SJM españa
servicio jesuita a migrantes

SEEKING A WAY OUT

REPORT ON THE SOUTHERN BORDER 2020

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The Jesuit Service to Migrants (SJM) Spain is a network that advocates for the rights of migrants and their full access to citizenship. The SJM is promoted by the Society of Jesus.
The SJM is made up of Jesuit social entities that work in Spain with/for migrants: Centro Pueblos Unidos Fundación San Juan del Castillo (Madrid), Centro Santo Padre Rubio (Madrid) Fundació Migra Studium (Barcelona), Asociación Claver (Sevilla), Fundación Ellacuría (Bilbao), SJM Valencia, Fundación Red Íncola (Valladolid), Atalaya Intercultural Association (Burgos), Centro Padre Lasa (Tudela) and Asociación Loiola Etxea (San Sebastián).
There is a technical office in Madrid and a SJM office in Melilla providing legal assistance and monitoring Human Rights. The SJM also collaborates with the Instituto Universitario de Estudios sobre Migraciones (IUEM) of the Universidad Pontificia Comillas and the Diocesan Delegation on Migration in Nador (Morocco).

SJM wishes to work for justice in all its dimensions. It accompanies and defends migrants at all stages of their migration process. SJM works in partnership with other organisations to prevent the causes of forced migration at the point of origin. It welcomes migrants in the Spanish Southern Border since their arrival in the territory. Through hospitality, it accompanies the processes of reception, integration and citizenship; the processes of social inclusion, access to rights, full participation in society, the strengthening of associations, the management of cultural and religious diversity, the visibility of migrant women who work in domestic service, etc. SJM also works on the processes of exclusion: detention, the need to emigrate again and return. It is present in migrants' Detention Centres to ensure compliance with human rights standards. It accompanies people in return processes, also from other EU Member States due to the application of the Dublin Regulation. Furthermore, it raises public awareness and advocates for migration policies, integration, social coexistence, and cooperation. In this, it seeks the coherence of political measures.

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SUMMARY

Morocco's tightening of control over migratory movements (with EU funds) implies continued police harassment and more violence against migrants and refugees. The news of **people killed and injured** in the attempt to cross the border makes clear **the need to risk life and physical integrity to seek asylum**. The Supreme Court has set **case law** on a **safe way to access asylum**: third country nationals can request international protection in **Spanish embassies and consulates**.

The practice of different forms of pushbacks through the gates that mark the fences and in Melilla's territorial waters is constant, as well as returns at the border with merely formal guarantees, usually to implement the 1992 bilateral readmission agreement. Spanish and Moroccan police operations are observed beyond the limits of their territorial jurisdiction. The Spanish Civil Guard continues to practise "rejections at the border" as if they had uncontested legal coverage: not having been amended the first paragraph of the tenth additional provision of the Aliens Act, which was voided of substance by the ruling of the Grand Chamber of the European Court of Human Rights; nor can it be said that it meets the criteria of constitutionality established by the Constitutional Court.

The **Supreme Court** has set **case law** on the **fundamental rights to free choice of residence and free movement** of **documented applicants for international protections** throughout the national territory. The police cannot prevent or restrict these rights because it has no legal basis. However, it persists in its policy of preventing people from boarding in the Mainland on the pretext that they are not domiciled there, breaching the legal order.

A border control to prevent entries at all costs without addressing protection needs also **fails to protect victims of human trafficking**. Some malpractices by operators involved in border control (police, public prosecutors, judges, and even social workers from the Centre for Temporary Stay of Migrants (CETI by its Spanish acronym) have led to **criminal convictions of victims**.

Administrative malpractice persists in failing to process the documentation of foreign minors under administrative guardianship, which places them in an irregular situation upon reaching the age of majority. The situation of vulnerability is aggravated in the cases of care leavers who are not given the corresponding Foreigners' Identity Card (TIE by its Spanish acronym). Not being able to travel to the mainland or being admitted to the CETI condemns them to live homeless.

The **slow pace of DNA testing** and **excessive administrative zeal** condemn **family members** to **separation** when there are **minors** whose **guardianship** has been **assumed by the Autonomous City of Melilla**. The situation is aggravated when older and younger siblings travel together without their parents: while administrative guardianship of the minors persists, the older siblings face the dilemma of either continuing with their own migration project by breaking family ties or getting stuck in Melilla to preserve the relationship.

It is striking **how determined the Ministry of the Interior** persists in **minimising the transfer of migrants and applicants for international protections from Melilla to the mainland**. This policy has consequences for the public health of the entire population. It generates a tension that has even exploded into violent protest. It subjects the migrant population housed in temporary facilities to undignified living conditions. It has placed people in a legal limbo if they did not have an identity card relating to their stay. And it carries with it forms of restriction of liberty and deprivation of liberty without legal basis.

2

PICKING UP THE THREAD

2.1 ■ CONTINUITY AND CHANGES IN THE SOUTHERN BORDER

The report published in 2018 identified the Autonomous City of Melilla as a geographical labyrinth complicated by a tangle of rules and administrative practices that frustrate the regularisation of the migration project of asylum seekers, migrants in an irregular situation, or even those with a legal residence. The SJM understood its role of providing the ball of yarn to help people getting out of the maze, by tying up loose ends and trying to understand the springs that provide the way out.

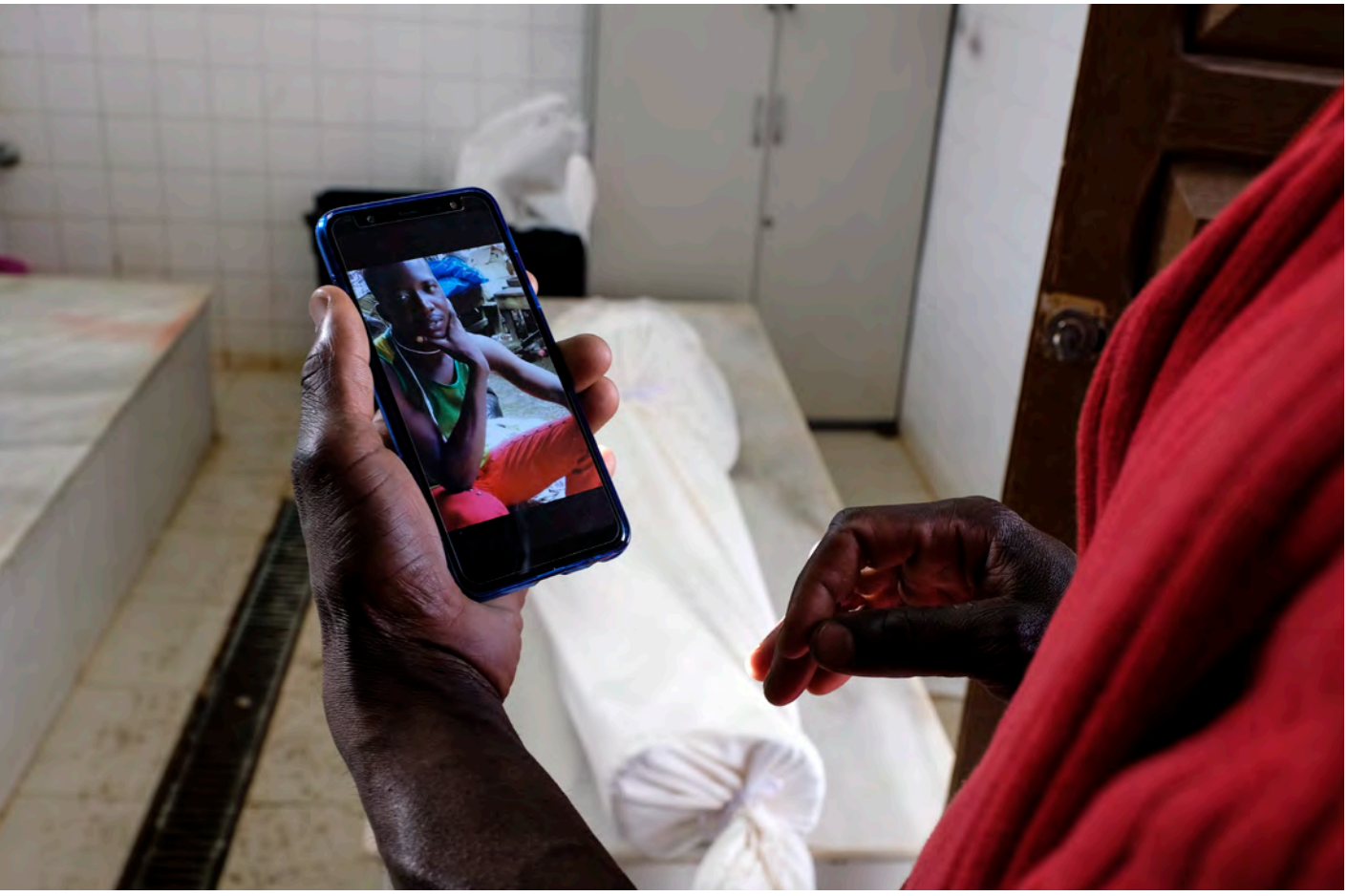
Three years later, **Melilla is still a maze where to seek a way out**. Broadly speaking, the number of people from Syria, Palestine, Iraq and Yemen seeking international protection has decreased: but in 2018 and 2019 it became clear that it was more difficult for them to overcome the Moroccan border controls at Beni Enzar before they could reach the Asylum and Refugee Office. In 2018 and 2019, the number of Tunisians applying for international protection increased significantly, as well as did the number of Algerians applying for international protection during 2019 and until the closure of the Moroccan border in 2020. At the same time, there was an unprecedented migration movement of Egyptians, Sudanese, and Eritreans. 2018 also marked a new trend: Sub-Saharans, especially Malians, applied for international protection and were granted the refugee status or subsidiary protection. In addition, there were Moroccan applicants for international protection.

2020 was defined by the fact that nearly a thousand people from Morocco, Algeria and Tunisia stayed in Melilla. Many applied for international protection, and both their applications and initial administrative appeals were refused. The police gave them the choice between either complying with the compulsory exit mandate with the possibility to enter Spain again in the future or having a return order imposed on them with an entry ban of at least three years. In January 2020, the police arrested groups of Algerian migrants and took them to Almeria by air before executing their deportation. Algeria appears not to have readmitted any more of its citizens for return from Spain since the closure of international borders due to the pandemic, even after the visit of the president of the government. Nor do the Tunisian, Moroccan and Egyptian authorities wish to readmit their nationals despite official visits from the interior and Foreign affairs ministers. They remain in Melilla, mostly in the CETI, since the Ministry of the Interior refuses to transfer them to the mainland, where they would be released, transiting through Spain to France or other EU Member States.

When the Spanish government declared the state of alarm on 14 March 2020, the CETI was overcrowded, so it stopped admitting new registrations, even when some places were freed up due to very limited relocations to the Mainland. Although the number of irregular entries by jumping over the fences, swimming or in boats, dropped dramatically, few entries continued taking place. On 06 April, the largest entry took place due to the simultaneous jumping of 55 young Sub-Saharans. The Ministries of the Interior and of Inclusion, Social Security and Migration had to find ways to provide shelters. The non-resident Moroccan population that had been trapped in Melilla by the closure of the border, those who ceased to have the right to reside in the CETI because their asylum application had not been accepted, and the young people who had been discharged from the centres for minors upon their coming of age required urgent attention from the Autonomous City in order to avoid being left on the streets. The response

of the administrations to this problem has been extremely poor. The people who have spent months in the provisional emergency facilities set up in the Bullring, in the facilities of the Rostrogordo Fort and the "El V Pino" recreational area have suffered unworthy living conditions. On the other hand, some applicants for international protection with vulnerable profiles were transferred from CETI to a modest hotel, where living conditions are adequate, although it is not clear whether this stay counts as part of the official refugee reception service system. The second wave of the pandemic has affected Melilla much more than the first. Infections have been registered in the CETI. The despair of North African population, with no way out on sight, led to virulent protests at the end of August, with episodes of violence and destruction. The leaders of the protests were sent to prison: some fell ill with COVID-19 and infected other inmates. Authorisations for the transfer of Sub-Saharan applicants for international protection and migrants in an irregular situation to the mainland (the long sought *Salida*), along with some nationals from the Middle East, were very rare. Therefore, **there is a feeling that migrants who have entered Melilla do not have a way out**, in a year, paradoxically, in which there have been few entries since mid-March.

In the 2018 report the SJM reflected on six "mazes within the maze" that it had to deal with in its legal guidance and advocacy work: the practice of pushbacks in land border control operations; the peculiarities of migration police operations in adjacent waters; the return of people who arrived to islands and rocks through the readmission agreement signed with Morocco in 1992; a variety of problems that arise during the stay of migrants and applicants for interna-



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tional protection in Melilla; the deprivation of the right to free movement of some of the latter mentioned; and, finally, the obstacles that affect unaccompanied foreign minors under the guardianship of the autonomous city and former supervised minors when they come of age. The situation addressed by the 2020 report does not deviate much from those issues: it aims to address the following issues:

- Risking your life and limbs to seek asylum
- Lack of guarantees in return procedures at the border
- Undue restrictions on the right to free movement
- Treating potential victims of trafficking as criminals
- From the protection centre to the street
- Family life broken by disproportionate zeal
- Management that exacerbates the impact of the pandemic

First, a few notes about the SJM team, its work, and its way of proceeding.

2.2 ■ CONTINUITY AND CHANGES IN THE SJM SOUTHERN BORDER TEAM

The SJM team accompanies and provides legal guidance to migrants and applicants for international protection during their stay in Melilla, advising them on their rights, accompanying them in their administrative procedures and providing them with legal representation when it is necessary to litigate before a court of the Autonomous City or higher courts outside the city. A lawyer and an administrative and linguistic assistant in Arabic work full-time in Melilla with the professional support, also full-time, of another lawyer in Madrid and a team coordinator in Seville, as well as other SJM professionals responsible for projects, management, communication, etc. The team also includes the occasional collaboration of volunteers and interns.

In addition to **accompaniment**, **guidance** and **legal defence**, the SJM-Southern Border team continuously publishes its **monitoring** on the **living conditions** and **human rights violations** migrants and applicants for international protection suffer, in order to **raise awareness** in society and **advocate** for public policies that guarantee human rights. Observation and advocacy are only possible through **networking** with civil society in Melilla, the SJM in Spain and wider networks.

The presence of SJM on the Southern Border is expanded insofar as it supports persons and entities that accompany migrants and refugees in transit through Morocco, especially in the border town of Nador; as well as through visits to the Migrants Detention Centre (CIE by its Spanish acronym) in Algeciras and Tarifa, where many of the migrants who cross the border irregularly by sea are interned. The SJM-Southern Border team keeps in touch with the teams in Morocco and Andalusia.

The SJM's advocacy on the Southern Border before the public authorities of the State, the EU, the Autonomous City of Melilla or other Autonomous Communities entails, when the occasion warrants, direct contact with authorities, statements to the media and other communication activities through various channels. It is based on the knowledge acquired of what

is happening on the ground, which involves considerable field-work where large groups enter outside the authorised border posts: near the fences and the port, or when Sea Search and Rescue vessels transport people to Melilla.

The SJM team observes (directly and through testimonies) what happens in public reception centres for migrants and refugees in transit, such as: the CETI, the Bullring and other provisional facilities; centres for the protection of minors such as Fort La Purisima, Fort Baluarte, La Gota de Leche, etc. To ensure monitoring, the team systematically collects all incidents in each case. This data supports the team's own research and that of other entities in the network, especially that of JRS. Periodic dialogue with technicians from other social organisations enriches its vision of reality.

Carrying out advocacy work in order to achieve structural changes in the way administrations act is not enough: there are **personal problems to be solved**. When it is convenient to influence an administrative or judicial resolution, the SJM lawyer in Melilla or the volunteer staff that supports him eventually accompany users to different offices of the Public Administrations, Courts or Tribunals, Police station, Spanish Civil Guard or to the Bar Association of Melilla for tasks such as providing legal assistance, mediation, etc.

An important tool of SJM is **strategic litigation**. An essential task is the preparation of qualified administrative claims in cases that are of special interest or complexity: preparing files to be submitted to the Asylum and Refugee Office, the Foreigners' Office or others; drafting and submitting documents to the Police Prefecture Senior Police Headquarters, the Public Prosecutor's Office for Minors, the Government's Delegation or the Autonomous City Councils; legal assistance in the personal interview for the formalisation of international protection or in sanctioning procedures due to infringements of the immigration law; organising the legal defence strategy and legal representation before the courts, etc. Given the material impossibility of assuming all the cases presented to SJM, a constant joint discernment of the team is necessary to decide which ones to prioritize, carrying out an in-depth representation. A characteristic of the main strategic litigation has been to conduct it outside Melilla: mainly before the High Court of Justice of Madrid, when it has been directed against decisions of the Commissioner General for Aliens and Borders; but also before the Supreme Court, which has already ruled on an appeal in cassation, denying it to the State Attorney, thus supporting the arguments of the SJM, which keeps other ongoing appeals open.

Our day to day is based on a routine that includes welcoming people to the SJM office; checking if they are registered in the database; interviewing them to solve their questions and demands; examining the documentation they provide; informing them about the legal and administrative conditions necessary for the enjoyment of a right (helping to determine to what extent they comply or not); guiding them on the documentation to be prepared, procedures to be carried out, administrations to be contacted; help them fill out forms and any documentation necessary for the administrative procedures in question; identifying possible cases of vulnerability, such as signs of needing international protection, victims of gender violence and/or trafficking, among others.

We have observed **a paradox** throughout 2019 and early 2020: many of the people who came to the SJM office were presenting cases for which there was no room for manœuvre using the legal tools, while others whose situation could be improved did not approach our office. There were many North Africans whose applications for international protection had been refused,

even after re-examination; or young Moroccan former supervised minors who could not board a ship to the mainland because they lacked a residence permit or a foreigner's identity card. Instead, it was necessary **to go out and meet** other people who were not aware of their international or subsidiary protection profile; or of the shortcomings of procedures such as identification, international protection interview or documentation by the Autonomous City when it exercised legal guardianship. **Networking** with other entities is key to **discern the resources to be employed in each case**.

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3

RETRIEVING ARIADNE'S THREAD TO FIND A WAY OUT

3.1 ■ RISKING YOUR LIFE AND LIMBS TO SEEK ASYLUM

Anyone who has read reports such as *Forgotten at the Gates of Europe* or *Sacar del laberinto* (*Getting out of the Maze*) could draw the conclusion that applicants for international protection can easily access the Asylum and Refugee Office at the Beni Enzar border post: Moroccans as entitled to enter Melilla only with their passport or identity card issued in the province of Nador; Syrians, Palestinians, Iraqis and Algerians helped by smugglers who provide them with Moroccan papers. These reports already pointed to an incipient migratory flow of Yemeni refugees who found access more difficult due to their phenotypical features, which differed from the Moroccans. They also assumed that Sub-Saharans who had to enter hidden in vehicles, by sea or jumping over the fence did not request protection, at least in Melilla.

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The situation has clearly changed since the second semester of 2018, once Spain, within the framework of the European Union, transferred significant funds to Morocco to make its border more inaccessible and to involve it actively in search and rescue operations. In 2018, 2019 and 2020, the mortality by sea crossings to reach the mainland or to enter Melilla has become more evident, as a greater number of people with a refugee profile are also crossing.

Prior to the closure of the Moroccan border to manage the COVID-19 pandemic, refugees also entered through the Beni Enzar border post after multiple attempts and attacks by the Moroccan security forces. There was also more Sub-Saharans seeking international protection when arriving to the Chafarinas Islands or immediately after jumping over the fences. In general, there **the number of people risking their lives and physical integrity to seek international protection raises**. It is necessary to study some cases and think about the responsibility that falls on Spain as a State.

■ RISKING YOUR LIFE AT SEA

The Ministry of the Interior counts 918 people who entered Melilla illegally by sea in 2018, 906 in 2019 and 9 between the 01 January and 15 October 2020[1]. SJM's experience on the ground suggests that there would be more. However, the team does not have precise data on the people rescued by search and rescue operations in open water or those who arrive directly to Melilla by swimming, with or without the help of floats, on board jet skis or small boats. It is possible to make an estimation counting, from different sources, the boats disembarked in the Chafarinas. However, figures are less important than the need to highlight the cases in which the migratory journey by sea has resulted in death or serious risk to life, as well as how the request for international protection has been managed for those who have entered Spanish territory by sea.

THE DEATH OF AN ELITE YEMENI SPORTSMAN

The death of Helal Ali Mohammed Al-Hajj, a 24-year-old Yemeni who tried to swim to Melilla with another Yemeni refugee on 16 September, is recorded in the memory of 2019. A boat brought them about 30 metres from the coast, place from where they had to dive and swim. The other refugee reached the land and was able to apply for international protection. When he realised that Helal had not arrived, he reported his disappearance to the Spanish Civil Guard. On 18 September, the Spanish Civil Guard's Special Group on Underwater Activities (GEAS, by its Spanish acronym) rescued the body from the bottom of the sea next to the shoulder of the breakwater. His case had more media resonance because of his status as an elite athlete: he was a kung-fu fighter who had participated in the Asian Games in Jakarta (2018) and who had won a bronze medal at the Islamic Solidarity Games in Baku (2017). But he is not the only one who lost his life in the desperate attempt to apply for international protection when the access roads to the border post of Beni Enzar were closed[2].

ONE OF THE DEADLY SHIPWRECKS IN THE ALBORAN SEA

The SJM team first heard of the shipwreck around 22:30 on Tuesday 26 November 2019 through the radio station Onda Cero Melilla. The initial information was confusing: after reporting that there were about 70 immigrants in the Chafarinas Islands, the news media quickly corrected to specify that a small boat (*patera*) had been rescued from adrift 30 miles north

1 Ministry of the Interior. *Balance quincenal. Inmigración irregular 2019. Datos acumulados del 1 de enero al 31 de diciembre*. Accessible online (2020-10-31) at: http://www.interior.gob.es/documents/10180/11261647/informe_quincenal_acumulado_01-01_al_31-12-2019.pdf/97f0020d-9230-48b0-83a6-07b2062b424f

2 As shown in the news published by ELDIARIO.ES on 09/25/2019, accessible online (10/31/2020) at: https://www.eldiario.es/desalambre/medallista-yemeni-Kung-fu-ahogado-Melilla_0_945956421.html

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of Melilla, where 78 people were travelling and two of them could be missing[3]. Minutes later they reported 10 people missing, 5 seriously injured and 3 dead.

The lawyer of the SJM in Melilla, who was that night at the Melilla passenger port accompanying the official transfer of CETI residents to the mainland, headed for the industrial port in order to wait for the arrival of the ship Salvamar Alcor. He assumed that the authorities would prefer facilities closed to the public as there were victims. He was informed that the rescue operations had entrusted to the Salvamar Spica, based in Almería. In the image taken from the website www.vesselfinder.com the place of the rescue can be guessed due to the change of course. It is **striking** that the Sea Search and Rescue Service resorted to a ship at anchor at a much greater distance from the place of the shipwreck; and that **Melilla had been without an operational Salvamar vessel for more than two months**.

3 News accessible online (2020-10-31) at: https://twitter.com/ondaceromelilla/status/1199444164397674502

The lawyer was informed that the Salvamar Spica had docked at the marina. He arrived 6 or 7 minutes later. On the way, he met two ambulances going in the opposite direction at full speed, and on the quay he saw a man being resuscitated while being put into another ambulance that left immediately. There was a fairly large number of professionals: volunteers from the Red Cross, a doctor from the Melilla Regional Hospital, the Spanish Civil Guard, the National Police (and also agents from the Spanish and Foreigners' Documentation Unit, hereinafter UDEYE) and 6 or 7 journalists and photographers who acted with a wide margin of manœuvre. He managed to get to the front line without any problems.

The passengers on the *patera* seemed to have different symptoms of hypothermia and post-traumatic shock. They were quickly given changes of clothes, thermal blankets, and other heat products. Several of them were introduced into vehicles that were closed with the heating on. The lawyer noted the presence of three minors, also placed in another parked car, who appeared to be in good condition. Initially he counted up to six women. From the phenotypical features, they seemed to come from Sub-Saharan African countries and Bangladesh. A few minutes later UNHCR staff arrived. Then the ambulances returned to take more wounded to the hospital[4]. The forensic team arrived immediately to inspect the bodies. Little by little, they began to transfer those who did not require hospitalization to CETI. The transfers lasted until approximately 2:00 a.m. because the police vans could only transport 5 or 6 at a time.

On Wednesday, the 27th the SJM lawyer received confirmation that one person had died in hospital, bringing **the number of deaths to four**[5]. The media updated the news on the total number of people transferred to Melilla: 42 live adult men (counting the one who died in the hospital), 10 live adult women and 3 live minors and 3 dead adult men, making a total of 58 passengers[6]. At that time, the identity of the four deceased men was unknown, beyond their adult status, the Bangladeshi origin of two and the Sub-Saharan origin of the other two. The families and relatives of the missing people started sending photos and names to the SJM team, which still did not have enough information to confirm their status. Back then, the survivors, who did not have a CETI resident's card, were not allowed to leave the premises.

On Thursday, the 28th the hospitalised patients were discharged, except for a male from Ivory Coast who remained in the Intensive Care Unit. The SJM team was completing a list of survivors: 11 men from Bangladesh (they said there were 18 on board); 9 adult women, 6 adult men and 3 minors from Ivory Coast; 9 men from Mali; 5 adult men and 2 adult women from Guinea Conakry; 4 adult men from Cameroon; 2 adult men from Senegal; 1 adult man from Sierra Leone; 1 adult man from Angola and 1 adult man from Benin. **Bangladeshis could not communicate as there were no Bengali interpreters in Melilla**. The SJM team in Melilla was assisted by a Bangladeshi worker from the Migra Studium Foundation, an organization member of SJM. She was asked to organise an information session in which she would intervene as an interpreter and cultural reference. Firstly, she sent an audio in Bengali with the proposal and invitation to be transmitted to the Bangladeshis. The response was long awaited, as one can understand in people recovering from an extremely traumatic situation. That day, a first survivor came to the premises of the Geum Dodou association.

4 More information accessible (2020-10-31) at: https://vimeo.com/375821347

5 More information accessible (2020-10-31) at: https://twitter.com/ondaceromelilla/status/1199602593904963584

6 More information accessible (2020-10-31) at: https://twitter.com/ondaceromelilla/status/1199602758405545985

On Friday, the 29th, the SJM lawyer contacted the Spanish Civil Guard to inform them **that relatives of the disappeared had asked him to check photos and names against the deposited corpses**. He also informed the Spanish Civil Guard that a would-be Bangladeshi deceased had relatives living in Spain who wanted to travel to Melilla to recover the remains in case they were located. Several survivors came to the premises of the Geum Dodou association. At least one had lost a close relative in the shipwreck.

On Saturday, the 30th in the afternoon, the Geum Dodou association organised an **event to welcome** the Sub-Saharan survivors of the shipwreck, which was attended by other regular users of the association: 60 or 65 people in all. It was led by the psychologist from the Diocesan Delegation of Migration in Nador. They were conveyed a few words of support and solidarity. Next, they observed a minute's silence and encouraged them to intervene or offer a prayer. One of them led a Muslim prayer for the dead. A Christian response was then offered by another survivor. There were very intense and emotional moments. The event continued with a snack, free time to use the computers and other activities for rest and relaxation. The psychologist held several individual interviews. And they were scheduled for Monday, the 2nd of December at 11:00. At that time, they said they had not yet spoken to any medical professionals or psychologists from CETI, despite some complaining of various discomforts in their bodies and that they were very distressed.

In the context of that shipwreck the SJM team appreciated a good practice. On Friday, the 13 December, several unidentified corpses were buried, which had been frozen at the Forensic Anatomical Institute since March 2019. The **conservation of the remains for nine months** can be interpreted as an **objective availability to try to identify them** when relatives of missing migrants contact the authorities in Melilla.

Four weeks after the incident **one of the survivors expressed his wish to apply for international protection with the assistance of the SJM lawyer**. His level of recovery from the trauma was sufficient to allow further steps to be taken. In this regard:

> He had benefited from the humanitarian work carried out by all the institutions involved in the rescue of the *patera*, in health care, in the mortuary police of the deceased and in the contact with the families. But he had had to put his life in grave danger in order to seek asylum.

OTHER CASES

The number of deaths at sea continues to rise. On Tuesday, the 01 September 2020 the Sea Search and Rescue Service rescued the lifeless body of a woman in the Chafarinas Islands and the following Saturday the body of a man arrived on the beach of San Lorenzo de Melilla, later identified as the Syrian couple who on 30 August had notified their relatives that they were heading for the Chafarinas Islands.

■ RISKING YOUR PHYSICAL INTEGRITY ON FENCES TO GET PROTECTION

TO DIE DOING BOZA[7]

When a group of migrants jumped over the fences on 21 October 2018, several migrants and civil guards were injured, and one death was reported: Daouda Sossingue. He died at the foot of the fence, not having fallen from the top nor having suffered a direct attack. The cardiorespiratory stoppage was attributed to overexertion caused by an advanced form of tuberculosis. He was taken to the morgue and identified thanks to the testimony of several fellow migrants and a cousin living in Spain who contacted the SJM legal team. The Spanish Civil Guard command and the investigating court dealing with the case facilitated the arrangements for the burial in the Muslim cemetery.

Certainly, it was an accidental death. But it was suffered by a Malian citizen from Timissa, in the region of Ségou, included by UNHCR as a region of non-return in its 2019 position, so he could have received subsidiary protection in Spain. He died doing *Boza*: he paid the highest price before he could express his willingness to apply for protection.

A young Burkinabe man, Issoufou Bara, died accidentally when he fell into a ravine after jumping over the fence on 20 August 2020. The few facts about his life do not point to a clear international protection profile by legal standards, although his village, located in the south of the country, is suffering the consequences of climate change, making life very difficult.

A VERY COSTLY SUBSIDIARY PROTECTION

On 10 January 2020, the Deputy Director General of International Protection signed the granting of subsidiary protection to AT, a Malian citizen who had entered Spain through Melilla on 12 May 2019 by jumping over the fence with 51 other young people. Their story is similar to that of many other Malians:

He was born in 1998 in Konna. He spent his childhood between his hometown and Gao, depending on his father's work requirements. He lost his father in 2010, at the age of 12, and was left under the financial responsibility of his older brother, who had taken over the job from the deceased father. In 2012, while living in Gao, he witnessed the atrocities of the rebel groups, which mutilated the population at random. His family then returned to Konna. In 2013 he sighted an armed confrontation between the rebels, the Malian army and the French troops supporting it. His house was burned down in the air raid that the French army inflicted on the population. His family was scattered, with two of his brothers dying in the wreck of the canoe in which they were trying to escape down the Niger River. He himself dug the mass grave in which he saw his brothers buried along with other civilians. Another brother of his disappeared, without any further news. Between 2013 and 2015 he lived in Bankass with his maternal aunt as an internally displaced person. He was abused by his uncle and continued to witness occasional rebel attacks. The harshness of life in general was compounded by the psychological trauma of years of war. In 2015 he decided to leave the country.

7 Boza is a cry of victory that Sub-Saharans express when they jump over the fences. This word has become synonymous with crossing the border.

AT first settled in Tamanrasset, until he was shocked by the shamelessness of a Malian rebel who boasted of having killed many people in Konna. He moved on to northern Algeria and crossed into Morocco, where he lived for three years, mainly in the forests around Nador, suffering arrests and forced displacement to towns further south, including Western Sahara. During these years he kept in touch with his mother, who notified him in September 2018 of the death of his older brother when a mine exploded under the truck in which he was travelling.

When AT jumped over the fence in Melilla and was admitted to the CETI, as can be seen in other entries by large groups since 21 October 2018, the police tried to speed up the identification formalities and the international protection interview procedures as much as possible, hoping that Morocco would readmit migrants who had not been pushed-back at the very border. When they were identified, they expressed the police their intention to apply for international protection and passed the interview at the Asylum and Refugee Office at the Beni Enzar border post on 17 May. Despite repeated requests for a Bambara interpreter, the police forced him to tell his story in French, using an interpreter that AT identified as Moroccan. On the one hand, he distrusted the interpreter due to the accumulated suffering in Morocco. On the other hand, his command of French is limited. His mother tongues are Bambara and Fula, the language of the Fulani, his mother's ethnic group.

The SJM reinforced the statements he made during the asylum interview with additional allegations. It did so on 22 May, when it offered AT a psychological examination by the psycho-legal support network for survivors of violence SIRA. In his allegations, beyond specifying details of the violence suffered in Mali during the war years, he claimed that he had had not been aware of the determining value of his statements at the time he passed the international protection interview; moreover, as he had been exhausted after years of suffering and hardship between Mali and Morocco, shattered to talk about such traumatic situations, as well as self-conscious in front of unknown people to whom he had to talk about such personal and painful issues. The allegations confirmed his account of war episodes with documentation from the UNHCR, Amnesty International and other sources.

When his application was accepted for processing, he was documented as an applicant for protection on 18 June 2019. When AT was transferred to the Mainland, he was sent to a reception centre in Gijon. Fortunately, his file was resolved in just over six months. On 10 January 2020 he was granted subsidiary protection and on 14 January he got his residence permit by way of subsidiary protection. He can be considered **lucky for the protection granted and for the speed of his case**. But this does not alleviate the years of hardship in the surrounding mountains of Nador, the imprisonment suffered in Morocco, the forced transfers to the south of the country, the lack of access to protection in Morocco, the impediments to request protection at the Spanish embassy or consulate, and the obstruction when trying to arrive to the Asylum and Refugee Office in Beni Enzar through the border crossing. In order to request and obtain protection, AT had had to jump over the first Moroccan fence full of razor lame wire, cross the moat, jump over the first fence on Spanish soil while being stoned by Moroccan military auxiliaries, pass the towline and jump overt the second fence on Spanish land risking to fracture his bones in case of falling. The AT situation is not an isolated case, but the most significant of those accompanied by the SJM. It is a sad reality to acknowledge:

> The very State that grants him protection, that Article 13.4 of the Constitution refers to legal development, has given him no other remedy, in order to request it, than to risk his life and physical integrity: fundamental rights he is entitled to according to Article 15.

■ A STEP IN THE RIGHT DIRECTION TO REQUEST PROTECTION WITHOUT RISKING YOUR LIFE AND LIMB

At the time of closing this edition of the report, some good news arrived: on 15 October 2020, the 5th section of the Administrative Chamber of the Supreme Court issued ruling 1327/2020, which resolves the cassation appeal 4989/2019. This ruling culminates a line of strategic litigation by the citizens' platform *STOP Mare Mortum* to strengthen the possibilities of access to international protection without risking life and limb. Its objective has been to recognise **effective access to applications for international protection in Spanish embassies and consulates**, as recognised in Article 38 of Law 12/2009, of 30 October, that regulates the right to asylum and subsidiary protection:

> Article 38. Applications for international protection at embassies and consulates.
>
> In order to deal with cases presented outside national territory, provided that the applicant is not a national of the country in which the diplomatic representation is located and his or her physical integrity is at risk, the Spanish Ambassadors may promote the transfer of the asylum seeker(s) to Spain in order to make it possible to present the application in accordance with the procedure provided for in this Act.
>
> The Regulations implementing this Law shall expressly determine the conditions of access to the embassies and consulates of the applicants, as well as the procedure for assessing the needs of transferring them to Spain.

The Supreme Court had admitted the appeal on the grounds of the objective interest of the cassation to set out case law on the following issue:

> (...) what is the legal regime applicable to applications for international protection submitted outside the national territory under Article 38, and whether and how the provisions of that provision are applicable to them, despite the fact that they have not been the subject of regulatory development, specifying the country to which the phrase "their physical integrity is at risk" refers - if it refers to the country of origin of applicants for international protection, or, on the contrary, to the country in which the application is made - and what the legal consequence is of failure to respond to the application made under it.

In its reasoning on the grounds of law, the judgment finds that Article 38 does not establish a separate legal regime for obtaining international protection but issues **a procedural rule for submitting the application outside the national territory**.

The Supreme Court also states that the Spanish Ambassadors do not intervene in the process of admitting or rejecting applications for international protection. In fact, they only **assess** that the applicants meet the three requirements set out in Article 38: that they are **not nationals of the country where they are**; that **their physical integrity is at risk in the country of origin**

(the of nationality, or that of habitual residence for stateless persons, according to Articles 3 and 4 of Law 12/2009); and that **the State where they are has not remedied their situation**. And, in accordance with the above assessment, **Ambassadors issue laissez-passer to travel to Spain with the express authorisation** of the Directorate General of Spaniards Abroad and of Consular and Migratory Affairs of the Ministry of Foreign Affairs and Cooperation. This Directorate-General in turn requires a favourable report from the Asylum and Refugee Office of the Ministry of the Interior.

The Supreme Court also confirms that there is a legal procedure to apply Article 38 of Law 12/2009 even though this has not been developed by regulation. Indeed, according to Article 2.2 of the Civil Code, **the provisions of the remaining legislation that have not been repealed due to their opposition to the provisions of the law remain applicable**. This is what is provided for in the sole derogatory provision of Law 12/2009. In this regard, reference should be made to Articles 4.1 and 16 of Royal Decree 203/1995 of 10 February, approving the implementing regulations of Law 5/1984, regulating the right to asylum and refugee status, as amended by Law 9/1994 of 19 March.

At last, the Supreme Court determines that, when international protection is requested outside national territory, **the administration must settle the matter** in the general terms under the Procedural Law and in the particulars referred to in Article 38 of Law 12/2009. In this sense, the lack of a legal ruling implies an alleged act liable to be challenged through administrative and jurisdictional channels.

> The case law established is important so that the administration does not systematically disregard requests for protection made at Spanish embassies and consulates by nationals of third countries whose physical integrity is in danger in the country of origin. Once the legal framework, the procedure and the possibility to appeal against the lack of response have been specified, the real difficulty will be the practical accessibility of the delegations, the attention to the requests made and the accompaniment to lodge appeals.

Without these practical conditions, many people in need of protection who do not find a solution during their migratory journey will continue to risk their lives and physical integrity until they enter Spanish territory.

3.2 ■ LACK OF GUARANTEES IN RETURN PROCEDURES AT THE BORDER

The publication on 13 February 2020 of the judgement of the Grand Chamber of the European Court of Human Rights (hereinafter ECHR) in the case of N.D. and N.T. against Spain, (appeals 8675/15 and 8697/15, brought by two third-country nationals pushed-back to Morocco immediately after having jumped over the fence in Melilla on 13 August 2014), has stirred up the debate on effectiveness and guarantees in migration control procedures at the border. The SJM intervened by defending a position in favour of the respect of guarantees. The pursuit of effectiveness does not justify police practices which devoid of substance the guarantees provided by the legal system in procedures for refusal of entry and removal. Much less does it

justify the regulation of summary procedures without guarantees, as happens in the so-called border rejection, established as a special regime in Ceuta and Melilla by the first final provision of Organic Law 4/2015, of 30 March, on the protection of citizen security, which introduces into Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter Immigration law) as the tenth additional provision.

The SJM-Southern Border team reflects on the refusal of entry and various forms of refoulement based on its observation work in Melilla, assessing some relevant points of the ECHR ruling.

■ REFUSAL OF ENTRY

The Spanish legal system establishes in Article 26.2 of the Immigration law a procedure to deny the entry of foreign persons who intend to enter Spanish territory through a land border post, sea station or airport:

> Aliens who do not fulfil the requirements for entry shall be refused entry by means of a reasoned decision, which shall contain information on the appeals that may be lodged against it, the time limit for doing so and the authority to which they must apply, as well as their right to legal assistance, which may be provided automatically, and to an interpreter, which shall commence at the same time as the check is carried out at the border post.

The SJM has noted some cases of refusal of entry of foreign persons who had arrived at the Spanish documentary control of Beni Enzar to express their intention to apply for international protection.

It is worth noting the case of a Moroccan woman who had explained her husband's aggressions in Nador, fearing for her life and not being protected by the Moroccan police. The lawyer urged her to return to Nador to collect her children and apply for international protection at the Office of Asylum and Refuge (OAR) in Beni Enzar. When she applied for asylum, a policeman insisted on refusing her entry orally. She was able to call the SJM lawyer, who immediately went to the border post and got them to initiate a procedure to apply for protection which Spain recognises for similar cases.

> The seriousness of these cases is the purely oral proceedings, without any administrative formality to record the refusal of entry.

■ PUSHBACKS

The SJM team has recorded and edited a dozen long interviews with Sub-Saharan migrants pushed-back to Morocco after jumping over the fences or while swimming to the port or a beach, or returned under the 1992 bilateral readmission agreement[8] after their landing in the Chafarinas Islands. Most of the testimonies are taken the very day of their return or few days later, usually during their convalescence from injuries or fractures suffered during the jump over the fence. It also collects testimonies in Melilla from people who have managed to get in after several failed attempts.

8 Agreement between the Kingdom of Spain and the Kingdom of Morocco on the movement of people, transit and readmission of foreigners illegally entered, signed in Madrid on 13 February 1992. Accessible online. Accessible online (2020-10-31) at: https://www.boe.es/buscar/doc.php?id=BOE-A-1992-8976

PATTERN OF THE OBSERVED PUSHBACKS

All the interviewees are young men, some of them minors. Many of those who jump over the fences have razor-wire cuts in their hands and forearms, bruises on their heads from stones thrown by the Moroccan military auxiliary forces to prevent them from jumping over the fences, or fractures in their feet or legs when they fall from the last Spanish fence. Most of the interviewees jumped the fences in small groups and did not use any kind of violence, although they suffered from the lapidation of the auxiliary forces, who beat them with sticks after they were returned to Morocco from Spain.

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The testimonies of young people who have jumped over the fences agree on the firm, calm and rather silent treatment given to them by the civil guards when they were arrested. The civil guards never asked them to identify themselves, turning a deaf ear to their requests for medical assistance. The migrants were not provided with interpreters or legal assistance. They were immediately sent back to Morocco through the gates that mark the fences. There

the testimonies agree on the usual violence of the Moroccan military auxiliary forces: they often beat them up and confiscate their most valuable belongings when the civil guards have left. Only a few badly injured or more seriously fractured people indicate that a commander ordered them to be taken to El Hassani hospital in Nador without hitting them. Those who do not have serious health problems are usually taken to other locations far from the border: Rabat, Casablanca, Safi, etc. In short:

> The lack of violence by the civil guards in the vicinity of the fences cannot mask the systematic deprivation of the most elementary guarantees for identifying the factors of vulnerability that require some form of legal protection and health care, in addition to the physical violence to which they are exposed in Morocco.

The stories of migrants who tell of their pushbacks at sea coincide on one point: that they are intercepted by Spanish Civil Guard patrols, forcing them to stay in the water. Some of the young people pushed-back testify to having been beaten with a cape from the boat. Sometimes they are kept in the same place until a Moroccan patrol boat arrives. Other times they are towed to the place where the Moroccan patrol boat will pick them up: attached to a float tied to the end of a rope that is thrown to them, or attached to a ring on the patrol boat's side. In any case, and whatever the slowness with which the patrol boat advances, the towing operation is dangerous because they can easily drown. All the testimonies coincide in pointing out episodes of violence inflicted by the Moroccan security forces: on the boat, in the port premises, in the police station...

> It is extremely worrying that the Spanish Civil Guard pushes-back migrants at sea putting their lives in danger, even exercising some kind of violence.

A testimony tells of an **operation by the Spanish Civil Guard** on the 01 October 2020 at the border breakwater of Beni Enzar, in the part of the breakwater that is **beyond the fences**: they would have held a young man until the Moroccan patrol boat arrived and took him to the port of Beni Enzar. This poses a dilemma:

> The civil guards acted on Moroccan territory outside their jurisdiction, or the fences did not coincide with the legal border and carried out a pushback, a kind of return from Spanish territory deprived of guarantees.

The SJM's observation of the non-compliance with these guarantees was reinforced by the ECHR's judgment of 03 October 2017 in the case of N.D. and N.T. v. Spain, (appeals 8675/15 and 8697/15). However, the judgment of the Grand Chamber of the ECHR of 13 February 2020 requires careful examination because it contains contradictory elements:

> This judgment renders meaningless the concept of refusal at the border coined in the first paragraph of the tenth additional provision of the immigration law; but it seems to deprive pushed-back migrants of any recourse against actions of the state which disregard the guarantees provided for the refoulement procedure.

PUSHBACKS INSTEAD OF REJECTION AT THE BORDER

The **Government**, applying the "**operational concept of border**" coined by the Ministry of the Interior, intends that:

> People who jump over the fences do not come under Spanish jurisdiction until they have crossed the police line trying to contain them: as if, for the sole purpose of fighting illegal immigration, they were not yet in Spain.

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The **ECHR**, on the other hand, insists that the concept 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. It **concludes** that:

> The specific nature of the migratory context and the difficulties in managing the border (§107) 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.

Thus, it states that the Human Rights Convention cannot be applied selectively to parts of a State's territory by artificially reducing the extent of its territorial jurisdiction. To conclude otherwise would be to render meaningless the postulate of effective protection of human rights that underlies the Convention as a whole.

As a consequence of this argument, it must be acknowledged that **the first paragraph of the tenth additional provision of the immigration law is meaningless**:

> Tenth additional provision. Special regime for Ceuta and Melilla.
>
> 1. Foreign nationals who are detected at the border line of the territorial demarcation of Ceuta or Melilla while attempting to cross the border checkpoints in an irregular manner may be rejected in order to prevent their illegal entry to Spain.

In fact, this provision places the action of overcoming border containment elements as prior to the irregular crossing of the border as used by the preposition "to". However, the overcoming of border obstacles located on Spanish territory implies the prior crossing of the border and the action of the Spanish Civil Guard in territory under Spanish jurisdiction, subject to Spanish law. Consequently, what is a refoulement from Spain cannot be called a "rejection to prevent illegal entry into Spain", even if it is a refoulement carried out summarily. Then: what happens to the guarantees provided for in the LOEX and its Regulation?

LIMITS TO THE REQUIREMENT FOR GUARANTEES IN RETURN PROCEDURES

The Grand Chamber recognises that any procedure for expulsion, refoulement, refusal of entry, rejection at the border, etc., must respect **minimum guarantees**. When several people are involved in a group (without the need for a minimum number or common characteristics), **collective expulsion** takes place, which is contrary to the European system of human rights. -Article 4 of Additional Protocol No 4 to the European Convention on Human Rights (ECHR)-. This happens when they are not given a personalised treatment. Legal defence and interpretation services should be provided in order to assure individual identification, gathering information about their personal background, being informed of the possibility of requesting international protection and appealing against administrative decisions. Up to this point, the recent judgment gives continuity to the case law of the ECHR, having as its most recent references *Hirsi Jamaa and others v. Italy* 27765/09 and *Khlaifia and others v. Italy* 16483/12.

Nevertheless:

> The Grand Chamber of the ECHR sets two limits to the requirement of personalised procedure in the case of illegal entry: when the person does not actively cooperate in the identification work (by refusing to answer the questions raised) or when he or she tries to take advantage of the mass effect and use of violence (§ 201).

The Grand Chamber considers that the applicants put themselves in an illegal situation when they deliberately attempted to enter Spain by crossing the Melilla border protection system in unauthorised places and in a large group; that they decided not to use the existing legal channels which allowed them legal access to Spanish territory, ignoring the relevant provisions of

the Schengen Borders Code on the crossing of external borders and the relevant domestic legislation. In so far as the Court reached the following conclusion:

> The lack of an individualised expulsion procedure (a concept used within the meaning of Article 4 of Protocol No 4 to the ECHR) was a consequence of the applicants' own conduct in attempting to enter Melilla illegally, and it therefore ruled that the defendant State could not be held responsible for the lack of a legal remedy in Melilla which would have enabled them to challenge that expulsion.

In this exercise, **the Grand Chamber of the ECHR closes its eyes to the reality that Sub-Saharan migrants in Morocco face when they stay near the border with Spain in Melilla or Ceuta**. It says nothing about the daily police harassment, the beatings, the destruction of their huts in the mountains, the theft and burning of their belongings, the forced removal to the border with Algeria or to cities in southern Morocco, the material impossibility of crossing border posts. It presupposes that what is shown to be practically impossible is feasible. And the Grand Chamber's way of closing their eyes is deliberate, guilty in this respect. In short:

> According to the Grand Chamber of the ECHR, the state would not be entitled to practise pushbacks, but those who suffer from them would not have much room for appeal.

The Constitutional Court, in ruling on appeal of unconstitutionality n.º 2896-2015 on 19 November, and in the absence of publication of the judgement, establishes three **criteria** that "**rejections at the border**" must respect in order **to be constitutional**: **individualised application**, full submission to **judicial control** and **application of the guarantees recognised for foreigners in the international rules, agreements and treaties ratified by Spain**, having to be **real and effective the procedures for legal entry into Spanish territory**. In any case, it requires special attention to people who are particularly vulnerable: minors, pregnant women, or the elderly. The legal argument must be analysed: that is where the observed reality remains.

■ DEFICIENT GUARANTEES IN RETURN PROCEDURES

The SJM, in the legal aid services it provides, observes **bad administrative practices that empty the guarantees provided for the return procedure** in Article 23.3 of the Regulations of Organic Law 4/2000 (Aliens Law) of their substance:

> In any of the cases referred to in paragraph 1, the foreigner in respect of whom proceedings are being taken for a return decision shall be entitled to legal aid, as well as to the assistance of an interpreter, if he does not understand or speak the official languages used. Both types of assistance shall be free of charge in the event that the interested party lacks sufficient economic resources, in accordance with the provisions of the regulations governing the right to free legal aid.

These are cases in which the police are conducting **refoulement procedures in the hope that Morocco will readmit the migrants by applying the 1992 readmission agreement**. Since 2017 we have been observing its application to people landed on the Chafarinas Islands. Since the summer of 2018, also to those who have jumped over the fences in large groups.

DIMINISHING GUARANTEES FOR PEOPLE LANDED ON THE CHAFARINAS ISLANDS

Throughout 2019 the SJM team collected information from various sources on 20 boats that landed on the Chafarinas Islands: a total of 513 people, of whom 314 were adult women, 60 minors and 135 adult men. Many of them came from Sub-Saharan African countries, but there were also some Algerians, Syrian Kurds, Syrian Arabs, Palestinians, Iraqis, Yemenis, Bangladeshis, and Eritreans. Even on the basis of **declared nationality**, it could be assumed that a significant percentage had a **clear international protection or subsidiary protection profile**.

Under the 1992 bilateral agreement, the national police tried to return 35 adult men from another boat that landed on 3 June to Morocco, including 10 adult women and 5 minors (all Sub-Saharan). Just as the women were taken to the CETI and the minors to the Fuerte la Purisima protection centre, the adult men were taken to the police station for identification work and to spend the night. The police officers attached to the OAR in Beni Enzar cancelled the appointments given to other people for their asylum interviews so that any of the 35 could be interviewed as quickly as possible. In fact, they were transferred to Beni Enzar without being allowed to shower, change their clothes, eat, or pass any other medical examination than the superficial one they had been given at the port. They had to wait in the vicinity of the OAR in the open, under the curious gaze of the public who were passing through the border. They carried out the interviews exhausted and disoriented. The police provided them with two Bambara interpreters.

> The police used the application procedure at the border, which involves shorter deadlines, in the hope of being able to return them within the 10-day deadline laid down in the 1992 bilateral readmission agreement.

It was certainly a striking way of proceeding, because until then, those who had jumped over the fences and were admitted to the CETI when they expressed their wish to apply for protection, had followed the application procedure on the territory. Having been subjected to **a less protective treatment**, the SJM initiated legal proceedings before the National High Court (pending on 31 October 2020).

The case of an **Iraqi refugee** who landed on the Chafarinas Islands on 20 August 2019 deserves special mention. He came from a Shiite tribe in southern Iraq. He had studied engineering in Moscow, where he shared a flat with other Muslim students, albeit Sunni ones. Living together led him to perceive the greater significance of what unites Shiites and Sunnis as Muslims, blurring their differences. Hence, he began to frequent the Sunni mosque where his classmates went. **The sheikh of his tribe condemned him to death as a traitor** because of his religious practice in a Sunni mosque. The ruling authorized anyone in Iraq who had knowledge of its content to carry out the death sentence. That death threat prevented him from returning to his country, while the completion of his studies deprived him of permission to stay for study purposes in Russia. Determined to enter the European Union, he opted for the North African route. Once in Morocco, he headed first to Nador to enter Spain via Melilla. He was unable to get through the Moroccan documentary checkpoint. **When the police recognised him as a foreigner, they beat him up**. This happened **whenever he was found near the border**, since in other places further away he was treated with deference, recognising in him an Arab brother. When he was interviewed, he counted 50 attempts to enter Spain by land and sea, both on the Canary Islands route and through the Straits and the Alboran Sea. When he succeeded, accidentally arriving in Chafarinas Islands, he was taken to Melilla, where **he was able to apply**

for international protection and be documented as an asylum seeker. He could have done so without risking his life if he had had open access to Beni Enzar without being attacked by the Moroccan security forces to prevent him from doing so.

One of the boats, occupied by 25 women and 6 Sub-Saharan minors, was reportedly seized by the Moroccan Royal Navy in the vicinity of the archipelago on 01 September 2019.

On 03 January 2020, the Government Representative in Melilla reported on **the rescue by a Moroccan boat and the driving to the nearest Moroccan safe port** of a group of over 40 migrants who had landed on the **Chafarinas Islands**. He claimed that international maritime law was being applied to the rescue. He added that the security forces wanted to close down a route used by the smuggling mafia, which puts their integrity at serious risk. He did not say, however, that they were in a place under Spanish sovereignty, nor whether the Spanish authorities had intervened or not in the exercise of their jurisdiction. In a case like that, the figure of the rescue of shipwrecked persons conceals a return without guarantees.

Just as in 2017 it seemed that landings on the Chafarinas Islands were rather accidental, due to the poor condition of the boats or engine breakdowns, in 2019 it is easier to portray the deliberate use of an access route to Spain that allows a minimum investment in engine and fuel. But this consideration should not obscure the main one: the greater risk taken by people with a clear protection profile.

In September and October 2020, the SJM went on to document other cases of refoulement practiced from the Chafarinas Islands. In the early morning of 01 October 2020, six immigrants arrived on Congreso Island, one of the Chafarinas. There were two women in the group, one pregnant. Around midday a Spanish Civil Guard patrol arrived. According to the news published in *El Faro de Melilla*[9], after their mobile phones were confiscated, they were handed over to the crew of a Moroccan patrol boat, who took them into custody, although the pregnant woman was released. The pregnant woman's husband claimed to have been beaten by a civil guard when he asked for protection. Refoulement was carried out summarily, without identification, in the absence of legal defence and interpretation. According to the news, the Government delegation stated that it had no record of the case, while the Spanish Civil Guard Command admitted that it was an ordinary procedure. This is a reality to which we must continue to pay attention.

RETURNS AFTER ENTRIES BY LAND LACKING AN EFFECTIVE AUDIENCE

On 21 October 2018, more than 200 migrants jumped over the fence in Melilla and crossed the Spanish Civil Guard's line of defence. They were taken to the CETI as detainees. The police rushed to initiate refoulement procedures, violating their procedural guarantees in various ways.

First of all, **many were not in good health**: quite a few had cuts (some very deep) on their hands and forearms, caused by the razor lame wire and other elements of the fences; while others had difficulty walking because of the traumas suffered in their jump (some were driven from their armpits by policemen, unable to walk).

9 Accessible online (2020-10-31) at:
https://elfarodemelilla.es/devolucion-caliente-seis-migrantes-llegaron-islas-chafarinas/

Secondly, **the police emptied out the hearing procedure** by simultaneously initiating the notification of the return proposal and of the return decision.

Thirdly, **legal aid was little more than nominal**. Public defenders attended groups of six in fifteen minutes, except for a few who refused to do their work if they could not meet with their clients in private. The SJM lawyer took the time to see the two migrants who had applied for legal aid immediately after their admission to CETI.

Fourthly, the situation was aggravated by the **mere presence of an interpreter for French, English, and Arabic**: languages that many did not speak.

Fifth, **they lacked the interviewing of social workers to assess their specific circumstances and situations of vulnerability**, and to inform them about international protection.

The haste of the proceedings was explained by the hope that Morocco would readmit those migrants in application of the bilateral agreement of 1992. This haste came at a price for the migrants, lawyers, interpreters, and police officers who worked until after three in the morning, when they could have carried out the proceedings with more guarantees over several days.

It was the **first time** in years that **Malian migrants and those from other Sub-Saharan countries expressed their intention to apply for international protection**, suspending the return. But the fundamental right to effective judicial protection of the 55 who were returned within 24 hours of their entry was violated because they did not have sufficient guarantees. They did not even have the possibility to extend a power of attorney in favour of their lawyers to appeal the return to Morocco.

VIOLATION OF GUARANTEES BY THE PUBLIC APPOINTED LAWYER

In September 2020, a documented asylum seeker reported his entries in Melilla by jumping over the fences in large groups on 21 October 2018 and 06 April 2020. On both occasions he managed to get through all the border checkpoints. In 2018 he entered the CETI, while in 2020 he was assigned accommodation in the provisional facilities of the enclosure for celebrations called “El V Pino” and then of the Bullring. On both occasions he was identified by the police. On both occasions he expressed his wish to apply for international protection. He points out the difference in that the **public appointed lawyer** who took over his legal defence in 2018, **far from conveying his intention and facilitating the procedures for his asylum interview, smoothed out the return procedures** by urging him to sign a document without revealing its content. A day later, he was sent back to Morocco by sea (between the ports of Melilla and Beni Enzar). Eleven days later, he was expelled to Mali. He had to leave the country again because, six years after his first departure from the country, his life was still threatened in his home village. When he managed to enter Melilla on 06 April 2020, he was quick to refuse the publicly appointed legal assistance in order to ensure that his lawyer conveyed his wish to apply for international protection and assisted him in the interview.

LACK OF GUARANTEES ON THE RETURN OF THIRD COUNTRY NATIONALS TO MAURITANIA

There are **other forms of return in which there are also deficient guarantees**. On 20 January 2020 the SJM read in the activity reports of the Ombudsman, in charge of the National Mechanism for the Prevention of Torture that the Ministry of the Interior used FRONTEX flights to **return nationals of this Islamic Republic to Mauritania together with nationals of third states**, under Article IX(B) of the Agreement between the Kingdom of Spain and the Islamic Republic of Mauritania on immigration, done at Madrid on 01 July 2003:

> Each Contracting Party shall readmit to its territory, at the request of the other Contracting Party, a third-country national who does not, or no longer, fulfil the conditions for entry to, or stay in, the territory of the requesting Contracting Party, provided that the third-country national is presumed to have transited through the territory of the requested Contracting Party, subject to agreement on the case.

Apart from the unequal position of power between the contracting parties revealed by this clause, what worries the SJM most is the presence of **Malian citizens** among those returned to Mauritania. From the outset, there is reasonable doubt as to their fate in Mauritania or their transfer to the border with Mali by the Mauritanian security forces. It turns out that in July 2019 the UNHCR advised against the forced repatriation of Malian citizens to the regions of Timbuktu, Gao, Kidal, Taoudenni, Ménaka, Mopti, Ségou, Sikasso and Koulikoro (Nara, Kolikana, Banamba and Koulikoro districts). These are places where the violence previously suffered in the North has spread, pitting diverse ethnic or community groups against each other, reactivating armed groups who had previously signed a peace agreement as well as mobilising other extremist groups of Islamic nature. Therefore, **the direct or indirect return of Malian citizens to the regions and districts of the north and centre of the country is contrary to the principle of non-refoulement** of Malians, who would be in need of international protection according to the 1969 Organization of African Unity Convention, which ratifies the 1951 Geneva Convention's refugee criteria. After the SJM published a press release, the best quality investigative journalism corroborated at least one Malian's testimony who had been taken to the border with Mali by Mauritanian security forces[10].

By the year 2020, the bad practices of the police towards the Malian population arriving in the Canary Islands have become evident. They start the return procedure in the hope of practising it through Mauritania, requesting authorisation for internment in some cases, and without informing about the possibility of applying for international protection. These issues are addressed in detail in the *CIE Report 2019: Ten Years Looking the Other Way* and will be dealt with in the next report.

■ THE RETURN DURING THE COVID-19 CRISIS

The minister of the Interior issued the Ministerial Order INT/248/2020, of 16 March, establishing the applicable criteria for action by the security forces and corps in view of the temporary restoration of border controls. He was exercising the functions laid down in article 4

10 Consult: Martín, M. One of those deported by Spain to Mauritania: "After three days without food, we were abandoned in Mali.", El País, 2020-07-02 (accessible online on 2020-10-31): https://elpais.com/politica/2020/02/06/actualidad/1581003885_273856.html

of Royal Decree 463/2020, of 14 March, which declared the state of alert for managing the health crisis caused by the COVID-19. Article 3 regulates the implementation of border control measures such as refusal of entry or refoulement. Article 3.3 identifies the case for which the latter applies: the attempt to enter Spanish territory illegally; and the persons included in the figure: foreigners intercepted at the border or in its vicinity, for which purpose second line controls may be established. Art. 3.5 specifies that the Spanish Civil Guard is the subject in charge of the interception and the procedure to follow: driving to police station for identification and, when appropriate, return. Just as Article 3.2 details the guarantees in the procedure for refusal of entry, Article 3.3 remains ambiguous: its wording is very similar to that of Article 23.2 of the Immigration Law's Regulation, but does not extend to the guarantees provided for in Article 23.3.

■ CONCLUSION

Following the judgment of the Grand Chamber of the ECHR, it is clear that the so-called "rejection at the border" is a refoulement. According to the information note of the Constitutional Court on its judgement, the criteria of individualisation, full submission to judicial control and compliance with international obligations remain to be analysed. And it still needs to be regulated according to these criteria. In any case, there is concern about the bad administrative practices that leave the guarantees provided by the law as a simple declaration of intent. An area of respect must be further developed.

3.3 ■ UNDUE RESTRICTIONS ON THE RIGHT TO FREE MOVEMENT

The report *Sacar del laberinto* (*Getting out of the Maze*) described a problem detected: the **uneven extension of time that applicants for international protection can stay in Melilla before being granted permission to transfer to the mainland**, the longed-for *Salida*. Moreover, it exposed how **they are prevented from travelling on their own initiative even presenting their documentation** (the *red card*) at the police controls before boarding. It seemed that the **length of stay** of many protection seekers **depended on the availability of places in the refugee or humanitarian reception system**, as well as on certain priority scales depending on whether they were families or persons with a special situation, which unfortunately are not public. Observation over the years leads one to suspect that even objective criteria are not being applied. But there were **quite a few other cases in which the stay in Melilla seemed to be prolonged *sine die***, even exceeding a year. As these are almost always applicants for protection with Moroccan or Algerian nationality, it was easy to infer a dissuasive intention that is probably politically motivated so as not to complicate relations with two neighbouring countries in which Spain has many economic interests.

The SJM, as CEAR had previously done in Ceuta, observed **that administrative action infringes the fundamental right to freedom of movement** within the national territory of foreign persons whose **documentation as applicants for international protection** implies a **transitional residence permit**, subject to a positive decision on the case by granting asylum, subsidiary

protection or an ordinary residence permit on humanitarian grounds. As this right is systematically and selectively ignored by the Administration, it was important that it be declared in court, ordering the Administration to stop preventing the journey to the mainland.

The 2018 report briefly presented the strategy followed to provoke an administrative act to be challenged before the contentious-administrative jurisdiction: the attempts (failed or successful) to obtain a resolution from the Commissioner General for Aliens and Borders to answer whether there was an inconvenience in undertaking the planned journey to a mainland port; the oral prohibition of embarkation of several applicants for international protection by the National Police officer who controlled the documentation of the passengers, together with a written communication of the inhibition of the Government Representative in Melilla to resolve the appeal lodged against the action of the National Police, indicating that the Commissioner General for Aliens and Borders is competent to authorise or deny the transfer to the mainland. On that basis, the SJM's legal team lodged an administrative appeal against the decision of the Commissioner General for Aliens and Borders, to be solved by the Director General of Police. And against the decision in appeal, a contentious administrative appeal. The procedural strategy has been changing. An appeal has been lodged against the *de facto* procedure of the police officer who prevented the boarding, which infringed the fundamental right to free movement on national territory of duly documented applicants for international protection. Other appeals have attacked the validity of the inscription "Valid only in Melilla" included in the *red card*. Sometimes the SJM has used the contentious-administrative appeal through the ordinary procedure and sometimes through the special procedure for the protection of fundamental rights.

At the time of that report, the SJM welcomed with pleasure the adoption of **positive precautionary measures** in one of the contentious-administrative appeals lodged with the Madrid High Court of Justice: the Court ordered the Commissioner-General for Aliens and Borders to cease preventing travel, indicating a date and destination for the transfer. The report therefore provided a summary of the arguments on which they were based: facts which could a priori be subsumed under a material act constituting a *de facto* procedure, in so far as the refusal to allow the appellants access to the ship of the company Transmediterránea was not supported by any duly reasoned administrative decision issued within the corresponding administrative procedure; material acts which caused serious harm to the persons on whose behalf the action was brought in so far as they infringed their right to freedom of movement within national territory; and the presence of *fumus boni iuris* in their favour, on the basis of Articles 10.2, 13.1 and 19 of the Spanish Constitution in relation to Article 5 of the Organic Law 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration, by virtue of which foreign nationals in a regular situation have the right to move freely within national territory and to choose their residence, this being the situation of those who have been admitted to the processing of their application for asylum, in accordance with the provisions of Article 13. 2 of the Royal Decree 203/1995, of 10 February, which approves the Regulations for the application of Law 5/1984, of 26 March, regulating the right to asylum and the condition of refugee and Articles 3, 4, 16, 17, 18, 19, and 36.1. h) of Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection; adding that the Final Act, section III of the agreement on the accession of the Kingdom of Spain to the Schengen Convention does not justify the refusal of access to the territory of the Iberian Mainland to the appellants and citing in support of its claim several judgments of this Chamber and of the Chamber for Contentious Administrative Proceedings of the High Court of Justice of Andalusia.

Indeed, the Court relied on the judgment it delivered on 26 January 2018 (P.O. 41/2017) in a similar case, the criteria for which were also upheld in its own judgments of 11 May 2015 (P.O. 1088/14), 28 May 2015 (P.O. 1089/14), 10 June 2015 (P.O. 1091/14), 29 September 2017 (P.O. 1470/16) and 26 January 2018 (P.O. 41/17). Thus, the report *Sacar del laberinto* (*Getting out of the Maze*) was able to succinctly set out the main arguments why the Commissioner General for Aliens and Borders cannot confuse transit between Ceuta or Melilla and other points in Spain with crossing an external border of Spain and the European Union, on the grounds that the Final Act, section III of the agreement on the accession of the Kingdom of Spain to the Schengen Convention provides for documentary checks to be carried out on access to maritime or air boarding between the autonomous cities and other points in Spain.

■ JUDGMENTS RULING ON APPEALS LODGED BY THE SJM

In recent years, the SJM has lodged ten contentious-administrative actions against police actions which prevented applicants for international protection from travelling to the Mainland, duly documented as such with a ticket and boarding card, on the grounds that their documentation is not sufficient in itself to authorise the crossing of borders. Four appeals have followed the procedure for the protection of fundamental rights (PPDDFF), while six others have followed the ordinary procedure (PO). Only one appeal (PDF) is pending.

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An Internal Order of the Commissioner General for Aliens and Borders of 12 February 2010, addressed to the Senior Chief of Police of Melilla, sets out a criterion which he has maintained in practice:

The documentation or certificate issued to applicants for international protection in the cities of Ceuta and Melilla does not entitle them, unless the conditions required by current regulations are met, to pass the controls on access to the rest of the national territory. Only for humanitarian reasons or due to the need to process an application for international protection may entry into Mainland Spain be permitted, with the prior authorisation of the competent body.

The First Section of the Contentious-Administrative Chamber of **the High Court of Justice of Madrid (herein, TSJM by its Spanish acronym) has denied that this criterion is in accordance with the law** in the judgments which resolve the procedures technically directed by the legal team of the SJM.

In all cases the TSJM had issued positive precautionary measures in favour of the people on behalf of whom the proceedings had been initiat-

ed. **All the judgments uphold the appeals lodged; they annul the contested administrative actions on the grounds that they violate the fundamental right of the appellants to move within the national territory and to freely choose their residence** as enshrined in Article 19 of the Spanish Constitution; declare that, in accordance with the situation of the appellants on the date on which the rejected application was made, there was no obstacle to their travel to Mainland Spain, recognising their right to move from the autonomous city of Melilla to any other city in the Spanish national territory; and order the claimed administration to pay the costs incurred in the proceedings.

CONTESTED ADMINISTRATIVE ACTS

Most of the contentious-administrative appeals, such as 564/2018, 861/2018 or 500/2019, contest the decision of the Commissioner General for Aliens and Borders denying access to the Mainland from Melilla to applicants for international protection who are provided with legal assistance by the SJM, or the decision of the Director General of the Police confirming the decision of the Commissioner General for Aliens and Borders in appeal.

QUALIFICATION OF THE POLICE ACTION PREVENTING EMBARKATION AS A *DE FACTO* **PROCEDURE**

It should be noted that procedures 1491/2017, 1063/2018 and 955/2019 reject the idea that the police action appealed against should be qualified as a *de facto* procedure, since it is carried out by agents of the National Police Force in the exercise of the functions legally entrusted to them in the control of the entry and exit of foreigners from the national territory and, in general, with respect to the police regime for foreigners, refuge and asylum and immigration. They add that this consideration does not in any way prevent the determination of whether the administrative action subject to the appeal has infringed the fundamental right whose protection is sought by the appellants in this special procedure, having regard to its purpose, which is none other than to determine whether the action appealed against, whatever its nature, is in breach of the legal order and, as a consequence, infringes a right of those entitled to protection, as provided for in Article 121.2 of the Law on Contentious Administrative Jurisdiction.

UNITY OF DOCTRINE ON FREE MOVEMENT AND IDENTITY AND DOCUMENTARY CHECKS

In all the judgments the TSJM maintains the same storyline followed in the growing collection of judgments handed down in similar cases. For reasons of unity of doctrine, and in order to preserve the principles of equality in the application of the law and legal certainty, they all reproduce the argument of the legal grounds set out in the ruling of 18 December 2017 (P.O. 1457/2016), whose doctrine was reiterated in the ruling of 26 January 2018 (PO 41/2017).

THE RIGHT TO FREE MOVEMENT OF APPLICANTS FOR INTERNATIONAL PROTECTION

The judgement taken as a reference in all the other ones recognizes the fundamental right to free movement throughout the national territory of the people documented as applicants for international protection documented as a quote in Article 13 of the Royal Decree 203/1995, of 10 February, which approves the Regulation of application of the Law 5/1984, of 26 March,

regulating the right to asylum and the condition of refugee, modified by the Law 9/1994, of 19 May.

> All the judgments deny the interpretation given by the Ministry of the Interior to the nature of the identity and documentation checks foreseen by paragraph III e) of the Final Act of the Agreement on the Accession of the Kingdom of Spain to the Schengen Convention.

These controls simply aim to verify that whoever entered Ceuta or Melilla legitimately has sufficient title to enter the rest of the territory, that is: because he is a visa holder, because he has a residence or study permit, because he is exempted from the visa (whatever the reason for the exemption), etc. It is true that these controls are valid to prevent other foreigners who have entered Ceuta and Melilla illegally from passing through. But this does not include those who have applied for international protection, whose application has been admitted and who have been duly documented. Such documentation implies the authorisation of temporary residence during the period in which their file is being processed.

> The establishment of identity and documentation controls between the North African autonomous cities and the rest of Spain, including the Schengen territory as a whole, does not imply that there is an external border there.

In this sense, it is illegitimate to prevent the boarding of an asylum seeker documented in Ceuta and Melilla on the grounds that his/her card adds the mention *this document is not valid for the crossing of borders*.

NON-CONFORMITY WITH THE LEGAL SYSTEM OF THE WORDING "VALID ONLY IN MELILLA"

In the 500/2019 proceedings, is sought a declaration that **the inclusion of the entry "valid only in Melilla" on the personal document proving the applicant's status as people seeking protection is null and void**. It also sought a declaration from the Court that **the applicant was not prevented from moving freely within the national territory without any limitation other than that provided for in the legal system**. In other words, the action attacks the link which may exist between the restriction of the validity of the document to a defined geographical area and the impediment to free movement beyond that area.

Judgment 26/2020, in ruling on the contentious-administrative appeal, echoes the judgment delivered by the same section of the Madrid High Court of Justice on 21 March 2019 in ruling on the special procedure for the protection of fundamental rights N.º 1063/2018, which recognises the fundamental right of the applicant to move freely within the national territory.

The Court, in order to resolve the request to declare the registration "Valid only in Melilla" null and void, as it does in judgments issued in similar cases (appeals 122/2019 and 120/2019), **analyses the Joint Instruction of the Secretariat of State for Security and the Undersecretary of the Ministry of the Interior on the information and documentation to be provided to applicants for international protection, dated 30 June 2010**. In its Annex III, when it indicates which mentions the document should include on its back cover, it adds the territorial validity scope in the cases of Ceuta and Melilla.

Relying on the doctrine laid down by the Constitutional Court in STC 26/1986, of 19 February, it recalls that **the Instruction is not a legal rule of a general nature, but an internal directive of the Administration**. **The Court is therefore not called upon to challenge it, even indirectly, when it examines the nullity or invalidity of the administrative act which restricts the applicant's freedom of movement**. The nullity or voidability of that act would be a sign of disagreement with the legal order of the guidelines given in the Instruction. However, following the doctrine set out in the above-mentioned judgments, it observes that:

> Limiting the validity of the document to a specific territory, as is the case in Ceuta or Melilla, does not in itself impose the need to restrict the right to free movement throughout the national territory.

The key rule for examining whether the aforementioned Instruction is in accordance with the law or not is Article 13 of Royal Decree 203/1995, of 10 February, which approves the Regulation of application of Law 5/1984, of 26 March, regulating the right to asylum and the condition of refugee, modified by Law 9/1994, of 19 May; since Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection, has not been developed as mandated by the regulations.

> According to Article 13, the asylum seeker's document entitles its holder to remain in Spanish territory during the processing of the international protection file, without geographical restrictions due to the place where the recognition of the right is requested. It only requires him to notify the Asylum and Refugee Office of any changes of address.

Consequently, the administration cannot restrict the right to remain temporarily in Spanish territory to the city of Melilla under any circumstances. In its ruling, the Court declares the appellant's right to have the administration remove the inscription "Valid only in Melilla" from the document identifying him as an applicant for international protection, and to move freely within national territory.

Since mid-2019, people whose application for protection has been accepted in Melilla no longer receive a red card with the words "Valid only in Melilla" on the back cover, but a paper document that does not contain any restrictive mention of validity for geographical reasons. It is important that this new practice be consolidated, but it is even more important that their free movement should not be impeded by the possibility of travelling to the Mainland subject to express authorisation by the Commissioner General for Aliens and Borders.

■ THE CASSATION APPEAL 1953/2019

On 29 July 2020, the Fifth Section of the Third Chamber of **the Supreme Court issued judgment** 1130/2020. This resolved the appeal in cassation 1953/2019. It ruled that **the cassation appeal** lodged by the State's Attorney against the judgment of 17 January 2019, delivered by the Administrative Chamber of the Madrid High Court of Justice, **was not admissible**. That was the judgment which upheld appeal N.º 564/2018 brought by the person to whom the SJM provided legal assistance against the decision of 05 February 2018, delivered by the Director General of the Police, confirming on appeal the decision of the Commissioner General for Aliens and Borders of 17 October 2017 refusing him access from Melilla to the city of Almería.

In this judgment, the Supreme Court answers **two questions of objective interest to set up case law**:

> The first question that arises concerns is the extent and limits of the fundamental right to free choice of residence and movement within the national territory of applicants for international protection in Spain.

> The second question focuses on the issue prior to the case of people who have requested international protection in the autonomous cities of Ceuta and Melilla and, in application of the Schengen Borders Code, have to pass police document controls before travelling to other parts of Spain or, even, the Schengen area.

THE RIGHT TO FREEDOM OF RESIDENCE FOR APPLICANTS FOR INTERNATIONAL PROTECTION

The Chamber examines the regulations governing asylum and international protection to determine whether they limit in any way the fundamental rights to the free choice of residence and movement of applicants for international protection, since, according to Article 13.1 of the Spanish Constitution, "foreigners shall enjoy in Spain the public freedoms guaranteed by this Title under the terms established by the treaties and the law", while Article 13.4 of the Spanish Constitution specifies that "the law shall establish the terms under which citizens of other countries and stateless people may enjoy the right to asylum in Spain."

When the Chamber examines Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection, it finds no provision that limits the fundamental rights to free choice of residence and movement within the national territory to applicants for international protection. When it examines the list of rights of applicants for international protection contained in Article 18.1, it observes that it is not exhaustive, but must be completed with the regulations on aliens contained in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, and in its implementing regulations, which Article 30 of Law 12/2009 recognises as applicable to applicants for international protection. Even more so:

> The Chamber recognises that when Article 18.2.d) of Law 12/2009 forces applicants for international protection to "inform about their domicile in Spain and any change in it", it presupposes that the applicant can choose domicile, and not necessarily in the city where he/she presented his/her application, because he/she enjoys the fundamental right to free movement in the national territory.

Only Article 22, in relation to Article 29 of Law 12/2009, establishes the possibility of confining the asylum seeker who requests a re-examination or lodges an appeal for reversal of the decision denying asylum.

Although the Chamber considers the previous argument to be sufficient, it adds a **consideration of the rights of the asylum seeker regulated in Law 12/2009 outside of its Article 18 which presupposes freedom of choice of residence and movement within the national territory**: as when Article 33.1.a) provides for the possibility that the administration reduces or withdraws some or all of the reception services to the applicant who leaves the assigned

place of residence without informing the competent authority or, if requested, without a permit. Similarly, it considers that when Articles 31 and 32 of the Law allow the asylum seeker to maintain the family unit or to work, it would not make sense to limit him/her to a certain city, which is what the administration intends with the interpretation that is supported in the cassation appeal.

Finally, relying on the judgment of the Constitutional Court (ECLI:ES:TC:2013:17) of 26 February, the Chamber considers that the State's Attorney has not invoked constitutionally relevant interests (which the SC itself considers non-existent) before which the fundamental right to freedom of residence and movement within the national territory must be surrendered by means of a curtailment which is necessary to achieve the legitimate aim pursued, proportionate to that aim and, in any event, respectful of the essential content of the restricted fundamental right.

> Consequently, it concludes that the applicant for asylum has the fundamental right to freedom of movement throughout the territory of the Spanish State and to be able to freely establish his/her residence throughout the national territory, although he/she is obliged to communicate this to the Administration.

THE RIGHT TO FREEDOM OF RESIDENCE OF APPLICANTS FOR INTERNATIONAL PROTECTION IN THE AUTONOMOUS CITIES REGARDING THE APPLICATION OF THE SCHENGEN BORDERS CODE

The Chamber examines the arguments of the State's Attorney, who claims that the administration may refuse all applicants for international protection the possibility of transferring their residence from the Autonomous Cities of Ceuta or Melilla to any other point in Spain in the course of the identity and documentation checks established pursuant to the referral made by Article 36 of Regulation (EC) N.º 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) to the Final Act of 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, of 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, to which the Italian Republic acceded by the Agreement signed at Paris on 27 November 1990, done on 25 June 1991.

First, the Chamber recalls that the Schengen Borders Code (2006) was replaced, and repealed, by the new Schengen Borders Regulation, adopted by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 establishing a Code on the rules governing the movement of persons across borders. It is another matter that Article 41 reproduces verbatim Article 36 of the 2006 Agreement.

Second, contrary to the argument of the State's Attorney, the Chamber finds that:

> The Schengen Borders Regulation is applicable in Spain for the Autonomous Cities, only in accordance with what was agreed in the aforementioned Accession Agreement. The identity and documentation checks established on sea and air connections from Ceuta and Melilla whose sole destination is another point in Spanish territory or another State party to the Convention do not mean the imposition of borders between the Autonomous Cities and the rest of Spanish territory or the Schengen area beyond Spain.

The Chamber notes that the State's Attorney, in his appeal proceedings, applies only to applicants for international protection an argument concerning special legislation which applies to all foreigners: he points out that there is no Community legislation or provision for any area which establishes a special regime for applicants for international protection whose case is still pending resolution.

The judgment reproduces in full point III of the Final Act closing the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement, and then sets out the correct interpretation of paragraph (e) of the section one, concerning identity and document checks, on the basis of which the State's Attorney's Office is required to interpret it in the present case and, as the Chamber insists, in the case of any change of residence of foreigners.

> III. The Contracting Parties take note of the following declarations by the Kingdom of Spain:
>
> 1. Declaration on the cities of Ceuta and Melilla
>
> (a) Spain will continue to apply the controls currently in place for goods and travellers coming from the cities of Ceuta and Melilla prior to their introduction into the customs territory of the European Economic Community, in accordance with the provisions of Protocol No 2 to the Act of Accession of Spain to the European Communities.
>
> (b) The specific visa exemption arrangements for small border traffic between Ceuta and Melilla and the Moroccan provinces of Tetouan and Nador will also continue to apply.
>
> (c) Moroccan nationals who are not resident in the provinces of Tetouan and Nador and who wish to enter only the towns of Ceuta and Melilla will continue to be subject to visa requirements. The validity of this visa will be limited to the two cities mentioned and will allow multiple entries and exits ("multiple limited visa"), in accordance with Articles 10(3) and 11(1)(a) of the 1990 Convention.
>
> (d) In applying these arrangements, the interests of the other Contracting Parties will be considered.
>
> (e) In application of its national legislation and in order to verify whether passengers continue to fulfil the conditions listed in Article 5 of the 1990 Convention whereby they were authorized to enter national territory at the time of passport control at the external frontier, Spain shall maintain controls (of identity and documents) on

> sea and air links from Ceuta and Melilla with their sole destination elsewhere in Spanish territory.
>
> To the same end, Spain will maintain controls on internal flights and on regular ferry connections from the cities of Ceuta and Melilla to another State party to the Convention.

The Chamber goes through paragraphs (a), (b), (c), (d) and (f). Their literal interpretation does not raise any question in the case. In commenting on paragraph (e), raised by the State's Attorney in his application, he points out that it governs, first, the situation created by Moroccan nationals resident in the provinces of Tetouan and Nador who may enter Ceuta and Melilla (respectively) without a visa, or by Moroccan nationals not resident in those provinces who may enter the autonomous cities with multiple limited visas. The aim is **to keep a regime of entry into the autonomous cities suitable for neighbourhood relations without lowering the requirements of border controls**. As the Chamber states: "The requirement makes sense only in relation to those specific foreign citizens who are exempt from the visa requirement because, dissociated from them, it cannot be understood that the borders of Ceuta and Melilla are not external borders of the Union, with that speciality of the Moroccans of the two provinces of the Kingdom of Morocco to which express reference is made."

The Chamber adds that Protocol 2 of the Act of Accession (BOE of 01 January 1986) to which the provision alludes to substantially refers to goods traffic, which has little impact on the transit of passengers and does not regulate the entry of applicants for international protection.

It interprets the reference in paragraph e) to **Article 5 of the Convention of 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities**, done at Dublin on 15 June 1990 and ratified by Spain on 27 March 1995 (BOE of 01 August 1997). This article restricts itself to regulating the rules for determining which Member State of the European Union is responsible for examining the application for international protection of citizens of third States who enter the Member State in question are holders of residence permits, valid visas or even transit visas issued by one or more EU Member States.

It insists that:

> This article neither limits nor empowers an unconditional power to demand, in any case, such controls to any foreigner who wishes to transfer his residence from the Autonomous Cities to any other point in the national territory, including those who are awaiting a decision on an asylum application.

The Chamber reiterates the sense of the provision: the advisability of balancing the documentary control requirements for the entry of Moroccan citizens into the Schengen territory with maintaining a laxer regime for their entry into Ceuta and Melilla.

Beyond what is expressly indicated by the Chamber in this judgment, the meaning of paragraph (e) can be interpreted more precisely. According to Article 5 of the Dublin Convention, a person who is **a national of a third country may have entered Ceuta or Melilla from Morocco as the holder of a residence permit or a visa in force** (including transit visa) in one or more EU

Member States; he may then have expressed his **intention to apply for international protection in Spain**, but **another EU Member State will be responsible for examining his application**; and the applicant **intends to continue his journey** to another part of Spain or the Schengen area. The documentary checks that Spain carries out before boarding must **verify that the documents which had allowed entry through the external border are still in force**.

In any event, the Chamber concludes that, in accordance with the legislation invoked and examined above, the criterion of the Trial Chamber must be upheld and it must be considered that any foreign citizen who has applied for international protection or asylum in the Autonomous Cities has the right to freedom of movement and to establish his residence in any other city in the national territory, without that right being limited by the administration due to his status as an applicant for international protection and always with the obligation of the applicant to communicate that change of address to the administration.

■ THE JUDGMENT OF THE SUPREME COURT IN CASSATION APPEAL 4893/2019

The Supreme Court's judgment follows in one day the judgment 1128/2020 of the fifth section of the Contentious Administrative Chamber of the Supreme Court, which resolves the cassation appeal 4893/2019, filed by the General State Administration against the judgment of 06 May 2019, issued by the Contentious Administrative Chamber of the High Court of Justice of Madrid in appeal 617/2018. It challenges the alleged dismissal of the appeal against the decision of the Ceuta Police Headquarters, as delegated by the Commissioner General for Aliens and Borders of the Ministry of the Interior. Resolution by which the inscription "valid only for Ceuta" is included in the documentation justifying the status of applicant for international protection. This is one of the cases promoted by CEAR from Ceuta.

The Supreme Court admits the appeal when it assessed objective interest to set up case-law, as it also recognised in its judgment 1130/2020. It concludes in the judgment that the applicant for asylum in the autonomous city of **Ceuta** (or in another case, **Melilla**), **admitted to process his/her application, has the right to free movement in Spain (with the obligation to communicate changes of address)** and, consequently, **the registration that limits the validity of the documentation** accrediting his/her condition as an applicant for international protection, to Ceuta (or in another case, Melilla), **is not in accordance with the law**.

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The case law established by this ruling undoubtedly determines the course of the appeal 4516/2019, lodged by the State Attorney's Office (representing the State Administration) against the ruling of 21 March 2019 by the First Chamber for Contentious Administrative Proceedings of the Supreme Court of Justice in the Special

Procedure for the Protection of Fundamental Rights n.º 1 1063/2018, promoted by the SJM. It does indeed respond to the request made by the Public Prosecutor on 16 April 2020 that the Court should dismiss the appeal in its judgment, setting out the case-law resulting from the terms of the document submitted and, in accordance with that doctrine, uphold the judgment in all its decisions except for the costs.

■ ADMINISTRATIVE PRACTICES CONTRARY TO THE CASE LAW OF THE SUPREME COURT

After the publication of the Supreme Court judgments, the police have continued to prevent documented applicants for international protection from boarding ships and aircraft bound for the Mainland. It has done so, as far as SJM is aware, from Melilla and from the Canary Islands. In Melilla it has prevented access to the ship. There, it has been recurrent to hear policemen claiming that they prevent boarding only to those who are not domiciled in the Mainland, but there are cases of people who have relatives, even naturalised Spanish citizens, who have not been able to travel despite indicating their address.

In **Ceuta**, the police provide protection seekers with an **application form for a change of address**, in which they enter their identity details and the person inviting them, the period for which they are invited, the nature of the address (main or second home, as well as the legal title proving the availability of the home to the person inviting), the link or relationship between them both, etc.

In the **Canary Islands**, **police officers patrolling ferries have ordered the disembarkation of passengers documented as applicants for international protection**. Also in the Canary Islands, too, on the 03 August, **the police issued instructions to transport companies not to accept the asylum seeker's card as a document suitable for checking the identity of passengers** who were about to embark. Despite instructions to the contrary, some applicants for international protection have gone unnoticed and managed to travel to the mainland.

This variety of responses cannot be explained by the confusion that arose immediately after the publication of the judgement. On 01 September, the minister María Jesús Montero, appearing after the Council of Ministers as government spokesperson, said that the ministries involved were analysing the ruling to study its implications and scope, not to study how to apply the doctrine established by case law.

On 25 September, the parties received official communication by means of a scanned image of the judgment on which the seal of the Registry of the Third Chamber-Section 5 of the Supreme Court was affixed in its role of judicial public witness: this was the official communication of a judgment already published on 30 July. On the same date, the parties received the measure of organisation issued by the lawyer of the Administration of Justice. In this document the TSJM acknowledges receipt of the Supreme Court's judgment, which states that there is no need to appeal the judgment issued by that court, which is being appealed against by the State's Attorney, leaving the purpose of this procedure "for the appropriate purposes", without being specified. In addition, **it requires the Directorate General of Police to take the judgment "to pure and due effect and to practice what is required to comply with the statements contained in the ruling. Having to, within TEN DAYS, acknowledge receipt and communicate the body responsible for compliance with the ruling of the Judgment"** (article 104.1 of Law 29/1998, of 13 July, regulating the Contentious-Administrative Jurisdiction).

It is worth asking what it means **to "take the judgment to its fullest effect" to a Supreme Court judgment in an appeal in cassation**. Such appeals do not seek to resolve a specific claim, but rather to refine the legal system by fixing the interpretation of the law, so that **the scope of the case law is general, going beyond the case**. In this sense, it is not a question of unblocking the journey to the Mainland of the person defended by the SJM. Among other considerations, because he had travelled some time back in compliance with a positive precautionary measure agreed by the TSJM months before the sentence was passed. The effect of taking this judgment, as well as the judgment on a case in Ceuta brought by CEAR, is more of **a series of actions**. As the SJM understands it, it implies that:

> The Ministry of the Interior must no longer restrict a geographical area in which the red card is valid ("Valid only in Ceuta - or Melilla").

> The Commissioner General for Aliens and Borders must not issue any decision which prevents, restricts, limits or obstructs (more verbs could be added to the list) the exercise of the fundamental rights to free choice of residence and free movement throughout the national territory of properly documented applicants for international protection.

> No police officer stationed at documentary checks prior to boarding between Ceuta or Melilla and other points in Spain or the Schengen area may prevent the applicant for protection from boarding if he/she has his/her card in force.

The government could not claim that it was informed of the judgement on 25 September and that the deadline for taking it into full effect could be extended to Tuesday 13 October (if the ten working day deadline is taken into account). Nor is it acceptable that the Ministry of the Interior responded on 09 October to the parliamentary question put on 02 September by Mr. Iñarritu on whether it already authorised the free movement of applicants for international protection who are in Ceuta or Melilla by arguing that *they have the same limitations as citizens in the Autonomous Cities of Ceuta or Melilla because of the COVID-19 pandemic*.

CEAR reported, in a press release[11], a memorandum from the Director General of the Police on 12 November, instructing the State's legal counsel to yield in all legal proceedings concerning the free movement of applicants for international protection. His arguments show that he fully understands the scope of the rights to freedom of residence and movement, which imply that the administration cannot restrict to applicants for international protection on account of their status as such. This step in the right direction must be followed by others so that the police stop preventing boarding.

11 Accessible online (2020-11-20) at:
https://www.cear.es/la-abogacia-del-estado-dejara-de-oponerse-a-las-peticiones-de-traslados-a-la-peninsula/

3.4 ■ TREATING POTENTIAL VICTIMS OF TRAFFICKING AS CRIMINALS

One of the problems identified by SJM since 2015 and again outlined in its 2017 report was the **poor detection and protection of people with special needs at the CETI, especially persons who may be trafficked**. The 2017 report referred to the different treatment of men and women arrived in the Chafarinas Islands or other islets under Spanish sovereignty: the prompt return of men under the 1992 bilateral readmission agreement, while women remained in the CETI and, in some cases, were transferred to a CIE. The direct contact of the SJM team with potential trafficked women was scarce: hardly any consultation on the implications of the decision to apply for international protection or on the date of transfer to the mainland.

Since the publication of the last report, SJM has continued to provide occasional advice to women with a profile of potential victims of trafficking. It highlights a case that illustrates the very serious consequences of not detecting the profile of a potential trafficked person early with the consequent lack of specific treatment.

This is a 23-year-old woman (hereafter identified as EG) from a West African country who disembarked in the Chafarinas Islands at the end of 2018. She entered the CETI. According to her testimony, a Sub-Saharan man she met in Nador called her once she arrived in Spain, notifying her that another person would be travelling to Melilla from the Mainland to accompany her on the journey. This second contact called her initially from France and then from Melilla to meet him outside the CETI, from where he drove her to the port in a taxi and gave her identity documents. They were detained at the police control of the port when the policeman detected signs of manipulation of the documents. She remained in the dungeon for 72 hours while her statement was taken. In her declaration, she added that she had not paid the people who had contacted her to take her to the Mainland, but that she knew that the benefits of her future work as a cleaner would be for them.

Despite evidence of trafficking, which the police exposed to the media when reporting the case, **criminal proceedings were instituted against her**. And she was **convicted as a criminal responsible for a crime of false documentation** of article 400 bis of the Criminal Code (in relation to articles 392.2. and 390.1. 1), to the deprivation of the right to vote during the period of the sentence and to a fine of 4 months (at 6.00 euro/day).

It is striking that the judgement has been issued with the agreement of the accused, her defence counsel and the prosecution to the qualification established by the Public Prosecutor's Office. In her testimony to the SJM, EG is surprised that **the public appointed lawyer played a passive role in the police proceedings during her arrest**, that she had not asked her to tell her story, that she had simultaneously assisted her companion as a lawyer, who was later convicted of a crime of which she was a victim. EG points out that in the port she did not feel like master of herself: it was as if her companion had drugged her. She also points out that when her companion presented her as his wife, she denied it, thus arousing the suspicion of the police officer in charge of the documentary control.

It is surprising that the conviction of the man who provided the documentation as the author of an offence against the rights of foreign citizens under article 318 bis.1 of the Criminal Code did not warrant consideration of the extent to which EG could be held responsible for the of-

fence of false documentation. He was the subject of a European search and arrest warrant, having been previously convicted of membership of a criminal trafficking organisation.

The judge, the public prosecutor and the public appointed lawyer had access to the police report containing the statement of EG and her companion, in which she denies being his wife, and states she intended to work in Spain as a cleaning worker. If they did not have access at it, they should have requested it, especially as EG had been arrested and brought from the dungeon, where it was obvious that the police had proceeded to take note of her statement. **The legal operators mentioned could have applied the excuse of acquittal of Article 177.11 of the Criminal Code** for the victim of the crime of trafficking in human beings for the criminal offences committed in the situation of exploitation suffered.

The above-mentioned facts highlight a problem observed in other cases later dealt with by the SJM: lawyers who are entrusted with the legal public defence and who do not take into account the complexity of the case, and are satisfied with a narrative of the facts that lack relevant elements for its classification.

> Specialised training in trafficking for lawyers in the Immigration and International Protection Unit would be highly desirable; as well as extensive training for all actors involved in the process: police, prosecutors, judges. In short, it is a matter of pursuing the crime more effectively, better protecting the victims.

EG was not protected but convicted as the author of a crime. In March 2019, the police initiated a return procedure despite the fact that the 90-day reflection period that had been granted to her at the beginning of January of the same year was still in force, with the aim of letting her decide whether to cooperate in the prosecution of the crime against the rights of foreigners of which she had been the victim, and for which the man who had taken her to the port had been convicted. The decision by which the Government Representative granted her this reflection period implied that no sanctioning procedures was to be initiated against her and that she was authorised to stay temporarily in Melilla.

As a victim of a crime, she is stigmatized by what is connoted as trafficking. This affects the victim's identification, makes their protection conditional on collaboration with police investigations, and increases their **vulnerability**, which is useful for trafficking networks.

> By using a human rights and gender-based approach, as well as focusing primarily on the protection of victims, international standards and the Ombudsman's recommendations would be respected, and offenders would be more effectively prosecuted.

3.5 ■ FROM THE PROTECTION CENTRE TO THE STREET

> The report *Sacar del laberinto* (*Getting out of the maze*) reflects the problems suffered by foreign minors under the administrative care of the Autonomous City of Melilla and by young people formerly under guardianship. Among these problems it is worth mentioning their exit from the centre without being granted a residence permit in accordance with article 196 of Royal Decree 557/2011 or without being given the Foreigners' Identity Card (TIE, by its Spanish acronym) which documents the duly processed residence permit.

Many of the minors who came to the SJM office are Moroccan nationals: more unusual situations were the Syrian minors travelling alone or in the company of adult relatives with a *kafala* (guardianship) document not recognised by Spain. Less often, minors with Malian, Guinean or other Sub-Saharan African nationality were under administrative guardianship: they usually declared themselves to be of legal age. However:

> The case of three young Malians who approached to the SJM office in October 2019 put the spotlight on a growing problem: that of young ex-Sub-Saharans under guardianship whose lack of a TIE condemned them to homelessness as they could neither travel to the Mainland nor be admitted to the CETI.

They were two young Malians from the Kayes region (which is outside the UNHCR's list of regions of non-return) and a third Senegalese who had identified himself as Malian. The first two entered Melilla after their boat was rescued, the third having jumped over the fences. The three, who claimed to be underaged, were tested by the standard official procedure and the Public Prosecutor's Office determined that they were 17 years old and would turn 18 on 05 November 2019. They went to the SJM office at the end of October 2019, in anticipation of their imminent discharge from the *Fuerte de la Purísima* youth protection centre. **Despite having been under the guardianship of the Administration for a year, none of the three had the Residence Card they were entitled to**. Two of them had a Temporary Registration Card as their sole identity document and had the proof of having their fingerprint taken fort the TIE a few days before coming to the SJM office. The third person had only begun the process of obtaining a TIE and had not been his fingerprint taken because he did not have a temporary registration card: he was completely undocumented. **Their legal guardian had committed an irregularity by exceeding the maximum legal deadline for requestion the residence permit in representation of the minors**.

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They returned to the office on 05 November, when they were **discharged from *La Purisima* without being able to board a ship to the Mainland due to the lack of TIE or to be admitted to CETI as holders of a residence permit**. They were in the same situation as many young Mo-

roccans when they left the centre for the protection of minors: in a regular situation in Spain, but without the proper documentation to be able to travel to the Mainland.

The SJM team tried to extend the time spent in the protection centre until an alternative solution was found. It relied on the Geum Dodou association to prepare alternative emergency and accompaniment resources. It accompanied them to the police station, where UDEYE staff confirmed that they were not entitled to access the CETI on the instructions of the new head of the Brigade of Alien Affairs, to have a residence permit granted, when the CETI is identified a as a centre for the documentation of migrants still in an irregular situation blocked their access. After being accompanied to the CETI to insist on their admission, and having their documentation checked by security officials, UDEYE police personnel let them enter the premises, admitting them as provisional residents while they completed their TIE procedures. But the police warned them that they would not be transferred to a centre in the humanitarian reception network, as they considered that they were free to travel on their own, being in a fully regular situation and having a TIE as a sufficient identity document to embark on.

The case of these three young people drew attention to a problem that would affect another twenty young Malians and Guineans who were in the *Fuerte de la Purísima* child protection centre at the end of 2019.

On the one hand, previous problems persist, as the **lack of diligence when processing the residence permit and the TIE of minors under the guardianship of the Autonomous City, the continuous obstacles without legal basis that the Foreigners Office puts up**, not to mention the relinquishment of functions of the Public Prosecutor's Office for Minors when it comes to supervising the work of the public guardianship entity.

On the other hand, **the Administration still does not publish clear criteria on the requirements for admission to the CETI**, which allows an **excessive margin of discretion** on the part of CETI and UDEYE staff, to the point of identifying **arbitrary actions**. Until the beginning of 2020, the CETI was the only residential resource for migrants in the city (even for those whose profile advises against it) because the Autonomous City did not offer alternatives (the problems of the provisional facilities set up during the state of alarm and later in 2020 will have to be addressed).

And **there is no legal certainty in the police control of identity and documentation prior to the boarding of migrants to the Mainland**. Although the police officers attached to the UDEYE claimed that the young people assisted were free to embark with their TIE, in practice the police prevent the embarkation of the young people formerly under guardianship, the majority of whom are Moroccans.

3.6 ■ FAMILY LIVES BROKEN DUE TO DISPROPORTIONATE ZEAL

Since 2015, trough the report *No protection at the border*, SJM has expressed its concern for the **families** who, once all their members are in Melilla, **suffer the separation between those who reside in the CETI and some who remain under the guardianship of the autonomous city** in one of the centres for the protection of minors **until they receive the results of the DNA tests that determine the kinship**.

Over the years, the most frequent cause of this issue was the difficulty experienced by Syrian, Palestinian and other Arab families in crossing the Moroccan documentary checkpoint at Beni Enzar. The smugglers they use advise parents and children to cross at different times, the minors normally being accompanied by Moroccan adults. They arrange the day and time of the crossing so that parents, relatives, or other trusted adults wait for the children in the vicinity of the border post. When the operation is not been properly coordinated, the children have been left alone on the Spanish side of the border and have started to cry, normally they are picked up by the police and made available to the minors' services. If the parents go to the police or to the Department in charge of Family Affairs of the local council before the declaration of abandonment and the assumption of guardianship by the autonomous city has been processed, they have managed to take their children on presentation of their passport. Once administrative guardianship has been assumed, for legal certainty, the Autonomous City verifies the family link by performing the DNA test.

The protocol followed is, by itself, a good practice to prevent cases of trafficking. It is just that, as indicated in the report *Sacar del laberinto* (*Getting out of the Maze*), unlike the many cases of Sub-Saharan women who had crossed the border in previous years with minors who were not their biological children, the link had always been confirmed in the exodus of Syrian refugee families. The **problem** with the DNA test requested by the Department on charge of Family Affairs is **the time it takes for the results to arrive**.

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Given the damage caused by the delay in obtaining the results of the DNA test and the systematic confirmation of the family relationship, the SJM sought **a procedure to alleviate the suffering of the families without reducing legal certainty**: it sought to

have the Public Prosecutor's Office urge the local Department of Social Welfare **to facilitate the provisional delegation of custody** of the minors under its care to the parents, **taking into account the evidence of the family relationship**. The results were meagre and continue to be so.

It is interesting to compare the administrative response in Melilla with that in the Canary Islands. There are more cases of couples or women travelling with babies or infants, declaring themselves to be their parents or close collateral relatives, without documentation to prove the link. The administrative response has been constant in performing DNA testing to verify the link. Given the delay in obtaining results, aggravated during the pandemic, which coincides with a very significant increase in irregular arrivals by sea, administrations have changed their way of proceeding. There was a time when they tried to keep adults and children together. However, as some disappeared before the results of the DNA test were received and there was a reasonable suspicion that the children were being trafficked, the Directorate General for Child and Family Protection took automatic custody of the children until the results were verified, separating them from the adults. This way of proceeding has also meant the separation of persons who did have the paternal affiliation or collateral kinship. To avoid trauma, **the Regional Administration of the Canary Islands has created residential places in which groups travelling together can be kept together under the proper surveillance** so that they do not disappear before the results of the DNA tests are verified. In his Internal Order n.º 1/2020, the Canary Islands Regional Public Prosecutor indicates that this is the preferred solution, even offering a catalogue of criteria so that prosecutors can evaluate each case according to the documentation provided, whether there is breastfeeding, whether the infants can communicate any clues about the relationship and other indications.

It is worth mentioning some demonstrative cases of families who have suffered the separation of one of the children, as well as siblings who migrate together without the parents, one of whom is an adult and the other a minor.

■ FAMILIES SUFFERING FROM THE SEPARATION OF A CHILD AND A SIBLING

"M" AND HIS THREE TEENAGE CHILDREN

A Palestinian family, consisting of a father ("M") and his three underaged children who were listed in the original passport with which he was travelling, tried to enter Spain via the Beni Enzar border post, but were prevented from doing so by the Moroccan police. The family had to change their strategy, staggering the entries. The first to succeed were the children (on 19 December, 24 December 2018 and 05 January 2019): they were all declared to be in

destitution, placed under the guardianship of the autonomous city and taken to the *Fuerte la Purísima* child protection centre. M was able to enter Melilla on 19 January and express his willingness to apply for international protection. He went to the Directorate General for Minors on 21 January to claim the reintegration of his children. **Despite showing his passport, he was told that DNA tests were to be carried out to determine the family link**. In the meantime, he could see his children in the street outside the closing hours of the centres: one of his children had to spend a night by the door of CETI because he was prevented from entering the children's centre after the closing hour. The child suffered an anxiety attack. On 28 January, DNA samples were taken from the siblings. On 05 February, "M" and his three children told the juvenile prosecutor's office about their paternal-filial relationship, providing his original passport as evidence, and asking for the children to be heard on their desire to be reunited with their father, which they ultimately did. On 12 March, the three children were documented as applicants for international protection. The Directorate General for Children granted the delegation of custody on 26 April, provisionally reintegrating the children with their father. The positive result of the DNA tests came on 03 June, on which date the autonomous city ceased to exercise guardianship over the children. On 10 June they were transferred to the Mainland. They had been separated for four months, and their stay in Melilla was unusually extended to six months.

"A", "Z" AND THEIR FOUR CHILDREN

A Syrian family consisting of "A" and "Z", the spouses, and their four children aged 10, 7, 3 and 3 (twins). They tried to cross the border from Beni Enzar together but were prevented by the Moroccan police. So, "Z" entered alone on 14 January, and on 17 and 21 January helped her young children to cross, and she picked them up near the border post. The same happened to the eldest one on 24 January. "A" tried to enter with his 7-year-old daughter on 28 February: he was prevented from doing so by the Moroccan police, while the girl managed to cross the border in a hurry. As she was expected to pass with her father, "Z" was not waiting for her near the border. As the police detected that she was alone, they placed her at the disposal of the Directorate General for Minors, which declared her to be in destitution, took her under guardianship and took her to the La *Gota de leche* child protection centre. "A" managed to enter Spain on 05 February. "Z", who had applied for international protection as soon as she arrived, gradually extended the application to her children as they entered. "A" also did so since his arrival on 05 February.

"A" and "Z" made several requests for the Directorate General for Minors to provisionally delegate the custody of their daughter until the results of the DNA tests arrived, reuniting her with her biological family. For this purpose, they also approached the Public Prosecutor's Office for Minors. One of the additional problems of the case is that **they were not allowed to take their daughter out of the centre, even to walk with her for a few hours**. In addition, **the father was prevented from visiting his daughter at the centre, which the mother could do**. On 03 April, the parental bond with the mother was established, so the girl was reintegrated with her mother.

A FAMILY SEPARATED DURING CONFINEMENT

Again, a Syrian family consisting of a married couple, a son and a daughter who could not enter Spain together through the border post of Beni Enzar. They had to pay smugglers to accompany the children after the parents had entered separately (in January 2020). They

thought that both children would enter through the same border post, but this was not the case: one entered through Farhana and the other through Beni Enzar. When they did not arrive in time to Beni Enzar, their son was picked up by the police and taken to the Directorate General for Minors, which declared him to be in destitution and took custody of him, sending him to the *La Gota de Leche* minors' centre. Again, this is **a case of protection applicants who are unable to reintegrate their child into his biological family despite showing documentation**, having to wait a long time for the results of the DNA test. This family has the additional suffering of the events taking place after the declaration of the state of emergency, which prevents them from visiting the child in the children's centre and interrupts the administrative deadlines. At the moment this report is being drafted, they are still waiting for the Directorate General for Minors to decide whether to provisionally delegate custody to them.

■ TWO BROTHERS, ONE OVER AGE AND THE OTHER UNDERAGE, WHO MIGRATE TOGETHER

Three similar cases can be presented, each with its own accent, according to the documentation they show, and the value given to them by the Spanish authorities:

"N" AND "I"

The most prominent case would be that of two brothers we identify with their name's initials "N" and "I", members of a Palestinian family from a refugee camp in Syria consisting of the parents and 14 children. "N" is the eldest, is married and has a daughter. "I" is 13 years old. The family sought refuge in southern Lebanon, under the control of the Shiite party Hezbollah and its militias. Difference in religion -the Palestinian family is Sunni- was one of the reasons for the intense harassment of the family. In the new dispersion in search of a refuge denied in the Arab countries, "N" and "I" followed the North African route to Nador.

After five months of trying to cross to Melilla through Beni Enzar, sometimes together and sometimes separately, "I" succeeded in June 2018 by sliding between cars during the month of Ramadan. When he arrived at the Spanish checkpoint, he displayed his passport shouting "asylum!" and was taken directly to the *Fuerte de la Purísima* child protection centre, where there were two other boys from the Middle East. He told the educators that his older brother, "N", was waiting in Nador for the moment when he could arrive to Spain. A few days later he was summoned to the OAR in Beni Enzar to undergo an asylum interview. As often happens, he was alone with the policeman who was taking his statement and the person who was providing the interpretation: his lawyer only appeared at the end to sign the document containing the interview.

"N" continued his attempts to enter Melilla until mid-July. Exhausted and stressed, he fainted at the Spanish documentary checkpoint in Beni Enzar. It had been 14 months since he had been separated from his family. He was admitted to CETI and applied for international protection.

Both brothers requested to live together in the CETI: **"I" was suffering due to the living conditions in the *Fuerte de la Purisima* and was outraged for not being able to be with his brother**, unlike so many families he saw together in CETI. Both were documented, and had Syrian documentation concerning the family. They provided **a document in which the father authorised both children to travel together but had not entrusted him with the guardianship through *kafala***. As required, the Directorate General for Minors requested DNA testing to determine

their kinship. But it could not be performed until September 2019, after the summer holidays. The results did not arrive until February 2020. Then the Directorate General for Minors agreed to provisionally delegate the guardianship of "I" in favour of "N" so that they could reside together in CETI, but did not transfer the guardianship or authorise "I" to be transferred to the Mainland with his brother until they were recognised as refugees and assigned a place to receive refugees in the mainland. They travelled on 21 October 2020 together with two other brothers who were in the same situation and a Moroccan girl.

> The departure of "I" from the *Fuerte de la Purísima* meant a small improvement in his living conditions. In fact, he had spent most of his days with his brother in the surroundings of CETI. But the prolonged stay of both brothers in Melilla, and the prospect of having to stay on for years, has had very negative effects on their morale. The transfer to the Mainland two years after arriving to Melilla opens up new perspectives for them, as well as confronting them with new challenges.

"T" AND "S"

Two Palestinian brothers travelling together: the older one provided with a notarised document in which the parents entrust him with *kafala* or guardianship over the minor until he comes of age. After a long journey, they tried to enter Melilla together, but the Moroccan police held the older one while the younger one was able to run across the border. The older one was initially calm, thinking they would meet the following day, but it took him 20 days to complete the crossing at the border post.

The younger brother presented his own passport when he entered, but the police considered it false, so they performed an age determination test on him, establishing that he was seven years old. The Directorate General for Minors declared him in destitution and the autonomous city assumed his guardianship, sending him to the *Fuerte la Purísima* child protection centre, where he suffered very difficult living conditions. When the eldest entered, he requested international protection and tried to have his younger brother reintegrated, but was unable to show the original *kafala* certificate, which he had lost during the migration journey. A refugee relative in Europe assisted in the case by providing the birth certificate of the youngest child, a photo of the whole family and a document issued by UNRWA showing the composition of the family unit. He was also able to send a copy of the notarized *kafala* document. They were subjected to DNA testing to determine kinship.

Six months after their respective entries, "T" got the provisional delegation of the guard and the reintegration of his brother "S". A year after entering Melilla they were transferred to the Mainland.

"M" AND "O"

Two Guinean brothers who were orphaned by their father and had an uncle in France, whom they had as a reference in their migration project. "M", the eldest, entered Melilla when he was about twenty years old, while the youngest, "O", was about 17, although he had never bothered to find out his actual date of birth. As he did not have a passport or other documents showing his date of birth, the police carried out an age determination test on him and gave him 15 years of age, so he was taken to the *Fuerte la Purísima* child protection centre. They did not apply for international protection, as they considered they had no reason to do so.

These brothers suffered from the separation between them, as well as the terrible conditions "O" endured at *Fuerte La Purísima*. As in other cases, they were subjected to DNA testing to determine kinship. As the results were not available for a long time, he asked to be delegated the custody of the child, which he obtained in April 2019. During this time **"M" declined several possibilities of being transferred to the Mainland so as not to leave his brother alone. Ten months after the test was carried out, they were notified that it had to be repeated. This provoked a crisis in "M", who saw how he remained blocked in Melilla without being able to join his extended family in France and look for a job**. His younger brother and other colleagues encouraged him to continue his journey, refusing even to have another DNA test so as not to be blocked. In the end, "M" travelled, leaving his brother in Melilla.

3.7 ■ MANAGEMENT THAT EXACERBATES THE IMPACT OF THE PANDEMIC

Morocco closed its borders with Spain on the night of 13-14 March 2020. Indeed, it closed the border crossings with Melilla and Ceuta. Over time it only allowed a few humanitarian flights for the repatriation of Spanish people who were surprised by their confinement in Morocco, and later some flights by Royal Air Maroc and Arabiya airlines for travel of nationals and residents. It always kept the maritime border between Tangiers and Algeciras open for the transit of goods. This simplified outline shows that the main access route for North African and Arab migrants to Melilla has been closed. According to the figures published by the Ministry of the Interior in its biweekly reports on irregular migration[12], 978 people entered Melilla illegally between 01 January and 15 March 2020, a figure that rose to 1,276 on 30 September and 1,285 on 15 October. That is, 307 people entered illegally between 16 March and 15 October. It is easy to conclude that the rate of irregular entry of migrants, including those preparing to apply for international protection, does not pose a major challenge to migration management.

> The closure of the border between Morocco and Spain in Melilla raised a major challenge in terms of providing shelter to the Moroccan people who were in the autonomous city without a home of their own or relatives willing to accommodate them.

The autonomous municipal administration first set up the *Lázaro Fernández* sports centre and then the facilities of the Bullring to prevent them from being on the streets when the entire population had been confined. The same occurred to the population that was already on the streets before the state of alarm was declared.

> It soon became clear that there was a need to expand the supply of temporary accommodation for young migrants who were leaving child protection centres once they had come of age.

The Department in charge of Minors and Family only rarely complied with the recommendations of the Secretary of State for Social Rights to prolong the stay in the centres for the

12 Accessible online (2020-09-09) on the Ministry of the Interior's Website: http://www.interior.gob.es/es/prensa/balances-e-informes/2020

protection of minors to those who turned 18 during the State of Alarm. They did not have their own domicile, so they approached the CETI requesting their admission unsuccessfully.

> At least since the declaration of the state of alert, the CETI direction refuses to admit more people since it has more than doubled its official reception capacity (almost tripled it), and given the firm policy of the Ministry of the Interior to restrict transfers to the Mainland as much as possible.

The number of people from Syria, Yemen, Palestine, Iraq and other countries are small. The number of people from North Africa (Morocco, Algeria, Tunisia and Egypt) and Bangladesh is around 1,000. As noted above, just as in January the Ministry of the Interior succeeded in deporting some of the CETI's residents to Algeria, it has not succeeded in getting the vast majority readmitted by the Algerian government. These are **people whose migratory destinations are mainly France or other EU member States**. Hence, it presupposes that their transfer to the Mainland, to humanitarian reception centres, will enable them to continue their migration projects, causing diplomatic incidents, mainly with France. It is necessary to **reflect on the legal, social and psychological implications of restricting the freedom of movement** of this population, which is prevented from leaving Melilla, **forcing them to live in facilities designed for temporary stay**. At the same time, there is a need to **reflect on the legal, social and psychological implications of not admitting nor documenting in the CETI** those foreigners who have entered Melilla illegally after 14 March 2020, regardless if they are documented as applicants for international protection or irregular migrants. It is also essential to reflect on the management of their reception in temporary facilities in conditions that do not reach minimum standards of dignity. Finally, it is important to consider the health implications of these policy options and of the management of temporary reception in the CETI and in the temporary facilities.

■ RESTRICTIONS ON FREEDOM OF MOVEMENT LACKING A SUFFICIENT REGULATORY BASIS

The declaration of the state of alert implied the limitation of freedom of movement for the entire population, regulated in Article 7 of Royal Decree 463/2020 of 14 March, which declared the state of alert for the management of the health crisis situation caused by COVID-19. This falls under the provisions of article 11 of Organic Law 4/1981, of 1 June, on states of alarm, exception, and siege. Terms such as "confinement" and "quarantine" have become common. Attention was paid to the conditions for transit between territories or on the streets in a given territory, to the days when movement had to be especially restricted for health reasons. After the state of alert ended on 21 June 2020, the legal basis for imposing restrictions on movement between territories or for going out on the public highway from one's own home disappeared.

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This obliges us to **consider on what legal ground the quarantine is imposed** on the newly arrived migrant population in Melilla that involve **locking them up for two weeks** in provisional reception facilities such as the Bullring:

During the period of strictest confinement, they were not allowed to leave the premises even for activities such as shopping in supermarkets or pharmacies, banking, etc. During the periods when confinement was eased by allowing people to go outside during age-specific time slots, they were not allowed to leave the CETI or the temporary facilities under any circumstances, not even to supplement the traditionally meagre diet with food purchased for themselves or their families.

> It is not a police detention for 72 hours or a precautionary detention measure authorised by the judicial authority in a return or expulsion procedure. Quarantine in terms such as previously described would be an illegal form of deprivation of liberty. The same applies to restrictions on the mobility of persons housed in the CETI and in the temporary facilities that go beyond what is prescribed for the population as a whole.

Furthermore, **the implications of holding foreigners in transit in Melilla beyond the reasonable time limit for assigning them a place to receive refugees or humanitarian aid on the Mainland must also be considered**.

The main reason for keeping them in Melilla, either housed in the CETI or other accommodation provided by themselves, is to facilitate the enforcement of their return when the authorities of the country of origin are willing to readmit them to their territory.

> The stay in Melilla cannot simply be equated to a form of detention as a deprivation of liberty: but it constitutes a restriction of freedom of movement lacking a legal basis.

The Ministry of the Interior will easily reply that foreigners who are in an irregular situation in Spain do not have the fundamental right to free movement throughout the national territory recognised, and that the documentation controls established between Melilla (or Ceuta) and other points in the national territory or in the Schengen area as a whole make it possible to prevent the crossing of those who do not have authorisation to stay in Spain: which is true. But the indefinite extension of their stay in Melilla places them in a situation analogous to detention which cannot be simply justified.

Beyond the legal issues outlined above, **indefinitely prolonging one's stay in the CETI or other temporary facilities impacts on physical and mental health**, increases levels of anxiety and aggression, and decreases the ability to take charge of one's life and dependants.

■ CONSEQUENCES OF NOT HAVING A CETI CARD

When the CETI reached its saturation level and the direction found that the Ministry of the Interior was not willing to transfer the North African and Bangladeshi population to the Mainland, it decided not to admit any more foreigners who requested their reception: neither the

few who have entered Melilla irregularly since 14 March 2020 nor those who left the child protection centres when they came of age.

> The reasons for not admitting anyone else to the CETI are perfectly understandable, since it would only aggravate the poor living conditions of the residents, increasing the epidemiological risk.

But **this rejection has other consequences**. For example, **there is no interpretation services, no psychologist, no social workers… in the provisional facilities**. They have **not** been provided for a long time with the **Welcome Kit** with clothes, blankets and some hygienic products. **They do not know which Administration is responsible**, as they only have direct contact with the staff of Eulen (a private, multiservice company). Until October, they have not been provided with a card (similar to the CETI's) with an **identification number** and photo card **to compensate for the lack of NIE** for those who have not been documented as applicants for international protection. Civil servants have been observed refusing to carry out administrative procedures when the person does not have an identification number, even when these procedures are mandatory: such as the periodic appearance in court of persons convicted of minor offences committed when entering Spanish territory (for example, for forms of resistance to detention later qualified as an attack on authority or for damage to privately owned vehicles).

It is striking that this lack of protection is taking place when only two fence jumps with media coverage in all of Spain have taken place: on 06 April and 20 August, when 55 and 13 people respectively entered and stayed in Melilla. Some other entries have found a slight echo in the local media. Other entries have gone completely unnoticed even by the police, who in mid-June had to count the people staying in the Bullring in order to count and identify them.

■ LIVING CONDITIONS THAT VIOLATE HUMAN DIGNITY

The Autonomous City tried to respond to the need for accommodation and food for the Moroccan population that had been confined to Melilla, as well as for young people who had left the child protection centres. It prepared the premises of the **Bullring**, the private area for celebrations called ***El V Pino*** and the **premises attached to the *Rostrogordo* Fort**. The 55 migrants who successfully jumped over the fences on 06 April without being pushed-back to Morocco were housed in one of the three tents set up at *El V Pino*. The same happened to the foreigners who entered irregularly from that date on. Once the tents of *El V Pino* were dismantled, they were moved to the upper corridor of the Bullring. In both cases, **they have suffered unworthy living conditions**. The premises of the Hotel Nacional were also made available for applicants for international protection in situations of greater vulnerability.

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In terms of material reception conditions, they have suffered from overcrowding, exposure to the elements at *El V Pino* and the heat of the summer at the Bullring, saturation and breakdowns in the showers, toilets and washrooms: black water running on the floor, unbearable stench, the need to move to other areas of the facilities to take a shower, etc.

It should be noted that **no administration has taken charge of these people properly**. They should be provided with accommodation, food and clothing by the Ministry of Inclusion, Social Security and Migration, to which CETI reports. However, the CETI does not take charge of them since they have not been registered for the first time as residents in the CETI with the corresponding identification number. They are located in facilities managed by the Autonomous City, which has no direct jurisdiction over the immigrant population and adult applicants for international protection in transit through Melilla. In practice, it is the staff of the company *Eulen* who have contact with migrants in transit, and who simultaneously carry out surveillance, security maintenance and management tasks. At most, they have come to collect some food prepared in CETI's kitchens to feed these people staying first in *El V Pino* and then in the Bullring. Civil society initiative has provided clothing, footwear and cleaning and hygiene products when they were not provided by the government. Unlike Moroccans who are housed in other facilities in the Bullring (as they were before *El V Pino*), they do not have the professional services of a cleaning company, but the migrants have to clean the facilities themselves using precarious means.

The situation of all the people housed in the provisional facilities (both Moroccans confined to Melilla, young people who were formerly under guardianship and migrants who entered after the border was closed) has been so bad that **a group of social organisations** has submitted **complaints to the Ombudsman, the Ministries of the Interior and Inclusion, Social Security and Migration, as well as to the Autonomous City. The response of the administrations has been insufficient**, mainly because the Ministry of the Interior persists in its policy of minimising transfers to the Mainland.

SANITARY IMPLICATIONS

The overcrowding and poor hygienic conditions of facilities such as *El V Pino* and the Bullring give rise to fears for public health in general and for the extension of COVID-19 in particular: it is very difficult to maintain social distance and a substantial degree of personal hygiene and disinfection of surfaces and utensils. Just as Melilla maintained a low number of infections during the first wave of the pandemic, none declared in the CETI or in the provisional facilities, there have been infections among residents and CETI staff during the second wave. Moreover, some of the CETI residents who were placed under arrest for their actions during the protests on Thursday 27 August have been infected and have spread COVID-19 in the prison.

There is no lack of reference documents for drawing up prevention protocols, as does happen in the migrants Detention Centres after their reopening at the end of September 2020. Supervisory judges and directors rely on the Recommendations for prisons in relation to the COVID-19 (version of 27 March 2020), issued by the General Secretariat of Prisons and the Ministry of Health of the Government of Spain, as well as on the Guide to Good Practice in Workplaces in relation to the COVID-19 issued by the Government of Spain on 11 April 2020. These are protocols that limit the occupation of bedrooms, common rooms, and other spaces, according to the surface area they have. And which then insist on the availability of hydroal-

coholic gel and soap for personal use, products and equipment for the disinfection of objects and surfaces, masks and screens or other obstacles so that the Flügge drops can reach other people in the vicinity. It contrasts with the fact that the Commissioner General for Aliens and Borders takes care of this issue in one facility while preventing others, however dependent on another ministry, from doing likewise.

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TO CONCLUDE

> The determination with which the Ministry of the Interior maintains its policy of minimising the transfer of migrants and applicants for international protection from Melilla to the Mainland is striking, despite its consequences for the public health of the entire population, from a manifestly growing tension that has even degenerated into violent protest, of the unworthy living conditions to which the migrant population housed in provisional facilities is subjected, of the legal limbo in which they remain for lack of an identification number giving them practical access to administrative procedures, of forms of restriction of freedom and of deprivation of liberty lacking a legal basis.

It is not only about COVID-19 contagion, which by itself would have to determine policies to prevent the spread of the pandemic, but much more. **As always, the rule of law suffers the consequences**.

4

PROPOSALS

The SJM points out some proposals for normative and policy production based on its work of legal guidance, legal aid, human rights monitoring and legal reflection:

It is urgent to publish **a regulation that develops Law 12/2009**, of 30 October, regulating the right to asylum and subsidiary protection, especially with regard to the procedure for applying for international protection in Spanish embassies and consulates, and even though the jurisprudence of the Supreme Court has confirmed the application of the procedure provided for in Article 16 of Royal Decree 203/1995, of 10 February, which approves the regulation of application of Law 5/1984, regulating the right to asylum and refugee status, modified by Law 9/1994, of 19 March.

The need for the regulation exists even in the event that the government adopts a new bill regulating the right to asylum and subsidiary protection, as suggested in the government coalition's programme. **A future law** should regulate the creation of **humanitarian corridors on Moroccan territory** to channel safe access of applicants for international protection to the asylum and refugee offices at the border posts of Ceuta and Melilla.

The **future law** should maintain unrestricted **recognition of the fundamental rights to free choice of residence and free movement throughout the national territory** of persons seeking protection who are duly documented, while maintaining the legal obligation to notify changes of address.

If the tenth additional provision of Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration is not repealed, the first paragraph, which considers that people "rejected at the border" have not yet crossed it, must be amended. In any case, **the way in which the Spanish Civil Guard proceeds must be regulated in detail so that the "rejection at the border" meets the criteria established by the Constitutional Court**.

Access to **the various forms of protection must be facilitated instead of impeded**: international, subsidiary, humanitarian... certainly, but also the specific protection required by minors or victims of human trafficking.

In pursuing trafficking and smuggling networks, law enforcement should **not criminalise** people who have had to resort to smugglers or who are **victims of trafficking**.

The **protection of the life and physical integrity** of people crossing the border in search of protection or whatever the circumstances that have forced their migration requires the **operational availability of the Sea Search and Rescue Service** in all border territories, the **elimination of the razor-lame wires and other harmful obstacles** in all land border complexes (including those on Moroccan territory), **a protocol for the care of shipwreck victims** that preserves their dignity, **a protocol for the search for missing people** that includes the treatment of families, and **a revised protocol for the identification and treatment of corpses** that also includes the treatment of families.

Members of a family should not be separated or should otherwise be reunited without further delay when the family relationship is proven by reliable documentation, such as a passport, unless there are indications of tampering or falsification. This must be the case regardless of whether destitution has been decreed and the Autonomous City has assumed

guardianship. Alternatively, **the practice of kinship testing using DNA should be speeded up** so that the separation between members of the same family, some of whom have been placed under the administrative guardianship of the Autonomous City, is not prolonged. At the very least, provisional custody should be facilitated in any case where there are indications that an emotional link exists.

The legal deadlines for documentation of minors who are under the administrative guardianship of the Autonomous City must be met, as well as registering them and providing them with the Foreigners' Identity Card once they come of age, so that they can live normally as residents in Spain.

In the management of the COVID-19 pandemic, it is necessary **to abstain from any form of deprivation of liberty that lacks legal support and judicial control**: especially lockdown in the custody of employees of private security companies.

The European and Spanish policy of withholding migrants and applicants for international protection in Melilla to prevent them from transiting through the Mainland to other EU Member States must end. In any case, **transferring applicants for international protection to the Mainland who are accepted into refugee reception programmes must be accelerated**, **respecting the freedom of movement** of those who decide not to wait in Melilla for a place in the Mainland. Furthermore, **people in particularly vulnerable situations must be transferred quickly**. In no case should the CETI's reception capacity be allowed to be saturated, nor should the alternative be to create provisional facilities in which it is not possible to maintain minimally dignified living conditions.


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