



Mr. Dimitris Avramopoulos
Commissioner for Migration and Home Affairs of the European Union

November 6, 2014

Dear Commissioner,

The undersigned organizations are writing to express their grave concern in relation to proposed changes to Spanish immigration law that would formalize the documented practice of summary expulsions to Morocco from Spain's enclaves in North Africa. These practices and the proposed amendment violate not only Spain's obligations under international human rights law but also European Union law, in particular the Asylum Procedures Directive, the Schengen Borders Code, the Return Directive, and the Charter of Fundamental Rights of the European Union.

We note that then-Commissioner for Home Affairs Cecilia Malmström addressed a letter to Spain's Interior Minister Jorge Fernández Díaz on October 24, 2014, expressing concern over this proposed amendment to formalize summary expulsions as well as the use of excessive force at the enclave borders. We welcome this initiative and urge you to consider this issue as a matter of high priority and to further intervene with the Spanish government on the basis that the proposed amendment is contrary to EU law for reasons detailed below.

On October 22, 2014, the Popular Party Parliamentary Group (Grupo Parlamentario Popular) tabled an amendment to the draft Law on Public Security currently being debated in Congress that would modify Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their integration. The proposed change reads (the amendment in Spanish is attached):

*"Additional Disposition 10. Special regime for Ceuta and Melilla
Foreigners detected on the boundary line of the demarcation of Ceuta and Melilla attempting an unauthorized crossing of the border in a clandestine, flagrant or violent way, shall be rejected in order to prevent their illegal entry into Spain."*ⁱ

We are deeply concerned that the amendment would lead to indiscriminate summary and collective expulsions of migrants without an effective remedy. The amendment would allow rejecting individuals at the borders of Ceuta and Melilla without detailing how these would be carried out or providing for any procedural safeguards. The failure to clearly define the "rejection" procedure and lack of any human rights guarantees will deprive asylum seekers of access to the asylum procedure in Spain and could result in *refoulement*. It could expose both migrants

and asylum seekers to the risk of torture or cruel, inhuman or degrading treatment in Morocco.

It is crucial to emphasize that the government intends to apply this procedure to migrants and asylum seekers who have already entered Spanish territory, based on its aberrant interpretation of where Spanish territory begins. The government of Spain has repeatedly asserted that the area between the triple-fence in Melilla is not Spanish territory in order to justify ongoing, continuous summary returns from this enclave to Morocco.ⁱⁱ It has gone so far as to allege that migrants should not be considered to have entered Spanish territory until they have crossed the “police line.”ⁱⁱⁱ The proposed amendment would enshrine this interpretation in law, by affirming that “illegal entry into Spain will be considered ‘achieved’ when migrants have passed the security perimeter in its entirety.”^{iv}

A Spanish court has affirmed that the Spanish border begins at the outside fence and that all areas between the fences are on Spanish territory.^v The independent national human rights institute, the *Defensor del Pueblo*, supports this view.

The implementation of the proposal aimed at rejecting individuals at the border would constitute a clear breach of European and international human rights and refugee law obligations undertaken by Spain. In particular, it would lead to violations of the right to asylum, the prohibition of torture and other ill-treatment, the *non-refoulement* obligation, the right to an effective remedy and reparation for victims of human rights violations, as well as the prohibition of collective expulsions.^{vi} Italy’s practice of summary returns from Italy to Greece depriving individuals of access to the asylum procedure or any other remedy in the port of Ancona was recently condemned by the European Court of Human Rights. In the case of *Sharifi and Others v. Italy and Greece*, the Court held that the automatic removal to Greece of four Afghan nationals by Italy particularly violated their rights to freedom from inhuman or degrading treatment, to protection against collective expulsion, and to an effective remedy.^{vii}

If adopted, the proposed amendment would constitute a clear breach of European Union law and its guarantees with regard to access to the asylum procedure and protection from *refoulement* at the external borders of the EU as well as in the context of return procedures. First, the proposed amendment is incompatible with the recast Asylum Procedures Directive which requires all Member States to ensure access to the asylum procedure (Article 6), the provision of information on the possibility to apply for international protection and counseling to third country nationals present at the external borders (Article 8), the right to remain in the Member States pending the examination of an application for asylum (Article 9), and the right to an effective remedy with suspensive effect (Article 46).^{viii} The Directive applies “to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States.”^{ix}

Secondly, the proposed amendment is not in line with the Return Directive which establishes common standards and procedures for the removal of irregular migrants from Member States.^x Whereas Spain has exercised its prerogative to not

apply most of the provisions in the directive to persons apprehended at its borders, it is nonetheless obligated to respect minimum guarantees with respect to those persons, including the principle of *non-refoulement* and appropriate attention to the special needs of vulnerable persons.^{xi}

Thirdly, the proposed amendment would, if adopted, be in clear violation of the Schengen Borders Code which establishes that a refusal of entry of third country nationals “shall be without prejudice to the application of special provisions concerning the right of asylum,” that “entry may only be refused by a substantiated decision stating the precise reasons for the refusal,” and that “persons refused entry shall have the right to appeal.”^{xii}

Finally, the proposed amendment would, if adopted, be incompatible with several provisions of the Charter of Fundamental Rights of the European Union and in particular Article 18 which affirms the right to asylum, Article 4 on the prohibition of torture and inhuman or degrading treatment or punishment, as well as Article 19 on the prohibition of *refoulement* and collective expulsions and Article 47 on the right to an effective remedy and a fair trial.^{xiii}

European Union law provides for special treatment of Ceuta and Melilla with respect to the customs regime and visa requirements imposed on legal residents of the Moroccan cities, Tetuán and Nador.^{xiv} These exemptions, however, cannot justify the failure to observe obligations under the EU legislation mentioned above, which must be respected by Spain on its territory and at its borders, including in Ceuta and Melilla.

The proposed amendment would carve out further exceptions to national immigration law applicable to Ceuta and Melilla. Organic Law 4/2000 prohibits summary returns and guarantees irregular migrants the right to legal counsel and an interpreter during expulsion proceedings, including entry refusals (*denegación de entrada*) and expulsions which take place at the border following an irregular entry (*devolución*).^{xv} Law 12/2009, on the right of asylum and subsidiary protection, guarantees the right to all those present on Spanish territory to apply for international protection.^{xvi} Rejection at the border as envisioned in the proposed amendment would deprive migrants and asylum seekers at the Ceuta and Melilla borders of these legal safeguards.

We are also concerned that the proposal increases the risk of excessive use of force by the Spanish Civil Guards patrolling Spain’s external borders in Ceuta and Melilla as the practice of summary expulsions will prevent individuals from reporting such human rights violations they may suffer on Spanish territory.

The Ministry of Interior announced on 23 October a protocol on “integrated action in Ceuta and Melilla perimeters.” According to a press release published on the Ministry’s website, this protocol would enter into force once the legal reform is approved by the Parliament, and would allow the use of force and riot control weapons by law enforcement agents when rejecting individuals at the border.^{xvii} Although the protocol would explicitly require that riot control methods be used

only when necessary and proportionate, we are nonetheless concerned about the use of such methods in border control operations.

On February 6, 2014, at least fifteen migrants drowned in waters off Ceuta after the Spanish Guardia Civil fired rubber projectiles and tear gas in their direction. A judicial investigation into those tragic deaths is ongoing at the time of writing this letter.

National and international human rights organizations have additionally documented numerous instances where the Spanish Civil Guards have used excessive force when summarily expelling irregular migrants to Morocco or in their attempts to prevent entry of irregular migrants to Melilla. Reports have also documented use of excessive force by Moroccan security forces upon migrants' unlawful expulsion from Spain.^{xviii} The most recent incident took place on October 15, when a video published by the Spanish migrant rights group *Prodein* shows Civil Guard officers beating a migrant with their batons as he climbs down from the fence separating Melilla from Morocco. The video then shows the officers carrying the man, who appears unconscious, through a gate in the fence back towards Morocco.^{xix}

In your introductory statement as Commissioner-designate on 30 September 2014 you affirmed that “[a]s a Union committed to upholding universal human rights, it is Europe’s responsibility to offer protection to refugees fleeing war or persecution, to respect human beings’ lives, and the right of *non-refoulement* in all circumstances.”^{xx} We believe that this is an opportunity to demonstrate the commitment of the European Commission to the idea of Europe as “the area in our world that guarantees fundamental rights.”^{xxi}

In conclusion, we urge you to intensify the Commission’s scrutiny of the situation at Spain and Europe’s borders in North Africa. We encourage you to address a timely and public communication to the Government of Spain making clear that the proposed amendment is contrary to Spain’s obligations under the laws of the European Union. We furthermore encourage you to launch an infringement procedure against Spain for documented summary expulsions from Ceuta and Melilla in violation of EU law, building on the recent steps already taken under the previous Commissioner.

Please do not hesitate to contact us if you need further information or clarification.

Best regards,

Amnesty International
European Council on Refugees and Exiles
Human Rights Watch
Rights International Spain

Cc. Mr. Morten Kjaerum
Director of the Fundamental Rights Agency of the European Union

Cc. EU Ombudsperson

Cc. LIBE Committee, EU Parliament

ⁱ <http://www.europapress.es/epsocial/politica-social/noticia-pp-propone-reformar-ley-extranjeria-incluir-rechazo-frontera-inmigrantes-ceuta-melilla-20141022101745.html>. We are attaching the amendment to this letter.

ⁱⁱ <http://elfarodigital.es/melilla/politica/151492-el-entrevallado-no-es-espana-segun-interior-para-justificar-la-presencia-de-mejanis-alli.html#>

ⁱⁱⁱ http://politica.elpais.com/politica/2014/02/21/actualidad/1392978609_302648.html

^{iv} See the official press release concerning the new protocol:

http://www.interior.gob.es/es/web/interior/noticias/detalle/-/journal_content/56_INSTANCE_1YSSI3xiWuPH/10180/2687323/?redirect=http%3A%2F%2Fwww.interior.gob.es%2Fes%2Fweb%2Finterior%2Fportada%3Bjsessionid%3D48E0E5F483B0B97D95E2E4AE75CE9A11%3Fp_p_id%3D101_INSTANCE_pNZsk8OxKI0x%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_pos%3D2%26p_p_col_count%3D4.

^v http://www.eldiario.es/desalambre/Imputado-Guardia-Civil-Melilla-devoluciones_0_303070030.html.

^{vi} Articles 3 and 13 of the European Convention on Fundamental Rights and Freedoms, article 4 of Protocol 4 to the Convention, articles 2.3, 7, 13 and 14 of the International Covenant on Civil and Political Rights, Articles 16, 25, 31, 32 and 33 of the Geneva Convention relating to the Status of Refugees, articles 4, 18, 19 and 47 of the Charter of Fundamental Rights of the European Union. See also the UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders.

^{vii} European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, judgment of 21 October 2014, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147287>. See also Amnesty International public statement, “European Court ruling condemns automatic and indiscriminate returns from Italy to Greece”, 23 October 2014, <http://www.amnesty.eu/en/news/press-releases/council-of-europe/european-court-ruling-condemns-automatic-and-indiscriminate-returns-from-italy-to-greece-0798/>; Human Rights Watch dispatch, “European Court Slams Italy, Greece on Migrants’ Rights,” October 21, 2014, <http://www.hrw.org/news/2014/10/21/dispatches-european-court-slams-italy-greece-migrants-rights>.

^{viii} Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)

^{ix} *Ibid.*, article 3.1

^x Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

^{xi} *Ibid.*, article 4.4

^{xii} Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), article 13. In addition, article 6 establishes that “Border guards shall, in the performance of their duties, fully respect human dignity” and that “any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.”. [In response to a question by a Member of the European Parliament about current practices in Ceuta and Melilla, former Commissioner Cecilia Malmström recently reaffirmed that “border surveillance must be carried out without prejudice to the rights of persons requesting international protection, in particular as regards the principle of *non-refoulement* and effective access to the asylum procedure”, and States must “ensure the respect of minimum guarantees based on the Return Directive notwithstanding their choice, as in the case of Spain, not to apply that directive to third-country nationals apprehended at the border” Doc. N° E-006912/2014, answer to the question for written answer to the Commission by Iosu Juaristi Abaunz \(GUE/NGL\), 20 October 2012.](#)

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-006912&format=XML&language=EN>.

^{xiii} The EU Charter of Fundamental Rights, is binding on the Member States when they implement EU law.

^{xiv} See agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985 [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922\(04\)&from=ES](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(04)&from=ES) and Protocol 2 to the Treaty on the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, on the Canary Islands, Ceuta and Melilla <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1985:302:FULL&from=ES>.

^{xv} Law 4/2000, article 22, <https://www.boe.es/buscar/act.php?id=BOE-A-2000-544>.

^{xvi} Law 12/2009, article 16.1. <https://www.boe.es/buscar/act.php?id=BOE-A-2009-17242>

^{xvii} See endnote (iv), above.

^{xviii} Human Rights Watch report, Abused and Expelled: Ill-treatment of Sub-Saharan African Migrants in Morocco, February 2014, <http://www.hrw.org/reports/2014/02/10/abused-and-expelled>; Human Rights Watch press release, “Halt Summary Push-backs to Morocco,” August 18, 2014, <http://www.hrw.org/news/2014/08/18/spain-halt-summary-pushbacks-morocco>; Human Rights Watch press release, “Excessive Use of Force,” October 21, 2014, <http://www.hrw.org/news/2014/10/21/spain-excessive-force-melilla>; Asociación Pro Derechos Humanos de Andalucía report, March 2014, “Derechos Humanos en la Frontera Sur,” http://www.apdha.org/media/frontera_sur_2014_web.pdf;

La Comisión de Derechos Humanos (CODH), “Vulneraciones de derechos Humanos en la Frontera Sur- Melilla,” July 2014, http://www.sosracismomadrid.es/web/wp-content/uploads/2014/07/Informe-MelillaDDHH_difusion.pdf.

^{xix} The video can be seen here: http://www.eldiario.es/desalambre/VIDEOS-Guardiua-Civil-ilegalmente-inmigrante_0_314268729.html. See also Human Rights Watch news release, “Excessive Force in Melilla,” October 21, 2014, <http://www.hrw.org/news/2014/10/21/spain-excessive-force-melilla>.

^{xx} http://ec.europa.eu/about/juncker-commission/docs/2014-ep-hearings-statement-avramopoulos_en.pdf

^{xxi} Ibid.