

HUMAN RIGHTS WATCH

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Sr. Presidente de Gobierno del Estado Español
D. José Luis Rodríguez Zapatero
Palacio de la Moncloa, 28071 Madrid
Spain

Dear President,

We contact you to express our concern over reports about the upcoming conclusion of a bilateral readmission agreement between Spain and Morocco for unaccompanied children. According to the Ministry of Foreign Affairs, the agreement is in the process of being finalized, and will be based on the 2003 memorandum of understanding between Morocco and Spain on the assisted repatriation of unaccompanied children.¹ Human Rights Watch believes that key provisions of the 2003 memorandum do not comply with Spain's obligations under international human rights instruments, and should not be replicated in any future bilateral agreements.

Of principal concern are points two and three of the 2003 memorandum. Point two foresees that once the identity and nationality of the child have been ascertained, repatriations will be carried out by handing the child over to border officials of the country of origin. Yet Human Rights Watch's research on unaccompanied children in Ceuta and Melilla exposed serious abuses suffered by children at the hands of border and security officials in the course of their repatriation.² Additional reports by non-governmental organizations, the Ombudsman office, the Committee on the Rights of the Child, and the UN Special Rapporteur on the rights of migrants raise equal concerns over the continued practice and abuses in connection with such repatriation procedures.³ These findings provide strong evidence that the repatriation of children by handing them over to Moroccan border officials and police puts them at heightened risk of abuse and subsequent detention.

Furthermore, point three of the memorandum foresees that authorities of the destination country may immediately return an unaccompanied child to the authorities of the country of origin if the child is apprehended the moment of crossing the border.

If enforced, this provision would constitute summary expulsion in apparent violation of Spain's legal obligations under the 1951

Convention relating to the Status of Refugees and the principle of *non-refoulement*. The provision further undermines applicable guarantees enshrined in the Convention on the Rights of the Child as well as Spanish legislation, and it is inconsistent with the UN High Commissioner for Refugees' guidelines on unaccompanied child asylum seekers, which calls upon states not to refuse access of such children to their territory.⁴

Spanish law requires that the return of unaccompanied children to the country of origin must follow a careful evaluation. Repatriation of the child is not the only objective but one possible solution that must be weighed against other factors, such as the child's life, physical and psychological integrity, and respect for the child's fundamental rights. Repatriation can only be carried out if the child's integrity is not at risk. Most importantly, under Spanish law the best interest of the child trumps any other consideration. As a consequence, the consultation of the child, a full evaluation of all factors for and against repatriation, family tracing or the identification of adequate protection services, a risk assessment and the consultation of the Prosecutor's office must be part of any repatriation proceeding.⁵

We are aware of several court decisions that halted repatriations of unaccompanied children underway.⁶ A recent decision by a Madrid administrative court stopped a repatriation procedure on the grounds that it failed to respect key constitutional guarantees, the best interest of the child, and the child's right to be heard, as spelled out in the national child protection act and the Convention on the Rights of the Child.⁷

Although the 2003 memorandum on the repatriation of unaccompanied children includes a reference to the Convention on the Rights of the Child and the primacy of the child's best interest, the procedures spelled out in the memorandum are inconsistent with these and make the references to international and national obligations appear meaningless.

Mr. President, we urge you to include vital safeguards in compliance with Spanish and international law into the readmission agreement to ensure that the rights of migrant and asylum-seeking children are upheld at every stage of their migration cycle. In particular, we call on you to ensure that this and any future readmission agreements incorporate at the very least the following provisions:

- Unaccompanied children attempting to enter the country must not be summarily expelled;
- Asylum-seeking children must never be denied entry at the border; they must enjoy access to asylum irrespective of their age and must be given information on their right to seek asylum in a way that is appropriate for their age and maturity;
- Repatriation decisions must be made on an individual basis, respect procedural safeguards and guarantee the child's access to qualified legal representation;
- Repatriation decisions must comply with the best interest of the child and take into consideration the child's views;
- Children must not be detained pending their repatriation;
- Unaccompanied children must not be repatriated if no suitable care-taker or protection service has been identified and if no contact between them and the child has been established;

- The return of a child to protection services or care-takers must be preceded by an evaluation of the services' or care-taker's ability and agreement to provide the required care and protection;
- Unaccompanied children must not be handed over to security or border officials without the presence of care-takers or representatives from protection services;
- Counseling shall be provided to all children who are to be returned;
- The creation of a committee, consisting of government representatives, independent human rights experts, and the UN High Commissioner for Refugees, to monitor the operation of the agreement in both states and to publicly report its findings on a periodic basis, including whether returns under it respect the best interests of the children involved.

We request you to kindly keep us updated on further developments in the final negotiations of the agreement and to share with us a copy of the latest draft document as soon as it becomes available. We look forward to having a dialogue with the office in charge and welcome a response at your earliest convenience.

Sincerely,

Lois Whitman
 Director
 Children's Rights Division

Cc:

- Sr. Ministro D. Jesús Caldera Sánchez-Capitán, Ministerio de Trabajo y Asuntos Sociales
- Sra. Dña. María Consuelo Rumí , Secretaria de Estado de Inmigración y Emigración
- Sr. Ministro de Interior Sr. D. Alfredo Pérez Rubalcaba
- Sr. D. Arturo Avello Diez del Corral, Director General de Relaciones Internacionales y Extranjera
- Sr. Presidente de la Comisión de Asuntos Exteriores, D. Josep Antoni Durán i Lleida
- Sra. Presidenta de la Comisión de Interior, Dña. Carmen Hermosín Bono
- Sra. Presidenta de la Comisión de Asuntos Sociales, Dña. Carmen Marón Beltrán
- Sr. D. Enrique Múgica Herzog, Defensor del Pueblo
- Mme Yasmina Baddou, Secrétaire d'Etat chargée de la Famille, de l'Enfance et des Personnes Handicapées, Maroc
- Mr. António Guterres, UN High Commissioner for Refugees
- Mr. Jorge A. Bustamante, UN Special Rapporteur on the human rights of migrants
- Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe
- Mr. Jacob Egbert Doek, Chairperson, UN Committee on the Rights of the Child

¹ Memorádum de Entendimiento Entre el Reino de Marruecos y el Reino de España Sobre Repatriación Asistida de Menores no Acompañados del 23 de diciembre de 2003.

2 Human Rights Watch, *Nowhere to Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, vol. 14, No. 4(D) – May 2002. <http://www.hrw.org/reports/2002/spain-morocco/>

3 Asociación pro derechos humanos de Andalucía (APDDHA), “Migraciones y Derechos del Menor Extranjero no Acompañado”, 2006, <http://www.nominorsindetention.org/download/migracionesyderechos.pdf>

Federación SOS Racismo, “Menores en las Fronteras: de los Retornos Efectuados sin Garantías a Menores Marroquíes y de los Malos Tratos Sufridos”, 2004,

http://www.mugak.eu/ef_etp_files/view/Informe%5fmenores%5fretornados%2epdf?revision%5fid=9202&package%5fid=9185

Comisión Española de Ayuda al Refugiado (CEAR), Letter to the Office of the High Commissioner for Human Rights, Madrid, September 8, 2006, <http://www.nominorsindetention.org/download/Escrito%20ONU%2010%2009%2006.pdf>

Defensor del Pueblo. Annual report 2005 <http://www.defensordelpueblo.es/index.asp?destino=informes1.asp>

“The Special Rapporteur believes that because of the way in which some family “reunifications” have been carried out, allegedly leaving the minor in the hands of the Moroccan police without the presence of his family or the social services, these reunifications are interpreted as expulsions. Nevertheless, many “reunited” minors return to Spain and some speak of ill-treatment by the Moroccan police. [...] She [The Special Rapporteur] considers that priority should be given to ensuring that repatriations are carried out with due respect for the rights and best interests of minors”, UN Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants, Ms. Gabriela Rodríguez Pizarro, Visit to Spain, E/CN.4/2004/76/Add.2, 14 January 2004, paras. 55-56.

4 “Los solicitantes menores de dieciocho años en situación de desamparo serán remitidos a los servicios competentes en materia de protección de menores [...] Las solicitudes de asilo se tramitarán conforme a los criterios contenidos en los convenios y recomendaciones internacionales aplicables al menor solicitante de asilo.” Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado, modificada por la Ley 9/1994, de 19 de mayo, RD 203/1995, art. 15.4.

“El extranjero que desee obtener el asilo en España presentará su solicitud ante cualquiera de las siguientes dependencias: [...] b) Puestos fronterizos de entrada al territorio español [...]” Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado, modificada por la Ley 9/1994, de 19 de mayo, RD 203/1995, art. 4.

“Because of his/her vulnerability, an unaccompanied child seeking asylum should not be refused access to the territory and his/her claim should always be considered under the normal refugee determination procedure.” United Nations High Commissioner for Refugees (UNHCR), Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997, para. 4.1

“State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.” UN Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (2005), para 12.

5 “En la aplicación de la presente Ley primará el interés superior de los menores sobre cualquier otro interés legítimo que pudiera concurrir.” Ley Orgánica 1/1996, de 15 de enero, de protección jurídica al menor, de modificación parcial del Código civil y de la Ley de enjuiciamiento civil, 1996, Art. 2

“La repatriación no es, sin embargo, un objetivo absoluto que se haya de perseguir a toda costa; pueden estar en juego también otros intereses, como la vida, la integridad física o psíquica y el respeto a los derechos fundamentales del menor, que pueden hacer que la balanza del interés superior de éste se incline finalmente en pro de su permanencia en nuestro país.” Instrucción 6/2004, de 26 de Noviembre, sobre Tratamiento Jurídico de los Menores Extranjeros Inmigrantes no Acompañados, 2004.

“La Administración del Estado, conforme al principio de reagrupación familiar del menor y previo informe de los servicios de protección de menores, resolverá lo que proceda sobre el retorno a su país de origen o aquél donde se encontrasen sus familiares o, en su defecto, sobre su permanencia en España”, Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, Art. 35.3, modificada por Ley Orgánica 8/2000, de 22 de diciembre.

“De acuerdo con el principio del interés superior del menor, la repatriación a su país de origen solamente se acordará si se dieran las condiciones para la efectiva reagrupación familiar del menor, o para la adecuada tutela por parte de los servicios de protección de menores del país de origen. [...] Una vez localizada la familia del menor o, en su defecto, los servicios de protección de menores de su país, se procederá a la repatriación mediante su entrega a las autoridades de fronteras del país al que se repatría. No procederá esta medida cuando se hubiera verificado la existencia de riesgo o peligro para la integridad del menor, de su persecución o la de sus familiares”, Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, *Ministerio de la Presidencia*, 2004, Art. 92.4

6 Joaquín Manso, “La Policía deporta a un menor pese a una orden judicial en contra” *El Mundo*, 24 November, 2006.

Ana Borderas, “Declarada nula la repatriación de un menor con papeles ordenada por la Delegación de Gobierno de Madrid”, *Cadena Ser*, 17 November, 2006.

“El Juzgado de lo Contencioso-Administrativo de Huesca rechaza repatriar a un menor marroquí acogido”, *Noticias Jurídicas*, 17 November, 2006.

⁷ Juzgado de lo contencioso administrativo número 14 de los de Madrid; Derecho Fundamental 1/06, Registro General 359/06.