

EUROPEAN COURT OF HUMAN RIGHTS

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*N.D. and N.T.*

v

*Spain*

Application Nos. 8675/15 and 8697/15

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**Intervener Brief**

filed by the

**United Nations High Commissioner for Human Rights**

pursuant to leave granted by the Court on 9 October 2015

## **Statement of Interest**

The United Nations High Commissioner for Human Rights (the High Commissioner)<sup>1</sup> intervenes as a third party in this case, by virtue of his mandate to protect and promote all human rights and to conduct necessary advocacy in that regard. The human rights of migrants have a special place in that mandate, in view of the particular vulnerabilities of many migrants. The High Commissioner's submissions engage questions of international law and practice that the present case contemplates. Those law and policy questions include the ambit of the human right to protection from collective expulsion in light of Article 4 of Protocol 4 to the European Convention on Human Rights (ECHR). The decision of the Court in those regards is of great interest to the High Commissioner, because of its potential implications for the interpretation and application of the prohibition of collective expulsion under general international law and the international human rights treaties.

## **Summary**

The High Commissioner focuses his submission on the prohibition of collective expulsion of non-nationals as a rule of general international law. This prohibition is inherently a fair trial and due process right that entitles every non-national to an individualized examination of all the arguments militating against his or her removal. It represents an important procedural guarantee to prevent arbitrary expulsions of non-nationals. According to this principle, any expulsion of groups of non-nationals must uphold the fair trial and due process requirement to consider, with due diligence and in good faith, the full range of individual circumstances that may weigh against expulsions of individuals within groups.

All non-nationals, including those who are in an irregular situation, enjoy protection from collective expulsion. States are bound by the prohibition of collective expulsion throughout their territory and in all places where they exercise border governance measures extraterritorially, including in so-called 'no-man's land' between border posts and in immigration and transit zones.

The prohibition of collective expulsions implies a right to individualised examination and draws upon fair trial and due process guarantees akin to conventional expulsion procedures. The right to individualised examination is also inextricably linked with the right of all individuals to have access to an effective remedy to challenge their expulsion decision, without discrimination. The State is thereby required to ensure that each individual can pursue and access his or her remedy. An integral element of the right to protection from collective expulsion and the right of access to an effective remedy is that an expulsion is stayed until its compliance with international human rights law has been finally determined.

## **Introduction**

1. The High Commissioner observes that contemporary migration is a complex phenomenon. In recent months, attention in Europe and elsewhere has been drawn to the movement of large groups of migrants. While not new, such movements have recently increased in scale particularly in Europe. Individuals within these movements may be migrating for multifaceted reasons, including flight from persecution, discrimination, conflict, poverty, lack of access to healthcare, education, water, food, housing, and the consequences of environmental degradation and climate change.

2. International human rights law imposes certain limitations on a State's sovereign entitlement to remove migrants from its territory. Specifically, it limits the ability of States to remove migrants from their territory when that person or these persons would be at risk of serious harm upon return. States have the responsibility to exercise due diligence and not to perpetuate human rights violations and abuses by returning migrants to harm, or to exacerbate their vulnerabilities and particular risks through their actions or inactions. International human rights law requires States to protect the human

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<sup>1</sup> This third party intervention is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations or the Office of the High Commissioner for Human Rights, its officials and experts on missions, pursuant to the Charter of the United Nations and the 1946 Convention on the Privileges and Immunities of the United Nations.

rights of all without discrimination. In light of contemporary migration realities, the High Commissioner regards it particularly pertinent to ensure that these human rights protections are effective and accessible to all migrants, regardless of their status.

### **Assessment of Spain before United Nations Human Rights Mechanisms**

3. Spain has ratified a number of international human rights treaties<sup>2</sup> and is periodically reviewed by the respective human rights treaty bodies, who have raised concerns at the legal and policy situation regarding collective expulsions in Spain.

4. In 2015, Spain was reviewed by the Committee against Torture, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women. All treaty bodies expressed concern at the practice of summary expulsions without access to an individual examination. They also expressed concern at the adoption of the Public Security Act (*Ley de Seguridad Ciudadana*), which seeks to legalise the practice of '*expulsiones en caliente*', the rejection of persons at the border.

5. In their concluding observations, the treaty bodies urged Spain to revise its immigration and asylum legislation, including the Public Security Act and ensure that persons requesting international protection have access to a fair, individualised examination, are protected, without discrimination, from expulsions and have access to an independent mechanism with the authority to reverse negative decisions. The individualised examination should pay attention to gender and age-specific concerns and the identification of possible victims of torture.<sup>3</sup>

6. The Special Rapporteur on the Human Rights of Migrants, through communications with the Spanish government, has similarly raised concerns at the provisions in the Public Security Act allowing the collective expulsion of individuals without an individualised examination in the Spanish enclaves, Melilla and Ceuta and depriving individuals of the right to an effective remedy, legal assistance or access to interpretation services.<sup>4</sup>

### **The prohibition of collective expulsion in international law**

7. The prohibition of collective expulsion set out in Article 4 of Protocol 4 to the ECHR is recognised in multiple other international and regional conventions.<sup>5</sup> Article 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) stipulates as follows: 'Migrant workers and members of their families shall not be subject to measures of collective expulsion'. The Human Rights Committee has expressed the opinion that Article 13 of the International Covenant on Civil and Political Rights (ICCPR) 'would not be satisfied with laws or decisions providing for collective or mass expulsions'.<sup>6</sup> The Committee on the Elimination of Racial Discrimination (CERD), in its General Recommendation on non-discrimination against non-citizens recommends that States 'ensure that non-citizens are not subject to collective expulsion [...]'.<sup>7</sup>

8. At regional level, the American Convention on Human Rights, Article 22 (9), the Arab Charter on Human Rights (2004), Article 26 (2), the Charter of Fundamental Rights of the European Union, Article 19 (1) and the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Article 25 (4), all provide for the prohibition of collective expulsions.

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<sup>2</sup> ICCPR, ICESCR, CERD, CAT, OPCAT, CRC and its three Optional Protocols, CEDAW, CED, CRPD and accepting individual complaints procedures and inquiry procedures, where applicable, under the relevant treaties.

<sup>3</sup> CEDAW, Concluding observations on the 7th and 8th report of Spain, CEDAW/C/ESP/CO/7-8 (2015), para 36-37; Human Rights Committee, Concluding observations on the 6th periodic report of Spain, CCPR/C/ESP/CO/6 (2015), para 18; CAT, Concluding observations on the 6th periodic report of Spain, CAT/C/ESP/CO/6 (2015), para 13.

<sup>4</sup> Communications report of special procedures, 2 June 2015, A/HRC/29/50.

<sup>5</sup> African Convention on Human and Peoples' Rights, Article 12 (5) [prohibiting mass expulsions aimed at national, racial, ethnic or religious groups]; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, article 25 (4).

<sup>6</sup> Human Rights Committee, General Comment No. 15, HRI/GEN/1/Rev.6 (1986), para 10.

<sup>7</sup> CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para 26.

The African Convention on Human and Peoples' Rights, Article 12 (5), prohibits mass expulsions aimed at national, racial, ethnic or religious groups.

9. The prohibition of collective expulsion has therefore evolved as a principle of general international law.

10. The High Commissioner submits that the concept of the prohibition of collective expulsion is not to be understood solely as prohibiting the expulsion of several people at the same time. Rather, the focus must be directed at the individual assessment process of each individual case. It is the *absence* of a reasonable and objective examination of each person's individual case, which characterises 'collective expulsions' as inherently arbitrary and requiring prohibition.<sup>8</sup> Notably, the notion of 'arbitrariness' in international law does not simply equate with 'against the law'. It must be interpreted more broadly, including elements of 'inappropriateness, injustice, lack of predictability, and due process of law'.<sup>9</sup> Consequently, to ensure that collective expulsions are not carried out, the fair trial and due process guarantees that must be adhered to should be analogous to those applicable in individual expulsion cases.

11. The prohibition of collective expulsion is distinguishable from the principle of *non-refoulement* in that it is a fair trial and due process right. It requires any State considering expelling a group of non-nationals to review, with due diligence and in good faith, and decide individually each case of expulsion.<sup>10</sup> It is a guarantee that must be considered in its own regard and that entitles every non-national to an individualised examination of all arguments militating against his or her expulsion.<sup>11</sup> At the same time, the purpose of this guarantee is closely connected to the broader concept of *non-refoulement*, in light of the protection of an individual from return to harm.

12. The Office of the High Commissioner for Human Rights (OHCHR) has developed guidance to States on ensuring individuals are not subject to collective expulsion in its *Recommended Principles and Guidelines on Human Rights at International Borders*.<sup>12</sup>

### **The personal scope of the prohibition of collective expulsion**

13. The prohibition of collective expulsion and the fair trial and due process guarantees that emerge from this obligation apply to all non-nationals, regardless of their status. Under ICRMW, Article 22, all migrants are protected by the prohibition of collective expulsion, irrespective of their migratory status. The ILC Draft Articles and regional human rights Conventions<sup>13</sup>, as well as other authoritative interpretations of international human rights law regard this right as applicable to all non-nationals, whether lawfully or unlawfully present on the territory.<sup>14</sup> This practice also emerges

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<sup>8</sup> *Andric v Sweden*, Application No. 45917/99 (1999), para 1 and *Conka v Belgium*, Application No. 51564/99 (2002), para 63; Human Rights Committee, General Comment No. 15, HRI/GEN/1/Rev.6 (1986), para 10; ILC Draft Articles, Article 9(3).

<sup>9</sup> Human Rights Committee, *Al-Gertani v. Bosnia Herzegovina*, Communication No. 1955/2010 (2013), para 10.3.

<sup>10</sup> ICRMW, Article 22(1); ECtHR, *Andric v Sweden*, Application No. 45917/99 (1999), para 1; ILC Draft Articles, Article 9(3).

<sup>11</sup> ICRMW, Article 22; ECtHR, *Andric v Sweden*, Application No. 45917/99 (1999), para 1; *Conka v Belgium*, Application No. 51564/99 (2002), para 63; ILC Draft Articles, Article 9(3).

<sup>12</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014, Principle C.11, Guideline s 4.5, 9.1, 9.4, 9.14.

<sup>13</sup> The Inter-American Court on Human Rights, the Inter-American Commission and the African Commission on Human and Peoples' Rights have all interpreted the prohibitions of collective and mass expulsion in their respective regional Conventions as applying also to non-nationals not lawfully on the territory. IACtHR, *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic, Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Order of the Court (2000); AfrCommHR, *Rencontre Africaine pour la Défense des Droits de l'Homme c. Zambia*, Communication No. 71/92 (1996), para. 23; *Union Inter-Africaine des Droits de l'Homme et al v. Angola*, Communication No.159/96 (1997), para. 20.

<sup>14</sup> ILC Draft Articles, Article 1 and Commentary, para 3; CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para 26; OHCHR *Recommended Principles and Guidelines on Human Rights at International Borders*, Principle A.7; Council of Europe, *Twenty Guidelines on Forced Return*, Guideline 2.

under the ECHR system, as the plain wording of Article 4 of Protocol 4, refers to ‘aliens’ without qualifying the term. In the jurisprudence of the ECtHR, Article 4 Protocol 4 of the Convention has been applied to protect individuals who are not in possession of proper authorisation to enter or remain in the territory.<sup>15</sup>

14. The High Commissioner is of the view that the object and purpose of the prohibition of collective expulsion and the concomitant right to individualised examination inherently contains the right of every individual, without discrimination, to have access to mechanisms which are able to assess their situation and prevent their expulsion until such an assessment has been completed.

### **Applicability of human rights obligations at international borders**

15. The High Commissioner submits that international borders are not zones of exclusion or exception for States’ human rights obligations. International law, including international human rights law, is applicable at international borders, including in so-called ‘no-man’s land’ between border posts and in immigration and transit zones.<sup>16</sup>

16. The ECtHR has accepted that international human rights obligations can be applicable extraterritorially, notably where the State is regarded as exercising *de jure* or *de facto* control.<sup>17</sup> As indicated by the Human Rights Committee, the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained [...].<sup>18</sup> The High Commissioner joins the concern of the Special Rapporteur against torture and other cruel, inhuman or degrading treatment or punishment at the inappropriate and artificial limits on territorial jurisdiction through which States attempt to evade or dilute their human rights responsibilities.<sup>19</sup> For the purposes of international human rights law, including Article 4 of Protocol 4 ECHR, it is the authority and control that a State exercises over the area, place or person that is decisive of the applicability of its international legal obligations and not the individual’s nationality or geographical location.<sup>20</sup>

17. The areas where a State executes border governance measures, including, *inter alia*, patrols, interceptions, cross-border military operations, detention, expulsions and other immigration measures, are not excluded from this notion of jurisdiction. It follows that international legal obligations to respect and protect the human rights of all individuals at international borders are fully applicable.

### **The right to an individual examination**

18. As noted above, the High Commissioner submits that the prohibition of collective expulsion inherently contains the right to a reasonable and objective examination in accordance with the law and free from any arbitrariness of the full range of individual circumstances that may militate against the expulsion of each particular individual in the group.<sup>21</sup>

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<sup>15</sup> *Khlaifia and others v. Italy*, Application No. 16483/12 (2015); *Sharifi and others v. Italy*, Application No. 16643/09 (2015); *Hirsi Jamaa and others v. Italy and Greece*, Application No. 27765/09 (2012); *Conka v Belgium*, Application No. 51564/99 (2002).

<sup>16</sup> *OHCHR Principles and Guidelines*; Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 10.

<sup>17</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 81.

<sup>18</sup> General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 10.

<sup>19</sup> See Report of the Special Rapporteur against torture and other cruel, inhuman or degrading treatment or punishment, A/70/303 (2015), para 13.

<sup>20</sup> *Ibid.*, para 17, 34-35(SR Torture Report); ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09 (2012), para 178.

<sup>21</sup> ICRMW, Article 22; ECtHR, *Andric v Sweden*, Application No. 45917/99 (1999), para 1; *Conka v Belgium*, Application No. 51564/99 (2002), para 63; IACtHR, *Pacheco Tineo Family v. Bolivia*, 2013, para 133; ILC Draft Articles, Article 9(3).

19. Relevant circumstances to be considered include, but are not limited to, nor are they mutually exclusive:

- The individual may face a risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment or a similarly gross human rights violations. The risk of *refoulement* should be assessed in regard to both the initial destination of expulsion (direct *refoulement*) and/or to a probability of subsequent secondary expulsion (indirect or chain *refoulement*).<sup>22</sup>
- The individual may face a threat to his or her life or freedom on account of race, religion, nationality, ethnicity, gender, sexual orientation, political opinion, or analogous discriminatory grounds if returned.<sup>23</sup>
- The individual may be a child, in which case the best interests of the child shall be the primary consideration, taking precedence over any other considerations.<sup>24</sup> Unaccompanied or separated children may be subject to specific protections under international law and typically also national law, which may protect them against expulsion.
- The individual may be a victim of trafficking subject to special protection under international and national law, entitled to temporary permission to stay.<sup>25</sup>
- The individual may be a smuggled person and entitled to a temporary residence permit.<sup>26</sup>
- The individual may be fleeing armed conflict or endemic violence and may thus claim temporary protection.<sup>27</sup>
- Under the national law of the State considering expulsion, the individual may have a direct, derived or contingent right or privilege of residence or other regular status permitting the individual to stay.<sup>28</sup>
- Under national or international law, the individual may enjoy protection against expulsion on the basis of the right to family life.<sup>29</sup>
- The individual may be a stateless person and may be entitled to temporary residence status.<sup>30</sup>
- The individual may be medically unfit to travel, have a right to urgent medical care, specific human rights assistance or protection due to a particular risk he or she faces.<sup>31</sup>

<sup>22</sup> ECHR, Article 3; CAT, Article 3; ICCPR, Articles 6, 7; CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para 27; ILC Draft Articles, Article 24.

<sup>23</sup> 1951 Convention relating to the Status of Refugees, Articles 33; ILC Draft Articles, Article 6(b).

<sup>24</sup> CRC, Article 3(1); ILC Draft Articles, Article 15(2); The CRC Committee has taken the position that the best interest shall be a primary determination and that allowing the child access to the territory is a prerequisite to initiate the assessment. It has further maintained that States parties 'shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child', and requested states inter alia to 'take into account the particularly serious consequences for children of the insufficient provision of food or health services', see CRC, General Comment No. 6, CRC/GC/2005/6 (2005), paras 19-20, 27; *OHCHR Principles and Guidelines*, Guideline 9.7. Note also, that a joint CRC and CMW General Comment on the rights of migrant children is forthcoming.

<sup>25</sup> *OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (2002), para 10, indicate that States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.

<sup>26</sup> See, e.g. European Union Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Articles 3, 8.

<sup>27</sup> See, e.g. European Union Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced, Article 2(c)(i).

<sup>28</sup> ICCPR, Article 13; ECHR, Protocol 7.

<sup>29</sup> The right to family life: ECHR, Article 8; ICCPR, Articles 17, 23; CRC, Articles 9, 10(1); ILC Draft Articles, Article 18; CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para 28; The Human Rights Committee has noted that where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in light of the significance of the State party's reasons for the removal of the person concerned and the degree of hardship the family and its members would encounter as a consequence of such removal, *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, 26 July 2004, para 9.8 and Human Rights Committee, *Al-Gertani v. Bosnia Herzegovina*, Communication No. 1955/2010 (2013), para 10.8; Where the rights of the child are concerned, the Convention on the Rights of the Child, Article 9(1) requires States to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. See also CRC, General Comment No. 6, CRC/GC/2005/6 (2005), paras 82-84; CRC General Comment No. 14, CRC /C/GC/14 (2013), para 85; IACtHR, *Advisory Opinion OC-21/14*, para. 281.

<sup>30</sup> 1954 Convention Relating to the Status of Stateless Persons, Article 31(2), (3); ILC Draft Articles, Article 7; *OHCHR Principles and Guidelines*, Guideline 8.5.

20. Individual examinations must be conducted with due diligence and in good faith so as to assess all the possible reasons that may weigh against an individual's expulsion, going beyond the mere identification of the individual and his or her country of nationality. For this purpose, processes must be established to determine notably the risks involved with expelling the individual.<sup>32</sup> Individuals who may require immediate assistance should be identified and appropriately referred.<sup>33</sup>

21. In compliance with international human rights laws and standards, the procedure of individualised examination should be non-discriminatory and take into account the vulnerabilities and specific rights and needs of each individual.<sup>34</sup> Such an examination must be gender, culture and age sensitive, appropriate, accessible and participatory in order to allow all migrants, including migrants at particular risk, the opportunity to have their case thoroughly examined.<sup>35</sup> In particular, individuals must be given an adequate opportunity to explain their situation in a manner that would enable them to contribute meaningfully to an appropriate assessment of the effects of their removal.<sup>36</sup>

22. Individuals should be immediately informed in accessible formats and in a language he or she understands, of the procedures that will be followed, their rights and obligations during the procedures, possible consequences of their non-compliance and remedies available to them.<sup>37</sup>

23. The state officials that carry out such an individualised examination must be: a) able to appreciate the full range of arguments that weigh against the expulsion of a particular individual; b) adequately trained on relevant standards of national and international law and non-coercive interviewing techniques;<sup>38</sup> c) sensitised to the specific needs of migrants at particular risk, including women, children, persons with disabilities, Lesbian Gay Bisexual TI individuals and older persons, as well as to the risk of stereotypes and bias;<sup>39</sup> and, c) in a position to corroborate relevant elements, where necessary.

24. The High Commissioner reiterates that diplomatic assurances must not be arranged with countries that are unable to demonstrate that they respect and protect the human rights of returned migrants.<sup>40</sup> Such arrangements cannot be deemed to serve as an adequate safeguard, especially if it has been determined that the individual would face a foreseeable risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>41</sup>

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<sup>31</sup> ICESCR, Article 12; ICRMW, Article 28; Protocol against the Smuggling of Migrants by Land, Sea and Air, Articles 16(1)-(3); ILC Draft Articles, Article 15 and Commentary, para 3; *OHCHR Principles and Guidelines*, Guideline 9.19. Under the *OHCHR Principles and Guidelines* 'migrants who may be at particular risk at international borders' are defined to include, *inter alia*, migrants in irregular situations, migrants in smuggling situations, trafficked persons, as well as migrants who are; children (accompanied by family members as well as unaccompanied and separated children), women (including pregnant women and new and/or breastfeeding mothers), persons who have suffered abuse including sexual and gender based violence, victims of torture and cruel, inhuman and degrading treatment and victims of violence and trauma, persons with disabilities, older persons, stateless persons, indigenous peoples, persons who are members of minority communities, persons with HIV or particular health concerns, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, human rights defenders and political dissidents.

<sup>32</sup> *OHCHR Principles and Guidelines*, Guideline 6.1.

<sup>33</sup> *Ibid.*

<sup>34</sup> IACtHR, *Pacheco Tineo Family v. Bolivia* (2013), para 133; *OHCHR Principles and Guidelines*, Principle C.12; Guidelines 6.12-6.17.

<sup>35</sup> CRC, Articles 3, 9; UNCRPD, Article 13; *OHCHR Principles and Guidelines*, Guidelines 9.7, 6.12-6.17.

<sup>36</sup> Human Rights Committee, *Al-Gertani v. Bosnia Herzegovina*, Communication No. 1955/2010 (2013), para 10.9.

<sup>37</sup> CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; *OHCHR Principles and Guidelines*, Guidelines 7.9, 9.4, 9.5.

<sup>38</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09 (2012), para 185; *OHCHR Principles and Guidelines*, Guidelines 3.8-3.12, 6.10.

<sup>39</sup> *OHCHR Principles and Guidelines*, Guidelines 6.12-6.17

<sup>40</sup> Report of the Special Rapporteur on the human rights of migrants, A/HRC/23/46 (2013), para 88.

<sup>41</sup> CAT, Concluding observations on the 6<sup>th</sup> periodic report of Spain, CAT/C/ESP/CO/6 (2015), para 12; CAT, Concluding observations on the 3<sup>rd</sup> periodic report of Azerbaijan, CAT/C/AZE/CO/3 (2009), para 22.

25. Bilateral or multi-lateral readmission agreements<sup>42</sup> are of particular concern when they foresee the return of migrants who do not hold the nationality of the country of return or who may never have entered this country in the first place, and who are likely to be subject to further expulsion from this country.<sup>43</sup> These agreements also do not absolve the State from its duty to ‘adopt clear and transparent procedures with adequate judicial mechanisms for review’.<sup>44</sup> Such agreements should be public and integrate rigorous human rights, due diligence, monitoring, accountability and oversight mechanisms.<sup>45</sup>

26. The prohibition of collective expulsion also requires States to follow specific procedural rules to ensure that no individual is expelled arbitrarily and that effective remedies are accessible to individuals who believe their rights have been curtailed:

- a) Any decision to expel an individual or group of individuals must be based in law and taken by a competent authority in accordance with the law.<sup>46</sup>
- b) Individuals have the right to be notified in writing of the expulsion decision and to receive information about the available legal remedies and the time provided to file an appeal.<sup>47</sup>
- c) The notice should include the reasons for the expulsion decision, the assessment of the personal circumstances, as well as an evaluation of the risks in expelling the individual and be made available to the individual in an accessible language and format.<sup>48</sup>
- d) Individuals have the right to challenge the expulsion decision and to be heard by a competent independent authority within a reasonable time.<sup>49</sup>
- e) Individuals have the right to be informed of their right to seek recourse to consular protection and assistance.<sup>50</sup>

### **Right to an accessible, adequate and effective remedy**

27. In addition to the duty to effectively protect human rights, States must ensure that individuals also have accessible, adequate and effective remedies to claim those rights.<sup>51</sup> The ECtHR has maintained that domestic remedies must be able to examine the substance of an ‘arguable complaint’ and to grant ‘appropriate relief’.<sup>52</sup>

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<sup>42</sup> In 1992, Spain and Morocco signed an agreement on *the movement of people, the transit and the readmission of foreigners who have entered illegally*, which entered into force on 21 October 2012. Article 2 of the Agreement states that: ‘The readmission will be effected if it is proven, by any means, that the foreigners whose readmission is requested actually come from the territory of the requested State. The application for readmission shall be submitted within ten days after the illegal entry into the territory of the requested State [sic]. It shall contain all available data relating to the identity, the personal documents that the foreigner may possess and the conditions of his/her illegal entry into the territory of the requesting State, as well as any other information available’. Article 5 states: ‘The requested State shall ensure that the foreigners readmitted are sent as soon as possible to their State of origin or the State where they started their journey, to the extent that they are not entitled to remain in the territory of the requested State’.

<sup>43</sup> Report of the Special Rapporteur on the human rights of migrants, A/HRC/23/46 (2013), paras 77, 97; see also CMW, Concluding observations on the initial report of Morocco, CMW/C/MAR/CO/1, (2013), paras 31-32, calling upon the State Party to put in place a legal framework governing expulsion procedures and to ensure individuals have the right to submit reasons why they should not be expelled and have their case reviewed by a competent authority.

<sup>44</sup> Human Rights Committee, Concluding observations on the 6<sup>th</sup> periodic report of Germany, CCPR/C/DEU/CO/6 (2012), para 12.

<sup>45</sup> Human Rights Committee, Concluding observations on the 6<sup>th</sup> periodic report of Germany, CCPR/C/DEU/CO/6 (2012), para 12; Report of the Special Rapporteur on the human rights of migrants, A/HRC/29/36 (2015), para 107.

<sup>46</sup> ICRMW, Article 22(2). In this regard, the CMW has noted that “the competent authority reviewing the decision of expulsion should ideally be a court”, see CMW, General Comment No. 2, CMW/C/GC/2 (2013), para 53.

<sup>47</sup> ICRMW, Article 22(3); CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; ILC Draft Articles, Article 26(1)(a); *OHCHR Principles and Guidelines*, Principle 9.4.

<sup>48</sup> ICRMW, Article 22(3); ECtHR, *Conka v. Belgium*, Application No. 51564/99 (2002), para 61; *OHCHR Principles and Guidelines*, Principle 9.4.

<sup>49</sup> ICRMW, Article 22(4); Human Rights Committee, *Pierre Giry v. Dominican Republic*, Communication No. 193/1985 (1990); CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; ILC Draft Articles, Article 26(1)(b), (c); *OHCHR Principles and Guidelines*, Principles 6.8, 9.5.

<sup>50</sup> ICRMW, Article 23.

<sup>51</sup> ICCPR, Article 2(3); CERD, Article 6; ECHR, Article 13; Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 15.

<sup>52</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09 (2012), para 197.



28. With regard to the right to access an adequate and effective remedy for victims of collective expulsion the High Commissioner submits that these individuals must a) have an effective opportunity to challenge this decision; b) the remedy must be able to prevent the carrying out of measures contrary to international human rights law; and, c) in the event of a violation of the prohibition of collective expulsion, appropriate redress should be provided to the individuals in question.

### **Ability to challenge an expulsion decision**

29. Individuals have the right to challenge the expulsion decision and to be heard by a competent authority within a reasonable time.<sup>53</sup> A first prerequisite to ensure this right is the duty to put in place appropriate judicial and administrative mechanisms or to designate a competent authority to review the challenged decision.<sup>54</sup> The CMW maintains that the ‘competent authority reviewing the decision of expulsion should ideally be a court’.<sup>55</sup> The mechanism must be independent and be able to substantially examine the claims brought before it.<sup>56</sup>

30. Secondly, an individual must be ‘given full facilities’ to pursue and access his or her remedy against expulsion.<sup>57</sup> This requirement of accessibility to a remedy must be understood to include ensuring that all persons have equal access to the mechanisms in place and are allowed to effectively pursue their remedies.<sup>58</sup>

31. The mechanisms for challenging expulsions must be sensitive to the obstacles faced by migrants at particular risk.<sup>59</sup> Individuals have the right to free and competent legal and interpretative assistance where required.<sup>60</sup> Individuals must also be given adequate time and facilities to effectively pursue a remedy,<sup>61</sup> including accessible information about their rights and how to access them.<sup>62</sup>

### **Suspensive effect**

32. For a remedy to be effective, it must also be able to prevent potentially irreversible harm to the individual.<sup>63</sup> One of the purposes of the right to an individualised examination is precisely to serve as a safeguard from returning an individual to a place where he or she faces a risk of suffering such irreversible harm. The ECtHR has repeatedly held that a remedy must have suspensive effect in order to be considered effective.<sup>64</sup>

33. The High Commissioner concurs with this view in that, as long as the individualised examination is still pending, the human rights risks to that individual must be considered as undetermined. Given the risk of irreparable harm that could ensue, it is the view of the High Commissioner that, in accordance with the principles of due diligence and good faith, the State should assume human rights risks exist until the matter has been finally determined.

34. In addition, the right of access to an adequate and effective remedy requires the State to ensure that an individual is able to exhaust all available remedies. In this context, the procedure to

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<sup>53</sup> ICRMW, Article 22(4); Human Rights Committee, *Pierre Giry v. Dominican Republic*, Communication No. 193/1985 (1990); CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; ILC Draft Articles, Article 26(1)(b), (c); *OHCHR Principles and Guidelines*, Principles 6.8, 9.5.

<sup>54</sup> ICRMW, Article 22(4); Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 15;

<sup>55</sup> CMW, General Comment No. 2, CMW/C/GC/2 (2013), para 53.

<sup>56</sup> ECtHR, *Chahal v. United Kingdom*, Application No. 22414/93 (1996), para 151; *OHCHR Principles and Guidelines*, Principle 6.8.

<sup>57</sup> Human Rights Committee, General Comment No. 15, HRI/GEN/1/Rev.6 (1986), para 10.

<sup>58</sup> CERD, Article 6; CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para 25; IACtHR, *Advisory Opinion OC-21/14*, para 113.

<sup>59</sup> CRC, Articles 3, 9; UNCRPD, Article 13; *OHCHR Principles and Guidelines*, Guidelines 9.7, 6.12-6.17.

<sup>60</sup> CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09 (2012), para 185; ILC Draft Articles, Article 26(1)(e), (f).

<sup>61</sup> CMW, General Comment No. 2, CMW/C/GC/2 (2013), para 53; *OHCHR Principles and Guidelines*, Principle 9.5.

<sup>62</sup> CAT, *Kwami Mopongo and others v. Morocco*, Communication No. 321/2007 (2014), para 11.3; ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09 (2012), para 204; *OHCHR Principles and Guidelines*, Guidelines 7.9, 9.4, 9.5.

<sup>63</sup> ECtHR, *Conka v. Belgium*, Application No. 51564/99 (2002), para 79.

<sup>64</sup> *Ibid.*; ECtHR, *Khlaifia et autres c. Italie*, Application No. 16483/12 (2015), para 172.

assess the compatibility of an expulsion decision with the right to be protected from collective expulsion can therefore only be regarded as finally concluded when all available remedies have been exhausted.

35. It should furthermore be noted that a finding of an individual's right to remain subsequent to that person's expulsion would equally constitute an ineffective remedy, due to the individual's potential obstacles to return or inability to access complaint mechanisms from abroad.<sup>65</sup>

36. Consequently, for a remedy in relation to the prohibition of collective expulsion to be effective, it must have automatic suspensive effect.<sup>66</sup>

37. The failure of a State to ensure effective procedures, and also effective access to these procedures, necessarily results in a violation of both the prohibition of collective expulsion and the right to an adequate and effective remedy. Of particular concern are those conditions that negate these rights from the outset, such as incompatible laws and policies that will inevitably lead to repeat violations of the prohibition of collective expulsion.

### Reparation

38. The obligation to afford an adequate and effective remedy is not considered fully discharged without reparation to individuals whose rights have been violated.<sup>67</sup> The High Commissioner notes that the objective of an effective remedy includes the cessation of an ongoing violation, the elimination of the consequences of the violation and appropriate compensation. Reparation can also involve 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.<sup>68</sup> The ECtHR has commented that if 'national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate'.<sup>69</sup>

39. Integral to the obligation to provide an effective remedy is the State's duty to take appropriate and effective measures to prevent the recurrence of similar violations in the future by amending those laws, policies and practices that gave rise to the violation.<sup>70</sup> In a similar vein, the State should investigate allegations of cases of collective expulsion and hold to account those responsible in a prompt, thorough and effective manner through independent and impartial bodies.<sup>71</sup> The State should furthermore implement training programs on the international standards on the human rights of migrants and the guarantees of fair trial and due process of law.<sup>72</sup>

40. When fair trial and due process rights in expulsion procedures have been violated, the primary obligation of the State is to review the expulsion decision. Thereby, the State must take full consideration of each individual's circumstances and risks related to their expulsion, in line with the safeguards correspondent to the prohibition of collective expulsion and right of access to an effective remedy.<sup>73</sup> In cases in which such a review of an expulsion decision determine that an individual was

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<sup>65</sup> ILC Draft Articles, Commentary to Article 27, para 2.

<sup>66</sup> *Conka v Belgium*, Application No. 51564/99 (2002), para 79; Council of Europe, *Twenty Guidelines on Forced Return, 2005*, Guideline 5; ECtHR, *Gaberamadhien v. France*, No. 25389/05 (2007), para 58; IACtHR, *Advisory Opinion OC-21/14*, para 142.

<sup>67</sup> CERD, Article 6; Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 16.

<sup>68</sup> Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 16.

<sup>69</sup> ECtHR, *Iatridis v. Greece*, Application No. 31107/96 (1999), para 33.

<sup>70</sup> Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 17; Human Rights Committee, *A.H. v. Denmark*, Communication No. 2370/2014, para 10.

<sup>71</sup> Human Rights Committee, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 15; CMW, Concluding observations on the initial report of Algeria, CMW/C/DZA/CO/1 (2010), para 23.

<sup>72</sup> IACtHR, *Pacheco Tineo Family v. Bolivia* (2013), para 270.

<sup>73</sup> Human Rights Committee, *Al-Gertani v. Bosnia Herzegovina*, Communication No. 1955/2010 (2013), para 12; Human Rights Committee, *Husseini v. Denmark*, Communication No. CCPR/C/112/D/2243/2013 (2014), para 11.

unlawfully or arbitrarily expelled, arrangements should be made for the return of that person to the State's jurisdiction, and appropriate compensation afforded.<sup>74</sup>

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<sup>74</sup> Human Rights Committee, *A.H. v. Denmark*, Communication No. 2370/2014, para 10.