



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

THIRD SECTION

CASE OF N.D. AND N.T. v. SPAIN

(Applications nos. 8675/15 and 8697/15)

JUDGMENT

STRASBOURG

3 October 2017

Referred to the Grand Chamber

29/01/2018

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

In the case of N.D. and N.T. v. Spain,

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

Branko Lubarda, *President*,

Luis López Guerra,

Helen Keller,

Dmitry Dedov,

Pere Pastor Vilanova,

Alena Poláčková,

Georgios A. Serghides, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 12 September 2017,

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

PROCEDURE

1. The case originated in two applications (nos. 8675/15 and 8697/15) against the Kingdom of Spain. The applicant in application no. 8675/15, N.D. (“the first applicant”), is a Malian national. The applicant in application no. 8697/15, N.T. (“the second applicant”), is a national of Côte d’Ivoire. The applications were lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 12 February 2015. The Chamber to which the cases had been allocated acceded to the applicants’ request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr C. Gericke and Mr G. Boye Tuset, lawyers practising in Hamburg and Madrid respectively. The Spanish Government (“the Government”) were represented by their Agent, Mr R.-A. León Cavero, State Counsel and head of the Human Rights Legal Department, Ministry of Justice.

3. The applicants alleged, in particular, a violation of Article 3 and Article 13 of the Convention, of those two Articles taken together, of Article 4 of Protocol No. 4 to the Convention, and, lastly, of Article 13 taken together with Article 4 of Protocol No. 4. They complained of their immediate return to Morocco and of the lack of an effective remedy in that regard. They submitted that they had been subjected to a collective expulsion and had had no opportunity to be identified, to explain their individual circumstances and the ill-treatment to which they allegedly risked being subjected in Morocco, or to challenge their return by means of a remedy with suspensive effect.

4. By a decision of 7 July 2015 the Government were given notice of the complaints under Article 4 of Protocol No. 4 and Article 13 of the

Convention, and under both those Articles taken together. The Court decided to join the applications and found the remaining complaints inadmissible.

5. The applicants and the Government each filed observations on the admissibility and merits of the case.

6. The Commissioner for Human Rights of the Council of Europe (“the Human Rights Commissioner”) exercised his right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2).

7. The Court also received written observations from the Office of the United Nations High Commissioner for Refugees (UNHCR), the UN High Commissioner for Human Rights (OHCHR), the Spanish Commission for Assistance to Refugees (CEAR) and, acting collectively, the Centre for Advice on Individual Rights in Europe (the AIRE Centre), Amnesty International, the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), all of which had been given leave by the President to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

8. The parties replied to those observations. They also submitted observations following the delivery on 15 December 2016 of the Court’s judgment in *Khlaifia and Others v. Italy* ([GC], no. 16483/12, ECHR 2016).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant was born in 1986 and the second applicant in 1985.

10. The first applicant left his village in Mali on account of the 2012 armed conflict. He arrived in Morocco in March 2013. He spent approximately nine months in the makeshift camp for migrants on Gurugu Mountain, near the Spanish border crossing into Melilla, a Spanish enclave on the North African coast. He spoke of several raids on the camp by the Moroccan law-enforcement authorities.

11. The second applicant arrived in Morocco in late 2012. He also stayed in the camp on Gurugu Mountain.

A. The first attempt to enter Spain via the Melilla border crossing

12. On 13 August 2014 the applicants left the Gurugu Mountain camp and attempted to enter Spain as part of a group of sub-Saharan migrants, via the Melilla border crossing. The crossing comprises three successive fences: two six-metre-high outer fences and a three-metre-high inner fence. A

system of infrared CCTV cameras and movement sensors is in place. The applicants and other migrants scaled the first fence in the morning. They claimed that stones had been thrown at them by the Moroccan authorities. The first applicant managed to climb to the top of the third fence, and remained there until the afternoon without medical or legal assistance. The second applicant stated that he had been hit by a stone while climbing the first fence and had fallen, but had subsequently succeeded in climbing over the first two fences. During this time the applicants allegedly witnessed violence against some of the sub-Saharan migrants by the Spanish *Guardia Civil* and Moroccan law-enforcement officials. At around 3 p.m. and 2 p.m. respectively the first and second applicants climbed down from the third fence, assisted by Spanish law-enforcement officials. As soon as they reached the ground they were apprehended by members of the *Guardia Civil*, who handcuffed them and sent them back to Morocco. At no point were the applicants' identities checked. They had no opportunity to explain their personal circumstances or to be assisted by lawyers, interpreters or medical personnel.

13. The applicants were then transferred to Nador police station, where they requested medical assistance. Their request was refused. They were subsequently taken, together with other individuals who had been returned in similar circumstances, to Fez, some 300 km from Nador, where they were left to fend for themselves. The applicants stated that between 75 and 80 migrants from sub-Saharan Africa had also been returned to Morocco on 13 August 2014.

14. Journalists and other witnesses were at the scene of the assault on the fences and the expulsions of 13 August 2014. They provided video footage which the applicants submitted to the Court. Some non-governmental organisations subsequently lodged a complaint with the Melilla investigating judge no. 3, seeking the opening of an investigation.

B. Subsequent entry into Spain

15. On 9 December and 23 October 2014 respectively, the first and second applicants succeeded in entering Spanish territory by the Melilla border crossing. Two sets of proceedings were commenced concerning them and orders were subsequently issued for their expulsion.

N.D. was returned to Mali on 31 March 2015 under an expulsion order issued on 26 January 2015, after his asylum application of 17 March 2015 had been rejected by the administrative authorities on 26 March 2015. He is currently in the Bankoumana area (Koulikoro region, south-west of Bamako).

An order for N.T.'s expulsion was issued on 7 November 2014 and was upheld on 23 February 2015 after the dismissal of his administrative appeal (*de alzada*). His current situation is unknown.

Both applicants were represented by lawyers during these proceedings.

II. RELEVANT DOMESTIC LAW

A. Royal Decree 557/2011 of 20 April 2011 (implementing regulations for Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration – “the LOEX”)

16. The provisions of Royal Decree 557/2011 read as follows:

Article 1. Entry via authorised crossings

“1. Without prejudice to the provisions of the international conventions to which Spain is a party, aliens seeking to enter Spanish territory must do so via the authorised border crossings. They must be in possession of a valid passport or travel document that provides proof of their identity and is accepted for that purpose, and, where required, of a valid visa. They must not be subject to an explicit entry ban. They must also present the documents required by these regulations explaining the purpose and conditions of their entry and stay, and must provide proof that they have sufficient funds for the expected duration of their stay in Spain or, as applicable, that they have the means of obtaining them lawfully.

...”

Article 4. Conditions

“1. The entry of foreign nationals into Spanish territory shall be subject to compliance with the following conditions.

(a) They must be in possession of the passport or travel documents referred to in the previous Article.

(b) They must be in possession of the relevant visa in accordance with Article 7.

(c) [They must present] supporting documents concerning the purpose and conditions of their entry and stay, in accordance with Article 8.

(d) [They must provide] a guarantee, as applicable, that they have sufficient funds to live on for the expected duration of their stay in Spain, or that they have the means of obtaining those funds, and sufficient funds for travel to another country or return to the country from which they arrived, in accordance with Article 9.

(e) They must present, as applicable, the health certificates referred to in Article 10.

(f) They must not be subject to an entry ban for the purposes of Article 11.

(g) They must not present a danger to public health, public order, national security or Spain’s international relations or those of other States to which Spain is linked by a convention on this subject.

2. The Office of the Commissioner-General for Aliens and Borders (*Comisaría General de Extranjería y Fronteras*) may grant permission to enter Spain to aliens not satisfying the conditions set forth in the previous paragraph, on exceptional humanitarian or public-interest grounds or in order to comply with the undertakings entered into by Spain.”

B. The *Guardia Civil* operations protocol of 26 February 2014 on border surveillance, which introduced the term “operational border”

17. The relevant parts of the *Guardia Civil* operations protocol of 26 February 2014 on border surveillance read as follows:

“With this system of fences, there is an objective need to determine when unlawful entry has failed and when it has taken place. This requires defining the line which delimits the national territory, for the sole purpose of the rules governing aliens, a line which takes the physical form of the fence in question. Hence, where attempts by migrants to cross this line unlawfully are contained and repelled by the law-enforcement agencies responsible for controlling the border, no actual unlawful entry is deemed to have taken place. Entry is deemed to have been effected only where a migrant has penetrated beyond the internal fence referred to, thus entering the national territory and coming within the scope of the rules governing aliens ...”

C. Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration, as amended by, among other provisions, Law 4/2015 on the protection of citizens’ safety

18. Following various incidents similar to those that are the subject of the present applications, the Spanish Government enacted Institutional Law 4/2015 of 30 March 2015 on the protection of citizens’ safety, amending Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration (“the LOEX”). The amendment, which has been in force since 1 April 2015, lays down special rules for the interception and removal of migrants arriving in Ceuta and Melilla.

19. The relevant provisions of the LOEX currently in force read as follows:

Section 25

“1. Aliens seeking to enter Spain must do so via the authorised border crossings. They must be in possession of a passport or travel document that provides proof of their identity and is accepted for that purpose under the international conventions to which Spain is a party, and must not be subject to an explicit entry ban. They must also present the documents required by the implementing regulations [of the present Law] explaining the purpose and conditions of their entry and stay, and must provide proof that they have sufficient funds for the expected duration of their stay in Spain or have the means of obtaining them lawfully.

...”

Tenth additional provision, added by the aforementioned Institutional Law 4/2015 of 30 March 2015. 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 recognised 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.”

III. EUROPEAN UNION LAW

A. Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

20. Fundamental rights, as guaranteed by the Convention, form part of European Union law and are recognised in the following terms in the Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009):

Article 2

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities ...”

Article 6

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

...

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

B. Charter of Fundamental Rights of the European Union (2000), which has been part of the primary law of the European Union since the entry into force of the Treaty of Lisbon

21. Article 18 of the Charter of Fundamental Rights of the European Union contains an express provision guaranteeing the right to asylum, which reads as follows:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

22. Article 19 of the Charter provides:

Protection in the event of removal, expulsion or extradition

“1. Collective expulsions are prohibited.

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

23. Article 47 of the Charter, entitled “Right to an effective remedy and to a fair trial”, is worded as follows:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

C. Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

24. The issues of particular relevance to the present case are covered by Title V – “Area of freedom, security and justice” – of Part Three of the Treaty on the Functioning of the European Union (TFEU), entitled “Union policies and internal actions”. In Chapter 1 of this Title, Article 67 stipulates:

“1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It ... shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals ...”

25. Article 72 of the same Chapter of the Treaty provides as follows:

“This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

26. The second chapter of Title V is entitled “Policies on border checks, asylum and immigration”. Article 78 § 1 provides:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle

of *non-refoulement*. This policy must be in accordance with the Geneva Convention ... and other relevant treaties.”

27. Article 78 § 2 provides, *inter alia*, for the Union’s legislative bodies to adopt a uniform status of asylum and subsidiary protection, as well as “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum”.

D. The “Return Directive”

28. In the European Union context, the return of irregular migrants is governed by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (the “Return Directive”) on common standards and procedures in Member States for returning illegally staying third-country nationals. The Directive contains the following provisions in particular:

Article 1 – Object

“ This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.”

Article 2 – Scope

“1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

...”

Article 8 – Removal

“1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

...”

Article 12 – Form

“1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

...”

Article 13 – Remedies

“1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.”

29. In interpreting the Return Directive, the Court of Justice of the European Union (CJEU) has held that aliens are entitled, before a decision to return them is adopted, to express their view on the legality of their stay (see, in particular, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, case C-249/13, judgment of 11 December 2014, §§ 28-35). The principles established by the case-law of the CJEU concerning the right to be heard under the Return Directive are set out in detail in the judgment in *Khlaifia and Others* (cited above, §§ 42-45). This right to be heard, which applies as a fundamental principle of EU law, (a) guarantees to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely; and (b) is designed to enable the competent authority effectively to take into account all relevant information, to pay due attention to the observations submitted by the person concerned, and thus to give a detailed statement of reasons for its decision (see *Khaled Boudjlida*, cited above, §§ 37-38). The CJEU added, among other things, that the alien need not necessarily be heard in respect of all the information on which the authority intended to rely to justify its return decision, but must simply have an opportunity to present any arguments against his removal. The CJEU established the restrictions to which the right to be heard could be made subject, and the consequences of failure to comply with this condition, and held that a decision taken following an administrative procedure in which the right to be heard had been infringed would result in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different. Furthermore, the right to be heard could be subjected to restrictions, provided that they

corresponded to objectives of general interest and did not involve, with regard to the objective pursued, a disproportionate and intolerable interference which infringed the very substance of the right guaranteed (see *Khlaifia and Others*, cited above, §§ 44-45).

E. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

30. The relevant provisions of Chapter II of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) read as follows:

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

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

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

Article 9 – Right to remain in the Member State pending the examination of the application

“1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

...”

Article 11 – Requirements for a decision by the determining authority

“1. Member States shall ensure that decisions on applications for international protection are given in writing.

2. Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with such information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 7(2), and whenever the application is based on the same grounds, Member States may take a single decision, covering all dependants, unless to do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.”

Article 12 – Guarantees for applicants

“1. With respect to the procedures [for applying for international protection], Member States shall ensure that all applicants enjoy the following guarantees:

(a) they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

(d) they and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall have access to the information referred to in Article 10(3)(b) and to the information provided by the experts referred to in Article 10(3)(d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application;

(e) they shall be given notice in reasonable time of the decision by the determining authority on their application. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him or her instead of to the applicant;

(f) they shall be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 11(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paragraph 1(b) to (e).”

31. The further provisions of Chapter II set forth, *inter alia*, the obligations of applicants for international protection *vis-à-vis* the competent authorities with a view to establishing their identity and the other elements required; the possibility for applicants to have a personal interview with a person competent under national law, the conditions governing that interview, the content of the interview and the recording thereof; the medical examinations which the applicant may be required to undergo relating to signs that might indicate past persecution or serious harm; the provision of legal and procedural information free of charge and the conditions governing the provision of such information free of charge; the right to legal assistance and representation at all stages of the procedure, the scope of such assistance and representation and the conditions for granting them (Articles 13 to 23).

F. 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)

32. Article 13(1) of the Schengen Borders Code states:

“1. The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.”

IV. OTHER RELEVANT DOMESTIC AND INTERNATIONAL MATERIALS

A. The Spanish Ombudsperson’s Office

33. In his 2005 annual report, the Spanish Ombudsperson wrote as follows:

“As regards the issue whether the border zone should be regarded as Spanish territory and, accordingly, which rules are applicable to it, [it can be asserted, in] the light of the various conventions signed during the nineteenth century between Spain and Morocco defining the jurisdictional limits of the autonomous city of Melilla, that the zone is constructed ... on Spanish territory, that [the area in question] belongs exclusively to Spain and that it is controlled by the Spanish law-enforcement authorities. It is therefore not for the Spanish administrative authorities to determine where our country’s legislation begins to apply. That

territorial application is governed by international treaties or, as applicable, by international custom, which define the borders with neighbouring States.”

34. In presenting her 2013 annual report to the Senate on 9 April 2014 the Spanish Ombudsperson deplored the “heart-rending images of people having climbed to the top of the fences” and stressed that “once a person is on Spanish territory – as we believe to be the case [when he or she is on the fences of the Melilla border crossing] – he or she should be dealt with in accordance with the law in force”. The Ombudsperson therefore condemned the practice of immediate returns (*devoluciones en caliente*), which, she reiterated, “do not exist under the legislation on aliens”¹.

B. Vienna Convention on the Law of Treaties of 23 May 1969

35. Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning the general rule of interpretation, reads as follows:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

36. Article 32 of the Treaty, on supplementary means of interpretation, provides:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

¹. <https://www.defensordelpueblo.es/noticias/la-defensora-del-pueblo-concluye-en-el-senado-el-tramite-parlamentario-del-informe-anual-2/>

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

C. International Law Commission

37. At its sixty-sixth session in 2014, the International Law Commission (ILC) adopted a set of “Draft articles on the expulsion of aliens”. This text was submitted to the United Nations General Assembly, which took note of it (Resolution A/RES/69/119 of 10 December 2014). The following articles are of particular interest:

Article 2 – Definitions

“ For the purposes of the present draft articles:

(a) ‘expulsion’ means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State (b) ‘alien’ means an individual who does not have the nationality of the State in whose territory that individual is present.”

Article 3 – Right of expulsion

“ A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.”

Article 4 – Requirement for conformity with law

“ An alien may be expelled only in pursuance of a decision reached in accordance with law.”

Article 5 – Grounds for expulsion

- “1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law.
3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.”

Article 9 – Prohibition of collective expulsion

- “1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
2. The collective expulsion of aliens is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.”

Article 13 – Obligation to respect the human dignity and human rights of aliens subject to expulsion

“1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.”

Article 17 – Prohibition of torture or cruel, inhuman or degrading treatment or punishment

“ The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.”

38. In its commentary on Article 9 of the draft articles, the International Law Commission noted, *inter alia*, as follows:

“... (4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions under which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. Paragraph 3 states that such an expulsion is permissible provided that it takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles ...”

V. COUNCIL OF EUROPE DOCUMENTS

A. Report of the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

39. From 14 to 18 July 2014 a delegation of the CPT carried out a visit to Spain. One objective of the visit was to examine certain aspects of the treatment of irregular migrants intercepted in the Melilla enclave, along the border with Morocco.

40. In its report, published on 9 April 2015, the CPT stated as follows:

“... ”

38. The CPT acknowledges that a number of European States have to cope with frequent influxes of irregular migrants. It is notably the case for those countries situated at the external frontiers of the European Union which act as the gateway to the rest of Europe. Spain is one of these countries facing such pressures.

39. The autonomous municipality of Melilla is a Spanish exclave of 12 km² located on the northern coast of Africa, surrounded by Moroccan territory. The autonomous municipality lies on the migration route from North and Sub-Saharan Africa towards Europe; it is also used by Syrian migrants. The delegation was informed that the number of foreign nationals trying to cross Melilla's border irregularly has increased drastically over the last year and a half.

The *Guardia Civil* is responsible for patrolling the land border and the coast to prevent clandestine entry. The delegation was informed in Melilla that the *Guardia Civil* has institutionalised co-operation with the Moroccan Gendarmerie but no formal co-operation with the Moroccan Auxiliary Forces ("MAF"), which have the prime responsibility for border surveillance.

40. The Spanish authorities have built a multi-fence barrier along the 13 km land border separating Melilla from Morocco to prevent irregular migrants from accessing Spanish territory. The CPT notes that it was built within Spanish territory and is therefore, on both sides, under the full jurisdiction of Spain.

The barrier consists of a six meter high fence, slightly tilted towards Morocco, a three dimensional tow-line followed by a second three meter high fence and, on the other side of a patrol road, another six meter high fence. At regular intervals, gates have been inserted into the fences to enable access through the barrier from both sides. In addition, a sophisticated CCTV system (including infrared cameras) combined with movement sensors has been installed. Most of the fences are also equipped with anti-climbing grids.

41. On 13 February 1992, Spain concluded a Bilateral Agreement with the Kingdom of Morocco on the movement of persons, transit and readmission of foreign nationals who entered illegally ('the Readmission Agreement'). According to the Readmission Agreement, 'following the formal request of the border authorities of the requesting State, border authorities of the requested State shall readmit in its territory the third-country nationals who have illegally entered the territory of the requesting State from the requested State.' The application for readmission shall be submitted within ten days after the illegal entry into the territory of the requesting State.

...

48. Groups of foreign nationals of varying sizes – from a few persons to a thousand – attempt, on a regular basis, to access Spanish territory. Regarding the attempts to access Spanish territory by sea, the CPT was informed about an incident that took place on 6 February 2014, which was widely reported in the media. Members of the *Guardia Civil* fired rubber bullets from the beach at persons who were attempting to swim from Moroccan territory to Melilla and forced them to head back to Morocco. However, not all the persons were able to swim back and it was reported that 15 foreign nationals drowned.

As regards attempts to access Spanish territory by climbing the border fences, the delegation received consistent allegations, confirmed by video footage, that irregular migrants were stopped within or right after the border by members of the *Guardia Civil*, occasionally handcuffed, before being immediately forcibly returned to Morocco without being identified. Several foreign nationals also stated to the delegation that they had been returned to Morocco after being apprehended by the *Guardia Civil* several hundred meters from the border. It seems that the duty of the *Guardia Civil* was seen as encompassing apprehending irregular migrants on their way to the CETI in Melilla and forcibly returning them to Morocco. Further, foreign

nationals were allegedly sometimes returned to Morocco despite the fact that they were injured and could hardly walk (see also paragraph 51).

The CPT considers that such practices of immediately and forcibly returning irregular migrants, without any prior identification or screening of their needs, would be clearly contrary to the principles and standards mentioned above.

...

50. ... the CPT recommends that:

- clear instructions be given to Spanish law enforcement officials to ensure that irregular migrants who have entered Spanish territory will not be forcibly returned to Morocco prior to an individualised screening with a view to identifying persons in need of protection, assessing those needs and taking appropriate action;
- adequate guarantees in this respect be provided in national legislation.”

B. The 2015 annual activity report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe (“the Human Rights Commissioner”), dated 14 March 2016

41. The parts of the report of relevance to the present case read as follows:

“1.2 Visits

Visit to Spain

The Commissioner visited Melilla and Madrid from 13 to 16 January 2015 in order to discuss issues pertaining to the human rights of migrants, refugees and asylum-seekers in Ceuta and Melilla, Spain’s territories in Northern Africa.

In Melilla, the Commissioner held meetings with the Government’s Delegate, Mr Abdelmalik El Barkani and the President of the city, Mr Juan José Imbroda Ortiz. He also met with the Head of the Guardia Civil in Melilla, Colonel Ambrosio Martín Villaseñor; the Head of the National Police, Mr José Angel González Jiménez; and representatives of civil society organisations. He visited the border check-point of Beni Ansar, where an office to register asylum claims started operating in November 2014. He also visited the triple-fence surrounding Melilla and the Centre for Temporary Stay of Migrants (CETI), where he met with Centre’s Director, Mr Carlos Montero Díaz, other staff members and with persons accommodated in it.

In Madrid, the Commissioner met with the Secretary of State for Security, Mr Francisco Martínez Vázquez. He also met with the Ombudsperson, Ms Soledad Becerril Bustamante, UNHCR’s Representative in Spain and civil society representatives. Additionally, the Commissioner held, on 27 January 2015, an exchange of views with members of the Spanish delegation to the Parliamentary Assembly of the Council of Europe on issues raised during the visit.

The main issue of the visit was the draft amendment to the Aliens Act aimed at establishing a special regime for Ceuta and Melilla and allowing the immediate return of migrants who did not enter Ceuta and Melilla through a regular border post. While recognising that Spain has the right to establish its own immigration and border management policies, the Commissioner stressed that it must also uphold its human rights obligations. Therefore, he urged the Spanish authorities to ensure that any future legislation fully comply with these obligations, which include ensuring full

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.

The Commissioner welcomed the opening of an asylum office at one of Melilla's border check-points and the effective co-operation of the police with UNHCR. At the same time, he highlighted the need to strengthen the asylum system in Melilla so as to allow all persons in need of protection, irrespective of their country of origin, to access the territory safely, to have their situation assessed on an individual basis and to submit international protection claims. Additionally, he urged the authorities to take urgent steps to improve existing arrangements for the reception of migrants in Melilla and clarify rules governing transfers to the mainland.

The press release issued at the end of the visit (16 January) is available on the Commissioner's website. The visit also served as a basis for the written comments the Commissioner submitted to the Court as third party in November on two cases against Spain (N.D. and N.T., Applications No 8675/15 and No. 8697/15). These cases related to alleged pushbacks of migrants from the Spanish city of Melilla to Morocco (see below, European Court of Human Rights).

...

2. Thematic activities

...

2.3 Human rights of immigrants, refugees and asylum seekers

Human rights of immigrants, refugees and asylum seekers featured prominently in the Commissioner's work in 2015. He took an active part in various debates on these issues, reminding Council of Europe member states of their human rights obligations towards immigrants, asylum-seekers and refugees. Issues pertaining to migration were addressed in the Commissioner's ... *ad hoc* visits to ... Spain, as well as through third party interventions before the Court.

...

6. European Court of Human Rights

In 2015, the Commissioner made extensive use of his right to submit written comments in cases before the European Court of Human Rights, pursuant to Article 36, paragraph 3 of the ECHR. He did so in ... two cases against Spain, relating to alleged push-backs of migrants from the Spanish city of Melilla to Morocco. ...

On 12 November 2015, the Commissioner published the written comments he submitted to the Court on two cases against Spain (N.D. and N.T., Applications No. 8675/15 and No. 8697/15) relating to alleged pushbacks of migrants from the Spanish city of Melilla to Morocco. Based inter alia on his visit to Melilla and Madrid from 13 to 16 January 2015 ..., the Commissioner points to the existence of a practice whereby migrants who attempt to enter Melilla in groups by climbing the fence surrounding the city are summarily returned by Spain's border guards to Morocco. The Commissioner underlines that these returns take place outside of any formal procedure and without identification of the persons concerned or assessment of their individual situation, a circumstance which prevents them from effectively exercising their right to seek international protection in Spain. Additionally, he stresses that migrants summarily returned from Melilla have no access to an effective remedy

which would enable them to challenge their removal or seek redress for any ill-treatment they may have been subjected to during such operations.”

C. Press release issued on 16 January 2015 following the Human Rights Commissioner’s visit to Spain (from 13 to 16 January 2015)

42. The press release in question reads as follows:

“Spain: Legislation and practice on immigration and asylum must adhere to human rights standards

Madrid 16/01/2015

The Commissioner at Melilla, Spain

‘The proposed amendments to the Aliens Act aimed at legalising push-backs of migrants arriving in Ceuta and Melilla currently discussed in Spain are in clear breach of human rights law. The Spanish authorities should reconsider them and ensure that any future legislation fully abides by Spain’s international obligations, which include ensuring full access to an effective asylum procedure, providing protection against refoulement and refraining from collective expulsions’, said today Nils Muižnieks, the Council of Europe Commissioner for Human Rights, concluding a visit to Melilla and Madrid that started on 13 January.

The Commissioner stressed that these fundamental human rights safeguards can never be waived, irrespective of the challenges that the management of migration flows may pose in certain contexts. ‘Migration is certainly a complex issue which requires a concerted European response, but this does not exempt individual States from their obligations. Spain has the right to establish its own immigration and border management policies, but at the same time it must uphold its human rights obligations, in particular those assumed under the European Convention on Human Rights and the 1951 Convention Relating to the Status of Refugees.’

During the visit to Melilla, the Commissioner received consistent information on push-backs, in some cases accompanied by excessive use of force, carried out by the Spanish border police (Guardia Civil). ‘Push-backs must stop and should be replaced by a practice which reconciles border control and human rights. This is not mission impossible, considering that the migration flows in Melilla currently remain at a manageable level. Any excessive use of force by law enforcement officials must be fully and effectively investigated and those found responsible must be adequately sanctioned.’

The Commissioner warmly welcomes the establishment in November 2014 of an asylum office at one of Melilla’s entry points to Morocco, which provides safer access to Spain for persons in need of protection. ‘This is particularly true for people fleeing the conflict in Syria, who are increasingly making use of this new possibility. However, for other people, particularly Sub-Saharan Africans, who may also have valid protection claims, this possibility is still out of reach and they have to take serious risks, including jumping over the fence that surrounds the city, to get in. I call on the Spanish authorities to strengthen the asylum system in Melilla so as to allow all persons in need of protection to access the territory safely and submit claims.’ With asylum applications rapidly rising, the Commissioner urges the Spanish authorities to ensure that material and human resources, including adequate numbers of trained police officers, lawyers and interpreters, are made available.

The Commissioner also welcomes UNHCR's field presence in Melilla since July 2014 and its good co-operation with the authorities. However, he recommends adopting urgent measures to improve the current reception arrangements in Melilla ...

Additionally, the Commissioner calls on the authorities to establish clear and transparent rules governing the transfers of asylum seekers from Melilla to the mainland and to streamline such transfers, in order to both ease overcrowding and address the uncertainty currently prevailing among migrants about their future."

THE LAW

I. THE ISSUE OF JURISDICTION UNDER ARTICLE 1 OF THE CONVENTION

43. Article 1 of the Convention provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

A. The parties' submissions

44. The Government submitted that the applications were based on facts that had occurred outside Spain's jurisdiction, since the applicants had not succeeded in going beyond the protective structures at the Melilla border crossing (see paragraph 17 above) and had thus not entered Spanish territory. Consequently, they argued that the law-enforcement officials had been bound to prevent the applicants from entering Spanish territory, and that the individuals concerned had therefore not been within the jurisdiction of Spain for the purposes of Article 4 of Protocol No. 4 to the Convention. However, the Government added that, "always supposing that the border fence were inside Spain's land borders, the exercise of jurisdiction, even within the territory of the member States, [could] have a different object and purpose in relation to each of the rights protected by the Convention."

45. The applicants submitted that Spain's jurisdiction was not open to question in the present case, and referred to the observations of the third parties set out below. In the applicants' view, the removal of aliens, the effect of which was to prevent migrants from reaching the borders of the State or even to push them back to another State, constituted an exercise of jurisdiction within the meaning of Article 1 of the Convention which engaged the responsibility of the State in question under Article 4 of Protocol No. 4 (they referred to *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 180, ECHR 2012).

46. The Human Rights Commissioner, in his capacity as a third-party intervener in the present case, referred in particular to the statement published by the Spanish Ombudsperson on 9 April 2014 on her official

website (see paragraph 34 above), according to which Spanish jurisdiction was also exercised on the land between the fences at the Melilla border crossing and not just beyond its protective structures.

47. The CEAR submitted that neither the Spanish State nor the European Union recognised the existence of a special legal situation regarding the delimitation of the borders of Ceuta and Melilla. The border between the Kingdom of Morocco and the cities of Ceuta and Melilla was therefore as delimited by the international treaties to which the Kingdom of Spain and the Kingdom of Morocco were parties. The CEAR referred to the paragraph from the Spanish Ombudsperson's 2005 annual report set out at paragraph 33 above.

48. The NGOs Centre for Advice on Individual Rights in Europe (the AIRE Centre), Amnesty International, the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), which submitted joint observations as third-party interveners, cited the Court's judgment in *Hirsi Jamaa and Others* (cited above, § 180), to the effect that "the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4". In their view, this must apply also to situations in which persons arriving unlawfully in Spain were refused entry into the country (they cited *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 212, 21 October 2014). These persons, in the NGOs' submission, were under the effective control of the authorities of that country, whether they were inside the State's territory or on its land borders.

B. The Court's assessment

1. Brief summary of the general principles regarding jurisdiction within the meaning of Article 1 of the Convention

49. The Court finds it appropriate to reiterate that, under Article 1 of the Convention, the undertaking of the Contracting States is to "secure" (*reconnaître* in French) to everyone within their "jurisdiction" the rights and freedoms defined therein (see *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII). The exercise of "jurisdiction" is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Hirsi Jamaa and Others*, cited above, § 70).

50. A State's jurisdictional competence under Article 1 is primarily territorial (see *Banković and Others*, cited above, §§ 61 and 67, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII), and is presumed to be exercised normally throughout the State's territory (see *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II).

51. In keeping with the essentially territorial notion of "jurisdiction", the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention (see *Banković and Others*, cited above, § 67, and *Ilaşcu and Others*, cited above, § 314). For specific examples, it refers to paragraphs 73 et seq. of its judgment in *Hirsi Jamaa and Others* (cited above). It reiterates, however, that whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 137, ECHR 2011, and *Hassan v. the United Kingdom* [GC], no. 29750/09, § 74, ECHR 2014).

2. Application of these principles in the present case

52. The Court notes the Government's view that the facts of the present case occurred outside the jurisdiction of the respondent State in so far as the applicants allegedly did not enter Spanish territory (see paragraphs 17 and 44 above). The Government further submitted that, even supposing that "the border fence were inside Spain's land borders", the actions of the law-enforcement authorities in preventing the migrants from entering did not come within Spain's jurisdiction for the purposes of Article 4 of Protocol No. 4. The applicants and the third-party interveners, for their part, submitted that the removal of aliens with the aim of preventing migrants from reaching the borders of the State or pushing them back to another State constituted an exercise of jurisdiction within the meaning of Article 1 of the Convention which engaged the responsibility of the State in question under Article 4 of Protocol No. 4.

53. The Court also observes that the border between the Kingdom of Morocco and the cities of Ceuta and Melilla has been defined by international treaties to which the Kingdom of Spain and the Kingdom of Morocco are parties and that it cannot be altered on the initiative of one of those States in order to deal with a specific factual situation. It takes note of the remarks made by the CEAR in its observations concerning the border zone between Spain and Morocco (see paragraphs 33 and 47 above), and those of the Human Rights Commissioner echoing the remarks of the

Spanish Ombudsperson, according to which Spanish jurisdiction is also exercised on the land between the fences at the Melilla border crossing, and not just beyond the protective structures of that crossing (see paragraphs 34 and 46 above).

54. In view of the foregoing and of the background to the present applications, the Court refers to the applicable international law and the agreements entered into by the Kingdom of Morocco and the Kingdom of Spain concerning the determination of the land borders between those two countries. However, it does not deem it necessary to establish whether or not the border fence erected between Morocco and Spain is located on the latter's territory. It simply observes that, as it has found in the past, where there is control over another this is *de jure* control exercised by the State in question over the individuals concerned (see *Hirsi Jamaa and Others*, cited above, § 77), that is to say, effective control by the authorities of that State, whether those authorities are inside the State's territory or on its land borders. In the Court's view, from the point at which the applicants climbed down from the border fences they were under the continuous and exclusive control, at least *de facto*, of the Spanish authorities. Speculation regarding the powers, duties or actions of the Spanish law-enforcement agencies as to the nature and purpose of their intervention would not lead the Court to any other conclusion.

55. Accordingly, there can be no doubt that the facts underlying the alleged violations come within Spain's "jurisdiction" within the meaning of Article 1 of the Convention.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Lack of victim status

56. The Government submitted that the applicants could not claim to be "victims", for the purposes of Article 34 of the Convention, of the facts of which they complained. The applicants had asserted, without providing official identity papers in support of their claims, that they had taken part in the assault on the Melilla border crossing at dawn on 13 August 2014 and had recognised themselves on the video footage which they supplied (see paragraph 14 above). Basing their assertions on expert assessments, the Government criticised the poor quality of the video recordings in question, which in their view made it impossible to compare the footage with the photos in the official identity archives that had been checked when the applicants had entered Spanish territory subsequently. Furthermore, even assuming that the persons visible in the video footage were indeed the applicants, the latter had ceased to have victim status in so far as, a few months later, they had succeeded in entering Spanish territory unlawfully via the same border crossing and had been the subject of expulsion orders

issued in the context of proceedings which, in the Government's submission, had been attended by all the necessary safeguards. Moreover, neither of the applicants had applied to the Spanish authorities for international protection before applying to the Court. Only N.D. had done so subsequently, despite the fact that, when they had entered Spain unlawfully after the events in the present applications, both applicants had been assisted by lawyers and interpreters. The Government therefore concluded that the applicants were not victims of the alleged violations.

57. The applicants, for their part, submitted that the evidence they had gathered – videos of the assault on the fences in which they allegedly recognised themselves among the other migrants (see paragraph 13 above), and reports by independent international institutions and organisations – were sufficient to demonstrate that they had indeed been part of the group that had attempted to enter Spain by climbing over the fence at Melilla on 13 August 2014, and that they had been summarily returned. They added that the Spanish Government had already acknowledged the existence of a systematic practice of collective summary expulsions at the Melilla border fence. They called into question the independence and quality of the reports submitted by the Government, arguing that no “comparison” was possible since the footage used by the Government was not the relevant footage. They alleged that the Government had not produced the video recordings made by the infrared security cameras and movement sensors installed at the Melilla fence; those images, in the applicants' submission, were clearer than the ones which they had themselves produced (see paragraph 14 above), and which had been taken by third parties in spite of the threats issued by the *Guardia Civil* officials in an attempt to prevent them from filming. The impossibility of providing additional evidence of their identity was the result of the Spanish Government's failure to follow the procedures for identification and assessment of individual circumstances required by Article 4 of Protocol No. 4. The Government had been unable to respond to the request for information regarding the facts established by the Court on 7 July 2015; in the applicants' view, this in itself constituted a breach of the Government's duty to adduce the evidence or provide the information required by the Court under Rule 44C of the Rules of Court, and made it impossible to test the veracity of their witness statements.

58. The applicants further stated that they had received no compensation for the harm they had suffered, and had not had any remedy by which to complain of their summary expulsion. They therefore submitted that they had not lost their victim status and that the subsequent events were not relevant to assessing the existence of the alleged violation.

59. In view of the material in the case file, the Court considers that the applicants may claim to be victims of the alleged violation of the Convention. It notes that they gave a coherent account of the circumstances, their countries of origin, the difficulties that had led them to Gurugu

Mountain and their participation on 13 August 2014, together with other migrants, in the assault on the fences erected at the land border between Morocco and Spain at the Beni-Enzar border crossing (see paragraph 41 above), an assault which was immediately repelled by the Spanish *Guardia Civil*. It observes that the applicants supported their assertions with video footage which appears credible. Moreover, the Government did not deny the existence of summary expulsions and, shortly after the events in the present case, even amended the Institutional Law on the rights and freedoms of aliens in Spain and their social integration so as to make these “immediate expulsions” lawful.

60. Furthermore, the Court cannot overlook the fact that the applicants’ inability to furnish documents identifying them more precisely among the group of migrants expelled on 13 August 2014 is primarily due to the fact that, when they were expelled, the aliens in question did not undergo any identification procedure. In the Court’s view, the Government cannot take shelter behind the absence of identification given that they are themselves responsible for it. Moreover, the fact that the applicants subsequently entered Spanish territory by other means cannot deprive them of their victim status in relation to the Convention violations which they allege in the present case, since the subsequent proceedings did not examine, let alone find, any possible violation of the Convention.

61. Consequently, the Government’s preliminary objection of a lack of victim status is rejected.

B. Exhaustion of domestic remedies

62. The Government raised an objection of failure to exhaust domestic remedies. They observed that the expulsion orders issued in respect of N.T. and N.D. had not been challenged in the administrative courts and that only N.D. had lodged an asylum application. This had been rejected following two reports from UNHCR concluding that there were no grounds for granting asylum; in the absence of any administrative appeal against the expulsion order, it had been enforced on 31 March 2015 when N.D. had been sent back to Mali. As to N.T., he had not challenged the decision of 23 February 2015 dismissing his administrative appeal against the order for his expulsion, despite the fact that, like the first applicant, he had been represented by a lawyer (see paragraph 15 above).

63. The applicants stressed that their applications concerned their summary expulsion on 13 August 2014 and not the subsequent proceedings referred to by the Government, which related to different facts. In any event, only domestic remedies which had suspensive effect, and were therefore deemed effective, had to be exhausted. In the applicants’ submission, Article 4 of Protocol No. 4 to the Convention and Article 13 of the Convention were closely linked (they referred to *Georgia v. Russia (I)*

[GC], no. 13255/07, § 212, ECHR 2014 (extracts)). As far as their summary expulsion on 13 August 2014 was concerned, they had not access to any effective remedy which they could have exercised before applying to the Court.

64. The Court observes that the Government referred to expulsion orders that were issued after the facts being examined in the present case. After being expelled on 13 August 2014 the applicants again succeeded in entering Spain unlawfully by circumventing the checks at the Melilla city border crossing. Administrative proceedings were then brought against them, culminating in the adoption of two expulsion orders dated 7 November 2014 and 26 January 2015. However, the applicants' complaints before the Court do not concern those orders, but rather an alleged collective expulsion following the events of 13 August 2014. In the applicants' submission, the Spanish authorities carried out that expulsion without subjecting the migrants to any identification procedure and without gathering any information regarding their personal circumstances, and did not document the expulsion in any way.

65. Accordingly, as the objection of non-exhaustion relates to expulsion orders issued after the facts complained of in the present case, it must be dismissed.

C. Conclusion

66. The applications cannot be dismissed on the grounds that the applicants lacked victim status or failed to exhaust domestic remedies. The Court therefore rejects the preliminary objections raised by the respondent Government.

III. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

67. The applicants alleged that they had been subjected to a collective expulsion without any individual assessment of their circumstances. In their view, this reflected a systematic policy of irregular returns which lacked any legal basis and was conducted in the absence of legal assistance. They relied in this regard on Article 4 of Protocol No. 4 to the Convention, which provides:

“Collective expulsion of aliens is prohibited.”

A. The parties' submissions

1. *The Government*

68. The Government argued that Article 4 of Protocol No. 4 to the Convention was not applicable in the present case. In their submission, the facts of the present case did not amount to a “collective expulsion of aliens”. In order to come within the scope of Article 4 of Protocol No. 4, the measure in question had to constitute the “expulsion” of an individual who was on the territory of the respondent State, it had to be “collective” (that is, it had to affect a group of persons linked by the same set of circumstances, specific to that group), and it had to be applied to “aliens”.

69. The Government stressed at the outset that the binding force of the Convention was confined to the agreements expressly entered into by the High Contracting Parties in the context of the conclusion of that treaty and based, for the purpose of their interpretation in cases of doubt, on the Preamble and annexes thereto and the preparatory work, as indicated in the Vienna Convention on the Law of Treaties (see paragraph 35 above), to which paragraphs 170 and 171 of the *Hirsi Jamaa and Others* judgment (cited above) referred. While the Government acknowledged that the Convention was a living instrument requiring a dynamic and evolutive approach which rendered its rights practical and effective and not just theoretical and illusory, they argued that the Court could not, by means of an evolutive interpretation, derive a right from the Convention that had not been included therein at the outset.

70. Referring to the judgment in *Hirsi Jamaa and Others* (cited above), the Government submitted that the circumstances of the present case were different. The case concerned migrants who had attempted to enter Spanish territory unlawfully by crossing a land border, instead of applying for leave to enter the country as they could have done.

71. The applicants could have entered Spain lawfully by lodging asylum applications in the countries of transit, namely Mauritania and Morocco, at the Spanish consulates in those countries or at the authorised Beni-Enzar border post, or alternatively by securing a contract to work in Spain in their countries of origin. The Government also stressed that N.T. had not lodged an asylum application at any point and that N.D. had submitted his only after an order had been issued for his expulsion.

72. In the Government's view, the right to enter Spanish territory as claimed by the applicants, that is, the right to enter at any point along the border without undergoing checks, was contrary to the Convention system and posed a threat to the enjoyment of human rights both by the citizens of the member States and by migrants, while affording huge profits to criminal organisations engaged in human trafficking. A decision by the Court legitimising such unlawful conduct and finding that maintaining the system

of border protection at unauthorised crossing points, as in the present case, constituted a human rights violation, would create an undesirable “suction effect” and result in a migration crisis with devastating consequences for human rights protection.

73. In that regard, Article 72 of the TFEU itself (see paragraph 25 above) stipulated that policies on border checks, asylum and immigration must not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. In the Government’s view, a dynamic interpretation of the Convention must not result in guaranteeing a right to breach the rules on border protection which afforded non-nationals the opportunity to make use, from outside the country they wished to enter, of the procedures governing entry.

74. In the Government’s submission, compliance with the obligations flowing from the Convention and from Article 4 of Protocol No. 4 was compatible with the maintenance of a system for the protection of Spain’s borders. That system provided for the possibility of requesting asylum at the Beni-Enzar border post, which could be accessed freely from Morocco. The border protection arrangements consisted of an advanced detection system comprising cameras and sensors and of fences aimed, firstly, at discouraging people from crossing and, secondly, at hindering or preventing entry into Spanish territory for the purposes of Article 13 of the Schengen Borders Code (see paragraph 32 above). In addition, active surveillance, containment and prevention measures were in place in the form of the appropriate human resources.

75. Persons who had not requested leave to enter the national territory via the authorised border crossing or had not applied for asylum before entering the territory in question, but who nevertheless succeeded in getting past the border protection structures by unlawful means, could be deemed to have entered Spanish territory and were entitled to an administrative procedure, giving rise to a right of review before the courts, concerning the lawfulness of their stay. By contrast, persons who had not made use of the legal avenues referred to or who had not succeeded in getting past the border protection structures – as was the case with the applicants – were lent assistance to climb down from the fences. Hence, they either remained on Moroccan territory or, where applicable, were taken by Red Cross personnel to the appropriate health-care centre.

76. The Government referred to the special rules for Ceuta and Melilla laid down in the tenth additional provision of the LOEX, as amended by Institutional Law 4/2015, cited above (see paragraph 19 above). They added that Spain, as a sovereign State belonging to the European Union and forming part of the Union’s external border, had a duty to protect, monitor and safeguard its borders. Hence, that duty transcended the purely national

context and took on the nature of a responsibility towards the European Union as a whole.

77. This was reflected both in the Spanish legislation (see paragraphs 18 and 19 above) and in the Schengen Borders Code, Article 13 of which (see paragraph 32 above) distinguished two different stages, the first being aimed at preventing unauthorised border crossings and the second at taking measures against persons who had crossed illegally. The Government referred in particular to the LOEX as in force at the time the applications were lodged with the Court (see paragraph 18 above) and to the amendments made subsequently (see paragraph 19 above), to the effect that entry into Spanish territory had to be effected at the border posts authorised for that purpose. Responsibility for border surveillance lay with the *Guardia Civil*.

78. The Government also contested the written observations of the third-party interveners. In that regard they submitted as follows: (a) the present case was the first in which the Court had declared a complaint under Article 3 inadmissible in the context of collective expulsion; (b) although it was true that a fenced land border existed, there also existed the possibility of applying for asylum through the Spanish authorities or UNHCR in Rabat or Mauritania, rendering it unnecessary to attempt to scale fences; (c) the fences in question formed an external European land border protecting the Schengen area and the European population living in a Spanish enclave in Africa; and (d) the present applications had been lodged only by two individuals who had ultimately succeeded in entering Spanish territory by other means and had therefore had access to procedures in full compliance with the Convention.

79. The Government concluded by stating that a border protection structure had been created as a bar to unlawful entry by persons who deliberately sought to circumvent the procedure for requesting lawful entry or international protection at the authorised border crossing. Lastly, there was no unconditional right for non-nationals to enter the member States of the Council of Europe wherever they chose.

2. *The applicants*

80. The applicants contested the Government's assertions concerning the possibility of lodging an asylum application in Mauritania or Morocco. The latter did not have a national asylum system; there was no automatic recognition of refugee status and the asylum-seekers registered by UNHCR did not receive any assistance from the State. That situation had not changed since the time of the events in the present case, and Morocco had even stepped up its punitive approach towards migrants from sub-Saharan Africa, including registered asylum-seekers.

81. With regard to the Beni-Enzar border post, the applicants disputed the Government's arguments. Prior to the opening of the international

protection office in November 2014, they had not had access to the asylum procedure. This had been confirmed (see paragraph 87 below) by UNHCR and by the Human Rights Commissioner, according to whom this border crossing was accessible almost exclusively to Syrian asylum-seekers and could not be accessed from Morocco by sub-Saharan asylum-seekers (see paragraph 86 below).

82. The applicants stated that they had attempted, with a group of between 70 and 85 persons, to enter Spanish territory over the fences at Melilla, that they had been subjected to a “summary” and “automatic” expulsion on 13 August 2014 and that there were no grounds for asserting that their expulsion had not been collective. They also referred to the interpretation of the term “alien” contained in the *travaux préparatoires* to Protocol No. 4 (they cited *Hirsi Jamaa and Others*, cited above, § 174) and to OHCHR’s written intervention in the present case (see paragraph 90 below), and sought to demonstrate that no distinction could be drawn between refugees and non-refugees or between regular and irregular migrants in terms of the international protection guaranteed by Article 4 of Protocol No. 4.

83. With regard to the Government’s arguments concerning Spain’s duty as a sovereign State to protect its borders against attempts to enter the country unlawfully, the applicants referred to the judgments in *Hirsi Jamaa and Others* (cited above, § 179) and *Sharifi and Others* (cited above, § 224), observing that problems with managing migratory flows or with the reception of asylum-seekers could not justify having recourse to practices that were incompatible with States’ obligations under the Convention.

84. As to the collective nature of their expulsion, the applicants submitted that, where the Convention institutions had found in the past that there had been no violation of Protocol No. 4, they had made clear that the fact that a number of aliens had been made subject to such decisions did not in itself lead to the conclusion that there was a collective expulsion if each of the persons concerned had been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis. In the applicants’ view, the issue of individual treatment in the course of the expulsion procedure was therefore the crucial issue in determining whether or not their expulsion had been contrary to Article 4 of Protocol No. 4; this had been confirmed by OHCHR in its written intervention in the present case (see paragraph 90 below).

85. Referring to the third-party interveners’ submissions, and in particular those of the Human Rights Commissioner and the CEAR (see paragraphs 86 and 92 below), the applicants concluded that their expulsion constituted a classic example of collective expulsion as prohibited by Article 4 of Protocol No. 4 in that it had concerned a group of non-nationals expelled from the national territory without any individual examination of their claims and on the basis of a law or an explicit policy.

3. *The third-party interveners*

(a) **The Human Rights Commissioner**

86. The Human Rights Commissioner referred to the amendments to the LOEX that had not yet been adopted at the time of his visit to Spain in January 2015, and to the fact that he had urged the Spanish authorities to ensure that the final text of the legislation complied with Spain's international obligations. These included ensuring full access to an effective asylum procedure, providing protection against *refoulement* and refraining from collective expulsions. He observed that in November 2014 an asylum office had been set up at Beni-Enzar, one of the crossing points between Melilla and Morocco, but noted that it was accessible to persons fleeing the Syrian conflict but remained inaccessible to those from sub-Saharan Africa. The latter took considerable risks in order to enter the city, attempting to enter in groups by climbing the fences surrounding it or to access it by sea (see paragraphs 41 and 42 above). Returns ("push-backs") took place outside of any formal procedure and without the persons concerned being identified or having their individual situation assessed, thereby preventing migrants from exercising their right to seek international protection in Spain. Lastly, the migrants sent back from Melilla were deprived of any effective remedy by which to challenge their expulsion or to claim compensation for possible ill-treatment by the border guards during their expulsion (see paragraph 41 above).

(b) **UNHCR**

87. According to UNHCR, it had not been possible before November 2014 to claim asylum at the Melilla border crossing, and there had been no mechanism for identifying persons in need of international protection.

88. In UNHCR's view, it was for the national authorities to enquire as to the treatment to which migrants would be exposed after their return; the fact that the persons concerned did not expressly apply for asylum did not relieve the State of its obligations under Article 3 of the Convention (reference was made to *Hirsi Jamaa and Others*, cited above, § 133, and to *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 359, ECHR 2011). The prohibition on *refoulement* also concerned, as in the present case, direct or indirect *refoulement* to the country from which the migrant in question had fled (the intervener cited, among other authorities, *Müslim v. Turkey*, no. 53566/99, §§ 72-76, 26 April 2005, and *M.S.S.*, cited above, §§ 286 and 298).

89. Referring to the minimum guarantees which asylum procedures must afford, UNHCR submitted that these required as a minimum that asylum-seekers be identified and that the circumstances of each of the persons concerned be genuinely and individually taken into account. The intervener referred to Chapter II of Directive 2013/32/EU of the European

Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (see paragraph 30 above), which also applied to border crossings, and to the Court's findings in *Hirsi Jamaa and Others* (cited above, § 185) regarding the prohibition on the expulsion of migrants without prior identification.

(c) OHCHR

90. OHCHR observed that the prohibition of collective expulsions was a rule of general international law inherent in the right to a fair trial. That rule implied the right to individualised examination via a procedure affording sufficient guarantees that the personal circumstances of the persons concerned would be genuinely and individually taken into account. The intervener further noted that the collective nature of the expulsion was determined more by the absence of an objective and reasonable examination of each individual case, or the existence of an examination that was unpredictable, unjust, inappropriate and in breach of the rule of law, than by the number of aliens expelled. Persons were to be classified as aliens if they did not possess the nationality of the State concerned, irrespective of whether or not they had refugee status. The prohibition on collective expulsions was also distinguishable from the principle of *non-refoulement* in that it formed part of the right to a fair trial. States were required to ensure that the victims of collective expulsion had the right to an effective remedy enabling them to challenge the measure in question and capable of preventing the taking of measures contrary to international human rights law and, where applicable, of affording redress for the violation, putting an end to its effects, erasing its consequences and compensating the individuals concerned. In order to be effective, the remedy against a collective expulsion measure had to have automatic suspensive effect.

91. OHCHR further submitted that borders were not zones of exclusion or exception from States' human rights obligations. The same applied to the "no-man's land" between border posts and in transit zones. It was the authority and control that a State exercised over a territory or person that was decisive for the applicability of its international legal obligations and not the individual's nationality or geographical location.

(d) The CEAR

92. Referring to its previous remarks concerning Spain's jurisdiction at the Melilla border crossing (see paragraph 47 above), the CEAR submitted that it was beyond doubt that the border between the Kingdom of Spain and the Kingdom of Morocco at Ceuta and Melilla was subject to the ordinary law. Accordingly, in the CEAR's view, there was no justification for applying the special rules for Ceuta and Melilla laid down by the tenth additional provision of the LOEX (see paragraph 19 above). The special rules allowed the administrative authorities to return migrants in the absence

of any procedure, in a manner wholly incompatible with the principle of legal certainty. It deprived the aliens who were returned of any opportunity to plead their case in a Spanish court and afforded them no procedural guarantees and no legal or linguistic assistance. Furthermore, the mere fact of including a reference to international human rights rules in paragraph 2 of the tenth additional provision (see paragraph 19 above) did not in itself equate to actual respect for human rights. That reference could not therefore legitimise an illegal act which did not provide for any administrative procedure or guarantees.

(e) The NGOs the AIRE Centre, Amnesty International, ECRE and the ICJ, acting collectively

93. The NGOs the AIRE Centre, Amnesty International, ECRE and the ICJ, acting collectively, submitted that Article 4 of Protocol No. 4 to the Convention prohibited collective expulsions and expulsions carried out without the situation of each individual being taken into account. Where Article 4 of Protocol No. 4 was engaged, it was incumbent on the State in question to put in place an effective remedy with suspensive effect, at least where there was a risk to life or a risk of ill-treatment or collective expulsion.

94. Article 19(1) of the Charter of Fundamental Rights of the European Union prohibited collective expulsions, which included interceptions, rejection at the border and indirect *refoulement*. States' obligations in that regard applied even if the persons concerned had omitted to apply explicitly for asylum or to describe the risks they would run in the event of their expulsion. The interveners also referred to Article 47 of the Charter of Fundamental Rights and submitted that, for a remedy to be considered effective, it had to be accessible (see paragraph 23 above).

95. With regard to the European Union *acquis* on the right of asylum, the third-party interveners referred to Directive 2013/32/EU, the relevant parts of which are cited at paragraph 30 above. They submitted that the asylum *acquis* applied not only to requests for international protection made by persons who had been authorised to enter a State's territory, but also to border procedures. The collective denial of access to the territory of a State for individuals at its land borders (and therefore under its jurisdiction), without consideration being given to each individual's circumstances, constituted a violation of Article 4 of Protocol No. 4. It also engaged the responsibility of the State under the European Union asylum *acquis* in relation to any individuals wishing to apply for international protection.

B. The Court's assessment

1. Admissibility

96. The Court considers that the Government's preliminary objection regarding the applicability *ratione materiae* of Article 4 of Protocol No. 4 in the present case is so closely linked to the substance of the applicants' complaint that it should be joined to the merits of the case.

97. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Brief summary of the principles laid down in the Court's case-law

98. The Court reiterates that collective expulsion is to be understood as 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 a detailed review of the relevant principles see, most recently, *Khlaifia and Others*, cited above, §§ 237 et seq., with further references). However, the background to the execution of the expulsion orders plays a role in determining whether there has been compliance with Article 4 of Protocol No. 4 (see *Georgia v. Russia (I)*, cited above, § 167).

99. The purpose of Article 4 of Protocol No. 4 is to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority (see *Hirsi Jamaa and Others*, cited above, § 177, and *Sharifi and Others*, cited above, § 210). However, the fact that a number of aliens are subject to similar decisions does not in itself suffice to conclude that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis (see *Hirsi Jamaa and Others*, cited above, § 184). The Court has also found that there was no violation of Article 4 of Protocol No. 4 where the lack of an individual expulsion decision could be attributed to the culpable conduct of the person concerned (see, among other authorities, *Hirsi Jamaa and Others*, cited above, § 184).

100. To date, the Court has found a violation of Article 4 of Protocol No. 4 in only six cases. In four of them (*Čonka v. Belgium*, no. 51564/99, §§ 60-63, ECHR 2002-I; *Georgia v. Russia (I)*, cited above; *Shioshvili and Others v. Russia*, no. 19356/07, 20 December 2016; and *Berdzenishvili and Others v. Russia*, nos. 14594/07 and 6 others, 20 December 2016), the expulsions concerned individuals of the same origin (Roma families from

Slovakia in the first case and Georgian nationals in the others). In the other two cases (*Hirsi Jamaa and Others* and *Sharifi and Others*, both cited above), the violation found related to the return of an entire group of people (migrants and asylum-seekers) which had been carried out without any proper checks being performed in advance as to the identity of each member of the group.

101. The Court reiterates its previous remarks concerning States' sovereignty as regards immigration policy and the prohibition on having recourse, in managing migratory flows, to practices which are not compatible with the Convention or the Protocols thereto (see paragraph 83 above). It takes note of the "new challenges" facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East (see *Khlaifia and Others*, cited above, § 241).

(b) Application of these principles in the present case

102. The Court must first address the Government's argument (see paragraph 68 above) to the effect that Article 4 of Protocol No. 4 was not applicable to the facts of the present case because the case did not concern the "expulsion" of a person who was on the territory of the respondent State in question. The Government further argued that, even supposing that an expulsion was in issue, it was not "collective", that is, it did not affect a group of persons linked by the same set of circumstances specific to that group.

103. The Court observes that, according to the International Law Commission, "'expulsion' means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State" (see Article 2 of the "Draft articles on the expulsion of aliens" cited at paragraph 37 above; see also *Khlaifia and Others*, cited above, § 243). It refers to the analysis contained in its judgment in *Hirsi Jamaa and Others* (cited above, §§ 166-80, with further references; see also *Sharifi and Others*, cited above, § 210) and reiterates that, under the Vienna Convention on the Law of Treaties, it is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. It must have regard to the fact that Article 4 of Protocol No. 4 forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions. The Court must also take account of any relevant rules and principles of international law applicable in relations between the Contracting Parties, as well as supplementary means of interpretation, including the *travaux préparatoires* to the Convention (see

Article 32 of the Vienna Convention). In that connection the Court has previously found that neither the wording of Article 4 of Protocol No. 4 itself nor the *travaux préparatoires* preclude the extraterritorial application of that provision (see *Hirsi Jamaa and Others*, cited above, and in particular §§ 173-74).

104. Accordingly, the Court does not deem it necessary to establish, in the present case, whether the applicants were expelled after entering Spanish territory or whether they were turned back before managing to do so, as argued by the Government. Given that even interceptions on the high seas come within the ambit of Article 4 of Protocol No. 4 (see *Hirsi Jamaa and Others*, cited above), the same must also apply to the allegedly lawful refusal of entry to the national territory of persons arriving in Spain illegally.

105. The Court observes that it is beyond doubt that the applicants, who were under the continuous and exclusive control of the Spanish authorities (see also paragraphs 50 et seq. above), were removed and returned to Morocco against their wishes; this clearly amounts to an “expulsion” within the meaning of Article 4 of Protocol No. 4 (see *Sharifi and Others*, cited above, § 212).

106. It remains to be ascertained whether that expulsion was “collective”.

107. The Court observes that in its *Čonka* judgment (cited above, §§ 61-63), in order to assess the existence of a collective expulsion, it examined the circumstances of the case and verified whether the deportation orders had taken into consideration the specific situation of the individuals concerned. The applicants in the present case were part of a group of between 75 and 80 migrants from sub-Saharan Africa who had attempted to enter Spain illegally via the Melilla border crossing (see paragraph 13 above). They were made subject to a general measure consisting in containing and repelling the migrants’ attempts to cross the border illegally (see paragraph 17 above). The Court notes that in the present case the removal measures were carried out in the absence of any prior administrative or judicial decision. At no point were the applicants made subject to any procedure. The issue whether there were sufficient guarantees demonstrating that the personal circumstances of those concerned had been genuinely and individually taken into account does not even arise in the present case, in the absence of any examination of the individual situation of the applicants, who were not subjected to any identification procedure by the Spanish authorities. In these circumstances, the Court considers that the procedure followed is incapable of casting doubt on the collective nature of the expulsions complained of.

108. In view of the foregoing, the respondent Government’s objection *ratione materiae* must be dismissed. The Court concludes that the

applicants' expulsion was of a collective nature, in breach of Article 4 of Protocol No. 4. There has therefore been a violation of that provision.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

109. The applicants complained that it had been made impossible for them to have their identity established, to explain their individual circumstances, to challenge their immediate return to Morocco before the Spanish authorities by means of a remedy with suspensive effect, and to have the risk of ill-treatment they ran in that State taken into consideration. They relied on Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 to the Convention. Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ...”

A. The parties' submissions

110. The Government observed that the right to an effective domestic remedy was a procedural right which had to be linked to a possible violation of a substantive right under the Convention or the Protocols thereto. In paragraph 15 of its admissibility decision of 7 July 2015 the Court had found that “in the absence of an arguable complaint of a violation of Article 3 of the Convention, the complaint under Article 13 is unsustainable”. The Government therefore argued that, since there had likewise, in their view, been no violation of Article 4 of Protocol No. 4 in the present case, no violation of Article 13 of the Convention could be found.

111. The Government added that, in any event, the applicants could have lodged an application for international protection at the border crossing while they were on Moroccan territory. They would then have been able to avail themselves of the relevant administrative and judicial procedures.

112. The applicants, for their part, submitted that in cases concerning a violation of Article 4 of Protocol No. 4 the available remedies had to have automatic suspensive effect in order to be deemed effective for the purposes of Article 13 of the Convention. They contended that they had not at any point been subjected to an identification procedure of any kind, a fact not disputed by the Government, and complained of a lack of legal and linguistic assistance and of any procedure in respect of their *de facto* expulsion to Morocco. In their view, their assertions were borne out by the written submissions of the third-party interveners, summarised above, and especially those of the Human Rights Commissioner and the CEAR. The applicants also referred to the principles inherent in Article 13 of the Convention, as reiterated in the case of *A.C. and Others v. Spain*

(no. 6528/11, 22 April 2014). They argued that, in the context of immediate returns, the requirements of Article 13 could not be satisfied since the aliens in question were deprived of any access to procedures and to legal safeguards, and the returns were carried out in the absence of any individual decision amenable to appeal.

B. The Court's assessment

1. Admissibility

113. The Court considers that this complaint raises complex issues of law and fact which cannot be determined without an examination of the merits; it follows that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further notes that it is not inadmissible on any other grounds, and that no other preliminary objection was raised by the Government in this regard. It must therefore be declared admissible.

2. Merits

(a) Principles laid down in the Court's case-law

114. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint. However, the remedy required by Article 13 must be “effective” in practice as well as in law (see *Hirsi Jamaa and Others*, cited above, § 197, and *Khlaifia and Others*, cited above, § 268).

115. As regards the requirement for the remedy to have suspensive effect, the Court has taken different approaches, taking into account the risk of potentially irreversible harm which applicants would face in the destination country in the event of their removal from the territory of the respondent State. For instance, it found that no such risk of harm existed where the person concerned argued that his expulsion would interfere with his right to respect for his private and family life (see *De Souza Ribeiro v. France* [GC], no. 22689/07, § 83, ECHR 2012), despite finding a violation of Article 13 of the Convention read in conjunction with Article 8 on other grounds. In its judgment in *Khlaifia and Others* (cited above) the Court held that, where an applicant alleged that the procedure followed in

ordering his or her expulsion had been “collective” in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention, the Convention did not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely required that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum (see *Khlaifia and Others*, cited above, § 279). The Court therefore concluded in *Khlaifia and Others* that the lack of suspensive effect of a remedy against a removal decision did not in itself constitute a violation of Article 13 of the Convention where, as in that case, the applicant did not allege that there was a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country.

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

116. The applicants complained of the lack of an effective remedy by which to challenge their expulsion from the perspective of its “collective” aspect.

117. The Court has just found that the applicants’ expulsion to Morocco amounted to a violation of Article 4 of Protocol No. 4 (see paragraph 108 above). The applicants’ complaint on this point is therefore “arguable” for the purposes of Article 13 of the Convention (see *Hirsi Jamaa and Others*, cited above, § 201).

118. The Court notes that in the present case the issue of the automatic suspensive nature of the remedy does not even arise, since the applicants did not have access, before their removal to Morocco, to any procedure aimed at identifying them and verifying their personal situation. The Government did not comment on the fact that the *Guardia Civil* officials had not identified the applicants, merely stating that the identity of the persons concerned was unknown. They nevertheless argued that the applicants had not succeeded in proving their identity before the Court (see paragraph 56 above).

119. The Court attaches particular weight to the applicants’ version because it is corroborated by a large number of witness statements gathered by, among others, UNHCR and the Human Rights Commissioner.

120. It has found above, in the context of Article 4 of Protocol No. 4, that the applicants were turned back immediately by the border authorities and had no access to an interpreter or to any official who could provide them with the minimum amount of information required with regard to the right of asylum and/or the relevant procedure for appealing against their expulsion. There is a clear link in the present case between the collective expulsion to which the applicants were subjected at the Melilla border fence and the fact that they were effectively prevented from having access to any

domestic procedure satisfying the requirements of Article 13 of the Convention (see *Sharifi and Others*, cited above, § 242).

121. Having regard to the circumstances of the present case and the immediate nature of their *de facto* expulsion, the Court considers that the applicants were deprived of any remedy which would have enabled them to lodge their complaint under Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before their removal.

122. Accordingly, the Court considers that there has also been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 to the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

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

A. Damage

124. The applicants claimed 5,000 euros (EUR) each in respect of non-pecuniary damage. In their view, this amount was justified by the absolute nature of the prohibition on collective expulsions, the feelings of injustice, powerlessness, embarrassment, distress and frustration they had experienced, and the impossibility of obtaining *restitutio in integrum*.

125. The Government submitted that the applicants’ just satisfaction claims were “unacceptable”.

126. In view of the particular circumstances of the instant case, the Court considers that the sums claimed by the applicants are reasonable and awards them in full. It therefore decides to award the applicants EUR 5,000 each in respect of non-pecuniary damage, making a total of EUR 10,000 for both applicants.

B. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Dismisses*, unanimously, the preliminary objections raised by the respondent Government as to the applicants' lack of victim status and the non-exhaustion of domestic remedies (see paragraph 66 above);
2. *Decides*, unanimously, to join to the merits the respondent Government's objection *ratione materiae*, and to dismiss it (see paragraph 108 above);
3. *Declares*, unanimously, the applications admissible;
4. *Holds*, unanimously, that there has been a violation of Article 4 of Protocol No. 4 to the Convention;
5. *Holds*, unanimously, that there has been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4;
6. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in French, and notified in writing on 3 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Branko Lubarda
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

B.L.
F.A.

PARTLY DISSENTING OPINION OF JUDGE DEDOV

(Translation)

I regret that I am unable to subscribe unreservedly to the view of my colleagues in the present case. I voted in favour of finding a violation of Article 4 of Protocol No. 4 to the Convention, but I believe that the finding of a violation is sufficient by way of non-pecuniary damage. It is clear from the facts of the case that the applicants' situation was not an urgent one resulting from persecution or an immediate threat to their lives, integrity or dignity. Moreover, they had crossed the border illegally and in a violent manner. The authorities, for their part, examined the individual situation of both applicants when they crossed the border again, as required by the Convention. Consequently, even as regards its substance, the violation cannot be considered a serious one.

All the circumstances are clear to me. I have just one concern as regards this case and numerous other similar cases examined by the Court, namely the fact that the Court, in a situation of unlawful conduct or even violence, maintains (albeit not in all cases) the high standards it requires of the authorities. I can imagine how shocked the Spanish border guards must have been by this invasion, during which the applicants, together with numerous other migrants, launched an assault on the border. We think that State agents should remain calm and impartial in all circumstances because they are trained to deal with any "standard" situation. But they are people like you and I who have emotions; they also deserve our respect, and we should take that into consideration. We should therefore ask ourselves who was in the more vulnerable position in the present case.