

Questionnaire of the Special Rapporteur on the human rights of migrants: pushback practices and their impact on the human rights of migrants

Submission by Save the Children on the EU external borders pushbacks

Save the Children is hereby submitting input regarding the situation of children at the EU borders in Spain. The submission is not intended to be exhaustive.

I. Please provide information on any relevant legislation or policy in relation to the right to asylum to seek and enjoy in your country, which guarantees that migrants including asylum seekers' protection needs are examined individually, and they are not pushed back at the international border without access to this assessment and other relevant procedures.

Under Spanish Foreigners law¹, there is only reference made to specific circumstances which should exempt the visa requirement to enter Spanish territory are set under article 25. On requirement to Access to Spanish territory. Foreigners Law states that foreigner citizens need to comply with visa requirements except in the cases mentioned in the table below.

Artículo 25. Requisitos para la entrada en territorio español

3. Lo dispuesto en los párrafos anteriores no será de aplicación a los extranjeros que soliciten acogerse al derecho de asilo en el momento de su entrada en España, cuya concesión se regirá por lo dispuesto en su normativa específica.

4. Se podrá autorizar la entrada en España de los extranjeros que no reúnan los requisitos establecidos en los párrafos anteriores cuando existan razones excepcionales de índole humanitaria, interés público o cumplimiento de compromisos adquiridos por España. En estos casos, se procederá a hacer entrega al extranjero de la documentación que se establezca reglamentariamente.

Article 25. Requirements for entry into Spanish territory

3. The provisions of the preceding paragraphs shall not apply to foreigners who request to avail themselves of the right of asylum at the time of their entry into Spain, the granting of which shall be governed by the provisions of its specific regulations.

4. The entry into Spain of foreigners who do not meet the requirements established in the preceding paragraphs may be authorized when there are exceptional reasons of a humanitarian nature, public interest or compliance with commitments acquired by Spain. In these cases, the documentation established by regulation will be delivered to the foreigner.

Moreover, Spanish Foreigners Law also includes a reference to the possibility to “reject” at the Ceuta and Melilla land borders, which was introduced by the Law on Citizens Security² in 2015. The provision was very much criticized by civil society and human rights defenders as introduced the possibility to pushbacks in the law. Nonetheless, it does make reference to international law on human rights and international protection as limitation to the procedure.

Disposición final primera. Régimen especial de Ceuta y Melilla.

1. Se adiciona una disposición adicional décima a la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, con la siguiente redacción: «Disposición adicional décima. Régimen especial de Ceuta y Melilla.

1. Los extranjeros que sean detectados en la línea fronteriza de la demarcación territorial de Ceuta o Melilla mientras intentan superar los elementos de contención fronterizos para cruzar irregularmente la frontera podrán ser rechazados a fin de impedir su entrada ilegal en España.

¹ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.

2. En todo caso, el rechazo se realizará respetando la normativa internacional de derechos humanos y de protección internacional de la que España es parte.

3. Las solicitudes de protección internacional se formalizarán en los lugares habilitados al efecto en los pasos fronterizos y se tramitarán conforme a lo establecido en la normativa en materia de protección internacional.»

First final provision. Ceuta and Melilla special regime.

1. A tenth additional provision is added to Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration, with the following wording: «Tenth additional provision. Ceuta and Melilla special regime.

1. Foreigners who are detected on the border line of the territorial demarcation of Ceuta or Melilla while trying to overcome the border containment elements to cross the border irregularly may be rejected in order to prevent their illegal entry into Spain.

2. In any case, the rejection will be made in compliance with international human rights and international protection regulations to which Spain is a party. 3. Applications for international protection shall be formalized in the places authorized for this purpose at border crossings and shall be processed in accordance with the provisions of international protection regulations. "

In 2020, the norm was subjected of a judgement on its constitutionality by the Spanish Constitutional Court. Question n.2 of the present questionnaire details the Court ruling.

For this reason, in Foreigners Law, under the First Final Provision, the following interpretation of the norm was introduced regarding the procedural guarantees the procedure should apply to be Constitutional:

Téngase en cuenta que se declara que la disposición adicional décima de la Ley Orgánica 4/2000, de 11 de enero, es conforme a la Constitución, siempre que se interprete tal y como se ha indicado en el FJ 8 C), de la Sentencia del TC 172/2020, de 19 de noviembre. Ref. BOEA-2020-16819, concretado en los siguientes puntos: a) Aplicación a las entradas individualizadas. b) Pleno control judicial. c) Cumplimiento de las obligaciones internacionales.

Note that it is declared that the tenth additional provision of Organic Law 4/2000, of January 11, is in accordance with the Constitution, provided that it is interpreted as indicated in FJ 8 C), of the Sentence of TC 172/2020, of November 19. Ref. BOEA-2020-16819, specified in the following points: a) Application to individualized entries. b) Full judicial control. c) Compliance with international obligations.

2. Please provide information on any existing good practices or measures taken (such as screening and referral mechanisms at borders) in your country to ensure that persons crossing international borders in mixed movements are protected according to international human rights law.

In November 2020, a ruling³ by the Spanish Constitutional Court, following the ECHR ruling on the ND and NT case (reference in question n. 4 of present questionnaire) decided on the constitutionality of pushbacks who try to enter Spanish territory by crossing the border fence in Spain's North African exclave cities, Ceuta and Melilla. The ruling decided that the Law is not contrary to the Spanish Constitution, due to the fact that it contains reference to international obligations. In this sense, in accordance with the Spanish Constitution, the court ruled that pushbacks can be realized only if: a) applied to individual entries b) with full judicial control c) under compliance with international obligations. The Court made clear that provisions adopted must be carried out with the guarantees recognized for foreign persons by the international norms, agreements and treaties signed by Spain and comply in a real and effective way with international human rights standards that have to ensure full respect for the guarantees derived from the dignity of the person. Moreover, security forces must pay special attention to particularly vulnerable categories of people.

³ Available at : <https://www.boe.es/buscar/doc.php?id=BOE-A-2020-16819>



3. Please provide information on existing restrictions or limitations in law and in practice in relation to the right to claim and seek asylum at international borders in your country (e.g., border controls, restricted access to territory) and elaborate the impact of these restrictions on the protection of the rights of migrants crossing international borders.

Restricted access to territory is the main existing limitation to seeking international protection in Spain and is due to the visa requirements needed to reach Spain legally and to the border controls existing in Morocco to leave the North African country and reach the border checks of Spanish Ceuta and Melilla. The first limitation is exemplified by the fact that since the introduction of the transit visa requirements for Palestinian or Yemeni's nationals, asylum applications from both nationalities have dramatically dropped.

Regarding the second limitation, proof is that since the opening of asylum office in Ceuta and Melilla, the two cities have seen completely different circumstance. The Beni Enzar at Melilla's borders rapidly became one of the main points in the territory with higher asylum claims, while Ceuta hasn't received any. Also, difficulties to enter Spanish territory by land also affects Melilla but mainly impacts on the nationalities that can access the Spanish border rather than on the number of asylum claims overall. In fact, most of people on the Moroccan side are stopped following racial profiling. Sub-Saharan nationals are victims of the discriminatory checks that take place at the Moroccan border to leave the territory, and are never allowed to exit the country and reach the Spanish side. Between 1 January 2015 and 31 May 2017, only 2 out of 8,972 persons seeking asylum in Ceuta and Melilla were of Sub-Saharan origin.

4. Please provide information on any concrete instances of pushbacks, including an analysis on the circumstances of the event.

Three episodes of pushbacks have been object to judicial appeal in recent years:

1. One case before the European Court of Human Rights (ECtHR) concerned two Sub-Saharan men – from Mali and the Ivory Coast respectively – who alleged having been summarily and collectively expelled from Spanish territory on 13 August 2014 as part of a group of over 75 individuals.
2. A recent decision adopted by the United Nations (UN) Committee on the Rights of the Child regarding the case D.D. vs Spain of 12 February 2019 concerned pushback of a minor. The case concerned an unaccompanied minor originating from Mali who had been pushed back from Melilla to Morocco in December 2014, without being provided information on his rights and without being assisted by a lawyer or an interpreter. The Committee's decision thus clearly reaffirmed the rights of unaccompanied minors at Europe's borders and further condemned Spain for creating zones of exception at the border where basic rights are suspended.
3. The "El Tarajal" case is another example, concerning 15 migrants who drowned in February 2014 after attempting to reach the Spanish enclave of Ceuta by sea and were repelled with rubber bullets and smoke grenades by officers from the Guardia Civil.

Most recent reported situations: at the beginning of January 2020, the Guardia Civil has pushed-back 42 persons (including 26 women and 2 children) to Morocco after arriving to the Spanish Chafarinas islands. So far, almost 400 human rights NGOs signed a statement denouncing the illegal pushbacks. On 19 January 2020, the NGO ELIN reported the summary expulsion by Spanish authorities of two people who managed to cross the border between the Spanish enclave Ceuta and Morocco.

During 2020, many news and testimonies concerning pushback during sea rescue operations were denounced by actors of the civil society and newspapers. An enhanced cooperation with maritime patrols in Moroccan, Senegal and Mauritanian seas have raised concerns on the legality of joint operations when intercepted boats were brought back to the coasts of harbour of departure in third countries.

5. Please indicate any specific challenges that your Government has encountered, in the context of the COVID-19 pandemic, on ensuring the human rights of migrants crossing international borders, either by land or by sea.

The State of Emergency meant the closure of all external borders, causing a de facto suspension of the possibility to apply for asylum in Spain for migrant and refugee population seeking international protection. Freedom of movement along the Spanish territory was suspended, and so were all deadlines applicable to all administrative procedures, including residence permits and identification documents expiration dates, return decisions or asylum claims. Although asylum registrations and applications have been suspended during the state of emergency, access to asylum reception was not suspended even when applicants had not been able to register their claim. In addition, counting time in reception for asylum seekers who were already hosted was interrupted, in order not to expel those who would have reached the maximum period of reception, which is 6 or 9 months depending on the level of vulnerability. On June 1st, the Asylum and Refugee Office OAR re-activated the asylum procedures, but only those which had already been filed. Spain still has a backlog of 54 300 asylum claims.

In Melilla, new resources were improvised in order to give reception to the 300 migrants and asylum seekers who jumped the border fence and made it in the city from Morocco, to a group of 20 unaccompanied minors who were expelled from the protection center because they aged out during the state of emergency, and to all other people who live in the streets in Melilla or who found themselves stuck there because of the forces closure of the border, most of them Moroccan nationals. The new reception spaces did not provide adequate reception to such vulnerable population, and have been repeatedly denounced by civil society because of the lack of appropriate infrastructure, alimentation, sanitary resources, health service nor rights recognized to asylum seekers and unaccompanied minors. Freedom of movement was restricted even when to the rest of the city was permitted to move.

6. Please indicate any challenges and/or obstacles faced by Governmental institutions or civil society organizations and individuals in protecting the human rights of migrants at international borders, including those in distress at sea and in situations where pushbacks or pullbacks are likely to take place.

Main obstacles regard lack of accountability, lack of clarity on the actor responsible and competent in that particular area of action (EX international waters, land between Spanish and Moroccan borders etc.), lack of testimonies during pushbacks, difficulties to track people when they are pushed back in transit or origin countries).

