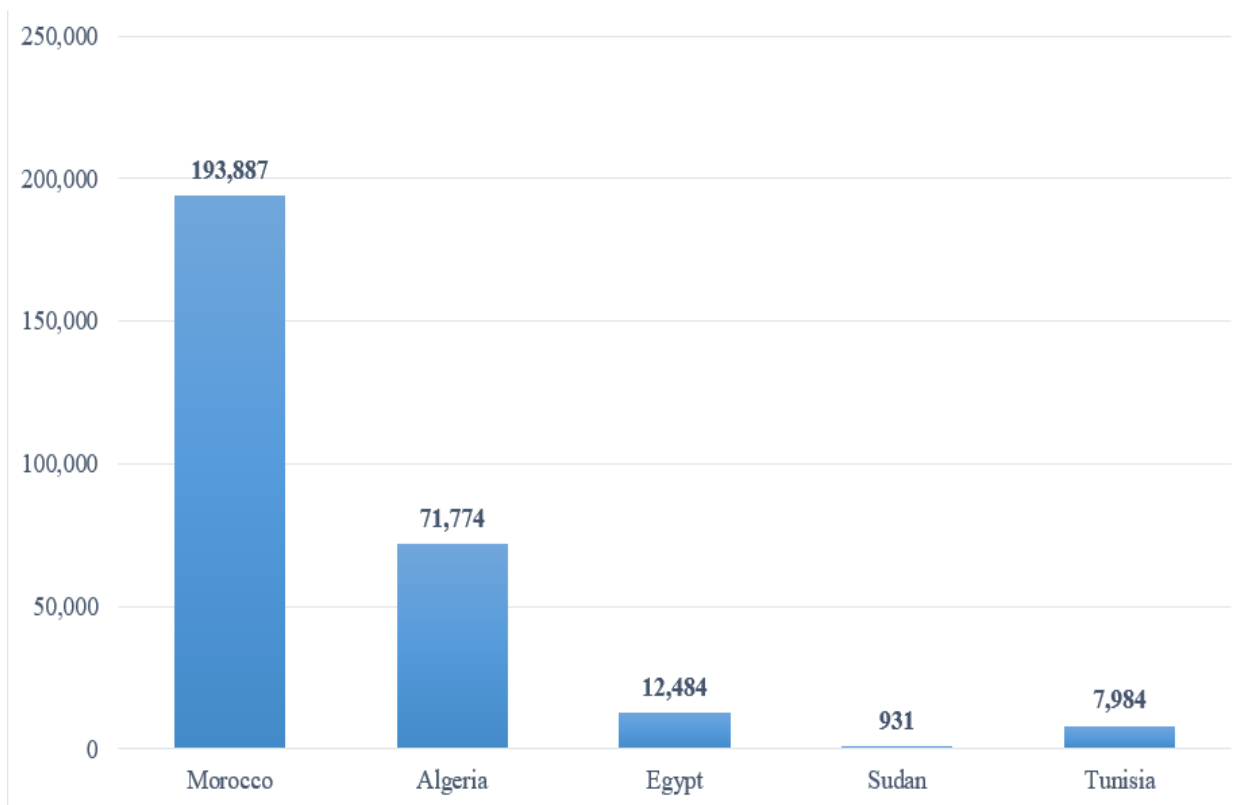
The statistical data provided by the applicants and UNHCR corroborated the extremely low number of nationals from Sub-Saharan African countries who had successfully entered into Melilla and applied for asylum. The oral intervention of UNHCR representative during the public hearing of 16 September 2018 in Strasbourg<sup>62</sup> informed the judges that ‘approximately 35 asylum-seekers from Sub-Saharan African countries were registered during the same period and only because they had managed to enter the enclave, not through the Beni-Enzar border, but by other means. UNHCR observes further that to date, not a single person of any nationality has been able to claim asylum at El Tarajal, the main border crossing between Ceuta and Morocco.’

The argument by the Grand Chamber according to which the applicants could have legally entered Spanish territory and applied for asylum is in stark contradiction with the above data. A similar finding relates to the Court’s view that the applicants could have applied for working visas. This is illusory and does not stand up in light of the realities showed by the statistics provided in Graphs 1, 2 and 3 below. The Spanish authorities abroad have given a visible preference to visa applications of nationals from North African countries when it comes to the issuing of visas, mainly individuals from Morocco, Algeria, Egypt, Sudan and Tunisia. Some of these same nationalities correspond with those having submitted a higher number of asylum applications in Melilla, including Moroccan nationals (See Annex 1 of this Paper).

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<sup>62</sup> UNHCR’s oral intervention before the European Court of Human Rights Grand Chamber hearing in the case of N.D. and N.T. v. Spain (Application Nos. 8675/15 and 8697/15) Strasbourg, 26 September 2018, available at <https://www.refworld.org/pdfid/5bb3873b4.pdf>

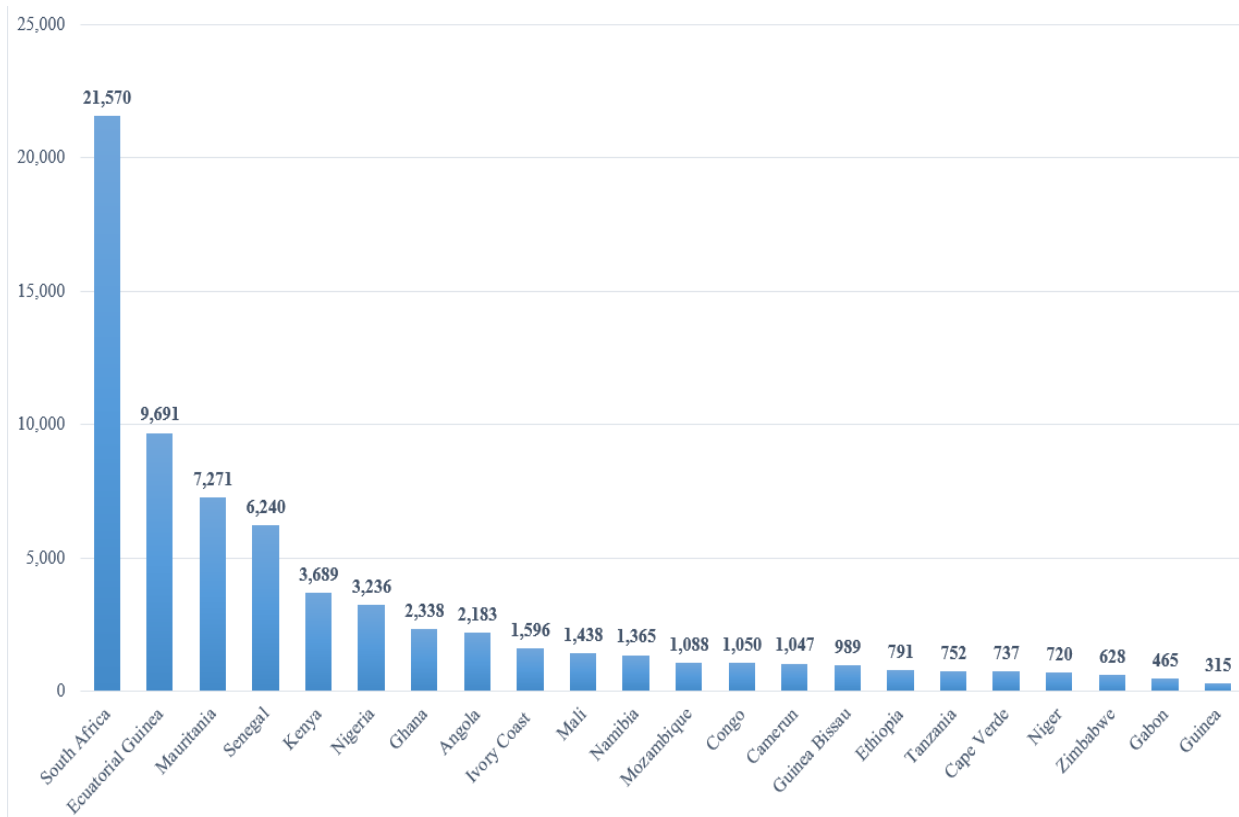
**Graph 1: Total Number of Visas Issued by Spanish Consulates in North African Countries 2018**



*Source:* Own Author's elaboration based on 2018 statistical data provided by the Spanish Ministry of Labour, Social Security and Migration, <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/visados/index.html>

In contrast, as Graph 2 below demonstrates, the total number of visas for nationals of countries in 'Sub-Saharan Africa' is much lower, and in some cases, such as Mali, the number of visas issues are strikingly miniscule. Such a low record has remained constant from 2014 to 2018. In the case of Mali from 877 in 2014 to about 1,400 in 2018. In addition, for Ivory Coast from about 1,200 visas in 2014 to about 1,600 in 2018.

**Graph 2: Total Number of Visas Issued Spanish Consulate in Sub Saharan African Countries 2018**



*Source:* Own Author's elaboration based on 2018 statistical data provided by the Spanish Ministry of Labour, Social Security and Migration, <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/visados/index.html>

When it comes to visas for reasons of employment issued by Spanish consulates abroad in African countries, Graph 3 shows the extraordinarily low number of visas issued for employment purposes. For the two African countries of relevance in the Grand Chamber judgement, nationals from Mali and Ivory Coast were issued 0 short-term visas by the Spanish authorities. As regards long-term visas for reasons of residence and work, the Spanish authorities issued 25 to Malian nationals, and 15 to nationals from Ivory Coast.<sup>63</sup> The Grand Chamber argument that the applicants could have applied for working visas in their countries of origin misses this overwhelming practical reality.

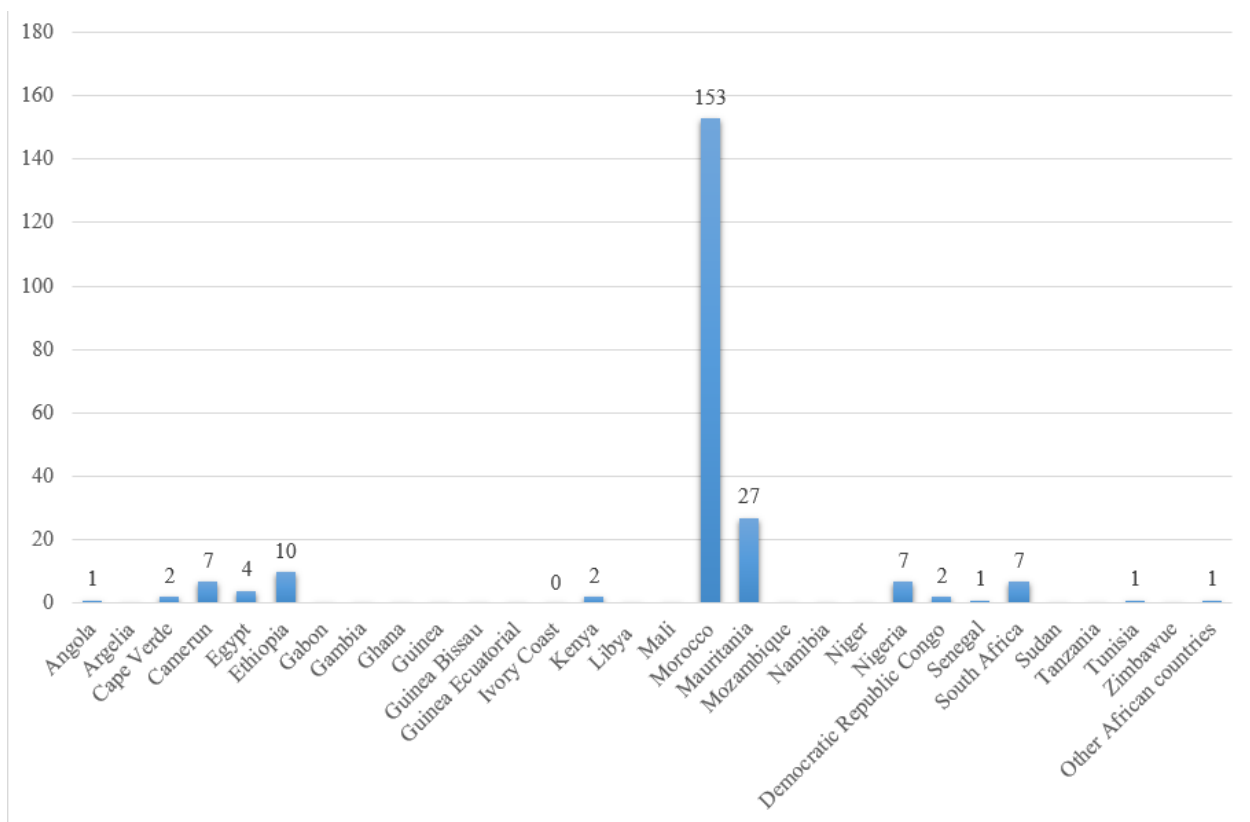
<sup>63</sup> According to the same Spanish Ministry statistics, the low number of visas for employment purposes reflected a longer-term trend: 2017 (Ivory Coast: 1 short-term visa for employment, and 8 long-term visas for residence and employment / Mali: 0 short-term visas for employment, and 14 long-term); 2016 (Ivory Coast: 0 short-term visa for employment, and 13 long-term visas for residence and employment / Mali: 3 and 11 respectively); 2015 (Ivory Coast: 1 & 10; Mali: 0 & 4). See <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/visados/index.html>

**Table 1: Number of Visas Issued Spanish Consulate in Mali and Ivory Coast 2014-2018**

	2014	2015	2016	2017	2018
<b>Mali</b>	877	692	1,027	1,303	1,438
<b>Ivory Coast</b>	1,233	1,286	1,675	1,660	1,596

Source: Own Author’s elaboration based on statistical data provided by Spanish Ministry of Labour, Social Security and Migration, <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/visados/index.html>

**Graph 3: Total Number of Short-Term Visas for Employment Issued by Spanish Consulates in Africa during 2018**



Source: Own Author’s elaboration based on 2018 statistical data provided by Spanish Ministry of Labour, Social Security and Migration

Notwithstanding the above, the evidence provided by the applicants and third party witnesses showing that Spanish policies were, and still are, *de facto non-genuine and ineffective* when it comes to legal channels of entry, the Grand Chamber judges expressed that the information remained ‘not conclusive as to the reasons and factual circumstances underlying these allegations’.<sup>64</sup>

The Court also emphasised a key difference between the present case and the ones covered by its previous case-law. In view of the Grand Chamber, in its previous jurisprudence the applicants were

<sup>64</sup> Paragraph 218.

‘genuine asylum seekers’ whose return would have clearly exposed them to a real risk of ill-treatment in the country of destination or chain *refoulement* to their countries of origin.<sup>65</sup> Indeed, the Court’s undertone – despite the third party interveners evidence proving that Morocco’s asylum system remains inaccessible and unreliable<sup>66</sup> – was that the applicants did not sufficiently prove that they would be subject to unsafety, institutional racism and ill-treatment when and if returned to Morocco. This argument came along the Grand Chamber even questioning the soundness of the subsequent application for asylum by one of the applicants in the *N.D. and N.T.* case.<sup>67</sup> This is inconsistent with the fact that in many cases applicants of international protection may apply for asylum only subsequently.

The non-submission of an asylum application or the existence of subsequent application do not necessarily entail that individuals’ claims for international protection are to be considered illegitimate or suspect of being unfounded. The Court demonstrated a lack of understanding about the factual reasons why individuals may decide not to apply for asylum in Melilla. The written submissions of UNHCR in this case,<sup>68</sup> underlined how asylum seekers in Melilla experienced severe restrictions to their freedom of movement to enter Spanish mainland territory, and therefore could not leave the region without authorisation. In addition to UNHCR, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Spanish Ombudsman’s Office had expressed concerns about this *de facto* containment policy, which plays a key role in deterring asylum seekers to apply for international protection in Melilla.<sup>69</sup> Other reasons included the requirement for asylum applicants to stay in heavily overcrowded reception centres, and the very long delays in asylum procedures.

In addition, the Court did not consider the structural violence that these border fences inherently carry. This is particularly so in a long-standing historical context of territorial disputes between the Spanish and Moroccan authorities regarding sovereignty claims over Ceuta and Melilla. The Moroccan authorities’ position has been consistent in referring to these as ‘occupied territories’ by Spain.<sup>70</sup> The Court’s Grand Chamber approach to pass the buck of responsibility towards the applicants over the structural and geopolitical violence featuring border fencing practices in these two regions in such a historically embedded context is disingenuous and unjust.<sup>71</sup>

The situation in both Ceuta and Melilla in relation to containment, i.e. forced rejections of entry at border crossing points, would have merited closer scrutiny. Eurostat statistics on ‘*Enforcement of Immigration Legislation*’ published on June 2019 bring to light the disproportionately high number of

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<sup>65</sup> Paragraph 196, quoting *Hirsi Jamaa and Others* and *Sharifi and Others*. See also *Ilias and Ahmed v. Hungary*, no. 47287/15, 21 November 2019.

<sup>66</sup> S. Carrera, J.-P. Cassarino, N. El Qadim, M Lahlou and L. den Hertog (2016), *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?*, CEPS Liberty and Security in Europe Series, No. 87, Brussels.

<sup>67</sup> The Court stated that ‘Quite apart from the doubts as to the credibility of this allegation arising from the fact that it was made at a very late stage of the procedure...’.

<sup>68</sup> UN Refugee Agency (UNHCR), Submission by the Office of the United Nations High Commissioner for Refugees in the cases of *N.D. and N.T. v. Spain* (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, paragraph 2.3.2, page 5.

<sup>69</sup> Refer to Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Addendum: Visit to Spain, 6 June 2013, pages 11-13 and 19, <http://www.refworld.org/docid/51b5c49d4.html>; Summary of the 2013 Ombudsman’s Annual Report, pages 220 to 222, [https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013\\_Informe\\_Anuual\\_Vol\\_I\\_Informe\\_2013.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013_Informe_Anuual_Vol_I_Informe_2013.pdf)

<sup>70</sup> El País (2020), *Marruecos ahoga el paso de los porteadores por Ceuta y apunta ahora hacia Melilla: Las medidas de Rabat animan en los medios marroquíes la reivindicación soberanista sobre las dos ciudades autónomas*, 2 March 2020, retrievable from <https://elpais.com/espana/2020-03-01/marruecos-ahoga-el-porteo-en-ceuta-y-apunta-ahora-hacia-melilla.html> As recently as October 2019 the Moroccan authorities closed the border crossing point of Tarajal II.

<sup>71</sup> I. Gonzalez García (2017), *Rechazo en las Fronteras Exteriores Europeas con Marruecos: Inmigración y Derechos Humanos en las Vallas de Ceuta y Melilla 2005-2017*, *Revista General de Derecho Europeo* 43, pp. 17-57.



refusals of entry into the EU by Spanish authorities in comparison to the rest of EU Member States.<sup>72</sup> In 2017 alone, ‘some 439,505 non-EU citizens were refused entry into the EU at one of its external borders. Nearly half of the total number of refusals were recorded in Spain (203,025), with the next highest numbers in France (86,320) and Poland (38,660)’.

Moreover, while the share of Spanish refusals in the total number of refusals in the EU decreased from 80.3 per cent in 2008 (excluding Croatia) to 46.2 per cent in 2017’, from a comparative perspective, the numbers are still disproportionately high.<sup>73</sup> These Eurostat statistics tell us little however about who those people actually were,<sup>74</sup> or the extent to which any asylum applications were duly considered. There should be a closer assessment about the exact substantive reasons behind these refusals, and the extent to which some Moroccan nationals (e.g. Western Sahara), and certain nationals (e.g. individuals from Sub-Saharan African countries) may have been more affected or targeted than other individuals.<sup>75</sup>

## 5. Inequivalent and Competing Human Rights Standards

The 2020 *N.D. and N.T. v Spain* judgement illustrates an example of *inequivalent* level of human rights demanding the Spanish government to apply lower protection standards in contradiction to those required by United Nations human rights bodies and EU law.<sup>76</sup> The resulting picture is one characterized by inconsistency and competing demands for States parties.

The findings of the Strasbourg Court in this ruling stand in contradiction with other CoE and UN human rights monitoring bodies’ standards, findings and follow up procedures. The CoE Parliamentary Assembly (PACE) issued a Recommendation on ‘Pushback policies and practice in Council of Europe member States’ 2161 (2019)<sup>77</sup> urging member states’ governments ‘to provide adequate protection to asylum seekers, refugees and migrants arriving at their borders, and thus to refrain from any pushbacks, to allow for independent monitoring, and to fully investigate all allegations of pushbacks.’ The Assembly recommended the Committee of Ministers to ‘exhort the governments of all member States to reject and prevent any form of pushback policy and action’.

In its reply to this PACE Recommendation on 25 February 2020, the Committee of Ministers underlined its agreement with PACE that ‘pushback practices raise serious issues regarding respect for the human rights of asylum seekers and refugees’. It added that the protections under the ECHR extend ‘to all persons placed under the jurisdiction of a State Party’, including Article 4 Protocol 4 which prohibits collective expulsions.

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<sup>72</sup> Eurostat, Statistics Explained, Enforcement of Immigration Legislation Statistics, data extracted in June 2019. Available at <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/37449.pdf>

<sup>73</sup> According to Eurostat, in 2017, the total number of refusals made in Spain was considerably lower (at 203 025) than in 2008 (when there had been 510 010 refusals).

<sup>74</sup> Eurostat brief does include a sentence saying that ‘Note that the overwhelming share of non-EU citizens who were refused entry into Spain were Moroccan citizens who tried to enter one of the two Spanish territories on the African continent, namely, Ceuta and Melilla.’

<sup>75</sup> In light of the absence of official statistics, Spanish investigative journalism sources reported in 2013 that Spanish authorities had engaged in illegal push backs in Melilla during the last 12 years. The source made reference to an estimate of about 5,000 individuals during this time-frame, with an estimate of +/- 400 individuals expelled every year. See *El Diario* (2013), *España lleva 12 años expulsando ilegalmente inmigrantes en Melilla*, 19 November 2013; Available at [https://www.eldiario.es/desalambre/inmigrantes-expulsados-ilegalmente-Melilla-ultimos\\_0\\_198430239.html](https://www.eldiario.es/desalambre/inmigrantes-expulsados-ilegalmente-Melilla-ultimos_0_198430239.html)

<sup>76</sup> On ‘human rights pluralism’ refer to C. Costello (2015), *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, pp. 42-47.

<sup>77</sup> Refer to PACE Recommendation (2019), *Pushback policies and practice in Council of Europe member States*, Recommendation 2161 (2019)1, Assembly debate on 28 June 2019 (27th Sitting). This was based on PACE Report, *Pushback policies and practice in Council of Europe member States*, Doc. 14909, Rapporteur: Tineke Strik, 8 June 2019.

The Committee referred to the work by the CoE Commissioner of Human Rights, who acted as third party intervener in the *N.D. and N.T.* case. The Commissioner of Human Rights had underlined during the ECtHR proceedings that ‘collective expulsions made it impossible to protect migrants’ fundamental rights...and that in practice immediate returns deprived migrants of their right to an effective remedy by which to challenge their expulsion’.<sup>78</sup> The Committee of Ministers reply to PACE made reference to the contribution by the CoE Special Representative of the Secretary General on migration and refugees, who on the basis of a country visit had recommended the Spanish authorities to ensure ‘the screening and identification of persons in need of international protection and their access to fair and efficient asylum procedures with a view to ensuring that every foreigner is able to submit an asylum application in Melilla and Ceuta’.<sup>79</sup>

The results and recommendations of the UN Universal Periodic Review (UPR) on Spain are equally revelatory.<sup>80</sup> The latest compilation file on Spain by the Office of the United Nations High Commissioner for Human Rights (OHCHR)<sup>81</sup> to the UN Working Group on the UPR of November 2019 contains a summary of all the concerns expressed by UN Treaty bodies and special procedures on the Spanish policy on ‘summary expulsions or hot expulsions’.<sup>82</sup> The compilation report underlines how there was consensus among UN Treaty bodies and special procedures in recommending Spain to review its Public Security Act and ‘ensure that all persons seeking international protection had access to fair and personalised assessment procedures, to protection against *refoulement* without discrimination and to an independent mechanism with the authority to suspend negative decisions’.

The same document refers to the recommendation put forward by the UN Working Group of Experts on People of African Descent to the Spanish government ‘to put an end to all forms of collective expulsions and pushback of asylum seekers and migrants’, and comply with the right of access to identification procedures.<sup>83</sup> The UN Committee on the Elimination of Discrimination against Women (CEDAW) has expressed similar concerns.<sup>84</sup>

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<sup>78</sup> Refer to Paragraphs 142 and 143 of ECtHR Grand Chamber *N.D. and N.T.* judgement. See also the 2015 Annual Report by the former CoE Commissioner for Human Rights, Nils Muiznieks, of 14 March 2016, which reports in paragraph 41 how he recommended the Spanish authorities ‘to ensure that any future legislation fully comply with human rights obligations, which include ensuring access to an effective asylum procedure, providing protection against *refoulement* and refraining from collective expulsions. He also underscored Spain’s obligation to ensure that no push-backs of migrants occur in practice and to effectively investigate all allegations of excessive use of force against migrants by law enforcement officials at the border’.

<sup>79</sup> Council of Europe, Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018, SG/Inf(2018)25, 3 September 2018, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016808d2c31#\\_ftn6](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808d2c31#_ftn6)

<sup>80</sup> Refer to <https://www.ohchr.org/EN/HRBodies/UPR/Pages/ESIndex.aspx>

<sup>81</sup> In addition, the OHCHR published in 2014 the ‘Recommended principles and Guidelines on Human Rights at international borders’. The Guidelines call States to ‘respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially’. It continues by saying that ‘States shall ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration..., are in accordance with the principle of *non-refoulement* and the prohibition of arbitrary and collective expulsions’ OHCHR, *Recommended principles and Guidelines on Human Rights at international borders*, available at <https://www.ohchr.org/en/issues/migration/pages/internationalborders.aspx>, pt. 22.

<sup>82</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR), HRC/WG.6/35/ESP/2, 18 November 2019.

<sup>83</sup> A/HRC/39/69/Add. 2, paragraph 64 stated that ‘The Working Group urges the Government to put an end to all forms of collective expulsions and pushbacks of asylum seekers and migrants. The Spanish authorities must respect the right of *non-refoulement* and the right of access to identification procedures. The summary returns should be carried out with a prior evaluation of the risk of return that allows access to the procedures for determining refugee status, since the pushbacks are contrary to the principle of *non-refoulement*.’

<sup>84</sup> CEDAW, Concluding observations on the 7th and 8th report of Spain, CEDAW/C/ESP/CO/7-8 (2015), paragraphs 36-37.

The OHCHR compilation report equally highlights the recommendation issued by the UN Subcommittee on Prevention of Torture (CAT OP), according to which ‘no returns should be carried out without an individual pre-removal assessment of the risk of torture upon return to the country of origin’, since automatic and summary returns of immigrant ‘run counter to the principle of *non-refoulement* under article 3 of the Convention against Torture’.<sup>85</sup> The CAT OP urged the Spanish authorities ‘to issue an administrative decision to all individuals who are refused entry at the border and to provide them with legal assistance and interpretation services, as well as information on the remedies available for challenging the decision and details of the procedure available to persons in need of international protection for requesting asylum.’ It also reminded the Spanish government about its obligation to ‘ensure that minors and possible victims of human trafficking are not subjected to automatic returns.’

The calls for the Spanish government to put an end to its hot returns policy has also come from several national government representatives. The 2015 Report of the UN Working Group on the UPR on Spain included a set of specific recommendations by representatives of the governments such as those of Austria, Canada, Czech Republic, Israel, Tunisia and the Russian Federation, for the Spanish government to review and put an end to the current expulsion practices and ‘summary returns’ in Ceuta and Melilla. These government-led recommendations called the Spanish government to comply with international human rights obligations, chiefly procedural safeguards and ensuring due process, including access to a lawyer and an interpreter,<sup>86</sup> and ensure the prompt investigation of allegations of mistreatments by Spanish security forces of migrants at the border.<sup>87</sup>

In a similar logic, the United Nations Global Compact for Safe, Orderly and Regular Migration (GCM), as endorsed by the UN General Assembly in December 2018,<sup>88</sup> envisages a political commitment by all states party to rule of law and human rights-complaint border management activities. Objective 11 calls states to implement border management policies in full respect of ‘the rule of law, obligations under international law, human rights of all migrants, regardless of their migration status’, including the need to ensure the pre-screening and individual assessment of arriving persons and due process.<sup>89</sup>

A most recent and visible case of competing human rights standards is a recent decision by the UN Committee on the Rights of the Child, *D.D. v. Spain* of 19 May.<sup>90</sup> The Committee reached a diametrically opposed conclusion to the Strasbourg Court in *N.D. and N.T.* regarding the legality of Spanish push back policy in Ceuta and Melilla. The Committee held that, irrespective of whether individuals are ‘refugees’ or apply for asylum, ‘it is imperative and necessary that the State conducts an initial assessment, prior to any removal or return, that includes whether the person is an unaccompanied minor’.<sup>91</sup> This, according the Committee, should include an initial interview and vulnerability and best interests assessments, which should in turn guarantee access by the child to the States’ party territory (regardless of their documentation), and to national competent authorities assessing their needs and protections.

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<sup>85</sup> UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT OP), Visit to Spain undertaken from 15 to 26 October 2017: observations and recommendations addressed to the State party, 2 October 2019, CAT/OP/ESP/1, paragraph 93.

<sup>86</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Spain, HRC/29/8, 13 April 2015. Recommendations laid down between paragraphs 131.166 and 131.182 by Argentina, Russian Federation, Japan, Jordan, Turkey, Costa Rica, Israel, Tunisia, Canada, Norway, Sweden, Uruguay, Austria, and the Czech Republic.

<sup>87</sup> Paragraph 131.175, recommendation made by Canada.

<sup>88</sup> United Nations, General Assembly endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, GA/12113, 19 December 2018.

<sup>89</sup> Refer to paragraph 27 of the UN GCM.

<sup>90</sup> UN Committee on the Rights of the Child, Views concerning Communication No. 4/2016, *D.D. v Spain*, 15 May 2019.

<sup>91</sup> Paragraphs 14.3 and 14.4.

The UN Committee on the Rights of the Child concluded that the applicant had no possibility to object his expulsion in violation to Articles 3 and 20 of the Convention.<sup>92</sup> As an unaccompanied child, he did not undergo an identity check and an individualised assessment before its expedited expulsion to Morocco, or any effective redress to challenge that decision by the Spanish authorities. The Committee added that the failure to carry out an assessment of the possible risks involved and to take into account the complainant's best interests violated articles 3 and 37 of the Convention in the light of the principle of *non-refoulement*.<sup>93</sup> The UN CRC Communication brought to the spotlight the central importance of ensuring rule of law guarantees to avoid arbitrariness by state authorities. The Committee concluded by requesting the Spanish Government to change the law (Organic Act No. 4/2015) on safeguarding the security of citizens, and its tenth additional provision 'which would authorize its practice to indiscriminate automatic deportations at the border'.<sup>94</sup>

While some could argue that the legal weight of the Strasbourg Court ruling is heavier than a Communication by a UN human rights body, such an argument would be incorrect and misleading. The Spanish Courts have considered UN body decisions as legally binding in the national legal system. This was confirmed in a judgement by the Spanish Supreme Court (*Tribunal Supremo*) published in July 2018 dealing with a communication issued by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee).<sup>95</sup>

The complexity of the current situation is exacerbated when considering the illegality of the Spanish hot returns policy in light of European Union (EU) law. The ECtHR ruling does not hesitate to declaring that 'neither the Convention nor its Protocols protect, as such, the right to asylum'.<sup>96</sup> It highlights that the main obligation under the ECHR is 'negative' in nature; that is, an obligation by States of refraining from expulsions that directly or indirectly would lead individuals to real risk of ill-treatment under Article 3 ECHR. By doing so, the Court reconfirms that the ECHR does not envisage a 'positive' obligation for States to ensure access to asylum procedures by applicants.

In addition to its incompatibility with the SBC and the application of the EU Charter of Fundamental Rights to both border controls and border surveillance, the ECtHR Grand Chamber ruling provides for a non-equivalent level of protection in contrast to the EU fundamental right to asylum.<sup>97</sup> In the case of the Spanish government, an exclusive focus on 'negative obligations' would stand in contradiction with Article 18 of the EU Charter of Fundamental Rights. This provision foresees the protection of a 'right to seek asylum' in the EU legal system and entails the obligation to ensure effective access to procedures by applicants.

The right to seek asylum in EU law needs to be interpreted in conformity with the EU Treaties.<sup>98</sup> The compliance with the EU Charter by EU Member States constitutes a crucial component and a *condicio*

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<sup>92</sup> Paragraph 14.7 of the Communication.

<sup>93</sup> Paragraph 14.9.

<sup>94</sup> Paragraph 15.

<sup>95</sup> Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección Cuarta, Sentencia num. 1263/2018, R. Casación/1002/2017. The judgment dealt with the UN Committee on the Elimination of Discrimination against Women, Communication No. 47/2012, 15 August 2014. See K. Casla (2018), *Supreme Court of Spain: UN Treaty Body individual decisions are legally binding*, August 1 2018, Blog of the European Journal of Migration and Law, EJIL: Talk!. Available at <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/>

<sup>96</sup> Paragraph 188.

<sup>97</sup> There is therefore no equivalent level of protection as underlined in the so-called 'Bosphorus presumption' laid down by the ECtHR in the Case *Bosphorus v Ireland*, Application no. 45036/98, 30 June 2005. And on the autonomy of EU law and mutual trust see Opinion 2/13 of the Court of Justice of the EU, 18 December 2014, ECLI:EU:C:2014:2454.

<sup>98</sup> As argued elsewhere, 'The EU legal system, and in particular the EU CFR, offers a 'human rights+' framework for determining states' responsibility in the areas of asylum, borders and migration management abroad falling within the scope of EU law and policies. The EU fundamental rights system provides an additional safeguard to the ECHR standards'. Refer to S. Carrera et al. (2018), page 72.

*sine qua non* of the principles of mutual recognition and mutual trust in the Common European Asylum System (CEAS).<sup>99</sup> Furthermore, even purely from the perspective of EU asylum secondary legislation, EU Member States are for instance under the obligation to provide effective access by individuals to asylum procedures,<sup>100</sup> as well as common standards on material reception conditions for applicants for international protection.<sup>101</sup>

All the above leaves the Spanish government with directly conflicting decisions by parallel human rights venues. Pending the Strasbourg Court final ruling, the Spanish media reported in January 2020<sup>102</sup> that the Spanish Constitutional Court had already issued a final draft ‘project judgement’ declaring unconstitutional the Public Security Act (*Ley Mordaza*) because the hot returns policy contravened the victims’ human rights to fair trial and effective remedies envisaged to anyone under the Spanish Constitution. Following the publication of the 2020 ECtHR Grand Chamber ruling, media sources reported that the Spanish Constitutional court was planning to change its own ruling to be in line with the Strasbourg court conclusions.<sup>103</sup> At the time of writing, it is uncertain the exact way in which the Spanish Constitutional Court will deal with the interpretation of the scope and apply the prohibition of collective expulsions to the hot returns policy in Ceuta and Melilla.

## 6. Conclusions

The 2020 *N.D. and N.T. v Spain* judgment by the Strasbourg Court puts forward a set of mixed outputs in light of the hot expulsions policies systematically implemented by the Spanish government at the EU external borders in Ceuta and Melilla. The ruling is not a *carte blanche* for European states to engage in automatic expulsions and hot returns of irregular migrants and asylum seekers, which puts under the spotlight ongoing ‘push backs’ in Spain and other countries like Croatia and more recently Greece. The Grand Chamber has confirmed that the notion of expulsion for purposes of Article 4 Protocol 4 of the ECHR protection covers non-admission policies and practices, and it applies indistinctively to any persons, irrespective of whether they are seeking international protection. The Court has also held that States should not engage in ‘creative legal thinking’<sup>104</sup> and instrumentally frame certain parts of their

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<sup>99</sup> On the role of non-automatic mutual trust in EU mutual recognition policies under the rubric of the Area of Freedom, Security and Justice see V. Mitsilegas (2012), *The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, 31 *Yearbook of European Law*, pp. 319-372.

<sup>100</sup> Refer to Council Directive on common procedures for granting and withdrawing international protection (recast), 26 June 2013, OJ L180/60, 29.6.2013. Article 3.1 of the Directive states that it ‘shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.’ Refer also to Articles 6 (Access to Procedure), 12 (Guarantees for Applicants) and 21-23 on the provision to applicants of free legal assistance and representation.

<sup>101</sup> Council Directive laying down standards for the reception of applicants for international protection (recast), 26 June 2013, L 180/96, 29.6.2013. This Directive includes persons making an international protection application ‘on the territory, including at the border, in the territorial waters or in the transit zones of a Member State’, Article 3.1. See also Chapter IV of the Directive dedicated to ‘Vulnerable Persons’. It is also particularly relevant for this Paper Article 25 which deals with ‘victims of torture and violence’, which requires EU Member States to ensure that ‘persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.’

<sup>102</sup> El País (2020), *El ponente del Constitucional propone acabar con las devoluciones en caliente*, 31 January 2020, retrievable from [https://elpais.com/politica/2020/01/30/actualidad/1580412017\\_778559.html](https://elpais.com/politica/2020/01/30/actualidad/1580412017_778559.html) (accessed 25 February 2020).

<sup>103</sup> El País (2020), *El Constitucional cambiará su proyecto de sentencia sobre las devoluciones en caliente para permitir las*, retrievable from [https://elpais.com/politica/2020/02/13/actualidad/1581622843\\_610090.html?prm=enviar\\_email](https://elpais.com/politica/2020/02/13/actualidad/1581622843_610090.html?prm=enviar_email) (accessed 25 February 2020).

<sup>104</sup> T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds) (2017), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York: Routledge.

territory as ‘non-territory’ for purposes of escaping their human rights obligations in the context of border and migration management policies.

The judgement is however full of contradictions and legal incoherencies, as well as factual errors. The Court first leaves unclear and seems to advance the idea that ECHR-related protections against collective expulsions and *non-refoulement* are only applicable at specific ‘border crossing points’. This disregards the fact that border management by States entails not only land border checks at clearly defined territorial crossing points, but also other ‘creative’ bordering practices and wider border surveillance activities both in land and at sea. Furthermore, while the Grand Chamber ruling could be seen as adopting a statist approach in its positioning and argumentation, its demand to states to ensuring and making accessible to individuals effective and genuine to means of legal entry – both for asylum and other purposes such as employment - gets us right into national competences’ territory. It is also uncertain the extent to which the Court will be in a position to assess this requirement in a timely and accurate manner.

The Strasbourg Court has not focused on the extent to which the Spanish authorities violated their ECHR obligations, in a context of disproportionate use violence preventing effective access to justice and asylum by individuals. It decided to centre its assessment on the individuals’ own conduct at times of ascertaining whether they deserved human rights protection. This paper has argued that the application of the ‘own conduct doctrine’ to cases dealing with absolute or non-derogable human rights is manifestly unfounded and legally misleading, and should be abandoned by the Court. More generally, the Court’s gradual departure from a person-centric to a state-centric logic is incompatible with its own mandate to deliver independently human rights to individuals in their relations to states and its impartiality. It has also led the Court to inaccurately waive the facts of the case in a way that contradicts existing evidence. This is particular so in respect of the practical inexistence of legal pathways for asylum seekers and migrants to enter regularly Melilla and Spanish mainland territory, as well as the structural unsafety and acts of violence for people expelled back to Morocco.

The ruling conclusions are in contradiction to the results and recommendations issued by other CoE actors and UN human rights bodies and special procedures, such as the UN Committee on the Rights of the Child. These have called the Spanish government to immediately stop and change its expulsions policy in Ceuta and Melilla and comply with international human rights and the rule of law. It is also incompatible with EU law, which envisages the scope of application of human rights to cover both border controls and surveillance in the SBC, and a right to asylum in the EU Charter of Fundamental Rights. The *N.D. and N.T. v Spain* judgement misplaces the individual at the periphery of the ECHR system, and gives priority to states’ sovereignty and insecurity claims to manage their borders in ways that contravene both human rights and the rule of law. The result is a ruling which, quoting Mr N.D. statement during the Court’s hearing advanced in the opening of this Paper, denies justice to those who are poor, vulnerable and don’t have a voice.

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## ANNEX 1

### Number of Asylum Applications in Melilla 2012-2018

	2018	2017	2016	2015	2014	2013	2012
<b>Syria</b>	1,468	2,105	1,840	5,312	515	15	2
<b>Palestine</b>	627	181	173	581	1		
<b>Yemen</b>	418	164	44	6	0		
<b>Morocco</b>	254	142	161	246	11	1	5
<b>Argelia</b>	216	66	117	107	3	10	19
<b>Mali</b>	143	8	1	1	0	1	
<b>Tunisia</b>	114	5	18	6	0		
<b>Burkina Faso</b>	40	0	5	0	1		1
<b>Guinea</b>	38	57	30	5	0	1	1
<b>Ivory Coast</b>	28	31	10	3	2		1
<b>Lebanon</b>	22	47	34	27	0		
<b>Egypt</b>	20	2	0	6	0	1	
<b>Turkey</b>	15	0	0	0	0		
<b>Mauritania</b>	12	5	0	2	0		
<b>Senegal</b>	11	6	2	0	0		
<b>Gambia</b>	6	18	1	0	0		
<b>Libya</b>	6	1	0	1	0		
<b>Cameron</b>	4	3	0	4	1		1
<b>Comoros</b>	3	1	0	0	0		
<b>Central African Republic</b>	3	3	0	0	0		
<b>Eritrea</b>	2	2	0	0	0		
<b>Guinea Bissau</b>	2	4	1	0	0		
<b>Iraq</b>	2	0	4	1	3		
<b>Pakistan</b>	2	4	0	0	0		
<b>Bangladesh</b>	1	0	1	1	0		1
<b>Benin</b>	1	0	1	1	0		
<b>USA</b>	1	0	0	0	0		
<b>Nigeria</b>	1	0	0	5	0		
<b>Democratic Republic of Congo</b>	1	2	0	0	0	1	
<b>Sudan</b>	1	0	0	0	0		
<b>Venezuela</b>	1	3	0	0	3		
<b>Angola</b>	0	0	0	2	0		
<b>Chad</b>	0	0	0	1	0		
<b>Congo</b>	0	0	0	0	1		
<b>Philippines</b>	0	1	0	0	0		
<b>Gabon</b>	0	1	0	0	0		
<b>Ghana</b>	0	0	1	0	0		
<b>India</b>	0	1	0	0	0		

*Sergio Carrera*

<b>Iran</b>	0	1	0	0	0		
<b>Jordan</b>	0	0	1	6	0		
<b>Myanmar</b>	0	0	0	1	0		
<b>Serbia</b>	0	0	0	0	0		
<b>Sierra Leona</b>	0	1	0	0	1		
<b>Somalia</b>	0	0	0	0	1	11	
<b>Sri Lanka</b>	0	2	0	0	0		
<b>Uganda</b>	0	0	0	1	0		2
<b>TOTAL</b>	<b>3,475</b>	<b>2,887</b>	<b>2,456</b>	<b>6,335</b>	<b>543</b>	<b>41</b>	<b>33</b>

*Source:* Author's own elaboration based on annual data provided by Spanish Minister of Labour, Social Security and Migrations.

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