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Observatori del Sistema Penal i els Drets Humans - OSPDH

**Report on the situation on the Euro-
Mediterranean borders¹
(from the point of view of the respect of
Human Rights)**

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¹ This working paper has been elaborated with the collaboration of the Italian team (WP 8)

I. INTRODUCTION. AN APPROACH TO THE CONCEPT OF EUROPEAN BORDERS.

In order to get to know the situation of Euro-Mediterranean border, first of all we have to approach to the meaning of the European border and where is this border. Balibar (2003) warns that we must consider that the borders of the new political-economical institutions in which State's sovereign functions try to be preserved are not located in the limits of their territories any more: they are disseminated all around, where the flow of information, persons and things takes place or where it is controlled. In this context, GUILD and BIGÓ (2005:70) affirm that "processes such as European unification have modified those procedures that had made of territorial borders an institution, having resulted in a distinction between borders as a line that separates territories, and borders as controlling zones.

The abolition of internal borders introduced by Schengen agreements and their incorporation into the European Union through the Treaty of Amsterdam (1999) meant the genesis of the common European external border. More specifically, with the establishment of the area of "freedom, security and justice" the Schengen acquis was incorporated to the communitarian law and, since then the EU had officially an only external border that Member States and the EU institutions have to manage in a coordinated way².

The Schengen Agreements set in motion the mechanisms to abolish border controls on the movement of persons among the Member States of the European Union and the establishment of a system for common conditions of entry and exclusion of third country nationals into the combined territory. Besides, the EU has developed common rules on visas, asylum and external borders control in order to allow the free movement of people within the EU without disturbing the peace and security.

In this context, it would seem reasonable to locate EU's external border in the limits between member and non-member states. But experience shows it's not that way. In fact, on the one hand there are still restrictions and controls between original member states and recently incorporated countries (after EU extension in May, 2004) and on the other hand, as we will see below, bordering states are progressively assuming a more important role on border controls, what would take us to locate European borders in their respective territories.

By this, we mean that borders cannot be anymore considered as just a geographical issue. EU borders are located where the management strategy begins. This is how decisions and measures adopted by EU are capable to affect and also to transform zones that are really far –geographically, culturally and politically- from the one where the political decision is taken. As a consequence of the implementing of these policies by EU, certain territories become

² According to Rigo (2005:7) "the signing of the Schengen agreements, their incorporation in the Amsterdam Treaty through the creation of an area of 'freedom, security and justice' and the repositioning of national borders at the external frontiers of the Union determined structural changes in border control regimes. On a superficial level, the lifting of internal borders created a common space of circulation that widened the range of subjects able to enjoy a transnational freedom of movement. On a deeper level, the reciprocal responsibility implied by a "communitarized" concept of borders, transformed every internal and external frontier into a frontier belonging to each member state".

border zones susceptible to control and vigilance, where freedom of movement results obstructed. In this sense, we can see how in those last years Africa's sub-Saharan countries have become EU's southern border.

Different legislative levels and their implementation affect the geographical territory which is considered a European border. Most of the times the implementation of these rules goes beyond the territorial competence and, subsequently, extending the State's jurisdiction and –therefore- responsibility, as we will examine hereunder. So, these territories are affected by communitarian legislation passed by EU, member states legislation, laws of sovereign territories implied, and International Law. At this point, we must highlight the important role that must play International Law in the field of Human Rights, Asylum and Safety of Life at Sea. This law must inform the rest of the legislations and their implementation, especially on immigration and asylum policies, but as we will see below, it's not always taken into account. This situation represents a new challenge for the respect of Human Rights that the EU has to face.

On the other hand, we have to highlight that in the last few years, border controls (and controlling immigration) have turned to be a policy priority, every day more connected with the issue of security³. As it is stated by Pécaud and de Guchtenerie (2006:70), nowadays, “migration is commonly understood, in security terms, as a “problem” and many countries feel the need to protect against this “threat.” They add that “in recent years, terrorism-related concerns have further fueled this trend and put borders in the spotlight. In this context, irregular migration is perceived as a central phenomenon reflecting the porosity of borders and calling for greater surveillance”.

In this sense, the European Commission⁴ affirms that “since the Tampere Programme of 1999, the management of the external borders has been one of the cornerstones of the progressive establishment of the European Union as an area of freedom, security and justice.” Moreover, after the terrorist attacks of S-11 in New York and M-11 in Madrid the security dimension of borders and migrations management has acquired a highlighted position in the EU priorities as it appears in the Hague programme⁵ of 2004. Since these events, “illegal

³ According to CASTLES and MILLER “Never before statesmen accorded such priority to migration concerns. Never before had international migration seemed so pertinent to national security and so concerned to conflict and disorder on a global scale (1993: 260).

⁴ Communication from the Commission to the Council “Reinforcing the management of the European Union's Southern Maritime Borders”, Brussels, 30.11.2006

⁵ Adopted by the Brussels European Council held on 4 and 5 November 2004. It lays down the bases for work over the next five years for strengthening freedom, security and justice in the EU.

immigration”⁶ has been dealt with terrorism, as they were the two faces of the same coin⁷.

But it's not about a new tendency, it rather means a reinforcement of “securitarian” dynamics that have accompanied the construction of EU. From the beginning Schengen agreements have associated the regulation of EU's external borders with “security”: most of its rules are measures to guarantee internal security at Schengen space, protecting community from external threats, such as terrorism, cross-border crime or “illegal immigration”. All in all, the abolition of border controls inside Schengen States has represented a hardening of the tools of control of third countries nationals because EU considers them as potential risks for its security. For this reason, the improvement of EU external borders control is taken as necessary measure to guarantee domestic security.

As Walters affirms (2004:65), with Schengen the threat to security doesn't mean an encounter (military) with other countries. Threat to security would better be defined as a series of social and transnational menaces, frequently personified at the stereotype of the Islamic and dark skinned individual. This Schengen space doesn't define the rest of the States as “enemies”, but it defines as threats those countries considered origin or transit of illegal migrations⁸.

In this sense, we can affirm with BIETLOT (2004:700) that nowadays, when states have every time less power over the new international mobility, they try to secure their little sovereignty remaining through the control and repressive management of migration flows. In order to put this in practice, they don't hesitate to make of insecurity and terrorism and obsession, to exaggerate the threat that immigration might represent for sovereignty, identity and national security, and neither to criminalize foreign persons with the purpose of legitimating the weight and spectacularity of its interventions before public opinion.

So, as we have said, borders cannot be anymore considered as just a geographical issue. That is to say, borders don't fix with national states anymore, neither they are useful to

⁶ The use of the term “illegal” can be criticized for three reasons: 1) due to its connotation with criminality, and most undocumented migrants are not criminals; 2) defining people as “illegal” can be regarded as denying them their humanity; and 3) labelling “illegal” asylum seekers who find themselves in an irregular situation may further jeopardize their asylum claims. It has also been argued that “a human being can never be ‘illegal,’ as otherwise the right of everyone ‘to recognition everywhere as a person before the law’ would be violated.” PICUM underlines the position that is increasingly being taken by a multitude of non-governmental organizations, local authorities, professionals from diverse fields, and undocumented migrants themselves, and reaffirms what the NGO Solidar has stated in its comments on the same communication, that “both from a juridical and an ethical point of view, no human being can be considered illegal.” International organizations such as the International Labour Organization (ILO) and the International Organization for Migration (IOM) specifically refrain from using the term “illegal” when referring to undocumented migrants. In recently adopted policy measures, some regional organizations have expressly referred to the rights of “irregular migrants” or “undocumented migrants”: the Council of Europe adopted a resolution in June 2006 on the human rights of irregular migrants, in which it states that it “prefers to use the term ‘irregular’ migrants,” and the Association of Southeast Asian Nations (ASEAN) signed a declaration in January 2007 on the protection and the promotion of the rights of migrant workers, in which it refers to the “migrant workers who, through no fault of their own, have subsequently become undocumented.” (From Plataform for International Cooperation on undocumented migrants (PICUM), www.picum.org). In this sense, see also: RODIER, Claire (2006) “Illegal emigration: a notion that should be banished”, in *Liberation* (<http://www.migreurop.org/article922.html>).

⁷ The political process of linking migrations with terrorism and criminality, very frequent from some EU institutions, according to HUYSMANS (2000) is associated with a wider political process in which immigrants and asylum seekers are seen as a threat against the protection of national identity and welfare state's provisions.

⁸ In this sense, see also Walters, 2006.

delimit their sovereignty. These are characteristics that we have to take into account when analyzing the Euro-Mediterranean border because, as we will see, the control of this border is no more only exercised by the Euro-Mediterranean countries, neither it is no more only exercised in the Euro-Mediterranean area. The new migration routes of people coming from Africa to Europe and the new European instruments to prevent irregular migration have changed the actors and the territories where border controls are developed. In order to know this situation below we are going to analyze some characteristics of European and Spanish border policies implemented in the “southern European border”. And finally we are going to examine the consequences of these policies from a rights-based approach.

II. POLICIES IMPLEMENTED IN THE EURO-MEDITERRANEAN AND ATLANTIC BORDERS. NEW ACTORS, NEW STAGES.

Paolo Cuttitta (2006) in the Challenge working paper entitled “*The changes in the fight against illegal immigration in the Euro-Mediterranean area and in Euro-Mediterranean relations*”⁹ described recent years’ developments of European southern border controls with regard to migration movements from and/or transiting through North Africa. Particularly he gave an overview of “illegal migration” movements by the seaway between North Africa and Southern Europe, presented Italy as a case study and showed the instruments used by the Italian government to induce last transit countries to tighten border controls and cooperate in the fight against illegal migration movements, then he focused on EU policies for the delocalisation of southern external border controls and went over recent developments of border controls and fight against illegal immigration in selected North African countries (Egypt, Tunisia and Libya). And finally he dealt with the violation of the principle of *non refoulement* and the current delocalisation of asylum in Europe. In that paper Cuttitta conclude that according to the European migration policies, for the people of certain countries¹⁰ it is nearly impossible to migrate legally to Europe. For this reason, the clandestine ways to arrive to Europe through its southern borders have increased and the causalities involving irregular migrants on their way to Europe have not decrease. Neither restrictive immigration polices nor tightened and delocalised border controls result in changing this situation.

Starting from the situation and the framework described by Cuttitta and taking into account his analyses we are going to focus the study on the case of the southern Spanish borders and then we are going to pay special attention to the situation of the human rights of people who has experienced the consequences of “control measures” of the external integrated

⁹ See <http://www.libertysecurity.org/article1293.html>

¹⁰ In this sense, see Bigó and Guild, 2003.

border management carried out by the EU in their migratory experience.

In the last years, Spanish southern borders (so, European southwestern borders) have changed and they are still changing. As we have said, the new European instruments to prevent irregular migration and the new migration routes of people coming from Africa to Europe have changed the actors and the territories where border controls are developed. The amalgam and complexity of European policies, instruments and practices on migration, asylum and border management implies the intervention of different actors (public and private) and the deeply transformation of the geographical area that has become a european borderland.

On the one side, new European agencies has assumed border controls and the neighbouring countries everyday play a more important role in these issues. On the other side, borderlands have been equipped with military equipment such as border patrols, high technology for controls at sea, infra-red cameras, radars, walls and barriers up to 6 meters high, etc. And finally, the strengthen and the development of those border controls mean the move of the traditional migratory flows in order to avoid border controls: first, migrant people used to cross the Gibraltar strait (14 Km from the nearest point between the surrounding area between Tanger and Tarifa). Then from the surroundings of Alhucemas to Malaga, Almeria or Granada's beaches (more or less 100 km) or from Morocco to the enclaves of Ceuta and Melilla, Spanish cities situated in North Africa (crossing the wall). Later on from the Western Sahara to the Canary Islands (more than 100km.). Then from Mauritania and, nowadays, from Senegal, Gambia or Cape Verde (more than 800km)¹¹.

The geographical closeness of Spain to the African continent, is the reason that Spain has become for many people the way of entrance to the European Continent. It gave to Spain an outstanding role to check the massive entrance of migrants in Europe from North Africa. In order to improve the vigilance of the coasts, a huge amount of money has been invested to build a sophisticated technological system (named SIVE, for Integral System of Outer Watch) to detect small boats (pateras) which try to arrive to the coast. That system, introduced in 2002, controls millimetrically any movement made in that space. According to official figures, SIVE had drastically restrained the arrival of boats on the Spanish coasts, diverting thereby the immigration flows toward alternative (longer and more dangerous) routes¹².

Afer the strengthen of border controls carried out in order to stop the attempts of jumping the wall of Ceuta and Melilla in Otober 2005¹³ and the intensification of Morocco's controls to the people who wanted to leave its territory, has appeared new migratory routes to the Canary Islands from Mauritania or Senegal. (Amnistia Internacinal, 2006b).

¹¹ According to Walters (2006) border control is like antivirus software, not just because it aspires to filter and secure its interior, but also because its fate is to toil in the shadow of the restless hacker.

¹² According to SOS Racismo (2006) the sealing of Spanish borders of Ceuta, Melilla and the Strait of Gibraltar implies a diminishing of the entrance of migrant people by these ways, but it implies an increase in the casualties.

¹³ In this sense see Ortuño, 2006.

This means that nowadays, according to the criterion of the pre-border controls at the sea, European border controls could appear in territories which are more than 800km far from the European boundaries. In these circumstances, how could the EU or Member States authorities implement European border policies in these territories?

The answer to this question is not clear but we could try to find it in the complex network of actions carried out by the EU institutions, the Member States and increasingly by the active cooperation of third countries that we will analyse below.

1.- European external border management.

As it is stated by ILLAMOLA (2007: 8) European external borders mean a demarcation line between inclusion and exclusion, becoming an important element regarding migration management. The main objective of the EU policy in the field of external borders is to establish an integrated border management to guarantee a high and uniform level of control of people and of surveillance at the borders. This integrated management comprises, according to the Council of Ministers¹⁴: border control, the detection and investigation of crossborder crime; the third countries measures, the controls at the area of freedom, security and justice, and the return; the cooperation between the national agencies; and the coordination and coherence of national and EU activities.

This is a complex policy field where there is a combination of internal and external EU policies, and where security and immigration policies and Human Rights appear in the scene altogether. It is clear that the cross border control proceedings have to respect fundamental rights (as it is stated specifically in the Schengen border code, but as we will see below, in the practice they are not ever guaranteed).

According to the EU Commission¹⁵ “illegal entry, transit and stay of third-country nationals who are not in need of international protection undermine the credibility of the common immigration policy”. So, “a firm policy to prevent and reduce illegal immigration could strengthen the credibility of clear and transparent EU rules on legal migration”. The problem of this common immigration policy is that it is only based on an utilitarian criterion related to the need of (cheap) labour of the EU member States¹⁶, and it never has been approached from the perspective of the exercise of the fundamental right to migrate.

Despite the majority of migrant people who is in an irregular situation in the EU has entered legally by ports or airports and then they have overstayed their visas (and the EU

¹⁴ Consejo JAI de 4-5 de diciembre de 2006.

¹⁵ Communication from the Commission “on Policy priorities in the fight against illegal immigration of third-country nationals”, Brussels, 19.7.2006

¹⁶ The EU needs to deal with migration in the overall socio-economic context of Europe that is increasingly characterised by skill and labour shortages, competition for the highly skilled in an ever more globalized economy and accelerating demographic ageing of the European population”. (MEMO/07/188, Brussels, 14 May 2007)

politicians know this situation), border control and the fight against “illegal immigration” has become a priority for the area of freedom, security and justice of the EU.

Specifically The Hague Programme sets the agenda for stepping up the fight against the different forms of “illegal immigration” in a number of policy areas: border security, illegal employment, return and cooperation with third countries.¹⁷

Providing protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, regulating migration flows and controlling the external borders of the Union are three of the objectives pointed by the Hague programme. Specifically, in relation to these issues they are established two important aspects: ‘the external dimension of asylum and migration’, on which considerable emphasis is placed and the the “solidarity” and “sharing of responsibility” between Member States to tackle migratory flows and border management.

As it is affirmed by Claire Rodier (2006:6) it is the first time that the cooperation with third countries in the field of migration management has so relevant place in the EU agenda. The reasons for this, according Claire Rodier are: “on the one hand, with several spectacular episodes in 2004 having highlighted the tragedies caused by migrants crossing the sea to reach the Sicilian and Andalusian coasts, the Council calls upon ‘all states to intensify their cooperation in preventing further loss of life’, recognising that ‘insufficiently managed migration flows can result in humanitarian disasters’. On the other hand, the legislation intended to govern the EU’s common policy on asylum and immigration within its borders, as provided for by the Treaty of Amsterdam, was nearing completion at the end of 2004. The main concern now seems to be protecting those borders from entry by new migrants (2006:6).

As we will see below, these objectives are achieved with the approval of several communitarian regulations and the implementation of different policy instruments. Specifically, as regards control of the maritime borders, according to the Commission¹⁸ “it is necessary for the European Union to adopt a two-pronged approach identifying a set of complementary measures which can be implemented separately. On the one hand, operational measures to fight illegal immigration, protect refugees and reinforce control and surveillance of the external maritime border which can be implemented immediately; and on the other hand it is necessary building on the existing relations and practical cooperation already established with the third countries, pursuing and strengthening our dialogue and cooperation with third countries on these operational measures in the context of the Association Agreements and ENP Action Plans as well as in the context of the Cotonou Agreement¹⁹.

¹⁷ Communication from the Commission “on Policy priorities in the fight against illegal immigration of third-country nationals”, Brussels, 19.7.2006

¹⁸ Communication from the Commission to the Council “Reinforcing the management of the European Union’s Southern Maritime Borders”, Brussels, 30.11.2006

¹⁹ In a global dimension, the Cotonou Agreement which replaced the old Lomé Convention, was signed in June 2000 between European

2.- The global approach to migration.

In December 2005, the European Council adopted the “Global Approach to Migration: Priority actions in Africa and the Mediterranean”. With the objective of making migration a shared priority for political dialogue between EU and the African countries, this global approach formulates coherent policies and action on migration, addressing a vast array of migration issues and bringing together the various relevant policy areas including external relations, development, employment, and justice, freedom and security.

2006 has been a year of agenda setting with Africa. A ministerial conference on migration and development was held last July in Rabat bringing together some 60 countries along West and Central African migration routes. African and EU states participated in the UN High Level Dialogue on Migration and Development in September. An EU-Africa Ministerial Conference on Migration and Development was also held in Libya in November to formulate a joint approach to migration between the EU and the whole of Africa for the first time. 'Migration' has been a recurrent agenda item in dialogue and cooperation programmes with Mediterranean countries, building on the considerable work already carried out in the ENP framework, and the EuroMed forum has been used to further exchange best practice and work towards a joint programme of activities. It has also been on the agenda of high level meetings with the African Union and the regional organisations²⁰.

Specifically, in the Euro-African Conference on Migration and development held in Rabat on the 10-11 July 2006, the Foreign Ministers agreed to sign an Action Plan from Africa based on a new approach to the migration phenomenon. The awareness that this process is part of a long-term approach implies the necessity of concrete measures. The promotion of economic development in Africa to generate employment “in particular in areas with high levels of migration”, the reinforcement of the national border capacity of countries of transit and departure, and the campaigns to sensitizing potential migrants on the risk of illegal immigration are one of the main goals of its declaration. Then, in the last Euro-Africa Conference of migration and development as headed on 23rd of November 2006 in Tripoli, Foreign Ministers agreed in a Joint Euro-Africa Declaration which establish a number of important issues and goals to achieve in a short term. After recognizing that the “fundamental causes of migration within and from Africa are social and economic problems such as poverty, unemployment and

Union and 77 countries in Africa, Caribbean and Pacific (ACP) and has two main objectives: “reducing and eventually eradicating poverty” and the “gradual integration of the ACP countries into the world economy”. The article 13 of the Cotonou Agreement emphasises the importance of migration issue as a structural problem. The “in depth dialogue” and action programme should be lead by the Council Of Ministers, particularly a prevention policy against illegal immigration such as readmission of people, visa cooperation, development of strategies to constraint migration flows and the training of ACP nationals in their country of origin¹. This context originates a new era in the political dialogue between with the Euro-African Conferences related to Migration and Development.

²⁰ Communication from the Commission to the Council and the European Parliament “The global Approach to Migration one year on: Towards a comprehensive European migration policy”, Brussels, 30.11.2006

“uneven impact of globalization and humanitarian disaster”, and that the “well-managed migration can have a positive development impact for countries of origin, transit and destination”. The Tripoli Declaration emphasises the urgency of a common strategy policy in management of the external borders by encouraging the African countries to sign the financial programs of cooperation. The task is to assist Africa to build capacity to develop national policies on mobility and migration including training of border guards²¹. Once more, the Declaration reaffirms the need to work together in the spirit of mutual partnership to the better management of migration flows by sharing information, supporting joint research on migration and developing the exchange of personnel between nation administrations to continue the battle against illegal migration.

But, the Global Approach was criticized by the prioritization of security and control perspective instead of development or other dimensions mentioned in this initiative. In this sense, Spijkerboer (2007:133) says that although “ the introduction to such policy proposals does refer to the human costs of border control, the concrete proposals fail to clearly follow-up on this point. The European Council proposes projects that reinforce surveillance and monitoring. This is said to have “the aim of saving lives at sea and tackling illegal immigration”, but the evidence suggests that measures aimed at tackling illegal immigration greatly increase the risks to migrants, including loss of life. The policy outlines do not address how they will protect migrants from the risks that they face. The proposals also contain an approach that combines development and migration, but the short term aim of the proposals is to combat migration, while development is clearly relegated to the distant future. Thus, while a development-focused approach may in the long term change migration patterns such that human costs decrease, in the short and medium term, the European Council’s proposals will probably increase human costs because of the intensified security and surveillance orientation”. Spijkerboer (2007:134) makes the same critics on the outcomes of the Euro-African Conference carried out at Rabat in July 2006²².

Anyway, the problem of this global approach is not only the relevance given to the control or repressive elements, but also for the limited interpretation of the term “global”. If the approach means to be global, with the sense of comprehensive, integral, it should take into account all the structural factors that influences in the need of emigration of millions of people. The absence of external and international dimension (as trade policies, investments’ protection bilateral agreements, agricultural subsidies, international economic pressures, etc.) reveal an incomplete or even hypocrisy approach, which is far from being a “global” one (paradoxically, the “global approach” omits the causes of emigration related to globalization).

In addition, there is the contradiction (mentioned repeatedly) within the global context,

²¹ Join Euro-Africa Tripoli Declaration.

²² For another critic to the global approach strategy from the point of view of Human Rights see Peral, 2006.

about the restrictive immigration policies and unrestrictive trade and investment policies which not only try to ensure a free movement of good and services (and, according to economic interests, some persons) but also determines substantially the weakness of many states to adopt measures and policies needed to fulfill all human right to every person who lives in its territory.

In this sense, Sassen (2001:95) points out that there is some consensus about the increasing lack of coordination between the purposes of immigration policies and the reality of the more Developer receiving countries. One possible explanation for this is that the limited efficacy of the current immigration policies is due, in part, to the omission of considering the transformation of the general context of international migration and the institutional framework for its regulation. Immigration policies are still characterised by its formal isolation or other main process within the international system, as if it were possible treat immigration as a delimited and close issue. For this author, a combination of tendencies seeks the creation of economic spheres without borders, and however, intensifies the border control to stop immigrants and refugees.

3.- Policy instruments to implement external border management

The amalgam and complexity of dispositions in the Schengen acquis, together with necessary changes coming from new situations required their clarification, simplification and updating resulting in the Schengen Borders Code²³. Just like the previous texts, partially modified by it, the new Code regulates the persons crossing of internal and external borders. (Illamola, 2007) With this Community Code on the rules governing the movement of persons across EU borders and the FRONTEX agency²⁴ the EU has the suitable framework to develop external border controls to the highest level. Furthermore, there are a broad rage of policy instruments at EU's disposal included in the strategy on the external dimension of the area of freedom ,security and justice which represents a significant strength enabling the EU to tailor its external cooperation to the situation of each country. This include:

- bilateral agreements (e.g. on mutual legal assistance and extradition and on the issue of visas);
- the enlargement process, which includes justice, freedom and security priorities;
- EU neighbourhood policy and the action plan;

²³REGULATION (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)This text has entered into force on 13 October 2006.

²⁴ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was established by Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004).

- external aid programmes²⁵ ;
- regional cooperation such as the Euro-Med Process²⁶;
- individual arrangements such as those with some countries, with justice, freedom and security issues.

Furthermore, Community bodies such as Europol and Eurojust are establishing agreements and methods for working with non-EU countries. Development policy contributes in the long term to addressing justice, freedom and security concerns. Lastly, the European Communities and its Member States are key players in international organisations such as the Council of Europe, which provide a basis for promoting common values and priorities²⁷.

4.- Spanish immigration, cooperation and border policies

It is not the aim of this study to do an exhaustive analysis of the existing Spanish immigration legislation²⁸ but it is necessary to mention some aspects because they are relevant to understand the situation at borders. The Spanish Immigration law, the so called “*Ley de extranjería*” establishes entrance conditions; the conditions for having a legal staying permit; and the proceedings of internment, return, devolutions and expulsions of foreigners who are in the Spanish territory.

The forced exit of Spain is carried out by measures of different nature. The devolution (in Spanish, “*devolución*”) and the return (in Spanish, “*retorno*”) are border control measures which are applied to the foreigners prevented to enter in Spain. In the other hand, the expulsion could be an administrative sanction for breaking the law of “*extranjería*”, and also a criminal sanction: “a sanction in place of prison or a sanction besides the prison” for those who were suspicious or have committed a crime. And finally, the internment in a detention centre for foreigners is a preventive measure in order to ensure the expulsion and a deprivation of freedom for those people waiting for being returned. Between May 2004 and October 2006 the Spanish Government spent in expulsions and devolution more than 45.187.744 Euros. For 2007 the budget is 33 millions but it can be more depending on the needs. In this table we can see the Spanish official numbers of repatriated people in 2006.

²⁵ Specifically, projects on justice, freedom and security issues are financed under the external relations assistance programmes (e.g. CARDS, TACIS and MEDA). Under the new financial perspectives, the proposed external relations instruments include appropriate provisions for these actions. The Commission has proposed a thematic programme for migration and asylum as successor to the current AENEAS programme, which provides assistance for migration management

²⁶ The Barcelona Process Declaration, also known as the Euro-Mediterranean Partnership, represents the new European Union political view of the Mediterranean countries. The Declaration proposes to strengthen the cooperation partnership in three main spheres: politics and security; economy and finance; and in social, cultural and human affairs, in accordance to “International Law” and regarding “human rights and fundamental freedoms” (Barcelona Declaration Conclusion. http://ec.europa.eu/external_relations/euromed/bd.htm)

²⁷ Communication from the Commission “A strategy on external dimension of the area of freedom, security and justice”, Brussels, 12.10.2005

²⁸ See Fernández Bessa, C. and J. M. Ortuño Aix (2006), *Spanish immigration policies and legislative evolution in that field as a new exceptional framework*, Observatori del Sistema Penal i els Drets Humans, (retrievable from www.libertysecurity.org).

Countries	Repatriations (30 th October)
Senegal	4.864
Morocco Border at Melilla	3.891
Morocco	1.018
Mali	354
Mauritania	303
Guinea Bissau	110
Nigeria	95
Total southwestern Border	10.635

source: Informe Asociación Pro Derechos Humanos de Andalucía. Derechos Humanos en la frontera sur 2006. p.12

In order to carry out this deportations it is necessary a place for detention and confinement of those people. The Spanish Centres of Internment for Foreigners, the so called CIEs (for *Centros de Internamiento de Extranjeros*) play a fundamental role to guarantee full operation of the utilitarian immigration policies regulated by European border's regime. In Spain, the CIEs were introduced by the law 7/1985 with the object of facilitating the administrative removal of foreigners without a residence permit but in fact, according to their geographical situation the CIEs deal with different functions: on the one hand, the overcrowded centre of Canary Islands organize the deportation to Africa of those people who has just arrived to the islands by sea. The Centres of Ceuta and Melilla, despite they have been created to provide accommodation for asylum seekers waiting for the resolution of their proceedings in fact, they also organize the deportation of African migrants. But, they have also a symbolic importance, since they have introduced the best illustration and confirmed the worse fears about the assault on Europe on the part of great masses coming from the Third World. On the other hand, the CIEs of the cities where there is a high rate of migrant population (Madrid, Barcelona, Valencia, Málaga or Murcia) are useful to detain or/and expel the people who were unable to regularize his/her situation. As it is known, special attention needs to be paid to the respect of fundamental rights of people detained in those centres. But, we have highlighted that there are several detainees who after 40 days in the CIE could not be expelled, so they are free in the EU without any possibilities of being subjects of citizen's rights. In this sense, it guarantees the continuity of today's system of utilitarian migrations and the exploitation of migrant labour because this centres remind migrant people the vulnerability of their situation in the EU, as they could be detained and expelled (physically or legally) at any time.

At this point we also have to mention the external dimension of Spanish border policies which includes the relationship with neighbouring countries and the Barcelona Process and other the bilateral agreements.

From the last years, the relationship with Morocco fits in the framework of the European

Neighbourhood policies (ENP). Specifically, the Association Agreement was signed in 26 of February 1996 and entered into force on 1 March 2001. It replaces the 1976 co-operation Agreement. This agreement forms the legal basis for EU-Morocco co-operation. The European Union's strategy for Morocco's migration issues is based on the acknowledgment that this is not only a sending, but also a very important transit country for a large part of migrants that are moving towards the EU. The parties assume to intensify the discussion about legal migration, integration, asylum and a long-term strategy to combat illegal migration. The Agreement mentions the need to ensure harmonious economic and social relation between the parties in order to foster the development and prosperity of Morocco, gradual liberalization of trade, a free movement of goods in a "transitional period lasting a maximum of 12 years starting from the date of the entry into force of this Agreement"²⁹, economic cooperation, a "regular political and social dialogue" that shall cover illegal migration. Since 2000, several meetings at Ministerial and expert level have also addressed migration.

In 2005 July, ENP adopted the EU-Morocco Neighbourhood Action Plan³⁰ for a period of 5 years related to different matters such as economic, social and political fields and which contains a significant section on migration cooperation. Morocco implemented numerous reforms in all the main chapters of the Action Plan; the Government is pushing ahead with its political, economic and social modernization effort which should enable it to meet its objectives, together with the European Union³¹.

Concrete cooperation on projects aimed at developing Morocco's ability to manage migration flows has begun in the context of the MEDA budget line. Morocco received more than 45 Millions to deal with two main objectives: "to strengthen borders and to foster economic development in areas which produce large numbers of migration". In 2005, the budget of MEDA to Morocco was 217 millions³². Morocco is also identified in the Aeneas programs a focus for intervention in 2004- 2006 as part of the Magreb region³³. The aim of AENEAS program is to give financial and technical assistance to third countries in the area of migration and asylum. Following a request from the Moroccan authorities, the MEDA project for the management of border controls was largely redirected in order to provide financial support for a new emergency program aimed at upgrading the migration strategy as a whole, with a budget of approximately €67 million despite Morocco's authorities' effort to patrol their borders, these are hampered by

²⁹ ENP Strategy Plan 2007-2013 for Morocco

³⁰The EU cooperation strategy in Morocco's for 2007-2013 have some priorities for financial programs such as: the development of social policies, economic modernization, institutional support, good governance and human rights and environmental protection

³¹The EU cooperation strategy in Morocco's for 2007-2013 have some priorities for financial programs such as: the development of social policies, economic modernization, institutional support, good governance and human rights and environmental protection.

³² ENP Strategy Plan 2007-2013

³³ The Legal basis of this Program was set out in Regulation 419/2004 of the European Parliament and of the Council of 10 March 2004

inadequate infrastructures³⁴.

On the other side, on May 2006, in order to face the “massive” arrivals of sub-Saharan immigrants to the Canary Islands that have taken place on the first half of 2006³⁵ the Spanish government launched the so called “Plan Africa” for the period of 2006-2008 on May 2006. This plan consist of a diplomatic offensive to reinforce the Spanish presence in the origin countries of sub-Saharan irregular migrants. Its main objective was to negotiate readmission agreements with six new countries (Senegal, Gambia, Cape Verde, Guinea Bissau, Guinea and Niger).

The Plan Africa regards a new global policy approach to Africa Sub-Saharan which is divided into seven political aims³⁶ that focus the importance to deal with three main issues: the reinforcement of the immigrants flow control, the development of Spanish economy in Africa and the fight against terrorism. The strategy to control the immigrants flows is based on two spheres: the internal dimension, the reinforcement of borders control and the administrative procedure to the immediate repatriation of illegal immigrants; in an external dimension (that represents the bilateral dimension) the creation of a network of cooperation agreements regarding migration and readmission of people from priority countries in Africa (Romero, 2006). According Eduardo Romero (2006), these agreements set out a cooperation between the origin and transit countries that compromise to control “illegal” emigration and to accept repatriation in exchange of Spanish economic and technical help. To use a label such as development aid like change currency with African Countries so that governments, in turn, have to raise fences, hard migratory controls or accept the repatriation of emigrants, is an unacceptable perversion of a supposed cooperation for the development. The strategy of the plan could be resumed in the following word: “the help will be for those who wants to collaborate”.

The first countries to sign these agreements were Guinea Conakry and Gambia. These agreements focus on three different but complementary issues: repatriation of illegal immigrants, integration of immigrants and labour flows. The Exterior and Cooperation Minister quickly started to force the African Government to sign these agreements. These repatriation agreements carried out a violation of human rights in many fields. First, the international commitments to human rights and refugees to request asylum and obtain protection is not ensured. Like International Amnesty defends that the readmission agreements with Morocco and other countries of transit should respect their international duties to protect refugees³⁷.

³⁴ For a critical comment on the relationship between the EU and Morocco, see Khachani, 2006.

³⁵ El Gobierno aprueba el Plan África y pide ayuda logística a la UE para frenar la inmigración ilegal” in www.elmundo.es

³⁶ The objectives of this Program are: 1) Contribution to Democracy Consolidation, Respect for Human Rights Peace and Security; 2) Fight against Poverty and contribution to the Africa Development Agenda; 3) Promoting Cooperation to Appropriately Regulate Migratory Fluxes; 4) Active participation in the Development of the EU’s Strategy for Africa; 5) Promotion of Trade and Investment Special Focus on Fisheries and Energy Relationship; 6) Strengthening Cultural and Scientific Cooperation.

³⁷ For a critical view of this plan see APDHA, 2007 and the report: “La realidad de la ayuda”, at www.intermonoxfam.org.

Finally we are going to see some operational actions developed by Spain and the EU to face the arrival of irregular migrant people to the Spanish territories located in Africa (that is the Canary Islands and the autonomous cities of Ceuta and Melilla).

In this field, we have to focus on the outstanding role played by the The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). The Agency, created by the Council Regulation (EC) 2007/2004, is one of the main tools of what is called the EU integrated border management. Their tasks are: “to coordinate operational cooperation between Member States in the field of management of external borders; to assist Member States on training of national border guards, including establishment of common training standards; to carry our risk analysis; to follow up on the development of research relevant for control and surveillance of external borders; to assist Member States in circumstances requiring increased technical and operational assistance at external borders; and to provide Member States with necessary support in organising joint return operations”³⁸.

FRONTEX strengthens border security by ensuring the coordination of Member States’ actions in the implementation of Community measures relating to the management of the external borders and can play a crucial role in providing technical assistance aimed at strengthening the management of operational cooperation at the external borders while bearing in mind that the responsibility for control and surveillance of the external borders remain with the Member States³⁹.

Specifically, the flow of illegal immigration towards the Canary Islands was during 2006 in the focus of Frontex activities, being a part of one of the main four routes to the EU, as identified by Frontex risk analysis. In this framework the agency has developed operations Hera I, II and III⁴⁰.

Carrera (2006:21) explains that “Hera II consisted of facilitating technical equipment for border surveillance. The aim was to reinforce the control of the zone between the occidental African coast and the coast of the Canary Islands. This operation sought to dissuade the Cayucos (...) transporting irregular immigrants to set off from the African coasts. However, if the boats were already found at sea, the goal pursued was to intercept them in the territorial waters of the third country and then the authorities of the sending country would deal with the actual handling of the immigrants and their subsequent return to their territory. According to a Press Release from the European Commission ‘When a target is seen, they get in touch with the other FRONTEX means deployed and FRONTEX local coordination centre in *Santa Cruz de*

³⁸ Frontex Workprogramme2007, Brussels, 22 february 2007.

³⁹ Communication from the Commission to the Council “Reinforcing the management of the European Union’s Southern Maritime Borders”, Brussels, 30.11.2006

⁴⁰ The surveillance mission Hera III has been deployed from 15th february 2007 in Mauritanian and Senegal territorial waters.

Tenerife and prepare the interception. Normally the Senegalese boats escort the migrants inshore, start the legal procedure and try to arrest the people that were paid for organizing the journey'. Only if the vessels were intercepted outside the 24-mile zone, would they be escorted to the territory of the Canary Islands and be offered the possibility to lodge an asylum claim."

According to Carrera (2007:21) FRONTEX Hera Operations involved a process of externalization and prevention which find its legal basis in bilateral agreements between the EU member state and the third countries in Africa.

The Spanish authorities' created their own maritime control projects in Canarias' area, but they also has been approved (and co-financed) by the EU. These are the "Sea Horse" and "Atlantis" Programs. The "Sea Horse" has the following goals, according to the Spanish Civil Guard: Establish in the affected countries an effective prevention policy from "illegal migration", which include the effort to stopping human trafficking; create and develop relation between the Maghreb with Subsaharian Africa, as well as migration dialogues; support and involve Morocco, Mauritania, Cap Verde and Senegal. On the other hand, Atlantis Project is specifically related with cooperation between Mauritania and Spain, with the aim of "combat the increasing irregular immigration coming from [Mauritania] reaching material and human means financed by European Commission and the Civil Guard, with a 400.000 Euros cost⁴¹".

According to SOS Racismo (2006), the externalization of borders control means the delegation of such control to EU external neighboring countries, from which belongs a considerable part of the immigration, as Morocco, Algeria, Libya, Mauritania, Tunisia or Senegal. This kind of controls, as Parkers (2006:5) remembers, were already criticized because "they were felt to advocate an ambiguous understanding of the principle of territoriality in order to maximize the EU's capacity to block migration whilst minimizing migrants' opportunities to activate rights. The proliferation of such operations in international waters has drawn comparisons with the establishment of international zones in airports; such zones create areas in which migrants are unable to claim some or all the rights available to claimants on state territory. A lack of clarity about the immigration powers of member state officials operating in territorial, foreign and international waters has admittedly helped scupper earlier sea-bound joint operations..., however it has also led to a diffusion of liability and responsibility for such measures; this diffusion is compounded by the lack of judicial and public oversight, as well as by the involvement of different member states and now FRONTEX".

If the EU is to continue tu use extraterritorialization as an instrument of its migration policy it must address seriously the issue of ensuring a concomitant extra-territorialisation of the rule of law, in particular the effective judicial review of administrative action (Rijpma and Cremona, 2007: 24)

⁴¹ GUARDIA CIVIL (2006) Proyecto para el control de la inmigración irregular, MINISTERIO DEL INTERIOR. Oficina de relaciones informativas y sociales, <http://www.guardiacivil.es/prensa/notas/index.jsp>

III. THE MIGRATION CONTROL POLICIES AT EUROPEAN SOUTHWESTERN BORDERS: A CRITICAL OVERVIEW FROM THE INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE.

As we have stated before, immigration and asylum policies can not be adopted and implemented without taking into account the entire national, regional and international legal framework related to these issues. Moreover, in these matters it is usually needed to reaffirm once again the obligation to do so, especially in the case of the International Human Rights Law (which, of course, is complemented -for each country- with national and regional human rights instruments). All these legal tools must be considered and fully respected by States when they design, approve and apply measures that can affect people who migrate (or try to do it) to its territory, either as an immigrant or asylum seeker.

The European Court of Human Rights has stated that although the “Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory... this right must be exercised in accordance with the provisions of the Convention [European Convention on Human Rights and Fundamental Freedoms]”⁴². In this sense, the Interamerican Court of Human Rights, in a case related to the situation of Haitian migrants in Dominican Republic, emphasized that adopting “...sovereign decisions concerning its immigration policy... must be compatible with the human rights protection rules established in the American Convention”⁴³. This criterion has been also expressly adopted by all States at the World Conference against Racism, where they have committed to “review and revise, where necessary, their immigration laws, policies and practices so that they are free of racial discrimination and compatible with States’ obligations under international human rights instruments”⁴⁴.

Therefore, in the following section, we will examine with a rights-based approach, the policies taken by both Spanish government and the EU related to migration coming to the southern border of Spain (Canary Islands, Ceuta, Melilla and Andalusia). Before doing that, it is necessary to speak some words about an essential legal concept for this discussion: the issue of “people within the jurisdiction of a State”. This topic, along with the theme of State responsibility, is a crucial tool to determine whether the policies being enforced to control immigration have legitimacy or whether they are breaching international human rights obligations and, in this last case, who is or are responsible for such acts.

⁴² European Court of Human Rights, Case Amurr v. France, Judgment of 25th June, 1996, para. 41

⁴³ Interamerican Court of Human Rights, Provisional measures requested by the Interamerican Commission on Human Rights in the matter of the Dominican Republic, Case of Haitian and Haitian-origin Dominican persons, August 18, 2000, para. 4.

⁴⁴ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Program of Action, Durban, 8th September 2001, parag. 30.b.

1.- The concept of people within a State's jurisdiction

All the human rights treaties (both regional and universal) recognize certain fundamental rights, where respect, protection and fulfillment are the main obligations assumed by States that become parties of the respective legal instrument. Moreover, these commitments must be undertaken by party States in a way that secure the rights and freedoms -as the European Convention on Human Rights says-, to everyone *within their jurisdiction*. This assessment is a key element of the content and extension of the human rights protection system, particularly because it defines who are responsible for guarantying such rights and also for determining whose rights have to be ensured by each State.

It is very common that the idea of jurisdiction could be confused or assimilated to the territory of a State, as well as with the relation between a State and its "nationals. Therefore, clarifying some points about this issue constitutes an important task when we are dealing with the rights of "non nationals" or "non citizens" (in a restrictive and questionable sense) who are living or trying to get to a foreign State. And particularly, it's essential when it's being analyzed migration and border policies. The measures adopted for establishing a State's border policy and migration control are usually connected with the concept of jurisdiction. Territorial borders (maritime, aerial or continental) are not only the physical limit where is determined the fact of entering or not to another country but also are usually identified as the places that indicate the jurisdiction in which a sovereign State rules. The territory, an historical element of the configuration (and legitimacy) of a State Nation, has been closely connected with the idea of jurisdiction of such State. Nevertheless, the actions and areas of intervention or influence of States are not always circumscribed to within its territory, and as we will examine, this has been repeatedly asserted by international human rights courts and committees. This situation occurs, among other fields and each year with more emphasis, in the question of immigration control policies.

As we have already examined, in their intention of preventing immigration coming by informal routes from African countries, European Union member States, and particularly Spain, are adopting measures outside their territory (directly or through third countries authorities) which have a considerable impact on human rights of thousands of people that are trying to arrive there. Further, Spanish, Italian or other European patrols –either within FRONTEX operations or separately- are authorized (in most cases, by bilateral agreements, formal or informal, and sometimes secretly) to adopt decisions related to the interception of vessels circulating within these waters (with the supposed intention of reaching the Canary Islands). As an element of their migration control strategies, EU member States have been pressing not only to other member States⁴⁵ but also some African ones, in order to establish different kind of controls to vessels that could try to leave African coasts towards European territory. These

⁴⁵ For the case of the pressure exercised by Spain to the EU institutions, see MIR, Miriam (2007)

controls (in the air, sea and land of African countries territory) are organized, managed and led by European authorities, despite of the participation, collaboration or co-ordination of African functionaries. After the interventions of vessels in African waters, its occupants are transported or pushed towards African coasts, without further intervention of European functionaries (except in some cases, as we will see below with the case of the ship “Marine I”). However, regardless this essential role played by European security forces, it has been repeatedly invoked that the only jurisdiction involved is the one of the African country concerned in each action, but not the European one. Furthermore, with this reasoning, the African States would be the only who would eventually be responsible for any dispute or damage (for example, against human rights) that these acts could cause.

In this context, it's necessary to study –once again- the meaning and implications of the concept of jurisdiction, in order to conclude the degree of responsibility of the intervenient State, with regard to the human rights of the intercepted persons that could be involved in each decision taken regarding them.

A very important element of the notion of “within State’s jurisdiction” is referred –in each case- to the relation between the State representatives and the people whose rights could be affected. The key is in this relation, and not in the place where the facts occur. According to the European Commission of Human Rights, “authorized agents of a State not only remain under its jurisdiction when abroad, but bring any other person ‘within the jurisdiction’ of that State to the extent that they exercise authority over such persons. Insofar as the State’s acts or omissions affect such persons, the responsibility of the State is engaged”⁴⁶.

The same criterion was adopted by the UN Human Rights Committee. In *Lopez Burgos Case*⁴⁷, the Committee has established that “the reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction [not refers] to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant [of Civil and Political Rights], wherever they occurred (...) Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than

⁴⁶ European Court on Human Rights, case *Stocké v. Federal Republic of Germany*, ECHR Series A, n.º 199, Opinion of the European Commission, p. 24, para. 166.

⁴⁷ Human Rights Committee, Communication No. 52/1979: Uruguay, 29/07/81, CCPR/C/13/D/52/1979, Jurisprudence, p. 12.2, 12.3.

is provided for in the present Covenant. In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.

In this sense, De Schutter (2005:10) concludes that the term “jurisdiction”, in the view of the Committee on Human Rights, refers “not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”, so the States must respect and ensure the rights laid down in International Convention of Civil and Political Rights to “anyone within the power or effective control of that State party, even if not situated within the territory of the State party”⁴⁸. De Schutter (2005:10) remarks that the same position has been adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social, and Cultural Rights and have also been spectacularly endorsed by the International Court of Justice in the Advisory Opinion it delivered on 9 July 2004 regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁴⁹.

In the same line, Rijpma and Cremona have affirmed (2007:17) that “in the eyes of policy makers, extra-territorialisation allows them to evade the legal constraints on migration control within the Member States and appeals to public anxieties over migration, whilst allowing for desired movement of people, such as trade and tourism. As regards human rights, this territorial link is questionable, and it has been argued that it is jurisdiction more than anything else that triggers a state’s responsibility for the protection of these rights. Therefore, a State would be responsible for anyone acting within the effective control of that State party (...) The ECtHR has recognized the extra-territorial application of the ECHR stating that ‘the responsibility of contracting parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory’. Article 1 ECHR, in which the Contracting parties agree to secure the Convention rights or everyone within their jurisdiction, cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the Territory of another State, which it could not perpetrate on its own territory’...”.

Therefore, it is unquestionable that in the circumstances and within the -formal and informal- legal framework in which Spanish and other EU member States are acting to prevent “illegal” immigration in the southern border, and particularly towards Canary Islands, all the

⁴⁸ Human Rights Committee, *General comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, para. 10.

⁴⁹ Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 23 May 2003, p. at § 31; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 102-113. The ICJ said that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions” (p. 109).

people who are intercepted, returned or detained are within the jurisdiction of such States. This means that those authorities must fulfill with the obligations assumed by their States through the international human rights and refugee law, according with the existing standards on State's responsibility, as well as the rights and guarantees recognized by European Union Law (as the Schengen Border Code).

The international standards about responsibility of the States as a result of its acts establish that it can be determined both by acts made directly or indirectly by a State, which means not only the responsibility by the actions of its functionaries and non-state actors within its jurisdiction, but also by another State's authorities. As it was stated by the International Law Commission (ILC), in the *Articles on the Responsibility of States for Internationally Wrongful Acts*⁵⁰, in certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. According to these international principles, a State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations⁵¹.

Within this context, where a State can be responsible both for its acts committed within its jurisdiction and because of wrongful acts made by another State, the analysis of the migration control policies in the Spanish southern border must be done constantly taking into account these thoughts.

2.- Interception and devolutions in the sea: a systematic denial of the right to asylum

The interceptions and devolutions made by Spanish and other European authorities, mean in many cases the impossibility of thousands of people to reach European territory, or at least, to leave their country (in some cases, leaving from a transit country, but nationals from either Asia or other African countries).

In these cases, as it was confirmed, FRONTEX (EU) authorities are in charge of stopping the "Cayucos" found in territorial waters of some African country, and returning them to African coasts. Therefore, even the European (mainly, Spanish) functionaries are those who take the decision of intercepting and interrupting the migration of the people on board of such vessels, they don't take into account, case by case, the situation of each of those persons. They are just left under African countries authorities, who will finally decide (in most of the cases) what to do with people that have been intercepted. In order to apply for asylum before European representatives (those who, in fact, intercept and prevent continuing the trip), before

⁵⁰ International Law Commission, text submitted to the General Assembly as a part of the Commission's report covering the work of that session, 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*.

⁵¹ ILC, *Ibidem*, p. 94.

they should get to international waters.

The possibility that one of these people could be an asylum seeker is not taken into account in these proceedings (interception and devolution), because this kind of decision is trespassed to the African country involved in each case. It is quite paradoxical that whereas they don't allow them (*ipso facto*) to present the asylum request, at the same time authorities from several European countries (included Spain) do recognize refugees coming from the same countries of those intercepted and returned within African coasts⁵². Therefore, if they reach the territory (by sea, air or continent) or at least international waters, they may have a chance to apply for asylum to a European country, but if they are interrupted before getting to international or European (territorial) jurisdiction, they will be unable to do it. Of course, this situation is unacceptable, and reveals the illegitimacy of the method of current proceedings.

Last November, European Commission has asserted that, taking into account that "irregular maritime immigration at the European Union's southern maritime external borders" could imply not only migrants but also asylum seekers, "it is necessary to ensure coherent and effective application of the Member States' protection obligations in the context of measures relating to the interception and rescue at sea of persons who may be in need of international protection, as well as the prompt identification of persons with protection needs at reception sites following disembarkation. It should be underlined, that third countries are, of course, under the same obligations in this respect"⁵³. So far, the existing information about the interceptions would reveal that these guidelines are not being implemented yet, therefore it is to hope that they do it with the due urgency.

If Member States of EU are seeking for policy coherence, then they should act in consequence. In addition, it doesn't look quite coherent that at the same time that EU states authorities (as Spanish) intercept and return people going to Canary Islands (for example, nationals from Guinea) without considering at all if they could be asylum seekers, the European Parliament (EP) adopted unanimously a resolution criticizing the repressive measures that had been taken by Guinea's authorities to deal with social and political unrest. The EP resolution stated that the government had declared a state of emergency and had given the army wide-ranging powers and special forces, which had killed or wounded many civilians, a kind of fact that have occurred several times since 2005⁵⁴. So, if the EU representatives recognize situations like this, it is reasonable to think that from those countries could come asylum

⁵² In 2005, Spain admitted the asylum request made by 34 people from Algeria, 38 from Cameroon, 5 from Gambia, 27 from Guinea, 6 from Guinea-Bissau, 26 from Guinea Equatorial, 19 from Liberia, 9 from Mali, 71 from Nigeria, 119 from Democratic Republic of Congo and 23 from Sierra Leone (CEAR, 2006:86). It is true that the numbers are not very high, and also that the admission of the request doesn't mean that they will finally be recognized as refugees, but it reveals that at least there are some indications that could cause that they need international protection. Those intercepted in African waters by European patrols, are not able even to present these indications (to ask for this first admission of the asylum request) before the authority that prevent them to leave their country (of origin or transit).

⁵³ European Commission, *Reinforcing the management of the European Union's Southern Maritime Borders*, Communication from the Commission to the Council, COM(2006) 733 final, Brussels, 30.11.2006, para. 10.

⁵⁴ European Union Parliament, Press Service, 15/02/2007.

seekers (in fact, as it was mentioned, different EU member states have already conceded refugee status to nationals from the same countries of those who are being intercepted in African coasts). But what it is unreasonable is that regardless of this, other functionaries of European countries take decisions that collide strongly against those recognitions.

In this sense Gil-Bazo (2006: 577) reminds that in 2005, Amnesty International reported its concern that migration control measures, including visas, carrier sanctions and immigration controls undertaken in countries of origin, were preventing refugees from accessing the protection guaranteed under international and national legislation. Many of the people who arrive to Spain via Morocco, both through the Spanish city of Ceuta and the Canary Islands, come from countries including Algeria, Cameroon, Côte d'Ivoire, Congo, Democratic Republic of Congo, Gambia, Ghana, Guinea-Bissau, Guinea Conakry, Iraq, Mali, Niger, Nigeria, Liberia, Senegal, Sierra Leone, Sudan, and Togo; many of whom have a background of serious human rights violations. The organization believes that often individuals are prevented from requesting asylum in the Canary Islands and are made to wait until they are sent to the mainland, which puts them at risk of a speedy removal before they have had the chance to formalise their asylum claim. In the case of Ceuta, the organization continues to report cases of 'disappearances' among asylum seekers who are expelled to Morocco in breach of Spanish and international law, often during the long waiting period between reporting themselves to the police and the appointment given to formalise their claims. The total number of people who have been secretly expelled is not known, nor is the presence among them of refugees fleeing human rights violations who have been deprived of the chance to seek asylum".

The contradictions and irregularities that generate these policies can not be justified by neither legitimate objectives as border control or international security, neither the so invoked humanitarian intervention for saving lives in the high sea. In this sense, and while they were explaining the technology elements for their challenges at the EU southern maritime border, FRONTEX representatives announced that such "system would use modern technology with the aim of saving lives at sea and tackling illegal immigration"⁵⁵. In different occasions, the reference to these savings has been done as one of the "nice" faces of immigration control and security measures. But the issue is that within the current context in those waters, these rescues constitute a legal obligation, not a favour or a charitable attitude. The "rescues" of thousands of people that are traveling in the vessel towards Canary Islands, although are measures that necessary as valuables are also part of the legal responsibilities of the States that are having control over these waters.

International Law establishes clearly the obligation to save or rescue people in danger within the sea. The United Nations Convention on the Law of the Sea (UNCLOS Convention) asserts that "Every State shall require the master of a ship flying its flag, in so far as he can do

⁵⁵ FRONTEX, Report of Activities of FRONTEX between 1 January and 30 June, 2006.

so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him”⁵⁶. In addition, the International Convention for the Safety of Life at Sea (SOLAS Convention) obliges the “master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so....”. At last, the International Convention on Maritime Search and Rescue (SAR Convention) asserts that the “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”⁵⁷.

These obligations, as well, are complemented (and interrelated) with those of the international refugee law. For this reason, the International Maritime Organization (IMO) has stated that all measures taken, adopted or implemented pursuant to this circular to combat unsafe practices associated with the trafficking or transport of migrants by sea should be in conformity with the international law of the sea and all generally accepted relevant international instruments, such as the United Nations 1951 Convention and the 1967 Protocol Relating to the Status of Refugees⁵⁸. In identical sense, the United Nations High Commissioner for Refugees (UNHCR) affirms: “Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions”⁵⁹.

Both IMO and UNCHR have also established a series of measures that must be taken in the specific case of intercepting (and in some cases, also saving) vessels with migrants and asylum seekers in the sea. First of all, they affirmed that in the case that people rescued at sea request for asylum, it is due to alert the closest RCC (Rescue Coordination Centre), contact UNHCR, and “do not ask for disembarkation in the country of origin or from which the individual has fled; do not share personal information regarding the asylum-seekers with the authorities of

⁵⁶ Article 98.1.

⁵⁷ Para. 2.1.10.

⁵⁸ IMO, Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea, IMO circular msc/circ.896/rev.1, 12th June 2001, http://www.imo.org/includes/blastdataonly.asp/data_id=3881/896rev1.pdf. Annex, para. 5.

⁵⁹ UNCHR, Conclusion adopted by the Executive Committee on International Protection, Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV), in Conclusion adopted by the Executive Committee on international Protection of Refugees, <http://www.unhcr.org/excom/EXCOM/3f93b2894.html>, 2003, para. iv., p. 233.

that country, or with others who might convey this information to those authorities”⁶⁰.

In 2000 the UNHCR had already warned about the threats that could generate bilateral agreements for interceptions, which in cases of absence of an effective protection regime in the transit country, intercepted asylum-seekers are at risk of possible refoulement or prolonged detention. The refusal of the first country of asylum to readmit irregular movers may also put refugees “in orbit”, without any country ultimately assuming responsibility for examining their claim. Furthermore, UNHCR asserted that the direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only manifestation of refoulement, since the removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect refoulement, for which several countries may bear joint responsibility. Finally, the UNCHR reminded that this principle has not any geographical limitation (it extends to all government agents acting in an official capacity, within or outside national territory) and for that reason the international refugee protection regime would be rendered ineffective if States’ agents abroad were free to act at variance with obligations under international refugee law and human rights law⁶¹.

In addition, it is important to remark, as it has been mentioned by several social and political actors and analysts the beginning and increasing of the vessel routes to Canary Islands from farther places as Mauritania and Senegal, is closely related with the continuous and progressively restrictive immigration and control policy implemented by Spain and the EU during the last years. Whether by security, economic or market reasons, measures that have been adopted to prevent immigration from some African countries (such as the SIVE or the joint patrols and close cooperation with neighbouring countries as Morocco to prevent migration) are the main causes of the risky travels for the thousands of migrants who try to reach European territory.

In fact, several scholars and civil society organizations have pointed out the relation between those policies (both Spanish, Italian and European’s) and the increasing of the people who died in those trips. In this sense, SOS Racism (2006:140) has asserted that the policies promoted by Spanish government as well as by the European Union, are deeply inhuman, offender, unfair and contribute to difficult and worsen the situation of those people who decide leave their country seeking for better conditions of leaving. On this subject, Spijkerboer (2007) wonders about which would be the European State’s responsibility and obligations in relation to the increasing of casualties of migrants in the Mediterranean Sea and the Atlantic Ocean, and then identifies some positive measures that they should take. For that reason, he states that ‘if it’s clear that a particular set of State policies will lead to increased fatalities, it seems

⁶⁰ UNHCR and IMO, *Rescue at Sea. A Guide to principles and practices as applied to migrants and refugees*, 2006, www.imo.org.

⁶¹ UNHCR. *Interception of Asylum-Seekers and Refugees: the International framework and recommendations for a comprehensive approach*, Executive Committee of the High Commissioner’s programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, para. 19, 22, 23.

reasonable to take account of this in policy debates, and until now, however, this has not happened in the debate about border control (2007:13). In this matter, Khachani (2006:29) informs that according to the director of the Red Half Moon from Mauritania, over 40 percent of the vessels that leave the coast of this country towards Canary Islands (a route that has more than 1.000 kilometers) shipwreck during the passage, and that between 10th November 2005 and 6th March 2006, close to 1200-1300 people would have lost their life drowned trying to reach Canaries.

Anyway, beyond the question of the rescues and the fatalities in the sea, what it is indisputable is the inexcusable obligation of the States to guarantee the right to seek asylum to every person that is intercepted in the waters (both European, African and at the International Sea). The enforcement of the policies lately adopted to prevent emigration from northwest African coasts, is not fulfilling such commitment. As it was stated by the European Court of Human Rights in *Amuur Case*, "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions"⁶².

There are not many antecedents in this subject, because as we said, this kind of policies implemented in order to avoid some immigration flows, are quite recent, at least in this region. But there is a very important precedent in which a similar policy was developed by the United States of America, which latter was opposed by the Interamerican Commission of Human Rights (ICHR). In the famous "Haitians Case"⁶³ the Commission established that the interdiction and returning operations made by USA authorities in the Haitian coast and in the High Sea were contrary to the obligations assumed in the American Declaration of Human Rights. Specifically, the ICHR concluded that it had been violated the right to seek and to receive asylum protected by both the American and the Universal Declaration of Human Rights.

As we will examine below, the Commission has also stated that they were breached the right to liberty, the right to security of a person and the right to resort to the courts⁶⁴. In fact, in almost all of the cases in which the right to seek asylum is infringed, it must be taken into account that other rights are being affected, such as the right to a due process, the right to access to justice and, in the most serious cases, the right to life, liberty and physical integrity. As it's going to be analyze later on, several human rights, both of migrants and asylum seekers are being either threatened or breached by the migration control policies in this area.

⁶² European Court of Human Rights, *Amuur v. France*, cit., para. 43.

⁶³ Interamerican Commission of Human Rights (ICHR), *Haitian Interdiction Case*, Report N° 51/96, Decision of the Commission as to the merits of Case 10.675, United States of America, March 13, 1997.

⁶⁴ As conclusion of its decision, the ICHR established that the United States of America had breached: the right to life "of unnamed Haitian refugees identified by the petitioners who were interdicted and repatriated to Haiti; the right to liberty of several Haitian Interdicted; the right to security of the person; right to equality before the law; the right to resort to the courts to ensure respect for the legal rights; and the right to seek and receive asylum (para. 183-188).

3.- The right to due process of law in the interception and returning in African waters and coasts and in the Morocco-Spain border.

In the act of intercepting and returning people in “Cayucos” to African coasts, or even through Ceuta and Melilla borders, many fundamental human rights are under dispute. In this chapter we will analyze the issue of the right to due process of law in the control operations at the southern border. This right, as it's known, has been recognized by each one of the Human Rights Conventions, and aspires to assure every person enough guarantees for the defense of their rights, and includes different elements, such as: the right to defense, the right to be heard, the right to appeal against an administrative decision (either administrative or judicial authorities, or both), the right to obtain a motivated decision, the right to be informed about the facts in which the prosecution is based, the right to and independent and impartial court, etc. We won't analyze in detail each of these rights, since it is a well known subject; so will focus our sight on some questionable aspects of southern border migratory control policies, from the “right to due process of law” perspective.

The first aspect to be mentioned is that intercepting practices in African waters previously described do not only ignore obligations assumed in International Human Rights Law regarding to the guarantees of due process, but they also fail to fulfill the European Union Law itself, particularly established for borders control policies. In fact, article 13.3 of the Schengen Borders Code, asserts that all persons “refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national”⁶⁵. There's no sign, neither information, which could indicate that interceptions made by Spanish Civil Guard or any other European authority within FRONTEX, abide what is established by this article of Schengen Borders Code.

Information offered by both European and African officers that intervene in these operations, as well as media coverage of this actions, would reveal that intercepted people can not use their right to appeal against the decision and neither are informed about where and how could exercise that right. The issue is that there is not even administrative act disposing, in each case and for each person, the prohibition of continuing the trip, entering international and/or Spanish waters, and ordering the returning to the departing place or to other part of African coast. This is how a first consequence of these interventions and operations is to breach Communitarian Law.

Rights and guarantees recognized inside the European Union borders, are systematically omitted once out of UE territory despite, as we have already explained before,

⁶⁵ This provision has been introduced by the European Parliament during the process of the elaboration of this regulation.

intercepted persons are with no doubt under European authorities (in charge of those actions) jurisdiction. Therefore, if as it has been asserted by Sassen (2006), the EU has established a sort of “Berlin wall on water”, we could add that the paradox here is that the European authorities (and policies) are able to trespass that wall towards jurisdictions where wouldn't even exist –according to their perspective- the restrictive regulations that configure such excluding, extending and moving wall. Migrants (both migrants and asylum seekers) don't even have the right to reach the feet of such wall, because the controllers do have the right to cross it and virtually move it -to places where even the rules of this wall are not applied- with the aim of preventing any challenge to that barrier. That is why, as it has already happened regarding the right to asylum and also –as we will see later- the right to leave the country or freedom of movement, interceptions in African countries waters ordered by European authorities, denies or ignores the right to a motivated (and written) decision that expresses the causes of the denial to move freely and to enter European territory, together with the right to be informed about appeals against that decision and, consequently, to use that “right to appeal”, the right to access to a legal procedure and access to justice. We are dealing with particular policies which are based in *de facto* administrative decisions, excluded of the basic and lawful procedures established both in international human rights law, European countries legal frameworks and European Union Law.

In the same sense, in the borders between Spain and Morocco (Ceuta and Melilla) there has been denounced in the last years several cases in which returning of Moroccans and Subsaharians took place without guaranteeing those people their right to appeal against the decision, the right to justice, the right to a motivated decision by public administration and even, in many cases, the right to ask for and to obtain asylum.

One of the most dramatic cases of such irregular measures took place during the events between August and October of 2005, when hundred of people tried to cross the borders of Ceuta and Melilla. In this occasion, as it was questioned by different political and social actors, dozens of people were detained, deported or returned by the Spanish government with decisions full of irregularities, without any respect of due process basic guarantees. Reports as those made by the Association for Human Rights from Andalusia (2006), SOS Racism (2006) or even by the Commissioner for Human Rights of the Council of Europe⁶⁶ describe pretty well the massive violation of human rights committed in that time, both by Spanish and Moroccan

⁶⁶ In his report about the situation of human rights in Spain, he asserted that “it is difficult to understand the reasons behind the Spanish Government's recent decision to immediately return to Morocco more than 70 persons belonging to a group recently arrived in Ceuta and Melilla after jumping over the fence. Several organisations, including UNHCR, have maintained that there were asylum seekers among the persons deported. Even if the Ministry of Interior denied this information and the Vice-President of the Government announced that that the deportation had been an urgent and exceptional measure, which will not be repeated, I consider that this incident needs to be fully clarified. I deem it necessary, in this context, to draw the Spanish authorities' attention to the importance of respecting carefully Protocol 4 to the ECHR and the Guidelines on Forced Return, issued by the Committee of Ministers of the Council of Europe, which prohibit collective expulsion orders and require that each case be examined individually and deportation orders be, also, individually adopted and recalled in the Guidelines on Forced Return of the Committee of Ministers” (Report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain, Strasbourg, 9th November 2005, para. 123).

authorities.

Moreover, in its last annual Report, CEAR (2006:48) affirms strongly that there are infinity of testimonies which demonstrate that the Civil Guard violates the legislation by returning people *de facto* through the walls of Ceuta and Melilla, regardless their documentation or the reasons that made them leave their country. In many occasions they come from countries as Algeria, Ivory Coast, Iraq, Liberia, Democratic Republic of Congo or Mali, where human rights violations –also- occur daily. These automatic devolutions, CEAR concludes, breach the article 24 of the Spanish Constitution because they deny the right to legal assistance and to an effective judicial tuition, as well as the European Convention on Human Rights and Fundamental Freedoms, since they were put in risk to be subject of inhuman or degrading treatment⁶⁷.

In others parts of the Spanish border has also been denounced unlawful practices by authorities against migrants. In this sense, CEAR (2006:55-59) has had to present several judicial claims against the Spanish government, denouncing the violation of human rights in devolution proceedings. In one of these occasions, it was alleged that a migrant from Algeria had been returned (to the ship in which he had come) without any due process guarantees, such as the right to legal advice, or the right to appeal, to a motivated decision, or even a minimum administrative procedure. Therefore, the judge estimated that his right to defense had been violated. As the Spanish State has appealed against that sentence, the Higher Judicial instance hasn't taken a final decision yet. In further occasion, last November 2006, four people from Ghana were deported (devolved) from Castellon, Valencia, without a due and formal proceeding. In spite of that, there were some strong indications that they could be asylum seekers, that weren't taken in account, and therefore the case was presented under the courts. When the judge estimated the case, the petitioners had already returned to their country of origin, and so far they hadn't been founded and, then, notified of the judicial decision.

Anyway, there have been many more cases that civil society organizations had exposed, as it was done by *Medecins Sans Frontiers* (2005:16-17), which reveal a repeated practice of devolutions or returning of migrants to Morocco, Mauritania or other countries without taking into account the essential guarantees of a due process of law, recognized both in international human rights treaties, the Spanish Constitution and even in the Spanish immigration law.

⁶⁷ Besides, CEAR asserts, in those cases in which a person had left from his/her country because of being victim of the violation of his/her human rights, the right to seek asylum is violated too, despite its protection both in the Constitution and the Universal Declaration of Human Rights.

4.- The deprivation of the right to liberty as a consequence of “emigration” control policies

In many occasions, one of the direct consequences of immigration control measures from Africa to Spain, both through the sea (to Canaries, Mallorca and some parts of the Peninsula) and through the continent (by Ceuta or Melilla), particularly the returning, devolution or repatriation decisions, is the deprivation of liberty of those who are objects of such acts. In some of those cases, because African countries legislation itself penalizes with imprisonment the conduct named “illegal emigration”, while in others, because those people are sent to “Detention Centres” that Spain (and UE) have managed and installed in African territory –like in Nuadibú-, and even, in certain cases –as we will see later- in *ad hoc* detention places and with inadmissible conditions.

Criminal legislation or migratory laws passed in the last years in some African countries, characterized for being transit zones and/or points of migrations to Spain, have been reformed in order to expressly criminalize “illegal emigration”. In some cases, despite there is no specific information available about applicable rules, implemented practices also reveal progressive criminalization of emigration by irregular means, or even the attempt to do so. In this way, the searching of international protection or for better living conditions by the only channels allowed by destination countries laws (plenty of national and international security elements) has been progressively turned into a “criminal” behaviour, despite of that we are in fact dealing with the exercise of fundamental rights in extremely vulnerable conditions.

In this sense, article 50 of Moroccan Migration Law (Law 02-03), penalizes with a fine of 3000 to 10000 *dirhams* and with 1 to 6 months of imprisonment, jointly or alternatively –even though Criminal Code provisions on this subject- to those persons who illegally leave Moroccan territory using to cross one of the continental, maritime or aerial borders, an unlawful mean to avoid presenting required official documents or fulfilling the formalities established by law and other regulations in force, or using forged documents or by the usurpation of names, and to those people who enter or leave Moroccan territory through different places than the ones created with that purpose.

When are analysed Moroccan Migratory Law 2003 modification and its security forces actions during the last years, different sectors emphasize not only on its repressive nature, but also the connection between these practices and the UE interests. In this sense, Khachani (2006:48-50) affirms that the text of this law seems to answer, at least in part, to foreign pressures which grounds correspond to the security sphere, inscribes in an international and regional situation that gives priority to security in detriment of Human Rights. In this same sense, he considers that by adopting this legislation, Morocco breaks the receptive tradition it had showed for centuries, and it damages privileged relations that the country holds with some other African countries. It would seem that Morocco satisfactory plays the role the UE aspires to

play in the region. Khachani concludes that this law means a contradiction with the International Convention for the Protection of Rights of all Migrating Workers and their Families, ratified by Morocco in 1993.

In addition, some African NGOs have already denounced the illegal actions that are being made by Moroccan authorities, as a consequence of European interests and pressures. They have affirmed that “these operations have been presented by Moroccan authorities as made during the conclusions of the Governmental Conference about Migrations that took place in Rabat on 10th and 11th July, 2006. That's why they were developed out of any juridical frame, even the Law 02-03, and with no respect to international conventions signed by Morocco neither the rights recognized to migrants in that same conference. They cannot have other objective than to show Morocco's great predisposition in the UE battle against illegal immigration despite this combat takes places without respecting all international and national texts regarding to migrations”.

To a great extent, this situation happens in different countries of the region, which are every time more implicated in UE policies to control the exit of migratory flows to that continent. Different proposals made by UE states (jointly or separately) to African countries, the several agreements (formal and informal) recently signed, and concrete actions that have been taken place in waters and coasts of countries such as Mauritania or Senegal, are a clear proof of that. As a consequence of these measures, thousands of persons intercepted in these zones must later face the deprivation of their liberty.

Regarding to this issue, Spijkerboer (2007:130) explains that “European countries, particularly Spain, are now trying to convince the authorities at points of departure to prevent migration, as well as to take back irregular migrants who have succeeded in reaching Europe. The Senegalese government is reported to intercept migrants who want to sail to the Canary Islands. In May 2006, Senegalese authorities announced their intention to arrest over 15,000 irregular migrants who were preparing to reach the Canary Islands by small wooden boats, and at the end of that month, 642 Senegalese citizens were waiting in Mauritania to be returned home, while another 105 were being held by the police; 116 were given two-year prison sentences”.

These circumstances are verified especially trough the media about the interception actions made by FRONTEX in African waters. As an example, in one of the operatives done in Senegal's waters, the European Agency intercepted a vessel with 138 people on board, who were “supposedly” traveling towards Canary Islands. As it has been published, “all the occupants of the vessel are still detained in the police station of Dakar' port, where they can be charged of the violation of illegal emigration act, and be obligated to appear before a Court of

Justice”⁶⁸. Moreover, according to the newspaper “El País”, the Senegal Prosecutor has said that the Minister of Justice had ordered (in June 2006) to strengthen the punishment for emigrants, and consequently he didn't consider as victims of trafficking those people who pay for the trip, but authors of the crime and therefore they deserved to go to prison⁶⁹. This tendency to punish irregular migration means not only to be criminalizing an action that no way can be considered a crime and that rather means the exercise of fundamental rights, but it can also imply an increment of persons illegal traffic nets, criminalizing its victims and leaving them in even more vulnerable conditions.

Considering this situation, in which thousands of people are detained after being repatriated or returned, it is relevant to observe again the decision taken by the Interamerican Commission of Human rights in the “Haitians Case”. There, in relation to the right to liberty of those people that had been intercepted, the Commission affirmed that “the act of interdicting the Haitians in vessels on the high seas constituted a breach of the Haitians' right to liberty within the terms of Article I of the American Declaration”⁷⁰. This interpretation is quite interesting for the analysis of the EU and Spanish policies in the High Sea, and especially in African countries territorial waters, which includes not only the interception and returning itself but also (in most of the cases, as we have described) the detention after that, and in many occasions could be as an accused of a crime (“illegal emigration”). So, here we could have two restrictions to the right to liberty. First, the interception and returning, and second the detention (either in a center for migrant's retention or in a prison). Even though it might be possible that national or international courts will be who determine the legitimacy and reasonableness of such measures, we could assume that in several cases it will be stated that this kind of restrictions constitute a violation of the fundamental right to liberty, among others rights.

On the other hand, many of the detentions produced after the interceptions in African waters, don't have neither a judicial order for such detention or a judicial control upon this deprivation of liberty (controlling the lawfulness of the decision, the conditions of the detention, etc.). Therefore, a fundamental right guaranteed on article 5.4 of the European Convention on Human Rights (applicable, according to the ECtHR, to detention within border control policies⁷¹) is also ignored by such preventing and detention practices⁷². The case of the ship “Marine I” is a

⁶⁸ EFE Agency, Dakar, 27th March, 2007, the translation is our.

⁶⁹ El País, 12th September, 2006.

⁷⁰ Ídem, para. 169.

⁷¹ See European Court of Human Rights, cases *Amuur v. France* (judgment of July 25th, 1996), *Shamsa v. Poland* (Judgment of November 27th, 2003) and *Saadi v. United Kingdom* (Judgment of July 11th, 2006).

⁷² According to the Parliamentary Assembly of the Council of Europe, “...the European Convention on Human Rights provides a minimum safeguard and notes that the Convention requires that its contracting parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants. The following minimum rights merit highlighting: (...)12.5. detention of irregular migrants must be judicially authorised. Independent judicial scrutiny of the legality and need for continued detention should be available. Those detained should be expressly informed, without delay and in a language they understand, of their rights and the procedures applicable to them.

dramatic example of this unlawful interventions.

It might be possible that in the following years, different courts (both national and regional) pronounce about the lawfulness of these practices that are being implemented by European and African countries, and whether they are coherent or not with the obligations assumed towards the human rights of everyone who is within their jurisdiction. Another situation that could be subject of the interventions of the courts of justice are the conditions in which returned people are retained, as it still happens with some of the people who were in the ship *Marine I*, as we will examine below.

5.- Other human rights threatened by migration control policies.

Control measures of immigration to Spain throughout southern border, particularly interception, devolution and repatriation actions, has also meant that –in many cases due to the direct intervention of Spanish authorities as for the treatment given to victims of those decisions by security forces of African countries involved-, different fundamental rights hasn't been adequately respected.

Such essential rights as the right to physical integrity, the person's dignity, or even the right to life, have been violated (and still are) in several opportunities while executing those policies aimed at control and punishing migratory flows that take place on irregular conditions.

Regarding to this issue, *Médicos sin fronteras* (2005:15) has stated that: "Of all places, stages and moments in which Subsaharian immigrants are victims of violence, it is at Moroccan-Spanish border where most of the incidents happen; incidents in which intervene not only Moroccan security forces, but also Spanish ones, and that mean detentions, excesses in the use of force, abuses and degrading treatments, sexual violence, extrajudicial expulsions, and expulsions of persons under risk".

In identical sense, according to the "Asociación Pro Derechos Humanos de Andalucía" (APDHA, 2007), massive repatriations are not taking into account case by case separated and, moreover, there are not enough safeguards to ensure that repatriation are being made to the true country of origin, or that repatriated persons will not suffer any degrading treatment or torture, or won't be abandoned in the middle dessert, as it has already happened in many occasions. APDHA denounces that many migrants returned to Senegal have been tortured, fined or imprisoned, and in most of such cases the right to asylum has not been fulfilled.

In addition, CEAR (2006:51) has affirmed that Moroccan authorities, after the detention of persons returned by Spain, take them by buses to their southern or oriental border, deserted zones which temperatures vary between 6°C in winter and 43°C during summer, leaving them

They should be entitled to take proceedings before a court to challenge speedily the lawfulness of their detention..." (Parliamentary Assembly, *Human rights of irregular migrants*, Resolution 1509, 27th June 2006).

without water, food, shelter, exposed to the action of groups of criminals that take advantage of their situation to steal them their few belongings. Among detainees and illegally expelled there are minors, pregnant women, and sick people, despite the several actions taken by some NGOs in order to let them remain at Moroccan territory for humanitarian reasons.

Similar abuses have been denounced by *Médicos sin fronteras* (2005:14), some of whose members have been direct witnesses of the reconduction to the Moroccan-Algerian border of pregnant women, minors and even seriously sick persons (people affected by chronic diseases such as tuberculosis or AIDS), that were later abandoned in spite of the treaties made before Moroccan authorities for their immediate releasing for medical and humanitarian reasons.

This denounces about the violation of persons' rights in border zones by security forces of both countries involved (Spain and Morocco), as well as for the inhuman or degrading treatment that have suffered many persons that are repatriated or returned by Spanish authorities to Morocco, reveal conduct patterns which don't fulfil at all the obligations assumed by international human rights treaties. Migration control policies in the Spanish southern border aren't taking into account those compromises assumed by the State when signing and ratifying Human Rights International Conventions.

On the other hand, in these cases that reveal the deprivation of basic rights of those returned to departing (or transit) country, we would be also before the violation of one of the main principles of International Law, the "*non refoulement*" principle, to which we will refer next.

6.- The (direct and indirect) violation of the Principle of *Non Refoulement* in the southern border control⁷³.

As soon as all the available information reveals, interventions and returning at African coasts and waters, made by Spanish or other European authorities would be done without taking into account the consequences for each person object of such acts (or doing it, but without caring about these consequences). One of the main problems derived from this kind of attitude can be, in many cases, the violation of the principle of *non refoulement*. This principle, as it is known, is an imperative act (*Ius Cogens*) of the International Law, therefore it can not be affected at all by any national or regional law, no matter the level of legitimacy of the aims invoked.

Despite this principle aspires to protect the rights of life, liberty and physical integrity, the main idea behind it, is to avoid the trespass of a person from one country to another where his/her rights can be violated. In this sense, the UN Human Rights Committee has affirmed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary

⁷³ In this sense, see also Cuttitta, 2006.

and foreseeable consequence is that that person's rights under the Covenant [International Covenant on Civil and Political Rights] will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on"⁷⁴.

The due respect of the principle of *non refoulement* (or non devolution) is required in any situation where a person could be returned, deported or repatriated, whatever was the status of that person (immigrant, asylum seeker, refugee, stateless, etc.) and wherever the place in which the person is (the responsible is the State that exercises its jurisdiction upon such person).

In *Chahal* case, the European Court of Human Rights stated that the "prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion"⁷⁵. In addition, Borelli (2005:64), talking about the European Court and the UN Committee of Human Rights precedents, asserts that this "principle applies to every case in which an individual subject to the jurisdiction of the State (whether or not within its territory) is transferred from its jurisdiction. The formal characterization of the act through which the individual is actually transferred to the jurisdiction of another State is without relevance for the applicability of the principle of non-refoulement, as that principle applies equally to extradition, deportation, expulsion of illegal immigrants and irregular renditions". The same conclusion is applied in the case of a State that transfers individuals who are in its custody to another State, even if they are not and never have been held on its territory (Borelli, 2005:64).

The applicability of this principle without territorial restrictions was also embraced by the Interamerican Commission in the "Haitians Case". The Commission rejected USA representatives allegations in the sense that the principle of *non refoulement* should not be applicable "in a situation where a person is returned from the high seas to the territory from which he or she fled, specifically....to the Haitians interdicted on the high seas and not in the

⁷⁴ HRC, Communication No 470/1991: Canada, CCPR/C/48/D/470/1991, Jurisprudence, 18th November, 1993, para. 6.2.

⁷⁵ *Chahal v. United Kingdom*, 15th November 1996, para. 80.

United States' territory"⁷⁶. The ICHR agreed with the position advanced by the United Nations High Commissioner for Refugees (presented as *Amicus Curiae*) in the sense that article 33 of the Refugee Convention (which prescribes such article) has "no geographical limitations". Therefore, the Commission found that "the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as 'refugees' [so] the United States breached Article XXVII of the American Declaration when it summarily interdicted, and repatriated...and unnamed Haitians to Haiti, and prevented them from exercising their right to seek and receive asylum in foreign territory as provided by the American Declaration"⁷⁷.

On the other hand, several international decisions by organs as the European Court or the UN Human Rights Committee or UN Committee Against Torture, also asserted the ruling of the principle of non refoulement to those cases in which a State deliver a person to another State, and subsequently, this State transfers also to a third one where there could be risks about the breach of his/her fundamental rights. Therefore, besides a case-by-case analysis that should be done by Spanish (or other European authorities participating in a FRONTEX operation) to the people intercepted, any decision that could involve a devolution or deportation to the country of origin (different) from which the persons are national from, must take into account the possibility of the violation of the principle of *non refoulement* by the country to which they are sent. If not, Spain could be also responsible for the violation of such basic principle, and, consequently, the rights related to it in each case (life, liberty, physical integrity, due process, etc.).

One of the decisions taken in this matter by the UN Committee against Torture is pretty clear about this obligation of the States: "The Committee notes that the Swedish immigration authorities had ordered the author's expulsion to Jordan and that the State party abstains from making an evaluation of the risk that the author will be deported to Iraq from Jordan. It appears from the parties' submissions, however, that such risk cannot be excluded, in view of the assessment made by different sources, including UNHCR (...) the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning the author to Iraq. It also has an obligation to refrain from forcibly returning the author to Jordan, in view of the risk he would run of being expelled from that country to Iraq. In this respect the Committee refers to paragraph 2 of its general comment on the implementation of article 3 of the Convention in the context of article 22, according to which 'the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be

⁷⁶ *Ídem*, para. 156.

⁷⁷ *Ídem*, para. 163.

expelled, returned or extradited' ..."⁷⁸.

Within the European context, the standard is quite similar. The European Court of Human Rights, in the case *T.I. v. United Kingdom*, asserted that the "indirect removal [...] to an intermediate country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention"⁷⁹. Nonetheless, De Schutter (2005) explains, the fact that Germany was bound by the European Convention on Human Rights let the Court to presume that the fears expressed by the applicant are ill-founded, expressing that there were no basis to "assume that Germany would fail to fulfill its obligations under Article 3 of the convention to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country". Anyway, as De Schutter (2005:28) indicates, that presumption may be rebutted in the face of certain specific circumstances.

In the case of intercepted and diverted people to African countries, that presumption is much more weak or even doesn't exist, and not only because they are not bounded by the European Convention (because they are by other similar treaties) but particularly because of the amount of existing information that could legitimately generate doubts about a plenty fulfillment of the principle of *non refoulement*. The facts denounced at the end of 2005 about the treatment given by Moroccan's government to those returned from the borders with Spain in Ceuta and Melilla, are an indicator of this concern. The detentions of returned people (*de iure* or *de facto*), and the conditions of such detention in some cases, are also elements to be taken into account.

Recently, at the end of 2006, the European Commission stated that it's necessary that the EU consider "the extent of the States' protection obligations flowing from the respect of the principle of *non refoulement*, in the many different situations where State vessels implement interception or search and rescue measures. More specifically, it would be necessary to analyze the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim as a result of the application of international refugee law, in particular when engaged in joint operations or in operations taking place within the territorial waters of another State or in the high sea"⁸⁰.

In the paragraphs above, we explained quite clearly that those people intercepted are within the jurisdiction of the European authorities involved, therefore their State must take the necessary measures to fulfill the human rights (including, the right to seek asylum) as well as it

⁷⁸ UN Committee against Torture, *Communication No 88/199 : Sweden, CAT/C/21/D/88/1997, Jurisprudence, 16th November, 1998, para. 6.5.*

⁷⁹ Eur. Ct. HR, *T.I. v. the United Kingdom* (Appl. No. 43844/98) decision (inadmissibility) of 7 March 2000.

⁸⁰ European Commission, *Reinforcing the management of the European Union's Southern Maritime Borders*, Communication from the Commission to the Council, COM(2006) 733 final, Brussels, 30.11.2006, para. 34.

is obligated to analyze, case by case, if a returning decision could breach the principle of *non refoulement*, regardless they were migrants or asylum seekers. As Peral states (2006:8), in the particular case of refugees, if the access to the border is blocked, those who escape for persecution won't have the opportunity to find international protection, and in the case of migrants without regular travel papers, to prevent their entering knowing that they might be abandoned in the desert, in a situation which there is a certain risk for their life and liberty, means also a breach of such principle. In both cases, the State wouldn't be respecting obligations that are inherent to its condition of a Rule of law.

7. The rights of unaccompanied children.

In several reports made by civil society organizations in the last years related to immigration control policies in Spain, one of the main issues of concern is the situation, and the fundamental rights, of the unaccompanied children.

Five years ago, *Human Rights Watch* (2002) had already warned about the existence of many cases in which those children were repatriated to Morocco in what is called a "family reunification" process, but these measures would have been taken without procedural guarantees, and sometimes they had suffered of abuses, bad treatments and arbitrary detention by Moroccan security forces after the Spanish authorities left them in the border. Moreover, HRW denounces that the real situation (social, family) of the children in their country of origin wasn't seriously and correctly investigated before taking those decisions, therefore in several occasions that reunification didn't exist or even was against the best interest of the child. In the last years, Amnesty International has also been claiming about the situation of unaccompanied children's rights in Spanish southern border policies, as it's described in its last report about this region (2006:23-25).

At that moment, even the UN Committee on the Rights of the Child expressed strongly its concern on this issue, stating that it was deeply alarmed about the condition of those children, especially because: the ill-treatment by police during forced expulsion (with process, in some cases, without legal assistance and interpretation); the failure to provide temporary legal residence to those children; summary expulsions without ensuring that they are effectively returned to their family or social welfare agencies in their country of origin, etc⁸¹.

As we have examined when considering the general situation, children have been also victims of the immigration control policies, with a substantial impact in fundamental rights like the right to liberty, physical integrity or due process of law. In these cases, of course, we face the aggravating that means the violation of basic rights of the social groups that need especial protection according to the international human rights law.

⁸¹ CRC, Concluding Observations, Spain, CRC/C/15/Add.185, 13th June, 2002, para. 45.

In 2003, Spain and Morocco signed a Memorandum regarding the issue of unaccompanied children who were without legal residence in Spain, and in 2007, they finally signed a bilateral agreement on the cooperation in the field of preventing “illegal” emigration of unaccompanied children. However, this agreement has already received several criticisms.

In this sense, Human Rights Watch has asserted that the agreement “remains silent on key safeguards during repatriation proceedings such as explicit guarantees for children’s entitlement to legal representation and their right to be heard (Article 12, CRC) (...) The agreement furthermore lacks guidance on how the best interest of a child is to be determined by taking into account a variety of factors, such as safety, security, socio-economic conditions, and care arrangements in the country of origin as well as the continuity in a child’s upbringing and level of integration in the host country. As a consequence, there is no guarantee that the return of a child under this agreement represents a safe and durable solution that is in the child’s best interest (...) We are furthermore concerned that the agreement requires the Spanish government to transmit details of an unaccompanied child’s identity and family background within one month to Moroccan authorities. This provision may put children fleeing persecution, including child-specific forms of persecution, and their families at risk, especially if unaccompanied children don’t have access to asylum procedures. This is particularly the case in the Canary Islands, one of the main entry points for children from Morocco, where recent research by Human Rights Watch indicates that unaccompanied children have no information on or access to asylum (...) We finally urge...to ensure that the implementation of the readmission agreement will be, as required, in full accordance with international and national law and standards, particularly those set out in the CRC, and to ensure that each repatriation is a safe and durable solution that is made in the best interest of the child”⁸².

8. Measures at the border to prevent the exercise of the right to leave any country.

As we have already seen, different maritime, terrestrial and aerial operatives directed by European authorities through FRONTEX, as also some exclusively Spanish procedures, patrol African countries coasts and waters (such as Mauritania and Senegal) in order to prevent, detain, intercept and return persons that are suspected to be trying to depart or to go to Canary Islands. Likewise, African authorities (such as Moroccan), acting as a functional complement of UE states asylum and immigration policies, are also in charge of preventing that thousands of persons can leave to Spain through informal ways. Even, as we have described before, throughout the legislation or concrete practices implemented by many of these North-western African countries, they arrive to the point of criminalizing “illegal immigration attempt”.

⁸² HRW, letter to the Spanish government President, April 2, 2007. In this same sense, see also APDH Andalucía, Press Release, 21th March, 2007.

In addition, the last months and years, several newspapers have been reporting constantly about the proceedings implemented at the African coasts, in order to prevent the emigration to Spanish territory. In this sense, for example, on January 2007 was published that Mauritanian police had detained in Noadibou 25 “subsaharian irregular immigrants”, as was confirmed by police sources. The police had ensured that they didn’t know if those people had arrived in “cayuco” or if they were preparing to sail to Canary. The press said that police had detained all the subsaharians in the Noadibou Detention Center, where they remained entered⁸³. A few days later, other 92 people from Subsaharian countries were detained in “El Aaiún” (Western Sahara), accused of preparing a tentative of an “illegal immigration” to the Canary Islands. The news informed that once they were identified and judged, they would be deported to their country (as it had already happened with other 400 people deported by Moroccan authorities in the last three weeks)⁸⁴.

The level of restrictions imposed to emigration (through a regular or irregular border), or better said, to freedom of circulation and mobility, is so high that Carens (1992) has affirmed that we should consider this right in relation to the liberal critic to feudal practices, which determined the opportunities of each person’s life according to his/her born, because citizenship looks like feudal status in the medieval age. He explains that those born as a citizen of Canada is like having born within the nobility, whereas born in a country as Bangladesh is like have born as a peasant. So, restrictions of the entrance to countries as Canada are a way to protect a heresy privilege, in the same sense (and effectiveness) as the medieval practices that used to limit people movement and freedom. Subsequently, he asks: if feudal measures were wrong, which is the justification of the modern ones?

In the previous paragraphs we have analyzed how these policies present a deep deficit in relation to obligations assumed by European States regarding human rights and refugees’ rights. But it’s still to be examined other fundamental right that is also put in risk under these circumstances and that should be seriously taken into account, despite according to many opinions it’s almost not applicable when we talk about migration. We are referring to the right to “freedom of movement”, as a derivation of the right to personal autonomy⁸⁵. This right includes, specifically, the right to leave the country, as its logical opposite, the right to enter to other country. When this topic is studied from the International Law perspective, it’s the Universal Declaration of Human Rights the usual referent in the subject, particularly its article 13, which states, on the one hand, that “everyone has the right to freedom of movement and residence within the borders of each state” and, on the other hand, that “everyone has the right to leave any country, including his own, and to return to his country” (this right is also recognized in the

⁸³ El Día, 11th January 2007, cited in <http://medios.mugak.eu/noticias/noticia/85313>.

⁸⁴ Newspaper [Canarias 7](http://www.canarias7.es), *Detuvieron a 92 subsaharianos al intentar emigrar de manera ilegal a Canarias. Fueron identificados, juzgados y devueltos a su país.* www.canarias7.es, 13th January, 2007.

⁸⁵ In this sense see Pécoud and de Guchteneire, 2006.

protocol 4 of the European Convention on Human Rights⁸⁶). The Universal Declaration (which text has been recognized as lawfully obligating under Consuetudinary Law), gives us some important particulars. A sign in favor of the recognition of the right to immigrate to other country, seems to be clear in the text, when it affirms everyone's right to "decide his residence within the borders of each state". It is quite evident it doesn't refer to the state of the persons' nationality, but to other states, not only because of the wording but mainly because when it talks about "the right to leave" it expressly mentions the "own country". What is more, when article 14 of the Declaration recognizes the right to asylum, it's also applicable to these circumstances, since thousands of persons intercepted in African coasts or waters could be in the situation protected by this rule, when it affirms that "everyone has the right to seek and to enjoy in other countries asylum from persecution".

Article 13 is usually ignored by states policies. On one hand, because they deny the Declaration its obligatory nature, what is wrong and against international jurisprudence and declarations approved by international forums, and incoherent because they don't maintain same position regarding other articles of the same Declaration. On the other hand, because it's usually associated to the right to emigrate and not to the right to immigrate. When states provide restrictions to the right to leave the country, the international community (or part of it) immediately reactions condemning that measure, accusing it of being authoritarian and of violating fundamental rights, the freedom of movement and freedom itself, that is to say, the person's autonomy. However, when states implement policies that restrict or prohibit immigrants to enter its territories, it's pleaded (in addition to the reasons mentioned above) that this answers to security reasons (national or international security) and also to the need of protecting other interests of the destination community (in this case, Spain or the UE), both – supposedly- included in the wide margin that the principle of "national sovereignty" would have in this subject.

Witthol de Wenden (2000: 46-49) describes quite precisely the ambivalence between the exit and enter to a country as an exercise of the freedom of mobility. She explains that liberal states have never accepted the right to enter as a logic counterpart of the right to exit, using sovereignty as an angular stone of the system. Despite the freedom of circulation is within the international relations framework, states have the right and responsibility of containing migratory flows. All OCDE countries agree with controlling, or stopping, immigration. However, international migrations cannot be decided anymore upon a sovereignty base or the idea of a government as the only border controller. In fact, she adds, the margin of decision of each State is scanty, but it plays to present itself as a sovereign to the public opinion. Therefore, a moral crisis is outlined: emigration is widely considered as a human rights issue (asylum, not rejection), whereas immigration is viewed as a matter of national sovereignty (enter, not

⁸⁶ Article 2.2 states that "Everyone shall be free to leave any country, including his own".

residence). But if people are free to leave their country, where can they go?⁸⁷

Different factors, as the restrictive immigration laws passed in several countries (such as EU state members), or economic, labour or other conditions required to get a visa or any necessary document to travel abroad the country, makes inaccessible this possibility for millions of people. In the case of the African coasts, where the goal of the European member States with FRONTEX operations is to avoid any trip towards Europe by other routes, neither it is possible to leave the country across informal borders. So, if the right to leave turns absolutely impossible to be exercised, then this right is being violated. The right to leave the country is a fundamental right, and as each of these rights, it can be regulated, because it isn't an absolute right but a relative one. This assertion doesn't mean at all that any regulation (restriction) to the exercise of a human right (the exercise is regulated, not the right itself) could approve the test of legitimacy (if it's lawful and reasonable), and for this reason there are many international and national standards which determine whether such restriction is or reasonable and lawful or not.

In the current international context, the right to leave the country looks to be only available for few people, according to their nationality and/or economic condition: in the one hand, nationals from the more developed countries usually don't have (in almost all cases) any problem to obtain the necessary papers to leave their country. On the other hand, in the case of those who are forced to leave their country (as migrants or asylum seekers), they will only be able to get those papers because of a conjunction of elements as their nationality, their economic resources and –in some occasions- family relationships. Therefore, this situation determines that those persons suffered the deprivation of this right (paradoxically, despite they are the ones who need more than anyone to exercise it⁸⁸), were forced to seek diverse strategies and means to do it. The coercion and prohibitions imposed in the “legal” borders push them to desperately look for alternative ones. However, as we have already seen, the Spanish policies and the FRONTEX intervention in the Spanish southern border, both directly and through African authorities, are trying to prevent any “informal” exercise of such right, by interceptions, returning, detentions, and even trials and condemns as criminals to those who put their lives under risk to do so. In the perspective of the APDHA (2006:12), with the aim of rejecting clandestine emigration other countries are receiving pressures in order to clearly violate the article 13 of the Universal Declaration of Human Rights, which recognizes to “everyone” the right “to leave any country, including his own, and to return to his country”. In this sense, APDHA express its doubts about the legality of police interventions (by the Army or Civil Guard) in the High Sea or in waters of third countries, where they would only be able to help (rescue) but not to control.

⁸⁷ Translation is ours.

⁸⁸ Those deprived to their basic rights (either economic and social rights, or civil and political rights, but usually all of them) in their country of origin, are whose find more obstacles and restrictions to be able to exercise the right to leave the country, whether to reach a minimally adequate condition of living, whether to survive for killing or torturing.

These circumstances must lead States (and EU) to review their policies in the external borders, as well as their relations with African authorities about this issue. They must be obligated to fulfill, both directly and indirectly, with all the obligations assumed through the international human rights law, which includes the right to leave the country. This would mean the revision of the interception proceedings, the detention of “illegal emigrants”, and the bilateral agreements signed with African States, and also their immigration policies, both national and regional, particularly in relation to the right to enter and to stay in their territory, because as we have already said, the right to leave a country has as its logical complement the right to enter to another one.

The restrictions to enter to a country are, in fact, ways to regulate the right to mobility (which includes both the right to leave and the right to enter or to immigrate). Legislation and policies which determine who can enter and live within a territory are establishing the conditions to exercise the right to migrate, despite they don't mention it with these words. The issue is to analyze, and to decide, if those conditions are legitimate (lawful, reasonable, non discriminatory) or not, which means whether they are in concordance with the international law, particularly with the human rights instruments, or they are not. In fact, many measures and policies have already been challenged by international organizations dedicated to the protection of human rights (ECHR, ICHR, etc.) for different reasons, such as the violation of the principle of non discrimination, or the right to a due process of law, to a family life, right to health care, the right to asylum, the principle of *non refoulement*, etc. Indirectly, these decisions imply the establishing of manners by which a person can exercise the right to enter and to live in another country, as well as they act as limitations to State discretion in this subject. In immigration issues, states cannot still invoke the principle of sovereignty as the only (or main) element to decide their border policy. Human rights obligations, adopted also by sovereign states, must be fully respected in all policies approved and implemented by states, including those related to immigration.

That is how both specific obligations emerging from Human Rights Conventions and international standards derived from there after interpretation made by specialized organisms, must be fully applicated to those policies connected with immigrants and asylum seekers admission. Basic principles of the International Law of Human Rights (ILHR), such as the one of progressiveness, dynamic interpretation of rules, non discrimination (*ius cogens*), or the one of reasonability, become fundamental means to determine legitimacy or illegitimacy of current policies and practices regarding immigration and, consequently, to modify them. If it's taken into account, on the one hand, the current situation and international migration challenges, and on the other hand, the obligations and basic principles of the International Law of Human Rights, we can not find a so legitimate and indispensable way as it isn't the one of redefining migratory policies, both at a national and at a regional level, in order to adequate them to the

compromises assumed by the states when signing and ratifying international human rights instruments.

Considering this issue from a Human Rights' perspective, the recognition of the right to immigrate constitutes an important and needed step. This doesn't necessarily mean to remove borders neither to end up with state sovereignty, but to establish legitimacy margins in order to exercise these rights margins that must be determined attending persons' human rights and considering the concrete regional and international setting.

Nowadays, however, immigration receiving countries such as Spain, apart from an out of place and restricted vision of sovereignty, resort to an entirely utilitarian and instrumental conception of immigration, treating these persons as "goods" or "objects" necessary to maintain certain welfare standards, to assure that the market logic and an economic system –that generates benefits just for a few- keep rolling. This posture is becoming every time more indefensible, especially from a Human Rights and an ethical perspective. If states need immigrants, they should adequate their conducts (their policies) to obligations regarding human rights, taking into account that the fact of immigrating doesn't respond to a favor or a state grace but to the use of the right to personal liberty, to the person's autonomy, which begins by the right to leave his/her country, fundamental right that is becoming each day more difficult to be exercised by those persons who live in Africa northwestern countries.

9.- A paradigmatic case of practices against international law: the ship Marine I

The detailed explanation of these cases doesn't mean at all that basic rights have not been affected in the rest of the situations of interception and returning in the border between Spain and Morocco or in African countries coasts that we have described. The analysis made above could be applied to all cases, because it's related to the policy itself, not only with its enforcement. Therefore, the following cases are considered separately because of some particularities, especially the fact that most of the people within the boats were coming from other region (Asia), the kind of response of Spanish authorities in each of them, and particularly because of the amount of information that it is available in relation to those facts (aspect that is quite difficult in most of the cases).

On February 12th, 2007, in front of the coast of Mauritania, a damaged ship (Marine I) detained with 372 persons on board, 305 of them from India and Pakistan, and the rest from Ivory Coast, Myanmar, Sierra Leone, Sri Lanka and Liberia. As the ship seemed to be sailing through Canary Islands, since its detention at the port of Nuadibú, Spanish authorities intervened with the purpose of identifying those persons and returning them to the countries of origin. After an agreement between both countries (Spain and Mauritania) crew were divided in different groups in order to give them a different destination. Those coming from subsaharian

countries were sent to Cape Verde.

Some of the 35 people that had been transported to Canary Islands were, after that, returned to their country of origin. In the case of nine of those persons, the Spanish NGO CEAR denounced that Spanish government had violated the right to asylum and access to justice of those persons. The UN High Commissioner for Refugees (UNHCR) –added CEAR when divulging its complaint- had expressed a positive report about those people, understanding that there were enough motives for them to fear persecution in their countries of origin and for that reason they should be recognized as refugees⁸⁹.

The rest of the people were returned to India and Pakistan, from Mauritania, after the Spanish government could arrange the necessary conditions for it with these countries. The “voluntary returning” operations had assistance from the International Organization for Migration (IOM).

Finally, there were other 23 people who rejected any returning and refused to their identification, alleging they feared to be persecuted, tortured or even killed. Therefore, they were detained in a fish hangar in the port of Nuadibú (Mauritania), in conditions quite far from the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*⁹⁰. Two months later (April 2007), the NGO’s *CEAR*, *Amnesty International* and *Doctors of the World* presented a legal claim under the National Audience in Madrid against Spanish administration, for the violation of the human rights of those people detained in Mauritania but under Spanish authorities’ custody. In their allegation, they stated that despite the jurisdiction exercised by these functionaries upon those people, Spanish legislation was not being abided. Moreover, they weren’t able to have a legal advice, their right to asylum wasn’t respected in the proper way and, of course, neither was their right to liberty (there wasn’t a judicial order of the detentions, neither any judicial control upon the detentions during these months).

A few weeks afterward, and as a consequence of this claim, the 23 people were transferred to the *Internment Center for Migrants* that has been built in Nuadibú with Spanish funding on March 2006. Yet the measure could be a good initiative at the beginning (especially because of the improvements of the conditions of detention), there still are two huge concerns: their situation not being resolved, particularly the asylum claim; and the transference under the authority of Mauritanian officials. As it regularly does with the vessels intercepted, here again the Spanish government has decided to leave detained people in Mauritanian hands. As it has been already stated by the NGO’s, this decision doesn’t prevent the Spanish responsibility in the case and therefore they will hold the legal claim promoted.

⁸⁹ CEAR, Madrid, Tuesday 27th, March, 2007.

⁹⁰ Adopted by the United Nations General Assembly, Resolution 43/173, 9th December 1988.

At the end of May, the Spanish government announced that Pakistan authorities had identified 7 of those 23 as their nationals, so it is very expectable a soon deportation for them⁹¹. The others 16, by the moment, will remain detained in Mauritania. Besides this question, it will be necessary to wait for the decision of the Spanish court in charge of the complaint presented by the NGO's, as well as if in the nearby future there is any other denounce for deprivation of fundamental rights that could have been committed during the returning or detaining of these migrants.

IV. CONCLUSIONS

As we have seen in this report, the precarious conditions of migrant people coming to Europe from Africa by the new migration routes (specially from Northwestern Africa to the Canary Islands) and the new European instruments to prevent irregular migration, in a context where borders cannot be anymore considered as just a geographical issue and they are not related exclusively with the national state, imply an important challenge for the EU in the field of Human Rights.

We have analysed the general framework of the European border management strategies. That is, the priorities and axes of the policies and the instruments to implement border controls. Then we have focused in the Spanish migration and border policies paying special attention to the external dimension of these policies. And finally, we have seen some operational measures implemented at the southern European border. With all this, we tried to make evident that from the point of view of Human Rights, security issues cannot be the criterion to "manage" borders.

Taking into account this framework, and specially the EU and Spanish policies developed to carry out migration controls at the southern border, we have shown this complex reality in detail through one of the most important (and at the same time most absent) element in the design and the implementation of these policies: the International Law of Human Rights.

In this sense, we have focus this report in the concrete measures implemented by the EU and Spain in order to prevent, detain and sanction migrant people coming from Africa to Europe through Spanish southern borders in an irregular way, and how they are affecting seriously and widely some fundamental rights. They affect rights which are such essential as the right to life, liberty and physical integrity, the right to asylum, the right to a due process or the children's rights are worryingly threaten (and in most cases, they have been already seriously affected) regarding the situation of emigrant people (or those who try to do it) from

⁹¹ El día, CAN, "Pakistan identifica a 7 de los 23 del 'Marine I', todavía en Mauritania" Madrid, 24 de mayo de 2007.

Northwestern Africa to the Spanish shores.

An analysis of the current international Human Rights standards, together with the remarks made by different policy actors, scholars and civil society clearly reveal that policies put into practice to control migration in this framework, are very far from fulfilling properly the obligations committed by the countries in the different Human Rights treaties, or even in the EU law and the internal law of Member States. In this sense, we affirm with Pécaud and de Guchtenerie(2006: 74) , that “the values that guide societies cannot stop at their borders; they must also inspire attitudes toward outsiders”.

The practices of interception and returning of migrant people in “Cayucos”, the proceedings carried out in each case, certain expulsions and devolutions carried out from the Iberian Peninsula to origin or transit countries, or the repression to the “illegal emigration” to these people in the exit countries, are some of the ways where the fundamental rights mentioned above could be violated at the Euro-Mediterranean and Atlantic border.

Finally, we have shown that in view of these complex reality, migratory policies have to consider the need of the right to the freedom of movement (the right to leave the own country and to enter in another). As we have pointed, nowadays, this right is determined by restrictive criteria such as the nationality or the economic conditions of the person. The recognition of this right, which do not necessarily mean to remove borders neither to end up with state sovereignty, but to face this topic from a point of view completely different which has to go through all migration laws because migrant people will be people exercising a right, nor “criminals” who threat a territory or a population.

The characteristics of nowadays migrations are related with the effects of the globalization that make transport and communications easier, but, at the same time affect deeply the mobility causes, that is, it affects the increase of the social gap between rich and poor countries (and inside them). In this framework, the restrictive and control perspective of migratory policies are not only ineffective, but also imply the State's responsibility of a generalized and serious affection of the fundamental rights. A real “global approach toward migrations” needs to incorporate, through an expert and serious debate, elements such as the (local, national and international) causes of migration, the limits of the exercise of the State's sovereignty, and the human mobility as an inalienable right of the person. For this reason, the Human Rights perspective must to be an essential part, even the principal part of the design and the implementation of all migratory policies.

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