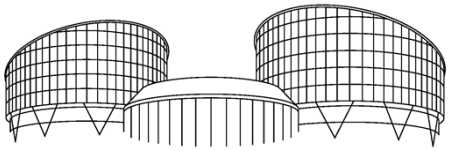

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

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

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

JUDGMENT

Art 4 P 4 • Prohibition of collective expulsion of aliens • Immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross it in an unauthorised manner and en masse • No distinction between non-admission and expulsion of aliens for the purposes of applicability of Art 4 P 4 • Availability of genuine and effective access to means of legal entry allowing to claim protection under Art 3 • Absence of cogent reasons for failure to use official entry procedures, which were based on objective facts for which the respondent State was responsible • Lack of individual removal decisions being a consequence of the applicants' own conduct

STRASBOURG

13 February 2020

This judgment is final but it may be subject to editorial revision.

TABLE OF CONTENTS

PROCEDURE **5**

THE FACTS **8**

I. THE BACKGROUND TO THE CASE **8**

II. THE CIRCUMSTANCES OF THE CASE **9**

A. Origins of the case 9

B. The events of 13 August 2014 9

C. The applicants' subsequent entry into Spain 10

RELEVANT LEGAL FRAMEWORK AND PRACTICE **12**

I. DOMESTIC LAW AND PRACTICE **12**

A. Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration ("the LOEX") 12

B. Law 12/2009 of 30 October 2009 on asylum and subsidiary protection 13

C. Royal Decree 203/1995 of 10 February 1995 (implementing regulations for the Law on asylum) 14

D. Royal Decree 557/2011 of 20 April 2011 (implementing regulations for the LOEX) 15

E. The *Guardia Civil* border control operations protocol of 26 February 2014 (as applicable at the relevant time), which introduced the term "operational border" 16

F. Circular letter to all Spanish ambassadors 17

G. The Spanish Ombudsperson's Office 18

II. EUROPEAN UNION LAW **19**

A. Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009) 19

B. Charter of Fundamental Rights of the European Union 19

C. Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009) 20

D. The Agreement on the accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990 22

E. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the

rules governing the movement of persons across borders (Schengen Borders Code) 22
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) (codification) 24
G. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("the Return Directive") 24
1. The text of the Directive 24
2. Relevant case-law of the CJEU in relation to this Directive 26
H. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [subsequent version: Directive 2013/32/EU of 26 June 2013] 27
I. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 30
J. European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)) 31

III. COUNCIL OF EUROPE DOCUMENTS 32

A. Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies 32
B. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 33
C. The 2015 annual activity report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe ("the Commissioner for Human Rights"), dated 14 March 2016 35
D. Report dated 3 September 2018 of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018 (SG/Inf(2018)25) 36
E. Resolution 2299 (2019) of the Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019: Pushback policies and practice in Council of Europe member States 39

IV. OTHER INTERNATIONAL MATERIALS 40

A. Charter of the United Nations (UN Charter), signed on 26 June 1945 in San Francisco 40
B. Vienna Convention on the Law of Treaties of 23 May 1969 41

C. Geneva Convention of 28 July 1951 relating to the Status of Refugees 41
D. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (UNCAT) 43
E. Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967 (Resolution 2312 (XXII)) 44
F. International Law Commission's Draft Articles on the Expulsion of Aliens 44
G. Conclusions on International Protection adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 49
H. Views adopted by the Committee on the Rights of the Child on 12 February 2019 under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016 50

THE LAW 53

I. PRELIMINARY ISSUES 53
A. Continued examination of the case – Article 37 § 1 (a) 53
B. Assessment of the evidence and establishment of the facts by the Court 57

II. THE ISSUE OF JURISDICTION UNDER ARTICLE 1 OF THE CONVENTION 59
A. The Chamber judgment 59
B. The parties' submissions 60
C. The third parties' observations 60
D. The Court's assessment 62
1. General principles 62
2. Application to the present case 63

III. THE GOVERNMENT'S OTHER PRELIMINARY OBJECTIONS 64
A. The applicants' alleged loss of victim status 64
B. Exhaustion of domestic remedies 65
1. The Government 65
2. The applicants 66
3. The Court's assessment 67

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION 67
A. The Chamber judgment 68
B. The parties' submissions before the Grand Chamber 68
1. The Government 68
2. The applicants 71
C. The third parties' observations 73

1. The Commissioner for Human Rights of the Council of Europe 73
2. The third-party Governments 73
(a) The Belgian Government 73
(b) The French Government....75
(c) The Italian Government....75
3. The other third-party interveners 76
(a) UNHCR 76
(b) OHCHR....77
(c) The CEAR 77
(d) The AIRE Centre, Amnesty International, the European Council on Refugees and Exiles (ECRE), the Dutch Council for Refugees and the International Commission of Jurists, acting jointly 78
D. The Court's assessment 79
1. Applicability 79
(a) General principles....80
(b) Application to the present case....86
2. Merits....87
(a) General principles....87
(b) Application to the present case....90
(i) The fact that there were only two applicants....90
(ii) The applicants' conduct 90
(α) The parties' submissions 90
(ß) The Court's assessment 91

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 4 OF PROTOCOL No. 4 98
A. Admissibility....99
B. Merits 100
1. The Chamber judgment 100
2. The Court's assessment 100

CONCURRING OPINION OF JUDGE PEJCHAL 103

PARTLY DISSENTING OPINION OF JUDGE KOSKELO....109

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

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Angelika Nußberger,
Robert Spano,
Vincent A. De Gaetano,
Ganna Yudkivska,
André Potocki,
Aleš Pejchal,
Faris Vehabović,
Mārtiņš Mits,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pauliine Koskelo,
Marko Bošnjak,
Tim Eicke,
Lətif Hüseynov,
Lado Chanturia,
María Elósegui, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 26 September 2018, 3 July and 5 December 2019,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 8675/15 and 8697/15) against the Kingdom of Spain. The applications were lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Malian national, N.D., the applicant in application no. 8675/15 ("the first applicant"), and a national of Côte d'Ivoire, N.T., the applicant in application no. 8697/15 ("the second applicant"), on 12 February 2015.

2. The applicants were represented by Mr C. Gericke and Mr G. Boye, 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 RigM.A. v. lihts Legal Department, Ministry of Justice.

3. In their applications 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, which amounted in their view to a collective expulsion, of the lack of an effective remedy in that regard and of the risk of ill-treatment which they allegedly faced in Morocco. They submitted that they had had no opportunity to be identified, to explain their individual circumstances or to challenge their return by means of a remedy with suspensive effect.

4. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). 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 (Rule 54 § 3).

5. Mr Nils Muižnieks, Commissioner for Human Rights of the Council of Europe ("the Commissioner for Human Rights") exercised his right to participate in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2).

6. The Court also received written observations from the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations 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, all of which had been given leave by the President to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

7. 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).

8. In a judgment of 3 October 2017 a Chamber of the Third Section of the Court unanimously declared the remaining parts of the applications admissible and held that there had been a violation of Article 4 of Protocol No. 4 and of Article 13 of the Convention read in conjunction with Article 4 of Protocol No. 4. The Chamber was 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. Judge Dedov expressed a partly dissenting opinion concerning the award of just satisfaction.

9. On 14 December 2017 the Government requested the referral of the case to the Grand Chamber under Article 43 of the Convention and Rule 73. On 29 January 2018 the panel of the Grand Chamber granted that request.

10. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

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

12. The Belgian, French and Italian Governments, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3) submitted third-party observations. Observations were also received from the Commissioner of Human Rights of the Council of Europe and from UNHCR, the CEAR and, acting collectively, the AIRE Centre, Amnesty International, ECRE and the International Commission of Jurists, joined by the Dutch Council for Refugees. The OHCHR's written observations in the Chamber proceedings were also included in the file. The parties replied to these observations in the course of their oral submissions at the hearing (Rule 44 § 6).

13. Ms. Dunja Mijatović, Commissioner for Human Rights since 1st April 2018, spoke at the hearing, in accordance with Article 36 § 3 of the Convention. UNHCR, which had been given leave by the President to participate in the oral proceedings before the Grand Chamber in accordance with Article 36 § 2, also took part in the hearing.

14. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 September 2018.

There appeared before the Court:

– *for the applicants*
Mr C. GERICKE,
Mr G. BOYE, *Counsels,*
Ms I. ELBAL,
Ms H. HAKIKI,
Mr W. KALECK
Ms R. MORENO, *Advisers;*

– *for the Government*
Mr R.-A. LEÓN CAVERO, *Agent,*
Mr F. DE A., SANZ GANDASEGUI,
Mr A. BREZMES MARTÍNEZ DE VILLAREAL, *Co-Agents,*
Mr M. MONTOBBIO, *Permanent Representative of Spain to the Council of Europe*
Mr F. CORIA RICO,
Mr J. RUEDA JIMÉNEZ,
Mr L. TARÍN MARTÍN,
Mr J. VALTERRA DE SIMÓN, *Advisers*;

– *for the Commissioner of Human Rights of the Council of Europe*
Ms D. MIJATOVIĆ, *Commissioner*,
Ms F. KEMPF,
Ms A. WEBER, *Advisers*;

– *for the Office of the United Nations High Commissioner for Refugees*
Ms G. O'HARA, Director, Division of International Protection,
Ms M. GARCÍA,
Mr R. WANIGASEKARA, *Advisers*.

The Court heard addresses by Mr León Cavero, Mr Gericke, Mr Boye, Ms Mijatović and Ms O'Hara, and the replies by Mr León Cavero, Mr Gericke, Mr Boye and Ms O'Hara to questions put by the judges.

THE FACTS

I. THE BACKGROUND TO THE CASE

15. The autonomous city of Melilla is a Spanish enclave of 12 sq. km located on the north coast of Africa and surrounded by Moroccan territory. It lies on the migration route from North and sub-Saharan Africa which is also used by Syrian migrants. The border between Melilla and Morocco is an external border of the Schengen area and thus provides access to the European Union. As a result, it is subject to particularly intense migratory pressure.

16. The Spanish authorities have built a barrier along the 13 km border separating Melilla from Morocco, which since 2014 has comprised three parallel fences. The aim is to prevent irregular migrants from accessing Spanish territory. The barrier consists of a six-metre-high, slightly concave, fence ("the outer fence"); a three-dimensional network of cables followed by a second, three-metre-high fence; and, on the opposite side of a patrol road, another six-metre-high fence ("the inner fence"). Gates have been built into the fences at regular intervals to provide access between them. A sophisticated CCTV system (including infrared cameras), combined with movement sensors, has been installed and most of the fences are also equipped with anti-climbing grids.

17. There are four land border crossing points between Morocco and Spain, located along the triple fence. Between these crossings, on the Spanish side, the *Guardia Civil* has the task of patrolling the land border and the coast to prevent illegal entry. Mass attempts to breach the border fences are organised on a regular basis. Groups generally comprising

several hundred aliens, many of them from sub-Saharan Africa, attempt to enter Spanish territory by storming the fences described above. They frequently operate at night in order to produce a surprise effect and increase their chances of success.

18. Those migrants who do not manage to evade the *Guardia Civil*, and whom the officials succeed in persuading to come down of their own accord using ladders, are taken back immediately to Morocco and handed over to the Moroccan authorities, unless they are in need of medical treatment (see paragraph 58 below).

19. At the time of the events this *modus operandi* was provided for only by the *Guardia Civil* "Border control operations protocol" of 26 February 2014 and by service order no. 6/2014 of 11 April 2014 (see paragraph 37 below).

20. On 1 April 2015 the tenth additional provision of Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration ("the LOEX") came into force. The additional provision was inserted by means of Institutional Law 4/2015 of 30 March 2015 laying down special rules for the interception and removal of migrants in Ceuta and Melilla (see paragraphs 32 and 33 below).

II. THE CIRCUMSTANCES OF THE CASE

A. Origins of the case

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

22. The first applicant left his village in Mali on account of the 2012 armed conflict. After spending a few months in a refugee camp in Mauritania and then in Algeria, he arrived in Morocco in March 2013 and reportedly lived in the "informal" migrants' camp on Mount Gurugu, close to the Melilla border. He stated that there had been several raids by the Moroccan security forces and that he had broken his leg during the summer of 2014 while fleeing from them.

23. The second applicant arrived in Morocco in late 2012 after travelling through Mali. He also stayed in the Mount Gurugu migrants' camp.

B. The events of 13 August 2014

24. On 13 August 2014 two attempted crossings took place, organised by smuggling networks: one at 4.42 a.m. involving 600 people, and another at 6.25 a.m. involving 30 people. The applicants stated that they had taken part in the first of these. They had left the Mount Gurugu camp that day and tried to enter Spain together with their group, scaling the outer fence

together with other migrants. According to the Government, the Moroccan police prevented around 500 migrants from scaling the outer fence, but around a hundred migrants nevertheless succeeded. Approximately seventy-five migrants managed to reach the top of the inner fence, but only a few came down the other side and landed on Spanish soil, where they were met by the members of the *Guardia Civil*. The others remained sitting on top of the inner fence. The *Guardia Civil* officials helped them to climb down with the aid of ladders, before escorting them back to Moroccan territory on the other side of the border through the gates between the fences.

25. The first applicant stated that he had managed to reach the top of the inner fence and had remained there until the afternoon. The second applicant said that he had been struck by a stone while he was climbing the outer fence and had fallen, but had subsequently managed to get to the top of the inner fence, where he had remained for eight hours. At around 3 p.m. and 2 p.m. respectively the first and second applicants reportedly climbed down from the fence with the help of Spanish law-enforcement officials who provided them with ladders. As soon as they reached the ground they were allegedly apprehended by *Guardia Civil* officials who handcuffed them, took them back to Morocco and handed them over to the Moroccan authorities. The applicants alleged that they had not undergone any identification procedure and had had no opportunity to explain their personal circumstances or to be assisted by lawyers or interpreters.

26. The applicants were then reportedly transferred to Nador police station, where they requested medical assistance. Their request was refused. They were allegedly taken subsequently, together with other migrants 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 been returned to Morocco on 13 August 2014.

27. Journalists and other witnesses were at the scene of the attempt to storm the border fences and the subsequent events. They provided video footage which the applicants submitted to the Court.

C. The applicants' subsequent entry into Spain

28. On 2 December and 23 October 2014 respectively, in the context of further attempts to storm the fences, the first and second applicants succeeded in climbing over the fences and entering Melilla. Two sets of proceedings were instituted against them. The applicants were subsequently issued with expulsion orders.

29. An order for the first applicant's expulsion was issued on 26 January 2015. He was accommodated in the temporary detention centre for aliens

(CETI) in Melilla before being transferred to the Barcelona CETI in March 2015.

He lodged an administrative appeal (*recurso de alzada*) against the expulsion order.

On 17 March 2015, while this appeal was still pending, the first applicant lodged an application for international protection. His application was rejected on 23 March 2015 on the grounds that it was unfounded and that the applicant was not at risk, as the UNHCR office had issued an opinion on 20 March 2015 finding that the first applicant's circumstances did not justify granting him international protection. A request for review lodged by the applicant was rejected by a decision of the Interior Ministry's Asylum and Refugees Office on 26 March 2015, following a further negative UNHCR opinion issued on the same day.

The stay of the administrative expulsion proceedings was therefore lifted and the first applicant was sent back to Mali by airplane on 31 March 2015.

The previous day an appeal against the decision refusing international protection had been lodged with the administrative courts, but was withdrawn by the applicant's representative on 15 September 2015.

The first applicant's administrative appeal against the order for his expulsion was declared inadmissible by a decision of 19 May 2015. As no appeal against that decision was lodged with the administrative courts, the order became final on 26 September 2015.

According to the first applicant's account, he has been living in very precarious circumstances since his return to Mali and has no fixed address.

30. An order for the second applicant's expulsion was issued on 7 November 2014 and was upheld on 23 February 2015 following the dismissal of his administrative appeal (*de alzada*). He was accommodated in the Melilla CETI and in November 2014 was transferred to the Spanish mainland. The order for his expulsion became final on 11 July 2015. The second applicant did not apply for international protection. On expiry of the maximum period of 60 days' immigration detention he was released. Since then he has apparently been staying unlawfully in Spain, probably in Andalusia and without any fixed address, according to the statements made by his lawyers at the hearing before the Court.

31. Both applicants were represented by lawyers during these proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration ("the LOEX")

32. The relevant provisions of the LOEX as in force at the material time read as follows:

Section 25 – Conditions for entering Spain

"1. Aliens seeking to enter Spain must do so at the authorised border crossing points. 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 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.

...

3. The preceding paragraphs shall not apply to aliens claiming the right of asylum on entering Spain. Such claims shall be dealt with under the specific legislation on asylum."

Section 27 – Issuance of visas

"1. Visas shall be requested and issued in the Spanish diplomatic missions and consulates, save in the exceptional circumstances laid down in the regulations or in those cases where the Spanish State, in accordance with the Community legislation in this sphere, has entered into a representation agreement with another European Union Member State concerning transit or residence visas.

..."

Section 58 – Effects of expulsion and removal (*devolución*)

"...

3. The creation of an expulsion file is not required for the removal of aliens who

...

(b) attempt to enter the country illegally;

..."

Section 65 – Possibility of appeal against decisions concerning aliens

"...

2. In all cases, where the alien concerned is not in Spain, he or she may submit the relevant administrative or judicial appeals through the diplomatic or consular representations, which shall forward them to the competent authorities."

33. Institutional Law 4/2015 of 30 March 2015 on the protection of citizens' safety introduced the tenth additional provision into the LOEX. The provision has been in force since 1 April 2015 (after the events in the present case). It lays down special rules for the interception and removal of migrants in Ceuta and Melilla. The provision in question reads as follows:

"1. Aliens attempting to penetrate the border containment structures in order to cross the border in an unauthorised manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal 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 crossing points; the procedure shall conform to the standards laid down concerning international protection."

B. Law 12/2009 of 30 October 2009 on asylum and subsidiary protection

34. The relevant provisions of the Law on asylum read as follows:

Section 21 – Requests made at a border crossing point

"1. Where a person not satisfying the conditions for entry into Spain applies for international protection at a border crossing point, the Minister of the Interior may declare the application inadmissible by a reasoned decision where it falls into one of the categories referred to in section 20(1). In any event the decision shall be served on the person concerned within a maximum period of four days from submission of the application.

..."

Section 38 – Applications for international protection in embassies and consulates

"In order to examine applications made outside the country, and provided that the applicant is not a national of the State in which the diplomatic representation is located and that there is a risk to his or her physical integrity, the ambassadors of Spain may facilitate the transfer of the asylum-seeker or asylum-seekers to Spain for the purposes of submitting an asylum claim in accordance with the procedure laid down by this Law.

The implementing rules for this Law shall lay down expressly the conditions of access to the embassies and consulates for persons seeking international protection, and the procedure for assessing the need to transfer them to Spain."

C. Royal Decree 203/1995 of 10 February 1995 (implementing regulations for the Law on asylum)

35. The relevant provisions of Royal Decree 203/1995 read as follows:

Article 4 – Place of lodging of the application

"1. Aliens seeking asylum in Spain shall lodge their application with one of the following entities:

(a) the Asylum and Refugees Office;

(b) the border posts for entry into Spanish territory;

(c) Aliens Offices;

(d) the provincial or district police stations designated by ministerial order;

(e) Spain's diplomatic missions or consulates abroad.

2. Where the UNHCR's representative in Spain makes a request to the Spanish Government for the urgent admission of one or more refugees under UNHCR's mandate who are at high risk in a third country, the Ministry of Foreign Affairs, via the diplomatic mission or consulate of Spain or of another country ... shall issue visas ... to facilitate the transfer of the persons concerned to Spain in conformity with Articles 16 and 29 (4) of this decree."

Article 16 – Transfer of the asylum-seeker to Spain

"Where the person concerned is at risk and has submitted his or her application from a third country through a diplomatic mission or a consulate or in the circumstances provided for in Article 4 (2), the Asylum and Refugees Office may submit the case to the Inter-ministerial Committee on Asylum and Refugees with a view to authorising the person's transfer to Spain pending examination of the file, after the issuance of the corresponding visa, *laissez-passer* or entry authorisation, which shall be processed as a matter of urgency.

2. The Asylum and Refugees Office shall communicate the approval of the Inter-ministerial Committee to the Ministry of Foreign Affairs and to the Directorate-General of Police, which shall inform the relevant border post.

3. An asylum-seeker whose transfer to Spain has been authorised on account of the risks he or she faces shall be informed of his or her rights under Part 2 of Chapter I of this decree. He or she shall have a maximum period of one month from his or her entry into Spanish territory in which to exercise those rights.

4. The competent body of the Ministry of Social Affairs shall adopt the appropriate measures for reception of the asylum-seeker by the designated public or private institution."

Article 24 – General processing rules

"1. The interested party may submit such documentation and additional information as he or she considers appropriate, and formulate such allegations as he or she deems necessary in support of his or her application, at any time during the processing of the file by the Asylum and Refugees Office. These actions must be verified prior to the hearing preceding the sending of the file to the Inter-ministerial Committee on

Asylum and Refugees, in accordance with section 6 of Law 5/1984, which governs the right to asylum and refugee status.

2. The Asylum and Refugees Office may request such reports as it deems appropriate from the organs of the State administration or from any other public entity.

3. Likewise, the reports of UNHCR and of the legally recognised associations providing advice and assistance to refugees shall be included in the file where appropriate.

4. The maximum period for processing the file shall be six months. If no decision has been taken on the asylum application on expiry of this period, the application may be considered to have been rejected, without prejudice to the obligation of the administrative authorities to take an express decision. In cases where the application is processed by a diplomatic or consular mission, the six-month period shall begin to run from the date of receipt of the application by the Asylum and Refugees Office.

5. Where the procedure is halted for reasons attributable to the asylum-seeker, the Asylum and Refugees Office shall inform him or her that the procedure will expire after three months. If this period expires without the individual in question carrying out the necessary actions to revive the procedure, the procedure shall be discontinued and the interested party shall be notified at his or her last known address."

Article 29 – Effects of granting asylum

"...

4. Where the applicant has presented his or her application at a Spanish diplomatic or consular mission, these entities shall issue the visa or entry authorisation necessary for his or her travel to Spain, together with a travel document if necessary, as provided for by Article 16."

D. Royal Decree 557/2011 of 20 April 2011 (implementing regulations for the LOEX)

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

Article 1 – Entry via authorised crossing points

"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 crossing points. 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, where 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 next 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, where 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, where 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 for this purpose.

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, where this is justified on exceptional humanitarian or public-interest grounds or in order to comply with the undertakings entered into by Spain."

Article 23 – Removals

"1. In accordance with section 58(3) of the LOEX, the creation of an expulsion file is not necessary ... for the removal of aliens in the following circumstances.

...

(b) Persons attempting to enter the country illegally. Aliens intercepted at the border or in the vicinity will be considered to fall into this category.

2. In the cases covered by sub-paragraph (b) above, members of the coastal and border security forces who apprehend an alien attempting to enter Spain in an unauthorised manner shall take him or her to the police station immediately with a view to his or her identification and, where applicable, removal.

3. In all cases covered by paragraph 1, aliens in respect of whom steps are being taken with a view to the adoption of a removal order shall have the right to be assisted by a lawyer, and by an interpreter if they do not understand or speak the official languages used. Such assistance shall be free of charge where the person concerned lacks the necessary financial resources ..."

E. The *Guardia Civil* border control operations protocol of 26 February 2014 (as applicable at the relevant time), which introduced the term "operational border"

37. The parts of the border control operations protocol of relevance to the present case read as follows:

"With this system of fences, there is an objective need to determine when illegal 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 illegally are contained and repelled by the law-enforcement agencies responsible for controlling the border, no actual illegal entry is deemed to have taken place. Entry is deemed to have been effected only where a migrant has penetrated beyond the above-mentioned internal fence, thereby entering the national territory and coming within the scope of the rules governing aliens ..."

F. Circular letter to all Spanish ambassadors

38. The relevant parts of this circular read as follows:

"Law 12/2009 of 30 October 2009 on asylum and subsidiary protection, published in the Official Gazette on Saturday 31 October 2009 ...

[Section 38 of this Law concerns 'persons applying for international protection in embassies and consulates']

...

The key elements of this section are as follows.

(1) This section is not applicable if the person concerned is a national of the country where the diplomatic representation is located.

(2) In addition, his or her physical integrity must be at risk from causes linked to the scope of application of the Law (asylum or subsidiary protection).

(3) It is the task of Spanish ambassadors (but under no circumstances of consuls) to 'facilitate [where appropriate] the transfer of the asylum-seeker or asylum-seekers to Spain' for the sole purpose of 'submitting the asylum claim in accordance with the procedure laid down by this Law', that is to say, in Spain. This authority lies with the ambassadors alone.

At all events neither ambassadors nor consuls are authorised by law to take a decision on applications for asylum or protection, still less to inform Spain thereof. This is crucial. If such a decision were to be taken, the Spanish State would be obliged to provide [the asylum-seeker with] legal assistance and protection [including against refoulement from the country] and to meet his or her needs (in terms of food and housing), including healthcare needs; section 38 makes no provision for this.

Consequently, the fact that someone seeks to lodge an asylum application with an embassy or consulate does not in any circumstances entail the start of a procedure for possible admission.

This does not prevent the ambassador, if he or she has determined that the conditions set out above are satisfied in a given case, from confirming the actual nationality [of the person concerned] and verifying whether his or her physical safety is at risk in the manner described above. Every effort must be made to obtain as much information as possible and to compile full records of the case and the allegations made by the potential applicant for asylum or protection. These are to be sent to the Directorate of Consular Affairs and Migration so that the supervisory authority can take cognisance of them, assess them and take a decision.

In sum, if in the exercise of his or her duties the ambassador considers that 'there is a risk to [the asylum-seeker's] physical integrity', he or she may secure the person's

transfer to Spain (this may entail issuing a visa and a one-way airline ticket to Spain, subject to prior approval by the Ministry).

The second sub-section of section 38 provides for the adoption of implementing regulations, to be drawn up jointly by the Ministries of the Interior, Justice and Foreign Affairs. These regulations will lay down the procedure enabling ambassadors to assess the issue of possible transfer to Spain.

With regard to proceedings already in progress, the first transitional provision provides, where relevant, for application of the rules in force prior to the entry into force of the new Law (which will apply as of today, 20 November 2009).

For new cases, and until such time as the implementing rules for the Law, referred to in the second sub-section of section 38, enter into force, you should follow the instructions set out in this circular.

...

Madrid, 20 November 2009".

G. The Spanish Ombudsperson's Office

39. 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 Spain has full ownership [of the area in question] and that it is controlled by the Spanish law-enforcement agencies. It is therefore not for the Spanish administrative authorities to determine where our country's legislation should start to apply. That territorial application is governed by international treaties or, where applicable, by international custom, which define the borders with neighbouring States."

40. In presenting her 2013 annual report to the Senate on 9 April 2014 the Spanish Ombudsperson "deplored the heart-rending images of people who had climbed to the top of the fences and stressed that once a person was on Spanish territory – as we believe to be the case [when he or she is on the fences of the Melilla border] – he or she should be dealt with in accordance with the law in force". The Ombudsperson therefore condemned the practice of immediate removals (*devoluciones en caliente*), which, she reiterated, were not provided for under the LOEX.

II. EUROPEAN UNION LAW

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

41. The relevant Articles of the Treaty on European Union provide as follows:

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

42. The relevant provisions of the Charter read as follows:

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 18 – Right to asylum

"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."

Article 19 - 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."

Article 47 – Right to an effective remedy and to a fair trial

"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)

43. The relevant provisions of the Treaty on the Functioning of the European Union (TFEU) provide:

AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1

General provisions

Article 67

"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 ..."

Article 72

"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."

CHAPTER 2

Policies on border checks, asylum and immigration

Article 77

"1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law."

Article 78(1)

"1. 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 of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

Article 79

"1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

...

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

..."

D. The Agreement on the accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990

44. The relevant parts of this Agreement read as follows:

"...

III. The Contracting Parties take note of the following declarations by the Kingdom of Spain:

Declaration concerning the cities of Ceuta and Melilla;

(a) The current controls on goods and travellers coming from the cities of Ceuta and Melilla prior to their introduction into the customs territory of the European Economic Community shall continue to be applied by Spain in accordance with the provisions of Protocol 2 of the Act of Accession of Spain to the European Communities.

(b) The specific visa exemption regime for small border traffic between Ceuta and Melilla and the Moroccan provinces of Tetuan and Nador will also continue to apply.

(c) Moroccan nationals not residents in the provinces of Tetuan and Nador and wishing to enter exclusively the cities of Ceuta and Melilla shall remain subject to a visa requirement. The validity of this visa will be limited to the two above-mentioned cities and will allow multiple entries and exits ("*visado limitado múltiple*"), in accordance with the provisions of Articles 10(3) and 11(1)(a) of the 1990 Convention.

(d) In applying this regime the interests of the other Contracting Parties shall be taken into account.

(e) In application of its national legislation and in order to verify whether passengers continue to comply with the conditions listed in Article 5 of the 1990 Convention, by virtue of which they were authorised to enter national territory upon passport control at the external border, Spain will maintain controls (identity and document controls) on sea and air connections from Ceuta and Melilla having as their sole destination any other place on Spanish territory.

To this same end, Spain shall maintain checks on domestic flights and on regular ferry connections departing from the cities of Ceuta and Melilla to a destination in another State party to the Convention."

E. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

45. The relevant provisions of the Schengen Borders Code read as follows:

"THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

...

Whereas:

...

(6) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.

..."

Article 1 - Subject matter and principles

"This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the Union.

It lays down rules governing border control of persons crossing the external borders of the Member States of the Union."

Article 4 – Crossing of external borders

"1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

...

3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive."

Article 6 – Conduct of border checks

"1. Border guards shall, in the performance of their duties, fully respect human dignity.

Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Article 7 - Border checks on persons

"1. Cross-border movement at external borders shall be subject to checks by border guards. Checks shall be carried out in accordance with this chapter.

...

2. All persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a

minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border ...

3. On entry and exit, third-country nationals shall be subject to thorough checks. ..."

Article 12 – Border surveillance

"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.

..."

Article 13 - Refusal of entry

"1. A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

..."

Article 14 - Staff and resources for border control

"Member States shall deploy appropriate staff and resources in sufficient numbers to carry out border control at the external borders, in accordance with Articles 6 to 13, in such a way as to ensure an efficient, high and uniform level of control at their external borders."

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) (codification)

46. The codified version of Articles 14 and 15 of the Schengen Borders Code corresponds to former Articles 13 and 14.

G. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("the Return Directive")

1. The text of the Directive

47. The relevant provisions of the Return Directive read as follows:

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 4 – More favourable provisions

"...

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

(a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and

(b) respect the principle of non-refoulement."

Article 5 – Non-refoulement, best interests of the child, family life and state of health

"When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement."

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.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

..."

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."

2. Relevant case-law of the CJEU in relation to this Directive

48. 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).

In a recent ruling (judgment of 7 June 2016, *Affum*, C-47/15), the CJEU clarified the interpretation to be given to Article 2(2)(a) of that directive, stating that it concerned third-country nationals who had been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it had been so crossed.

The relevant paragraphs of the judgment read as follows:

"72. Finally, still in relation to that second situation, Article 2(2)(a) of Directive 2008/115 specifies that the apprehension or interception of the third-country nationals concerned must take place 'in connection with the irregular crossing' of an external border, which, as Ms Affum, the Greek Government and the Commission submit in

essence, and as the Advocate General has observed in point 41 of his Opinion, implies a direct temporal and spatial link with that crossing of the border. That situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed.

73. In the second place, it is to be noted that the exception provided for in Article 2(2)(a) of Directive 2008/115, unlike the exception provided for in Article 2(2)(b), is coupled with certain obligations which are set out in Article 4(4) of the directive.

74. The fact that Article 4(4) of Directive 2008/115 thus regulates in detail the exercise by the Member States of the power provided for in Article 2(2)(a) of the directive can be explained, as the Commission set out at the hearing, by the purpose of Article 2(2)(a), as apparent from the directive's history, of permitting the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders. Article 4(4) of Directive 2008/115 is intended in that context to ensure that those simplified national procedures observe the minimum guarantees prescribed by the directive, which include, in particular, the detention conditions laid down in Articles 16 and 17."

The CJEU has also defined the expression "irregular crossing of a border" as a crossing that does not fulfil "the conditions imposed by the legislation applicable in the Member State in question" and which must necessarily be considered "irregular" within the meaning of Article 13(1) of the Dublin III Regulation (judgment of 26 July 2017, *Jafari*, C-646/16, §§ 74 et seq.). The CJEU's judgment of 19 March 2019 in *Arib* (C-444/17) is also interesting in this regard as it reiterates that, according to the CJEU's case-law, the two situations covered by Article 2(2)(a) of Directive 2008/115 relate exclusively to the crossing of a member State's external border, as defined in Article 2 of the Schengen Borders Code, and do not concern the crossing of a common border of member States forming part of the Schengen area (see *Affum*, cited above, § 69).

H. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [subsequent version: Directive 2013/32/EU of 26 June 2013]

49. The relevant provisions of Directive 2005/85/EC read as follows:

Article 6 – Access to the procedure

"1. Member States may require that applications for asylum be made in person and/or at a designated place.

2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.

3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

...

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority."

Article 7 – 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. This right to remain shall not constitute an entitlement to a residence permit.

..."

Article 8 – Requirements for the examination of applications

"1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications."

Article 9 – Requirements for a decision by the determining authority

"1. Member States shall ensure that decisions on applications for asylum are given in writing.

2. Member States shall also ensure that, where an application is rejected, 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 state the reasons for not granting refugee status in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting refugee status are stated in the applicant's file and that the applicant has, upon request, access to his/her file.

Moreover, 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 this information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 6(3), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants."

Article 10 - Guarantees for applicants for asylum

"1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) they shall be informed in a language which they may reasonably be 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, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This 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 11;

(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 give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Articles 12 and 13 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

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

(e) they shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 9(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article."

I. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

50. The relevant provisions of Directive 2011/95/EU read as follows:

Article 14 - Revocation of, ending of or refusal to renew refugee status

"...

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

..."

51. In its judgment of 14 May 2019 (C-391/16, C-77/17 and C-78/17, *M. v. Ministerstvo vnitra and Others*), the CJEU clarified the interpretation of the terms "refugee" and "refugee status" for the purposes of Article 2(d) and Article 2(e) respectively of this directive and also, among other points, the material conditions required in order for a third-country national or stateless person to be regarded as a refugee.

The relevant paragraphs of the CJEU judgment read as follows:

"84. ... it should be noted that, regarding the term 'refugee', Article 2(d) of that directive reproduces, in essence, the definition set out in Article 1(A)(2) of the Geneva Convention. In that regard, the provisions of Chapter III of Directive 2011/95, entitled 'Qualification for being a refugee' provide clarification regarding the material conditions necessary to enable a third-country national or a stateless person to be considered a refugee for the purposes of Article 2(d) of that directive.

85. For its part, Article 2(e) of Directive 2011/95 defines 'refugee status' as 'the recognition by a Member State of a third-country national or a stateless person as a refugee'. As can be seen from recital 21 of that directive, that recognition is declaratory and not constitutive of being a refugee.

...

90. The fact that being a 'refugee' for the purposes of Article 2(d) of Directive 2011/95 and Article 1(A) of the Geneva Convention is not dependent on formal

recognition thereof through the granting of 'refugee status' as defined in Article 2(e) of that directive is, moreover, borne out by the wording of Article 21(2) of that directive, which states that a 'refugee' may, in accordance with the condition laid down in that provision, be refouled 'whether formally recognised or not'.

...

95. Thus, where the refoulement of a refugee covered by one of the scenarios referred to in Article 14(4) and (5) and Article 21(2) of Directive 2011/95 would expose that refugee to the risk of his fundamental rights, as enshrined in Article 4 and Article 19(2) of the Charter, being infringed, the Member State concerned may not derogate from the principle of non-refoulement under Article 33(2) of the Geneva Convention.

...

105. It must therefore be held that Member States, when implementing Article 14(4) or (5) of that directive, are, in principle, required to grant refugees who are present in their respective territories only the rights expressly referred to in Article 14(6) of that directive and the rights set out in the Geneva Convention that are guaranteed for any refugee who is present in the territory of a Contracting State and do not require a lawful stay."

J. European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI))

52. The relevant parts of this resolution read as follows:

"The European Parliament,

...

73. Recalls that, since the establishment of the Schengen Area, the Union is an area without internal borders, that the Schengen Member States have developed a step-by-step common policy towards the Schengen external borders, and that the inherent logic of such a system has always been that the abolition of internal border controls has to go hand in hand with compensatory measures strengthening the external borders of the Schengen Area and the sharing of information through the Schengen Information System ('SIS');

74. Acknowledges that the integrity of the Schengen Area and the abolition of internal border controls are dependent on having effective management of external borders, with high common standards applied by all Member States at the external borders and an effective exchange of information between them;

75. Accepts that the Union needs to strengthen its external border protection and further develop the CEAS[1], and that measures are necessary to enhance the capacity of the Schengen Area to address the new challenges facing Europe and preserve the fundamental principles of security and free movement of persons;

76. Points out that access to the territory of the Schengen Area is generally controlled at the external border under the Schengen Borders Code and that, in addition, citizens of many third countries require a visa to enter the Schengen Area;

1. Common European Asylum System

77. Reiterates the UNHCR's call that respect for fundamental rights and international obligations can only be ensured if operating procedures and plans reflect those obligations in practical, clear guidance to border personnel, including those at land, sea and air borders; points out to the need to further strengthen the Union Civil Protection Mechanism in order to respond to events with wide-ranging impacts which affect a significant number of Member States;

78. Emphasises again that, as for legislation specifically in the area of asylum and migration, in order for legislation on internal and external borders to be effective, it is essential that measures agreed at Union level are implemented properly by the Member States; underlines that better implementation of measures by Member States at the external borders, following increased pressure, is essential and will go some way towards allaying the security fears of citizens;

...

80. Considers that the Schengen Area is one of the major achievements of European integration; notes that the conflict in Syria and other conflicts elsewhere in the region have triggered record numbers of refugees and migrants arriving in the Union, which in turn has revealed deficiencies at parts of the Union's external borders; is concerned at the fact that, in response, some Member States have felt the need to close their internal borders or introduce temporary border controls, thus calling into question the proper functioning of the Schengen Area;

..."

III. COUNCIL OF EUROPE DOCUMENTS

A. Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies

53. The relevant parts of this document provide as follows:

Preamble

"... member states have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens on their territory;

... in exercising this right, member states may find it necessary to forcibly return illegal residents within their territory; ..."

Guideline 2. Adoption of the removal order

"Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.

1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

..."

54. The Committee of Ministers of the Council of Europe took note of the comments on these Guidelines drafted by the *Ad Hoc* Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR). The relevant parts concerning the scope of application of the guidelines read as follows:

"... The Guidelines apply to procedures leading to the expulsion of non-nationals from the territory of members states of the Council of Europe. Refusals to enter the national territory at the border are not included in their scope of application, although certain norms restated in the Guidelines are applicable to such decisions ..."

B. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

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

56. In its report published on 9 April 2015 the CPT found 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."

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

57. 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."

D. Report dated 3 September 2018 of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018 (SG/Inf(2018)25)

58. The relevant parts of this report read as follows:

"3. THE SITUATION IN MELILLA AND CEUTA

3.1. Preventing access to the territory

Asylum-seekers and migrants in an irregular situation enter into the autonomous cities of Melilla and Ceuta both through the land and sea borders. As regards land

borders, Melilla is surrounded by a 12 km triple fence – the external and internal fences are six metres high and the middle one is a lower three dimensional barrier which is a structure of steel cables tied to stakes. The fence is equipped with sensors to detect movements towards its external part. When such movements are detected the *Guardia Civil* notifies the Moroccan authorities, which in turn often prevent people in the Moroccan territory from jumping the fence. ...

On previous occasions, I have drawn attention to practices involving information sharing by the border police with the relevant authorities of a neighbouring country regarding suspected unauthorised border crossings and the subsequent action of the authorities in the neighbouring country to intercept migrants and refugees before they cross the border. I have underlined the questions that these practices raise with regard to the right to seek asylum and the respect for the principle of non-*refoulement*. It is legitimate that Council of Europe member states, in the exercise of their right to prevent unauthorised border crossings as well as to prevent and combat cross-border criminal activities co-operate with neighbouring countries including through the sharing of relevant information. However, as a matter of principle, member states should exercise human rights due diligence in the context of such co-operation. They should take into account the situation in their neighbouring countries and refrain from sharing information with or requesting the latter to intercept people before they reach member states' borders when they know, or should have known, that the intercepted persons would as a result be exposed to a real risk of torture or inhuman and degrading treatment or punishment and that they would not be given protection in the neighbouring countries. ...

3.2. Summary returns

According to the Spanish Law 4/2000 on the rights and freedoms of aliens in Spain and their social integration (the Law on Aliens), foreigners who attempt to cross the border irregularly, including persons intercepted at and near the border, may be denied entry or may be rejected at the border in order to prevent their illegal entry into Spain. In accordance with the Law on Aliens, their return shall in all cases be carried out in compliance with the international human rights standards; applications for international protection shall be submitted in dedicated placed provided for that purpose at the border crossings. The *Guardia Civil* explained to us that attempts by foreigners to jump the fences happened on a daily basis, although not by massive groups of people as it had been frequently the case in 2016 and 2017. When foreigners attempt to jump the fences in both Melilla and Ceuta the *Guardia Civil* does not intervene unless they have climbed down the internal fences. In most of the cases foreigners endure physical injuries while jumping over the fences. This is the reason why the authorities have entered into a co-operation protocol with the Spanish Red Cross, which provides immediate medical assistance to intercepted foreigners.

The *Guardia Civil* explained to us that foreigners who jump the fences are usually violent and that they do not communicate with authorities but rather attempt to escape from them. The *Guardia Civil* also does not seek to establish any communication with foreigners. Hence, no claims for international protection are expressed by foreigners either while climbing or when intercepted at or near the border after jumping the fences. Shortly after receiving the Spanish Red Cross assistance they are returned to Morocco through special doors, which are spread throughout the border fences and are distinct from border-crossing points. Foreigners do not have access to interpreters, lawyers or the asylum offices located at border crossing point. Finally, they are returned to Morocco without any identification or registration having taken place.

In a Chamber judgment, the European Court of Human Rights found that the immediate return to Morocco of Sub-Saharan migrants who were attempting to enter into Melilla amounted to a collective expulsion and held that there had been a violation of Article 4 Protocol 4 and Article 13 of the ECHR taken together with Article 4 Protocol 4. The case has been referred to the Grand Chamber.

Articles 2 and 3 of the ECHR entail an obligation on the part of Council of Europe member states not to return a person to his/her country of origin, any other country to which removal is to be effected or any other country to which he/she may subsequently be removed, where there are substantial grounds for believing that the person would run a real risk to his/her life or a real risk of being subjected to torture and other forms of ill-treatment. On the basis of the principle of non-*refoulement* enshrined in Article 33 of the 1951 Geneva Convention on the Status of Refugees and the relevant jurisprudence of the European Court of Human Rights, states are obliged to screen intercepted migrants with a view to identifying persons in need of protection, assessing those needs and enabling the relevant persons' access to asylum procedures.

While the Spanish Law on Aliens contains a general guarantee that the returns described above will be carried out in compliance with international human rights standards, in practice the *Guardia Civil* does not yet have a protocol on screening foreigners who irregularly cross the borders in Melilla and Ceuta which would provide instructions to its officers on identifying persons in need of international protection and taking necessary action regarding their access to a fair and efficient asylum procedure. As international bodies, including the Commissioner for Human Rights, the CPT and the UNHCR, have called for the issuance of such instructions for some years it is now necessary that Spain takes action. The Council of Europe can provide its human rights expertise to ensure that the relevant instructions provide for the respect of the principle of non-*refoulement*, prohibit collective expulsion and contain the necessary procedural guarantees regarding access to a fair and effective asylum procedure.

4. ACCESS TO THE ASYLUM PROCEDURE

Anyone who wishes to seek international protection in Spain must lodge a formal application with the competent authorities. In cases when the asylum seeker is at an airport, maritime port or land borders he/she must lodge a formal application with the border control authority. If the person is already on Spanish territory he/she must lodge a formal application with the OAR, in Detention Centres for Foreigners (*Centro de Internamiento de Extranjeros*, CIEs)or police stations. The admissibility and merits of applications lodged at the borders and in CIEs are assessed within shorter periods of time compared to applications lodged in Spanish territory, which are examined under the regular procedure. However, procedural safeguards for applications lodged at the border or in CIEs concerning the presence of interpreters and legal assistance are the same as those applicable under the regular procedure.

4.1. At the land border

At the Beni Enzar border-crossing point in Melilla we were informed that the persons who crossed the border in a regular manner in order to seek asylum are mostly Syrians, Palestinians, Algerians or nationals of other Northern African countries. They are given an appointment for a preliminary interview by Ministry of Interior officials within two or three days, but no later than nine days, from the time they express their intention to seek asylum. The registration of asylum applications and a preliminary interview takes place in dedicated premises adjacent to Beni Enzar. At the time of our visit there had been around 700 asylum requests for 2018.

The OAR in Madrid usually makes a decision on the admissibility of the applications within 48 hours of the registration of the application. The admissibility rate is rather high at 90%. After a decision on admissibility the merits of the asylum application is examined with priority within three months under the regular asylum procedure (see section 4.3. below). At the El Trajal border-crossing point in Ceuta we were informed by the Spanish authorities that no single asylum application had been lodged since 1993.

A number of reports have underlined that persons from sub-Saharan Africa are effectively prevented by Moroccan authorities from approaching regular border crossing points, notably in Melilla (see section 3.1. above). Consequently, they do not have access to the asylum procedure. Spanish authorities explained that one of the possible reasons why sub-Saharan Africans cannot approach the border are the sizeable daily flows of persons involved in the so-called 'atypical trade' who cross the border daily into and out of Melilla. While I understand the difficulties that the Spanish authorities encounter in managing such flows I was not convinced that they affect the ability of sub-Saharan Africans to approach the Spanish border. Without any possibility for legal and safe access to the Spanish territory, persons from sub-Saharan Africa, including women and young children, turn to organised crime networks, hiding in cars or embarking on rafts to gain access to the autonomous cities of Melilla and Ceuta, thereby exposing themselves to risks of trafficking in human beings, violence and sexual abuse. It is, therefore, important that the Spanish authorities provide to persons in need of international protection the possibility to access the Spanish territory safely so that they can submit their asylum claims ..."

E. Resolution 2299 (2019) of the Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019: Pushback policies and practice in Council of Europe member States

59. The relevant parts of this report read as follows:

"1. To control and manage migration flows, Council of Europe member States concentrate much of their efforts on guarding frontiers. In this context, refusals of entry and expulsions without any individual assessment of protection needs have become a documented phenomenon at Europe's borders, as well as on the territory of member States further inland. As these practices are widespread, and in some countries systematic, these "pushbacks" can be considered as part of national policies rather than incidental actions. The highest risk attached to pushbacks is the risk of *refoulement*, meaning that a person is sent back to a place where they might face persecution in the sense of the 1951 United Nations Convention Relating to the Status of Refugees ("the Refugee Convention"), or inhuman or degrading treatment in the sense of the European Convention on Human Rights (ETS No. 5, "the Convention").

2. This is why the European Court of Human Rights, for instance in its judgment *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), but also in *N.D. and N.T. v. Spain* (Applications Nos. 8675/15 and 8697/15), requires the individual assessment of protection needs and of the safety of a return in order to prevent violation of Article 3 of the European Convention on Human Rights and of the prohibition of collective expulsions, as enshrined in Article 4 of Protocol No. 4 to the Convention (ETS No. 46). Pushbacks take place in particular at European Union borders, which is at least in part a consequence of the shortcomings of the current Dublin Regulation and of the failure of attempts to introduce fair responsibility-sharing in Europe.

3. Pushbacks often take place where migrants attempt to enter the territory of a member State in large numbers because the passage is, or appears to be, more "open" than elsewhere, or is geographically close to the countries of origin of asylum seekers. However, recent evidence of pushbacks shows that they also take place where numbers of arrivals are low, but where national policies are hostile towards migration in general. There are also cases of "multiple pushbacks" where migrants are expelled by various countries successively.

4. The Parliamentary Assembly is concerned about the persistent and increasing practice and policies of pushbacks, which are in clear violation of the rights of asylum seekers and refugees, including the right to asylum and the right to protection against *refoulement*, which are at the core of international refugee and human rights law. In view of the gravity of the human rights violations involved, the Assembly urges member States to provide adequate protection to asylum seekers, refugees and migrants arriving at their borders, and thus to refrain from any pushbacks, to allow for independent monitoring and to fully investigate all allegations of pushbacks.

5. The Assembly is extremely worried about persistent reports and evidence of inhuman and degrading treatment of migrants by member States and their agencies in the framework of these pushbacks, through intimidation, confiscating or destroying migrants' belongings, and even through the use of violence and by depriving migrants of food and basic services. In denying having carried out such pushbacks, these types of (sometimes systematic) inhuman and degrading treatment are denied as well, and are therefore not adequately examined or not examined at all.

6. The Assembly therefore calls on Council of Europe member States to comply with their international obligations in this regard, in particular those set out in the European Convention on Human Rights concerning the prohibition of collective expulsion and inhuman and degrading treatment, as well as the right of access to asylum procedures and the prohibition of *refoulement* as established in the United Nations Refugee Convention.

..."

IV. OTHER INTERNATIONAL MATERIALS

A. Charter of the United Nations (UN Charter), signed on 26 June 1945 in San Francisco

60. The relevant provision of this international instrument reads as follows:

Article 51

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

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

61. The relevant provisions of the Vienna Convention read as follows:

Article 27 - Internal law and observance of treaties

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

Article 31 - General rule of interpretation

"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."

Article 32 - Supplementary means of interpretation

"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 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. Geneva Convention of 28 July 1951 relating to the Status of Refugees

62. The relevant provisions of the 1951 Geneva Convention read as follows:

Article 1 - Definition of the term 'refugee'

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

...

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

..."

Article 3 – Non-discrimination

"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

Article 4 – Religion

"The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children."

Article 16 – Access to courts

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi.*

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

Article 22 – Public education

"1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships."

Article 31 – Refugees unlawfully in the country of refugee

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

Article 32 – Expulsion

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

Article 33 – Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

D. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (UNCAT)

63. The relevant provision of this international instrument reads as follows:

Article 3

"1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where

applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

E. Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967 (Resolution 2312 (XXII))

64. The relevant parts of the declaration provide:

Article 1

"1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights ... shall be respected by all other States.

..."

Article 3

"1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

..."

F. International Law Commission's Draft Articles on the Expulsion of Aliens

65. At its sixty-sixth session, in 2014, the International Law Commission adopted a set of Draft Articles on the Expulsion of Aliens. The text, of which the United Nations General Assembly took note (Resolution A/RES/69/119 of 10 December 2014), includes the following provisions:

Article 1 – Scope

"1. The present draft articles apply to the expulsion by a State of aliens present in its territory.

..."

Commentary

"...

(2) In stating that the draft articles apply to the expulsion by a State of aliens who are present in its territory, paragraph 1 defines the scope of the draft articles both *ratione materiae* and *ratione personae*. With regard to scope *ratione materiae*, which relates to the measures covered by the draft articles, reference is made simply to the 'expulsion by a State', which covers any and all expulsion measures; no further elaboration is provided, since 'expulsion' is defined in draft article 2, subparagraph (a), below. With regard to scope *ratione personae*, that is, the persons covered by the draft articles, it follows from paragraph 1 that the draft articles apply in general to the expulsion of all aliens present in the territory of the expelling State, with no distinction between the various categories of persons involved, for example, aliens

lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons. The term '*alien'* is defined in draft article 2, subparagraph (b).

(3) The draft articles cover the expulsion of both aliens lawfully present and those unlawfully present in the territory of the expelling State, as paragraph 1 of the draft article indicates. The category of aliens unlawfully present in the territory of the expelling State covers both aliens who have entered the territory unlawfully and aliens whose presence in the territory has subsequently become unlawful, primarily because of a violation of the laws of the expelling State governing conditions of stay. Although the draft articles apply in general to the expulsion of aliens present lawfully or unlawfully in the territory of the expelling State, it should be noted at the outset that some provisions of the draft articles draw necessary distinctions between the two categories of aliens, particularly with respect to the rights to which they are entitled. It should be also noted that the inclusion within the scope of the draft articles of aliens whose presence in the territory of the expelling State is unlawful is to be understood in conjunction with the phrase in article 2, subparagraph (a), *in fine*, which excludes from the scope of the draft articles questions concerning non-admission of an alien to the territory of a State."

Article 2 – Use of terms

"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."

Commentary

"(1) Draft article 2 defines two key terms, 'expulsion' and 'alien', for the purposes of the present draft articles.

...

(4) Conduct – other than the adoption of a formal decision – that could result in expulsion may take the form of either an action or an omission on the part of the State. Omission might in particular consist of tolerance towards conduct directed against the alien by individuals or private entities, for example, if the State failed to appropriately protect an alien from hostile acts emanating from non-State actors. What appears to be the determining element in the definition of expulsion is that, as a result of either a formal act or conduct – active or passive – attributable to the State, the alien in question is *compelled* to leave the territory of that State. In addition, in order to conclude that there has been expulsion as a result of *conduct* (that is, without the adoption of a formal decision), it is essential to establish the intention of the State in question, by means of that conduct, to bring about the departure of the alien from its territory.

(5) For the sake of clarity, the Commission thought it useful to specify, in the second clause of subparagraph (a), that the concept of expulsion within the meaning of the draft articles did not cover extradition of an alien to another State, surrender to an international criminal court or tribunal or the non-admission of an alien to a State. With respect to non-admission, it should be explained that, in some legal regimes, the

term 'return (*refoulement*)' is sometimes used instead of 'non-admission'. For the sake of consistency, the present draft articles use the latter term in cases where an alien is refused entry. The exclusion relates to the refusal by the authorities of a State – usually the authorities responsible for immigration and border control – to allow an alien to enter the territory of that State. On the other hand, the measures taken by a State to compel an alien already present in its territory, even if unlawfully present, to leave it are covered by the concept of 'expulsion' as defined in draft article 2, subparagraph (a). This distinction should be understood in the light of the definition of the scope *ratione personae* of the draft articles, which includes both aliens lawfully present in the territory of the expelling State and those unlawfully present. Moreover the exclusion of matters relating to non-admission from the scope of the draft articles is without prejudice to the rules of international law relating to refugees. That reservation is explained by draft article 6, subparagraph (b), which references the prohibition against return (*refoulement*) within the meaning of article 33 of the Convention on the Status of Refugees of 28 July 1951 and hence inevitably touches on questions of admission.

..."

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 6 – Prohibition of the expulsion of refugees

"The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

Commentary

"(1) Draft article 6 deals with the expulsion of refugees, which is subject to restrictive conditions by virtue of the relevant rules of international law. It contains a 'without prejudice' clause aimed at ensuring the continued application to refugees of the rules concerning their expulsion, as well as of any more favourable rules or practice on refugee protection. In particular, subparagraphs (a) and (b) of draft article 6 recall two particularly important rules concerning the expulsion or return (*refoulement*) of refugees.

...

(5) Draft article 6, subparagraph (a), reproduces the wording of article 32, paragraph 1, of the Convention relating to the Status of Refugees of 28 July 1951. The rule contained in that paragraph, which applies only to refugees lawfully in the

territory of the expelling State, limits the grounds for expulsion of such refugees to those relating to reasons of national security or public order.

(6) The prohibition of expulsion of a refugee lawfully in the territory of the expelling State for any grounds other than national security or public order has also been extended to any refugee who, being unlawfully in the territory of the State, has applied for refugee status, as long as this application is under consideration. However, such protection can be envisaged only for so long as the application is pending. This protection, which reflects a trend in the legal literature and finds support in the practice of some States and of UNHCR, would constitute a departure from the principle whereby the unlawfulness of the presence of an alien in the territory of a State can in itself justify expulsion of the alien. The protection might be set aside only in cases where the manifest intent of the application for refugee status was to thwart an expulsion decision likely to be handed down against the individual concerned. It concerns only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of 'refugee' within the meaning of the 1951 Convention or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law. Any individual who does not correspond to the definition of refugee within the meaning of the relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in subparagraph (a), including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. In any event, article 6 is without prejudice to the right of a State to expel, for reasons other than those mentioned in subparagraph (a), an alien whose application for refugee status is manifestly abusive.

(7) Draft article 6, subparagraph (b), which concerns the obligation of *non-refoulement*, combines paragraphs 1 and 2 of article 33 of the 1951 Convention. Unlike the other provisions of the draft articles, which do not cover the situation of non-admission of an alien to the territory of a State, draft article 6, subparagraph (b), provides that these draft articles are without prejudice to that situation as well, as indicated by the opening phrase: 'A State shall not expel or return (*refouler*) ...'. Moreover, unlike the protection stipulated in subparagraph (a), the protection mentioned in subparagraph (b) applies to all refugees, regardless of whether their presence in the receiving State is lawful or unlawful. It should also be emphasized that the mention of this specific obligation of *non-refoulement* of refugees is without prejudice to the application to them of the general rules prohibiting expulsion to certain States as contained in draft articles 23 and 24."

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."

Commentary

"(1) Paragraph 1 of draft article 9 contains a definition of collective expulsion for the purposes of the present draft articles. According to this definition, collective expulsion is understood to mean the expulsion of aliens 'as a group'. This criterion is informed by the case-law of the European Court of Human Rights. It is a criterion that the Special Rapporteur on the rights of non-citizens of the Commission on Human Rights, Mr. David Weissbrodt, had also endorsed in his final report of 2003. Only the 'collective' aspect is addressed in this definition, which must be understood in the light of the general definition of expulsion contained in draft article 2, subparagraph (a).

...

(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*. ..."

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."

66. In his second report on the expulsion of aliens, dated 20 July 2006 (Document A/CN.4/573), examined in connection with the writing of the Draft Articles, Mr Maurice Kamto, Special Rapporteur, stated as follows:

"40. ... The traditional notion of expulsion ... concerns aliens whose entry or stay are lawful, whereas non-admission concerns those whose entry into or stay on its territory a State seeks to prevent; removal of an illegal immigrant who is at the border or has just crossed it is strictly speaking non-admission, not expulsion. It is by virtue of this judicious distinction that non-admission does not, in the opinion of the Special Rapporteur, fall within the scope of this topic.

...

170. As can be seen, no real terminological distinction can be drawn among the three terms 'expulsion', 'escort to the border' and 'refoulement'; they are used inter-changeably, without any particular semantic rigour. The word 'expulsion' will consequently be used in the context of the present topic as a generic term to mean all situations covered by all three terms and many others, such as 'return of an alien to a country' or 'exclusion of an alien', this list not being exhaustive."

G. Conclusions on International Protection adopted by the Executive Committee of the UNHCR Programme 1975 – 2017

67. The relevant conclusions provide as follows:

No. 6 (XXVIII), Non-refoulement (1977) – 28th Session of the Executive Committee

"The Executive Committee,

...

(c) *Reaffirms* the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."

No. 22 (XXXII), Protection of asylum-seekers in situations of large-scale influx (1981) – 32nd Session of the Executive Committee

"...

II. Measures of protection

A. Admission and non-refoulement

1. In situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below.

...

2. In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.

..."

No. 82 (XLVIII), Safeguarding asylum (1997) – 48th Session of the Executive Committee

"The Executive Committee,

...

(d) *Reiterates* ... the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:

(i) the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;

...

(iii) the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs;

..."

No. 99 (LV) General conclusion (2004)1 – 55th Session of the Executive Committee

"The Executive Committee,

...

(l) *Expresses concern* at the persecution, generalized violence and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and calls on States to address these challenges while ensuring full respect for the fundamental principle of *non-refoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs;

..."

H. Views adopted by the Committee on the Rights of the Child on 12 February 2019 under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016

68. The relevant parts of these views read as follows:

"...The facts as submitted by the complainant

2.4. On 2 December 2014, the author and a group of people of sub-Saharan origin left Mount Gurugu with the intention of entering Melilla. The author reached the top of the third fence and saw that other people climbing down the fence on the other side were being summarily pushed back by the Spanish Civil Guard and handed over to Moroccan forces. Then, for fear of being deported and subjected to possible ill-treatment and violence by Moroccan forces, the author waited for several hours at the top of the fence. During this period, he was not offered any form of assistance. He had no access to water or food. He was also unable to communicate with the Civil Guard, since he did not speak Spanish and there were no interpreters present. Finally, he climbed down the fence with the help of a ladder provided by the Civil Guard. As soon as he set foot on the ground, he was arrested and handcuffed by the Civil Guard, handed over to the Moroccan forces and summarily deported to Morocco. At no time was his identity checked. He was also denied the opportunity to explain his personal circumstances, give his age, challenge his imminent deportation or claim protection as an unaccompanied child. He was not assisted by lawyers, interpreters or doctors...

2.5. The author submits that there were no effective domestic remedies available to him that could have served to suspend his deportation from Spain to Morocco on 2 December 2014. He points out that the deportation was summarily executed without him being notified of a formal expulsion decision that he could have challenged before the competent authorities.

2.6. On or around about 30 December 2014, the author entered Spain through Melilla and went to stay in the temporary reception centre for migrants. In February 2015, he was transferred from the enclave of Melilla to mainland Spain.

At the end of July 2015, thanks to the assistance of *Fundación Raíces*, a non-governmental organization (NGO), and the consular registration card issued to him by the Malian consulate in Madrid, which showed his date of birth as 10 March 1999, the author obtained protection as an unaccompanied child and was placed in a residential centre for minors under the care of the Spanish authorities.

2.7. The author states that, on 30 March 2015, Spain adopted Organic Act No. 4/2015 on safeguarding the security of citizens, which entered into force on 1 April 2015. This law, and in particular its tenth additional provision concerning the special regime applicable in Ceuta and Melilla, legalizes the Spanish practice of indiscriminate summary deportations at the border and makes no reference to unaccompanied minors nor establishes any procedure for their identification and protection.

...

Issues and proceedings before the Committee

Consideration of admissibility

...

13.3. As to the mismatches between the details of the person registered by the Spanish authorities and those of the author, the Committee notes that the file provides no conclusive evidence that shows that the author is not the person who attempted to gain access to Melilla on 2 December 2014 in the circumstances described. The Committee considers that the burden of proof cannot rest solely on the author of the communication, especially given that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. In the present case, the Committee considers that the author has provided a credible and consistent account of the facts, which is supported by evidence. The Committee also notes the author's allegations that the State party could have compared the fingerprints of the person registered as Y.D. with those of the author. The Committee therefore finds the present communication admissible *rationae personae*.

13.4. The Committee takes note of the State party's argument that the communication is inadmissible *rationae loci* because the actions of the Moroccan authorities are not attributable to Spain. The Committee notes, however, that the scope of the present communication is limited to the actions of the Spanish authorities on 2 December 2014, to the exclusion of those of the Moroccan authorities. In this regard, the Committee notes that, according to the author, he was arrested by Spanish security forces at the third fence of the Melilla border crossing and was handcuffed and returned to Moroccan territory. Given these circumstances, and irrespective of whether or not the author is considered to have arrived in Spanish territory, he was under the authority or effective control of the State party. The Committee therefore finds the present communication admissible *rationae loci*.

13.5. The Committee also notes the State party's argument that the communication is inadmissible *rationae materiae* because it refers to the author's right to asylum, which is not covered by the Convention. The Committee notes, however, that the present communication concerns alleged violations of the author's rights under articles 3, 20 and 37 of the Convention and not his right to asylum. The Committee therefore finds that the communication is admissible *rationae materiae*.

13.6. Lastly, the Committee notes the State party's argument that the complainant did not exhaust available domestic remedies ... The Committee also notes that it can

be gleaned from the case file that on 2 December 2014 no formal expulsion order against the author had been issued. Accordingly, the Committee considers that, in the context of the author's imminent expulsion on 2 December 2014, and in the absence of a formal expulsion order that could have been challenged by the author, the judicial remedies mentioned in point (d) of the State party's argument would have been worthless, as they were neither available nor effective. ...

13.7. ... The Committee therefore finds the complaint admissible and proceeds to consider it on the merits.

Consideration of the merits

...

14.2. The issue before the Committee is whether, in the circumstances of this case, the author's return to Morocco by the Spanish Civil Guard on 2 December 2014 violated his rights under the Convention. In particular, the author claimed that, by summarily deporting him to Morocco on 2 December 2014, without performing any form of identity check or assessment of his situation, the State party: (a) failed to provide the author with the special protection and assistance to which he was entitled as an unaccompanied minor (art. 20); (b) failed to respect the principle of *non-refoulement* and exposed the author to the risk of violence and cruel, inhuman and degrading treatment in Morocco (art. 37); and (c) failed to consider the best interests of the child (art. 3).

14.3. The Committee is of the view that the State's obligations to provide special protection and assistance to unaccompanied children, in accordance with article 20 of the Convention, apply even 'with respect to those children who come under the State's jurisdiction when attempting to enter the country's territory'. Similarly, the Committee considers that 'the positive aspect of these protection obligations also extends to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border'. Accordingly, it is imperative and necessary that, in order to comply with its obligations under article 20 of the Convention and to respect the best interests of the child, the State conducts an initial assessment, prior to any removal or return, that includes the following stages: (a) assessment, as a matter of priority, of whether the person concerned is an unaccompanied minor, with, in the event of uncertainty, the individual being accorded the benefit of the doubt such that, if there is a possibility that the individual is a child, he or she is treated as such; (b) verification of the child's identity by means of an initial interview; and (c) assessment of the child's specific situation and particular vulnerabilities, if any.

14.4. The Committee is also of the view that, in compliance with its obligations under article 37 of the Convention, in order to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment, the State should not return a child 'to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child'. The Committee therefore considers that, in accordance with article 37 of the Convention and the principle of *non-refoulement*, the State has an obligation to carry out a prior assessment of the risk, if any, of irreparable harm to the child and serious violations of his or her rights in the country to which he or she will be transferred or returned, taking into account the best interests of the child, including, for example, 'the particularly serious consequences for children of the insufficient provision of food or health services'. In particular, the Committee recalls that, in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to: (a) access the territory, regardless of the documentation they have or lack, and be referred to the

authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards.

...

14.6. The Committee also notes the State party's allegation that the principle of *non-refoulement* does not apply in the present case because it only applies when the person comes from a territory where there is a risk of persecution. However, the Committee reiterates that the State party has an obligation not to return a child 'to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child'. The Committee also notes that, before returning the author to Morocco, the State party did not ascertain his identity, did not ask about his personal circumstances and did not conduct a prior assessment of the risk, if any, of persecution and/or irreparable harm in the country to which he was to be returned. The Committee considers that, given the violence faced by migrants in the Moroccan border area and the ill-treatment to which the author was subjected, the failure to assess the risk of irreparable harm to the author prior to his deportation or to take into account his best interests constitutes a violation of articles 3 and 37 of the Convention.

14.7. The Committee considers that, in the light of the circumstances of the case, the fact that the author, as an unaccompanied child, did not undergo an identity check and assessment of his situation prior to his deportation and was not given an opportunity to challenge his potential deportation violates his rights under articles 3 and 20 of the Convention.

14.8. Lastly, the Committee considers that the manner in which the author was deported, as an unaccompanied child deprived of his family environment and in a context of international migration, after having been detained and handcuffed and without having been heard, without receiving the assistance of a lawyer or interpreter and without regard to his needs, constitutes treatment prohibited under article 37 of the Convention.

14.9. The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it amount to a violation of articles 3, 20 and 37 of the Convention.

..."

THE LAW

I. PRELIMINARY ISSUES

A. Continued examination of the case – Article 37 § 1 (a)

69. In their observations before the Grand Chamber in reply to a written question to the parties concerning the maintenance of contact between the applicants and their representatives, the latter stated that both applicants were living in precarious circumstances and had no fixed address. The first applicant was reportedly in Mali and was moving from one place to another within the country. The second applicant was apparently moving around

within Spain. One of the applicants' representatives stated that he remained in contact with both applicants, through his legal assistant, by telephone and WhatsApp. With the help of Bambara interpreters, he and his assistant received updates from the applicants and had informed them of developments concerning the Chamber judgment and of the referral of their case to the Grand Chamber. The applicants had retained an interest in the case.

70. For their part, the Government made no reference, either in the Chamber proceedings or in their written observations before the Grand Chamber, to the issue of continued examination of the case by the Court. In a letter received by the Court on 25 April 2018 they complained of a lack of information from the applicants' representatives in that regard, but did not request the striking-out of the case on that ground, although they referred at the hearing to the judgment in *V.M. and Others v. Belgium* (striking out) ([GC], no. 60125/11, 17 November 2016) concerning the lack of an address and contact details for the applicants.

71. In view of these circumstances, the Court considers it necessary first to examine the need to continue the examination of the application in the light of the criteria set forth in Article 37 of the Convention. That provision reads as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires. ..."

72. The Court observes that in the case of *V.M. and Others v. Belgium* (cited above), it examined the need to continue the examination of the case with reference to the criteria set forth in Article 37 of the Convention. It specified, in the light of Article 37 § 1 (a), that an applicant's representative must not only supply a power of attorney or written authority (Rule 45 § 3 of the Rules of Court), but that it was also important that contact between the applicant and his or her representative be maintained throughout the proceedings, both in order to learn more about the applicant's particular circumstances and to confirm the applicant's continuing interest in pursuing the examination of his or her application (see also *Sharifi and Others v. Italy and Greece*, no. 16643/09, §§ 124-34, 21 October 2014).

73. The Court notes that in some cases in which the applicant's representative had lost touch with his or her client, including in cases concerning the expulsion of aliens, it found that such a situation might warrant striking the application out of the list under Article 37 § 1. The lack

of contact was sometimes taken as an indication that the applicant no longer wished to pursue the application within the meaning of Article 37 § 1 (a) (see *Ibrahim Hayd v. the Netherlands* (dec.), no. 30880/10, 29 November 2011, and *Kadzoev v. Bulgaria* (dec.), no. 56437/07, § 7, 1 October 2013) or that examination of the application was no longer justified because the representative could not "meaningfully" pursue the proceedings before it in the absence of instructions from the applicant, despite the fact that the lawyer had authority to continue with the proceedings (see *Ali v. Switzerland*, 5 August 1998, §§ 30-33, *Reports of Judgments and Decisions* 1998-V, and *Ramzy v. the Netherlands* (striking out), no. 25424/05, §§ 64-66, 20 July 2010). In some cases, the Court's findings combined these two reasons (see *M.H. v. Cyprus* (dec.), no. 41744/10, § 14, 14 January 2014, and *M.Is. v. Cyprus* (dec.), no. 41805/10, § 20, 10 February 2015). In *Sharifi and Others* (cited above), the Court struck the application out of its list with regard to some of the applicants in respect of whom the information provided by the lawyer was vague and superficial and insufficiently substantiated (§§ 127-29 and 131-34).

74. The Court notes that in the present case the Government did not request that the case be struck out of the list for this reason. It observes that the applicants' representatives stated that they remained in touch with the applicants, who could be contacted by telephone and WhatsApp. Furthermore, one of the lawyers read out at the hearing an extract from a conversation he had reportedly had with the first applicant, in which the latter had told him that he "could still not accept that human beings could treat other human beings like that", that he had suffered harm when his rights had been breached by Spain, and that he wanted to see "steps taken so that other people did not suffer the same harm". The Court also notes that the powers of attorney included in the case file are signed and bear fingerprints. In the Court's view, there is nothing in the case file that could call into question the lawyers' account or the exchange of information with the Court (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 54, ECHR 2012).

75. That being said, the Court observes that, even if the circumstances of a case lead to the conclusion that an applicant no longer wishes to pursue the application, it may continue its examination "if respect for human rights as defined in the Convention and the Protocols thereto so requires" (Article 37 § 1 *in fine*). In the cases cited at paragraph 73 above the Court considered that there were no special circumstances regarding respect for human rights as defined in the Convention and the Protocols thereto requiring it to continue the examination of the application (Article 37 § 1 *in fine*).

76. By contrast, in the Grand Chamber judgment in the case of *F.G. v. Sweden* ([GC], no. 43611/11, §§ 81-82, ECHR 2016), the Court considered that the circumstances of the case justified striking the case out

of its list under Article 37 § 1 (c) since there was no longer a risk that the expulsion order would be enforced. It nevertheless decided to continue its examination of the application for the following reasons:

> "81. It will be recalled that on 2 June 2014 the case was referred to the Grand Chamber in accordance with Article 43 of the Convention ...
>
> 82. The Court notes that there are important issues involved in the present case, notably concerning the duties to be observed by the parties in asylum proceedings. Thus, the impact of the current case goes beyond the particular situation of the applicant, unlike most of the similar cases on expulsion decided by a Chamber."

77. The Court reached a similar conclusion in its Grand Chamber judgment in *Paposhvili v. Belgium* ([GC], no. 41738/10, 13 December 2016). In that case it found that there were important issues at stake, notably concerning the interpretation of the case-law on the expulsion of aliens who were seriously ill. It therefore considered that the impact of the case went beyond the applicant's particular situation (§§ 132 and 133).

78. The Court observes that the present case was referred to the Grand Chamber in accordance with Article 43 of the Convention, which provides that a case can be referred if it raises "a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance". It notes that important issues are also at stake in the present case, particularly concerning the interpretation of the scope and requirements of Article 4 of Protocol No. 4 with regard to migrants who attempt to enter a Contracting State in an unauthorised manner by taking advantage of their large numbers. This is especially important in the context 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). The participation of numerous third parties, both governments and NGOs (see paragraph 12 above), testifies to the public's interest in the case. Thus, the impact of this case goes beyond the particular situation of the applicants (see *F.G. v. Sweden*, cited above, § 82).

79. In view of the foregoing, the Court reiterates that there is no reason to cast doubt on the credibility of the information provided by the applicants' representatives as to the truth of their contact with the applicants (see paragraph 74 above). In any event, the Court considers that special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto require it to continue the examination of the application in accordance with Article 37 § 1 *in fine* of the Convention.

B. Assessment of the evidence and establishment of the facts by the Court

80. The Government submitted that the applicants had not demonstrated that they had taken part in the attempt to enter Spain at the Melilla border at daybreak on 13 August 2014. They noted the applicants' claim to recognise themselves on the video footage which they provided (see paragraph 27 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 photographs in the official identity archives, which had been checked when the applicants had entered Spanish territory subsequently. The applicants had not provided proof of their participation in the storming of the fences, although the burden of proof lay with them. In any event, on the basis of the images provided by the applicants and in view of the injuries and fractures they claimed to have sustained prior to their attempted entry, the first applicant would have been unable to climb over the three fences and the second applicant, who had allegedly had a painful knee, could not be the person shown on the video footage provided, who appeared to have a problem with his heel and a broken arm. The Government contested the Chamber judgment in that regard and argued, relying on Article 34 of the Convention, that the applications should be declared inadmissible for lack of victim status.

81. The applicants, meanwhile, submitted that the evidence they had gathered – videos of the storming of the fences in which they claimed to recognise themselves among the other migrants, and reports by independent international institutions and organisations – was sufficient to demonstrate that they had indeed been part of the group that had attempted to enter Spain by scaling the fence at Melilla on 13 August 2014 in large numbers, and that they had been summarily returned to Morocco. The Spanish Government had already acknowledged the existence of a systematic practice of collective summary expulsions at the Melilla border fence. The applicants called into question the independence and quality of the reports submitted by the Government, arguing that no "comparison" was possible since the photographs from the official identity archives used by the Government were not the relevant images. They criticised the Government for not producing the video recordings made by the infrared security cameras and movement sensors installed at the Melilla fence. In the applicants' submission, those images would have been clearer than the ones which they had themselves produced (see paragraph 27 above) and which had been taken by third parties (journalists and other eyewitnesses) despite the threats issued by the *Guardia Civil* officials in an attempt to prevent them from filming.

82. The applicants observed that it was of the utmost importance for the effective operation of the system of individual petition that States should furnish all necessary facilities to make possible a proper and effective examination of applications (they referred to *Timurtaş v. Turkey*, no. 23531/94, § 66, ECHR 2000-VI). They also observed that in its judgment in *Hirsi Jamaa and Others* (cited above), the Court had attached particular weight to the applicants' version because it was corroborated by a large number of witness statements gathered by UNHCR, the CPT and Human Rights Watch (§ 203), as in the present case (see, by way of example, paragraphs 55 et seq. above concerning the reports of the Commissioner for Human Rights, the CPT and the Special Representative of the Secretary General of the Council of Europe on migration and refugees). They argued that their inability to provide additional evidence of their participation in the storming of the fences on 13 August 2014 was the result of the Spanish Government's failure to comply with the procedures for identifying persons and assessing their individual circumstances as required by Article 4 of Protocol No. 4.

83. In the light of the parties' submissions the Court will now examine the Government's objection that the applicants lack victim status as a preliminary issue concerning the establishment of the facts.

84. In this regard the Court observes significant differences in the parties' accounts of the facts. The question is therefore whether the Grand Chamber is persuaded of the truthfulness of the applicants' statements regarding their participation in the storming of the fences on 13 August 2014, notwithstanding the fact that the evidence adduced by them does not appear conclusive.

85. According to the Court's case-law, the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among other authorities, *El Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 151). In this context it must be borne in mind that the absence of identification and personalised treatment by the authorities of the respondent State in the present case, which has contributed to the difficulty experienced by the applicants in adducing evidence of their involvement in the events in issue, is at the very core of the applicants' complaint. Accordingly, the Court will seek to ascertain whether the applicants have furnished prima facie evidence in support of their version of events. If that is the case, the burden of proof should shift to the Government (see, *mutatis mutandis*, *El-Masri*, cited above, § 152, and *Baka v. Hungary* [GC], no. 20261/12, § 149, 23 June 2016).

86. The Court notes that the applicants gave a coherent account of their individual circumstances, their countries of origin, the difficulties that had led them to Mount Gurugu and their participation on 13 August 2014,

together with other migrants, in the storming of the fences erected at the land border between Morocco and Spain (see paragraphs 24 et seq. above), the storming of which was immediately repelled by the Spanish *Guardia Civil*. In support of their assertions the applicants provided video footage showing the storming of the fences as described by them, and on which they claimed to recognise themselves. The expert reports provided by the Government, meanwhile, served only to demonstrate the impossibility of identifying the applicants in the footage, but did not refute the applicants' arguments.

87. The Court further observes that, as noted in paragraph 59 of the Chamber judgment, the Government did not deny the existence of the summary expulsions of 13 August 2014 and, shortly after the events in the present case, even amended the Institutional Law on the rights and freedoms of aliens in Spain in order to legalise this practice (see paragraphs 20 and 33 above).

88. In such circumstances and in view of the background to the present case, the Court considers that the applicants have presented *prima facie* evidence of their participation in the storming of the border fences in Melilla on 13 August 2014 which has not been convincingly refuted by the Government. Consequently, the Court dismisses the Government's preliminary objection of lack of victim status, and will presume the account of the events presented by the applicants to be truthful.

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

89. 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 Chamber judgment

90. The Chamber did not consider it necessary to determine whether the fences scaled by the applicants were located on Spanish or Moroccan territory. It took the view that from the point in time at which the applicants climbed down from the fences they had been under the continuous and exclusive control, at least *de facto*, of the Spanish authorities. There were no considerations regarding the powers, functions and actions of the Spanish security forces capable of leading to any other conclusion. Referring to the judgment in *Hirsi Jamaa and Others* (cited above), the Chamber thus held that, in any event, the alleged facts came within Spain's "jurisdiction" within the meaning of Article 1 of the Convention.

B. The parties' submissions

91. The Government contested the assertion that Spain was responsible for events occurring in the border area separating the Kingdom of Morocco and the Kingdom of Spain. They confirmed that the fences had been erected on Spanish territory. However, they submitted that the three fences at the Melilla border constituted an "operational border" designed to prevent unauthorised entry by non-nationals. After the introduction of the system of border controls, Spain had limited its "jurisdiction", which began beyond the police line forming part of "measures against persons who [had] crossed the border illegally" within the meaning of Article 13 of the Schengen Borders Code. In other words, it came into play only at the point where migrants had crossed all three of the fences comprising the system of border controls and had passed the police line (see paragraphs 15 et seq. above). In the Government's assertion, it was only after that point that Spain was bound by the obligation under the Convention to identify the persons concerned and by the procedural safeguards applicable to expulsion procedures. Were it otherwise, the result would be a "calling effect" liable to degenerate into a humanitarian crisis of major proportions.

92. The Government maintained that the applicants, after scaling the fences, had not climbed down from the "inner" fence (the third fence, on the Spanish side) by themselves, but had been apprehended by the *Guardia Civil* officials and escorted back to Morocco. As they had not passed the police line they had not come within Spain's full jurisdiction.

93. The applicants took the view that Spain's jurisdiction was not open to question in the present case in so far as the fences were located on Spanish territory, a fact which had been acknowledged by the Government. The concept of "jurisdiction" was principally territorial and was presumed to be exercised normally throughout the State's territory (the applicants referred to *Hirsi Jamaa and Others*, cited above, § 71). No exceptions could be made to that principle.

94. In any event, the applicants were of the view that the removal of non-national migrants, the effect of which was to prevent them from reaching the borders of the State or to send 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 (ibid., § 180). Where there was control over another by agents of the State, this was exercised by the State in question over the individuals concerned (ibid., § 77).

C. The third parties' observations

95. The French Government did not subscribe to the Chamber's assessment regarding the nature of the control exercised over the applicants,

taking the view that the applicants had not been within the jurisdiction of the Spanish State for the purposes of Article 1 of the Convention. In their view, "effective and continuous" control for the purposes of the Court's case-law implied a certain duration and actual control (physical or in the form of authority) over the persons concerned. A form of control that was confined, as in the present case, to a brief, limited intervention in the context of action to defend the country's land borders and protect national security could not, in their submission, give rise to extraterritorial application of the Convention.

96. The Italian Government, for their part, noted that the applicants had not been staying on the territory of the Spanish State. They stressed that Directive 2008/115/EC (the "Return" Directive) applied only to third-country nationals staying illegally on the territory of a member State. They referred to the European Union rules and, in particular, to the Schengen Borders Code (see paragraphs 45 et seq. above), which required member States with EU external borders to operate tight border controls.

97. The Belgian Government submitted that the facts of the case fell exclusively within the scope of surveillance of the external borders of the Schengen area. Where a member State operated border controls, it could not be required to admit persons attempting to cross the border illegally. Where such persons were turned back – with or without being intercepted – they could not be said to have entered the territory of the State concerned and to come within its jurisdiction. The findings regarding the issue of jurisdiction in *Hirsi Jamaa and Others* and *Khlaifia and Others* could not be transposed to the instant case since the international law of the sea, which had played a key role in those cases, was not applicable in the present case.

98. The non-State third parties argued in the Chamber and Grand Chamber proceedings that Spanish jurisdiction applied in the border area. Some of them contested, in particular, the *Guardia Civil* border control operations protocol of 26 February 2014 and service order no. 6/2014 of 11 April 2014, which excluded application of the legislation on aliens' rights in the border area and Spain's jurisdiction in that regard, unless the migrants in question had climbed down from the inner fence and gone beyond the police line. They pointed out that this land came within Spain's jurisdiction under domestic and international law in all other contexts.

99. The CEAR argued that Spanish jurisdiction was applicable in the present case, finding support, in particular, in the passages from the annual reports of the Spanish Ombudsperson's Office set out at paragraphs 39 et seq. above.

100. The AIRE Centre, Amnesty International, ECRE, the International Commission of Jurists and the Dutch Council for Refugees, which submitted joint observations as third-party interveners, cited the 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 [was] to prevent migrants from reaching the borders of the State or even to push them back to another State, constitute[d] an exercise of jurisdiction within the meaning of Article 1 of the Convention which engage[d] the responsibility of the State in question under Article 4 of Protocol No. 4". In their view, the same must apply to situations in which persons arriving in Spain illegally were refused entry into the country (they referred to *Sharifi and Others*, cited above, § 212). These persons were under the effective control of the authorities of that State, whether they were inside the State's territory or on its land borders.

101. The United Nations High Commissioner for Human Rights stressed in the Chamber proceedings that border control measures were not exempt from the concept of jurisdiction and that international human rights obligations were fully applicable in that regard.

D. The Court's assessment

1. General principles

102. 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 in the Convention (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others v. Belgium and Others* (dec.), [GC], no. 52207/99, § 66, ECHR 2001-XII). Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, *Reports* 1998-I, and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 29, ECHR 1999-I). 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 *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

103. A State's jurisdictional competence under Article 1 is primarily territorial (see *Banković and Others*, cited above, § 59; *Ilaşcu and Others*, cited above, § 312; and *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 178, 29 January 2019). It is presumed to be exercised normally throughout the State's territory. Only in exceptional circumstances may this presumption be limited, particularly where a State is prevented from exercising its authority in part of its territory (see *Assanidze v. Georgia* [GC], no. 71503/01, §§ 137-39, ECHR 2004-II, and *Ilaşcu and Others*, cited above, §§ 312-13 and 333).

2. Application to the present case

104. The Court notes at the outset that it is not disputed that the events in issue took place on Spanish territory. Moreover, the Government acknowledged that the three border fences at Melilla had been erected on their territory. However, they invoked an exception to territorial jurisdiction which not only encompassed any land between the Moroccan-Spanish border and the outer fence of the Melilla border protection system, but extended up to the point of descent from the "inner" (third) fence (on the Spanish side) and the area between that fence and the police line, up to the point where the latter had been passed.

105. As a State's jurisdiction is presumed to be exercised throughout its territory, the question to be addressed is whether the Spanish State may, by invoking exceptional circumstances as it has done, alter or reduce the extent of its jurisdiction by claiming an "exception to jurisdiction" applicable to the part of its territory where the events in issue took place.

106. In that regard the Court observes at the outset that its case-law precludes territorial exclusions (see *Matthews*, cited above, § 29, and *Assanidze*, cited above, § 140) other than in the instance referred to in Article 56 § 1 of the Convention (dependent territories), which is not applicable in the present case. However, it has previously acknowledged that the States which form the external borders of the Schengen area are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 223, ECHR 2011; *Hirsi Jamaa and Others*, cited above, § 122; and *Sharifi and Others*, cited above, § 176), but did not draw any inferences with regard to the jurisdiction of the States concerned.

107. In the instant case the Government referred to the difficulty of managing illegal immigration through the Melilla enclave and, in particular, the storming of the border fences by groups generally comprising several hundred non-nationals. However, they did not allege that this situation prevented them from exercising their full authority over this part of the national territory. It is clear, indeed, that the Spanish authorities alone were acting there, as is apparent from the case file and from the video footage provided by the parties, which shows that it was Spanish law-enforcement officials who helped the migrants concerned to climb down from the fences.

108. Hence, the Court cannot discern any "constraining *de facto* situation" or "objective facts" capable of limiting the effective exercise of the Spanish State's authority over its territory at the Melilla border and, consequently, of rebutting the "presumption of competence" in respect of the applicants (see *Ilaşcu and Others*, cited above, §§ 313 and 333).

109. The Court further reiterates that the concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Ilaşcu and Others*, cited

above, § 312, and *Assanidze*, cited above, § 137). Under that law, the existence of a fence located some distance from the border does not authorise a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border. Furthermore, as regards the argument of some of the third-party interveners that EU law required member States to protect the EU's external borders under the Schengen Borders Code (see paragraph 45 and 46 above), the Court observes that Articles 1, 2(2)(a) and 4(3) and (4) of the Return Directive make clear that States may adopt or maintain provisions that are more favourable to persons to whom it applies, without their decisions and actions in that regard coming within the European Union's sphere of competence (see paragraph 47 above). Furthermore, this EU legislation does not affect Spanish jurisdiction under international law. Besides, as is stipulated in Article 27 of the Vienna Convention on the Law of Treaties, the provisions of internal law may not be invoked as justification for failure to perform a treaty (see paragraph 61 above).

110. Furthermore, the Court has previously stated that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (see, *mutatis mutandis*, *Hirsi Jamaa and Others*, cited above, § 178). As a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310, and *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, ECHR 2011), the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless (see *Assanidze*, cited above, § 142).

111. Accordingly, the events giving rise to the alleged violations fall within Spain's "jurisdiction" within the meaning of Article 1 of the Convention. Consequently, the Court dismisses the Government's objection as to lack of jurisdiction.

III. THE GOVERNMENT'S OTHER PRELIMINARY OBJECTIONS

A. The applicants' alleged loss of victim status

112. The Government submitted that, even assuming that the persons visible in the video footage were indeed the applicants (see paragraphs 80-88 above), the latter had ceased to have victim status in so far as, a few months later, they had succeeded in entering Spanish territory illegally and had been the subject of expulsion orders issued in the context of

proceedings which, in the Government's view, had been attended by all the necessary safeguards (see paragraphs 28 et seq. above). Furthermore, by the time they lodged their applications with the Court the applicants had already been the subject of the aforementioned individualised expulsion procedures. Only the first applicant had subsequently applied for asylum, although both applicants had been assisted by lawyers and interpreters. They had therefore ceased to have victim status when they had succeeded in entering Spain in late 2014 without seeking to take full advantage of the procedures available to them. Accordingly, in the Government's view, the applications should be struck out of the list of cases under Article 37 § 1 (b) and (c) of the Convention.

113. With regard to the administrative expulsion proceedings commenced in 2015, the applicants stressed that their applications related solely to the summary expulsions of 13 August 2014 and not to the subsequent proceedings referred to by the Government, which had been instituted on the basis of different facts.

114. In a case of alleged expulsion such as the present one, the Court cannot take into consideration events that occurred following a separate crossing of the border. Consequently, it dismisses the Government's request to strike the case out of its list on this ground.

B. Exhaustion of domestic remedies

1. The Government

115. In the Government' submission, the two applicants could have tried to obtain entry visas for Spain in their respective countries of origin, under section 27(1) of the LOEX (see paragraph 32 above). The first applicant, in particular, could have applied for a special working visa under the Framework Agreement on cooperation in the field of immigration between Spain and Mali of 23 January 2007. Between 2015 and 2017, 34 working visas had been issued to Malian nationals and 31 to nationals of Côte d'Ivoire. The applicants could also have applied for asylum in Morocco or in any Spanish consulate in the countries they had travelled through on their way to Morocco, including in their countries of origin (section 38 of Law 12/2009 of 30 October 2009 on asylum and subsidiary protection, see paragraph 34 above). They could likewise have applied at the Spanish embassy in Rabat, the consulate in Nador (16.8 km from Melilla) or at the Beni Enzar official border crossing point, from where they would have been taken to the Melilla police station (section 21(1) of Law 12/2009, cited above).

116. The Government also observed that the orders for the applicants' expulsion had not been challenged in the administrative courts and that only the first applicant had lodged an asylum application, aimed solely at

obtaining a stay of execution of his expulsion. 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 and the first applicant had been sent back to Mali. As to the second applicant, 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 paragraphs 28 et seq. above).

2. The applicants

117. In the applicants' submission, there had been no mechanism enabling them to gain lawful access to Spanish territory in order to apply for asylum there. They maintained that the Beni Enzar official border crossing point was not accessible to migrants from sub-Saharan Africa. According to the reports furnished by the applicants and some of the third-party interveners in the Grand Chamber proceedings, the Moroccan authorities restricted access to that crossing point in practice. In the applicants' submission, the only options available to them in order to enter Spain had been to climb the fences or cross the border illegally with the help of smugglers.

118. The applicants argued that the Moroccan authorities had not recognised any international protection mechanism until 2013. In 2013-2014, when the Moroccan Office for Refugees and Stateless Persons (BRA) had resumed operations, its activities had been confined to regularising the status of refugees who had been recognised by UNHCR in the meantime. Likewise, Mauritania had no effective refugee protection system (operated either by the State itself or by UNHCR), and the situation was the same in Algeria. In Mali, the national asylum system, which existed in theory but operated on a discretionary basis, did not make available any data regarding asylum applications; moreover, UNHCR had ceased its activities there in 2002. Furthermore, the countries mentioned – Morocco, Algeria, Mauritania and Mali – were not on the list of safe countries in that regard. In the applicants' view, the possibility of applying for international protection in third countries did not constitute an effective remedy and was in any event non-existent. The remedies in question would have had to be available, effective and have suspensive effect, and to prove workable in respect of the collective nature of the expulsion; this had clearly not been the case.

119. The applicants stressed that their applications concerned the summary expulsions of 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 had access to any effective remedy which they could have exercised before or after the enforcement of the orders for their expulsion.

3. The Court's assessment

120. The Court observes that the Government have outlined the different procedures which, they maintain, were available to the applicants in order to enter Spanish territory lawfully with an entry visa or a contract of employment or as asylum-seekers (see paragraph 115 above). In the light of the applicants' complaint that they were subjected to a collective expulsion, the procedures proposed by the Government cannot be regarded as effective remedies in respect of the alleged violation. The Government themselves presented them as alternatives to illegal entry rather than as remedies. This question will be examined further below.

121. Furthermore, and in so far as the Government refer to the expulsion orders issued after the events under consideration in the present applications, and to the asylum proceedings begun by the first applicant in 2015 while he was still in Spain (see paragraphs 112 et seq. above), the Court has already found (see paragraph 114 above) that, although the applicants did not exhaust the available remedies in respect of the expulsion orders or the refusal of asylum, these matters do not constitute the subject-matter of the present case, which concerns the alleged collective expulsion following the events of 13 August 2014.

122. The Government's objection of non-exhaustion must therefore be dismissed.

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

123. The applicants contended that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. In their view, this situation reflected a systematic policy of removing migrants without prior identification, which had been devoid of legal basis at the relevant time. They specified that the present applications did not concern the right to enter the territory of a State but rather the right to an individual procedure in order to be able to challenge an expulsion. 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 Chamber judgment

124. The Chamber found that the Government's preliminary objection regarding the applicability *ratione materiae* of Article 4 of Protocol No. 4 in the present case was closely linked to the substance of the applicants' complaint and should be joined to the merits of the case. The Chamber did not deem it necessary to determine whether the applicants had been removed after entering Spanish territory, or before managing to do so as argued by the Government. It held that if interceptions on the high seas came within the ambit of Article 4 of Protocol No. 4 (see *Hirsi Jamaa and Others*, cited above, § 180, and *Sharifi and Others*, cited above, § 212), the same must also apply to the refusal of entry to the national territory in respect of persons arriving in Spain illegally. The Chamber concluded from this that the case indeed concerned an "expulsion" for the purposes of Article 4 of Protocol No. 4 (see paragraphs 98 et seq. and, in particular, paragraphs 102-05 of the Chamber judgment). As to the merits of the complaint concerning the "collective" nature of the expulsion, the Chamber concluded that, since the removal measures had been taken in the absence of any procedure whatsoever and without any assessment of the applicants' individual circumstances or any prior administrative or judicial decision, their expulsion had indeed been collective, in breach of the aforementioned provision.

B. The parties' submissions before the Grand Chamber

1. The Government

125. The Government submitted that the scope of application of Article 4 of Protocol No. 4 had been widened by the Court's case-law, and argued that the provision in question was inapplicable in the present case.

126. In the Government's view, the provision in question was applicable to aliens arriving in a State's territory in a peaceful manner. In this context the Government relied on Article 51 of the UN Charter, which articulates States' inherent right of individual or collective self-defence if an armed attack occurs against a member State. In the Government's submission, Article 4 of Protocol No. 4 further required the existence of a dangerous situation for the applicants (either in their country of origin or because they were arriving by sea) and an inability on their part to apply for asylum or lawful entry because they were not yet on the territory of the aforementioned State.

127. Article 4 of Protocol No. 4 was therefore inapplicable where there was no danger to the applicants and/or there was a possible means of requesting asylum or entering from a safe country. The Government referred in that regard to paragraphs 177 and 174 of the judgment in *Hirsi Jamaa and Others* (cited above), and emphasised the fact that the

applicants in the present case were migrants who had attempted to enter Spain illegally by crossing a land border. The applicants had provided no evidence that they fell into one of the internationally recognised categories for the granting of asylum.

128. The Government maintained that the principle of *non-refoulement* could be applied only to persons who were in danger or faced a risk recognised under international law. The applicants in the present case had not faced any such risk in Morocco, as confirmed by the Court in its decision declaring the complaint under Article 3 inadmissible. Moreover, even after they had succeeded in entering Spain the applicants had requested asylum belatedly (N.D.), or not at all (N.T.). In the Government's view, they could not therefore be regarded as asylum-seekers. The applicants came from safe third countries, they had not been exposed to risk and they could have entered Spain lawfully if they had submitted asylum applications at the Spanish embassy or consulates in Morocco (see paragraph 34 above) or in the other countries they had travelled through, or at the authorised border crossing point at Beni Enzar. Alternatively, they could have secured contracts to work in Spain from their countries of origin. The Government referred in that regard to the report of 18 December 2015 by the Melilla police directorate, which stated that six asylum applications had been submitted at Beni Enzar between 1 January and 31 August 2014 and that, after the office for registering asylum claims had been opened by the Spanish authorities at Beni Enzar on 1 September 2014, 404 applications had been lodged at the same location during the last four months of that year. The Government stated that "before the Special International Protection Unit was built and deployed at [Beni Enzar], the applicant for asylum was informed of his rights, with the help of an interpreter and assisted by a free of charge specialized lawyer assigned by the Bar. He/she was then driven to an open Centre for the Temporary Stay of Migrants, where their basic needs were taken care of. Health services, social services and NGO's [*sic*] develop their work in these centres too." In the Government's view, the applicants had taken part in an illegal storming of the border fences in an attempt to enter Spanish territory without using the designated border crossing points. Furthermore, migratory pressures had been especially intense in 2014 owing to the proliferation of networks of smugglers organising repeated, large-scale and violent assaults on the fences in order to enter Spain through Melilla.

129. In the Government's view, the right to enter Spanish territory as claimed by the applicants, that is to say, the right to enter at any point along the border without undergoing any 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 substantial profits to the criminal organisations engaged in human trafficking. The Government argued that a decision by the Court legitimising such illegal

conduct would create an undesirable "calling effect" and would result in a migration crisis with devastating consequences for human rights protection.

130. In that regard, Articles 72 and 79 of the TFEU itself (see paragraph 43 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 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.

131. 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 33 above). As a sovereign State belonging to the European Union and forming part of the Schengen external border, Spain had a duty to protect, monitor and safeguard its borders. Hence, that duty transcended the purely national context and constituted a responsibility towards the European Union as a whole.

132. The Government argued that, in any event, the facts of the present case did not amount to a "collective expulsion of aliens", since, in order to come within the scope of Article 4 of Protocol No. 4, the measure in question had to constitute the "expulsion" of persons who were in the territory of the respondent State. In their view, the present case did not concern an "expulsion", but rather the prevention of illegal entry into Spanish territory. They stressed the clear distinction made in the Schengen Borders Code between preventing entry into a European Union member State and the procedure to be followed with regard to persons who had succeeded in entering illegally.

133. The Government added that the expulsion also 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 had to be applied to "aliens".

134. They contested the findings of the Chamber judgment in so far as no right existed in their view to enter a given State without using the border crossing points. In support of their argument they cited the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and Articles 2 and 3 of Protocol No. 4 to the Convention. They also referred to paragraph 184 of *Hirsi Jamaa and Others* (cited above), according to which the Court took into account, in its case-law on Article 4 of Protocol No. 4, whether the lack of an individual removal decision could be attributed to the culpable conduct of the person concerned (the Government cited *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII (extracts), and *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011). They requested

the Court to find that the applications were inadmissible or, failing that, that there had been no violation of Article 4 of Protocol No. 4 or of Article 13 of the Convention.

2. The applicants

135. Referring to the *travaux préparatoires* of Protocol No. 4, cited in *Hirsi Jamaa and Others* (cited above, §§ 171 and 174), the applicants observed that no distinction could be made between refugees and non-refugees or between regular and irregular migrants with regard to the protection guaranteed by Article 4 of Protocol No. 4. They noted that the Committee of Experts charged with drafting the Protocol had expressly stated that the term "aliens" applied to "all those who [had] no actual right to nationality in a State, whether they [were] merely passing through a country or reside[d] or [were] domiciled in it, whether they [were] refugees or [had] entered the country on their own initiative, or whether they [were] stateless or possess[ed] another nationality" (*travaux préparatoires*, section 61, § 34). This position was reflected in the Court's case-law (the applicants referred to *Sharifi and Others*, § 211, and *Georgia v. Russia (I)*, both cited above) and in international law, where the applicability of the prohibition of the collective expulsion of aliens was not linked to their refugee status or to their intention or ability to claim asylum in the country concerned or in a transit country.

136. The applicants referred to the observations of the United Nations High Commissioner for Human Rights (OHCHR) in the Chamber proceedings, which stated that the prohibition on collective expulsion was distinct from the principle of *non-refoulement* in so far as it was part of the right to a fair trial, and that this rule required States which were planning to expel a group of aliens to examine the individual situation of each person concerned by the expulsion measure and to take decisions on a case-by-case basis, by means of a procedure ensuring that sufficient consideration was given to each individual's circumstances. OHCHR had added that individuals might have reasons other than asylum for appealing against their expulsion.

137. As to the Government's argument that, in accordance with the concept of an operational border, the present case did not concern an expulsion but rather a refusal of entry or a defensive mechanism against unauthorised entry, the applicants submitted that this was irrelevant in so far as the word "expulsion" was to be interpreted "in the generic meaning, in current use (to drive away from a place)" (they referred to *Hirsi Jamaa and Others*, cited above, § 174, and *Khlaifia and Others*, cited above, §§ 243-44). In the applicants' view, Article 4 of Protocol No. 4 was therefore applicable in the present case.

138. As to the "collective" nature of the expulsion, the applicants submitted that the key point in determining whether or not their expulsion

had been contrary to Article 4 of Protocol No. 4 was whether the removal procedure had been individualised. As the Court had reaffirmed in *Khlaifia and Others* (cited above), "[t]he purpose of Article 4 of Protocol No. 4 [was] 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" (ibid., § 238). In ruling on the existence of a collective expulsion the Court sought to ascertain, in the light of the circumstances of the case, whether each of the persons concerned had had "a genuine and effective possibility of submitting arguments against his or her expulsion" and whether those arguments "[had been] examined in an appropriate manner by the authorities of the respondent State" (ibid., § 248).

139. The applicants alleged that they had been part of a group of individuals who had attempted to climb over the Melilla fences and that they had been expelled in similar fashion to the migrants in the cases of *Hirsi Jamaa and Others* and *Sharifi and Others* (both cited above). They maintained that they had been quite simply expelled without any procedure, on the basis of the automatic application of the *Guardia Civil* operations protocol of 26 February 2014 and service order no. 6/2014 of 11 April 2014, without being identified and without any papers being drawn up or issued to them. The applicants observed that, according to the Court's case-law, the fact of belonging to a group was relevant only in so far as it reflected the collective manner in which the State had dealt with the persons concerned in ordering and enforcing their expulsion.

140. The applicants noted that the *Guardia Civil* officials who had been in the vicinity of the fences on 13 August 2014 had not been in a position to consider the applicants' arguments against their expulsion, as their task was confined to patrolling the border.

141. In the applicants' view, their collective expulsion was also contrary to European Union law, which was applicable in Melilla, a Spanish autonomous city. The EU Directive on asylum procedures required EU member States, among other things, to facilitate access to their asylum procedures for persons who had made an application for protection and who "[could] be understood to seek refugee status", including "at the border, in the territorial waters or in the transit zones". Even the Schengen Borders Code expressly set limits on States' obligation to monitor their external borders, requiring them to provide "a substantiated decision stating the precise reasons for the refusal [of entry]", taken "by an authority empowered by national law", and to notify the persons concerned of the decision by means of a "standard form".

C. The third parties' observations

1. The Commissioner for Human Rights of the Council of Europe

142. The Commissioner for Human Rights and her predecessor observed that collective expulsions made it impossible to protect migrants' fundamental rights, and in particular the right to seek asylum, and that in practice immediate returns deprived migrants of their right to an effective remedy by which to challenge their expulsion. The Commissioner for Human Rights stressed that the border fences in question were part of Spanish territory and that the question that arose in the present case was not so much whether the applicants should have requested asylum but whether their right to protection against collective expulsions had been breached.

143. The Commissioner for Human Rights observed that the territories of Ceuta and Melilla were part of the Schengen area. Under the LOEX (Institutional Law no. 4/2000) as in force at the time of the events, aliens could be refused entry at border posts and aliens attempting to enter the country in an unauthorised manner, including those intercepted near the border, could be sent back. However, these procedures required the identification and registration of the persons intercepted, respect for procedural guarantees, access to a lawyer and an interpreter, and access to the relevant legal remedies. The Commissioner noted that the LOEX had been amended in 2015 in order to lend coherence to the Government's concept of an "operational border", and that this amendment was liable to erode migrants' fundamental rights protections and encourage the practice of summary returns by other member States. She had therefore called on the national authorities to reconsider the amendment, to improve the ambiguous legal framework governing rejections at the border ("push-backs") and to put in place a clear procedural system, compliant with international human rights law, for the border police in Ceuta and Melilla. She observed that an office responsible for dealing with asylum applications had been opened in Beni Enzar in November 2014. However, access to this border crossing point continued to be impossible for persons from sub-Saharan Africa who were on the Moroccan side of the border, whose only option in order to enter Spain was to climb over the border fences. The Commissioner for Human Rights referred in particular to the report of the fact-finding mission to Spain by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, the relevant paragraphs of which are set out at paragraph 58 above.

2. The third-party Governments

(a) The Belgian Government

144. The Belgian Government submitted that the facts of the case fell exclusively within the scope of surveillance of the external borders of the

Schengen area for the purposes of Article 77(1)(b) of the Treaty on the Functioning of the European Union. They pointed out that the rules regarding the crossing of borders had also been adopted at European level and that the member States were required to monitor their external borders and to take measures to prevent irregular crossings. The aim, in their submission, was to prevent third-country nationals from crossing the external Schengen borders illegally in unauthorised places.

145. They observed that, under Article 5(1) of the Schengen Borders Code, "[e]xternal borders [could] be crossed only at border crossing points ...". They also referred to Article 13 of the Code, according to which the aim of border surveillance was "to apprehend individuals crossing the border illegally". The procedure provided for in Directive 2008/115/EC (the Return Directive) applied to persons who had already crossed the border without authorisation. In the Belgian Government's view, that directive was therefore inapplicable in the present case, since the border surveillance authorities had merely repelled an illegal crossing attempt by non-nationals, namely third-country nationals who had sought to enter the State's territory without complying with the rules in force (that is to say, without requesting asylum or reporting to the border crossing point). Hence, these persons could not be considered to have entered the country's territory. In the intervener's view, allowing persons who circumvented the rules on crossing borders to enter the territory, when they did not report to an authorised crossing point and did not have the necessary documents to enter and remain in the country, would be wholly contrary to the European rules on border controls and the crossing of borders, depriving those rules of any purpose and encouraging human trafficking. Persons attempting to cross the border in this way had to be intercepted and handed over, if necessary using coercive means, to the authorities of the State from whose territory they had attempted to cross illegally.

146. As to the "collective" nature of the expulsion the Belgian Government argued, referring to *Khlaifia and Others* (cited above, § 234), that in order for Article 4 of Protocol No. 4 to be applicable it had first to be established that the aliens in question were on the territory of a member State and that the authorities of that State had taken measures and/or engaged in conduct aimed at compelling the aliens concerned to leave the State's territory; this did not include measures such as the non-admission of an alien to the State. The fact of preventing a third-country national from crossing a Schengen external border illegally at an unauthorised point on a member State's border necessarily implied that the person concerned had never entered the territory of that State, with the result that Article 4 of Protocol No. 4 to the Convention could not come into play.

(b) The French Government

147. The French Government referred to paragraph 238 of the judgment in *Khlaifia and Others* (cited above) regarding the purpose of Article 4 of Protocol No. 4, which was to prevent States from being able to remove aliens without examining their personal circumstances. They pointed out that there was no violation of that provision "where the lack of an individual expulsion decision [could] be attributed to the culpable conduct of the person concerned". They cited the decisions in *Berisha and Haljiti* and *Dritsas and Others* (both cited above).

148. The French Government submitted that the present case differed from that of *Hirsi Jamaa and Others* (cited above) and that the circumstances of the instant case and those of interceptions on the high seas could not be compared. The applicants in *Hirsi Jamaa*, who had been intercepted on the high seas, had not had any opportunity to have their individual circumstances examined and, in particular, to apply for asylum or for a residence permit. That was not the situation in the present case, as there had been nothing to prevent the applicants from making use of the avenues that were available to them in law and in practice in order to obtain individualised consideration of their circumstances by the competent Spanish authorities. The French Government took the view that the applicants had placed themselves in an unlawful situation resulting in the present proceedings and in the fact that no decisions could be taken.

149. As to the impact of European Union law in the present case, the French Government were of the view that the "Reception" Directive (Directive 2003/9, replaced on 21 July 2015 by Directive 2013/33/EU) and the "Procedures" Directive (Directive 2005/85, replaced on 21 July 2015 by Directive 2013/32/EU) were not applicable, as they applied only where a third-country national had lodged an asylum application at the border or on the territory of a member State (Article 3 of the directives). The applicants had not undertaken any such procedures on the date of the events in issue. Furthermore, the border guards were not required under those directives to inform third-country nationals apprehended at locations other than the border crossing points of the possibility of applying for asylum on the territory of the member State concerned. Even assuming that such a requirement to inform could be inferred from Article 6(5) of Directive 2005/85 or Article 8 of Directive 2013/32 where there was evidence to suggest that the persons concerned actually wished to apply for international protection, there was in any event no such evidence in the present case.

(c) The Italian Government

150. The Italian Government observed that, according to the Court's settled case-law, Contracting States had the right to control the entry, residence and removal of non-nationals (they referred, among many other authorities, to *Saadi v. Italy* [GC], no. 37201/06, § 124, ECHR 2008), and

that neither the Convention nor its Protocols conferred the right to political asylum (they cited *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

151. They noted that the applicants had not entered Spanish territory, and observed that Directive 2008/115/EC (the Return Directive) applied only to third-country nationals staying illegally on a member State's territory. The present case concerned an attempt by third-country nationals to enter Spanish territory illegally despite having the option of applying for international protection, and therefore came within the sphere of the security policy and sovereignty of States and of Europe as a whole. The Italian Government pointed out that States had to comply with their obligations to monitor and control the European Union's external borders, in the interests of all its member States and of efforts to combat human trafficking and illegal immigration. This, they argued, was wholly compatible with the Convention.

3. The other third-party interveners

(a) UNHCR

152. In its written observations and at the hearing before the Court, UNHCR stated that prior to November 2014 it had not been possible to request asylum at the Beni Enzar border crossing point in Melilla or at any other location, and that there had been no system for identifying persons in need of international protection.

153. The removal of migrants attempting to enter Spain illegally through an unauthorised border crossing had to comply with certain safeguards laid down by the LOEX as in force at the relevant time. However, this was not the case in Ceuta and Melilla, resulting in "rejections at the border".

154. UNHCR observed that the LOEX had been amended in 2015, after the events in the present case, and that the amendment had introduced into the Law the concept of "rejection at the border", allowing the authorities to expel aliens attempting to cross the Spanish border at Ceuta and Melilla, in order to prevent their illegal entry into the country. In UNHCR's view, this practice did not conform to the standards of international human rights law and asylum law, especially because of the lack of identification of the persons concerned and the lack of access to fair, efficient and effective procedures without discrimination. Since the entry into force of the amendment regular reports of such rejections ("push-backs") continued to be received.

155. UNHCR observed that, in reality, migrants from sub-Saharan Africa did not have access to the immigration and asylum procedures at the authorised border crossing point in Melilla, as they were systematically prevented from reaching the border on the Moroccan side. Worse still, the placement of asylum-seekers in immigration detention in the Melilla and

Ceuta enclaves, the length of the asylum procedure and the conditions in the detention centres, particularly the problem of overcrowding, deterred aliens acting in good faith from seeking international protection there. According to the intervener, expulsions and push-backs of migrants without individual identification and in inadequate reception conditions continued.

(b) OHCHR

156. OHCHR observed that the prohibition of collective expulsion was a rule of international law inherent in the right to a fair trial. That rule required individualised examination by means of a procedure affording sufficient guarantees demonstrating that the personal circumstances of each of the persons concerned had been genuinely and individually taken into account; in the absence of such examination, expulsions were deemed to be collective in nature. The term "aliens" applied to all non-nationals of the country concerned, irrespective of whether or not they had refugee status. In OHCHR's submission, the prohibition of collective expulsion differed from the principle of *non-refoulement* in that it formed part of the right to a fair trial. States had a duty to secure to the victims of collective expulsion the right to an effective remedy with automatic suspensive effect so that they could challenge the measure in question, and also to prevent measures being taken that were contrary to international human rights law, and, if appropriate, to provide redress for the violation, put an end to it, eliminate its consequences and afford compensation to the persons expelled in breach of the prohibition of collective expulsion.

(c) The CEAR

157. The CEAR argued that there was no justification for applying the special rules for Ceuta and Melilla laid down by the tenth additional provision of the LOEX, which allowed the administrative authorities to send back migrants in the absence of any procedure, in a manner wholly incompatible with the principle of legal certainty. The intervener referred to the *Guardia Civil* operations protocol which, even before the legislative amendment in question, had allowed collective expulsions to be carried out without a requirement to afford any safeguards whatsoever at the time of expulsion.

158. In the CEAR's view, the legal framework in Morocco regarding international protection was inadequate. Since ratification of the Geneva Convention Relating to the Status of Refugees in 1956, no asylum law had been passed. The BRA (see paragraph 118 above), which was responsible for recognising persons under UNHCR's mandate, had been inactive from 2004 to 2013, when it had resumed operations. In practice, since 2013, the UNHCR office in Rabat had dealt with asylum applications, with the BRA taking the decisions on the recognition of refugee status in Morocco. However, most migrants trying to reach the UNHCR office in Rabat were

arrested and detained, which prevented them from applying for protection (see paragraph 163 below). It was clear from the report of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that sub-Saharan refugees were subjected to serious violence and sexual abuse on their route to Ceuta and Melilla.

159. The CEAR submitted that the Return Directive (2008/115/EU, see paragraph 47 above) was not applied to persons who entered Melilla by scaling the fences, who did not undergo any procedure and were immediately removed. In the intervener's view, while it was possible not to apply the directive to persons who were subject to a refusal of entry or who were intercepted while crossing the border illegally (Article 2(2)), the provisions of Articles 12 and 13 always had to be taken into account. The directive did not permit any exceptions to the right of asylum or the principle of *non-refoulement*, and required safeguards against arbitrary and/or collective expulsions. Immediate returns also breached the provisions of the Procedures Directive (2013/32/EU) and the Reception Directive (2013/33/EU) of 26 June 2013 concerning international protection and persons seeking such protection, owing to the lack of individual consideration of applications and the lack of information, procedural safeguards and so on. In cases of immediate return, the persons concerned were deprived of the right to claim asylum and were excluded from the benefit of these two directives.

(d) The AIRE Centre, Amnesty International, the European Council on Refugees and Exiles (ECRE), the Dutch Council for Refugees and the International Commission of Jurists, acting jointly

160. These interveners submitted that, where Article 4 of Protocol No. 4 was engaged, it was for the State to provide an effective remedy with suspensive effect, at the very least where there was a risk to life or a risk of ill-treatment or collective expulsion.

161. They pointed out that Article 19(1) of the Charter of Fundamental Rights of the European Union prohibited collective expulsions, adding that States were not exempted from their obligations in that regard because the applicants might have omitted to expressly request asylum or to describe the risks to which they would be exposed in the event of expulsion.

162. The third-party interveners referred to the Procedures Directive (2013/32/EU, see paragraph 49 above), indicating that the *acquis* concerning the right to asylum applied not only to requests for international protection made by persons authorised to enter a State's territory, but also to border procedures. In their view, the prohibition of *refoulement* applied to actions or omissions resulting in the expulsion from the national territory of non-nationals within the State's territorial or extraterritorial jurisdiction. Refusing a group of non-nationals access to the territory or to the border

without taking the individual circumstances of each of them into consideration amounted to a violation of Article 4 of Protocol No. 4 to the Convention. In the interveners' view, the responsibility of European Union member States under the EU asylum system was engaged in respect of any individual who might wish to seek international protection. Hence, certain measures constituted an aggravated violation of Article 4 of Protocol No. 4 because of the additional breach of the obligations arising out of EU law.

163. The interveners contended that Spain was the EU member State with the highest rate of refusal of asylum applications. They noted that certain nationalities were prevented by the Moroccan police from gaining access to the Beni Enzar border crossing point for reasons of racial profiling, as evidenced by various reports from NGOs including Amnesty International and the CEAR.

D. The Court's assessment

1. Applicability

164. In order to determine whether Article 4 of Protocol No. 4 is applicable the Court must seek to establish whether the Spanish authorities subjected the applicants to an "expulsion" within the meaning of that provision.

165. In the Government's view (see paragraphs 125 et seq. above), Article 4 of Protocol No. 4 did not apply to the facts of the present case because the applicants had not been subjected to an "expulsion" but rather had been refused admission into the respondent State. They argued that the applicants had not entered Spanish territory but had merely attempted to enter Spain illegally by crossing a land border. It was true that they had come under the control of the border guards after crossing two fences, but in any event they had not been given leave to enter Spanish territory lawfully. For an expulsion to occur, the person concerned had to have first been admitted to the territory from which he or she was expelled. The Government called into question the Court's case-law, which, they argued, had departed from the intentions of the drafters of Article 4 of Protocol No. 4 by extending its scope of application to extraterritorial situations (the Government referred to *Hirsi Jamaa and Others*, cited above, §§ 170 and 171). In their view, that case-law could not apply in any circumstances to events which, as in the present case, took place in the vicinity of States' land borders, given that the *Hirsi Jamaa and Others* judgment itself drew a distinction between "migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State ... [and] those travelling by land" (ibid., § 177). Article 4 of Protocol No. 4 did not afford any protection to the latter, who had the opportunity to cross a land border lawfully but did not make use of it. In the

instant case the applicants had not demonstrated that they had been unable to enter Spanish territory lawfully. The Governments of Belgium, France and Italy, in their capacity as third-party interveners, agreed with this argument (see paragraphs 144 et seq. above).

(a) General principles

166. The Court notes that in the present case it is called upon for the first time to address the issue of the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*. Although the Government referred to States' inherent right of individual or collective self-defence if an armed attack occurred against a member State of the United Nations, the Court notes that Spain has not indicated that it has referred the matter to the Security Council of the United Nations, as anticipated by Article 51 of the UN Charter (see paragraph 60 above) in this regard. In the circumstances of the case, the Court sees no need to pursue this argument further.

167. The Court finds it appropriate in the present case to place Article 4 of Protocol No. 4 in the context of its case-law on migration and asylum. It should be stressed at the outset that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Paposhvili*, cited above, § 172; *Hirsi Jamaa and Others*, cited above, § 113; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI; and *N. v. the United Kingdom* [GC], no. 26565/05, § 30, ECHR 2008). The Court also reiterates the right of States to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union (see *Georgia v. Russia (I)*, cited above, § 177; *Sharifi and Others*, cited above, § 224; and *Khlaifia and Others*, cited above, § 241).

168. With this in mind, the Court stresses the importance of managing and protecting borders and of the role played in that regard, for those States concerned, by the Schengen Borders Code, according to which "[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control" and "should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations" (recital 6, see paragraph 45 above). For that reason, the Contracting States may in principle put arrangements in place at their borders designed to

allow access to their national territory only to persons who fulfil the relevant legal requirements.

169. Furthermore, the Court has previously emphasised the 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 *M.S.S. v. Belgium and Greece*, cited above, § 223; *Hirsi Jamaa and Others*, cited above, §§ 122 and 176; and *Khlaifia and Others*, cited above, § 241). This also applies to the situation in Ceuta and Melilla, the Spanish enclaves in North Africa.

170. Nevertheless, the Court has also stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto (see *Hirsi Jamaa and Others*, cited above, § 179).

171. In that regard it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, among many other authorities, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32; *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI; *Hirsi Jamaa and Others*, cited above, § 175; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 272, 13 September 2016). The Court has also emphasised, like UNHCR, the link between the scope of Article 4 of Protocol No. 4 as defined by the Grand Chamber, and that of the Geneva Convention and of the principle of *non-refoulement* (see *Sharifi and Others*, cited above, § 211). Hence, the domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4.

172. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Pursuant to the Vienna Convention, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must have regard to the fact that the context of the provision is a treaty for the effective protection of individual 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. Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations

between the Contracting Parties (see, among many other authorities, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 134, 21 June 2016; *Güzelyurtlu and Others*, cited above, § 235; and *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 23, ECHR 2014).

173. In the present case, as the Government argued that the applicants' case concerned a refusal of admission to Spanish territory rather than an expulsion, the Court is called upon to ascertain whether the concept of "expulsion" as used in Article 4 of Protocol No. 4 also covers the non-admission of aliens at a State border or – in respect of States belonging to the Schengen area – at an external border of that area, as the case may be.

174. In that context the Court notes that Article 2 of the International Law Commission's Draft Articles on the Expulsion of Aliens (cited at paragraph 65 above and in *Khlaifia and Others*, cited above, § 243) defines the term "expulsion" as "a formal act" or as "conduct attributable to a State by which an alien is compelled to leave the territory of that State", emphasising that the term "does not include extradition to another State ... or the non-admission of an alien to a State". The comments on the Guidelines of the Committee of Ministers of the Council of Europe reach a similar conclusion (see paragraphs 53 and 54 above).

175. As regards the concept of "non-admission", the commentary on Article 2 of the Draft Articles states that it refers to cases where an alien is refused entry and that, in some legal regimes, the term "return" (*refoulement*) is sometimes used instead of "non-admission" (see paragraph 5 of the commentary on Article 2 of the International Law Commission's Draft Articles on the Expulsion of Aliens, cited at paragraph 65 above).

176. However, it transpires from this commentary that the exclusion of matters relating to non-admission from the scope of the Draft Articles is "without prejudice to the rules of international law relating to refugees". This is provided for by Article 6 (b), which references the prohibition against *refoulement* within the meaning of Article 33 of the Convention on the Status of Refugees of 28 July 1951 (see paragraph 62 above). It should be noted that the second report on the expulsion of aliens examined in connection with the writing of the Draft Articles observed that the terms "expulsion", "escort to the border" and "*refoulement*" were used inter-changeably, without any particular semantic rigour. The International Law Commission's Special Rapporteur, Mr Maurice Kamto, concluded that the word "expulsion" would consequently be used in the context of the present topic as a "generic term" to mean all situations covered by all three terms and many others, such as "return of an alien to a country" or "exclusion of an alien", the list not being exhaustive (see paragraph 170 of the report, cited at paragraph 66 above).

177. According to Article 6(b) of the Draft Articles, a State may not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be

threatened. In substance, this prohibition is also echoed, *inter alia*, in Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (see paragraph 42 above), Article 78(1) of the TFEU (see paragraph 43 above), Article 3 of UNCAT (see paragraph 63 above), and Article 3 of the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967 (see paragraph 64 above), and also in Guideline 2 of the Guidelines of the Committee of Ministers of the Council of Europe on Forced Return (see paragraph 53 above).

178. It is crucial to observe in this regard that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border, as stated by UNHCR in its observations in the Chamber proceedings and in the conclusions on international protection adopted by its executive committee (see paragraph 67 above).

179. As regards the rules of international law concerning the prohibition of *refoulement*, it is also important to note that the commentary on Article 6 of the International Law Commission's Draft Articles states that the notion of refugee covers not only refugees lawfully in the territory of the expelling State but also any person who, being unlawfully in that territory, has applied for refugee status, while his or her application is under consideration. However, this is without prejudice to the State's right to expel an alien whose application for refugee status is manifestly abusive (see paragraph 65 above).

180. The Court also notes, like UNHCR, that in the specific context of migratory flows at borders, the wish to apply for asylum does not have to be expressed in a particular form. It may be expressed by means of a formal application, but also by means of any conduct which signals clearly the wish of the person concerned to submit an application for protection (see *M.A. and Others v. Lithuania*, no. 59793/17, § 109, 11 December 2018; see also Article 8 of the Procedures Directive, cited at paragraph 49 above).

181. If therefore, as indicated by the International Law Commission, the "non-admission" of a refugee is to be equated in substance with his or her "return (*refoulement*)", it follows that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not release that State from its obligations towards the person concerned arising out of the prohibition of *refoulement* of refugees. The Draft Articles on the Expulsion of Aliens apply in general to "the expulsion of all *aliens* present in the territory of the expelling State, with no distinction between the various categories of persons involved, for example, aliens lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons" (see paragraph 2 of the commentary on Article 1 of the Draft Articles). Hence, they cover the expulsion both of aliens who are lawfully present and of

"those unlawfully present in the territory of the ... State" (see paragraph 3 of the commentary).

182. Meanwhile, European Union law, to which several of the intervening governments referred, enshrines in primary law the right to asylum and the right to international protection (Article 78 TFEU and Article 18 of the Charter of Fundamental Rights, cited at paragraphs 43 and 42 above), and also the prohibition of collective expulsion and the principle of *non-refoulement* (Article 19 of the Charter, cited at paragraph 42 above). As regards third-country nationals who are staying illegally on the territory of a member State, the Return Directive (2008/115) sets out the standards and procedures governing their return, "in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations" (Article 1). Furthermore, the Schengen Borders Code stipulates that third-country nationals who do not fulfil all the entry conditions shall be refused entry to the territories of the member States, by means of a substantiated decision, without prejudice to the special provisions concerning the right to asylum and international protection (Articles 13 and 14 of the Schengen Borders Code applicable at the relevant time, corresponding to the new Article 14 and Article 15 of the codified version of Regulation (EU) 2016/399 of 9 March 2016 (the Schengen Borders Code), and Article 2 of Directive 2008/115, cited at paragraphs 45, 46 and 47 above). Moreover, member States may decide not to apply the Return Directive to third-country nationals who are subject to such a refusal of entry, 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 2(2)(a) of the Return Directive). In such cases, the member States may apply simplified national return procedures, subject to compliance with the conditions laid down in Article 4(4) of the Directive, including the principle of *non-refoulement* (see the CJEU judgment in the case of *Affum*, cited above, §§ 72-74).

183. Furthermore, under Article 14(4) and (5) of Directive 2011/95 (the Qualification Directive) the principle of *non-refoulement*, and certain rights enshrined in European Union law on the basis of the Geneva Convention (Articles 3, 4, 16, 22, 31, 32 and 33 of that Convention) are applicable, unlike the other rights enumerated in those two instruments, to any person present in the territory of a member State who fulfils the material conditions to be considered a refugee, even if he or she has not formally obtained refugee status or has had it withdrawn. It appears that the enjoyment of these rights is therefore not conditional on having already obtained refugee status, but derives from the sole fact that the person concerned satisfies the material conditions referred to in Article 1(A)(2) of the Geneva Convention and is present in the territory of a member State (see §§ 84, 85, 90 and 105

of the CJEU judgment in the case of *M. v. Ministerstvo vnitra and Others*, cited at paragraph 51 above). Moreover, under Articles 4 and 19(2) of the Charter, EU law does not permit member States to derogate from the principle of *non-refoulement* under Article 33(2) of the Geneva Convention (ibid., § 95).

184. For its part, the Court has not hitherto ruled on the distinction between the non-admission and expulsion of aliens, and in particular of migrants or asylum-seekers, who are within the jurisdiction of a State that is forcibly removing them from its territory. For persons in danger of ill-treatment in the country of destination, the risk is the same in both cases, namely that of being exposed to such treatment. Examination of the international and European Union law materials referred to above supports the Court's view that the protection of the Convention, which is to be interpreted autonomously (see, among many other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 48, ECHR 2009; *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013; and *Allen v. the United Kingdom* [GC], no. 25424/09, § 95, ECHR 2013) cannot be dependent on formal considerations such as whether the persons to be protected were admitted to the territory of a Contracting State in conformity with a particular provision of national or European law applicable to the situation in question. The opposite approach would entail serious risks of arbitrariness, in so far as persons entitled to protection under the Convention could be deprived of such protection on the basis of purely formal considerations, for instance on the grounds that, not having crossed the State's border lawfully, they could not make a valid claim for protection under the Convention. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions cannot go so far as to render ineffective the protection afforded by the Convention, and in particular by Article 3 (see, *mutatis mutandis*, *M.S.S. v. Belgium and Greece*, cited above, § 216, and *Amuur v. France*, 25 June 1996, § 43, *Reports* 1996-III).

185. These reasons have led the Court to interpret the term "expulsion" in the generic meaning in current use ("to drive away from a place") (see *Khlaifia and Others*, cited above, § 243, and *Hirsi Jamaa and Others*, cited above, § 174), as referring to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border. The Court has also used the term in the context of Articles 3 and 13 of the Convention (see, for example, *J.K. and Others v. Sweden*, no. 59166/12, §§ 78 and 79, 4 June 2015, and *Saadi v. Italy*, cited above, §§ 95, 124 and 125), and especially with regard to the removal of aliens at the border (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 54-58, ECHR 2007-II; *Kebe and Others v. Ukraine*, no. 12552/12, § 87, 12 January 2017; *M.A. and Others*

v. Lithuania, cited above, §§ 102 and 103; and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 123-28, 21 November 2019).

186. As a result, Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions (see, among other authorities, *Hirsi Jamaa and Others*, cited above, §§ 180 et seq., and *M.A. and Others v. Lithuania*, cited above, § 70). In the Court's view, this approach is confirmed by the International Law Commission's Draft Articles on the Expulsion of Aliens, which, with regard to refugees, equate their non-admission to a State's territory with their return (*refoulement*) and treat as a refugee any person who applies for international protection, while his or her application is under consideration (see Articles 2 and 6 of the Draft Articles and the commentary thereto, cited at paragraph 65 above; see also the Special Rapporteur's second report on the expulsion of aliens, cited at paragraph 66 above).

187. In the Court's view these considerations, which formed the basis for its recent judgments in *Hirsi Jamaa and Others*, *Sharifi and Others* and *Khlaifia and Others* (all cited above), concerning applicants who had attempted to enter a State's territory by sea, have lost none of their relevance. There is therefore no reason to adopt a different interpretation of the term "expulsion" with regard to forcible removals from a State's territory in the context of an attempt to cross a national border by land. Nevertheless, it should be specified that this approach follows from the autonomous interpretation of Convention terms.

188. The Court would also emphasise that neither the Convention nor its Protocols protect, as such, the right to asylum. The protection they afford is confined to the rights enshrined therein, including particularly the rights under Article 3. That provision prohibits the return of any alien who is within the jurisdiction of one of the Contracting States for the purposes of Article 1 of the Convention to a State in which he or she faces a real risk of being subjected to inhuman or degrading treatment or even torture. In that respect, it embraces the prohibition of *refoulement* under the Geneva Convention.

(b) Application to the present case

189. In the instant case the Government argued that the applicants had not been subjected to an expulsion. It was true that they had come under the control of the border guards after crossing two fences, but in any event they had not been given leave to enter Spanish territory lawfully. For an expulsion to occur, the person concerned had to have first been admitted to the territory from which he or she was expelled.

190. The Court is in no doubt that the applicants were apprehended on Spanish territory by Spanish border guards and were therefore within Spain's jurisdiction within the meaning of Article 1 of the Convention. The Court refers in that regard to the considerations it outlined in reply to the Government's preliminary objection that Spain lacked jurisdiction in the present case (see paragraphs 104 et seq. above). Those considerations were based on the fact that a State may not unilaterally claim exemption from the Convention, or modify its effects, in respect of part of its territory, even for reasons it considers legitimate. The Court observes in that regard that, according to Article 27 of the Vienna Convention, the provisions of internal law may not be invoked as justification for failure to perform a treaty (see paragraph 61 above).

191. It is further beyond dispute that the applicants were removed from Spanish territory and forcibly returned to Morocco, against their will and in handcuffs, by members of the *Guardia Civil*. There was therefore an "expulsion" within the meaning of Article 4 of Protocol No. 4. Accordingly, that provision is applicable in the present case. The Court therefore dismisses the Government's preliminary objection on this point and declares the applications admissible in this regard.

2. Merits

192. It must now be ascertained whether the expulsion was "collective" within the meaning of Article 4 Protocol No. 4.

(a) General principles

193. The Court points to its case-law concerning Article 4 of Protocol No. 4, as set out, with regard to migrants and asylum-seekers, in the judgments in *Hirsi Jamaa and Others*, *Sharifi and Others*, and *Khlaifia and Others* (all cited above). According to that case-law, an expulsion is deemed to be "collective" for the purposes of Article 4 of Protocol No. 4 if it compels 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" (see *Khlaifia and Others*, cited above, §§ 237 et seq.; *Georgia v. Russia (I)*, cited above, § 167; *Andric v. Sweden* (dec.), no. 45917/99, 23 February 1999; *Davydov v. Estonia* (dec.), no. 16387/03, 31 May 2005; *Sultani v. France*, no. 45223/05, § 81, ECHR 2007-IV (extracts); and *Ghulami v. France* (dec.), no. 45302/05, 7 April 2009).

194. As to whether an expulsion is "collective" within the meaning of Article 4 of Protocol No. 4, the Court reiterates its case-law according to which, when it uses the adjective "collective" to describe an expulsion, it is referring to a "group", without thereby distinguishing between groups on the basis of the number of their members (see *Georgia v. Russia* (I), cited above, § 167; *Sultani*, cited above, § 81; *Ghulami*, cited above; and *Khlaifia*

and Others, cited above, § 237; see also Article 9 § 1 of the International Law Commission's Draft Articles on the Expulsion of Aliens, according to which "collective expulsion means expulsion of aliens, as a group", and the accompanying commentary, cited in *Khlaifia and Others* (cited above, §§ 46-47, and at paragraph 65 above)). The group does not have to comprise a minimum number of individuals below which the collective nature of the expulsion would be called into question. Thus, the number of persons affected by a given measure is irrelevant in determining whether or not there has been a violation of Article 4 of Protocol No. 4.

195. Moreover, the Court has never hitherto required that the collective nature of an expulsion should be determined by membership of a particular group or one defined by specific characteristics such as origin, nationality, beliefs or any other factor, in order for Article 4 of Protocol No. 4 to come into play. The decisive criterion in order for an expulsion to be characterised as "collective" is the absence of "a reasonable and objective examination of the particular case of each individual alien of the group" (see *Khlaifia and Others*, cited above, §§ 237 et seq., with further references).

196. The cases of *Hirsi Jamaa and Others* and *Sharifi and Others* (cited above) concerned the removal to Libya and Greece respectively of a group of people who had been intercepted together at sea, without their identity or individual circumstances being taken into account. In *Hirsi Jamaa and Others* (§ 185), the applicants had not undergone any identity checks and the authorities had merely put the migrants, who had been intercepted on the high seas, onto military vessels to take them back to the Libyan coast. In *Sharifi and Others* (§§ 214-25), the Court found that the migrants, who had been intercepted in Adriatic ports, had been subjected to "automatic returns" to Greece and had been deprived of any effective possibility of seeking asylum. In both cases, many of the applicants were asylum-seekers whose complaint concerning the respondent State, under Article 3 of the Convention, was that they had not been afforded an effective possibility of challenging their return. The applicants' main allegation in those cases, therefore, was that their return to Libya and Greece respectively would clearly expose them to a "real risk" of ill-treatment or of being repatriated to Eritrea, Somalia and Afghanistan (see *Sharifi and Others*, cited above, §§ 135, 180 and 215, and *Hirsi Jamaa and Others*, cited above, §§ 131 and 158).

197. In the most recent case, that of *Khlaifia and Others*, the applicants had arrived in Italy across the Mediterranean and had been returned to Tunisia by the Italian authorities. In the proceedings before the Court, they did not allege a violation of Article 3 on account of that expulsion. The Grand Chamber, referring to *Hirsi Jamaa and Others* (cited above, § 177) and *Sharifi and Others* (cited above, § 210), reiterated that Article 4 of Protocol No. 4 established a set of procedural conditions aimed at preventing States from being able to remove 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 *Khlaifia and Others*, cited above, § 238, and *Andric*, cited above). It found that, in order to determine whether there had been a sufficiently individualised examination, it was necessary to have regard to the particular circumstances of the expulsion and to the "general context at the material time" (see *Khlaifia and Others*, cited above, § 238; *Georgia v. Russia (I),* cited above, § 171*;* and *Hirsi Jamaa and Others*, cited above, § 183).

198. It is apparent from this case-law that Article 4 of Protocol No. 4, in this category of cases, is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk. For that reason, Article 4 of Protocol No. 4 requires the State authorities to ensure that each of the aliens concerned has a genuine and effective possibility of submitting arguments against his or her expulsion (see *Hirsi Jamaa and Others*, cited above, § 177; *Sharifi and Others*, cited above, § 210; and *Khlaifia and Others*, cited above, §§ 238 and 248).

199. In this context, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion, if each person concerned has been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis (see *Khlaifia and Others*, cited above, § 239; see also *M.A. v. Cyprus*, no. 41872/10, §§ 246 and 254, ECHR 2013 (extracts); *Sultani*, cited above, § 81; *Hirsi Jamaa and Others*, cited above, § 184; and *Georgia v. Russia (I)*, cited above, § 167). However, Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances, as the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State (see *Khlaifia and Others*, cited above, § 248). In *Khlaifia and Others*, the applicants' representatives were unable to indicate "the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude[d] their removal". This called into question the usefulness of an individual interview in that case (ibid., § 253).

200. Lastly, the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4. According to the Court's well-established case-law, there is no violation of Article 4 of Protocol No. 4 if the lack of an individual expulsion decision can be attributed to the applicant's own conduct: see *Khlaifia and Others*, cited above, § 240, and *Hirsi Jamaa and Others*, cited above, § 184; see also *M.A. v. Cyprus*, cited above, § 247; *Berisha and Haljiti*, cited above; and

Dritsas and Others, cited above. In the last two cases, it was the lack of active cooperation with the available procedure for conducting an individual examination of the applicants' circumstances which prompted the Court to find that the Government could not be held responsible for the fact that no such examination was carried out.

201. In the Court's view, the same principle must also apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety. In this context, however, in assessing a complaint under Article 4 of Protocol No. 4, the Court will importantly take account of whether, in the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures. Where the respondent State provided such access but an applicant did not make use of it, the Court will consider, in the present context and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible.

(b) Application to the present case

(i) The fact that there were only two applicants

202. In the present case the Court observes at the outset that the Government disputed the "collective" nature of the expulsion to which the applicants had allegedly been subjected, because the case concerned only two individuals. The Court notes in that regard that the applicants in the present case were part of a large group of aliens acting simultaneously and that they were subjected to the same treatment as the other members of the group.

203. Irrespective of this factual consideration, the Court reiterates its case-law according to which the number of persons affected by a given measure is irrelevant in determining whether or not there has been a violation of Article 4 of Protocol No. 4. Moreover, the decisive criterion in order for an expulsion to be characterised as "collective" has always been the absence of "a reasonable and objective examination of the particular case of each individual alien of the group" (see paragraph 193 above). The Court sees no reason to reach a different conclusion in the present case and therefore rejects the Government's arguments in this regard.

(ii) The applicants' conduct

(α) The parties' submissions

204. The Government further alleged that the applicants' removal had been the consequence of their own "culpable conduct" for the purposes of

the Court's settled case-law. The applicants had tried to enter Spanish territory in an unauthorised manner (see section 25 of the LOEX and paragraph 32 above) and had in no way demonstrated that they had been incapable of using the numerous legal procedures available in order to obtain permission to cross the border into Spain. The Government argued that it was open to any alien wishing to enter Spain in order to claim asylum or international protection in general to submit such a claim at the Beni Enzar border crossing point (section 21 of Law 12/2009, cited at paragraph 34 above) or at the Spanish embassy in Rabat or the Spanish consulates in Morocco (in particular in Nador), or a Spanish embassy or consulate in another country (section 38 of Law 12/2009, cited at paragraph 34 above). Hence the applicants could – if they had needed to claim asylum or obtain international protection on other grounds – have submitted such a claim to the aforementioned institutions (section 38 of Law 12/2009, see paragraph 34 above). Furthermore, in the proceedings following their eventual entry into Spain in 2015, the applicants had not demonstrated the existence of any risks to which they had been exposed as a result of their removal to Morocco or to their country of origin.

205. The applicants contested the Government's assertion that the respondent State had afforded them genuine and effective legal options for obtaining lawful entry into Spain. They simply stressed the impossibility of gaining access to most of the locations referred to by the Government, especially for individuals from sub-Saharan Africa.

(ß) The Court's assessment

206. The Court notes at the outset that the applicants in the present case were members of a group comprising numerous individuals who attempted to enter Spanish territory by crossing a land border in an unauthorised manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance. It further observes that the applicants' complaints under Article 3 were declared inadmissible by the Chamber.

207. In the present case the applicants were not identified, as no written procedure was undertaken on 13 August 2014 to examine their individual circumstances. Their return to Morocco was therefore a *de facto* individual but immediate handover, carried out by the Spanish border guards on the sole basis of the *Guardia Civil*'s operations protocol (see paragraph 37 above).

208. The Court notes the Government's argument that the applicants had engaged in "culpable conduct" by circumventing the legal procedures that existed for entry into Spain. The question therefore arises whether such procedures existed at the material time; whether they afforded the applicants a genuine and effective opportunity of submitting reasons – assuming that

such reasons existed – against their handover to the Moroccan authorities; and, if this was the case, whether the applicants made use of them.

209. With regard to Contracting States like Spain whose borders coincide, at least partly, with external borders of the Schengen area, the effectiveness of Convention rights requires that these States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention. In the context of the present case the Court also refers to the approach reflected in the Schengen Borders Code. The implementation of Article 4(1) of the Code, which provides that external borders may be crossed only at border crossing points and during the fixed opening hours, presupposes the existence of a sufficient number of such crossing points. In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.

210. However, where such arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points (see also Article 6 of the EU Procedures Directive, paragraph 49 above). Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as described in paragraph 201 above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.

211. The Court must therefore ascertain whether the possibilities which, in the Government's submission, were available to the applicants in order to enter Spain lawfully, in particular with a view to claiming protection under Article 3, existed at the material time and, if so, whether they were genuinely and effectively accessible to the applicants. In the event that this was the case and the applicants did not make use of these legal procedures, but instead crossed the border in an unauthorised manner (in this instance taking advantage of their large numbers and using force), only the absence of cogent reasons (as described in paragraph 201 above) preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the fact that the Spanish border guards did not identify them individually.

212. In this regard, the Court notes that Spanish law afforded the applicants several possible means of seeking admission to the national territory, either by applying for a visa (see paragraph 115 above) or by applying for international protection, in particular at the Beni Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco (see sections 21 and38 of Law 12/2009, cited at paragraph 34 above, and Articles 4, 16 and 29 (4) of Royal Decree 203/1995, cited at paragraph 35 above). The availability and actual accessibility of these legal avenues in the applicants' case were discussed in detail in the Grand Chamber proceedings, including at the hearing.

213. It has been established that on 1 September 2014, shortly after the events in the present case, the Spanish authorities set up an office for registering asylum claims ("the Special International Protection Unit"), open around the clock, at the Beni Enzar international border crossing point. According to the report of the Melilla police directorate (see paragraph 128 above), even before the setting-up of an asylum registration office on that date, a legal avenue to that effect had been established under section 21 of Law 12/2009 (see paragraph 34 above). The Government stated that on this basis, twenty-one asylum applications had been lodged between 1 January and 31 August 2014 in Melilla, including six asylum applications lodged at the Beni Enzar border crossing point, with the asylum-seekers being escorted to the Melilla police station in order for them to lodge a formal application. These people came from Algeria, Burkina Faso, Cameroon, Congo, Côte d'Ivoire and Somalia.

214. The Court notes that the applicants and the third-party interveners did not convincingly challenge the accuracy of the statistics submitted by the Government on this issue. Neither did they challenge the statement by the Government according to which "before the Special International Protection Unit was built and deployed at [Beni Enzar], the applicant for asylum was informed of his rights, with the help of an interpreter and assisted by a free of charge specialized lawyer assigned by the Bar. He/she was then driven to an open Centre for the Temporary Stay of Migrants, where their basic needs were taken care of too" (see paragraph 128 above). The Court therefore has no reason to doubt that even prior to the setting-up on 1 September 2014 of the Special International Protection Unit at Beni Enzar, there had not only been a legal obligation to accept asylum applications at this border crossing point but also an actual possibility to submit such applications.

215. The uncontested fact that, according to the Government's statistics, 404 asylum applications were submitted at Beni Enzar between 1 September and 31 December 2014 – thus, many more than the six applications in the first eight months of 2014 – does not alter that conclusion. As indicated by the Commissioner for Human Rights of the Council of Europe, referring to

the 2014 annual report of the Spanish Ombudsman, those 404 applications were all submitted by Syrian refugees at a time when the Syrian crisis had intensified. This is confirmed by Annex 14 of the Government's submissions, according to which, owing to the notable increase in the number of applicants for international protection at the end of 2014, and in order to facilitate the processing of asylum applications, the number of national police officers in Beni Enzar and Tarajal was increased, and the officers received the appropriate training to deal with the asylum applications that were submitted. Thus, the higher number of applications from 1 September 2014 onwards would appear to be primarily the result of an increased number of requests for protection by Syrian nationals in that period and, as such, does not call into question the accessibility of Beni Enzar prior to 1 September 2014.

216. This conclusion would appear to be confirmed by the fact that, according to the statistics, the number of applications for asylum from persons from sub-Saharan Africa did not increase after 1 September 2014, unlike the number of applications from Syrian nationals. Indeed, not a single asylum request from persons from sub-Saharan Africa was submitted at Beni Enzar between 1 September and 31 December 2014 or in the whole of 2015, while only two such requests were submitted in 2016 and none in 2017. These figures were also relied on by the applicants in their pleadings before the Grand Chamber.

217. Consequently, the mere fact – not disputed by the Government - that only very few asylum requests were submitted at Beni Enzar prior to 1 September 2014 (see paragraph 213 above) does not allow the conclusion that the respondent State did not provide genuine and effective access to this border crossing point. The applicants' general allegation in their pleadings before the Grand Chamber that "at the material time, it was not possible for anyone to claim asylum at the Beni Enzar border post", is insufficient to displace this conclusion.

218. The Court will next ascertain whether the applicants had cogent reasons (as described in paragraph 201 above) for not using these border procedures at the Beni Enzar border crossing point. In this regard the Court observes that several third parties to the proceedings before the Grand Chamber argued that physically approaching the Beni Enzar border crossing point was, in practice, impossible or very difficult for persons from sub-Saharan Africa staying in Morocco. However, the various reports submitted to that effect, particularly by UNHCR and the Commissioner for Human Rights of the Council of Europe, are not conclusive as to the reasons and factual circumstances underlying these allegations. Some of them mention racial profiling or severe passport checks on the Moroccan side. However, none of these reports suggests that the Spanish Government was in any way responsible for this state of affairs.

219. As regards the findings of Mr Boček in his report from 2018 to the effect that the *Guardia Civil* would notify the Moroccan authorities of any movements at the Melilla fence, with the result that the latter would prevent people in Moroccan territory from jumping the fence, those findings would appear to apply only to unauthorised border crossings (see paragraph 58 above). There is nothing to suggest that a similar situation prevailed at official border crossing points, including Beni Enzar.

220. As regards the applicants in the present case, in the Grand Chamber proceedings they at first did not even allege that they had ever tried to enter Spanish territory by legal means, referring to the aforementioned difficulties only in the abstract. In their second set of observations to the Grand Chamber they still denied any link between their claim under Article 4 of Protocol No. 4 and a possible asylum claim. Only at the hearing before the Grand Chamber did they allege that they had themselves attempted to approach Beni Enzar but had been "chased by Moroccan officers". Quite apart from the doubts as to the credibility of this allegation arising from the fact that it was made at a very late stage of the procedure, the Court notes that at no point did the applicants claim in this context that the obstacles allegedly encountered, should they be confirmed, were the responsibility of the Spanish authorities. Hence, the Court is not persuaded that the applicants had the required cogent reasons (as described in paragraph 201 above) for not using the Beni Enzar border crossing point at the material time with a view to submitting reasons against their expulsion in a proper and lawful manner.

221. The Court stresses that the Convention is intended to guarantee to those within its jurisdiction not rights that are theoretical and illusory, but rights that are practical and effective (see paragraph 171 above). This does not, however, imply a general duty for a Contracting State under Article 4 Protocol No. 4 to bring persons who are under the jurisdiction of another State within its own jurisdiction. In the present case, even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation has been established before the Court.

222. This finding suffices for the Court to conclude that there has been no violation of Article 4 of Protocol No. 4 in the present case. The Court notes the Government's submission to the effect that, in addition to being afforded genuine and effective access to Spanish territory at the Beni Enzar border crossing point, the applicants also had access to Spanish embassies and consulates where, under Spanish law, anyone could submit a claim for international protection. As the Court has already found that the respondent State provided genuine and effective access to Spanish territory at Beni Enzar at the material time, it is not required to take a position in the present case on whether or to what extent such embassies and consulates would have brought the applicants within the jurisdiction of Spain, if they had

sought international protection there, and whether these embassies and consulates would thus also have been capable of providing them with the required level of access. However, in the light of the Government's reliance on these procedures and the detailed submissions received, the Court will proceed to consider this issue.

223. In this context the Court notes that under section 38 of Law 12/2009 Spanish ambassadors were already required at the material time to arrange for the transfer to Spain of persons who were shown to be in need of protection (see paragraph 34 above). It will therefore examine the protective effect of section 38, which is disputed between the parties.

224. At the hearing before the Grand Chamber, the applicants referred to a 2016 report of the Asylum Information Database (AIDA), according to which this section of Law 12/2009 "still lack[ed] specific implementing legislation to enable it to become a reality". However, the Government demonstrated that this allegation was mistaken, pointing out that according to Article 2 § 2 of the Civil Code, Royal Decree 203/1995 (cited in paragraph 35 above), laying down implementing arrangements for the previous version of the Law on asylum, was still in force. That decree provided for a specific procedure enabling the ambassadors to establish whether asylum applications submitted at the Spanish embassies and consulates were genuine and, if appropriate, to arrange for the transfer to Spain of the persons concerned, by means of an urgent admission in the event of a high risk in a third country. According to this Royal decree, an administrative decision had to be issued within six months and was subject to judicial review. The applicability of this procedure was confirmed by a circular letter of 20 November 2009, sent by the Government to all Spanish ambassadors and containing instructions regarding the arrangements for such transfers. This circular letter provides that "if in the exercise of his or her duties the ambassador considers that 'there is a risk to [the asylum-seeker's] physical integrity', he or she may secure the person's transfer to Spain (this may entail issuing a visa and a one-way airline ticket to Spain, subject to prior approval by the Ministry)" (see paragraph 38 above). The applicants' assertion that section 38 of Law 12/2009 was not applicable at the material time owing to the absence of an implementing decree is therefore erroneous.

225. In this connection the Government also presented specific figures concerning the asylum applications registered in 2014 at Spanish embassies and consulates. According to these figures, which were not contested by the applicants, 1,308 asylum applications were submitted at Spanish embassies and consulates between 2014 and 2018, including 346 in 2014. In that year, eighteen asylum applications were submitted by nationals of Côte d'Ivoire at the Spanish embassies in Abidjan and Bamako. All nine asylum applications submitted at the Spanish embassy in Rabat in those five years were made by Moroccan nationals. Moreover, only four of them were

submitted in 2014. The applicants, for their part, did not contest the actual accessibility of the Spanish embassies and consulates, including the Spanish embassy in Rabat and the Spanish consulate in Nador, or the possibility for themselves or other third-country nationals to apply for international protection there.

226. The Court is aware of the limited powers of the Spanish ambassadors in the application of the special procedure under section 38 of Law 12/2009 and of the time-limit of six months for their decision, circumstances which may mean that not all asylum-seekers are provided with immediate protection. However, in the present case these circumstances were not decisive, as in its inadmissibility decision of 7 July 2015 the Court dismissed the applicants' complaint under Article 3 concerning their fear of ill-treatment in Morocco and declared it manifestly ill-founded. There is therefore no indication that the applicants, had they made use of the procedure under section 38, would have been exposed, pending the outcome of that procedure, to any risk of ill-treatment in Morocco, where they had been living for a considerable time (see paragraphs 22 and 23 above).

227. Accordingly, the Court is not persuaded that these additional legal avenues existing at the time of the events were not genuinely and effectively accessible to the applicants. It observes in that connection that the Spanish consulate in Nador is only 13.5 km from Beni Enzar and hence from the location of the storming of the fences on 13 August 2014. The applicants, who stated that they had stayed in the Gurugu camp for two years (in N.D.'s case) and for one year and nine months (in N.T.'s case), could easily have travelled there had they wished to apply for international protection. They did not give any explanation to the Court as to why they did not do so. In particular, they did not even allege that they had been prevented from making use of these possibilities.

228. Lastly, the applicants likewise did not dispute the genuine and effective possibility of applying for a visa at other Spanish embassies, either in their countries of origin or in one of the countries they had travelled through since 2012. In N.D.'s case, a special treaty between Spain and Mali even afforded an additional possibility of obtaining a special working visa (see paragraph 115 above). At the hearing before the Grand Chamber, the Government gave concrete figures showing that a considerable number of working visas had been issued to citizens of Mali and Côte d'Ivoire in the relevant period. Those statistics were not contested by the applicants either.

229. However that may be, for the reasons set out above (see paragraphs 213-220 above), the Court is not convinced that the respondent State did not provide genuine and effective access to procedures for legal entry into Spain, in particular by an application for international protection at the Beni Enzar border post, and that the applicants had cogent reasons

based on objective facts for which the respondent State was responsible, not to make use of those procedures.

230. At any event, the Court observes that the applicants' representatives, both in their written observations and at the Grand Chamber hearing, were unable to indicate the slightest concrete factual or legal ground which, under international or national law, would have precluded the applicants' removal had they been registered individually (see, *mutatis mutandis*, *Khlaifia and Others*, § 253; however, see also the views of the Committee on the Rights of the Child cited at paragraph 68 above).

231. In the light of these observations the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders (see paragraph 45 above). Consequently, in accordance with its settled case-law, the Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct (see references in paragraph 200 above). Accordingly, there has been no violation of Article 4 of Protocol No. 4.

232. However, it should be specified that this finding does not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*. In this regard the Court notes the efforts undertaken by Spain, in response to recent migratory flows at its borders, to increase the number of official border crossing points and enhance effective respect for the right to access them, and thus to render more effective, for the benefit of those in need of protection against *refoulement*, the possibility of gaining access to the procedures laid down for that purpose.

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

233. The applicants complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco. They relied on Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

234. 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 their view, there were no grounds for finding a violation of Article 13 of the Convention.

235. The applicants, for their part, submitted that they had not had access to a domestic remedy enabling them to complain of the collective nature of the expulsions of 13 August 2014; such a remedy would have to have been available and effective and have suspensive effect.

236. In their view, the summary and automatic expulsions of which they had been the victims had been in direct breach of the Spanish legislation applicable at the relevant time. The procedure that should have been followed was the removal procedure provided for by section 58(3)(b) of the LOEX and Article 23 of Royal Decree 557/2011 (see paragraphs 32 and 36 above), according to which border police officials who apprehended an alien had to escort him or her to the police station with a view to his or her identification and the possible commencement of a removal procedure. Any expulsion order issued on completion of that stage was subject to a judicial appeal in proceedings in which the person concerned had the right to be assisted free of charge by a lawyer and an interpreter.

237. The applicants further submitted that, in so far as no formal individual decision had been taken in the present case and in the absence of any identification, information or procedure, they had been deprived of any domestic remedy in respect of their expulsion, including the remedies provided for by domestic and EU law. In their view, this amounted to a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

A. Admissibility

238. 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 the complaint 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 that regard. It must therefore be declared admissible.

B. Merits

1. The Chamber judgment

239. The Chamber considered that this complaint was "arguable" for the purposes of Article 13 of the Convention (see *Hirsi Jamaa and Others*, cited above, § 201) and that the applicants had been deprived of any remedy enabling 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 being sent back. The Chamber therefore held that there had been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 to the Convention.

2. The Court's assessment

240. 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.

241. In so far as the applicants complained of the lack of an effective remedy by which to challenge their expulsion on the grounds of its allegedly collective nature, the Court notes that, although Spanish law provided a possibility of appeal against removal orders at the border (see paragraphs 32 et seq. above), the applicants themselves were also required to abide by the rules for submitting such an appeal against their removal.

242. As it stated previously in examining the complaint under Article 4 of Protocol No. 4 (see paragraph 231 above), the Court considers that the applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorised location. They thus chose not to use the legal procedures which existed in order to enter Spanish territory lawfully, thereby failing to abide by the relevant provisions of the Schengen Borders Code regarding the crossing of the external borders of the Schengen area (see paragraph 45 above) and the domestic legislation on the subject. In so far as the Court has found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla (see paragraph 231 above), it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal.

243. It follows that the lack of a remedy in respect of the applicants' removal does not in itself constitute a violation of Article 13 of the Convention, in that the applicants' complaint regarding the risks they were

liable to face in the destination country was dismissed at the outset of the procedure.

244. Accordingly, there has been no violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to continue the examination of the applications under Article 37 § 1 *in fine* of the Convention (see paragraph 79 above);

2. *Dismisses*, unanimously, the Government's preliminary objection of lack of victim status, examined by the Court from the standpoint of the establishment of the facts (see paragraph 88 above);

3. *Dismisses*, unanimously, the Government's preliminary objection of lack of jurisdiction (see paragraph 111 above);

4. *Dismisses*, unanimously, the Government's preliminary objection concerning the applicants' alleged loss of victim status on account of the events occurring after 13 August 2014 and the Government's request to strike the case out of the list on that ground (see paragraph 114 above);

5. *Dismisses*, unanimously, the Government's preliminary objection of failure to exhaust domestic remedies (see paragraph 122 above);

6. *Dismisses*, by a majority, the Government's preliminary objection concerning the inapplicability of Article 4 of Protocol No. 4 in the present case (see paragraph 191 above);

7. *Declares*, unanimously, the applications admissible (see paragraphs 191 and 238 above);

8. *Holds*, unanimously, that there has been no violation of Article 4 of Protocol No. 4 to the Convention (see paragraph 231 above);

9. *Holds*, unanimously, that there has been no violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 (see paragraph 244 above).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 February 2020.

Johan Callewaert	Linos-Alexandre Sicilianos
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Pejchal;

(b) partly dissenting opinion of Judge Koskelo.

L.A.S.
J.C.

CONCURRING OPINION OF JUDGE PEJCHAL

1. Introduction

If I leave aside the solution entailing a preliminary question as to whether the conditions for striking the application out of the list of cases are met under Article 37 of the Convention, then I can agree with the opinion of the majority. That is why I voted, after some hesitation, with the majority. Nevertheless, considerable doubts remain for me as to whether the Grand Chamber should have dealt with this case at all. In particular, I have doubts as to whether in this case it was fair to the community of free citizens living in the Council of Europe member States for an international court to order a hearing on which it expended considerable financial resources, entrusted to it by the High Contracting Parties for the pursuit of justice. I will address these doubts in my concurring opinion, as I consider them to be serious.

2. The right of individual application under Article 34 of the Convention (general considerations)

There is no reason not to accept Rawls's postulate that justice is first and foremost fairness and that in establishing the criteria for justice it is necessary to begin with fairness. This idea is neither new nor revolutionary. Long ago, it was Cicero who, in his "*De officiis*", stated: "*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*".

In the quest for justice Rawls's theory holds much more true in the field of international law than in domestic law, which has substantially more possibilities than international law to enforce the observance of the law. The Vienna Convention on the Law of Treaties, which provides guidelines for the interpretation of international treaties including the Convention, is rightly based on the principle of fairness in international relations.

It is useful to bear in mind that any individual application in which the applicant claims a violation of the Convention by a High Contracting Party not only impacts upon the life of the community of free citizens living on the territory of that particular High Contracting Party, but also affects, either directly or indirectly, the life of the community of free citizens in all the member States of the Council of Europe.

In my opinion, every applicant is thus duty-bound to submit his or her application on genuine and truly substantial grounds. In the course of the ongoing proceedings applicants are further duty-bound to make clear to the Court, not only via their representatives but also through their personal attitude to the case in progress, that they are genuinely convinced that the High Contracting Party has breached their fundamental freedoms or that they were actually unable to exercise their rights guaranteed by the

Convention. An applicant may certainly be wrong in his or her interpretation of the Convention, but in any event it must be evident that the application is motivated by a serious intention and that the applicant is committed to pursuing it. If that is not the case, it is the Court's duty to consider such a situation carefully and, if there are no exceptional circumstances in the applicant's case (such as illness, mental immaturity, and the like), then it is certainly not appropriate, from the point of view of universal justice, for the Court to deal with the application, not even as regards the question whether the application was justified or not. To my mind, it is therefore necessary to interpret the last sentence of paragraph 1 of Article 37 of the Convention ("However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires") exclusively in relation to the applicant and his or her specific problem and not generally in relation to the issue raised by the applicant, which might possibly entail a violation of the Convention in general rather than concrete terms.

Should the circumstances of the case clearly indicate that the applicant exhibits no real interest in the case at any stage of proceedings before the Court, then in the prospective examination of the case it is impossible to comply with the requirement of adversarial proceedings for the purposes of Article 38 of the Convention ("The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities"). The aim must always be the resolution of the case at hand, which must have a serious intention behind it, and not the academic interpretation of an issue raised by the applicant which, as the circumstances of the case may reveal, was not seriously intended by the applicant and does not disclose any serious problem on his or her part. Ours is an international court which must take meticulous care to ensure that it deals with serious cases only.

3. Consideration of this case on the basis of Rawls's theory

The application was lodged by citizens of two African States which are not amongst the member States of the Council of Europe and have not acceded to the Convention (and cannot do so as they are not European States). Accordingly, both applicants claimed protection of fundamental rights and freedoms that are guaranteed by a community of free citizens of other States on another continent. Citizens of this (European) community fulfil their fiscal duties *vis-à-vis* their home countries, member States of the Council of Europe, which use the taxes thus collected to pay their contributions to the Council of Europe, including the European Court of Human Rights. The fulfilment of fiscal duties and the payment of contributions by the member States to the Council of Europe are the

prerequisites for the very existence of the European human rights protection mechanism for everyone.

It appears that neither of the applicants fulfils his basic duties (including fiscal ones) derived from Article 29 of the African (Banjul) Charter on Human and Peoples' Rights, which reads as follows:

> "The individual shall also have the duty:
>
> 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
>
> 2. To serve his national community by placing his physical and intellectual abilities at its service;
>
> 3. Not to compromise the security of the State whose national or resident he is;
>
> 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
>
> 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
>
> 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
>
> 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
>
> 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity."

Both States of which the applicants are citizens have ratified the African (Banjul) Charter on Human and Peoples' Rights. From the point of view of general fairness, it must therefore necessarily be assumed that the applicants find themselves in an exceptional situation that renders it justifiable for them not to fulfil their essential duties *vis-à-vis* their home country and their continent. Only if such an exceptional situation exists is it possible to imagine that the applicants could claim protection of fundamental rights and freedoms guaranteed by a community of free citizens of other States on another continent. Likewise, their attitude to the process of being granted protection of those rights and freedoms must show cognisance of the exceptional nature of the situation. Otherwise, the applicants' conduct would be entirely lacking in the fundamental elements of fairness; in such a case it is inconceivable, in my view, that they should seek justice in the field of international law.

4. Brief recapitulation of the facts of the case

Two young men – the applicants – left their home countries on the African continent. The alleged reasons for their doing so are known to the Court only through the mediated submissions prepared by their lawyers.

The objective existence of those reasons is impossible to assess owing to the almost total lack of evidence. All that is known for certain is that after leaving their home countries they spent some time in Morocco, a State which from the perspective of international law is considered to be safe, and which on 30 January 2017 rejoined the African Union. The fundamental question which, in my opinion, the majority should have addressed is the reason why the two young men – the applicants – did not try to resolve their allegedly unfavourable situation in their home countries while in Morocco, by lodging an application with the African Court on Human and Peoples' Rights. That court could have examined the applicants' situation directly in relation to their home countries, as the latter are members of the African Union and, as mentioned above, have ratified the African (Banjul) Charter on Human and Peoples' Rights.

But instead of trying to resolve their allegedly unfavourable situation by the means indicated above, the applicants purportedly tried to climb illegally over a boundary fence between Morocco and Spain's territory in Africa. According to the application submitted by their lawyers, they were sent back to Moroccan territory by the Spanish security forces. As I see it, there is no objective evidence that the applicants climbed over the fence, or, more precisely, no such evidence was produced by the applicants' lawyers.

Several months later one of the applicants officially requested Spain to grant him asylum. Presumably there was nothing to prevent him from taking this legal course of action any time before. He was not granted asylum, because no reasons to do so were found in regular asylum proceedings.

One of the applicants returned to his home country and his whereabouts have been unknown for more than four years. However, his lawyers are allegedly in contact with him, albeit not in person. According to his lawyers, the other applicant has been somewhere in Spain for the past four years. The lawyers claim to be in contact with him as well, albeit not in person. According to the lawyers, both applicants insist that the Court should examine their case, in which they claim that Spain violated Article 4 of Protocol No. 4 to the Convention.

5. Consideration of the case under Article 37 § 1 (a) of the Convention

From a formal perspective it is necessary to take account of Rule 47 § 7 of the Rules of Court, according to which "[a]pplicants shall keep the Court informed of any change of address and of all circumstances relevant to the application". Why? Because neither the applicants nor their lawyers have fulfilled this obligation over the long term. This obligation – one of the few obligations applicants have *vis-à-vis* the Court, and also *vis-à-vis* the European community of free citizens – cannot be satisfied by a declaration from the lawyer that he is in contact with his client but that his client does not have a permanent address or he does not know his client's permanent

address. From this situation alone – which, moreover, has lasted for more than four years – the Court can, and I think must, infer that the circumstances lead to the conclusion that the applicant does not intend to pursue his application.

6. Consideration of the case under Article 37 § 1 (c) of the Convention

There is not the slightest doubt that the climbing of the fence, whether the applicants participated in it or not, was contrary not only to the legal order of Spain but also to customary international law. The Spanish security forces did not imperil the health, life, dignity or freedom of any of the participants. The Court, before examining the question whether the complaint concerning the climbing of the fence was admissible or not in the light of Article 4 of Protocol No. 4 to the Convention, could and should, in my opinion, have dealt with the question whether this concrete fact should give rise to the application of Article 37 § 1 (c) to the Convention, which provides for an application to be struck out of the list of cases where the circumstances lead to the conclusion that it is no longer justified to continue the examination of the application.

Both applicants explained their illegal conduct on Morocco's border with Spain by their intention to request asylum in Spain owing to their unfavourable situation in their home countries. However, they did not explain why from the very beginning they did not choose the legal course of action consisting in seeking asylum. Moreover, they found themselves on the territory of another African State – Morocco – which from the perspective of international law is a safe country. They had a unique opportunity to turn to the African Court on Human and Peoples' Rights, as indicated above. As they did not do so, I consider that in this specific situation it would have been more logical for the Court to proceed under Article 37 § 1 (c) of the Convention.

The European Court of Human Rights should not inquire into the alleged consequences (in this case the climbing of the fence) of an allegedly inhuman situation (the alleged conditions in the home countries of both applicants) in a situation where another international human rights court clearly has jurisdiction. In my view, practically speaking and allowing for a touch of overstatement, the Spanish security forces committed one small mistake. When returning all the persons involved in the climbing of the fence back to Moroccan territory, they could have informed them that if they were not satisfied with the situation of human rights protection in their home countries, they could bring an action before the African Court on Human and Peoples' Rights, which was competent in the matter.

7. Conclusion

I am aware that the above assessment of the case represents a totally different and new approach to the consideration of applications brought before the European Court of Human Rights. I believe that I am right in considering that Article 37 of the Convention deserves a far deeper examination by the Court and, especially, an exact interpretation as described above. I am of the opinion that both applications could have been struck out of the list of cases even before the Grand Chamber hearing, on the grounds that it was no longer justified to continue the examination of the applications. The majority did not share this opinion and, therefore, being aware of this fact, I voted with the majority by way of compromise. The approach taken is also a way of resolving the case, albeit, in my view, less effectively. Nonetheless, I considered it important to clarify my point of view, as the reasons why I eventually agreed with the wording of this judgment were somewhat different from those of the majority.

PARTLY DISSENTING OPINION OF JUDGE KOSKELO

Introductory remarks

1. I have regrettably been unable to agree with the majority's conclusion that Article 4 of Protocol No. 4 is applicable in the circumstances of the present case. In my view, the position taken by the majority on the interpretation of the notion of "expulsion" makes the scope of application of this provision wider than is justified.

2. It is recalled, as a matter of common ground, that the prohibition of collective expulsions as enshrined in Article 4 of Protocol No. 4 amounts to requiring an individualised procedure as a prerequisite for the expulsion of aliens. The Court has established on many occasions that the purpose of this provision is to prevent States from being able to remove certain aliens without examining their personal circumstances and thus without enabling them to put forward arguments against the measure (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 238, 15 December 2016).

3. In other words, the protection provided under this provision is of a procedural nature. Thus, what is at issue is the scope of this procedural requirement in the context of aliens about to cross the external border of a State Party in an unauthorised manner.

4. The majority in this case have found that Article 4 of Protocol No. 4 is applicable in circumstances such as those in the present case, but that there has been no violation of that provision. It may be useful therefore to briefly explain at the outset why it makes a difference to take this position rather than to consider, as I do, that the provision is not applicable. The main reasons why the difference matters a great deal are twofold. Firstly, the interpretation according to which the circumstances fall within the scope of the provision in question brings the substance under the Court's supervision. In my view, the Court is thereby stepping outside the bounds of its proper remit. Secondly, the criteria developed by the majority for the assessment of the merits of the case mark a significant shift of focus in this context. Both moves will have major implications in practice.

Some preliminary clarifications

5. I would like to stress at the outset that my dissent in no way calls into question the necessity of ensuring compliance with the non-derogable obligation of *non-refoulement.* In this respect, there is no disagreement.

6. It may therefore be useful, for the sake of clarity, to list some of the key starting-points reiterated in the present judgment to which I fully subscribe:

- There is a link between the scope of Article 4 of Protocol No. 4 and that of the principle of *non-refoulement* (see paragraph 171 of the judgment);
- The principle of *non-refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border (see paragraph 178 of the judgment);
- For migrants and asylum-seekers within the jurisdiction of a State, the risk in the event of forcible removal from the State's territory is the same notwithstanding any distinction between non-admission and expulsion, namely that of being exposed to ill-treatment in violation of Articles 2 or 3 of the Convention (see paragraph 184 of the judgment);
- Persons entitled to protection under the Convention cannot be deprived of such protection because of reliance (in terms of the procedural safeguards under Article 4 of Protocol No. 4) on purely formal considerations (ibid.). The protection afforded by the Convention, in particular by Article 3, would otherwise be rendered ineffective (ibid.).

7. Indeed, all these points highlight the link between Article 4 of Protocol No. 4 and the obligation of *non-refoulement* in the context of the entry of aliens. My view is precisely that this link should not be lost. As the Court has previously held, the right of foreigners to enter a State is not as such guaranteed by the Convention, but border and immigration controls must be exercised consistently with Convention obligations (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 59, Series A no. 94). Whereas for aliens who already reside in the State in question the pertinent reasons against expulsion may be more varied (in particular under Article 8), for aliens seeking entry at the border the relevant grounds that may be invoked against a measure refusing such entry are linked to the obligation of *non-refoulement*.

8. What the majority position entails, however, is to widen the scope of Article 4 of Protocol No. 4 even to situations where no such link is present. This is where I see problems: the term "expulsion" is extended to *any* situation of "forcible removal from a State's territory in the context of an attempt to cross a national border by land". Such an unlimited and unqualified expansion of the notion of "expulsion" by the present judgment stretches the applicability of Article 4 of Protocol No. 4 well beyond what is necessary and reasonable for the effective safeguarding of the obligation of *non-refoulement* in the context of the entry of aliens into a State Party.

The legal background to the present case

9. It is useful to recall the context of the present case. The applicants' complaints under Article 3 of the Convention were declared inadmissible at an early stage as being manifestly ill-founded (see paragraphs 4 and 226 of the judgment). In other words, it has been clear from the very beginning of

the processing of the case that the applicants' rights under Article 3 of the Convention, in so far as it incorporates the obligation of *non-refoulement*, were not at stake.

10. Thus, while the Court (as stated above) has stressed the link between the scope of Article 4 of Protocol No. 4 and the obligation of *non-refoulement*, the present case is not about the need to safeguard the applicants' rights in that regard. Instead, the judgment entails an interpretation of the notion of "expulsion" that is detached from any actual link to the protection of the applicants against the risk of a violation of the principle of *non-refoulement*.

The Convention framework

11. Next, it is appropriate to recall some fundamental features and limitations inherent in the Convention.

12. *Firstly*, the scope of the obligations arising under the Convention has expressly been limited to persons within the jurisdiction of the relevant Contracting State. This point is worth noting although the applicants in the present case did in fact enter the jurisdiction of the respondent State. It is important to recall the basic jurisdictional limitation in this context, because the primary future beneficiaries of the expanded scope of Article 4 of Protocol No. 4 will be aliens *intending to enter* the jurisdiction of a State Party.

13. As the Court has acknowledged in the past, the engagement undertaken by a Contracting State under Article 1 is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom,* 7 July 1989, § 86*,* Series A no. 161, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII). In other words, the obligations arising for the Contracting States under the Convention are not intended to apply for the benefit of persons outside their jurisdiction. Furthermore, the Court has also acknowledged that the "living instrument" doctrine cannot serve to widen the scope of Article 1, which is "determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection" (see *Banković and Others*, cited above, §§ 64-65).

14. *Secondly*, the Convention – unlike, for example, the European Union (EU) Charter of Fundamental Rights (see Article 18 of the latter) – does not include provisions concerning the right to asylum or international protection. Ensuring access to asylum procedures for aliens wishing to enter the jurisdiction of a State Party is therefore not a matter falling under the Convention, and consequently not a matter for the Court's supervision. The extent to which the Convention regulates matters relating to asylum and international protection is limited to the obligation of *non-refoulement*, as

encompassed in Articles 2 or 3, that is to say, a duty for the Contracting States not to remove or surrender anyone within their jurisdiction to another jurisdiction where the individual concerned would be subjected to a real risk of treatment prohibited under those provisions.

15. *Thirdly*, the Convention is not intended as an instrument for the supervision of the States Parties' obligations arising under other international treaties, such as the Geneva Convention, or under EU law (see *Avotiņš v. Latvia* [GC], no. 17502/07, § 100, 23 May 2016).

16. The confines of the Convention system are therefore imposed by the States Parties and are not for the Court to set aside.

Some observations on the approach taken

17. The idea underlying the position taken by the majority appears to be to preclude the States Parties from closing their borders to aliens. This is borne out by the principles developed by the majority in addressing the merits of the present case (discussed further below). Without expressing any opinion on that aim as such, the point I wish to make, in the light of the remarks above, is simply that in my view the Court has not been put in charge of this matter by the States Parties.

18. The majority refer in this context, *inter alia*, to former Article 4(1), current Article 5(1), of the Schengen Borders Code, according to which external borders may only be crossed at border crossing points and during fixed opening hours; the majority state that the implementation of this requirement presupposes the existence of a sufficient number of such crossing points (see paragraph 209 of the judgment). While this is true, it does not follow that the Court is entitled to turn this observation, derived from an internal regulation adopted by a group of States that have pooled their sovereignty in matters of border management, into a Convention requirement. (Moreover, the application of the Schengen Borders Code is in any event subject to compliance with "obligations related to access to international protection, in particular the principle of *non-refoulement*" (Article 4 of the Code) – obligations which, as already mentioned, are expressly enshrined in EU primary law. Article 5 of the Code also contains a specific exception for individuals or groups of persons in the event of an unforeseen emergency situation.)

19. When aliens do come under the jurisdiction of a State Party, having entered the territory of the latter or having become subject to the exercise of authority by its agents at the State's external border, the obligation of *non-refoulement* as enshrined in the Convention is triggered. My starting-point in the light of the above limitations enshrined in the Convention is that wider obligations in terms of the provision of access to entry for aliens through the State's external borders, or access to asylum procedures, are not matters falling under the Convention. In this regard it is

important to note that *non-refoulement* as covered by the Convention is a negative obligation, that is to say, an obligation to refrain from measures entailing the removal of persons from the State's jurisdiction, directly or indirectly, to another jurisdiction where they would be subjected to a real risk of ill-treatment. In the present judgment, however, the majority go beyond the supervision of those obligations and undertake to formulate positive obligations for the benefit of aliens intending to enter the territory of a State Party.

20. In my view, the majority espouse an interpretation of Article 4 of Protocol No. 4 which stretches its application and impact too far.

21. As already mentioned, the need to ensure effective procedural protection for substantive Convention rights arising under Article 3 is, according to the Court's own findings made at an early stage in the procedure, manifestly absent in the present case. The applicants, having made it to Spanish territory – albeit without any claim or need for protection under the Convention – provided the opportunity now seized by the Court to create a basis for formulating obligations which, essentially, will operate for the benefit of aliens intending to enter the jurisdiction of a State Party. In this sense, the present complaints are a conduit for a significant extension of the Court's role. I am not convinced of the appropriateness of such a move.

On the scope of Article 4 of Protocol No. 4

22. There is no doubt, and it is not disputed, that the obligation of *non-refoulement* in respect of aliens attempting to cross the external border of a State Party cannot be restricted on the grounds of a legal distinction between non-admission and expulsion (see above). In other words, the protection against *non-refoulement* must extend to those who have arrived at the border of a State Party and make known to the authorities there (expressly or, as the case may be, by clear indications through their conduct) that they wish to obtain such protection. But it does not follow from this that the scope of Article 4 of Protocol No. 4 (that is, of its requirements for an individualised procedure) should be expanded to cover *any* aliens intending to cross the border, quite regardless of whether the actual circumstances may engage the obligation of *non-refoulement* by the State which they are attempting to enter.

23. The interpretation adopted by the majority, however, makes Article 4 of Protocol No. 4 applicable in the context of any attempt by aliens to cross the external border of a State Party by land (see paragraph 187 of the judgment), even in the absence of any indication that they are seeking international protection, and even in the presence of circumstances indicating other motives for entry into the jurisdiction. The Court announces that it finds it "appropriate" to place this provision in the context of its case-law on migration and asylum (see paragraph 167), without providing

any explanation or justification as to why it would be "appropriate" to disregard any other context or scenario involving an unauthorised attempt by aliens to cross the border of a State Party. It can be noted that in the recent case of *Ilias and Ahmed v. Hungary* ([GC], no. 47287/15, 21 November 2019), in which Article 3 of the Convention was at issue, the Court stated that where asylum-seekers were removed to a third country without the merits of their asylum applications being examined, it could not be known whether the persons to be expelled risked treatment contrary to Article 3 in their country of origin or were simply economic migrants, and that it was only by means of a legal procedure resulting in a legal decision that a finding on this issue could be made and relied upon (ibid., § 137). Even in that context, reference is thus made to asylum-seekers and not to *any* aliens arriving at the external border with the intention of entering the jurisdiction of a State Party.

24. The above position is taken under the banner of effective protection of the principle of *non-refoulement*. What is overlooked, however, is that the arrival at the border of individuals in need of international protection, and the corollary application of the obligation of *non-refoulement* as enshrined in the Convention, is not the only scenario that must be taken into account in the context of the surveillance by States Parties of their borders and the control of the entry of aliens across their borders.

25. Although the mass influx of migrants and asylum-seekers wishing to claim international protection has in recent years become, and is likely to remain, a dominant point of focus around Europe, these developments should not detract from the fact that other issues and other interests are also relevant in the context of the powers which the States Parties must be able to exercise at their borders. Important issues of national security, the protection of territorial integrity and public order are at stake as well. I see no justification for disregarding those matters in the legal analysis solely on the grounds that, at a given time, many of the aliens turning up at the border may be persons wishing to claim international protection. In my view, it amounts to a distortion of perspective to view the latter scenario as the only one deserving attention and consideration, and to overlook the legitimate need for States Parties to prevent and refuse, in particular, the entry into their jurisdiction of aliens aiming to cross their external borders with known hostile intentions or posing known threats to national security.

26. An interpretation according to which the Convention will require, in the interest of effective compliance with the obligation of *non-refoulement,* that nobody, regardless of the circumstances, can be turned away or removed from a State Party's external borders without being granted access to an individualised procedure, is in my view neither necessary nor justified. In fact, it appears rather bizarre. I find it difficult to see why the States Parties should be expected to accept that, as a matter of principle, *any* persons about to penetrate their external borders must be treated as potential

asylum-seekers, and that *nobody* can be stopped and prevented from entry without individualised procedural safeguards, including persons whose hostile intentions are obvious or are known in advance on the basis of intelligence activities. A situation where the States Parties would no longer be able to respond to national security crises or incidents at their borders without the necessity of first invoking Article 15 of the Convention (in so far as permitted) appears neither reasonable nor very sensible. Nor does it appear reasonable that detention as provided for under Article 5(1)(f) would be the only available option in any kind of situation involving the illegal entry of aliens.

Legal considerations

27. In addition to the remarks above concerning the basic limits of the Convention framework, the following points appear to me to be relevant from a legal perspective.

28. *Firstly*, the majority rely on the Draft Articles on the Expulsion of Aliens, with commentaries, adopted by the International Law Commission in 2014. It is to be noted that according to Article 2(a) of the Draft Articles, the notion of "expulsion" does *not include* "the non-admission of an alien to a State". In the commentary, it is made clear that this limitation of the notion of "expulsion" is, however, without prejudice to the rules of international law relating to refugees and to the principle of *non-refoulement*. Thus, the Draft Articles are in line with the position – on which there is no disagreement (see above) – according to which the key point with regard to the Convention, including the interpretation of Article 4 of Protocol No. 4, is to ensure and preserve compliance with the obligation of *non-refoulement*. What the Draft Articles neither call for nor support is an interpretation of the notion of "expulsion" which would *under all circumstances* encompass the non-admission of aliens and thus require the wholesale equating of any non-admission to expulsion, subjecting all to the same principles. Thus, I see no dictate deriving from the above Draft Articles that would support the interpretation adopted by the majority.

29. *Secondly* – bearing in mind that Spain belongs to the Schengen system essentially governed by EU law – it can be observed that the relevant EU legal framework actually provides an illustration of the fact that ensuring compliance with the obligation of *non-refoulement* does *not* require the adoption of a wholly unlimited and unqualified interpretation of the notion of expulsion as set out in the present judgment.

30. Under EU law a distinction is made, in respect of third-country nationals, between *refusal of entry* at external border crossing points, *the immediate return* of those who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the external border or near that border after it has been so crossed (see the

CJEU judgments in *Affum*, C-47/15, EU:C:2016:408, paragraph 72, and *Arib and Others,* C-444/17, EU:C:2019:220, paragraphs 46 and 54), and the *return* of illegal residents. Each scenario is without prejudice to compliance with the principle of *non-refoulement*.

31. More specifically, the EU legal framework – all the way from primary law[1] through the relevant secondary law[2] and further to the

[1] At the level of primary law, Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) provides as follows: "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 of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."
Also at the level of primary law, Article 19 of the Charter of Fundamental Rights, entitled "Protection in the event of removal, expulsion or extradition" provides as follows:
"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."

[2] At the level of secondary law, the obligation of *non-refoulement* is reiterated in several instruments. In the present context, the following may be noted in particular:
Article 4(4) of Directive 2008/15/EC ("the Return Directive") provides as follows in respect of member States making use of the option not to apply the directive to third-country nationals who are subject to refusal of entry or are apprehended or intercepted by the competent authorities in connection with irregular crossing:
"4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:
…
(b) *respect the principle of non-refoulement*" (emphasis added).
Article 5 of the Return Directive provides as follows:
"When implementing this Directive, Member States shall … respect the principle of non-refoulement."
Article 4 of the Schengen Borders Code provides as follows:
"When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), relevant international law, including the [Geneva Convention], obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights …".
Furthermore, Article 14 of the Schengen Borders Code, concerning the refusal of entry, provides as follows:
"1. A third-country national who does not fulfil all the entry conditions … shall be refused entry to the territories of the Member States. This shall be *without prejudice to the application of special provisions concerning the right of asylum and to international protection*" (emphasis added).
In the Frontex Regulation, as previously in force (Regulation (EC) No 2007/2004 as amended by Regulation (EU) No 1168/2011), Article 1, paragraph 2 provided that "the Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union …; the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 …; obligations related to access to international protection, in particular the principle of *non-refoulement* …". In the new Regulation (Regulation (EU) 2019/1896), Article 80,

practical guidelines for application[3]– makes it expressly clear that all the measures taken in the context of border control must comply with the obligation of *non-refoulement*. Furthermore, EU agencies, in particular the Fundamental Rights Agency (FRA) and the Asylum Support Office (EASO), have issued specific practical guidance on these matters[4].

32. Furthermore, with regard to effective protection, there is a need to distinguish between issues concerning the content of the law on the one hand and problems of implementation and compliance on the other. I am not convinced that a novel legal interpretation is the best response to the undeniable challenges of implementation and compliance in this field.

33. *Thirdly*, the present judgment repositions the legal landscape not only in terms of the scope of application of Article 4 of Protocol No. 4 but also in terms of its content. Having established the scope of the provision in a manner that acknowledges no limitation or qualification of the notion of expulsion in the context of the entry of aliens, the majority subsequently develop a "carve-out" in the assessment of whether there has been a violation of that provision.

34. The latter limitation is based on the criterion of the individual's "own conduct". Thus, the respondent State is dispensed from an individualised procedure and decision on expulsion if the lack of such a measure "can be attributed to the applicant's own conduct" (see paragraph 200 of the judgment). More specifically, this exception will come into play in situations where "the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and

---

paragraph 1 provides that "the European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of *non-refoulement*".

[3] As regards the "Schengen Handbook" (Practical Handbook for Border Guards, C (2006) 5186 final with subsequent amendments), Section 6.2 of Part Two on the refusal of entry sets out the possible exceptions to refusal of entry on grounds, *inter alia*, of international obligations, for example where a person asks for asylum or is otherwise in need of international protection.

[4] See in particular the FRA document "Scope of the principle of *non-refoulement* in contemporary border management: evolving areas of law" (2016). This document emphasises, for instance, the following (p. 39):

"The border guards exercising effective control are fully bound by the principle of *non-refoulement*. If protection is requested, an individual assessment of the need for such protection must be made. … If such individual assessment is not made or protection is unlawfully denied, the principle of *non-refoulement* is breached.

The obligation can also be triggered if the migrant does not apply for asylum and is denied entry in spite of indications that the person is in need of international protection."

In this context, reference is also made to a practical tool developed by EASO together with Frontex and the FRA for the purpose of helping the first contact officers to determine whether there are indications that a person may wish to apply for international protection.

use force is such as to create a clearly disruptive situation which is difficult to control and endangers public safety" (see paragraph 201 of the judgment). The exception will, however, remain subject to the availability of "genuine and effective access to means of legal entry" (ibid.).

35. On this basis, the conditions under which the States Parties will be dispensed from the requirement of individualised procedures are further elaborated into a two-pronged test. The first condition is that the State Party must have made available genuine and effective access to means of legal entry, in particular border procedures, for those arriving at the border (see paragraph 209 of the judgment). Where, and only where, this condition has been satisfied, the State Party may refuse entry to its territory to aliens, including potential asylum-seekers, who have failed without cogent reasons to comply with those arrangements by seeking to cross the border at a different location, especially by taking advantage of their large numbers and using force (see paragraph 210 of the judgment).

36. Such an approach strikes me as somewhat paradoxical. In the name of the need to effectively guarantee the obligation of *non-refoulement*, the focus is actually shifted from that notion, and the ensuing safeguards, to the notion of "own conduct" as elaborated in the judgment.

37. I am not persuaded that the crucial need to ensure effective compliance with the obligation of *non-refoulement* is best served by such a move. As can be seen from the EU legal framework, there has been a significant effort to consolidate the requirements of that obligation at all levels of the relevant norms and guidelines. The introduction of novel notions and criteria will, instead, raise new issues and questions. Not least in the light of Article 52(3) of the Charter, the present judgment may cause unnecessary disruption with regard to the EU legal framework currently in place in these matters. The orderly management of the influx of migrants and asylum-seekers, which in all likelihood will continue to be a difficult challenge, is not necessarily assisted by this.

38. *Fourthly*, it appears that, according to the judgment, the general principles developed on the merits only concern situations at the external *land* borders of a State Party. While it is clear that the factual circumstances of border surveillance and controls at sea or sea borders may differ from those prevailing at land borders, in particular as the situations at sea may involve particular legal obligations relating to the rescue of the aliens concerned (reflected in the *Hirsi Jamaa* and *Khlaifia* case-law), this will not necessarily always be the case. It is not clear why the legal principles at land and sea borders should be different generally, regardless of whether the actual circumstances of a given situation differ in any significant respect.

39. *Finally*, it is to be noted that Protocol No. 4 has not been ratified by all the member States of the Council of Europe. To the extent that the effective protection of substantive Convention rights relies on the procedural safeguards under this provision, the legal situation thus created

will therefore not prevail in all the States that are bound by the relevant substantive provisions.

Practical considerations

40. Even a solid legal framework alone is not a sufficient guarantee of effective compliance with the obligation of *non-refoulement*. I do not underestimate the problems and shortcomings which are evident in various situations. As already mentioned, however, it is also important not to confuse deficiencies in implementation and compliance with the need to recast the underlying legal norms. On the contrary, the reshaping of the legal requirements and the introduction of new criteria may cause unnecessary difficulties in implementation, not least in a context such as the present one where effective compliance depends to a significant extent on the ability of border guards on the ground to correctly apply the relevant legal norms. I doubt whether the present judgment will be truly helpful in this regard.

41. Furthermore, it may be feared that the principles set out in the present judgment will create the risk of false incentives, namely by encouraging people smugglers to direct the flows of migrants to places that may best lend themselves to arguing a lack of access to points of legal entry, thereby giving rise to excuses for the storming of borders by aliens quite regardless of whether the obligation of *non-refoulement* is engaged in their regard. Such developments in turn may have negative repercussions on attitudes among the public even towards those who actually do need protection under that principle.

42. At the international level, the present judgment means that the Court now sets itself up – in the name of effective protection – as the ultimate arbiter of matters such as whether "States make available genuine and effective access to means of legal entry, in particular border procedures" (see paragraph 209 of the judgment). Apart from the legal reservation raised earlier, namely that the Court is stepping outside its remit as set out in the Convention, this move begs the question whether the Court will be in a position to actually ensure "effective protection" with regard to "genuine and effective access to means of legal entry". This concern is particularly relevant in a context such as the present one, where the issues relate to circumstances and situations that are both fact-sensitive and time-sensitive. The Court's supervision will only be carried out retrospectively and with considerable delays. As a matter of fact, the Court is not well placed to be in charge of the task it has now undertaken.

Summary

43. My main concerns with the present judgment may be summarised as follows:

(i) The unlimited and unqualified interpretation of the scope of Article 4 of Protocol No. 4, whereby that provision is made applicable, without distinction, to any unauthorised crossing by aliens of the external border of a State Party, thus detaching its applicability from any link to the obligation of *non-refoulement*;

(ii) The articulation, with ensuing supervision by the Court, of positive obligations for the States Parties regarding the provision of "genuine and effective access to means of legal entry" on their external borders for the benefit of aliens aiming to enter the jurisdiction of a State Party;

(iii) The shift in focus from the relatively well-established requirements arising under the obligation of "*non-refoulement*" to a "carve-out" based on the criterion of "own conduct", elaborated and circumscribed by a series of novel criteria the application of which on the ground will not be without difficulties;

(iv) The lack of consideration for other vital concerns relating to border surveillance and controls besides those relating to the entry of actual or potential asylum-seekers, as well as the risk of undesirable incentives being created for people smugglers.

Conclusion

44. With the Court's finding, early on in the procedure, that the applicants' rights under Article 3 (in terms of the obligation of *non-refoulement*) were manifestly not engaged in the circumstances of the present case, the conclusion should have been that, under those circumstances, Article 4 of Protocol No. 4 was not applicable. I reiterate that this position does not detract from the absolute character of Article 3. The point is that under the Convention, the scope of the obligations arising for the States Parties from that Article in the specific context of measures concerning aliens apprehended or intercepted at the border in the context of an unauthorised entry, or an attempt at such entry, is limited.

45. I therefore voted in favour of points 1 to 5 and point 7 of the operative provisions concerning the preliminary issues, but against point 6 concerning the applicability of Article 4 of Protocol No. 4 in the present case. In my view, the complaints are incompatible *ratione materiae* with that Article. As the majority found the provision to be applicable, I voted in favour of finding no violation of that Article. The reasons for the latter position echo the reasons why I consider that the provision was not applicable in the first place. I can thus refrain from elaborating further.