COMMISSIONER FOR HUMAN RIGHTS

COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Hearing of the Grand Chamber of the European Court of Human Rights

in the cases *N.D. and N.T. v. Spain*, 26 September 2018

Oral submission of the Commissioner for Human Rights

Mr President, Distinguished members of the Court,

This is my first appearance before this Court since the beginning of my mandate in April this year.

It is based on the work of my predecessor, Nils Muižnieks, in particular the written comments he submitted to this Court in November 2015 and March 2018 concerning the case you are hearing today. His work included a visit to Melilla and Madrid in January 2015, as well as continuous monitoring work and dialogue with the Spanish authorities.

I have decided to take part in this hearing because of the special importance this case has for the protection of the human rights of migrants, asylum seekers and refugees. While migration-related issues are omnipresent in the public debate, it has become increasingly difficult for those in need of protection to reach Europe in a safe and legal way. And perhaps most worryingly, there appears to be a growing assumption that those who cross borders in an irregular manner should not be entitled to human rights protection. This is antithetical to the principle, reiterated by this Court, that states have the right to control migration, but must do so in full respect of their Convention obligations.[1]

In a context so clearly marked by a risk of rolling back essential protection, ensuring that states act in accordance with the Court's case-law became one of the top priorities of my Office.

Our work has focused on a number of key rights at stake in today's case. Firstly, the right to be protected against **collective expulsion**. Across Europe, we are witnessing a multiplication of summary expulsions of migrants and potential asylum seekers, without an assessment of the

[1] *Hirsi Jamaa v. Italy* (§179) and Georgia v. *Russia* (§177)

individual circumstances of each person. These expulsions happen at land borders and at sea; at borders between member states and non-member states of the Council of Europe; but also at borders between Council of Europe member states. My predecessor repeatedly raised concerns regarding such summary expulsions, including with the authorities of Bulgaria, Greece, Hungary, Italy, Spain and Switzerland, each time aiming to uphold the basic principles set out by this Court.

Crucially, the work of my Office has been based on the premise that the prohibition of collective expulsion applies to all, regardless of whether they claim asylum or enter the member state in an irregular manner. My Office has also followed the Court's lead by addressing the prohibition of collective expulsions not only in cases where the persons had entered the territory of a member state, but also when they had been refused admission, in line with the Court's finding in *Sharifi and Others*[2] that Article 4 Protocol 4 also applied in that situation.

In this context, I want to highlight the crucial contribution of the Court's case-law in two respects. Firstly, its recognition, in particular in *Hirsi Jamaa*,[3] that the protection provided by the Convention must adapt to changing migration patterns and border control practices, with the aim of ensuring that guarantees for migrants, asylum seekers and refugees remain practical and effective, and do not become theoretical and illusory. And secondly, that the challenges states meet in managing migratory flows cannot justify practices incompatible with obligations under the Convention, as this Court has clearly stated in *Hirsi Jamaa* and in *Georgia v. Russia (I)*.[4]

A second area of work is the separate, but related, issue of **protection against *refoulement***, including by ensuring access to asylum procedures. Again, my Office has on several occasions reminded member states of this Court's case-law establishing that Convention obligations with regards to non-*refoulement* can also be triggered when a state intercepts a person before they can enter their territory, provided they were under the effective control of the state.[5]

In light of all this, I now want to share a number of observations on the situation in Spain.

My predecessor visited Melilla and Madrid in January 2015 in a context marked by consistent reports of regular summary returns to Morocco of migrants having climbed the fence surrounding the city of Melilla. All information gathered during the visit pointed to the existence of an established practice of immediate expulsion of migrants – most of them Sub-Saharan Africans - once

[2] *Sharifi and Others v. Italy*, §212.
[3] *Hirsi Jamaa v. Italy*, §177
[4] *Hirsi Jamaa v. Italy* (§179) and *Georgia v. Russia* (§177).
[5] *Hirsi Jamaa v. Italy*, §180.

they came down from the fence, without any individualised or reasoned written decision or an assessment of their protection needs.

Following this visit, we continued to receive reports of summary expulsions at the borders of Ceuta and Melilla. In a letter of July 2016 to the Spanish Minister of the Interior, my predecessor reiterated his concerns about these expulsions which, in practice, also deprived migrants of any possibility to seek asylum.

The practice of summary returns was given legal underpinning through the adoption, in 2015, of amendments to the legislation on foreigners. These amendments fell short of providing clear guarantees against collective expulsions and *refoulement*, including the right to be identified, to have one's protection needs assessed, and to have access to an interpreter and to legal assistance.

Apart from raising serious concerns in relation to the prohibition of collective expulsion and *refoulement*, the practice I have just described also has obvious implications for the right to an effective remedy. Since they are immediately expelled to Morocco, those affected do not have access to any procedure in Spain to request a review of the expulsion decision. Even if they did have access to such a procedure, the lack of an individualised and reasoned written expulsion order would make it impossible to start such review proceedings.

Finally, I would like to conclude my intervention by addressing two arguments that have been raised in this case.

Firstly, the argument that persons intercepted on or near the fence cannot be considered as having entered Spain and should therefore not benefit from the protection of the Convention. As noted in my predecessor's written comments, official bodies and a court in Spain have asserted that the border fences are indeed on Spanish territory. But irrespective of that, I note that this Court has found in *Sharifi and Others* that the question whether the applicants had de facto entered Italy or had been refused admission was irrelevant, since the protection against collective expulsion would apply in either case. This Court has also found a violation of the prohibition of collective expulsion in cases of migrants intercepted outside the territory of a member state, on the basis that the authorities had *effective control*.[6] All information available indicates that persons who have scaled the border fences and subsequently climbed down are apprehended and removed by the Spanish authorities. At no point has my Office received information that any other state's authorities shared control over those apprehended, until the moment they were handed over to the Moroccan authorities.

[6] Hirsi Jamaa v. Italy, §180.

The second issue is the argument that the applicants *could have* applied for asylum. In my view, this should not distract attention from the actual situation at stake. The applicants allege having tried to enter Melilla by crossing the border fence, and having been apprehended in this process. The basic question should be whether their right to be protected against collective expulsions was violated at that point. The fact that the applicants could have, theoretically, taken another course of action, should not bear relevance.

However, let me stress that applying for asylum in Melilla through regular channels seems practically impossible for Sub-Saharan Africans. As highlighted by many, including my predecessor, the Spanish national Ombudsperson and most recently, the Council of Europe Secretary General's Special Representative on Migration and Refugees, migrants of Sub-Saharan origin are prevented from accessing the border post on the Moroccan side. It means that, in practice, they cannot access the official Spanish asylum office at Beni Enzar border post either. Thus, they are left with the option of climbing over the fence, taking the sea or using irregular means of crossing the border point.

One could also note that migrants intercepted on or near the fence could in principle be brought by the *Guardia Civil* to the border post and asylum office of Beni Enzar, so that they can be formally identified and, if necessary, introduce an asylum application at the appropriate place. However, to my knowledge, this has never been done so far.

I will conclude my comments by reiterating that protection against collective expulsion and against *refoulement*, as well as access to effective remedies, are crucial components of a migration control system that is human rights compliant. However, the practice of summary returns to Morocco of migrants who attempt to enter Melilla by climbing the fence deprives them of the possibility of being identified, of having their individual situation duly assessed and of having access to an effective remedy.

I hope my comments will be helpful to the Court and I thank you for your attention.