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FROM MELILLA TO STRASBOURG: UNPACKING THE SPANISH INSPIRATION IN THE ECTHR'S *VOLTE-FACE* ON ARTICLE 4 OF PROTOCOL NO. 4 ECHR AT THE MOROCCAN-SPANISH BORDER

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ABSTRACT: Few jurisprudential U-turns in the history of the ECtHR have attracted as much criticism as the one in the case of *N.D. and N.T. v. Spain*. Indeed, not only did the Grand Chamber severely curtail migrants' rights at land borders, but also did it with a largely unconvincing reasoning. In fact, the ECtHR had to come up with some legal novelties and resort to rather confusing arguments in order to force a non-violation verdict that could not have otherwise been reached. For this reason, the ECtHR has often been accused of 'inventing' new limitations to Article 4 of Protocol No. 4 ECHR (A4-P4). This paper purports to demonstrate, however, that the ECtHR did not really 'invent' anything. Rather, the change would have actually originated in Spain, and the ECtHR would have

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only taken inspiration therefrom to make the jurisprudential change happen. This would suggest an atypical 'bottom-up' influence or inspiration from the State level to the ECtHR which would raise, in turn, a series of methodological issues and have a 'top-down' impact back on the State level. This is an avenue worth exploring, as it may cast a new light, not only on the Grand Chamber judgment of *N.D. and N.T.*, but also on the restrictive approach towards A4-P4 over the last years, both at the ECtHR and within the Spanish framework.

KEYWORDS: Ceuta, Melilla, prohibition on the collective expulsion of aliens, Article 4 of Protocol No. 4 ECHR, 'hot returns', 'bottom-up' influence

DE MELILLA A ESTRASBURGO: UN ANÁLISIS DE LA INSPIRACIÓN ESPAÑOLA EN EL GIRO DEL TEDH CON RESPECTO AL ARTÍCULO 4 DEL PROTOCOLO N.º 4 CEDH EN LA FRONTERA HISPANO-MARROQUÍ

RESUMEN: Pocos giros jurisprudenciales en la historia del TEDH han suscitado tantas críticas como el del caso de *N.D. y N.T. c. España*. En efecto, la Gran Sala no solo recortó gravemente los derechos de los migrantes en las fronteras terrestres, sino que además lo hizo a través de un razonamiento poco convincente. De hecho, el TEDH tuvo que recurrir a varias novedades jurídicas y a argumentos un tanto confusos para forzar un fallo absolutorio que no podría haber alcanzado de otra forma. Por esta razón, el TEDH ha sido a menudo acusado de haber «inventado» nuevas limitaciones al Artículo 4 del Protocolo n.º 4 CEDH (A4-P4). Este artículo pretende demostrar, sin embargo, que el TEDH no «inventó» realmente nada. Más bien, el cambio habría ocurrido en España y el TEDH simplemente se habría inspirado en él para llevar a cabo su giro jurisprudencial. Esto indicaría la existencia de una atípica influencia o inspiración «de abajo arriba» que generaría, a su vez, una serie de problemas metodológicos y tendría un impacto «de arriba abajo» de vuelta en el nivel nacional. Esta es una vía que vale la pena explorar, ya que podría arrojar una nueva luz, no solo sobre la sentencia de la Gran Sala en *N.D. y N.T.*, sino también sobre el enfoque restrictivo de los últimos años con respecto al A4-P4 tanto en el TEDH como en el marco español.

PALABRAS CLAVE: Ceuta, Melilla, prohibición de expulsiones colectivas de extranjeros, Artículo 4 del Protocolo N.º 4 CEDH, devoluciones en caliente, influencia «de abajo arriba»

DE MELILLA A STRASBOURG : UNE ANALYSE DE L'INSPIRATION ESPAGNOLE DANS LE REVIREMENT DE LA CEDH VIS-A-VIS DE L'ARTICLE 4 DU PROTOCOLE NO. 4 CEDH A LA FRONTIERE HISPANO-MAROCAINE

RÉSUMÉ : Peu de revirements jurisprudentiels dans l'histoire de la Cour Européenne des Droits de l'Homme (CEDH) ont attiré autant de critiques que celui de l'affaire *N.D. et N.T. c. Espagne*. En effet, la Grande Chambre a non seulement réduit les droits des migrants aux frontières terrestres, mais elle l'a fait à travers un raisonnement peu convaincant. Dans les faits, la Cour a dû avoir recours à des nouveautés juridiques et des arguments assez confus afin de forcer un verdict de non-violation qui n'aurait pas pu être trouvé autrement. Pour cette raison, la Cour a souvent été accusée d'« inventer » de nouvelles limitations à l'Article 4 du Protocole nº 4 CEDH (A4-P4). Cet article démontre cependant que la Cour n'aurait rien « inventé ». En réalité, le changement se serait d'abord produit au niveau domestique espagnol, et la Cour s'en serait simplement inspirée pour rendre possible le revirement jurisprudentiel. Ceci montrerait une influence ou inspiration « de bas en haut » assez atypique qui entraînerait, à son tour, plusieurs problèmes méthodologiques et aurait un impact « de haut en bas » au niveau de l'État. C'est une voie qui mérite d'être explorée car elle peut porter un éclairage nouveau sur la décision de la Grande Chambre dans l'affaire *N.D. et N.T. c. Espagne*, mais aussi sur l'approche restrictive vis-à-vis l'A4-P4 au fil des dernières années, aussi bien au niveau de la Cour que dans le cadre espagnol.

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MOTS CLES: Ceuta, Melilla, interdiction des expulsions collectives d'étrangers, Article 4 du Protocole nº 4, « retours à chaud », influence « de bas en haut ».

I. INTRODUCTION

Few jurisprudential U-turns in the history of the European Court of Human Rights ('ECtHR' or 'Court') have attracted as much criticism as the one in the case of *N.D. and N.T. v. Spain*.[2] This case, which shall be explored in depth in due course, was the fourth in which the ECtHR was required to pronounce itself on the compatibility between the prohibition on collective expulsion of aliens under Article 4 of Protocol No. 4 ECHR ('A4-P4') and the so-called 'pushbacks' (i.e., 'measures taken by States […] which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea […] from where they attempted to cross or crossed an international border').[3]

The three 'pushback' cases that had previously come before the ECtHR had either concerned removals from the high seas[4] or from national territory following an arrival by sea.[5] In the first two, the Court was unanimous in finding a violation of A4-P4.[6] In the third case, the judges appeared to be more divided on the issue. While the Chamber initially found a violation of A4-P4 by five votes to two,[7] the Grand Chamber reversed this outcome by sixteen votes to one.[8] With the wisdom of hindsight, it seems now safe to argue that this reversal was the beginning of a changing trend at the ECtHR.[9]

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[2] *ND and NT v Spain [GC]* No. 8675/15 and 8697/15 (ECtHR 13 February 2020).

[3] González Morales, F., 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea (Human Rights Council)' (12 May 2021) p. 4.

[4] *Hirsi Jamaa and Others v Italy [GC]* No. 27765/09 (ECtHR 23 February 2012).

[5] *Sharifi et Autres c Italie et Grèce* No. 16643/09 (ECtHR 21 October 2014); *Khlaifia and Others v Italy [GC]* No. 16483/12 (ECtHR 15 December 2016).

[6] *Hirsi Jamaa and Others v Italy [GC]* (n 4); *Sharifi et Autres c Italie et Grèce* (n 5).

[7] *Khlaifia and Others v Italy* No. 16483/12 (ECtHR 1 September 2015).

[8] *Khlaifia and Others v Italy [GC]* (n 5).

[9] See, however, discussion in Spijkerboer, T., 'Coloniality and Recent European Migration Case Law' in Stoyanova,V., and Smet, S., (eds), *Migrants' Rights, Populism and Legal Resilience at the European Level*, Cambridge University Press, 2022, p. 117.

However, at that time, it was perhaps too early to jump into such a conclusion, and the opposite outcomes at the Chamber and Grand Chamber could have simply been attributed to a divergent factual assessment.[10] For this reason, when the case of *N.D. and N.T.* was first heard by the ECtHR, the Chamber's unanimous finding of a violation of A4-P4 did not come as a surprise.[11] After all, the facts of *N.D. and N.T.* only differed from those of the three previous cases in that they had taken place at a land border, as opposed to at sea or following an arrival by sea (something which did not seem, in itself, capable of justifying a different interpretation of A4-P4).[12] However, only a couple of years later, the Grand Chamber overthrew the Chamber judgment, reaching the conclusion (strikingly, also by unanimity) that Spain had not violated A4-P4.

This jurisprudential U-turn came as a 'shock' for two main reasons.[13] First, it significantly curtailed the rights of migrants attempting to enter into the territory of a Contracting State, amongst whom there could be refugees or other individuals with protection needs. It did so by creating a protection gap into A4-P4 which could, in turn, seriously compromise other rights, such as the prohibition of *non-refoulement* under Article 3 ECHR. Second, and most importantly for the purposes of this analysis, this U-turn was impossible to predict based on the ECtHR's jurisprudence thus far, as none of the criteria that led to it existed previously as such therein. Indeed, in order to reach its outcome, the Grand Chamber had to do what Di Filippo has rightly described as 'acrobatics'.[14] This included, in the view of several commentators, 'inventing'

[10] For an academic who correctly assessed the magnitude of the change at that time, see Günther, J., 'Collective Expulsion and the Khlaifia Case: Two Steps Forward, One Step Back' (*Verfassungsblog*, 16 December 2016), available at https://verfassungsblog.de/collective-expulsion-and-the-khlaifia-case-two-steps-forward-one-step-back/.

[11] See, e.g., Pijnenburg, A., 'Is N.D. and N.T. v. Spain the New Hirsi?' (*EJIL: Talk!*, 17 October 2017), available at https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/.

[12] Sánchez Legido, A., 'Las Devoluciones En Caliente Españolas Ante El Tribunal de Estrasburgo', *Revista Española de Derecho Internacional*, nº 72(2), 2020, pp. 235, 257.

[13] Pichl, M., and Schmalz, D., '"Unlawful" May Not Mean Rightless' (*Verfassungsblog*, 14 February 2020), https://verfassungsblog.de/unlawful-may-not-mean-rightless/.

[14] Di Filippo, M., 'Walking the (Barbed) Wire of the Prohibition of Collective Expulsion: An Assessment of the Strasbourg Case Law', *Diritti umani e diritto internazionale,* 2020, p. 14.

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new limitations to A4-P4.[15] However, in this paper I shall argue that the latter conclusion is not accurate. As will be seen, the Court would not have 'invented' anything. Rather, the change would have actually originated in Spain, and the ECtHR would have only taken inspiration therefrom.

This difference has significant implications. Indeed, it would suggest an atypical 'bottom-up' influence from the State level to the ECtHR which would raise, in turn, a series of methodological issues, and have an important 'top-down' impact back on the State level. As such, it is an avenue worth exploring because it may cast a new light on the judgment of *N.D. and N.T.* This may help fully grasp, not only the real extent of the Grand Chamber's U-turn in this case, but also the ECtHR's restrictive approach towards A4-P4 in the last few years, both at the ECtHR and within the Spanish framework. Indeed, it would provide concrete evidence of the actual contribution of States to the backsliding on the interpretation of the prohibition of collective expulsion of aliens, which has generally been linked to political influence, or pressure from States.[16]

This paper analyses the Grand Chamber judgment in the case of *N.D. and N.T.* from this perspective. Indeed, it examines the 'bottom-up' influence of Spain on this decision, as well as its 'top-down' impact back on the Spanish level. Following this introduction (Part I), it is structured in three main parts. Part II outlines the relevant Spanish framework in terms of history, law and practice in order to set the background for later discussion. Part III pursues

[15] Bast, J., and others, *Human Rights Challenges to European Migration Policy: The REMAP Study*, Nomos/HART, 2022, p. 269; Hakiki, H., 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (*Verfassungsblog*, 29 November 2021), https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot/; Pichl and Schmalz, *loc. cit.*; Schmalz D., 'Enlarging the Hole in the Fence of Migrants' Rights' (*Verfassungsblog*, 6 April 2022), https://verfassungsblog.de/enlarging-the-hole-in-the-fence-of-migrants-rights/; 'Poll: Best and Worst ECtHR Judgment of 2020' (*Strasbourg Observers*, 29 January 2021), https://strasbourgobservers.com/2021/01/29/poll-best-and-worst-ecthr-judgment-of-2020/.

[16] See, e.g., Rodrik, D., and Hakiki, H., 'Accessing Borders, Accessing Justice?' (2023) 1 Asyl 3, 4; Riemer, L., *'The Prohibition of Collective Expulsion in International Law'* (PhD Dissertation), Freie Universität Berlin, 2020, pp. 219-220; Markard, N., 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (*EU Immigration and Asylum Law and Policy*, 1 April 2020), https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/; Schmalz, *loc. cit.*; Carrera, S., *'The Strasbourg Court Judgement N.D. and N.T. v Spain. A Carte Blanche to Push Backs at EU External Borders?'*, European University Institute, 2020, p. 9.

a triple goal: (1) critically analyse the Grand Chamber judgment in *N.D. and N.T.*, (2) demonstrate the bottom-up influence of the Spanish framework on the latter, and (3) discuss the methodological issues arising thereunder. Part IV addresses the controversial reception of the *N.D. and N.T.* judgment back on the Spanish system. The paper concludes with some final reflections on the rather atypical evolution of the interpretation of A4-P4 under this new light, and on its broader consequences for the protection the rights of migrants attempting to enter European territory irregularly by crossing land borders. In the light of the structure, research questions and objectives of this paper, I considered that a doctrinal approach would be the most suitable. Indeed, this research has been conducted based on (a) a doctrinal examination of primary sources (law and jurisprudence, both at the level of the ECHR as well as of Spain), (b) an extensive literature review primarily in English and Spanish, and (c) an analysis of the developments around A4-P4 in their wider historical and political context.

II. SPANISH FRAMEWORK

1. Background

It is obvious that the geographical situation of Spain has largely contributed to it becoming a main recipient of irregular immigration from the African continent. Its proximity to Morocco, from which it is only separated by 14.4km of sea in the narrowest point of the Strait of Gibraltar, makes it quite attractive for migrants seeking to reach Europe from Africa. However, what makes Spain truly unique amongst its European neighbours is that, furthermore, it possesses certain territories *on* African soil. The most important ones, both in terms of size and population, are the exclaves of Ceuta and Melilla, situated in the north of Morocco, with which they share some 20km of land border in total. These are the only ones with civilian population (around 83,000 inhabitants each), while the remaining territories are tiny uninhabited rocky islets, mostly used for military purposes, located right off the northern Moroccan coastline. In fact, some of them are so close to Morocco that they are practically at a swimming distance from it (such as Isla de Tierra and the Perejil islet, which are respectively located only 100m and 250m offshore), or can be even reached by foot (such as the rock of Vélez de la Gomera, which

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is actually attached to Morocco through an isthmus and, hence, technically shares a land border with it, although at only 85m, it is the smallest border in the world). Most of these territories became Spanish between the 15th and the 17th centuries,[17] as the Spanish rulers of that time sought to secure strategic bulwarks on the northern African coastline.[18] However, the aim in this case, unlike in other latitudes, was not so much to expand the territories of the Spanish Crown, but to control the Mediterranean, which was then besieged by pirates, and to frustrate potential attacks on the Iberian Peninsula.[19]

2. Spain, a country of emigrants

Setting aside the tiny border that separates the rock of Vélez de la Gomera from Morocco, the only land borders of the entire European Union (and, by extension, of the Council of Europe) with Africa are those of Ceuta and Melilla. As seen above, these land borders are in no way new, even though their actual demarcation did not take place until the 19th century.[20] However, they were for a very long time totally permeable to transit[21]—and, strikingly, that was not an issue, since migration flows from Morocco to Spain were practically non-existent.[22] In fact, as Reques and de Cos have put it, Spain had always been a 'country of emigrants'.[23] It suffices to look back to the most part of the twentieth century to realise that the preoccupations of the Spanish legislator actually revolved around emigration, as opposed to immigration.

[17] Except for the Chafarinas, which were occupied in 1848.

[18] Bravo Nieto, A., *'La Ocupación de Melilla En 1497 y Las Relaciones Entre Los Reyes Católicos y El Duque de Medina Sidonia'*, Aldaba, Melilla (Spain), 1990, pp. 15, 23.

[19] *Ibidem.*

[20] For a thorough discussion on the issue, see Del Valle Gálvez, A., and Acosta Sánchez, M.A., 'Delimitación y demarcación de las fronteras y vallas de Ceuta y Melilla: ¿Cesión territorial a Marruecos?' in *La Unión Europea y los muros materiales e inmateriales: Desafíos para la seguridad, la sostenibilidad y el estado de derecho*, Tirant lo Blanch, 2021.

[21] Sánchez Tomás, J. M.,'Las «devoluciones en caliente» en el Tribunal Europeo de Derechos Humanos (STEDH, AS. N.D. y N.T. vs España, de 03.10.2017)*), *Revista Española de Derecho Europeo*, nº 65, 2018, pp. 1, 21, fn 4.

[22] INSTITUTO GEOGRÁFICO Y ESTADÍSTICO (Spain), *Estadística de La Emigración é Inmigración de España En Los Años de 1882 á 1890* (Dirección General del Instituto Geográfico y Estadístico 1891) 54.

[23] Reques Velasco, P., and de Cos Guerra, O., 'La emigración olvidada: la diáspora española en la actualidad', *37 Papeles de Geografía*, 2003, p. 199, [author's translation from Spanish]

Indeed, as González-Rothvoss has pointed out, between 1907 and 1935 alone, Spain adopted 1,163 legal provisions to regulate the former.[24] Following the Spanish Civil War (1936-1939), the adoption of new measures in this regard, including the creation of a specific court to deal with emigration-related offences in 1960,[25] continued during Franco's dictatorship (1939-1975).[26] By contrast, as Triguero has noted, immigration was comparatively neglected from a legislative point of view, insofar as it was only marginal.[27] The best evidence of this is, perhaps, that Spain did not enact its first immigration law *as such* until 1985.[28] However, as Sánchez Alonso has argued, Spain's position in the context of international migrations started to rapidly change in the last quarter of the century.[29]

3. Spain's repositioning in the context of international migrations

The origins of this change can be retraced to the end of Franco's dictatorship in 1975. Indeed, as soon as it began the transition towards democracy, Spain started a race against time to narrow the gap with its neighbours and find a place in what Keller and Stone Sweet have called the 'circle of good European

[24] González-Rothvoss, M., Los problemas actuales de la emigración española, *Instituto de Estudios Políticos*, 1949, p. 30.

[25] Babiano, J., and Fernández Asperilla, A., 'En manos de los tratantes de seres humanos (Notas sobre la emigración irregular durante el franquismo)', *Historia Contemporánea*, nº 26, 2003, pp. 35, 54.

[26] See, e.g., González-Rothvoss, *op. cit.*, pp. 30–35.

[27] Triguero Martínez, L.A., 'La nueva reforma de la Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros y su integración social: notas clave para su comprensión', *Revista de Estudios Jurídicos*, 2009, p. 1.

[28] Before that, legislation on immigration, though existent to a limited extent, was rather fragmented, in that it was only regulated through scattered norms, such as the Real Decreto de Extranjería of 1852. Striking as it may seem, this primitive law which, amongst other things, considered that Spanish women who married a non-national became foreigners themselves (Article 5), automatically granted Spanish nationality to children born to a Spanish father but not to a Spanish mother (Articles 2 and 3), and only regarded as 'foreigners' those registered in the State (Article 12), remained in force until 1986. See Muro Castillo, A., and Cobo del Rosal, G., 'La Condición de Nacional y Extranjero En El Constitucionalismo Decimonónico Español' in García Castaño, F. J., and Kressova, N., (eds), *Actas del I Congreso Internacional sobre Migraciones en Andalucía* (Instituto de Migraciones), 2011, p. 2086 fn 12.

[29] Sánchez Alonso, B., 'La política migratoria en España: un análisis de largo plazo', *Revista Internacional de Sociología*, nº 69, 2011, pp. 243-244.

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countries'.[30] This required, amongst other things, joining two key regional organisations—namely, the Council of Europe (CoE) and the European Economic Community (EEC)—that had arisen in the last few decades and which, as will be seen below, would profoundly and permanently change Spain's migratory landscape. We will begin by discussing the change brought about by Spain's accession to the EEC (1986) and to the Schengen area five years later (1991), which had two main consequences for the purposes of our analysis.

First, only a few weeks after signing the Treaty of Adhesion to the EEC on 12 June 1985, Spain adopted its first comprehensive immigration law ever, the so-called *Ley Orgánica 7/1985*.[31] At that time, Spain was not (yet) a recipient of immigration. However, as pointed out by Sánchez Alonso, the adoption of an immigration law was a condition for Spain's accession to the EEC, which became effective on 1 January 1986.[32] According to Aja, the purpose was to ensure that Spain did not become a 'loophole' for immigration, 'not so much thinking of Spain, which did not have any, but of the rest of Europe'.[33] Indeed, from then on, Spain was likely to become a primary target of migratory flows attempting to irregularly reach Europe via Morocco given its particular geographical situation and, as Arango has put it, 'Spain's European neighbours were worried about the laxity of Spanish immigration controls'.[34] This essentially led Spain to regulate immigration before even being confronted with it—something which, according to Arango, distinguishes Spain from other European countries, which had already been dealing with immigration for decades.[35] The result was a first law heavily focused on border control.

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[30] Keller, H., and Stone Sweet, A., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press, 2008, p. 679.

[31] Ley Orgánica 7/1985, de 1 de julio, sobre derechos y libertades de los extranjeros en España [Organic Law 7/1985, of 1st July, on the rights and freedoms of aliens in Spain] (Spain).

[32] Sánchez Alonso B., *op. cit.*, p. 249.

[33] Aja, E., 'La Evolución de La Normativa Sobre Inmigración' in Aja, E., and Arango, J., (eds), *Veinte años de inmigración en España Perspectivas jurídica y sociológica (1985-2005),* 2005, pp. 9-10 [author's translation from Spanish].

[34] Arango, J., 'Becoming a Country of Immigration at the End of the Twentieth Century: The Case of Spain' in King, R., and others (eds), *Eldorado or Fortress? Migration in Southern Europe*, Palgrave Macmillan UK, 2000, p. 265.

[35] *Ibidem*.

This law will not be thoroughly discussed here, as it was later replaced with a new one (*Ley Orgánica 4/2000*), which is still in force today, and which will be the backdrop to the developments that will be analysed in this paper.[36] However, this earlier law remains relevant in that it laid the first legal framework for the removal of aliens from the country.[37] In particular, it established two procedures to that end that still exist, although with certain differences, in the current law.[38] On the one hand, 'expulsion' (*expulsión*) applied to non-citizens irregularly present in the country (e.g., for failing to renew their residence permit).[39] Such irregular stay within the national territory was considered a violation of the Spanish law,[40] and required the opening of an individual expulsion file.[41] On the other, 'return' (*devolución*) applied to those who entered irregularly into the country.[42] Unlike 'expulsions', however, 'returns' did not require the opening of an expulsion file.[43] Nonetheless, they did involve a formal procedure, as they had to be conducted by virtue of an order issued by

[36] Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social [Organic Law 4/2000, of 4 January, on rights and freedoms of non-nationals in Spain and their social integration].

[37] In fact, it laid down the present-day 'model' based on the control of entries. See Moya, D., 'La Evolución Del Sistema de Control Migratorio de Entrada En España' in Aja, E., and Arango, J., (eds), *Veinte años de inmigración en España Perspectivas jurídica y sociológica (1985-2005)... cit.,* p. 40.

[38] Apart from the 'prohibition of entry' (prohibición de entrada) under Article 14 of Real Decreto 1119/1986, de 26 de mayo, por el que se aprueba el Reglamento de ejecución de la Ley Orgánica 7/1985 (Spain) [Royal Decree 1119/1986, of 26 May, enforcing Ley Orgánica 7/1985], which is still present in the current law as 'refusal of entry' (denegación de entrada), and which applies to those who attempt to enter regularly but who do not meet the necessary requirements; see Ruiz Sutil, C., 'El rechazo en frontera o la denominada «devolución en caliente» y su regulación en la LOEX', *Revista Española de Derecho Internacional*, nº 68, 2016, pp. 329, 331.

[39] Article 26(1)(a) of Ley Orgánica 7/1985.

[40] See Article 75(2) of Royal Decree 1119/1986. Moreover, 'expulsions' were accompanied by measures of deprivation of liberty and the prohibition of entry into Spanish territory for at least three years, according to Articles 26(2) and 36(1) of Ley Orgánica 7/1985.

[41] In fact, collective expulsion within this meaning was explicitly prohibited under Article 36(3) of Ley Orgánica 7/1985.

[42] Article 36(2) of Ley Orgánica 7/1985.

[43] However, according to Article 75(1) of Royal Decree 1119/1986, it was also considered as a violation.

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the civil Governor of the province.[44] Hence, it may be argued that, from the beginning, even those who entered Spanish territory irregularly were, at least, subjected to some kind of administrative procedure—even if only with very few guarantees compared to later on—preceding removal.[45]

Second, due to the (foreseeable) surge in irregular migration that followed Spain's accession to the Schengen area, Spain was soon 'compelled … to tighten its border control measures', i.e., to seal its borders with Morocco.[46] This triggered a two-fold reaction from the Spanish authorities. In the first place, in 1992, as a response to the unprecedented high presence of Sub-Saharans in Melilla,[47] Spain concluded a bilateral agreement with Morocco for the readmission of third-country nationals.[48] By virtue thereof, upon the formal request of Spain, Morocco was supposed to readmit to its territory, following their identification, the nationals from third countries who had illegally entered Spain via Morocco. The problem was, however, the *difficulty* in proving that the migrants had actually entered through Morocco and not from elsewhere (e.g., in the case of migrants arriving on dinghy boats which could have departed from another country, or simply those who had not been caught 'red-handed' while crossing the Moroccan-Spanish border).[49] Morocco

[44] *Ibidem*.

[45] Ruiz Sutil, *op. cit.*, p. 333; in fact, according to Moya, 'returns' were applied 'without minimum guarantees' for migrants. See Moya, *op. cit.*, p. 40 [author's translation from Spanish].

[46] Said Saddiki, *World of Walls The Structure, Roles and Effectiveness of Separation Barrier,* Cambridge Open Book Publishers, 2018, p. 70.

[47] González García, I., 'El acuerdo España-Marruecos de readmisión de inmigrantes y su problemática aplicación: las avalanchas de Ceuta y Melilla', *Anuario Español de Derecho Internacional,* nº 22, 2018, pp. 255, 257.

[48] See B.O.E. no. 100, of 25 April 1992, 13969-13970, as well as correction of errors in BOE no. 130, 30 May 1992, 18417. Interestingly, as González García has noted, this agreement was concluded only six days after the signature in Maastricht of the Treaty of the European Union, which formally turned migration into a matter of common interest for Member States. See González García, I., 'La llegada de inmigrantes a Isla de Tierra en Alhucemas: crisis migratoria entre España y Marruecos y violaciones de derechos humanos', *Revista Electrónica de Estudios Internacionales*, 2014, pp. 1, 7.

[49] Cembrero, I., 'Solana Reconoce "Dificultades" Para Que Marruecos Readmita a Los Emigrantes Ilegales', *El País* (30 July 1992), https://elpais.com/diario/1992/07/30/espana/712447207_850215.html?event_log=oklogin.

often resorted to this argument to reject the readmissions.[50] In fact, it held off ratifying the agreement for twenty years (and still, this agreement has only been applied in a very limited way ever since), whereby it did not really fulfil its purpose.[51] However, in the latter half of the 1990s, Spain took a much more consequential step: it began the construction of two fences, one around Ceuta and one around Melilla, to physically prevent the arrival of irregular migrants. Similar to above, the purpose was not so much to contain the entry of Moroccans, but of sub-Saharans, who were already seeking to reach Spain after the entry into force of the Schengen Agreement in 1995.[52] In this way, by the end of the decade, the two Spanish exclaves were originally surrounded by a double, three-metre-fence which, over the years, would turn into a triple fence of up to 10m equipped with all sorts of dissuasive and surveillance elements.

4. Origins of a dubious practice

The construction of the fences brought along a new 'problem'—how to proceed when a migrant was apprehended while trying to jump the fences.[53] Indeed, attempts to do so emerged almost simultaneously with the finalisation of the construction works at the end of 1998. However, it is difficult to see why this new scenario would be a 'problem'. After all, as already seen, the domestic legislation then in force (the earlier discussed *Ley Orgánica 7/1985*) laid out a specific procedure for the removal of migrants having entered irregularly into the country. The same applies to the law that would soon replace it (the already mentioned *Ley Orgánica 4/2000*). In fact, as will be seen later, this new law roughly maintained the procedures already provided for in the previous law—i.e., 'expulsion' (*expulsión*) for those who were irregularly on Spanish territory and 'return' (*devolución*) for those who were apprehended while attempting to enter irregularly[54]—and actually attached additional guarantees to them.[55]

[50] González García, "El acuerdo España-Marruecos... *cit.*", pp. 258-259.

[51] For a thorough discussion of the agreement, see González García, "El acuerdo España-Marruecos... *cit.*".

[52] Federación de Asociaciones de SOS Racismo del Estado Español, 'Informe Frontera Sur 1995-2006: 10 Años de Violación de Los Derechos Humanos' (2006) 5.

[53] Sánchez Tomás, J. M., (n 21) 3.

[54] Article 58 of Ley Orgánica 4/2000 (formerly Article 54 in its original version).

[55] Apart from the 'refusal of entry' ('denegación de entrada or 'prohibición de entrada') under

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Indeed, from then on, all procedures explicitly included free legal assistance and the services of an interpreter wherever needed.[56] In short, Spanish law already contained an adequate procedure to handle situations in which migrants attempted to enter national territory irregularly (whether by climbing the fences, by crossing the border hidden in the back of a truck or by reaching the mainland on a dinghy boat, for instance).[57]

However, as came to light much later, it seems that, around 1999, the Spanish authorities started to make an *exception* with those who jumped the fences.[58] Indeed, instead of following the 'cumbersome' procedure that would normally apply, they began to informally and immediately push migrants back to Morocco as soon as they climbed down from the fences.[59] This practice, far from remaining an occasional (and illegal) deviation from the standard procedure, continued over the years, and actually became a new 'procedure' in itself. It began by becoming a widespread, systematic practice in the autumn of 2005 as a response to the first mass, coordinated storms of the fences, in which several hundred individuals attempted to surmount them at the same time (and, often, through the use of violence)[60] in order to maximise their chances of entry.[61] It even started to be known under a particular name—

Articles 26 and 60 (formerly Articles 24 and 56 in its original version, respectively) of Ley Orgánica 4/2000.

[56] Article 22 of Ley Orgánica 4/2000 (formerly Article 20 in its original version).

[57] For an account of the different procedures for the removal of aliens under Spanish law, see, e.g., Fernández Pérez, A., 'La regulación de las devoluciones y expulsiones de extranjeros: la ilegalidad de las devoluciones de extranjeros efectuadas sin las debidas garantías' [2014] *Diario La Ley* 1; and Martínez Escamilla, M., and Sánchez Tomás, J. M., *Devoluciones ilegales en la Frontera Sur*, Universidad Complutense de Madrid, 2015, pp. 5-6.

[58] Gálvez, J.J., and Óscar López-Fonseca, O., 'Los Gobiernos de PP y PSOE Ocultaron Las Devoluciones En Caliente Desde 1999', *El País* (31 October 2019), https://elpais.com/politica/2019/10/31/actualidad/1572547222_256861.html.

[59] Sánchez Legido, *op. cit.*, p. 238 [author's translation from Spanish].

[60] See, e.g., Macías, C. S., '«Entraron Matando. Nos Atacaban Con Cal Viva y Lanzallamas Caseros»', *La Razón* (26.07.2018), https://www.larazon.es/sociedad/unos-400-inmigrantes-entran-en-ceuta-tras-un-salto-masivo-a-la-valla-FI19223655/.

[61] For examples of media coverage back then, see 'Cinco Muertos En Un asalto En La Frontera de Ceuta; Zapatero Moviliza a 480 Soldados', *El Mundo* (29 September 2005), https://www.elmundo.es/elmundo/2005/09/29/sociedad/1127968660.html; '500 Inmigrantes Protagonizan El Cuarto Salto Masivo de La Valla de Melilla En Siete Días', *El País* (5 October 2005), https://elpais.com/

namely, 'hot returns' (*devoluciones en caliente*). Yet, the practice was only *de facto*. As seen above, Spanish law did not foresee the possibility of removing aliens (even if these had been intercepted while entering irregularly) without a formal procedure with minimal guarantees. Therefore, it may be argued that, at the very best, the practice was outside the law. At worst, it was 'radically illegal', as Martínez Escamilla and Sánchez Tomás have argued.[62] In either case, it was for a long time clandestine.[63] Over time, as the practice intensified along with the number of irregular crossings, especially after 2005, it became increasingly difficult to conceal it, with increasing civil society denunciation.[64] However, successive Spanish Governments, regardless of their political affiliation, systematically denied all accusation in this regard,[65] and made every effort to keep the practice hidden (e.g., by denying journalists access to the areas where it took place).[66]

5. An unexpected change

In total, since 1999, the Spanish authorities were able to clandestinely conduct 'hot returns' for around 15 years. Indeed, in 2014, a routine 'hot return' gone wrong led to a tragedy which fully exposed the practice and made it impossible for the Spanish authorities to keep denying it. What happened on that day may be summarised as follows: in the early hours of 6 February 2014, a group of around 90 individuals (initially 200, but half of them were intercepted by Moroccan officials before they even reached the border) attempted to cross from Morocco to Ceuta before dusk. Originally,

elpais/2005/10/05/actualidad/1128500217_850215.html; 'Unos 350 Inmigrantes Entran En Melilla Tras Saltar La Valla En Un Tramo de Máxima Altura', *El Mundo* (3 October 2005), https://www.elmundo.es/elmundo/2005/10/03/sociedad/1128317728.html.

[62] Martínez Escamilla, M., and Sánchez Tomás, J. M., *op. cit.*, p. 5 [author's translation from Spanish].

[63] Sánchez, G., 'De La Negación Hasta La Condena Judicial: 15 Años de Devoluciones En Caliente En España', *El Diario* (5 October 2017), https://www.eldiario.es/desalambre/devoluciones-caliente-espana-clandestinidad-normalidad_1_1157279.html.

[64] SÁNCHEZ TOMÁS, J. M., *op. cit.*, p. 4.

[65] Sánchez, G., 'Primero Las Negaron y Luego Las Defendieron Ante La Justicia: Casi 20 Años de Devoluciones En Caliente En España', *El Diario* (13 February 2020), https://www.eldiario.es/desalambre/devoluciones-caliente-espana-clandestinidad-normalidad_1_1131832.html.

[66] Sánchez, G., 'De la negación hasta la condena judicial: 15 años de devoluciones en caliente en España'... *cit.*

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their plan was to jump the fences—which, at that time, were crowned by the very controversial razor-barbed wires known as '*concertinas*'.[67] This is probably, together with the cold temperatures, the reason why they were wearing heavy, thick clothes. However, by the time they reached the fence, they discovered a strong presence of Spanish officials, who had already been alerted by their Moroccan counterparts, on the other side. For this reason, they changed their plans on the go: instead of jumping the fence, they would run in parallel to it until reaching the beach, and then cross to the Spanish side of the beach by swimming around the fence.[68] However, that would not be an easy task. On the one hand, they were being chased by Moroccan officials. On the other, the Spanish officials, who had already reached the beach by the time they arrived, tried to discourage their arrival by using abundant anti-riot material. The stress, fatigue, and the fact that many of the migrants could not even swim, coupled with the heavy clothes they were wearing (suitable, perhaps, for a storm at the fences, but not for swimming) took their toll. The operation concluded with 14 of the migrants drowned, and with the only 23 individuals who arrived on the Spanish side of the beach being *de facto* and immediately returned to the Moroccan officials, from whom 'they had escaped' and who were 'claiming them back', to reproduce the words of the then Spanish Minister of Interior.[69]

This tragedy has given rise to one of the few (and very controversial) cases in which the Spanish courts have dealt with different aspects of the practice

[67] In 2007, the same socialist Government that had installed them two years earlier both in Ceuta and Melilla partially removed them from Melilla. However, in 2013, the then conservative Government decided to reinstall them. See Carlos E Cué, 'Rajoy Se Pertrecha Para Mantener Las Cuchillas de La Valla de Melilla', *El País* (22-11-20213), https://elpais.com/politica/2013/11/22/actualidad/1385122249_220132.html; they were finally removed from the fences of both cities in 2020, as explained in María Martín, 'Interior Sustituye Las Concertinas En Ceuta y Melilla Por Una Estructura de Barrotes', *El País* (19 June 2020) https://elpais.com/espana/2020-06-19/interior-sustituye-las-concertinas-en-ceuta-y-melilla-por-una-estructura-de-barrotes.html.

[68] Aris Escarcena, J. P., 'Ceuta: The Humanitarian and the Fortress EUrope', 2022, pp. 54 Antipode, pp. 64, 71–72; see the map available on JJ Madueño, 'Ceuta, El Sueño Roto Para Miles de Marroquíes', *ABC* (19 May 2021), https://www.abc.es/espana/abci-ceuta-sueno-roto-para-miles-marroquies-202105190133_noticia.html.

[69] 'Diario de Sesiones Del Congreso de Los Diputados, Comisión de Interior, Sesión n.º 25' (13 February 2014) 5.

of 'hot returns'.[70] This case, which was closed and re-opened several times between 2015 and 2020 by the lower courts, was eventually dismissed by the Spanish Supreme Court in May 2022.[71] It is currently pending the decision of the Spanish Constitutional Court, which in June 2023 accepted to review the case upon the request of three Spanish NGOs which denounced a violation of the migrants' right to life and to an effective remedy.[72] This request was submitted as an *amparo* appeal (i.e., as the very 'last resort' available under the Spanish legal system, which only applies when all other judicial remedies have been exhausted).[73] Therefore, it is arguably the last step before, failing the redress of the Spanish Constitutional Court, it becomes a potential ECtHR case.[74]

However, let us come back to the events described above, which have come to be known as the tragedy of 'El Tarajal', because they turned out to be of utmost importance to understand later developments. Indeed, for the first time, 'hot returns' attracted so much public attention that the Minister of Interior had no choice but to appear before the Spanish Congress one week after the tragedy to account for them. However, contrary to what could have been expected, this did not signal the end of the practice. Rather, it was only the beginning of a 'headlong rush' of the Spanish authorities that led them to justify the practice, to *own* it publicly and, lastly, to legalise it.[75]

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[70] More on other cases in Sánchez Legido, *op. cit.* p. 240.

[71] An overview of the judicial evolution of this case can be seen at CEAR, 'Caso Tarajal: 14 Muertes y Nueve Años de Impunidad' (1 February 2024), https://www.cear.es/caso-tarajal/.

[72] Sánchez, G., 'El Constitucional Revisará El Archivo de La Causa Sobre La Muerte de 14 Migrantes En La Frontera Del Tarajal', *El Diario* (28 June 2023), https://www.eldiario.es/desalambre/constitucional-revisara-archivo-muerte-14-personas-frontera-tarajal_1_10334605.html.

[73] Candela Soriano, M., 'The Reception Process in Spain and Italy' in Keller, H., and Stone Sweet, A., (eds), *A Europe of Rights*, Oxford University Press, 2008, p. 396.

[74] In January 2024, one of the survivors also resorted to the United Nations' Committee against Torture. See Hierro, L.,, 'Un Superviviente de La Tragedia Del Tarajal Demanda a España Ante El Comité Contra La Tortura de La ONU', *El País* (31 January 2024), https://elpais.com/espana/2024-01-31/un-superviviente-de-la-tragedia-del-tarajal-demanda-a-espana-ante-el-comite-contra-la-tortura-de-la-onu.html.

[75] Martínez Escamilla, M., and Sánchez Tomás, J. M., *op. cit.*, pp. 6-7 [author's translation from Spanish].

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6. Legalisation

The Spanish 'hot returns' were legalised roughly one year later, in March 2015, under the name of 'rejection at the border' (*rechazo en frontera*). They entered the Spanish legal order through the following provision, consisting in three paragraphs:

> 1. Aliens attempting to penetrate the border containment structures in order to cross the border in an unauthorised manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal entry into Spain.
>
> 2. Their return shall in all cases be carried out in compliance with the international rules on human rights and international protection recognised by Spain.
>
> 3. Applications for international protection shall be submitted in the places provided for that purpose at the border crossing points; the procedure shall conform to the standards laid down concerning international protection.[76]

Let us inspect each of them more closely.

Paragraph 1

The first paragraph essentially said two things. In the first place, the practice would be geographically restricted to the bare 20km of *land* border that separated Ceuta and Melilla from Morocco. Hence, it would only apply to individuals who jumped the fences. As such, as Martínez Escamilla and Sánchez Tomás have pointed out, it could not be used to remove individuals having reached Ceuta or Melilla by swimming around the fence or having arrived to any of the Spanish rocky islets located right off the northern Moroccan coastline.[77] Yet, in practice, Spain was also conducting 'hot returns'

[76] Translation into English from the judgment of *ND and NT v Spain [GC]... cit.* para 33.

[77] Martínez Escamilla, M., and Sánchez Tomás, J. M., *op. cit.*, pp. 24.

in those instances, as illustrated by the events of El Tarajal or the numerous reports of informal expulsions from Isla de Tierra,[78] Chafarinas[79] or Vélez de la Gomera.[80]

In the second place, the provision was based on the premise that those intercepted while jumping the fences were *attempting to* enter Spanish territory (i.e., that they had not entered Spanish territory yet), insofar as this new procedure was meant to 'prevent their illegal entry into Spain'. This is rather striking, considering that not only were the fences built on Spanish territory, but the border between Spain and Morocco, as delimited by some bilateral treaties from the 19th century, actually lay well before the first wall, looked at from the Moroccan side. However, as the Minister of Interior recognised in his address to the Spanish Congress on 13 February 2014, this interpretation resulted from the application of the so-called 'operational border concept', a legal fiction that had been consistently followed by all Spanish Executives since 2005.[81] According to this, the effective entry into national territory, for the purposes of Spanish immigration law, would not materialise after crossing the land border between Spain and Morocco. Instead, it would occur when migrants overcame the three successive fences (which, as mentioned above, were entirely built on Spanish soil) *plus* a human (and, therefore, mobile) police line made up of the members of the Guardia Civil. Based on this purely political construction, the migrants who were intercepted and removed from this space would not be expelled from, but prevented from entering into, Spanish territory. This legal fiction was not restricted to 'rejections at the border' alone. On the contrary, the entire treatment of irregular entrants under the contemporary Spanish immigration law seemed to rest thereon. In fact, whereas under the first immigration law (*Ley Orgánica 7/1985*) the

[78] See, e.g., González García, I., 'La llegada de inmigrantes a Isla de Tierra en Alhucemas'... *cit.*

[79] 'Denuncian Devoluciones En Caliente En Las Islas Españolas de Chafarinas', *Público* (27 January 2022), https://www.publico.es/sociedad/denuncian-devoluciones-caliente-islas-espanolas.html.

[80] Varo, L, J., 'España Devuelve a Marruecos a 125 Inmigrantes Que Habían Entrado En Un Peñón Español Frente a Alhucemas', *El País* (20 September 2021), https://elpais.com/espana/2021-09-20/espana-devuelve-a-marruecos-a-125-inmigrantes-que-habian-entrado-en-un-penon-espanol-frente-a-alhucemas.html?event_log=oklogin.

[81] 'Diario de Sesiones del Congreso de los Diputados, Comisión de Interior, sesión nº 25'... *cit.* p. 7 [author's translation from Spanish].

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procedure of 'return' (*devolución*) applied to those who *had entered* national territory irregularly,[82] under the new law (*Ley Orgánica 4/2000*) it applied to those who *attempted* to do so,[83] meaning those who were 'intercepted at the border or its vicinity'.[84] The difference between a 'return' (*devolución*) and a 'rejection at the border' (*rechazo en frontera*) was key: under the former, migrants would enjoy the protection of Spanish law; under the latter, they would be entirely excluded from such protection.

Finally, there were two other things that this paragraph did not actually say, but which arguably reflected the actual intentions of the drafters better than the final version itself. They can be found in the two drafts that preceded the final provision. Indeed, according to the first draft, which was tabled on 4 November 2014, the provision was intended to apply to 'unauthorised border crossing[s] in a clandestine, violent or flagrant manner'.[85] This wording reproduced in writing the wishes publicly expressed by the Minister of Interior in a meeting with his Moroccan counterpart in February of that year. On that occasion, only two weeks after the tragedy of El Tarajal, the Spanish Minister openly proposed Morocco to jointly develop a 'mechanism to proceed to the immediate return of those who entered Ceuta and Melilla *in a violent or flagrant way*'.[86] The second draft, tabled only three weeks later, replaced such a reference with that of crossings 'as a group'.[87] However, that does not mean that the notion of violence was dropped. On the contrary, according to Gracia Pérez de Mergelina, this was just another way of conveying it, insofar as 'the mere conscious, intentional use […] of large numbers in order to force entry

[82] Article 36(2) of Ley Orgánica 7/1985.

[83] Article 58(3)(b) of Ley Orgánica 4/2000.

[84] Article 23(1)(b) of Real Decreto 557/2011 [author's translation from Spanish].

[85] *Proyecto de Ley Orgánica de protección de la seguridad ciudadana de 4 de noviembre of 2014* 105–2, 115 (2014) [author's translation from Spanish].

[86] 'Interior Ofrece a Marruecos La "Devolución Inmediata de Quienes Entren de Forma Violenta o Flagrante En Ceuta y Melilla"', *Europa Press* (20 February 2014), https://www.europapress.es/nacional/noticia-interior-ofrece-marruecos-devolucion-inmediata-quienes-entren-forma-violenta-flagrante-ceuta-melilla-20140220204802.html [author's translation from Spanish and emphasis added].

[87] *Proyecto de Ley Orgánica de protección de la seguridad ciudadana de 24 de noviembre of 2014* 28 (Spain 2014) [author's translation from Spanish].

is, in itself, a way of violence'.[88] As he has also pointed out, the final version of the provision omitted any express reference to violence.[89] However, as will be seen later, the aspect of violence would remain at the core of the 'hot returns', now legalised as 'rejections at the border'. In fact, it will be what triggers the forfeiture of rights—initially, only the right to benefit from a procedure with guarantees under Spanish law, but later, also at the ECtHR.

Paragraph 2

The intention to legalise the practice, from the very moment in which the first version was tabled in late 2014, triggered an extraordinary wave of criticism from all sectors of society, including 130 NGOs,[90] the Spanish Ombudswoman,[91] and the Catholic Church,[92] as well as the European Parliament,[93] the UNHCR,[94] and the Council of Europe.[95] None of this criticism seemed to discourage the Spanish Executive from pursuing its

[88] Gracia Pérez de Mergelina, D., 'El «rechazo» de Inmigrantes Irregulares En Las Fronteras de Ceuta y Melilla', *Diario La Ley*, nº 9057, 2017, pp. 1, 7 [author's translation from Spanish].

[89] *Ibidem*, p. 6.

[90] '130 Organizaciones Solicitamos Que Se Impida La Legalización de Las "Devoluciones En Caliente"' (*Médicos del Mundo*, 12 December 2014), https://www.medicosdelmundo.org/actualidad-y-publicaciones/noticias/130-organizaciones-solicitamos-que-se-impida-la-legalizacion-de.

[91] A A., 'La Defensora Del Pueblo Reitera Su Oposición a Las Devoluciones En Caliente', *La Voz de Galicia* (27 February 2015), https://www.lavozdegalicia.es/noticia/espana/2015/02/27/defensora-pueblo-reitera-oposicion-devoluciones-caliente/0003_201502G27P18993.htm.

[92] 'La Iglesia Pide La "Retirada Inmediata" de La Reforma Que Legaliza "Devoluciones En Caliente"', *Europa Press* (2 December 2014), https://www.europapress.es/epsocial/cooperacion-desarrollo/noticia-iglesia-pide-retirada-inmediata-reforma-legaliza-devoluciones-caliente-inmigrantes-20141202121354.html.

[93] 'Información Actualizada Sobre La Situación En Ceuta y Melilla - Pregunta Parlamentaria - E-010830/2015' (3 July 2015).

[94] Spindler, W., 'UNHCR Concerned over Spain's Bid to Legalize Push-Backs from Enclaves', *UNHCR* (28 October 2014), https://www.unhcr.org/news/stories/unhcr-concerned-over-spains-bid-legalize-push-backs-enclaves#_ga=2.30343228.224000262.1647775045-513097340.1647775045.

[95] 'Europa Recuerda a España Que Las Devoluciones En Caliente de Inmigrantes Son Ilegales', *20 Minutos* (3 November 2014), https://www.20minutos.es/noticia/2285552/0/consejo-europa/recuerda-espana/devoluciones-en-caliente-inmigrantes-ilegales/.

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roadmap towards the legalisation of 'hot returns'. However, the social and institutional pressure eventually triggered the inclusion of two additional paragraphs, not initially foreseen, intended as human rights guarantees.

Arguably, the first of those new paragraphs created high expectations, at least at first glance.[96] Nonetheless, one only had to reflect on its content to realise that it was 'contradictory' in itself.[97] Indeed, it was unclear how the Spanish authorities could live up to Spain's human rights commitments (e.g., the Refugee Convention, to which Spain acceded in 1978, or the prohibition of *non-refoulement* that the ECtHR had developed under Article 3 ECHR) while blindly pushing back migrants, amongst whom there could be refugees or other individuals with special protection needs. In fact, for the practice to be carried out in compliance with international rules, it would have to involve, amongst other things, an individual identification procedure, legal assistance and access to an interpreter, as requested by the UNHCR.[98] In other words, for rejections at the border to be compatible with Spain's commitments, they should not be rejections at the border, but something else—e.g., 'returns' (*devoluciones*).

Paragraph 3

The following paragraph was probably an attempt to resolve the above contradiction. Indeed, it established that it would be possible to seek asylum at the border. This paragraph was accompanied, on the ground, by the opening of two border asylum offices, one in Ceuta and the other in Melilla, both in

[96] For some positive reactions, see 'Becerril Celebra La Mejor Regulación de Las Devoluciones En Caliente y Rechaza Las Concertinas', *RTVE* (26 February 2015), https://www.rtve.es/noticias/20150226/becerril-celebra-mejor-regulacion-devoluciones-caliente-pero-rechaza-concertinas/1105442.shtml; and Testa, G., 'ACNUR "Valora" Los Matices Que El PP Prevé Añadir En El Senado a La Legalización de Las Devoluciones', *Ceuta al Día* (11 February 2015), https://www.ceutaldia.com/articulo/en-comunidad/acnur-valora-matices-pp-preve-anhadir-senado-legalizacion-devoluciones/20150211205532142051.html.

[97] Sánchez, G., 'El Congreso Aprueba Una Legislación Contradictoria Para Regular Las Devoluciones En Caliente', *El Diario* (26 March 2015), https://www.eldiario.es/desalambre/pp-pretende-legalizar-devoluciones-caliente_1_4310563.html.

[98] 'España: ACNUR Reconoce Avances En La Enmienda a La Ley de Extranjería' (*UNHCR*, 11.02.2015), https://www.acnur.org/noticias/historias/espana-acnur-reconoce-avances-en-la-enmienda-la-ley-de-extranjeria.

March 2015.[99] However, in the light of subsequent events, it appears that this step was mainly tokenistic. Indeed, the office in Ceuta would be inoperative for almost five years after its inauguration[100] and the one in Melilla would not be accessible, in practice, for Sub-Saharan migrants due to the 'racial profiling' conducted by Morocco—extensively documented by different NGOs—which prevented sub-Saharan individuals from approaching this office.[101] This is evidenced by the fact that, between late 2014 and the end of 2017, only two asylum requests had been submitted at the Melilla crossing point by sub-Saharan individuals,[102] and only because they arrived fully covered in a burqa.[103] In fact, it is striking that the Melilla office received thousands of applications from other origins (e.g., Syrians) but not from Africans, considering that it was located on African soil, and that several African countries were amongst the top producers of asylum-seekers.

7. In the meantime, at the ECtHR

In the year that elapsed between the tragedy of El Tarajal in February 2014 and the legalisation of 'hot returns' in March 2015, the Spanish authorities continued pushing migrants back to Morocco at the fences of Ceuta and Melilla on a routine basis. The difference was that, while in the past they had made every effort to keep media away, they now adopted the opposite approach. Indeed, they began to invite journalists to take photographs and video of the moments in which they were immediately returning migrants through the fence.[104] In other words, they went from denial to showcasing in order to prove how *legal* their practice was, and to give normalcy to it. As a

[99] 'Interior Inaugura Las Oficinas de Asilo de Ceuta y Melilla' (13 March 2015), https://www.europapress.es/epsocial/derechos-humanos/noticia-interior-inaugura-oficinas-asilo-ceuta-melilla-20150313145459.html.

[100] With the exception of one occasion in 2019 in which 155 migrants were received there. See Javier Sakona, 'España Solo Tramita El 4% de Las Peticiones de Asilo En La Frontera Del Tarajal' (25 August 2021), https://www.elconfidencial.com/espana/2021-08-25/ceuta-devoluvion-menores-colas-asilo-entradas-inmigrantes_3248978/.

[101] *ND and NT v Spain [GC]*... *cit.* para 163.

[102] *Ibidem* para 216.

[103] ECCHR, Fundación Raíces and Andalucía Acoge, '3rd UPR Cycle – Submission for the 35th UPR Working Group Session on Spain's Summary Returns in Ceuta and Melilla' (2020) 12.

[104] SÁNCHEZ, G., 'De la negación hasta la condena judicial: 15 años de devoluciones en caliente en España'... *cit.*

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result, 2014 was swamped with recordings of the practice, leading to increased public awareness and to the proliferation of legal studies on the issue.[105]

One of those recordings corresponds to a storm that took place at the Melilla fence on 13 August 2014.[106] On that day, a group of 75 individuals—originally 600 but, as it is often the case, most of them had been stopped by the Moroccan police even before approaching the border—attempted to overcome the fences. As they were climbing the first of them, they were intercepted by Spanish officials, handcuffed and immediately handed over to the Moroccan authorities, who were waiting on the other side of the fences. Nor did they undergo an identification procedure or have the opportunity to put forward any reasons they might have against their expulsion, never mind to be assisted by lawyers and interpreters. Indeed, they were clearly subjected to a 'hot return'. In February 2015 (i.e., only one month before the legalisation of the practice in Spain), two of the participants in the storm of that day submitted an application against Spain before the ECtHR which would give rise to the judgment of *N.D. and N.T.*, which shall be thoroughly discussed below. The applicants claimed to have been subjected to a collective expulsion of aliens such as those prohibited under Article 4 of Protocol No. 4 ECHR (A4-P4)—and, in fact, they had a case. This is, at least, what could be inferred from the new interpretation that the ECtHR had been giving to A4-P4 for the previous couple of years, since it started hearing the first 'pushback' cases. On account of the number of fundamental rights that such practices could breach, including the prohibition of *non-refoulement*, they started to give rise to cases in Strasbourg.

The 'case zero' of this jurisprudence was *Hirsi Jamaa*, decided in February 2012.[107] This case stemmed from the interception and removal from the high seas of a group of migrants who intended to reach Italy irregularly. Basically, what the Grand Chamber ruled therein is that A4-P4 (which, until then, had for long been interpreted as a procedural guarantee of individualisation in expulsion cases) not only applied to *expulsions from* the territory of States, but also to *non-admissions into* the latter. In other words, as Papanicolopulu has put

[105] Sánchez Tomás, J. M. *op. cit.*, p. 4.

[106] 'Refugee and Migrant Exclusion in Europe: Spain's Push-Back Practice (Melilla)' (15 February 2016), https://www.youtube.com/watch?v=amyEP7LIDF0.

[107] *Hirsi Jamaa and Others v Italy [GC]* (n 4).

it, the Court seemed to prohibit States from preventing 'collective … *entrance* in their territory, whether at their own borders, on the high seas, or on the territory of another [S]tate'.[108] This interpretation was, in fact, confirmed two years later in *Sharifi*, a case concerning the removal to Greece of a group of migrants who had, unlike in the former case, managed to reach Italian shores irregularly.[109] Indeed, the ECtHR held, in October 2014, that if 'even interceptions on the high seas fell within the ambit of [A4-P4], the same conclusion should be reached with regards to refusals of entry to national territory'.[110]

In the light of the above, it seems possible to argue that the Spanish authorities could have already *suspected* in 2012 (or, at the very latest, in 2014) that their 'hot returns' violated Protocol No. 4 ECHR. Spain was, at that time, a party to the latter and was, therefore, bound by it. As such, it should have discontinued the practice as soon as the ECtHR declared the Italian pushbacks illegal. Yet, as already seen, not only did it refrain from doing so, but also went one step further by introducing its 'hot returns' in its domestic legal order in 2015, in explicit contravention of the ECHR, as interpreted by the ECtHR at that time.[111] This was certainly a bold—and, it may be argued, rather unusual, if not totally unheard of—move coming from Spain. Indeed, since Spain acceded to the ECHR in 1977, the latter had always been very well received, in that it constituted, as Keller and Stone Sweet have put it, an 'external, and therefore legitimate, normative standard'.[112] It was particularly welcome in a country which had just emerged from one of the longest dictatorial regimes in Europe. Indeed, as Candela Soriano has argued, Spain's accession to the ECHR helped the country achieve 'international recognition' and 'encouraged the consolidation of [its young] democracy'.[113] The Spanish Constitution, adopted

[108] Papanicolopulu, I., 'Hirsi Jamaa v. Italy. Application No. 27765/09', *American Journal of International Law*, nº 107, 2013, pp. 417, 421 [emphasis added].

[109] *Sharifi et Autres c Italie et Grèce* (n 5).

[110] *Ibidem* para 212 [author's translation from French].

[111] Rodríguez-Pina, G., 'Nils Muižnieks, N., "Es La Primera Vez Que Veo a Un País Intentar Legalizar La Devolución de Inmigrantes"', *Huffington Post* (16 January 2015), https://www.huffingtonpost.es/2015/01/16/consejo-de-europa-migrantes-derechos-humanos_n_6486572.html.

[112] Keller, H., and Stone Sweet, A., *op. cit.*, p. 679.

[113] Soriano, C., *op. cit.*, p. 402.

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in 1978, drew heavily upon the ECHR.[114] The Spanish Constitutional Court established the direct applicability of the latter's provisions, as interpreted by the ECtHR, into the Spanish legal order.[115] Moreover, in Spain, the ECHR and its Protocols, similar to any other international treaty, are hierarchically superior to all national laws, ranking only below the Spanish Constitution.[116] This essentially means that, in case of conflict between the ECHR or any of its Protocols ratified by Spain and a domestic law, the latter must be amended to bring it in compliance with the former.[117] In fact, this has happened several times, when Spain has modified its laws to make them compatible with different ECHR provisions following ECtHR decisions against it or even against other States.[118]

However, that was certainly not the case when it came to A4-P4. In fact, the relationship between Spain and Protocol No. 4 ECHR, unlike the one between Spain and the ECHR, was a *complicated* one since the beginning. This became obvious since the very moment in which Spain signed Protocol No. 4 ECHR in 1978 (i.e., around the same time as it accessed the ECHR) but did not ratify it within a reasonable amount of time. In this sense, there was a huge difference compared to the several other Protocols that already existed at the time, and which Spain had no issues in signing *and* ratifying soon after. These were Protocol No. 2 (which Spain signed in 1978 and ratified in 1982), and Protocols No. 3 and 5 ECHR (both signed in 1977 and ratified in 1979). By contrast, Spain held off ratifying Protocol No. 4 ECHR for 31 years, becoming the very last State to have joined it thus far.[119] The reason for such delay seemed to be that this Protocol contained rights that, as Candela Soriano has argued, 'were not fully provided for in domestic law'.[120] As such, their ratification would have implied a high likelihood of being brought before Strasbourg,

[114] Pérez de los Cobos Orihuel, F., 'El Diálogo Entre El Tribunal Europeo de Derechos Humanos y El Tribunal Constitucional Español: Una Relación Fructífera', 2016, p. 1.

[115] Candela Soriano, *op. cit.*, p. 445.

[116] *Ibidem*, pp 403–404.

[117] This is one of the reasons why Spain is one of the countries with the lowest number of cases brought before Strasbourg every year. See *Ibidem* 417–418.

[118] For specific examples, see *Ibidem*, pp. 419–425.

[119] Protocol No. 4 ECHR has been signed and ratified by all ECHR States except for the United Kingdom, Greece, Turkey and Switzerland.

[120] Candela Soriano, *op. cit.*, 398.

and of being found in breach of the ECHR—something that Spain wanted to avoid at all cost.[121] As Keller and Stone Sweet have argued, those rights touched upon 'the politically sensitive domain' of migration,[122] one in which Spain has always acted 'cautiously'.[123] These rights included, in particular, the freedom of movement of everyone lawfully within the territory of a State (A2-P4), which concerned both nationals and aliens, and the prohibition of collective expulsion of aliens (A4-P4), which concerned aliens only.[124] Spain eventually ratified (and became bound by) it in October 2009.[125] After all, the Charter of Fundamental Rights of the European Union, which became legally binding with the entry into force of the Treaty of Lisbon only two months later, contained equivalent provisions: the freedom of movement under Article 45(2)[126] and the prohibition of collective expulsion of aliens under Article 19(1), which has the same meaning and scope as A4-P4 ECHR.[127] Thus, Spain would have been bound by those rights within the scope of application of EU law from December 2009 even if it had not ratified Protocol No. 4 ECHR.

The above means that, for many years, even if the Spanish 'hot returns' had been clearly contrary to A4-P4 since their origins in the 1990s, Spain could not even have been brought before the ECtHR for the simple reason that it was not a party to Protocol No. 4 ECHR. However, that was no longer the case after 2009. Had Spain followed its traditional stance towards the ECHR, it should have discontinued its 'hot returns' as soon as the ECtHR declared them illegal. This would have not even implied amending any pre-existing

[121] *Ibidem*, p. 403.

[122] Keller, H., and Stone Sweet, A., *op. cit.*, p. 680; see also Candela Soriano, M. *op. cit.*, p. 398.

[123] Candela Soriano, *op. cit.*, p. 398.

[124] Something similar happened with Protocol No. 7 ECHR, the only other Protocol to the ECHR which contains migrants' rights, as Spain signed it as soon as it was adopted in 1984, but did not ratify it until much later (October 2009, together with Protocol No. 4 ECHR).

[125] Europa Press, 'Entra En Vigor En España El Cuarto Protocolo Del Convenio de Roma Que Prohíbe Las Expulsiones Colectivas de Extranjeros' (13 October 2009), https://www.europapress.es/epsocial/migracion/noticia-entra-vigor-espana-cuarto-protocolo-convenio-roma-prohibe-expulsiones-colectivas-extranjeros-20091013115918.html.

[126] In fact, A2-P4 was almost identical to Article 12 ICCPR, that Spain had no issues in ratifying in 1977—and which it even did before States such as Belgium (1983), Luxemburg (1983), France (1980), Italy (1978) or the Netherlands (1978).

[127] Guild, E., 'Article 19' in Peers, S., and others (eds), *The EU Charter of Fundamental Rights : A Commentary*, Hart Publishing, 2021, pp. 573 and 583, Bloomsbury Collections.

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domestic law, as it was the case in other occasions, but simply discontinuing a *de facto* State practice. Yet, it did not do so. Hence, it was arguably only a matter of time before Spain would be brought before, and condemned by, the ECtHR on a violation of A4-P4 at its borders with Morocco. In fact, attempts to do so began shortly after the *Hirsi* judgment, but were eventually discontinued for different reasons.[128] It would be necessary to wait for five years to see such an application being eventually decided by the Strasbourg judges.

8. Spanish land pushbacks before the ECtHR

The first time that Spain had to respond to a pushback challenge before the Strasbourg court was in the famous case of *N.D. and N.T.*, whose facts have already been discussed. The forecasts that Spain would be sooner than later condemned were initially confirmed in this case. Indeed, in a first judgment in October 2017, the Chamber decided in favour of the applicants, unanimously ruling that Spain had violated A4-P4.[129] It was an applauded but also an expected judgment. Indeed, the facts of the case were so 'straightforward' that it seemed like a case taken out of a textbook.[130] Yet, the Spanish Government requested a referral to the Grand Chamber under Article 43 ECHR. This is a provision under which a party may, under exceptional circumstances, request a judgment by the Grand Chamber 'if [a] case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance'.[131] The panel of judges of the ECtHR which was in charge of assessing the requests made by the parties under Article 43 ECHR considered that this was the case, and accepted Spain's submission. In fact, the Grand Chamber noted that there were 'important issues […] at stake […], particularly concerning the interpretation of the scope and requirements of [A4-P4] with regard to migrants who attempt to enter

[128] For instance, an application submitted in October 2013 by 2 amongst 73 immigrants who were removed from Isla de Tierra in September 2012, as documented by the press of that time in Hierro, L., 'Dos Expulsados de La Isla de Tierra Denuncian a España Ante Estrasburgo', *El País* (17 October 2013), https://elpais.com/politica/2013/10/16/actualidad/1381927878_552243.html?event_log=oklogin; for academic commentary, see González García, I: "El acuerdo España-Marruecos de readmisión de inmigrantes"... *cit.*

[129] *ND and NT v Spain... cit.* No. 8675/15 and 8697/15 (ECtHR 3 October 2017).

[130] Pichl and Schmalz, *op. cit.*; PIJNENBURG (n 11).

[131] Council of Europe, 'European Convention on Human Rights' (1950) Art. 43.

a Contracting State in an unauthorised manner by taking advantage of their large numbers'.[132] This led the Grand Chamber to hear the case and deliver a new decision in February 2020. The outcome this time was another ruling by unanimity, but surprisingly in the opposite direction: Spain had *not* violated A4-P4.

In the first place, it is striking that, amongst all Convention States, it was Spain that won the first case in which the ECtHR was required to assess the compatibility of land pushbacks with A4-P4. Indeed, as Sánchez Legido has noted, Spain was the first State in the Council of Europe known to have resorted to this practice as a response to irregular crossings of its borders.[133] This is perhaps not too surprising, considering Spain's unique geographical situation. However, it is significant in terms of 'export value'. In fact, in the wake of the so-called 'refugee crisis' of 2015-2016, many other European States (including some of the best-known for conducting pushbacks today, such as Hungary or Croatia) imported the Spanish 'hot returns' and began to implement them at their own borders.[134] Yet, Spain's 'influence' amongst its neighbours did not seem to end there. On the contrary, it featured again in 2015, when Spain became the first State party to the ECHR which legalised land pushbacks.[135] Indeed, by doing so, it led the way for other States (in particular, Hungary, Latvia, Poland, Estonia and Lithuania, which followed Spain's example in July 2016, August 2021, October 2021, August 2022 and April 2023, respectively).[136] Now, with the case of *N.D. and N.T.*, it seems that

[132] *ND and NT v Spain [GC]... cit.* para 78.

[133] Sánchez Legido, A., *op. cit.*, pp. 238, 242–43.

[134] *Ibidem*, p. 243.

[135] Rodríguez-Pina, *op. cit.* (n 110).

[136] 'Hungary: Latest Amendments Legalise Extrajudicial Push-Back of Asylum-Seekers' (*ECRE*, 7 July 2016), https://ecre.org/hungary-latest-amendments-legalise-extrajudicial-push-back-of-asylum-seekers/; Jolkina, A., 'Legalising Refoulement: Pushbacks and Forcible "Voluntary" Returns from the Latvian-Belarus Border' (*Refugee Law Initiative*, 22 August 2022), https://rli.blogs.sas.ac.uk/2022/08/22/legalising-refoulement-pushbacks-and-forcible-voluntary-returns-from-the-latvian-belarus-border/; Baranowska, G., 'Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021', *Polish Yearbook of International Law*, nº 41, 2021, p. 193; 'Estonia Legalizes Migrant Pushbacks at Borders in Emergencies', *ERR News* (2 August 2022), https://news.err.ee/1608673804/estonia-legalizes-migrant-pushbacks-at-borders-in-emergencies; 'Lithuania Legalises Migrant Pushbacks', *Euractiv* (25 April 2023), https://www.euractiv.com/section/migration/news/lithuania-legalises-migrant-pushbacks/.

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Spain's 'export value' reached a new height. Indeed, after inventing the practice, conducting it for twenty years, exporting it around Europe and legalising it in its domestic law (in explicit contravention of the ECtHR's jurisprudence at that time, as already seen), it managed to convince the Grand Chamber that it had not violated A4-P4. What is more, not only did the latter unanimously overthrow the Chamber's decision, but also concluded its judgment with a metaphorical pat on Spain's back.[137]

In the second place, the Grand Chamber's outcome was only possible by 'shoehorning a novel, unexpected "exception" into the scope of protection of [A4-P4]'.[138] This alleged 'exception' excluded from the latter 'persons'—in practice, only *migrants*—'who cross[ed] a land border in an unauthorised manner, deliberately [took] advantage of their large numbers and use[d] force'.[139] The only condition for this 'exception' to apply was that the respondent State had provided for effective channels of legal entry (and that, if the migrants could not make use of those channels, the reason was not imputable to the respondent State). As long as this condition was met, migrants—'including potential asylum-seekers'—could be immediately and forcibly removed as soon as they crossed a land border irregularly without this amounting to a violation of A4-P4.[140] In other words, the ECtHR placed certain migrants, or migrants under certain circumstances, outside the protection of A4-P4. Ironically, this is what Spain had been doing for the past two decades, and the reason why it was brought before, and initially condemned by, the ECtHR. Now, as already seen, the Grand Chamber suddenly considered that the Spanish practice was compatible with A4-P4. However, the ECtHR not only used this 'brand-new exclusionary clause'[141] to exempt Spain from a breach of A4-P4 in this particular case, but turned such clause into the new protection

[137] The Grand Chamber concluded its findings regarding A4-P4 noting 'the efforts undertaken by Spain, in response to recent migratory flows at its borders, to increase the number of official border crossing points'. See *ND and NT v Spain [GC]... cit.* para 232.

[138] Bosch March, C., 'Revisiting Hirsi Jamaa and Others v. Italy – Carving a Dubious New Duty out of Protocol No. 4 ECHR?', *European Law Review*, nº 5, 2023, pp. 501, 518.

[139] *ND and NT v Spain [GC]... cit.* para 201.

[140] *Ibidem*, para 210.

[141] Ciliberto, G., 'A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in *N.D. and N.T. v Spain*', *Human Rights Law Review*, nº 21, 2021, p. 203.

standard at the ECHR. In fact, from then on, it began to adjudge subsequent A4-P4 cases based on this 'exception', which has become to be known as the 'culpable conduct test'.[142]

In the third place, as already mentioned, and most importantly for the purposes of this analysis, this U-turn was impossible to predict based on the then existing ECtHR jurisprudence.[143] Admittedly, the problem was not so much that the ECtHR departed from its own (established or expected) jurisprudence, but that it did so in the absence of compelling legal grounds that justified it.[144] In fact, as will be seen below, the analysis of the Grand Chamber judgment suggests 'that there were not enough legal grounds to support the reasoning of the Court'.[145] Rather, the next section purports to demonstrate that the Grand Chamber imported such legal grounds from the Spanish framework that it was arguably expected to condemn.

III. Spain's bottom-up influence on the case of N.D. and N.T.

1. Analysis of the Grand Chamber judgment in N.D. and N.T.

Both at the Chamber and at the Grand Chamber, the judgment of *N.D. and N.T.* revolved around three key issues: (a) whether Spain had exercised

[142] E.g., *MH and Others v Croatia* No. 15670/18 and 43115/18 (ECtHR 18 November 2021); *AA and Others v North Macedonia* No. 55798/16 55808/16 55817/16... (5 April 2022); *Shahzad v Hungary* No. 12625/17 (ECtHR 8 July 2021).

[143] Alonso Sanz, L., 'Deconstructing *Hirsi* : The Return of Hot Returns: ECtHR 13 February 2020, Nos. 8675/15 and 8697/15, *ND and NT* v *Spain*' (2021) 17 European Constitutional Law Review 335, 339; yet, as the Grand Chamber judgment approached, there was an increasing number of commentators who suspected the ECtHR could take a step back from its former decision. See, e.g., Lena Riemer, 'The ECtHR as a Drowning "Island of Hope"?' Its Impending Reversal of the Interpretation of Collective Expulsion is a Warning Signal' (*Verfassungsblog*, 19 February 2019), https://verfassungsblog.de/the-ecthr-as-a-drowning-island-of-hope-its-impending-reversal-of-the-interpretation-of-collective-expulsion-is-a-warning-signal/.

[144] For a critique of the case, as well as of the general restriction of A4-P4 in the last few years, see my analysis in Bosch March, C., 'The Backsliding on the Interpretation of Article 4 of Protocol No. 4 ECHR in "pushback" Cases: A Questionable Attempt to Redress the Hirsi "Overstretch"?' [forthcoming] *European Human Rights Law Review*.

[145] Bosch March, C., 'Backsliding on the Protection of Migrants' Rights? The Evolutive Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights', *Journal of Immigration, Asylum and Nationality Law*, nº 35(4), 2021, pp. 315, 331.

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jurisdiction, (b) whether the facts had amounted to an 'expulsion', and (c) whether such expulsion had been 'collective'. To a large extent, the reasoning of both Chambers was very similar. Indeed, both rebutted—at least, in principle—the submissions of the Spanish Government under the first two headings through similar arguments. Likewise, they initially followed a similar thread under the third one. In fact, until a relatively advanced stage of the judgment, the reader would have the impression that the Grand Chamber was going to confirm the Chamber's decision.[146] However, when it seemed that it was about to conclude that Spain had violated A4-P4,[147] the Grand Chamber suddenly introduced the 'culpable conduct test' discussed above, leading to an unexpected turn of events.[148] This section critically analyses both the submissions of the Spanish Government before the Grand Chamber and the reasoning of the latter under each of the above headings. It argues that the Court chose to create the 'culpable conduct test' under the adjective 'collective' because it was the *least confrontational* option.[149] Indeed, doing so under any of the other two headings ('jurisdiction' or 'expulsion') would have compelled the Court to overturn its position in earlier cases, and to negate well-established jurisprudential lines. By contrast, doing so under the adjective 'collective', while also controversial, could still be presented as a *refinement* of the Court's interpretation of A4-P4.[150] This allowed the Court to maintain, at least in appearance,[151] the 'considerable degree of collegiality' under which, according to Mallory, it usually operates.[152]

[146] See N*D and NT v Spain [GC]*...cit.paras 123–200.

[147] *Ibidem*, paras 202–203.

[148] *Ibidem*, paras 201–231.

[149] See Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*

[150] As perceived, e.g., by González Vega, J. A., '¿Un difícil equilibrio? La sentencia TEDH (Gran Sala) de 13 de febrero de 2020, N.D. y N.T. c. España, a la luz de la jurisprudencia del Tribunal de Estrasburgo', *Revista General de Derecho Europeo*, nº 52, 2020. 23.2020, N.D. and N.T. v. Spain has generated deep controversy when exempting our country from responsibility for the expulsions of foreigners carried out in Melilla in the context of the so-called "hot returns". Faced with the previous conviction of the Chamber (Judgment of October 3, 2017

[151] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*

[152] Mallory, C., 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?', *Questions of International Law*, Zoom-in 82, 2021, pp. 31, 46.

A. Jurisdiction

The first preliminary issue was the question of 'jurisdiction' within the meaning of Article 1 ECHR.[153] The Spanish Government accepted that the events had occurred on Spanish territory, in that the fences were built on Spanish soil, but asserted that they did not fall under Spanish jurisdiction.[154] The reason was that the applicants had not managed to overcome the triple fence plus the police line. Therefore, they had not entered into the country, either for the purposes of the Spanish immigration law or of the ECHR (and, in particular, of A4-P4). In fact, according to the Spanish Government, it was 'only after that point [i.e., after overcoming the police line] that Spain was bound by the obligation under the Convention to identify the persons concerned and by the procedural safeguards applicable to expulsion procedures'.[155] In other words, in order to defend its case before Strasbourg, Spain relied on the notion of the 'operational border'.

In a nutshell, as pointed out elsewhere, what Spain attempted to advance before the Strasbourg judges was the argument of 'extraterritoriality'.[156] The latter consists, as Rondine has put it, in the 'fictional excision'—only for purposes of immigration—of part of a State's territory in order to create a pretended extraterritorial situation that justifies the application of different laws, or of no laws at all.[157] Indeed, as Del Valle has argued, in the excised portions of the territory, laws only apply, at best, in an 'incomplete, conditioned, exceptional manner'.[158] The rationale of this legal construction is that individuals who find themselves in those areas have not entered the State's territory because they have not gone through the relevant border crossing

[153] *ND and NT v Spain [GC]*...cit.paras 89–111.

[154] At the Chamber judgment, Spain did not even recognise that the fences were built on Spanish territory. See *ND and NT v Spain* (n 128) para 52.

[155] *ND and NT v Spain [GC]*...cit.para 91.

[156] See, e.g., Sánchez Legido, *op. cit.*, pp. 247; Di Filippo, M. *op. cit.*, pp. 14–15.

[157] Rondine, F., 'Between Physical and Legal Borders: The Fiction of Non-Entry and Its Impact on Fundamental Rights of Migrants at the Borders between EU Law and the ECHR' (*Cahiers de l'EDEM, Special Issue*, August 2022), https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/rondineaout2022.html.

[158] Del Valle Gálvez, A., 'Las Zonas Internacionales o Zonas de Tránsito de Los Aeropuertos, Ficción Liminar Fronteriza', *Revista Electrónica de Estudios Internacionales*, nº 9, 2005, pp. 1, 9 [author's translation from Spanish].

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formalities.[159] Yet, as stated above, this is a legal fiction, in that those areas (usually, the international zones of airports, ports and border areas) are located within the State's territory and, therefore, under the latter's full territorial and personal jurisdiction.[160] As Del Valle has explained, this fiction stems from the replacement of the dichotomy '*de facto* entry' *versus* 'formal entry' (which captures all possible types of entry) with 'formal entry' *versus* 'no formal entry' (which only recognises, and regulates, formal entries).[161] As such, individuals who have not been formally admitted into a State's territory are left in sort of an artificial, and dangerous, no man's land.[162] Indeed, the end result is, as Mitsilegas has put it, the 'denial of the rule of law towards third-country nationals, whose access to the territory is not accompanied by access to law'.[163]

Spain was not the first State which resorted to a legal fiction to evade its responsibilities *vis-à-vis* migrants in selected parts of its territory. France, for instance, had also been applying a similar concept since the 1980s at the 'international' or 'transit' zones of its airports through a series of decrees and circulars.[164] In 1992, in a first attempt to formally regulate the issue of such zones, France enacted a law whereby non-nationals would only be deemed to have entered French territory—and, thus, to become subjects of French law—after they exited those zones. The French Government defended this position a few years later in the famous case of *Amuur v. France*, concerning the detention of four Somali nationals in a hotel nearby the Paris-Orly airport that had been reconverted into transit zone.[165] Indeed, the French Government argued that, since the applicants had not left the international zone, they had not entered French territory, so French law did not apply to them. However, the ECtHR flatly rejected that argument and held that 'despite its name, the

[159] This is what Shachar has called the 'shifting border' in Shachar, A., *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue*, Manchester University Press, 2020, p. 4.

[160] Del Valle Gálvez, A. *op. cit.*, p8.

[161] *Ibidem* [author's translation from Spanish].

[162] *Ibidem*, p. 9.

[163] Mitsilegas, V., 'The EU External Border as a Site of Preventive (in)Justice', *European Law Journal*, 2022, pp. 1, 3.

[164] See Maillet, P., *'Exclusion From Rights Through Extra-Territoriality at Home: The Case of Paris Roissy-Charles De Gaulle Airport's Waiting Zone'*, Wilfrid Laurier University, 2017, p. 21.

[165] *Amuur v France* No. 19776/92 (ECtHR 25 June 1996).

international zone [did] not have extraterritorial status'.[166] Hence, regardless of what the domestic law established, 'holding [the applicants] in the international zone of Paris-Orly Airport [had] made them subject to French law'[167] and, by extension, to the ECHR.[168]

Following the *Amuur* judgment, France formally abandoned the extraterritoriality argument.[169] However, as Rondine has noted, that was not the case in practice. In fact, such abandonment led France to 'institutionalis[e] a differential treatment for those at the borders as compared to irregular non-citizens on national territory'.[170] This differential treatment was no longer based on the extraterritorial argument, but on the migrants' status and the fiction of non-entry (which was, after all, another means to reach the same end).[171] In the light thereof, it is not striking that France, together with Italy and Belgium, was one of the third-party interveners which joined the case of *N.D. and N.T.* to support Spain and, in particular, the latter's extraterritorial discourse, before the Grand Chamber. The French Government argued that 'the applicants *had not been within the jurisdiction of the Spanish State*' because 'a brief, limited intervention in the context of action to defend the country's land borders … could not, in their submission, give rise to *extraterritorial* application of the Convention'.[172] Along similar lines, the Belgian Government contended that 'persons attempting to cross the border illegally … *could not be said to have entered the territory of the State* concerned *and* to *come within its jurisdiction*'.[173] Similarly, the Italian Government argued that 'the applicants had not been staying on the territory of the Spanish State'.[174]

The Grand Chamber disregarded the States' submissions in this regard

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[166] *Ibidem,* para 52.

[167] *Ibidem*.

[168] Rondine, F., 'Between Physical and Legal Borders'... *cit.*

[169] In fact, it had already abandoned it before. See Rondine, F., *'Le Zone Di Transito Aeroportuali e La Condizione Giuridica Dello Straniero in Stato Di Irregolarità Nello Spazio Europeo e Nel Diritto Italiano'*, Sapienza Università di Roma, 2023, p. 20.

[170] Rondine, F., 'Between Physical and Legal Borders'... *cit.*

[171] Rondine, F., *Le Zone Di Transito Aeroportuali... cit.*, pp. 21 and references therein.

[172] *ND and NT v Spain [GC]*...cit.para 95 [emphasis added].

[173] *Ibidem* para 97 [emphasis added].

[174] *Ibidem* para 96.

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and seemed to follow *Amuur* by flatly rejecting—at least, in principle—the extraterritoriality argument. Indeed, the Grand Chamber reminded that 'its case-law preclude[d] territorial exclusions', and the migration field was no exception.[175] In particular, it held that the 'special nature' of the migratory context could not 'justify an area outside the law where individuals [were] covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention'.[176] It followed, hence, that 'the Convention [could not] be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction', because '[t]o conclude otherwise would amount to rendering the notion of effective human rights protection … meaningless'.[177] As a result, the Grand Chamber considered that the facts fell within Spain's jurisdiction within the meaning of Article 1 ECHR and, after resolving two other preliminary objections without great difficulty,[178] proceeded to assess the substance of the case.[179]

B. 'Expulsion'

On the substantive plane, the first argument invoked by Spain was that the facts of the case had not amounted to an 'expulsion', but to a 'non-admission' and that, as such, fell outside the scope of A4-P4.[180] The Spanish Government 'called into question the Court's case-law, which, they argued, had departed from the intentions of the drafters of [A4-P4] by extending its scope of application to extraterritorial situations'—i.e., to non-admissions.[181] For this reason, they sought a jurisprudential change that, as pointed out by Sánchez Legido, was already on the verge of materialising in the case of *M.A. and*

[175] *Ibidem* para 106.

[176] *Ibidem* para 110.

[177] *Ibidem.*

[178] In particular, the loss of victim status and the exhaustion of domestic remedies, in *Ibidem* paras 112–122.

[179] *Ibidem* para 123.

[180] *Ibidem* para 132.

[181] *Ibidem* para 165; indeed, it had. See my analysis of the case of Hirsi Jamaa in Bosch March, C., 'Revisiting Hirsi Jamaa and Others v Italy – carving a dubious new duty out of Protocol No 4 ECHR?'... *cit.*

Others v. Lithuania in 2018.[182] In their view, '[f]or an expulsion to occur, the person concerned had to have first been admitted to the territory from which he or she was expelled'.[183] This was, after all, the logical consequence of their extraterritorial argument discussed above: if they considered that the area between the actual border and the police line, including the fences, was not Spanish territory for immigration purposes, it followed that the interception and removal of anyone from that area would be a 'non-admission', as opposed to an 'expulsion'.

As expected, the Spanish Government also received the full support of their peers in this regard. Notably, Belgium argued that 'third-country nationals who … sought to enter the State's territory without complying with the rules in force … could not be considered to have entered the country's territory'.[184] In its view, such individuals 'had to be intercepted and handed over, if necessary using coercive means, to the authorities of the State from whose territory they had attempted to cross illegally'.[185] Belgium also supported Spain's argument that such an interception and removal did not amount to an 'expulsion', but to a 'non-admission', and that, hence, should not trigger the application of A4-P4.[186] Similarly, Italy insisted that 'the applicants had not entered Spanish territory', and that the facts of the case fell 'within the […] sovereignty of States'.[187] It also reminded that, 'according to the Court's settled case-law, Contracting States had the right to control the entry, residence and removal of non-nationals'.[188] In fact, it argued that frontline States, such as Spain and itself, had the obligation to control the EU's external borders, and that this was 'in the interests of all … member States'.[189]

[182] Sánchez Legido, A., *op. cit.*, p. 248, fn 57; see, in particular, the distinction between 'expulsion' and 'non-admission' defended by Judges Ravarani, Bošnjak and Paczolay (i.e., three of the seven judges in the case) in their joint dissenting opinion in *MA and Others v Lithuania* No. 59793/17, para 5 (ECtHR 11 December 2018), in spite of the case not being actually adjudged on A4-P4.

[183] *ND and NT v Spain [GC]*...cit.para 189.

[184] *Ibidem* para 145.

[185] *Ibidem.*

[186] *Ibidem* para 146.

[187] *Ibidem* para 151.

[188] *Ibidem* para 150.

[189] *Ibidem* para 151.

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However, the Grand Chamber also rejected—at least, principle—the States' submissions in this regard. It is worth highlighting a rather lengthy but significant excerpt of the judgment in which the Court argued that the protection of the ECHR

> [could not] be dependent on formal considerations such as whether the persons to be protected [had been] admitted to the territory of a Contracting State in conformity with a particular provision of national or European law [...] The opposite approach would entail serious risks of arbitrariness, in so far as persons entitled to protection under the Convention could be deprived of such protection on the basis of purely formal considerations, for instance on the grounds that, not having crossed the State's border lawfully, they could not make a valid claim for protection under the Convention.[190]

Indeed, this led the Grand Chamber to hold that 'the domestic rules governing border controls'—arguably, the Spanish legal fiction of the 'operational border', the newly adopted 'rejections at the border' and the long-standing State practice of 'hot returns'—'[could not] render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and [A4-P4]'.[191] Since *Hirsi*, the latter encompassed not only *expulsions from* the territory of the State, but also *non-admissions into* the latter, at least in cases concerning arrivals by sea. In the case at hand, the Grand Chamber confirmed and extended this finding to land borders, as it found 'no reason to adopt a different interpretation' in the case of 'forcible removals from a State's territory in the context of an attempt to cross a national border by land'.[192] Hence, it essentially ruled that the distinction between 'expulsion' and 'non-admission' made in the Spanish framework (first as a *de facto* State practice and then through law) could not prevent the application of A4-P4 to the case of *N.D. and N.T*. Based on this, noting that 'the applicants [had been] removed from Spanish territory and forcibly returned to Morocco, against their will and in handcuffs, by members of the Guardia Civil', the Court concluded that the facts of the case had amounted to an 'expulsion' within the meaning of A4-P4.[193] It only remained

[190] *Ibidem* para 184.

[191] *Ibidem* para 171.

[192] *Ibidem* para 187.

[193] *Ibidem* para 191.

to be ascertained whether such an expulsion had been 'collective'.[194]

C. 'Collective'

In principle, after establishing that Spain had exercised jurisdiction and that the facts of the case had amounted to an 'expulsion', the finding of a violation of A4-P4 presented itself as the only possible outcome. Indeed, for the past forty-five years, the Court had consistently interpreted the adjective 'collective' as 'not follow[ing] an individual and objective examination of the personal circumstances of each alien concerned by an expulsion measure'.[195] It was arguably difficult to imagine a case in which the lack of an individual examination was clearer than in the case at hand. In fact, in the Chamber judgment, after confirming that the facts of the case had constituted an 'expulsion', the Court noted that 'the procedure followed [was] *incapable of casting doubt* on the collective nature of the expulsions', leading to a unanimous finding of violation.[196]

Initially, the Grand Chamber seemed to follow the same path, as it began by rejecting Spain's submissions on this point. In short, the Spanish Government argued that the expulsion had not been 'collective' because (a) it only concerned two individuals, and (b) such individuals did not share any common characteristic (e.g., nationality, in that one of them was from Mali and the other from Côte d'Ivoire). Relying on its own jurisprudence, the Grand Chamber forthright rebutted both arguments, arguing that (a) the applicants were part of a much larger group and that, in any event, the number of individuals involved was irrelevant to determine whether an expulsion had been 'collective',[197] and (b) the individuals did not need to belong to a particular group or share any specific characteristics.[198] Yet, when the finding of a violation seemed already imminent, the Grand Chamber suddenly turned its attention to a submission previously made by the Spanish Government,[199] and strongly supported by

[194] *Ibidem* para 192.

[195] Bosch March, C., 'Revisiting Hirsi Jamaa and Others v Italy – carving a dubious new duty out of Protocol No 4 ECHR?'... *cit.*, p. 502; this was the case since *Decision on the admissibility of the application Henning Becker v Denmark* No. 7011/75, para 235 (ECommHR 3 October 1975).

[196] *ND and NT v Spain* (n 128) para 107 [emphasis added].

[197] *ND and NT v Spain [GC]*...cit.paras 202–203.

[198] *Ibidem* para 195.

[199] *Ibidem* para 134.

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the French one,[200] regarding the conduct of the applicants.[201] The Spanish Government relied on two past inadmissibility decisions where the Court had dismissed claims under A4-P4 based on the conduct of the applicants.[202] In both cases, such 'conduct' had consisted in a lack of active cooperation with the authorities of the respondent State. The Court rejected both applications alleging that the lack of an individual decision had been a consequence of the applicants' conduct and that, hence, no violation of A4-P4 could be found. Now, according to the Grand Chamber, the same principle should also be extended to

> situations in which the conduct of persons who cross[ed] a land border in an unauthorised manner, deliberately [took] advantage of their large numbers and use[d] force, [was] such as to create a clearly disruptive situation which [was] difficult to control and endanger[ed] public safety.[203]

The fact that the Court focused on the applicants' conduct, as opposed to the State's response to that conduct, was, in itself, problematic at many levels. This aspect shall not be further explored here, as I have covered it elsewhere.[204] Instead, we will continue analysing the Court's findings through

[200] See *Ibidem* paras 147–148.

[201] *Ibidem* paras 201 and 204; Gracia Pérez de Mergelina, D. (*op. cit.*, p. 9), had already suggested this line of reasoning in 2017.

[202] The first time was in the partial decision as to the admissibility of Berisha and Haljiti v Former Yugoslav Republic of Macedonia, a case concerning a married couple from Kosovo who had jointly claimed asylum in Macedonia. In this case, the ECtHR held that "the fact that the national authorities issued a single decision for both the applicants, as spouses, was a consequence of their own conduct", in that they had lodged their asylum claim together. See *Partial decision as to the admissibility of Berisha and Haljiti v The Former Yugoslav Republic of Macedonia* No. 18670/03 (ECtHR 16 June 2005); the second time was in Dritsas and Others v. Italy. In this case, the applicants had refused to produce their identity cards to the police when requested to do so. Hence, the ECtHR considered that the Government could not be held responsible for the lack of an individual decision. See *Décision sur la recevabilité de Dritsas contre l'Italie* No. 2344/02 (ECtHR 1 February 2011) in both cases, unlike in N.D. and N.T., the authorities had at least attempted to examine the individuals' personal circumstances.

[203] *ND and NT v Spain [GC]*...cit.para 201.

[204] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... **cit.**; for a comprehensive analysis of the 'culpable conduct' as used by the ECtHR in its jurisprudence around A4-P4, see Petit-De-Gabriel, E., '«Clean Hands Revisited». El Eterno Retorno de Una Doctrina Discutible', *Anuario Español de Derecho Internacional*, nº 39, 2023, p. 341.

the lens of the influence of, or the inspiration on, the submissions of the Spanish Government in this case. Indeed, it is at this stage that, in the last thirty paragraphs of its reasoning in relation to A4-P4, the Grand Chamber introduced the earlier discussed 'culpable conduct test' that, as I will argue, overrode in practice the Court's own reasoning under the former two headings.

The 'culpable conduct test' was, in principle, conceived as a rather narrow, cumulative set of novel criteria which, if met, would deactivate the protection under A4-P4.[205] According to it, migrants would basically lose their right to invoke A4-P4 if:

> (1) they crossed a land border in an unauthorised manner, (2) deliberately took advantage of the large numbers, *and* (3) used force, provided that (4) they had had the possibility of entering regularly (in particular, through 'border procedures'), and either: (a) they had chosen not to use the legal channels available without 'cogent reasons' for doing so, or (b) in case they had such 'cogent reasons', the reason was not imputable to the respondent State.[206]

In this case, the Grand Chamber considered that all the above conditions were met. This is not surprising, considering that, as I have argued elsewhere, the above was a 'tailor-made checklist' that the judges made *in order to* force a non-violation of A4-P4 which could not have otherwise been found.[207] By contrast, the actual assessment of the judges under some of those conditions was, admittedly, quite questionable.

There was no doubt that the applicants had indeed (1) crossed a land border irregularly, and that (2) they had deliberately benefited from being part of a large group in doing so. It was not so clear, however, whether (3) they had used force. Indeed, as Hakiki has noted, the judges were not explicit as to whether the use of 'force' referred to 'muscular force to climb a fence'—which the applicants had undoubtedly applied to reach the top of the fence,

[205] Although, as commentators have noted, this novel 'exception' seemed to have as well a broader reading, which would actually be confirmed by the ECtHR in its later jurisprudence. See, e.g., Di Gianfrancesco, L., 'Pushback Practices and the Prohibition of Collective Expulsion of Aliens before the ECtHR: One Step Forward, Two Steps Back', *Diritti umani e diritto internazionale*, nº 16(3), 2022, pp. 696-697.

[206] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*; see *ND and NT v Spain [GC]*...cit. para 201.

[207] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*.

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where they remained for hours—or to 'violence' against the police officers—which was sometimes the case during storms at the fences,[208] although not on that particular day.[209] Yet, the Grand Chamber considered that 'force' had been used.[210] However, the greatest controversy arises under whether (4) the applicants had had the possibility of entering regularly. In the hearing of *N.D. and N.T.*, the Spanish Government insisted that there was a plethora of legal means available to enter Spain regularly, which the applicants voluntarily ignored. In particular, three were discussed: (1) obtaining visas, (2) seeking asylum at Spanish embassies worldwide, and (3) claiming protection at the border asylum offices of Ceuta and Melilla.[211] Both the applicants and third-party interveners, including the UNHCR and the European Commissioner for Human Rights of the Council of Europe, demonstrated the lack of effectiveness in practice of all those means. Yet, the Grand Chamber chose to disregard the solid evidence submitted by the latter in this regard, and to 'blindly follow' Spain's arguments.[212] In this way, the judges were satisfied that

[208] As already discussed and recognised in *MB and RA v Spain* No. 20351/17, para 4 (ECtHR 5 July 2022).

[209] Hanaa Hakiki, 'N.D. and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?' (*Strasbourg Observers*, 26 March 2020), https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/; along similar lines, see also Di Filippo, *op. cit.*, p. 26.

[210] In *AA and Others v North Macedonia* (n 141) paras 89 and 92, both the respondent Government and the applicants seemed to interpret 'force' as 'violence'. The discrepancy arose, however, as to the interpretation of 'violence', which for the applicants was the 'consensual administration of force to a person, either with direct bodily impact or through the use of weapons' (para 89) and, for the Government, the creation of 'a clearly disruptive situation which had been difficult to control, and which had endangered public order and safety' (para 97). Indeed, in the Government's view, '[t]he illegal entry and the march of around 1,000 illegal aliens was in itself a threat to public order, if not a threat to public security itself' (para 97); for a view close to that of the respondent Government in that case, see Gracia Pérez de Mergelina, D., *op. cit.*, p. 7, who argues that 'the mere conscious, intentional use of ... large numbers in order to force entry is, in itself, a way of violence' [author's translation from Spanish]. In either case, the Chamber eventually found therein that there was 'no indication ... that the applicants, or other people in the group, used any force or resisted the officers' (para 114). Hence, it appears that, at least in that case, the large numbers alone did not amount to 'use of force'.

[211] For a thorough discussion of each, see Sánchez Legido, A., *op. cit.*, pp 254–56.

[212] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*.

Spain had 'provide[d] genuine and effective access to procedures for legal entry'.[213] It remained to be seen whether (a) the applicants had freely chosen not to use such means, or (b) whether they had such 'cogent reasons' for not doing so which were imputable to Spain. In the case of the first two means (i.e., visas and embassies), the Grand Chamber essentially found that they were available, and that the applicants chose not to use them.[214] As for the third (i.e., border asylum offices), it did not outright deny the difficulty that the applicants could have found in using the offices due to the racial profiling of the Moroccan authorities, who prevented sub-Saharan people from even approaching them.[215] However, 'even assuming' that such difficulty (or 'cogent reason') existed, the judges considered that it would not be imputable to the Spanish State.[216] If at all, the Court argued, such difficulty would have been encountered in Morocco (i.e., not in Spain), and A4-P4 '[did] not […] imply a general duty for a Contracting State […] to bring persons who are under the jurisdiction of another State within its own jurisdiction'.[217] This led the Court to establish, by unanimity, that Spain had not violated the procedural right under A4-P4.[218]

2. Bottom-up inspiration in practical effects

As I have argued elsewhere, the introduction of the culpable conduct test led 'to quite a straightforward but, at the same time, puzzling conclusion', in that it implicitly *unmade* the progress of *Hirsi*, at least to a great extent.[219] Indeed, the main contribution of the latter to the jurisprudence on A4-P4 had

[213] *ND and NT v Spain [GC]*...cit. para 229.

[214] *Ibidem* paras 227–228.

[215] *Ibidem* para 218; in doing so, the Court seemed to ignore the reason why the Moroccan authorities conducted such racial profiling in the first place (i.e., their cooperation agreements with Spain). See Di Filippo, M., *op. cit.*, p. 29.

[216] *ND and NT v Spain [GC]*...cit.para 221.

[217] *Ibidem*.

[218] *Ibidem* paras 222 and 231. This was not, however, the first time that the ECtHR limited a procedural right. In fact, it had already done so with the right to access a court and immunities under Article 6 ECHR; for an extensive analysis of the limitation of this right, see Kloth, M., *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights*, Leiden, 2010.

[219] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*

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been the expansion of the meaning of the term 'expulsion' to cover 'non-admission' scenarios.[220] Now, without overturning this finding explicitly (and, in fact, by openly supporting the expansive interpretation of this term)[221] the Court reached the same outcome as if it had done so, but 'through the back door'.[222] Indeed, by carving out an exclusionary clause under 'collective', it eventually held that non-admissions would generally be out of the scope of application of A4-P4.[223] The only exception would be, in theory, situations in which the respondent State had not provided for means of legal entry. Yet, as seen above, the fact that the Court found that such means existed did not necessarily mean that they *really* existed. On the contrary, it seems that the verification of the availability of legal channels of entry could become a 'wild card' for the Court in future cases. However, in practice, the above 'puzzling conclusion' had another reading. Indeed, as I will argue here, the introduction of the 'culpable conduct test' was, in practice, an indirect, perhaps unintentional, yet obvious endorsement of the two main arguments of Spain that the Court had explicitly rejected under the two former points (i.e., the distinction between 'expulsion' and 'non-admission', and the pretended lack of jurisdiction). Let us see in what way.

A. Implicit exclusion of 'non-admissions' from the scope of A4-P4

As already seen, Spain insisted throughout the entire judgment that A4-P4 did not apply because the applicants had not managed to enter Spain and, thus, had not been expelled, but only refused admission. As such, they requested the Court to declare the application inadmissible or, failing that, to find no violation of A4-P4.[224] This was not an *ad hoc* argument made for the purposes of the case, as opposed to the rather poor, and even bizarre, arguments Spain submitted in other regards (e.g., invoking its 'inherent right of […] self-defence' in the case of 'an armed attack',[225] or alleging that the expulsion had

[220] Di Filippo, M., *op. cit.*, p 4.

[221] *ND and NT v Spain [GC]*...cit.para 187.

[222] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?'... *cit.*

[223] Bosch March, C., 'Revisiting Hirsi Jamaa and Others v Italy – carving a dubious new duty out of Protocol No 4 ECHR?'... *cit.*; see Sánchez Legido, A., *op. cit.*, p. 257.

[224] *ND and NT v Spain [GC]*...cit.para 134.

[225] *Ibidem* para 166.

not been 'collective' because 'the case concerned only two individuals').[226] On the contrary, the distinction between 'expulsion' and 'non-admission' lay at the very core of the Spanish 'hot returns', which had been a State practice for the last twenty years, and had even been grounded in law for the past five. In other words, the practice at stake was a reflection of Spain's very own framework in terms of law and practice.

As already discussed, the Grand Chamber openly rebutted Spain's arguments in this regard, stating that the protection of the ECHR '[could not] be dependent on formal considerations such as whether the persons … [had been] admitted to the territory of a Contracting State in conformity with a particular provision of national or European law'.[227] The judges specifically held that 'the domestic rules governing border controls [could not] render inoperative or ineffective the rights guaranteed by the Convention …, and in particular by Article 3 … and [A4-P4]'.[228] Yet, in the light of the outcome of the judgment, these assertions seemed now devoid of meaning. Indeed, the Grand Chamber had created an 'exception' under A4-P4 which, in practice, conditioned the applicability of A4-P4 (and, in a collateral way, potentially also of Article 3 ECHR, as will be seen below) to the formal entry into Spanish territory within the meaning of Spanish law.

Admittedly, the *N.D. and N.T.* judgment was ambiguous as to the exact scope of application of the 'culpable conduct test'.[229] On the one hand, the latter seemed to apply to 'persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers *and* use force'.[230] On the other, it appeared to extend, more broadly, to individuals who had circumvented the border-crossing formalities in place 'by seeking to cross the border at a different location, *especially,* as happened in this case, by taking

[226] *Ibidem* para 202.

[227] *Ibidem* para 184.

[228] *Ibidem* para 171.

[229] Rodrik and Hakiki, *op. cit.*, p. 6; Di Gianfrancesco, *op. cit.*, p. 696; in her concurring opinion in the subsequent case of *MH and Others v Croatia* (n 141), Judge Turkovic argued that 'the scope of [A4-P4] after the Grand Chamber case of N.D. and N.T. [...] still need[ed] further clarification as to whether the N.D. and N.T. exception should be interpreted and applied in a narrower or broader manner' (para 2).3, and article 4 of Protocol No. 4 ECHR. Yet in N.D. and N.T. v. Spain (2020

[230] *ND and NT v Spain [GC]*...cit.para 201 [emphasis added].

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advantage of their large numbers and using force'.[231] Following the judgment, there were hopes that subsequent jurisprudence would clarify this question, and that the Court would choose the narrower interpretation of the test.[232] However, far from doing so, as Hakiki and Rodrik have argued, later A4-P4 cases have actually 'broadened and blurred—rather than refined or clarified—the scope of the exception'.[233]

In fact, in the timespan of only two years—or, rather, two further cases[234]—it became reasonably clear that the Court had decided to pursue the more restrictive interpretation of A4-P4 amongst the two put forward in *N.D. and N.T.*[235] Yet, that does not make a big difference for the purposes of this analysis. Even if the Court had opted for the less restrictive interpretation,

[231] *Ibidem* para 210 [emphasis added].

[232] See, e.g., the joint dissenting opinion of Judges Lemmens, Keller and Schembri Orland in the case of *Asady and Others v Slovakia* No. 24917/15, paras 7 and 24–25 (ECtHR 24 March 2020), delivered only one month after the Grand Chamber judgment in N.D. and N.T. See also Di Filippo, M., *op. cit.*, p.29.

[233] Rodrik and Hakiki , *op. cit.*, p. 6.

[234] The first was *MH and Others v Croatia* (n 141), which originated from the application of an Afghan family who had crossed from Serbia to Croatia with the intention to claim asylum in the latter. They were denied access to the procedure and, without any individual examination of their circumstances, were compelled to walk alongside the train tracks back to Serbia. In the process, their six-year-old girl was struck by a train and died; the second was *AA and Others v North Macedonia* (n 141). This case was brought by a group of Afghan, Iraqi and Syrian nationals who, together with other 1,500 individuals, peacefully crossed the land border between Greece and North Macedonia, but who were shortly after compelled by North Macedonian soldiers to walk back to Greece.

[235] Indeed, none of the applicants in these two cases had used force. This should have sufficed for the Court to discontinue the application of the 'culpable conduct test', had it applied it in a narrow manner. However, the Court continued with it in both cases, and went on to assess the availability of legal means of entry, with mixed results. In the first case, the Court eventually found a violation of A4-P4. In the second case, it did not. At any rate, however, the Court seemed to have expanded the exception introduced in N.D. and N.T., insofar as an irregular entry seemed now to suffice for the Court to move on to assess the availability of legal means of entry, whether the applicants had used force or not. See, amongst others, analysis in Di Gianfrancesco, *op. cit.* , p. 698; and Wriedt, V., 'Expanding Exceptions? A.A. and Others v. North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways' (*Strasbourg Observers*, 30 May 2022), https://strasbourgobservers.com/2022/05/30/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/.

that would have still meant that 'expulsion' and 'non-admission' were two distinct concepts, and that the latter was not covered by A4-P4 under certain circumstances. Having chosen the more restrictive option, however, the Court seemed to effectively convey the message that non-admissions were, by default, outside the scope of A4-P4 (as already seen, only under the condition that the respondent State had provided for 'effective' means of legal entry). This is, in a somewhat mitigated manner, what Spain, with the support of France, Italy and Belgium, had pleaded before the Grand Chamber in *N.D. and N.T.* The Court, in principle, had rebutted this argument drawing from its prior jurisprudence. However, following our analysis, it seems safe to conclude that, as Di Filippo has suggested, the Court's confirmation of that earlier jurisprudence was only 'apparent'.[236] Indeed, in practice, the Court reversed (or, at least, created a competing line of jurisprudence to) the findings in *Hirsi* and *Sharifi* with regards to A4-P4 at land borders, in line with the requests of the Spanish and all other intervening Governments.

B. Implicit recognition of a lack of jurisdiction

The Grand Chamber judgment of *N.D. and N.T.* could also lead to another conclusion related to, but perhaps even more disturbing than, the former. Namely, for all practical purposes, the Court seemed to acknowledge that, after all, Spain lacked jurisdiction (in principle, for the purposes of A4-P4 only), in the undefined space comprised between the border and the mobile human line formed by the members of the Guardia Civil. Indeed, it essentially held that the 'special circumstances'[237] in a particular context (one in which 'numerous individuals … attempt[ed] to enter Spanish territory by crossing a land border in an unauthorised manner, taking advantage of their large numbers and in the context of an operation … planned in advance') led, not only to a non-violation of A4-P4, as in *N.D. and N.T.*, but to the very inapplicability of the provision.[238] This became clear only a couple of years later in the case of *M.B. and R.A. v. Spain*.[239] The latter was a very similar application to that of *N.D. and N.T.*, except for the fact that it originated from a storm at the fences of Ceuta, as opposed to those of Melilla, in 2016. However, the Court did not

[236] Di Filippo, M., *op. cit.*, p. 14 [emphasis added].

[237] *ND and NT v Spain [GC]*...cit.para 79.

[238] *Ibidem* para 206.

[239] *MB and RA v Spain* (n 207).

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even adjudge the substance of the case, as the application was struck out at the admissibility stage. The reason was that the applicants had not 'ma[d]e use of the official entry procedures' and, thus, their lack of individual removal decisions had been 'a consequence of their own conduct'.[240] This is particularly striking because, as already discussed, the border asylum office of Ceuta had mostly remained inoperative for five years following its inauguration in 2015. Hence, it is obvious that it was not an effective channel of entry at the time of the facts. Yet, the Court seemed to disregard this fact (or to consider that, in any event, the applicants could have used any of the *many* other channels of legal entry provided by the Spanish authorities), since it found the application 'manifestly ill-founded'.[241]

In short, the Court seemed to accept that, in a specific part of its territory (i.e., at its land borders with Morocco), Spain was exempted of complying with its duties under A4-P4. This conclusion rested uneasily with the Grand Chamber's initial assertions in *N.D. and N.T.* that 'its case-law preclude[d] territorial exclusions'[242] and that 'the Convention [could not] be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction'.[243] In fact, it explicitly contradicted them. The Court seemed to make an exception, perhaps not '*by means of* an artificial reduction in […] its territorial jurisdiction', but certainly with that effect.[244] Now, such an exception was supposed to apply to A4-P4 only. Other provisions, such as Article 3 ECHR, were supposed to remain unaffected by it. This is, at least, what the Grand Chamber appeared to ensure by stating that its ruling '[did] not call into question […] the obligation […] for the Contracting States to protect their borders […] in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*'.[245] However, it remains unclear how the protection gap created under A4-P4 could not affect Article 3 ECHR, for two main reasons. Firstly, as Thym has pointed out, '[w]ithout basic procedural safeguards, it is

[240] *Ibidem* para 23.

[241] *Ibidem* para 24.

[242] *ND and NT v Spain [GC]*...cit.para 106.

[243] *Ibidem* para 110.

[244] *Ibidem* [emphasis added].

[245] *Ibidem* para 232.

notoriously difficult to know whether someone is confronted with a real risk of *refoulement* or not'.[246] Secondly, the Grand Chamber explicitly authorised States to 'refuse entry to their territory to aliens, *including potential asylum-seekers*, who [had] failed, without cogent reasons …, to comply with [the] arrangements [in place] by seeking to cross the border at a different location'.[247] In the light of this, it seems safe to argue, in spite of the Court's grandiloquent assertion to the contrary, that the 'special nature' of the migratory context could *indeed* 'justify an area outside the law where individuals [were] covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention'.[248] In fact, the two main provisions which could reasonably be infringed at the border (i.e., A4-P4 and Article 3 ECHR) had been disabled in practice (once again, in line both with the expectations of Spain and all other intervening States).

3. Bottom-up inspiration in terms of content

Throughout the reading of the judgment of *N.D. and N.T* (and, in particular, of the last thirty paragraphs of the reasoning related to A4-P4, which is where the actual U-turn took place), the reader, who is by now acquainted with the Spanish background, may have experienced an unsettling *déjà vu* feeling.[249] This is unsurprising. Indeed, if we take a closer look at the provision through which the Spanish 'hot returns' were legalised in 2015 and compare it with the Grand Chamber judgment of *N.D. and N.T.* delivered five years later, it is possible to draw significant parallels between both. It seems safe to argue that such parallels were no coincidence, as the Grand Chamber was aware of the Spanish law. Indeed, in spite of being explicitly contrary to A4-P4 as interpreted by the ECtHR until then, the Spanish Government referred to it in its submissions before the Grand Chamber.[250] At any rate, it is possible to identify key elements of the Spanish law (and even, to some extent, of the practice of the Spanish courts) being reproduced, almost *verbatim*, by the ECtHR, as if they had been 'dumped' into the judgment.[251] Interestingly, that

[246] Thym, D., *European Migration Law*, OUP Oxford, 2023, p. 310.

[247] *ND and NT v Spain [GC]*...cit.para 210 [emphasis added].

[248] *Ibidem* para 110.

[249] In particular, in *Ibidem* paras 201–231.

[250] *Ibidem* para 131.

[251] For an observation along similar lines, see Carrera, *op. cit.*, p. 10.

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is the case in four essential points of the judgment without which the Court could not have taken its by now famous U-turn. The first three points gave rise, as a whole, to the 'culpable conduct test', while the fourth refers to the broader impact of the judgment. Let us prove this point under each of them.

A. Irregular, group, violent crossings

The notion of (1) irregular, (2) group and (3) violent crossings was core and central to the judgment of *N.D. and N.T.*[252] Indeed, it constituted the first half of the 'culpable conduct test', which began with the Grand Chamber's observation, in para. 201, that

> the same principle […] also [had to] apply to situations in which *the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force*, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety.[253]

This was a completely novel notion in the jurisprudence of the ECtHR, but not in the Spanish framework. In fact, it was the exact type of scenario to which 'rejections at the border' were supposed to apply at domestic level. This becomes apparent from the first paragraph of the provision through which 'hot returns' entered the Spanish legal order. Admittedly, that first paragraph only referred to 'unauthorised' crossings:

> [a]liens attempting to penetrate the border containment structures *in order to cross the border in an unauthorised manner*, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal entry into Spain.[254]

However, as already seen, that final version was preceded by two earlier drafts which included, respectively, an explicit mention to the 'violent' conduct of the applicants:

> [a]liens attempting to penetrate the border containment structures in order to cross the border in an unauthorised*, clandestine, flagrant or violent* manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, shall be returned in order to prevent their illegal entry into Spain[255]

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[252] For the purposes of this analysis, we shall assume that, by 'force', the Court referred to 'violence'.

[253] *ND and NT v Spain [GC]*...cit.para 201 [emphasis added].

[254] Translation into English taken from the judgment of Ibidem para 33 [emphasis added].

[255] *Proyecto de Ley Orgánica de protección de la seguridad ciudadana de 4 de noviembre of 2014* 105–2...

and to 'group' crossings:

> [a]liens attempting to penetrate the border containment structures in order to cross, *as a group*, the border in an unauthorised manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal entry into Spain.[256]

The Spanish Government essentially repackaged the three elements above and submitted them before Strasbourg. In particular, it argued that (1) 'the applicants had taken part in an illegal storming of the border fences in an attempt to enter Spanish territory without using the designated border crossing points' (i.e., it had been an *unauthorised crossing*), (2) that it had been only one of the many 'violent assaults on the fences' that were regularly organised by smugglers (i.e., there had definitely been some *force* involved), and (3) that it had been 'large-scale' (i.e., that it had been a *group crossing*).[257] These were the actual submissions heard by the judges, and what eventually might have influenced the latter's decision. However, as it becomes apparent, these submissions derived, in turn, from the Spanish law (which, as already explained, was initially contrary to the ECHR).

B. Applicants placing themselves in 'jeopardy'

The irregular, violent, group character of the crossing eventually led the judges to hold, thirty paragraphs later, that 'it was in fact *the applicants who placed themselves in jeopardy* by participating in the storming of the Melilla border fences […], taking advantage of the group's large numbers and using force'.[258]

and to find, as a consequence, a non-violation of A4-P4. This was the first time that the argument of 'applicants placing themselves in jeopardy' was used in the jurisprudence around A4-P4, but would not be the last. Indeed, the Court has since resorted to it twice: the first time, in April 2022, to find by unanimity a non-violation of A4-P4 in *A.A. and Others*,[259] and the second, in July 2022, to declare the application inadmissible in *M.B. and R.A.*[260] At first glance, it remains unclear why the Court made such a statement. Admittedly,

cit., p. 115.

[256] *Proyecto de Ley Orgánica de protección de la seguridad ciudadana de 24 de noviembre of 2014*, p. 28.

[257] *ND and NT v Spain [GC]*...cit.para 128.

[258] *Ibidem* para 231.

[259] *AA and Others v North Macedonia... cit.* para 123.

[260] *MB and RA v Spain*... para 23.

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the applicants in all those cases might have put themselves in a situation of *irregularity* by crossing a land border in an unauthorised manner, but not of *jeopardy*.[261] Yet, the argument of 'jeopardy' or 'voluntary undertaking of risk' had already been used in this context, not in the Spanish law itself, but in the practice of the Spanish courts—and, in particular, in the case of El Tarajal earlier discussed. Indeed, in her decision, through which the case was first dismissed in October 2015, the investigating judge of the court in charge (the *Juzgado de Instrucción n.º 6* of Ceuta) relied on it when holding that '*[t]he migrants took the risk of entering Spanish territory irregularly by swimming, as a group, benefitting from the night, wearing lots of clothes and disregarding* the dissuasive actions both from Moroccan forces as well as from the Guardia Civil'.[262]

This finding is as shocking as it sounds: according to the Spanish court, the death of the 14 migrants had been a consequence of their own conduct. Indeed, it appears to suggest that the victims should have foreseen that they could possibly lose their lives while swimming the bare 30 metres that separated them from the Spanish side of the beach. Leaving aside the substantial differences between both cases, in that one concluded with loss of lives and the other did not, the Grand Chamber arguably followed a similar reasoning in *N.D. and N.T.* Indeed, it seemed to imply that the immediate, forcible removal of the applicants without any procedural guarantee had been a foreseeable consequence (or 'jeopardy') of their participation in the storming at the fences—of which, it must be inferred, the applicants could therefore not *complain*.

C. The obligation to provide for means of legal access

Based on the 'culpable conduct test', an irregular, group, violent border crossing would only deactivate the protection under A4-P4 if the respondent State had not provided for means of legal access. Put otherwise, if States wanted to circumvent their obligations under A4-P4, they had to provide for legal pathways into their territory. This applied, in particular, to States 'like Spain[,] whose borders coincide[d], at least partly, with external borders of the

[261] See, however, Gracia Pérez de Mergelina, D., *op. cit.*, p. 9.

[262] Sánchez, G., 'La Jueza Archiva El Caso Del Tarajal y Carga Sobre Los Inmigrantes La Responsabilidad de Su Muerte', *El Diario* (15 October 2015), https://www.eldiario.es/desalambre/archivado-muerte-personas-frontera-ceuta_1_2433794.html [author's translation from Spanish].

Schengen Area'.[263] In this way, the Court imposed a new obligation on those States aimed at guaranteeing that those who needed it could apply for asylum or international protection. This was certainly a novelty under the ECHR (which did not contain, until then, any asylum-related provision other than the guarantee of *non-refoulement* developed through the jurisprudence under Article 3 ECHR), but not in the Spanish framework. Indeed, as already seen, the provision which introduced the 'hot returns' in Spanish law established, in its third paragraph, that '*[a]pplications for international protection [would] be submitted in the places provided for that purpose at the border crossing points*; the procedure [would] conform to the standards laid down concerning international protection'.[264]

Similar to the irregular, group, violent crossings, the existence of 'border crossing points' also became one of the key submissions of the Spanish Government before the Grand Chamber. Indeed, as Sánchez Legido has noted, throughout the entire judgment, Spain tried by all means to convince the judges that the storms at the fences were 'not only illegal and violent, but also *unnecessary* to claim asylum or attempt to enter Spanish territory'.[265] One of the arguments submitted to prove this point was that both Ceuta and Melilla had asylum offices at the very border (namely, the ones that were opened in March 2015, coinciding with the adoption of the provision that legalised the 'hot returns'). In the light of the reasoning of the Court on this issue, it seems that the Spanish Government succeeded in its attempt.[266] Indeed, the Grand Chamber considered it important to 'take account of *whether […] the respondent State provided genuine and effective access to means of legal entry*' and, as chance would have it, '*in particular border procedures*'.[267] In fact, it considered it so important that it turned it into the second part of the 'culpable conduct test'. This is what eventually allowed the Court to conclude that 'if they indeed wished to assert rights under the Convention, [the applicants] did not make use of the official entry procedures existing for that purpose, and [the lack of individual removal

[263] *ND and NT v Spain [GC]*...cit.para 209.

[264] *Ibidem* para 33.

[265] Sánchez Legido , *op. cit.,* p. 254 [author's translation from Spanish and emphasis added]; see, in particular,N*D and NT v Spain [GC]*...cit.para 128.

[266] In fact, the Court explicitly commended 'the efforts undertaken by Spain' in this regard inN*D and NT v Spain [GC]*...cit.para 232.

[267] *Ibidem* para 201 [emphasis added].

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decisions] was thus a consequence of their own conduct'.[268]

D. Compatibility with the obligation of *non-refoulement*

As I have argued elsewhere, one of the most pressing questions that arose from the judgment of *N.D. and N.T.* is the 'position in which Article 3 ECHR [was] left'.[269] The judges were probably aware of it, and tried to offset this concern by ensuring that '[their] finding [did] not call into question … *the obligation … for the Contracting States to protect their borders … in a manner which complie[d] with the Convention guarantees, and in particular with the obligation of* non-refoulement'.[270]

This closing statement was somewhat confusing, to say the least, considering that, only a few paragraphs earlier, the Grand Chamber had openly stated that States could 'refuse entry to their territory to aliens, *including potential asylum-seekers*, who ha[d] failed, without cogent reasons …, to comply with [the] arrangements [in place] by seeking to cross the border at a different location'.[271]

However, it was, once again, quite reminiscent of the Spanish provision that legalised the 'hot returns' (and, in particular, of its second paragraph), which established that '[the] return [of those who were intercepted at the fences] [would] in all cases be carried out *in compliance with the international rules on human rights and international protection recognised by Spain*'.[272]

Indeed, both highlighted States' duty to comply with human rights guarantees, but failed to specify how they are supposed to do it in practice (especially as far as the prohibition of *refoulement* goes), considering that the Court explicitly allowed States to immediately remove migrants under certain circumstances. Both the Spanish provision and the *N.D. and N.T.* judgment were, hence, equally evasive in this sense, in that they avoided, as Lübbe has called it, the 'elephant in the room'—i.e., to explain how States can engage in

[268] *Ibidem* para 231.

[269] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?' *op. cit.*.

[270] *ND and NT v Spain [GC]*...cit.para 232 [emphasis added].

[271] *Ibidem* para 210 [emphasis added].

[272] *Ibidem* para 33.

'hot returns' while effectively guaranteeing Article 3 ECHR.[273]

In the light of the above, it seems certainly difficult to maintain that the ECtHR *invented* in the abstract the requirements that would determine, from then on, access to protection under A4-P4. Indeed, it seems that the Court drew them, to a great extent, from the Spanish framework. It arguably did so by importing the Spanish Government's submissions (which derived, in turn, from two decades of Spanish law and practice originally contrary to the ECHR) into its own jurisprudence. In this way, it seems safe to confirm our initial suspicion that what has been branded as the 'culpable conduct test' is, indeed, the result of an obvious 'bottom-up' influence of Spain on the ECtHR.

4. Methodological issues

Far from being a merely anecdotal or unimportant observation, the bottom-up influence, or inspiration, of the Spanish framework on the judgment of *N.D. and N.T.* could turn out to be quite problematic. Indeed, it may raise substantive issues regarding, at least, two Convention articles (namely, Articles 1 and 53 ECHR), which are dealt with below, apart from serious questions related to the very nature of A4-P4 which, due to their breadth and complexity, shall be discussed elsewhere.

A. Article 1 ECHR

The first article concerned is Article 1 ECHR. As Schabas has pointed out, this provision dictates, amongst other things, that any given Contracting State must make sure that 'its legislation is consistent with the Convention'.[274] Of course, this implies that national laws should *generally* evolve in accordance with the ECHR, as interpreted by the ECtHR, and not the other way round. In this case, however, the opposite was true. As already seen, the Court did not limit itself to not condemn Spain (which is, in itself, quite striking, considering that Spain came before it with clearly offending law and practice). On the contrary, it also incorporated the latter's arguments into its own jurisprudence, and turned them into the new protection standard under A4-P4 across the

[273] Lübbe, A., 'The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?' (*Verfassungsblog*, 19 February 2020), https://verfassungsblog.de/the-elephant-in-the-room/.

[274] Schabas, W. A., *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p. 90.

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Convention States. This is certainly something infrequent (at least in the way it happened here).

Admittedly, when evolving the interpretation of rights, the Court does not necessarily have to follow what Kleinlein has called a 'constructive' or 'top-down' approach, in which the evolution of the interpretation of rights is 'accomplished by the Court', and then imposed on States.[275] Indeed, the Court may also display what he has called an 'analytic' or 'bottom-up' approach, in which the evolution of rights is 'achieved in the practice of Convention States', and then elevated to ECtHR jurisprudence.[276] As Kleinlein has noted, '[t]he ECtHR continuously crystalli[s]es and consolidates the (evolving) minimal human rights protection standards identified in the practice of different organs of the … State Parties … in its case law'.[277] Put otherwise, the Court sometimes draws inspiration from States, and that is *fine*, but only in a specific way.[278] In fact, this 'bottom-up' influence has played a crucial role in the advancement of rights in topics such as the recognition of transsexuals'

[275] Kleinlein, T., 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution', *International and Comparative Law* Quarterly, nº 68, 2019, pp. 91, p. 106.

[276] *Ibidem* p. 105.

[277] *Ibidem* p. 106.

[278] In fact, according to Bjorge, '[i]t is to be expected that the legal reasoning of the European Court would borrow explicitly or implicitly from some of the highest jurisdictions at the national level'. See Bjorge, E., 'Bottom-up Shaping of Rights: How the Scope of Human Rights at the National Level Impacts upon Convention Rights' in Brems, E., and Gerards, J., (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2014, p. 211.

rights,[279] the prohibition of torture[280] or mandatory life sentence.[281] Usually, such influence stems from the identification of (a) an improvement in the human rights' protection level in the domestic law of the respondent State (what Mowbray has referred to as 'evolving domestic understandings'),[282] (b) consensus, which Kleinlein defines as 'a general direction in which a certain area of the law is developing or changing in a certain number of Convention States',[283] or (c) an 'international trend' in a number of States outside the Convention.[284] In particular, as Kleinlein has pointed out, the 'bottom-up' approach is 'especially relevant in areas […] affected by technological, scientific and medical developments, by societal changes or by shifting moral or ethical convictions'.[285] As such, it is arguably an important tool for the realisation of the long-standing Court's assertion that the ECHR is a living instrument that 'must be interpreted in the light of present-day conditions'.[286] In fact, far from what could seem at first sight, the 'top-down' and 'bottom-up' approaches are not mutually exclusive. Rather, they seem to be two parts of the same

[279] In *Christine Goodwin v the United Kingdom* No. 28957/95 (ECtHR [GC] 11 July 2002), the Grand Chamber identified an 'international trend' (para 84-85) in States outside the Council of Europe to recognise gender re-assignment, which it used to depart from previous jurisprudence and find that the United Kingdom had violated the applicant's rights under Article 8 ECHR; for further analysis, see Mowbray, A., 'An Examination of the European Court of Human Rights' Approach to Overruling Its Previous Case Law', *Human Rights Law Review*, nº 9, 2009, pp. 179, 194.

[280] In *Selmouni v France* No. 25803/94, para 101 (ECtHR [GC] 28 July 1999), the Grand Chamber considered that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in [the] future', as 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties ... require[d] greater firmness in assessing breaches of the fundamental values of democratic societies'; for further analysis, see Dzehtsiarou, K., 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal*, nº 12, 2011, pp. 1730, 1734.

[281] In *Stafford v the United Kingdom* No. 46295/99 (ECtHR [GC] 28 May 2002), the Grand Chamber departed from its earlier precedent in the light of the developments at the domestic level (para 69); for further analysis, see also Mowbray, A., *op. cit.*, pp. 195.

[282] See Mowbray, A., *op. cit.*, pp. 195-198.

[283] Kleinlein , *op. cit.*, p. 108.

[284] See Mowbray, A., *op. cit.*1, p. 94.

[285] Kleinlein , *op. cit.*,, p. 106.

[286] *Tyrer v the United Kingdom* No. 5856/72, para 31 (ECtHR 25 April 1978).

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process.[287] Indeed, what begins as a 'bottom-up' inspiration ends up feeding into the Court's jurisprudence (which, in turn, is eventually imposed on States through the 'top-down' approach).

As already seen, the case of *N.D. and N.T.* reveals a strong 'bottom-up' inspiration of the Court on the Spanish framework. In the light of the above, this is not problematic in itself, insofar as the 'bottom-up' approach is an appropriate, and even necessary, way of evolving the interpretation of rights at the ECtHR. However, as it stands, the 'bottom-up' inspiration in this case was, to say the least, quite atypical. In the first place, it was not used to expand rights, as it is usually the case, but to restrict them. Second, it was not triggered by an improvement into the human rights' protection at the domestic level, but quite the opposite. Rather, it stemmed from an offending *de facto* State practice which later evolved into offending law. Likewise, it did not seem to follow any 'consensus', in that only a limited number of Convention States have legalised pushbacks, and most of them only following the judgment. Rather, it appears that it could have been the result of 'pressure' exerted by States.[288] The fact that three Governments (notably, those of three founding members of the Council of Europe, including France, which had always been one of the Court's most 'supportive' States)[289] joined the case to support Spain as third-party interveners was quite 'unusual' and should not be underestimated.[290] In fact, the Court noted this fact, and considered that it showed 'the public's

[287] See, in this regard, Kleinlein , *op. cit.*, p. 110 when he refers to 'the progressive development of human rights in both an analytic and a constructive mode, bottom-up and top-down'.

[288] Pichl and Schmalz , *op. cit.*.

[289] Erlings, E., '"The Government Did Not Refer to It": SAS v France and Ordre Public at the European Court of Human Rights', *Melbourne Journal of International Law,* nº 16, 2015, pp. 587, 606.

[290] See González Vega, *op. cit.*, p. 3 [author's translation from Spanish]; Fernández Vacas, F., 'Sombras, y algunas luces, en las sentencias de la Gran Sala del TEDH y del TCE de 2020 sobre expulsiones sumarias en frontera', *Revista Española de Derecho Internacional*, nº 73, 2021, p. 371; Cuadrón Ambite, S., 'Las devoluciones en caliente y el derecho a la defensa del extranjero en frontera' *Revista Española de Derecho Internacional*, nº 73, 2021, p. 387. In fact, over the last few years, the EU more generally has shown a tendency to disregard clear violations of the prohibition on collective expulsion of aliens at borders both by Member States and its neighbours, through the codification of the 'non-entry' fiction through soft-law instruments and the adoption of the 'New Pact on Migration and Asylum'. This could have certainly been a further reason behind the Grand Chamber's reversal in N.D. and N.T.

interest in the case' and that 'the impact of th[e] case [went] beyond the particular situation of the applicants'.[291] Finally, the 'bottom-up' inspiration in this case was not justified by any new scientific or societal development, which is what usually compels the Court to evolve its jurisprudence in the light of 'present-day conditions'. Instead, it could have arguably been one of those instances in which, as Helfer and Voeten have argued, the Court was 'responding to political signals from … [S]tates that Strasbourg judges ha[d] been too aggressive in expansively interpreting the Convention, especially in cases involving longstanding democracies'.[292]

Admittedly, as I have concluded elsewhere, the expansive interpretation of A4-P4 in *Hirsi*, through which the provision was extended to non-admission scenarios, 'ticked "all the boxes" to trigger a strong reaction from the part of States'.[293] Indeed, it imposed a new obligation on the latter that had been expressly rejected by the drafters of Protocol No. 4 ECHR;[294] it did so by expanding an (at least, in theory) 'absolute' prohibition which, as such, could not, in principle, be circumvented through any exception or balancing against other rights or interests;[295] and, moreover, was not based on an entirely sound reasoning.[296] This is the reason why, as I have argued elsewhere, the Grand Chamber may have tried to surreptitiously 'correct' its former jurisprudence beginning with *N.D. and N.T.*[297] In doing so, as Di Filippo has put it, the Grand Chamber would have now become 'more sensitive to States' concerns about the practical impossibility to protect their borders due to a perceived

[291] *ND and NT v Spain [GC]*...cit.para 78.

[292] Helfer, L. R., and Voeten, E., 'Walking Back Human Rights in Europe?', *European Journal of International Law,* nº 31, 2020, pp. 797, 823.

[293] Bosch March, C., 'Revisiting Hirsi Jamaa and Others v Italy – carving a dubious new duty out of Protocol No 4 ECHR?' , *op. cit.*, p. 522.

[294] See my analysis in *Ibidem* pp. 520-521.

[295] Council of Europe, 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto' (1976) 428.

[296] Bosch March, C., 'Revisiting *Hirsi Jamaa and Others v Italy* – carving a dubious new duty out of Protocol No 4 ECHR?' , *op. cit.*, p. 522.

[297] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?', *op. cit.*; see, along similar lines, SÁNCHEZ LEGIDO. *op. cit.* , p 257.

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"excess" of guarantees afforded by the … Court's [former] case law'.[298] In short, the 'bottom-up' inspiration of the Court in *N.D. and N.T.* would not have fit within the usual 'bottom-up' method of the Court in any way, and disrupted the 'top-down' approach in relation to another ECHR provision, as follows.

B. Article 53 ECHR

The second article concerned, in connection with the above, is Article 53 ECHR. This provision, intended as a 'safeguard for existing human rights', is supposed to ensure that the ECHR is not used as a pretext to lower the level of protection recognised elsewhere (e.g., in the domestic laws of a State or in another international instrument to which the concerned State is a party).[299] At the same time, Article 53 ECHR requires that the level of protection guaranteed by the ECHR is the 'minimum standard' across States.[300] In other words, this provision prevents States, let alone the ECtHR, from offering a level of protection below that minimum. Of course, as confirmed by the Court, 'nothing prevents the Contracting States from adopting a broader interpretation entailing a stronger protection of the rights and freedoms in question within their respective domestic legal systems'.[301] In the same way, as Gerards has pointed out, if a State used to offer a higher level of protection than the ECHR and then decides to reduce it, there is admittedly nothing that prevents it from doing so, but 'the level provided after a national reduction of an existing "surplus" must still be consistent with the Convention'.[302] In short, Article 53 ECHR simply acts as a bottom line for the 'limited catalogue of rights' of the ECHR and its Protocols.[303]

The judgment in *N.D. and N.T.* arguably deviated from the above in two

[298] Di Filippo, M., *op. cit.*, p. 14; see also González Vega, *op. cit.*, p. 3; and Fernández Vacas, F., *op. cit.*, p. 372.

[299] Council of Europe 'European Convention on Human Rights'... cit., Art. 53.

[300] Concurring opinion of Judge Wojtyczek in the *Case of National Union of Rail, Maritime and Transport Workers v the United Kingdom* No. 31045/10, para 3 (ECtHR 8 April 2014).

[301] *Gestur Jónsson and Ragnar Halldór Hall v Iceland* No. 68273/14 68271/14, para 93 (ECtHR [GC] 22 December 2020).

[302] Gerards, J., 'Article 53 ECHR and Minimum Protection by the European Court of Human Rights', *European Convention on Human Rights Law Review*, nº 3, 2022, pp. 451, 478.

[303] Concurring opinion of Judge Wojtyczek in the *Case of National Union of Rail, Maritime and Transport Workers v the United Kingdom... cit.* para 3.

ways. First and foremost, the Grand Chamber failed to condemn Spain even though the protection that the latter offered under A4-P4 was clearly below what was required by the ECtHR until then. Hence, the Court would have departed from Article 53 ECHR in that it did not compel Spain to bring up its protection level. Second, and even more strikingly, the Grand Chamber furthermore incorporated the submissions of the Spanish Government into its own jurisprudence, leading to a reduction of the protection under A4-P4. Put otherwise, not only did the Court not bring the State protection up, but actually lowered the ECHR protection to the State level, twisting the predicates of Article 53 ECHR and even the whole idea of human rights.

IV. TOP-DOWN IMPACT BACK AT HOME

The last section of this paper focuses on the reception of the *N.D. and N.T.* judgment back on the Spanish system. As such, it essentially refers to events that took place after February 2020. However, to properly understand the latter, it is necessary to briefly return to 2015 and, in particular, to the moment in which the provision legalising the 'hot returns' was introduced in the Spanish legal order. Indeed, some important facts that occurred shortly after are key to understanding the impact of the judgment back at the State level (which, as will be seen below, has been just as puzzling, if not more, than the Strasbourg judgment itself).

1. An apparent political confrontation

As already seen, the Spanish 'hot returns' were made into law without great difficulty. Indeed, the then conservative Government led by Mr Mariano Rajoy, which adopted the 'rejections at the border', had an absolute majority in the Spanish Congress at that time. This essentially allowed them to pass any laws they deemed fit without the approval of the rest of political parties.[304]

[304] However, the way in which the provision was actually introduced was severely criticised. Indeed, it was done as a mere 'amendment', whilst it should have triggered a fully fledged legislative initiative, considering the significant novelty it brought about. In this way, it escaped the necessary scrutiny on technical aspects and its compatibility with the Spanish legal order. See a commentary in. Gracia Pérez de Mergelina. D., *op. cit.*, pp. 4–5; and Martínez Escamilla, M., and Sánchez Tomás, J. M., 'La vulneración de derechos en la Frontera Sur: de las devoluciones en caliente al rechazo en frontera', *Revista Crítica Penal y Poder*, nº 18, 2019, pp. 28, 34.

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However, in May 2015, only three weeks after the entry into force of the provision, 114 members of Parliament from different political parties of the opposition challenged, as a block, the latter's constitutionality before the Spanish Constitutional Court (henceforth, SCC), as will be discussed below.[305] This could mistakenly lead to the conclusion that the only political party that was in favour of the 'hot returns' was the one in power in 2015 (i.e., the conservatives), whilst all the others were against them. This is, in fact, what could be inferred from the public stance that conservatives and socialists (i.e., the two major political parties that had been alternating in power for decades) have traditionally adopted on the issue. One of the most illustrative examples in this regard is the approach towards the very ratification of Protocol No. 4 ECHR. In 2000, on the 50th anniversary of the ECHR, Spain was one of the nine countries (out of a total of 41 member States back then) which had not ratified this instrument. The socialists, who were in the opposition at that time, urged the conservative Government of Mr José María Aznar to ratify it.[306] The latter refused to do so, as that 'would imply a very high likelihood of judgments confirming [its] violation …, which would lead to the obligation of modifying the … legal reality in conformity with Strasbourg's requirements'.[307] Eventually, Spain ratified it in 2009 under the socialist administration of Mr José Luis Rodríguez Zapatero. This might have suggested, in principle, a more sensitive attitude towards migrants' rights.

However, upon a closer look, it becomes evident that this was simply not true. On the contrary, the increasingly restrictive policies implemented by the Spanish authorities in this sense have come from both parties in equal shares. For instance, while the construction of the fences of Ceuta and Melilla was completed under the conservative Government of Mr José María Aznar

[305] Garea, F.,, 'La Oposición Recurre La "Ley Mordaza" Al Vulnerar 12 Puntos de La Constitución', *El País* (20 May 2015), https://elpais.com/politica/2015/05/20/actualidad/1432114191_278013.html?event_log=oklogin.

[306] De la Cuadra, B., 'El PSOE Pide Ratificar Dos Protocolos Europeos Sobre Garantías a Extranjeros', *El País* (10 June 2000), https://elpais.com/diario/2000/06/10/espana/960588027_850215.html; and again in 2004, in Bonifacio De la Cuadra, 'El PSOE Propone Ampliar El Compromiso de España Con Los Derechos Humanos', *El País* (7 June 2004, https://elpais.com/diario/2004/06/07/espana/1086559219_850215.html.

[307] Marcos, P., 'El PP Se Niega a Ratificar Tres Protocolos Europeos Que Protegen a Los Inmigrantes', *El País* (24 May 2001), https://elpais.com/diario/2001/05/24/espana/990655217_850215.html?event_log=oklogin [author's translation from Spanish].

(1996-2004), the fence of Ceuta was actually planned by the socialist party of Mr Felipe González before they left the Government in 1996.[308] Later on, 'hot returns' became a systematic State practice in 2005, under the socialist Government of Mr José Luis Rodríguez Zapatero (2004-2012). It was also the latter who increased the height of the fences and introduced the controversial razor-barbed wires thereon in 2006.[309] However, it is not necessary to go back so far in time to find relevant examples. In 2017, the then leader of the socialist party and current Prime Minister, Mr Pedro Sánchez, openly condemned the 'rejections at the border',[310] and committed to abolishing them if he came to power.[311] One year later, when he became the new Spanish Prime Minister, not only did he not do so, but has also carried them out extensively ever since.[312] Moreover, he came to power in the summer of 2018, i.e., only a few months after the salient conservative administration had requested a referral of the

[308] Jiménez Gálvez, J., '28.000 Inmigrantes Eluden Las Vallas Pese a Los 140 Millones Invertidos', *El País* (21 October 2014), https://elpais.com/politica/2014/10/01/actualidad/1412173060_960495.html.

[309] Sánchez Tomás, *op. cit.*, p. 3; 'Pampa' Sainz, P., 'El PSOE y Sus Políticas Migratorias: Esa Vieja Costumbre de Encerrar', *El Salto* (30 June 2018), https://www.elsaltodiario.com/migracion/el-psoe-y-sus-politicas-migratorias-esa-vieja-costumbre-de-encerrar.

[310] Bartolomé, A., 'Sánchez, Del Rechazo a Las Devoluciones En Caliente a La Expulsión Fulminante', *La Razón* (19.05.2021), https://www.larazon.es/espana/20210519/fsi5kepr2jbplad2h2zelrhane.html.

[311] Testa, G., 'El PSOE Promete Quitar Las Concertinas y Derogar El "Rechazo En Frontera" Si Llega a La Moncloa', *Ceuta al Día* (21 October 2015), https://www.ceutaldia.com/articulo/politica/psoe-promete-quitar-concertinas-y-derogar-rechazo-frontera-llega-moncloa/20151021141406144846.html.

[312] For instance, following the storm at the Melilla border on 24 June 2022, during which some 1,700 migrants attempted to enter Spain irregularly and at least 23 of them died in an avalanche. The Guardia Civil initially recognised that they had enforced 101 'rejections at the border'. Yet, the investigation of the Spanish Ombudsman concluded that this figure could be almost five times higher (470 migrants). See María Martín, 'El Defensor Del Pueblo Concluye Que Interior Incumplió La Ley En La Tragedia de La Frontera de Melilla', *El País* (14 October 2022), https://elpais.com/espana/2022-10-14/el-defensor-del-pueblo-concluye-que-interior-incumplio-la-ley-en-la-tragedia-de-la-frontera-de-melilla.html; or, one year earlier, following the arrival to Ceuta of 8,000-10,000 individuals in one single day. See Martín, M., 'Marlaska Defiende La Legalidad de Todos Los Retornos En La Crisis de Ceuta, Pero Acnur Denuncia Posibles Devoluciones Ilegales', *El País* (25 June 2021), https://elpais.com/espana/2021-06-25/marlaska-defiende-la-legalidad-de-todos-los-retornos-en-la-crisis-de-ceuta-pero-acnur-denuncia-posibles-devoluciones-ilegales.html.

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case of *N.D. and N.T.* to the Grand Chamber.[313] Under Article 37 ECHR, his new left-wing Government could have discontinued the case had they agreed with the Chamber's unanimous condemnation of the Spanish practice.[314] Yet, they chose not to do so, and actually defended the case before the Grand Chamber using similar arguments to those that had been put forward by the conservative Government at the Chamber hearing.[315] In short, it seems safe to argue that the only difference between the two major Spanish political parties with regards to 'hot returns' was their apparent stance thereto. While one has been relatively *upfront* about 'hot returns' by legalising them (after 15 years of clandestinity and only because they had no other choice if they did not want to discontinue them), the other has oscillated in its position depending on whether it was in the opposition or in power. However, in practice, both have supported the practice in similar ways. This may be helpful to understand the subsequent developments at the SCC.

Before moving forward, it is worth saying a few words about the latter. Contrary to what might be expected, the SCC is not the highest court in the country. Sometimes, it is regarded as such, and arguably for a good reason. Indeed, it has the power to overturn the decisions of the Supreme Court (which is, in fact, the highest court in the country) if these are contrary to the Spanish Constitution, while the contrary is not possible. The reason is that the SCC is the final interpreter of the Spanish Constitution. As such, it also has the authority to void domestic laws that contravene the latter, as well as to hear cases of individuals who consider that their fundamental rights have been violated (such as the one brought by the victims of the tragedy of El Tarajal which is currently pending before it, as already discussed). However, it is not a proper 'court', insofar as it is not included in the hierarchy of courts that make up the Spanish judiciary. In fact, its twelve members do not necessarily have to be judges, but may also include lawyers, prosecutors or professors meeting

[313] *ND and NT v Spain [GC]*...cit.para 9.

[314] Article 37(1)(a) ECHR establishes that '[t]he Court may at any stage of the proceedings decide to strike an application out of its list of cases where … the applicant does not intend to pursue his application'.

[315] Oviedo Moreno, C.,'A Painful Slap from the ECtHR and an Urgent Opportunity for Spain' (*Verfassungsblog*, 14 February 2020), https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/.

certain requirements and, very importantly, they are politically appointed.[316] In fact, the SCC is famous for having an openly declared 'progressive' and 'conservative' wing, whose proportions may vary from time to time (e.g., at the end of 2022, it was made up of seven 'progressive' and five 'conservative' members).[317] Of course, the composition of the SCC may influence the latter's decisions (although not necessarily, if its members leave their personal views aside in the exercise of their duties, which is sometimes the case).[318] In either case, it comes as no surprise that these dynamics played a role when the SCC was confronted with thorny issues that typically set both wings at loggerheads, such as abortion[319] or euthanasia.[320] However, as already seen, when it came to 'hot returns', there seemed to be a tacit consensus amongst the two major Spanish political parties. It would be necessary to wait for five years to find out whether this consensus would also influence the decision of the SCC.

2. Challenging the constitutionality of the 'rejections at the border'

A. Before the SCC judgment

Following the 'historical disappointment' amongst academics and human rights' defenders after the *N.D. and N.T.* judgment,[321] high hopes were placed on the SCC.[322] The latter had deliberately held off its verdict on the (in) constitutionality of the 'rejections at the border' for as long as the issue was

[316] Brunet, J. M., 'La Mayoría Progresista Del Constitucional No Logra Pactar Quién Será El Presidente Del Tribunal', *El País* (10 January 2023), https://elpais.com/espana/2023-01-10/la-mayoria-progresista-del-constitucional-no-logra-pactar-quien-sera-el-presidente-del-tribunal.html.

[317] 'Diez Claves Para Entender La Renovación Del Tribunal Constitucional' (*Universidad Complutense de Madrid*, 21 December 2022), https://www.ucm.es/otri/noticia-que-pasa-tribunal-constitucional-ucm.

[318] *Ibidem*.

[319] Brunet, J. M., 'El Constitucional Avala La Ley de Plazos Del Aborto', *El País* (9 May 2023), https://elpais.com/espana/2023-05-09/el-tribunal-constitucional-cierra-hoy-el-debate-sobre-el-aborto-con-el-aval-a-la-ley-de-plazos-vigente.html.

[320] Brunet, J. M., 'El Tribunal Constitucional Rechaza El Recurso Del PP Contra La Ley de Eutanasia', *El País* (13 September 2023), https://elpais.com/espana/2023-09-13/el-tribunal-constitucional-rechaza-el-recurso-del-pp-contra-la-ley-de-eutanasia.html.

[321] Pichl and Schmalz, *op. cit.*

[322] Oviedo Moreno, *op. cit.*

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still pending in Strasbourg.[323] This is understandable, considering the great importance that the SCC usually gives to the ECHR, as interpreted by the ECtHR. Hence, it is obvious that the SCC planned to take into account the *N.D. and N.T.* ruling to come up with its own verdict. However, as Presno Linera has argued, that did not necessarily mean that it was going to follow it.[324] In fact, according to Oviedo Moreno, it *did not have to* do so.[325] There are arguably two main reasons for that. First, the guarantees afforded by the Spanish Constitution were potentially higher than the one under A4-P4 in the light of the new interpretation of the ECtHR. However, as already seen, according to Article 53 ECHR, this could not be used as a pretext for Spain to lower its protection level. Second, the task of the SCC was to assess the 'rejections at the border' in the light, not of the ECHR, but of the Spanish Constitution. Admittedly, if the ECtHR had found that the practice was contrary to the ECHR, the SCC should have also found that it was contrary to the Spanish Constitution. However, the opposite was not necessarily true. Indeed, as Presno Linera has put it, 'if something is not compatible with the ECHR, it is not compatible with the Spanish Constitution, but not everything that is compatible with the ECHR is also compatible with the Spanish Constitution'.[326] Put otherwise, the SCC had the choice (and, arguably, even the duty) *not* to follow Strasbourg on this occasion. The decision of the SCC would finally come in November 2020 (accompanied, nonetheless, by a strong dissenting opinion by one of the sitting judges).[327]

B. The SCC judgment

[323] Villanueva N., 'El Tribunal Constitucional, a La Espera de Estrasburgo Para Decidir Si Tumba Las «devoluciones En Caliente»', *ABC* (12 February 2020), https://www.abc.es/espana/abci-tribunal-constitucional-espera-estrasburgo-para-decidir-si-tumba-devoluciones-caliente-202002120212_noticia.html.

[324] Presno Linera, M., 'Algunas Consideraciones a Propósito de Los Efectos de La Sentencia Del Tribunal Europeo de Derechos Humanos Sobre Las «devoluciones En Caliente»' (*El derecho y el revés*, 14 February 2020), https://presnolinera.wordpress.com/2020/02/14/algunas-consideraciones-a-proposito-de-los-efectos-de-la-sentencia-del-tribunal-europeo-de-derechos-humanos-sobre-las-devoluciones-en-caliente/.

[325] Oviedo Moreno, *op. cit.*

[326] Presno Linera *op. cit.* [author's translation from Spanish]; along the same lines, see De Lucas, J., 'El Derecho contra los derechos. Un comentario a la sentencia «N.D. y N.T. contra España» del Tribunal Europeo de Derechos Humanos', *Teoría & Derecho*, 2020, pp. 84, 92.

[327] *STC 172/2020* (Spanish Constitutional Court 19 November 2020).

a. The arguments of the parties

In short, the arguments of the parties could be summarised as follows. On the one hand, the applicants argued that the provision at stake introduced the possibility of removing irregular migrants in a mass, indiscriminate way. In their view, the 'rejections at the border' introduced an unnecessary exception to the procedures laid out under Spanish law, which already established a specific procedure with all due guarantees to remove aliens apprehended while entering irregularly into the country.[328] They argued that this exception, characterised by an utter lack of procedure, violated three articles of the Spanish Constitution: (1) the principle of legality and legal certainty under Article 9.3; (2) the judicial oversight of the legislative activity and the legality of administrative acts under Article 106; and (3) the principle of effective protection under Article 24.1), and that it prevented access to a fourth right (namely, the right of asylum under Article 13.4). As a consequence, they also alleged that the 'rejections at the border' contravened the ECHR, in that they made it impossible to guarantee the principle of *non-refoulement* that the ECtHR had developed through its jurisprudence.[329] On the other hand, the Spanish Government considered that the new provision filled 'a legal vacuum', in that it applied *before* the other procedures laid out in Spanish law kicked in.[330] Indeed, they considered that the individuals targeted by it had not entered Spain, either *de iure* or *de facto*, but that they were only attempting to do so. As such, they could not avail of the other procedures, which applied to non-nationals *already* present on Spanish territory. In fact, according to the Spanish Government, 'beyond the respect for their personal dignity, … these individuals [did] not enjoy the fundamental rights recognised to foreigners who *are* in Spain'.[331]

b. The reasoning of the SCC

In the light of the arguments of the parties, the SCC began its reasoning by clarifying that: (1) migrants entered Spanish territory as soon as they crossed the border (i.e., not the fences and/or the police line, as pretended by the Spanish Government); (2) the fences of Ceuta and Melilla, as well as the border crossing points, were entirely built on Spanish soil; (3) Spain could not

[328] *Ibidem* at 51.

[329] *Ibidem* at 46–47.

[330] *Ibidem* at 47 [author's translation from Spanish].

[331] *Ibidem* at 13 [author's translation from Spanish and emphasis added].

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unilaterally modify the location of the border, even if that was only for the purposes of its immigration law, as that would violate, amongst other things, the principle of legal certainty established under Article 9.3 of the Spanish Constitution; and (4) even assuming the 'rejection at the border' took place outside Spanish territory, it would still be carried out by Spanish police officers, so the migrants concerned would anyways be under Spanish jurisdiction.[332] In other words, it flatly rejected the concepts of 'operational border' and 'no man's land', and confirmed Spain's full jurisdiction over the 'rejections at the border'. In this sense, the SCC reasoning was arguably compelling and seemed to follow that of the Grand Chamber in this sense.

However, in a way which is also reminiscent of the Grand Chamber judgment, the reasoning of the SCC adopted a different tone from that moment on, which led to other 'not so plausible' findings, as Martínez Escamilla has put it.[333] Firstly, it did not consider it 'unreasonable or unjustified' to establish a separate, specific procedure for Ceuta and Melilla based on the 'singularity of their geographical location' alone.[334] As Puerto Calvo has noted, it is 'shocking' that the point of departure of the SCC are not the applicable legal guarantees 'in absolute terms, but the concrete situation in a particular geographical area'.[335] However, to support this point, the SCC relied on the Grand Chamber reasoning, according to which the Spanish practice was not contrary to A4-P4, considering that Spain had provided for means of legal access and the applicants had nonetheless attempted to enter Spanish territory in a large group and using force. However, it noted that the latter two aspects (i.e., the large group and the use of force) were not necessary. In fact, the mere attempt to enter Spain irregularly sufficed.[336] According to Fernández Pérez, the SCC went in this sense 'further' than the Grand Chamber, in that it considered the large group and the use of force as accessory, rather than

[332] *Ibidem* at 51–52.

[333] Martínez Escamilla, M., 'Las "devoluciones en caliente" en el asunto N.D. y N.T. contra España (sentencia de la gran sala TEDH de 13 de febrero de 2020)', *Revista Española de Derecho Europeo*, 2021, pp. 309, 333.

[334] *STC 172/2020* ... cit., p. 52 [author's translation from Spanish].

[335] Solar Calvo, P., 'Devoluciones en caliente: Análisis de la reciente STC desde una perspectiva europea', *Revista Aranzadi Unión Europea*, 2021, pp. 1, 6 [author's translation from Spanish].

[336] *STC 172/2020* (n 326) 53.

cumulative, requirements under the culpable conduct test.[337] Based on our earlier analysis, however, this would not be entirely true. Indeed, as already discussed, the Grand Chamber judgment was quite ambiguous, as it could arguably be read in both ways. Therefore, the SCC did not exceed the limits established by the Grand Chamber in this sense. Rather, it directly chose the most restrictive option amongst both, and made it its own (which, as already discussed, matches the subsequent evolution of the interpretation of A4-P4 at the ECtHR). However, this was already an indication of the path the SCC was about to walk.

Subsequently, when it comes to the 'legal nature' of the provision, the SCC considered that the purpose of the 'rejections at the border' was to 'immediately restore the legality violated by the attempted irregular crossing of a particular land border'.[338] In this sense, the SCC argued, no procedure *as such* was necessary.[339] According to it, the only indispensable requirement was that the individuals affected by such a measure could submit their cases to the courts if they considered that their rights had been infringed. However, this point is, in itself, quite 'debatable', as Martínez Escamilla has put it, for two main reasons.[340] In the first place, as Judge Balaguer Callejón convincingly argued in her dissenting opinion, the 'rejection at the border', understood as a measure geared towards 'immediately restoring the legality' without any procedure should in that case apply, at most, to the *interception* of migrants, but not to their *removal* to Morocco.[341] In fact, the latter implies the 'physical transfer' of individuals from a State's jurisdiction to another State's jurisdiction, which cannot be done without all due guarantees.[342] In the second place, as Martínez Escamilla has argued, the 'rejections at the border' are inherently

[337] Fernández Pérez, A., 'La ilegalidad del rechazo en frontera y de las devoluciones "en caliente" frente al Tribunal de Derechos Humanos y al Tribunal Constitucional', *Cuadernos de Derecho Transnacional,* nº 13, 2021, pp. 190, 204 [author's translation from Spanish].

[338] *STC 172/2020* (n 326) 53 [author's translation from Spanish].

[339] This point has been very criticised by the doctrine. See, amongst others, Fernández Vacas (n 289) 370; Martínez Escamilla, M., *op. cit.*, pp. 333–34.

[340] Martínez Escamilla, M., *op. cit.*, p. 333.

[341] Dissenting opinion of Judge Balaguer Callejón in *STC 172/2020* (n 326) 68 [author's translation from Spanish].

[342] Dissenting opinion of Judge Balaguer Callejón in Ibidem [author's translation from Spanish].

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'incompatible' with the requirement of judicial review.[343] Indeed, as she has noted, in order to seek redress before a domestic court, the affected person will have to prove first that she has been a victim of a violation, 'which is virtually impossible, considering the lack of individualisation'.[344] Yet, the SCC ignored such considerations, and held that the 'rejections at the border' introduced in the first paragraph of the provision were not, in this regard, contrary to the Spanish Constitution.

Following this, the SCC referred to the second paragraph of the provision at stake (which, as a reminder, established that, in any event, the 'rejections at the border' would be carried out in compliance of the human rights and international protection norms to which Spain was a party). Surprisingly, as Rodríguez Duque has noted, the SCC seemed to understand that this wording sufficed to 'fully guarantee' the constitutionality of the 'rejections at the border'.[345] This is, at least, what may be derived from its brief, superficial and, for Martínez Escamilla, incoherent reasoning on this point,[346] where it basically limits itself to paraphrasing the wording of the provision.[347]

The SCC concludes, however, by adding what appears to be an additional requirement: namely, that police officers must 'pay special attention to particularly vulnerable categories of people'.[348] In particular, the SCC refers to individuals who 'appear to be manifestly minor', who are affected by 'serious disabilities', the elderly, pregnant women and 'people who fall within the category of especially vulnerable'.[349] In other words, instead of declaring the provision contrary to the Spanish Constitution for a flagrant violation of several of its articles, which is what it should have done according to Fernández Pérez, the SCC decided to 'give recommendations […] so that the provision may be

[343] Martínez Escamilla, M., *op. cit.*, p. 334 [author's translation from Spanish].

[344] *Ibidem*.

[345] Rodríguez Duque, L., 'El rechazo en frontera ante los tribunales', I*nstituto de Derecho Europeo e Integración Regional (IDEIR)*, nº 40, 2021, p. 25 [author's translation from Spanish].

[346] Indeed, Martínez Escamilla wonders how it is possible to guarantee migrants' rights if migrants cannot even express themselves. See Martínez Escamilla, M., *op. cit.*, p. 334.

[347] *STC 172/2020* (n 326), pp. 53–54.

[348] *Ibidem* at 54 [author's translation from Spanish].

[349] *Ibidem* [author's translation from Spanish].

applied in a constitutional manner'.[350] However, such recommendations are, as Judge Balaguer Callejón argued in her dissenting opinion, 'clearly insufficient', as well as, if it may be added, absurd.[351] Firstly, the judgment 'does not explain how those obligations may be complied with in an effective manner without a procedure with essential guarantees'.[352] Secondly, many vulnerability situations are not obvious to the naked eye, and can only be identified through a proper procedure.[353] Last, but not least, it is very unlikely, to say the least,[354] that heavily pregnant women, young children, heavily disabled or very old individuals (i.e., the only ones who could be spotted straight away) attempted to jump the fences that separate Spain from Morocco, considering the extraordinary physical strength required to overcome a 10-metre-high wall slightly bent towards Morocco[355] and topped with metallic, anti-grip cylinders.[356]

Finally, the SCC moved on to clarify whether the new provision infringed the principle of *non-refoulement* and whether it prevented the access to asylum guaranteed under Article 13.4 of the Spanish Constitution, as the applicants had argued.[357] To that end, it began by recalling the Grand Chamber finding that, as long as a State had effective means of legal entry, it could 'refuse

[350] Fernández Pérez (n 336) 207.on the basis of certain conditions, a practice that is illegal in constitutional legal systems, the return of foreigners by "de facto means" without any legal guarantee. Based on these rulings, the figure of refoulement regulated in Spanish legislation will be analysed in order to subsequently verify whether the actions carried out in Ceuta and Melilla by the state security forces and bodies comply with the human rights regulations set out in the European Convention on Human Rights (ECHR).

[351] Dissenting opinion of Judge Balaguer Callejón in *STC 172/2020... cit.*, p. 70 [author's translation from Spanish].

[352] Dissenting opinion of Judge Balaguer Callejón in *Ibidem*.

[353] Dissenting opinion of Judge Balaguer Callejón in *Ibidem*.

[354] *Ibidem*. This has also been noted by Martínez Escamilla, M., *op. cit.*, p. 334.

[355] Blasco de Avellaneda, J., 'La Valla de Melilla: Saltarla, Un Reto; Vigilarla, Una Obsesión', *El Correo* (19 March 2014), https://www.elcorreo.com/bizkaia/sociedad/201403/19/valla-melilla-saltarla-reto-20140319115422.html.

[356] Some of these novelties were introduced following the removal of the razor-barbed wires in 2020 (see fn 67). See Gabriela Sánchez, 'Así Es La Nueva Valla de Melilla: 10 Metros de Altura, Barrotes y Un Cilindro "Antitrepado"', *El Diario* (14 October 2020), https://www.eldiario.es/desalambre/foto-nueva-valla-melilla-10-metros-altura-barrotes-cilindro-antitrepado_1_6293160.html.

[357] *STC 172/2020... cit.*, p. 54.

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entry to their territory to aliens, including potential asylum-seekers, who [had] failed, without cogent reasons …, to comply with [the] arrangements [in place] by seeking to cross the border at a different location'.[358] Then, it turned its attention to the third paragraph of the provision (i.e., the one that established that applications for international protection should be submitted at the places provided for that purpose at the border). However, as Rodríguez Duque has noted, it did not go into the substance of the applicants' claims.[359] Instead, it simply concluded that the provision legalising the rejections at the border 'limited itself to indicate where the [international protection] requests should be formalised', and called it quits.[360] In doing so, Judge Balaguer Callejón criticised that the majority disregarded the jurisprudence of the CJEU, which earlier that year had delivered its ruling on the case C-36/20. According to it, migrants could submit their international protection requests, not only before the 'competent authority', but also before 'other authorities' that may receive them, such as the police and border guards.[361] If, according to this, the Guardia Civil could be considered as 'other authorities', and yet, they applied the 'rejections at the border', that would, in the opinion of Judge Balaguer Callejón, prevent the fulfilment of Spain's international obligations.[362] In any event, the SCC eventually concluded that the 'rejections at the border' were constitutional, *but only as long as* they were: (a) applied to 'individualised entries', (b) subjected to 'full judicial review', and (c) in compliance of 'international obligations'.[363]

c. Some reflections on the SCC judgment

If reading the Grand Chamber judgment in *N.D. and N.T.* was, according to Pichl and Schmalz, a 'puzzling experience', no less can be said about that of the SCC.[364] This is evidenced by the fact that not even the Spanish doctrine seems to agree on how to interpret the latter's verdict. On the one hand, several commentators seem to have derived therefrom that the SCC has endorsed the

[358] *Ibidem* at 55; quoting N*D and NT v Spain [GC]*...cit.para 210.

[359] Rodríguez Duque, *op. cit.*, p. 26.

[360] *STC 172/2020... cit.*, p. 55 [author's translation from Spanish].

[361] *Ibidem* at 71.

[362] *Ibidem.*

[363] *Ibidem* at 55 [author's translation from Spanish].

[364] Pichl and Schmalz, *op. cit.*

'rejections at the border'.[365] On the other, other commentators have concluded the opposite, or the same but in a nuanced manner.[366] The same confusion is noticeable in the headlines of major Spanish newspapers that covered the SCC ruling.[367] However, this is normal. After all, the SCC conditioned the constitutionality of the 'rejections at the border' to three requirements which, as many commentators have noted, were inherently incompatible with the very concept of 'rejections at the border', which is preposterous in itself.

In short, as Alonso Sanz has pointed out, the SCC ruling was to a large extent 'based on the same formalistic and unrealistic interpretation' as the Grand Chamber judgment.[368] Scholars have defined it as a 'confusing',[369] 'simplistic'[370] judgment based on 'poor arguments'[371] that does not really go into the matter that it was supposed to assess[372] and 'leaves a lot to be desired from a technical point of view'.[373] However, this is understandable. After all, as Judge Balaguer Callejón argued in her dissent, the purpose of legalising

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[365] Acosta Penco, T., 'Abuse of Rights in the Jurisprudence - Justification of Border Rejection. Analysis of the Decision 172/2020 (November 19th) of the Spanish Constitutional Court, and the ECHR Decision (February 13th, 2020) on N. D. and N. T. v. Spain', *Revista Española de Derecho Internacional,* nº 73, 2021, pp. 373-374; Cuadrón Ambite *op. cit.*, p. 387.

[366] Martínez Escamilla, M., op. cit., pp. 333 and 335; González García, I., 'Las Devoluciones En Caliente de Inmigrantes En Las Fronteras de Ceuta y Melilla Con Marruecos' (*IEMed*, 20 June 2023), https://www.iemed.org/publication/las-devoluciones-en-caliente-de-inmigrantes-en-las-fronteras-de-ceuta-y-melilla-con-marruecos/?lang=es; Solanes Corella, A., 'Movilidad humana, pandemia y crisis en Europa: Un análisis jurídico-político', *Trayectorias Humanas Trascontinentales*, nº 8, 2022, p. 27; Fernández Vacas, F., op. cit., p. 366.

[367] See, e.g., Brunet, J. M., 'El Tribunal Constitucional Avala Las Devoluciones En Caliente de Inmigrantes', *El País* (19 November 2020), https://elpais.com/espana/2020-11-19/el-tribunal-constitucional-avala-las-devoluciones-en-caliente.html; as opposed to Pablo 'Pampa' Sainz, 'El Constitucional Desautoriza Las Devoluciones En Caliente Que Realiza El Ministerio de Interior', *El Salto* (20 November 2020), https://www.elsaltodiario.com/devoluciones-en-caliente/tribunal-constitucional-desautoriza-devoluciones-en-caliente-que-realiza-interior.

[368] Sanz, A., *op. cit.*, p. 350; Solar Calvo has referred to 'parallels' between both judgments in Solar Calvo, *op. cit.*, p. 4 [author's translation from Spanish].

[369] Martínez Escamilla, M., *op. cit.*, p. 333 [author's translation from Spanish].

[370] Rodríguez Duque, *op. cit.*, p. 27 [author's translation from Spanish].

[371] *Ibidem*.

[372] *Ibidem*, pp. 25–26; also Cuadrón Ambite, *op. cit.*, p. 386.

[373] Martínez Escamilla, M., *op. cit.*, p. 333 [author's translation from Spanish].

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the 'rejections at the border' was not 'to establish a different procedure to those already legally foreseen, … but … no procedure at all'.[374] This purpose is hardly reconcilable with the rule of law and cannot arguably find any convincing justification in the Spanish Constitution.[375] As such, it is certainly difficult to conjugate with a detailed, coherent reasoning where judges do not shy away from getting to the very bottom of the matter. This could explain the significant shortcomings discussed above. It is obvious that, as Judge Balaguer Callejón compellingly argued, the majority should have found the 'rejections at the border' contrary to the Spanish Constitution. However, in a way which was conspicuously reminiscent of the Grand Chamber's behaviour in *N.D. and N.T.*, the judges of the SCC seemed unwilling to find what presented itself as the only plausible outcome. Instead, it could be argued, they artificially forced the reasoning to reach a more politically palatable one, and shielded themselves behind the Grand Chamber judgment to do so. In fact, instead of assessing the compatibility of the provision at stake with the Spanish Constitution (which, after all, was their duty), they ended up assessing it in the light of the *N.D. and N.T.* Grand Chamber judgment.

V. CONCLUSIONS

As Judge Balaguer Callejón compellingly argued in her dissent in the SCC's judgment, 'the greatness of the system of liberties and human rights', which is essential in any so-called democratic regime, 'consists, amongst other things, in responding to supposed irregularities with the respect of minimum procedural guarantees when imposing the legal consequences that derive from that conduct'.[376] By pulling the 'rights forfeiture card' as a response to irregular incursions into its territory through the fences of Ceuta and Melilla, Spain failed to live up to a basic requirement of the rule of law.[377] However, the response of the Grand Chamber and the SCC was all the more unsettling.

[374] Dissenting opinion of Judge Balaguer Callejón in *STC 172/2020* (n 326) 66 [author's translation from Spanish].

[375] See dissenting opinion of Judge Balaguer Callejón in *Ibidem* at 69.

[376] Dissenting opinion of Judge Balaguer Callejón in *Ibidem*.

[377] Bosch March, C., 'Backsliding on the Protection of Migrants' Rights? The Evolutive Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights' (n 144) 328.

Indeed, they should have condemned the practice both in the light of Protocol No. 4 ECHR and of the Spanish Constitution. Yet, they refrained from doing so. What is more, the Grand Chamber heavily relied on the submissions of the Spanish Government (which, in turn, derived from the offending law and practice that the Court was expected to condemn) in order to force a verdict of non-violation that could not have otherwise been reached. Later that year, the SCC relied, in turn, on the Grand Chamber judgment in order to come up with its own decision. In doing so, it arguably deviated from its task of assessing the compatibility of a given legal provision with the Spanish Constitution to do so in the light of a Grand Chamber judgment. The result was a judgment that raised even more eyebrows than the former, and which fed back into the domestic system where the exclusionary clause originated, reverberating therein the effects of the Grand Chamber judgment in *N.D. and N.T.*

The most crucial question at this stage is, however, the concrete impact that *N.D. and N.T.* has had, not only on the Spanish system, but on the later jurisprudence at the ECHR level. More than four years have passed since the Grand Chamber delivered its decision in this case, and the ECtHR has since decided on around twenty further applications (a remarkably high number, considering the relatively sparse jurisprudence on A4-P4 over the previous decade). By 2022, as I have discussed elsewhere, one would have had the impression that the ECtHR had effectively dismantled the protection for all migrants crossing a land border[378] (unlike those arriving by sea, for whom the progress made in *Hirsi* in 2012 still seems to remain intact at the time of writing).[379] Indeed, after *A.A.*, it seemed that migrants entering irregularly into a State's territory would be automatically excluded from the protection of A4-P4, under the condition that the respondent State had provided for means of legal entry. However, as already seen, the fact that the Court found that such means existed did not necessarily mean that they really existed. This left the protection of migrants' rights at land borders in a rather precarious situation, and subject to the willingness of the Court to recognise the unavailability of means of legal access even in the light of irrefutable evidence.

[378] Bosch March, C., 'The backsliding on the interpretation of Article 4 of Protocol No 4 ECHR in "pushback" cases: a questionable attempt to redress the Hirsi "overstretch"?', *op. cit.*.

[379] See *JA and Others v Italy* No. 21329/18 (ECtHR 30 March 2023).

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However, contrary to what may have been expected, since *A.A.* (or, rather, since *N.D. and N.T.*), the ECtHR has found violations of A4-P4 in most of the subsequent applications that have come before it.[380] It certainly strikes that the ECtHR seems to have treated A4-P4 in a rather erratic way, modifying its scope and content in some of those applications.[381] Yet, this does not seem to have had a significant impact on the overall protection of migrants' rights at land borders—judging, at least, from the number of violations that the ECtHR has continued to find in the last few years. This could give the impression that the wealth of literature that criticised the ECtHR for curtailing the protection under A4-P4 in 2016-2022 was making too much ado about nothing, and that it overestimated the pernicious effects that this backsliding would have on migrants' rights in the long run.[382] It could also be interpreted as a Court 'adjust[ing]' its A4-P4 jurisprudence following *N.D. and N.T.*,[383] or simply reaching different outcomes based on different settings and circumstances.[384] While all these options remain possible, and cannot be either confirmed or rejected insofar as they have not been examined here, there might also be other reasons that account for this apparently erratic evolution. This would certainly be an interesting path to explore in the future, as it could provide valuable information on the Court's approach to A4-P4, as well as on the actual impact of *N.D. and N.T.* at the gates of Europe.

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[380] E.g., *MK and Others v Poland* No. 40503/17, 42902/17 and 43643/17 (ECtHR 23 July 2020); *Shahzad v Hungary* (n 141); *DA and Others v Poland* No. 51246/17 (8 July 2021); *JA and Others v Italy* (n 378); *SS and Others v Hungary* No. 56417/19 44245/20 (12 October 2023); *Sherov and Others v Poland* No. 54029/17 54117/17 54128/17 (ECtHR 4 April 2024).

[381] As already discussed, following N.D. and N.T., the ECtHR further expanded the 'exception' introduced therein in *MH and Others v Croatia* (n 141); and *AA and Others v North Macedonia* (n 141).

[382] In 2021, it was already suggested that N.D. and N.T. would have had a 'limited impact' in ECRE, 'Across Borders: The Impact of N.D. and N.T. v Spain in Europe' (2021).

[383] Brandl, U., 'A Human Right to Seek Refuge at Europe's External Borders: The ECtHR Adjusts Its Case Law in M.K. vs Poland' (*EU Immigration and Asylum Law and Policy*, 11 September 2020), https://eumigrationlawblog.eu/a-human-right-to-seek-refuge-at-europes-external-borders-the-ecthr-adjusts-its-case-law-in-m-k-vs-poland/.

[384] As Rodrik and Hakiki (*op. cit.*, p. 17) have argued, '[c]onstellations like the Poland and Hungary case', i.e., of the respondent States against which the ECtHR has found the highest number of violations in the last few years, 'are extraordinary' and presented 'unique circumstances' for various reasons.

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