UNHCR's oral intervention before the European Court of Human Rights
Grand Chamber hearing in the case of *N.D. and N.T. v. Spain*
(Application Nos. 8675/15 and 8697/15)
Strasbourg, 26 September 2018

Mr. President, Distinguished Judges,

Introduction

The Office of the United Nations High Commissioner for Refugees would like to thank the Court for allowing UNHCR to intervene as a third party in the present case, including at today's hearing. It is an honour for me, as the Director of the Division of International Protection, to represent UNHCR on this occasion.

This submission is made in the exercise of UNHCR's mandate and particularly, supervisory responsibility in accordance with its Statute[1] and Art. 35 of the 1951 Convention relating to the Status of Refugees, as the present case raises issues of law and State practice regarding the scope and the implications of the non-*refoulement* obligation under international refugee and human rights law. It is also informed by our detailed knowledge of the situation at the Ceuta and Melilla enclaves.

The present case is of particular interest to UNHCR and to many Member States of the Council of Europe as it deals with push-back practices or return arrangements at a land border. UNHCR recognizes, of course, the sovereign right of States to establish their own immigration policies provided they are in compliance with their treaty obligations, including those arising from the 1951 Convention and the European Convention on Human Rights.

As this Court has repeatedly indicated, problems and new challenges facing European States in terms of migration cannot justify practices incompatible with the standards set out in the ECHR.[2]

[1] Statute of the Office of the UNHCR, para. 8(a).

[2] ECtHR, *Khlaifia and others v. Italy*, Application no. 16483/12, para. 241;
ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, para. 223;
ECtHR, *Hirsi Jamaa and Others v. Italy*, Application. no. 27765/09, paras. 122, 176 and 179.

This submission will expand and elaborate upon UNHCR's key positions reflected in our written interventions regarding:

- **The situation at the Ceuta and Melilla enclaves**, in particular the lack of access for asylum applicants from Sub-Saharan Africa to any identification procedures enabling an individual assessment of their situation in the context of summary returns;
- **The scope and content of the prohibition of collective expulsion and its implications regarding non-*refoulement* under international refugee and human rights law**.

1. Allow me first to briefly describe the situation at the Melilla and Ceuta.

UNHCR was asked by the Court by way of a letter dated 16 August 2018 whether "the applicants, at the time of the events, have a real possibility to access the border checkpoint of Beni-Enzar and request asylum there?"

As a third party intervener, UNHCR does not pronounce itself on the claims of the individual applicants, however, as outlined in its written interventions, UNHCR reiterates that at the material time of the incidents at issue in the present case and until November 2014, when authorized asylum border posts were created by the Spanish authorities, there was no mechanism in place for persons seeking international protection, either at Beni-Enzar, the main Melilla/Morocco border-crossing post, or anywhere else, to safely access the territory of Spain in order to apply for asylum.[3]

Furthermore, prior to that date, the **procedural guarantees provided for in the national law**, which include individual identification, access to a lawyer and an interpreter[4] in cases of the

[3] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 15 November 2015, 8675/15 and 8697/15, para. 2.3.1, http://www.refworld.org/docid/59d3a81f4.html.

[4] The guarantees found in Articles 23.2 and 23.3 of the Royal decree 557/2011 are as follows:
(i) these foreigners must be taken to a police station (of the national police force),
(ii) a lawyer must be appointed for them,
(iii) where applicable, an interpreter must be provided for them,
(iv) they must be identified,
(v) a return decision –must be issued by the Government Sub-Delegate or Delegate, where applicable, and
(vi) the return itself must be carried out by the national police force.
Article 22.2 of the Aliens Act also provides for the right to legal assistance (which is free of charge when the person lacks sufficient economic means) and the right to an interpreter.

return of foreigners who attempt to enter Spain through an unauthorised border crossing provided for in the 2009 Aliens Act and its regulations had **not been properly implemented** at Melilla and Ceuta**, resulting in summary returns or 'push backs' in breach of the aforementioned procedural guarantees**.

The Court further asked "at the time of the events, i.e. prior to 1 September 2014, what were the reasons for the alleged impossibility or difficulties, referred to by some of the third parties (Human Rights Commissioner, UNHCR, CEAR), for persons from Sub-Saharan Africa to access the Spanish Embassy in Rabat, the Spanish Consulate in Nador"?

In response to this question, UNHCR wishes to inform the Court that notwithstanding Article 38 of the Spanish Asylum Law, promulgated in October 2009, which grants the Ambassador of Spain discretion to allow persons whose physical integrity is at risk and are in need of international protection to be transferred to Spain to apply for such,[5] no procedure for seeking international protection in a Spanish Consulate or Embassy has been established or applied except for family reunification purposes with recognized refugees in Spain.[6]

UNHCR has expressed concerns that, despite the amendments to the Aliens Act which came into force on 1 April 2015, i.e. after the incidents at issue in the present case, the newly introduced legal concept of **'rejection at the border'[7] at Melilla and Ceuta are not carried**

[5] Law 12/2009 of 30 October, Regulating The Right Of Asylum And Subsidiary Protection.
Article 38 (*Applications for international protection in embassies and consulates*) states:
In order to address cases that arise outside the national territory, provided that the applicant is not a national of the country in which the diplomatic mission is and their physical integrity is at risk, the ambassadors of Spain may promote the transfer of the asylum-seekers to Spain to make possible the presentation of the request in accordance with the procedure laid down in this law. The regulation(s) implementing this law will expressly determine the conditions of access to the embassies and consulates of the applicants, as well as the procedure to assess the needs of transfer to Spain of the same.

[6] Support for this is found in the Spanish Ombudsman's report ('Asylum in Spain', 2016, para 4.1 at page 49): *…Law 12/2009 does not allow applications for asylum to be lodged at diplomatic mission offices and leaves the possibility of promoting the transfer of the applicant to Spain in the hands of the ambassador if he or she deems that the applicant is in physical danger.* This has also been noted by ECRE ('Asylum Information Database, National Country Report: Spain', 2017 Update, March 2018, at page 15): *Asylum applications cannot be submitted through embassies or consular representations outside the Spanish territory, although the Asylum Act initially foresaw that possibility.*

[7] The proposal introduces the concept of "rejection at the border" ("rechazo en frontera" in Spanish), and aimed at legalizing the automatic return of people trying to cross border fences into the enclaves of Ceuta and Melilla located in North Africa. See UNHCR concerned over attempt to legalize automatic returns from Spanish enclaves, 28 October 2014, at http://www.refworld.org/docid/54575fd44.html.

out in compliance with international refugee law and European human rights standards because the duty to ensure a reasonable and objective examination of the particular case of each individual alien **has not been fully implemented in practice** (as set out in our written submissions at para 2.2.2. and supplementary observations at para 2.1.3.)[8], which may in certain instances, lead to the violation of the obligation of non-*refoulement* under international refugee and human rights law.

UNHCR is further concerned that access to the territory and a fair and efficient asylum procedure, including where relevant, an admissibility procedure, at the Melilla border crossing is, in practice, only available to persons from Middle East and North African countries. Access is virtually impossible for Sub-Saharan Africans who are prevented from approaching the border area.[9]

Statistics from the Spanish authorities indicate that 12,700 asylum-seekers from Middle Eastern and North African countries have been registered by the Spanish authorities at the Beni-Enzar border post since the end of 2014.

In contrast, approximately 35 asylum-seekers from Sub-Saharan African countries were registered during the same period and only because they had managed to enter the enclave, not through the Beni-Enzar border, but by other means. UNHCR observes further that to date, not a single person of any nationality has been able to claim asylum at El Tarajal, the main border crossing between Ceuta and Morocco.

[8] According to UNHCR, the duty to ensure that 'rejections at the border' are in compliance with international human rights standards, has not been fully implemented in practice because procedures allowing for the fair and efficient identification of persons in need of international protection are absent. The Spanish authorities are committed to implement a protocol for all actors involved (mainly the Guardia Civil and Policia Nacional). This protocol has not yet been issued (…)". See para. 2.2.2. of UNHCR's initial submissions at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=59d3a81f4.

[9] Amnesty International, *Fear and Fences: Europe's Approach to Keeping Refugees at Bay*, 17 November 2015, EUR 03/2544/2015, Page 40, http://www.refworld.org/docid/5652e0764.html; Jesuit Migrants Service Spain, *No protection at the border*, July 2016, page 29, http://www.asylumineurope.org/sites/default/files/resources/no-protection-at-the-border_sjm.pdf, Human Rights Watch, *Spain: Migrants Held in Poor Conditions*, 31 July 2017, https://www.hrw.org/news/2017/07/31/spain-migrants-held-poor-conditions.

Since the entry into force of the amendment to the Aliens Act on 1 April 2015, **summary returns (or push-backs) at the Melilla and Ceuta land borders continue to be reported on a regular basis**.

UNHCR estimates that 1,500 persons were summarily returned[10] by the Spanish border authorities (Guardia Civil) without any proper individual identification procedure in several incidents in Ceuta and Melilla since that date.

Mr. President, Distinguished Judges,

2. Allow me now to elaborate on the scope and the content of the prohibition of collective expulsions to show why the situation at the Melilla and Ceuta enclaves remains problematic.

As the learned members of this Court have stated, the purpose of Article 4 of Protocol No.4 is "to **prevent States being able to remove certain aliens without examining their personal circumstances** and, consequently, without enabling them to put forward their arguments against the measure."[11] In *Hirsi and Others v. Italy*, the Court found that the push-back of the applicants by the Italian authorities to Libya were "carried out without any form of examination of each applicant's individual situation" and that the Italian authorities did not carry out any identification procedures. Moreover, the Court noted that "the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers."[12]

The Court has gone on to find 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

[10] The Spanish Ministry has acknowledged that there are no official records of the number of 'push-backs' notably in the response of the Government of Spain to a parliamentary question on this matter at http://www.senado.es/web/expedientdocblobservlet?legis=12&id=45951. UNHCR's estimate of the number of persons who have been subjected to summary returns is based on border monitoring it has conducted and related follow-up activities whenever push-backs occurred (through the collection of individual testimonies, reports from civil society organizations in Morocco and media and press statements by local government authorities.)

[11] *Hirsi Jamaa and Others v. Italy*, para. 185.
[12] *Ibid*.

basis of a reasonable and objective examination of the particular case of each individual alien of the group."[13]

The prohibition of collective expulsion therefore involves the "existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned are actually the subject of a detailed examination."[14]

While these guarantees may vary depending on the circumstances of the case, in its *Khlaifia* judgment, the Court noted in particular the registration of the identity and the nationality of the individuals as an important indicator of the existence of an identification procedure in determining compliance with Article 4 Protocol 4.

In this connection, **the Court recalled that each alien should have a genuine and effective possibility of submitting arguments against his or her expulsion, and to have those arguments examined in an appropriate manner by the authorities of the respondent State**.[15] The Court further underlined that "in an expulsion procedure the possibility of lodging an asylum application is a paramount safeguard".[16]

In UNHCR's view, the procedural guarantees protecting the persons concerned against collective expulsion are therefore essential also to prevent possible violations of the non-*refoulement* obligation under the 1951 Convention. Indeed, the prohibition of *refoulement* is engaged wherever there is conduct [for instance, during border checks, 'push-backs' or forced removals] exposing an individual to a risk of being subject to persecution or ill-treatment in another country,[17] if the person has expressed a fear of such or the individual circumstances or characteristics of the applicant or group indicates a risk of *refoulement* of which the State ought to be aware.

The procedural guarantees ensuring compliance with Article 4 Protocol 4 contribute to the respect of the non-*refoulement* obligation under international refuge law. Indeed, without a

[13] *Khlaifia and others v. Italy*, para. 237.
[14] *Hirsi and Others v. Italy*, para. 185.
[15] *Khlaifia and others*, para. 248.
[16] *Ibid.*, para. 247.
[17] UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy, 22 June 2011, Application no. 27765/09,p. 4, http://www.refworld.org/docid/4e0356d42.html

genuine and effective possibility for persons concerned to submit arguments against their expulsion, and of having those arguments examined in an appropriate manner by adequately trained authorities, their potential need for international protection would not necessarily be identified.

In conclusion, Mr. President, Distinguished Judges,

UNHCR considers that **Spain's practice of rejecting at the border and pushing back** persons who may be in need of international protection **without a proper identification procedure, and without taking into account the circumstances, rights and needs of each individual is at variance with the prohibition of collective expulsion and may lead to a violation of the obligation of non-*refoulement***.[18]

I thank you for your attention.

[18] UNHCR written intervention in the case of ND and NT, para. 4.1.