



**SPAIN**

**SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE**

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# 1. INTRODUCTION

Amnesty International has prepared this submission for consideration by the United Nations Committee against Torture on the occasion of the seventh periodic report submitted by Spain on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This document reflects Amnesty International's main concerns regarding Spain's failure to comply with its international human rights obligations under the Convention against Torture. It is not an exhaustive list.

## 2. EXPULSIONS AND MIGRATION CONTROL MEASURES (ARTICLE 3)

Amnesty International has documented cases in which the Spanish state has failed to comply with the principle of non-refoulement enshrined in Article 3 of the Convention against Torture. In June 2022, Spain returned at least 470 people from sub-Saharan Africa across its border in Melilla without guarantees.<sup>1</sup> Together with other civil society organizations, Amnesty International is submitting another specific report on human rights violations against migrants and refugees committed by the Spanish authorities on 24 June 2022.<sup>2</sup> As part of its strategy to "stop and prevent irregular migration" Spain has reached cooperation agreements with third countries, mainly on returns.

For example, in 2003 a readmission agreement was signed with Mauritania<sup>3</sup> which allows Spain to return Mauritanian nationals, but also third-country nationals who have left or passed through Mauritania, or are presumed to have done so. The agreement contains no procedural or substantive guarantees against refoulement. There are credible reports that, in 2020 in the midst of the crisis caused by the Covid-19 pandemic, Spain illegally returned Malians to Mauritania, who were subsequently sent to Mali, despite UNHCR calls for the protection of Malian citizens affected by the conflict. Frontex carried out several return flights from the Canary Islands to Mauritania on the basis of the agreement between Spain and Mauritania signed in 2003. Between January and February 2020, Frontex returned a total of 139 people from the Canary Islands, of whom only five were nationals of that country, 100 were Malian nationals.<sup>4</sup>

In relation to the Frontex flight of 20 January 2020, the Mauritanian information agency confirmed the return of people deported by Spain to their countries of origin, including Mali.<sup>5</sup> Some sources indicated that some people

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<sup>1</sup> Amnesty International, Morocco: "They beat him in the head, to check if he was dead": Evidence of crimes under international law by Morocco and Spain at the Melilla border (MDE 29/6249/2022), 13 December 2022.

<sup>2</sup> España: *Violaciones al derecho a la vida, uso ilegítimo de la fuerza y expulsión violenta, sumaria y colectiva en el puesto fronterizo de Barrio Chino, en Melilla, el 24 de junio de 2022. Informe para el Comité contra la Tortura de la ONU [Spain: Violations of the right to life, unlawful use of force and summary, violent and collective expulsions at the Barrio Chino frontier post in Melilla: Submission to the UN Committee against Torture]* Index AI: EUR 41/6878/2023 (Spanish only).

<sup>3</sup> Agreement between the Kingdom of Spain and the Islamic Republic of Mauritania non immigration, Madrid, 1 July 2023, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-18767](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-18767) (Spanish only)

<sup>4</sup> Ombudsperson: Annual Report 2020, National Prevention Mechanism, p. 233 (Spanish only). The first flight on 20 January 2020 left Gran Canaria carrying 46 people: 34 from Mali, seven from de Mauritania, four from Senegal and one from one from Côte d'Ivoire. On 27 January 2020, another flight left Tenerife carrying 42 people: 38 from, three from Senegal and one from Mauritania. A third flight on 20 February, returned de 51 people: 36 from Mali, 13 from Senegal, and from Gabon and one from Côte d'Ivoire.

<sup>5</sup> <https://www.defensordelpueblo.es/evento-mnp/operativo-de-repatriacion-vuelo-frontex-desde-el-aeropuerto-de-gran-canaria-con-destino-a-noadhibou-mauritania/>

from Mali returned to Mauritania on the 20 January 2020 Frontex flight wished to apply for asylum, but were unable to do so or were not informed that they had the right to seek international protection.<sup>6</sup>

## 2.1 EXPULSION OF MOHAMED BENHALIMA

On 24 March 2022, the Spanish government expelled Mohamed Benhalima to Algeria, despite numerous reports that there was a real risk that he could be subjected to torture, endangering his physical and mental integrity. Mohamed Benhalima is a former member of the military, an activist who exposed the alleged corruption of senior military commanders in the Algerian army on his YouTube channel and participated in the mass movement of peaceful protest against the government that began in the country in 2019. He was sentenced to death *in absentia* in 2021 on charges of espionage and desertion.

On 14 March 2022, the Spanish authorities opened an administrative expulsion file for a breach of Article 54.1.a. of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, alleging that Mohamed Benhalima had participated in "*activities contrary to national security or that may harm Spain's relations with other countries*".

Spanish authorities alleged that Mohamed Benhalima had links with the political opposition group Rachad, which Algeria had listed as a terrorist group on 6 February 2022. However, the Spanish authorities did not provide any evidence of the use of violence, advocacy of hatred or any other action by the activist that could be considered "terrorism", according to the definition set out by the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. They also failed to take into account the fact that the Algerian authorities are increasingly bringing false terrorism and national security-related charges against peaceful activists, human rights defenders and journalists.<sup>7</sup>

The Spanish authorities did not give the court time to effectively review this expulsion and indicated that they did not know that his lawyers had filed urgent precautionary measures, which would have been ineffective had the court issued a ruling, and they also ignored the video that Mohamed Benhalima recorded in the Spanish Detention Centre before his deportation to Algeria warning of the risk of torture at the hands of the Algerian authorities for his reporting work.<sup>8</sup>

Mohamed Benhalima has been held in custody in the El Bilda military prison since 28 April 2022, facing more than 36 judicial cases. Although, according to the latest information available to Amnesty International, he has recently been granted the right to call his family once a week and to receive visits twice a week, he remains in solitary confinement and is only allowed to leave his cell for 10 minutes a day, denying him the possibility of contact with other prisoners. Those in charge of the military prison of El Bilda have forbidden him from receiving food, clothes and even books brought by his family.

On 19 June 2022, he testified before a judge in the Kolea court that agents of the Military Security Service of the Shawla information centre in Algiers had subjected him to torture and other ill-treatment for many days immediately following his return to Algeria on 24 March 2022. Among other things, he said he had been stripped naked and had ice cold water poured over him. Mohamed Benhalima's relatives have also reported several acts of intimidation against them. They alleged that staff at El Blida prison subjected them to unnecessary interrogation after each visit to Mohamed Benhalima.<sup>9</sup>

## 2.2 RECOMMENDATIONS

Amnesty International recommends that Spain:

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<sup>6</sup> <https://www.infomigrants.net/fr/post/28245/plus-de-100-maliens-expulses-en-mauritanie-par-frontex-et-lespagne-malgre-leur-droit-a-lasile> (French only).

<sup>7</sup> Amnesty International, *Annual Report 2022/23*, "Algeria", <https://www.amnesty.org/en/location/middle-east-and-north-africa/algeria/report-algeria/>

<sup>8</sup> Message posted on his Youtube channel on 20/03/2022, <https://www.youtube.com/watch?v=HHwwiS6lh4I>

<sup>9</sup> Amnesty International telephone interview with Mohamed Benhalima's lawyer on 9 March 2023.

- Guarantee that all individuals who are in Spanish territory or under Spanish jurisdiction have access to an effective remedy against their expulsion or any other form of forced return, based on a real risk of being subjected to serious human rights violations or other cruel, inhuman or degrading treatment in the country to which they are returned.
- Ensure that expulsion or refoulement procedures respect international human rights obligations, in particular the principle of non-refoulement and the right to seek international protection.

## **3. PERSISTENT DENIAL OF JUSTICE FOR VICTIMS OF TORTURE AND ENFORCED DISAPPEARANCE DURING THE CIVIL WAR AND UNDER FRANCOISM (ARTICLES 5, 12 AND 14)**

Since the Committee's last review in 2015, Amnesty International has repeatedly reported how the Spanish state has failed to guarantee the right to an effective remedy to those who experienced gross violations of international human rights standards during the Civil War and under Francoism. In the organization's opinion, the victims have not had access to truth and justice, which in turn has significantly impacted the right to obtain truth, justice and reparation of many of those who experienced human rights violations during the Civil War and under Francoism.

This is also the case as regards purely symbolic statements or financial compensation that are not linked to the unlawful act and in the absence of clarification of – or even trying to clarify – the circumstances surrounding the crimes and the lack of investigations aimed at determining the individual criminal responsibility of perpetrators, making it impossible to establish guarantees of non-repetition as a form of reparation.

### **3.1 NEW SUPREME COURT AND CONSTITUTIONAL COURT DECISIONS ENDORSE NON-INVESTIGATION OF THESE CRIMES**

The lack of investigation in Spain into the crimes under international law committed during the Civil War and under Francoism, including numerous reported cases of enforced disappearance and torture, remains almost total. The courts apply the arguments set out by the Supreme Court to dismiss or refuse to investigate reports of these serious

crimes, which include: i) considering them amnestied under the Amnesty Law of 1977; ii) the understanding that the statute of limitations has expired; iii) the principle of legality; or iv) the presumption that the alleged perpetrators have died.

These arguments were confirmed by the Supreme Court in its judgment of 27 February 2012 (Judgment 101/2012, in the “Garzón” Case), which since then has been applied by both the Spanish courts and the Spanish Prosecutor’s Office, resulting not only a failure to investigate these cases in Spain, but also in the obstruction of investigations initiated in other countries, such as Argentina, based on the principle of universal jurisdiction. These arguments came to the fore again, almost a decade later, in resolutions issued by the Supreme Court and the Constitutional Court during 2021.

Thus, on 17 February 2021, the Supreme Court issued a ruling confirming the closure of the investigation into the case known as “la fosa de los maestros” (“the teachers’ mass grave”),<sup>10</sup> a process promoted by the Memory and Dignity Association (Asociación Recuerdo y Dignidad), which succeeded in 2017 in exhuming the mass grave of five missing teachers in Cobertelada, Soria, and in returning their mortal remains to their families the following year.<sup>11</sup> Nine years after its February 2012 ruling, the Supreme Court again refused to enable the Spanish courts to investigate these serious human rights violations, literally reproducing the argument contained in the 2012 ruling.

The Supreme Court maintained once again that the absence of a definition in Spain’s criminal law of crimes under international law at the time the crimes were committed precludes their prosecution due to the principle of non-retroactivity of criminal law. Although the Supreme Court admits in its judgments the possibility of judging crimes against humanity not defined in domestic law at the time of they were committed,<sup>12</sup> it requires, as a minimum, that the state subsequently recognized them in its domestic law; in the opinion of the Supreme Court the Spanish state has not undertaken any such recognition.<sup>13</sup>

However, according to the Supreme Court, Spain has not been able to recognize the existence of crimes against humanity at the date of their commission for two reasons: (a) customary international law did not have sufficient substantive force to define the crime<sup>14</sup> and (b) Spain incorporated the Nuremberg principles in August 1952 with their adherence to the Geneva Conventions, a date after the events set out in the complaint covering the period July 1936 to December 1951.

For its part, the Constitutional Court, in its Ruling of September 2021, contends that at the time of the alleged torture reported in the complaint (1964, 1967 and 1974), the concept of crimes against humanity, which came into force in the Criminal Code on 1 October 2004, did not exist in the Spanish legal-penal system. It added that international law could also not be used as a source of the definition of a type of criminal offence, especially customary criminal law, since that was incompatible with the principle of criminal legality.

The Constitutional Court explained that accepting that international norms impose an obligation to investigate and punish international crimes, aimed at avoiding impunity for serious attacks on human rights, is far from equating this obligation with the existence of a type of criminal offence that meets the material conditions of accessibility and predictability.

In the particular case of crimes against humanity, the Constitutional Court points out that there were no specific treaty norms in this regard at the time of the alleged crimes and that neither the first judicial expression of crimes against humanity nor subsequent international practice present a level of uniformity that allows them to be considered a precise customary type of criminal offence.<sup>15</sup> Finally, having ruled out the possibility of investigating

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<sup>10</sup> Judgment 138/2021 of the Supreme Court, of 17 February,

<sup>11</sup> Press release of Recuerdo y Dignidad, of 1 March 2021: <https://recuerdoydignidad.org/notas-de-prensa/es/notas-de-prensa/el-tribunal-supremo-se-pronuncia-sobre-memoria-historica-por-primera-vez-desde-2012>

<sup>12</sup> Decision of the Supreme Court citing the ECtHR case of *Kolk and Kislyly v. Estonia*, of 17 January 2006, in its Legal Grounds Six.

<sup>13</sup> The Court notes that in the case of *Kolk and Kislyly*, Russia, the country of nationality of the accused, had not incorporated crimes against humanity, but its legal system did recognize such crimes under international law due to it having participated in the negotiation of the Nuremberg Statute, and by virtue of its status as a member State of the United Nations; cited in Legal Grounds Six.

<sup>14</sup> The Supreme Court refers to the extremely generic nature of the Martens Clause (principles of humanity and dictates of public conscience), which would prevent it being considered as a substantive penal norm. Cited in Legal Grounds Three.

<sup>15</sup> “Neither the analysis of the Nuremberg and Tokyo trials, nor the examination of art. 1 (b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 5 of the Statute of the International Tribunal for the Former Yugoslavia of 1993, of the Statute for the International Tribunal for Rwanda of 1994 (art. 3), or art. 7 of the Rome Statute of

the facts reported as crimes against humanity, the Constitutional Court affirms that they could only be prosecuted as ordinary crimes and, consequently, are subject to statute of limitations and amnesty.<sup>16</sup>

Amnesty International expresses its opposition to the arguments set out in the aforementioned judgments and would point out that for international law the absence of codification by a state of crimes under international law at the time they were committed does not allow the state to bypass its obligation to investigate them. Thus, for example, the Special Tribunal for Lebanon, established pursuant to Security Council resolution 1757 (2007), held in 2011 that the principle of legality is respected when a state adopts legislation criminalizing types of offences at a date after their perpetration, provided that such criminalization does nothing more than codify conduct that, at the time it was committed, was already considered criminal by the community of nations.<sup>17</sup>

This interpretation is in line with the true scope of the principle of legality under international law, which is not amended by either the constitutional or supreme courts, which provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law" and that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."<sup>18</sup> The Committee against Torture, in considering cases of torture committed prior to the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recalled that the obligation to punish those responsible for acts of torture was already enforceable prior to the entry into force of the Convention, since "there was a general rule of international law obliging States to take effective measures... to punish the practice [of torture]".<sup>19</sup> Finally, the obligation under international law to investigate and, where appropriate, punish torture cannot be avoided by domestic law. This is provided for in Article 27 of the Vienna Convention on the Law of Treaties, to which Spain is a party: "A party may not invoke the provisions of its internal law as justification for a breach of a treaty".

Amnesty International affirms that torture is always a crime under international law, since it has been codified as such, and not an ordinary crime covered by the national norms of states and, therefore, provisions specific to Spanish legislation such as the statute of limitation and amnesty cannot be applied to it. This was stated by the Human Rights Committee in its General Comment No. 20: "*The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.*

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*1998 allow us to understand that there was, at the time of the reported facts, a prohibition that reaches a degree of certainty sufficient in their elements to incorporate a customary description able to support a criminal conviction pursuant to art. 25.1 CE. A deficit compounded by the absence of a provision with minimum certainty about the criminal consequences of infringing such a prohibition. Even when there is a core constant identified regarding the prohibition of certain attacks on the civilian population, that basic core is not necessary and, to such an extent, sufficient to impose a criminal sanction because beyond its characterization as a type of attack that is prohibited and punishable, it does not offer data that allow the facts and their criminal consequences in all their magnitude. Neither does the authorization by Organic Law 6/2000 of 4 October and the ratification of the Rome Statute of 17 July 1998, ratified on 19 October 2000, which entered into force on 1 July 2002, although it involves the incorporation of a written norm, provide a normative basis for the investigation and criminal punishment of the reported facts."* Decision 80/2021, of 15 September of the Constitutional Court, Legal Grounds Four.

<sup>16</sup> *Ib. Legal Grounds Five.*

<sup>17</sup> The Appeals Chamber of the Special Tribunal for Lebanon, in its "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging" of 16 February 2011 held that: "132. According to the principles of legality, everybody must know in advance whether a specific conduct is consonant with, or a violation of, penal law ... This provision does not necessarily entail, however, that the authorities of a State party to the ICCPR may try and convict a person for a crime that is provided for in international law but not yet codified in the domestic legal order: in criminal matters, international law cannot substitute itself for national legislation; in other words, international criminalization alone is not sufficient for domestic legal orders to punish that conduct. Nevertheless, Article 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching the nullum crimen principle. This implies that individuals are expected and required to know that a certain conduct is criminalized in international law: at least from the time that the same conduct is criminalized also in a national legal order, a person may thus be punished by domestic courts even for a conduct predating the adoption of national legislation." (paras 132 and 133).

<sup>18</sup> International Covenant on Civil and Political Rights, supra, footnote 32, articles 15.1 and 15.2. The same principle is enshrined in Article 7.2 of the European Convention on Human Rights.

<sup>19</sup> United Nations Committee against Torture, Decision concerning communications 1/1988, 2/1988 and 3/1988 (Argentina) of 23 November 1989, paragraph 7.2, in United Nations document, General Assembly, Official Reports, Forty-fifth Session, Supplement No. 44 (A/45/44), 1990 at <https://redress.org/wp-content/uploads/2018/01/Apr-OBSERVATIONS-TO-THE-REPORT-SUBMITTED-BY-CHILE-UNDER-ARTICLE-19-OF-THE.pdf>, pag 10



*States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible*<sup>20</sup>

For all the above reasons, Amnesty International reaffirms that neither the Spanish state, nor any state, can invoke its domestic law to evade compliance with its international obligations, including due diligence to prevent, investigate, prosecute and punish acts of torture, and must not apply amnesties or statutes of limitations in such cases.

## 3.2 THE ENTRY INTO FORCE OF LAW 20/2022 ON DEMOCRATIC MEMORY

The Law on Democratic Memory is an improvement over previous legislation, but nevertheless has failed to eliminate obstacles to the judicial investigation of crimes under Francoism. Its entry into force has not led to a change of unequivocal criteria on the part of the Spanish courts when deciding on the opening of investigations for crimes under international law, including torture, committed in Spain in the past.<sup>21</sup>

The right to remedy for serious human rights violations is non-derogable.<sup>22</sup> However, the Law on Democratic Memory refrains from setting out provisions to guarantee the right of victims and their families to bring proceedings aimed at obtaining material and individualized justice. Amnesty International expresses its disappointment at a law in which material and individualized justice has no place, nor does it propose complying with state obligations to clarify abuses, their circumstances and the responsibility of the perpetrators.

### 3.2.1 1977 AMNESTY LAW

The Law on Democratic Memory makes no changes to the Amnesty Act of 1977 and limits itself to noting in article 2.3. that *"all the laws of the Spanish State, including the Amnesty Law 4/1977 of 15 October shall be interpreted and applied in accordance with conventional and customary international law and, in particular, with International Humanitarian Law, according to which war crimes, crimes against humanity, genocide and torture are considered not to be subject to a statute of limitations or amnesty."*

Already in its 2021 judgment, the Supreme Court had defended the fundamental role of the 1977 Amnesty Law to facilitate the Transition in Spain, noting that judges are subject to the principle of legality and that they cannot, under any circumstances, repeal laws; an action that only the Legislative has the power to undertake.<sup>23</sup> The Supreme Court has also declared that the international recommendations made to Spain by various human rights mechanisms to repeal the Amnesty Law,<sup>24</sup> when recalling the lack of statute of limitations for crimes against humanity, are only "recommendations and observations, and not complaints of non-compliance."<sup>25</sup>

Amnesty International considers that the 1977 Amnesty Law, as set out its text, only sought to pardon "acts with political intent, whatever their result may have been, classified as crimes and misdemeanours committed prior to 15 December 1976", which cannot be considered to include crimes against humanity or war crimes, which are crimes under international law and not political crimes. In addition, the same law excludes from its scope those "crimes that

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<sup>20</sup> Human Rights Committee, General Comment No. Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment); par. 15.

<sup>21</sup> See in this regard the organization's analysis in [Comentarios, preocupaciones y recomendaciones sobre el Proyecto de Ley de Memoria Democrática](https://doc.es.amnesty.org/ms-opac/recordmedia/1_@000034513/object/46350/raw), [Comments, concerns and recommendations on the Bill on Democratic Memory], of 1 March 2022: [https://doc.es.amnesty.org/ms-opac/recordmedia/1\\_@000034513/object/46350/raw](https://doc.es.amnesty.org/ms-opac/recordmedia/1_@000034513/object/46350/raw) (Spanish only).

<sup>22</sup> Article 2.3 of the International Covenant on Civil and Political Rights.

<sup>23</sup> The Supreme Court refers to its importance for national reconciliation because it sought first and foremost to ensure that there would not be two opposing Spains; Supreme Court ruling 101/2012 of 27 February 2012, Criminal Division, Legal Grounds Three.

<sup>24</sup> With reference to Resolution 828 of 26 September 1984 of the Council of Europe and to General Comment 20 of the United Nations Human Rights Committee of 10 March 1992, Human Rights Committee, 94th Session, Concluding observation, No. 5 on Spain.

<sup>25</sup> STS 101/2012, Legal Grounds Three.

have involved any kind of serious violence against the life or integrity of individuals”,<sup>26</sup> thus recognizing that there are acts for which, because of their nature, the state cannot be exempted from its responsibility to investigate, prosecute and punish.

Moreover, it is important to note that in April 1977 Spain had already ratified the International Covenant on Civil and Political Rights, which in its article 15.2 prohibits any type of obstacle to “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” The entry into force of the Covenant for Spain predates the adoption of the Amnesty Law in October of that year. Therefore, even if it were interpreted that the Amnesty Law does indeed grant a pardon for persons responsible for crimes under international law – which is not the case – such a rule would already have been rendered null and void, being contrary to an international treaty whose legal hierarchy is superior to any other under Spanish domestic law.<sup>27</sup>

In any event, international law prohibits the possibility for a State to invoke amnesty or any other reason to evade its obligations to investigate and punish crimes under international law and human rights violations. Amnesty has been interpreted as prohibited by various instruments of international law, including the International Covenant on Civil and Political Rights and the <sup>28</sup> Declaration on the Protection of All Persons from Enforced Disappearance.<sup>29</sup> In the words of the Human Rights Committee: “Amnesties and other similar measures which impede the perpetrators of human rights violations from being brought to trial, judged and punished are incompatible with the obligations which international human rights law imposes on States... to investigate, judge and punish those responsible for human rights violations.”<sup>30</sup> Furthermore, international law expressly prohibits crimes under international law from being regarded as political crimes or related to them.<sup>31</sup>

In his August 2021 report, the Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence deplored the numerous decisions taken by Spanish courts not to investigate serious human rights violations, invoking the Amnesty Law or the statute of limitations.<sup>32</sup> In this regard, the Rapporteur echoes how various human rights mechanisms, such as the Human Rights Committee, the Committee against Torture, the Committee against Enforced Disappearances and the Human Rights Council, have highlighted the incompatibility of the Amnesty Law with Spain’s human rights obligations and recommended its repeal; a recommendation that the Rapporteur has reiterated, urging the Spanish state to urgently align its legal system with its international commitments.<sup>33</sup>

As explained in above, Amnesty International considers that the very wording of the Law precludes its application with respect to crimes under international law, nevertheless the organization welcomes the fact that the Law on Democratic Memory states that the 1977 Amnesty Law must be interpreted in line with international standards. In the same vein, however, Amnesty International regrets that the Law on Democratic Memory does not expressly state that the provisions of the Amnesty Law can have no effect on serious violations of human rights or crimes under international law committed during the Civil War and under Francoism and that, therefore, it cannot be used to obstruct investigations and access to justice, truth and reparation for victims.

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<sup>26</sup> Law 46/1977 of 15 October 1977, article 1.c).

<sup>27</sup> Spanish Constitution, article 96, and article 1.5 of the Civil Code.

<sup>28</sup> Articles 2(3)(a) and 15(2)

<sup>29</sup> Article 18.

<sup>30</sup> Human Rights Committee, general comment No. 20 on article 7, forty-fourth session, Doc. Records of the General Assembly, (A/47/40), annex VI.A).

<sup>31</sup> See the International Convention for the Protection of All Persons from Enforced Disappearance, note 41, article 13, and the Convention on the Prevention and Punishment of the Crime of Genocide, article VII.

<sup>32</sup> Report of the Special Rapporteur on the promotion of truth, justice reparation and guarantees of non-recurrence, Fabián Salvioli, Follow-up on visits to Tunisia, Uruguay and Spain (A/HRC/48/60/Add.1), para. 28, <https://www.ohchr.org/en/documents/country-reports/ahrc4860add1-follow-visits-tunisia-uruguay-and-spain-report-special>

<sup>33</sup> Accountability: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes, Report of the Special Rapporteur on the promotion of truth, justice reparation and guarantees of non-recurrence, Fabián Salvioli, 9 July 2021 (A/HRC/48/60) <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F48%2F60&Language=E&DeviceType=Desktop&LangRequested=Fa>  
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### 3.2.2 PRINCIPLE OF LEGALITY

During the parliamentary process to approve the Law on Democratic Memory, and also after its approval, Parliament has refused on two occasions to initiate amendments to the Criminal Code in order to incorporate the principle of legality in accordance with international law, as enshrined in Article 7.2 of the European Convention on Human Rights and Article 15.2 of the International Covenant on Civil and Political Rights, instruments binding on the Spanish state. The first vote took place in March 2022<sup>34</sup> and the second in May 2023.<sup>35</sup>

To date, and as explained in previous paragraphs, the Spanish courts have invoked respect for the principle of legality as a reason not to carry out judicial investigations into crimes committed during the Civil War and under Francoism, claiming that, according to this principle, it is not possible to prosecute acts that were not defined in the Criminal Code at the time they were committed. As has also been explained, this interpretation ignores the fact that when these crimes were committed, customary international law had sufficient force to enable their prosecution, as evidenced by the 1945 Charter of the International Military Tribunal (Nuremberg Tribunal) and subsequent United Nations resolutions, cited above. Likewise, international instruments ratified by Spain such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights establish that there can be no obstacles to the prosecution of acts that were criminal according to the general principles of international law, precisely the provisions that the legislative initiatives rejected by Parliament on each occasion were intended to incorporate into the Criminal Code.

Already in 2014, the United Nations Special Rapporteur for the promotion of truth, justice and reparation criticized the excessive formalism in the interpretation of law by the Spanish courts which prevents investigations being conducted and alternatives being assessed which would guarantee victims truth and justice, and stated that: "It is in the field of justice that the greatest shortcomings are apparent in the way the legacies of human rights violations committed during the Civil War and the Franco era are dealt with."<sup>36</sup> Seven years later, the Rapporteur again expressed himself in similar and forceful terms, noting that: "In Spain, the violations committed under the Franco regime remain unpunished."<sup>37</sup>

Amnesty International regrets that the Spanish Parliament has twice refused to initiate the necessary amendments to the Criminal Code to incorporate an essential element of the investigation of crimes under international law, such as the principle of legality under international human rights law.

### 3.2.3 COMPLAINTS REGARDING TORTURE COMMITTED UNDER FRANCOISM FILED AFTER THE ENTRY INTO FORCE OF THE LAW ON DEMOCRATIC MEMORY

In its most recent general comments, the Committee noted with serious concern that the 1977 Amnesty Law remained in force. The Committee also expressed concern at the Supreme Court ruling of 2012, which established that no criminal investigation is warranted for cases of serious human rights violations during the Civil War and under Francoism (1936-1975) since, among other reasons, the statute of limitation on such crimes had expired, the alleged perpetrators had died or the 1977 Amnesty Law would have been applicable to them (arts. 12, 13 and 14). The Committee urged the Spanish state to take all necessary legislative and other measures to ensure that acts of torture, including enforced disappearances are not crimes subject to amnesty or a statute of limitations and that this

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<sup>34</sup> Boletín Oficial de las Cortes Generales [Official Gazette of the Spanish Parliament], 21 March 2022: [https://www.congreso.es/public\\_oficiales/L14/CONG/BOCG/B/BOCG-14-B-125-6.PDF#page=1](https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-125-6.PDF#page=1) (Spanish only).

<sup>35</sup> Boletín Oficial de las Cortes Generales [Official Gazette of the Spanish Parliament], 12 May 2023 [https://www.senado.es/legis14/publicaciones/pdf/senado/bocg/BOCG\\_D\\_14\\_492\\_4143.PDF](https://www.senado.es/legis14/publicaciones/pdf/senado/bocg/BOCG_D_14_492_4143.PDF) (Spanish only).

<sup>36</sup> United Nations, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, report of 22 July 2014 on his visit to Spain (A/HRC/27/56/Add.1) para. 67.

<sup>37</sup> Op.cit., Report of the Special Rapporteur on the promotion of truth, justice reparation and guarantees of non-recurrence, Fabián Salvioli, 9 July 2021 (A/HRC/48/60), para. 17, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F48%2F60&Language=E&DeviceType=Desktop&LangRequested=Fa> lse

prohibition is scrupulously enforced in practice. Furthermore, the state party should ensure that victims of torture and ill-treatment receive adequate reparation and compensation, and as full rehabilitation as possible.<sup>38</sup>

However, and as explained above, the recently enacted Law on Democratic Memory has not promoted measures to remove obstacles to the investigation of crimes under international law committed during the Civil War and under Francoism, including the 1977 Amnesty Law, or to counter view that the statute of limitations for such crimes had expired.

Following the promulgation of the Law on Democratic Memory, victims in various parts of the Spanish state filed complaints before regional courts claiming to have experienced torture during the last years under Francoism (1972-1975). So far, Amnesty International is aware of three judicial decisions; two of them declaring the complaints filed inadmissible, by courts in Ferrol and Pamplona, respectively; in contrast a court in Madrid ruled that an investigation could be initiated into: 1) a complaint regarding the killing of Xose Ramón (Moncho) Reboiras in Ferrol in 1975 who was shot in the context of a police operation and whose case was archived on grounds of the expiry of the statute of limitations, in application of the jurisprudence of the Supreme Court;<sup>39</sup> 2) a complaint filed by Concepción Edo Gil, who alleges she was tortured in detention in 1973 in Pamplona and whose case was archived on grounds of the expiry of the statute of limitations;<sup>40</sup> and 3) a complaint filed by Julio Pacheco Yepes, who alleges he was tortured while in detention in 1975 in Madrid and whose complaint was found admissible – the court ordered that the testimony be taken of Julio and his spouse, Rosa, as a witness.<sup>41</sup>

Amnesty International regrets that the Spanish courts continue to invoke the principle of legality and statutes of limitations to refuse to undertake judicial investigations for crimes under international law committed in Spain during the Civil War and under Francoism, in clear contradiction to the recommendations made by various United Nations human rights mechanisms.<sup>42</sup>

With regard to acts of torture during the Civil War and under Francoism, Amnesty International recalls that in its General Comment 3 the Committee against Torture stated that: "On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them."<sup>43</sup>

Amnesty International adds its voice to the recommendations of the bodies of the United Nations system urging the Spanish authorities to fully comply with their obligation to investigate allegations of crimes under international law committed during the Civil War and under Francoism and to refrain from claiming that these types of crimes are political crimes subject to amnesty. Amnesty International considers that the Spanish state still lacks the necessary legislation to guarantee against the erroneous application of statutes of limitations and amnesty when it comes to crimes under international law. The investigation and, where appropriate, punishment of these crimes is a legal obligation that must be undertaken *ex officio* by the authorities, regardless of whether there is a formal complaint.

In light of the above, Amnesty International recalls that states cannot invoke their domestic law to evade compliance with their international obligations. Therefore, the organization considers that as an obligation under

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<sup>38</sup> Concluding observations on the sixth periodic report of Spain, of the Committee against Torture, 29 May 2015, (CAT/C/ESP/CO/6) paras 14 and 15.

<sup>39</sup> Ruling of Ferrol Court of Instruction No. 1, dated 3 April 2023, which agrees to the permanent closure of proceedings (*sobreseimiento libre*) on the grounds of the expiry of the statute of limitations of the reported crimes. The ruling echoes, among others, the judgment of the Supreme Court of 27 February 2012 which considers that the arguments contained therein continue to be currently applicable, and remain unaltered by the provisions of Law 20/2022 on Democratic Memory.

<sup>40</sup> Ruling of Pamplona Court of Instruction No. 1, dated 27 April 2023, which orders the provisional archiving of the complaint, on the grounds, with a reasoning of just two sentences, that the statute of limitations on the facts in the complaint had expired.

<sup>41</sup> Ruling of Madrid Court of Instruction No. 50, of 12 May 2023, which authorized that an investigation be initiated and provides for investigative proceedings, such as the taking of a statement from Julio Pacheco and his spouse, Rosa María Alcón, who also reported in 2018 having experienced torture during the same period of detention, although her complaint was archived.

<sup>42</sup> See in this regard the report of the Committee against Torture of 29 May 2015 (CAT/C/ESP/CO/6), paras 14 and 15; the report of the Working Group on Enforced Disappearances of 2 July 2014 (A/HRC/27/49/Add.1) paras 67 (aa) to 67 (hh); the report of the Human Rights Committee of 14 August 2015 (CCPR/C/ESP/CO/6) para. 21; and the concluding observations of the Committee on Enforced Disappearances on the supplementary information submitted by Spain under article 29.4 of the Convention, 27 September 2021 (CED/C/ESP/OAI/1) paras. 17 and 18.

<sup>43</sup> General Comment No. 3 of the Committee against Torture of 13 December 2012 on the implementation of article 14 by States parties (CAT/C/GC/3) para. 40.

the Convention, the Spanish state should investigate crimes under international law committed during the Civil War and under Francoism and remove obstacles to compliance with international standards.

### 3.3 RECOMMENDATIONS

Amnesty International recommends that Spain:

- Expressly recognize the fundamental principles of international law in the investigation of crimes under international law, especially as regards their not being subject to statutes of limitations or the inapplicability of pardons or amnesties and the obligation to investigate the truth of the facts, regardless of the possible deaths of the alleged perpetrators.
- Amend the Criminal Code to:
  - Incorporate the principle of legality in accordance with international law, as enshrined in Article 7.2 of the European Convention on Human Rights and Article 15.2 of the International Covenant on Civil and Political Rights, instruments binding on the Spanish state.
  - Ensure that it does not provide for a statute of limitations on action and punishment in respect of crimes under international law.<sup>44</sup>

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<sup>44</sup> Rome Statute of the International Criminal Court, 17 July 1998, article 29; Convention for the Protection of All Persons from Enforced Disappearance, *op. cit.*, note 18, article 8.1.b; International Covenant on Civil and Political Rights, *op. cit.*, note 18, article 15.2; European Convention on Human Rights, *op. cit.*, note 38, article 7.2.

# 4. EXTRATERRITORIAL JURISDICTION OF SPAIN REGARDING CASES OF TORTURE AND ENFORCED DISAPPEARANCE (ARTICLES 5, 6 AND 7)

## 4.1 LIMITATIONS TO THE PRINCIPLE OF UNIVERSAL JURISDICTION

The Spanish state has made two amendments to the Organic Law on the Judiciary in order to restrict the jurisdiction of Spanish courts in accordance with the principle of universal jurisdiction to investigate crimes under international law, such as torture.

A first amendment, made in 2009, replaced the universality of jurisdiction with connections with Spain, namely the presence of the accused on Spanish territory, the Spanish nationality of the victim, another relevant link or the absence of investigation by another court.

In 2014, Organic Law 1/2014 on universal jurisdiction introduced detailed wording of proposed limitations on jurisdiction for each crime. Thus, with regard to the crimes of torture and enforced disappearance, article 23.4 b) and c) of the Organic Law on the Judiciary establishes the extraterritorial jurisdiction of Spain when: i) the proceedings are directed against a Spaniard; or ii) the victim had Spanish nationality at the time the crime was committed and the person alleged to have committed the crime is in Spanish territory.

Amnesty International notes that article 23.4 (b) and (c) violates international obligations under, *inter alia*, the Convention against Torture, the Convention for the Protection of All Persons from Enforced Disappearance and the International Covenant on Civil and Political Rights: firstly, the obligation *erga omnes* to prosecute and punish torture and enforced disappearance; and secondly, the duty to provide an effective remedy for any victim.<sup>45</sup>

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<sup>45</sup> See International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No IT-95-17/1-T, paras 137, 144, 145, and 150: "In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law... The prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*... in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders... The mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility."

The 2014 reform also incorporated a Transitional Provision that provided for the dismissal of all cases “for which proceedings are ongoing at the time of entry into force of this Law for the crimes referred to therein”. In 2018, the Constitutional Court ruled on an appeal of unconstitutionality filed against this legislative reform, endorsing it, including this Transitional Provision.<sup>46</sup>

In conclusion, Amnesty International would underline that article 23.4 (b) and (c), which links jurisdiction over torture and enforced disappearance to the Spanish nationality of the accused or victim, violates Spain’s international obligations.

## 4.2 INVESTIGATION CURRENTLY ONGOING IN THE NATIONAL COURT REGARDING TORTURE AND ENFORCED DISAPPEARANCE

Despite the restrictions imposed on the universal and extraterritorial jurisdiction of the Spanish courts, since 2020 the Spanish National High Court has been investigating a case of possible kidnapping for terrorist purposes, enforced disappearance and torture against Spanish nationals and residents, opponents of the Equatorial Guinean regime to which Amnesty International wishes to draw the Committee’s attention, taking into account the obligations of the Spanish state under the Convention if alleged perpetrators of acts of torture are found in its territory.

Specifically, the National High Court, within the framework of Preliminary Proceedings 554/2020, is investigating the kidnapping of four members of MLGE3R, two of them residing in Spain, Martín Obiang and Bienvenido Ndong, and two of them Spanish nationals, Feliciano Efa Mangué and Julio Obama Mefuman, the latter having died in the custody of the Equatorial Guinean authorities on 15 January 2023; the Equatorial Guinean authorities have not complied with the requests for repatriation of his body.<sup>47</sup>

According to the investigation carried out by the police (General Commissariat of Information), the Equatorial Guinea is carrying out a systematic programme of kidnapping and transferring to Equatorial Guinea political opponents residing abroad (both in Spain and in other European countries), who would be subjected to unfair trials and torture. From this investigation it follows that the four people mentioned above were kidnapped after having been deceived into travelling from Madrid to South Sudan (Juba) on 15 November 2019 and then taken to Equatorial Guinea. In particular, Julio Obama Mefuman was sentenced to 60 years in prison and Efa Mangué, Martín Obiang and Bienvenido Ndong to 90 years, respectively, in March 2020, for their participation in an alleged coup attempt against President Obiang in 2017.<sup>48</sup>

Available evidence, according to the police investigation, indicates individualized sessions of torture (applying electric shocks to detainees, or leaving them hanging by their hands and feet), resulting in confessions being extracted, and very harsh conditions in prison (being held incommunicado with other prisoners, limited physical space available to them, lack of natural light, absence of access to the outer courtyard of the prison, a lack of medical assistance and the widespread mistreatment by the jailers who guard them).<sup>49</sup>

In the past, Amnesty International has highlighted actions by the authorities of Equatorial Guinea that have many similarities with those that are now being investigated in Spain.<sup>50</sup> In 2010, the organization reported how four

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<sup>46</sup> Judgment 140/2018, of the Constitutional Court of 20 December 2018.

<sup>47</sup> On 27 February 2023, the Ministry of Foreign Affairs and Cooperation sent a written response to a police officer, informing them that the Equatorial Guinean authorities had not responded to the request for repatriation of the body.

<https://guineaequatorialpress.com/noticias/el-tribunal-militar-reunido-en-ovengazem-ha-dictado-sentencia-contr-a-los-implicados-en-el-fallido-segundo-golpe-de-estado-de-2017> *Error! Hyperlink reference not valid.*

<https://guineaequatorialpress.com/noticias/el-tribunal-militar-reunido-en-ovengazem-ha-dictado-sentencia-contr-a-los-implicados-en-el-fallido-segundo-golpe-de-estado-de-2017>

<sup>48</sup> Report of the General Commissariat of Information of the General Directorate of the Police, of the National Police Corps, dated 1 December 2022.

<sup>50</sup> Amnesty International, “Urgent Action, AU: 44/10 AI” (Index: AFR 24/012/2010) 24 August 2010, <https://www.amnesty.org/en/documents/afr24/012/2010/en/>

people, former army officers, had been kidnapped in Benin, where they held refugee status, and were transferred to Equatorial Guinea to be subjected to courts martial. Reports received by Amnesty International indicate that these individuals were tortured into confessing to having participated in an attempted assassination of President Obiang Nguema in February 2009. They were sentenced to death on 21 August 2010 and were executed a short time after the sentences had been handed down against them; their bodies were not returned to their families.<sup>51</sup>

On 16 February 2023, the European Parliament adopted a resolution condemning the death of Julio Obama Mefuman in Equatorial Guinea's custody and stating that it considers it the responsibility of the Equatorial Guinean regime, calling for an independent international investigation into these cases. The European Parliament is extremely concerned about the extraterritorial actions of the Government of Equatorial Guinea, including the abduction of political dissidents and urged EUROPOL, EUROJUST and the European Commission to work together with Member States to protect nationals and residents of the European Union.<sup>52</sup>

For its part, the Spanish Congress of Deputies approved on 9 May a Draft Proposal urging the Spanish government, among other things, to promote police cooperation at the level of the European Union to prosecute the illegal criminal organization engaged in the surveillance and kidnapping of opponents of the regime of Equatorial Guinea; to request the authorities of Equatorial Guinea to clarify the death of Julio Obama Mefuman and repatriate his body; and to release Feliciano Efa Mangue (the Spanish state has already requested he be pardoned) and the other two people with permanent residence in our country detained for the same acts (Martín Obiang Ondo Mbasogo and Bienvenido Ndong Ondo).<sup>53</sup>

To date, the judicial authorities have not acted to ensure the presence of the alleged perpetrators and the possibility of conducting an investigation and, where appropriate, effective prosecutions. On 9 December 2022, the Prosecutor's Office of the National High Court urged that, if the alleged perpetrators are found to be in Spanish territory, this must be made known to the courts, all this in anticipation of their travelling to Spain around Christmas. In this same document, the Prosecutor's Office points out and acknowledges the very high probability that those investigated will not appear before the Spanish judicial authorities and that it is very unlikely that the authorities of Equatorial Guinea will collaborate with a possible future international arrest warrant.<sup>54</sup>

The investigating judge, reflecting the arguments of the Prosecutor's Office, agreed in a ruling of 10 December 2022, that "it is not appropriate to agree on the 'judicial' detention of those under investigation, and orders the police to carry out the necessary procedures to ensure they are brought before a judge, "intervening and seizing their mobile devices... without prejudice to the procedures that need to be carried out by the unit in charge of the investigation regarding the taking of statements"(sic).<sup>55</sup>

On 29 December 2022, the police informed the investigating judge and the Prosecutor's Office in writing that they had detected and confirmed the presence of one of the suspects in a hotel in Madrid (Carmelo Ovono Obiang, son of Teodoro Obiang). The Prosecutor's Office responded by referring to its letter of 9 December, but the investigating judge issued a new order merely agreeing to: "Transfer the complaint, the written complaint, and the opinion of the Public Prosecution Service and order of permission to proceed with the investigation of the complaint regarding Carmelo Ovono Obiang and requiring the appointment of a lawyer and attorney of their choice, on the understanding that if they do not do so, a duty lawyer will be appointed, and that a domicile be designated in Spain to which notifications will be made, or a person who receives them on his behalf".<sup>56</sup>

Following this decision, Carmelo Ovono Obiang travelled back to Equatorial Guinea.<sup>57</sup> The investigating judge of the National High Court summoned Carmelo Ovono Obiang and the other two people under investigation to testify by videoconference on 28 March. The Government of Equatorial Guinea made public statements asserting that it would

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<sup>51</sup> *Ib.*

<sup>52</sup> [https://www.europarl.europa.eu/doceo/document/RC-g-2023-0122\\_EN.html](https://www.europarl.europa.eu/doceo/document/RC-g-2023-0122_EN.html)

<sup>53</sup> See the text of the Draft Proposal that was finally adopted by the Congress of Deputies, [https://www.congreso.es/public\\_oficiales/L14/CONG/BOCG/D/BOCG-14-D-571.PDF#page=7](https://www.congreso.es/public_oficiales/L14/CONG/BOCG/D/BOCG-14-D-571.PDF#page=7) (Spanish only).

<sup>54</sup> Written statement by the Office of the Prosecutor of the National High Court dated 9 December 2022.

<sup>55</sup> Ruling of Central Court of Instruction No. 5 of the National High Court, 10 December 2022, within the framework of Preliminary Proceedings 554/2020.

<sup>56</sup> Ruling of Central Court of Instruction No. 5 of the National High Court, dated 29 December 2022, DDPP 554/2020.

<sup>57</sup> [https://www.cope.es/actualidad/espana/noticias/hijo-obiang-pide-declarar-desde-guinea-anuncia-que-hablara-20230308\\_2592034](https://www.cope.es/actualidad/espana/noticias/hijo-obiang-pide-declarar-desde-guinea-anuncia-que-hablara-20230308_2592034)



not cooperate with the Spanish justice system and would not authorize the making of such statements.<sup>58</sup> None of the three people under investigation appeared before the investigating judge, which prompted the Prosecutor's Office of the National High Court to call for international arrest warrants.<sup>59</sup>

The Government of Equatorial Guinea has informed the Spanish state of an investigation opened in that country since 15 February 2023 relating to the same incidents investigated by the National High Court. On 23 April 2023, the investigating judge of the National High Court requested the Ministries of Justice and Foreign Affairs to verify whether there were indeed ongoing proceedings in the Supreme Court of Equatorial Guinea against, among others, Carmelo Ovono Obiang.<sup>60</sup> To date, no further information has been provided by the Equatorial Guinean authorities on this.<sup>61</sup> The possibility that Spanish justice could be declared subsidiary to that of Equatorial Guinea raises concerns for Amnesty International. Article 23.5 b) of the Organic Law on the Judiciary establishes the subsidiary jurisdiction of Spain with respect to the court of the state in which the acts were committed or of the nationality of the accused.

On this point, it should be borne in mind that universal jurisdiction is concurrent with and not subsidiary to other traditional forms of jurisdiction, as the Goldstone Report to the Human Rights Committee has pointed out: "The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them."<sup>62</sup>

Moreover, there are no hierarchies among concurrent jurisdictions and the state exercising universal jurisdiction should not decline jurisdiction. According to the African Union-European Union Expert Report on the Principle of Universal Jurisdiction: "Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims."<sup>63</sup>

Finally, and in any case, the investigation into these facts by the authorities of Equatorial Guinea did not begin until 16 February 2023<sup>64</sup> and the Equatorial Guinean authorities themselves have publicly alleged that the investigation of the Spanish justice system was politically motivated.<sup>65</sup> It is also worth noting the difficulties in obtaining the repatriation of the body of Julio Obama and that efforts to obtain information on the circumstances surrounding his death continue to be unsuccessful.<sup>66</sup>

## 4.3 RECOMMENDATIONS

Amnesty International recommends that Spain:

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<sup>58</sup> <https://www.europapress.es/internacional/noticia-guinea-ecuatorial-asegura-miembros-gobierno-no-declararan-justicia-espanola-20230322064030.html>

<sup>59</sup> <https://www.publico.es/internacional/fiscalia-audiencia-nacional-pide-orden-busca-captura-hijo-obiang-acusado-tortura-secuestro.html#analytics-noticia:relacionada>

<sup>60</sup> <https://www.publico.es/internacional/guinea-ecuatorial-dice-juez-pedraz-investiga-torturas-hijo-obiang-estrategia-evitar-causa-espana.html>

<sup>61</sup> Amnesty International's conversation with the complainants' lawyer, 13 June 2023.

<sup>62</sup> Human Rights Council, Human rights in Palestine and other occupied Arab territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48) of 25 September 2009, para. 1849.

<sup>63</sup> Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction (Doc. 8672/1/09REV. 1) Brussels, 16 April 2009, Annex, para. 14.

<sup>64</sup> <https://www.publico.es/internacional/juez-asignado-guinea-ecuatorial-caso-hijo-obiang-accedio-recibir-soborno-dar-honorario.html>

<sup>65</sup> <https://www.europapress.es/internacional/noticia-guinea-ecuatorial-asegura-miembros-gobierno-no-declararan-justicia-espanola-20230322064030.html>

<sup>66</sup> On 27 February 2023, the Ministry of Foreign Affairs and Cooperation sent a written response to a police officer informing them that the Equatorial Guinean authorities had not responded to the request for repatriation of the body.

- Exercise their competence effectively to prosecute crimes under international law, where established by applicable international law.
- Refrain from applying the provisions of article 23.4 of the Organic Law on the Judiciary that are contrary to Spain's international obligations.
- Recognize its competence to investigate crimes under international law concurrently with any other foreign or international court, without prejudice to investigations that have already been initiated in other jurisdictions or in Spain.
- Promote legislation providing, without undue limitations, for the principle of universal jurisdiction. Such legislation should enable judicial authorities to investigate and prosecute any person suspected of committing a crime under international law, irrespective of the place where the crime was committed or the nationality of the accused or victim, and to grant reparations to the victim and their families.

# 5. EXCESSIVE USE OF FORCE AND USE OF LESS LETHAL WEAPONS BY THE POLICE (ARTICLES 13, 14 AND 16)

## 5.1 THE USE OF RUBBER BULLETS

In Spain, the use of large kinetic impact projectiles, such as rubber bullets the size of tennis balls – which are inherently inaccurate – has caused numerous serious injuries, including eye injuries. The Stop Rubber Bullets Campaign coalition has documented one death from head trauma and 24 serious injuries between 2000 and 2020. In 11 of these cases, these were serious eye injuries, four of which resulted in loss of vision in one eye.<sup>67</sup> In February 2014, members of the Spanish Civil Guard fired 145 rubber bullets and five smoke grenades at 200 migrants, refugees and asylum seekers from sub-Saharan Africa who were trying to swim to the beach at El Tarajal in Ceuta, a Spanish autonomous city located on the north coast of Africa, which contributed to the deaths by drowning of at least 14 people.<sup>68</sup> As a result of the numerous serious injuries caused, often to bystanders,<sup>69</sup> the police forces of

<sup>67</sup> International Institute for Nonviolent Action (Novact) and Center for the Defense of Human Rights (Iridia), Stop Balas de Goma [Stop Rubber Bullets], novact: [https://iridia.cat/wp-content/uploads/2021/06/Informe-Balas-de-Goma\\_V2.pdf](https://iridia.cat/wp-content/uploads/2021/06/Informe-Balas-de-Goma_V2.pdf) (Spanish only).

<sup>68</sup> Amnesty International, "Spain: Accountability urged for 'appalling' migrant deaths in Ceuta", 14 February 2014, [www.amnesty.org/en/latest/news/2014/02/spain-accountability-urged-appalling-migrant-deaths-ceuta/](http://www.amnesty.org/en/latest/news/2014/02/spain-accountability-urged-appalling-migrant-deaths-ceuta/); "España: La tragedia de los migrantes de Ceuta, lamentable menosprecio hacia la vida humana" ["Spain: Ceuta migrant tragedy - deplorable disregard for human life"], 6 February 2015, [www.amnesty.org/en/latest/news/2015/02/spain-ceuta-migrant-tragedy-deplorable-disregard-human-life/](http://www.amnesty.org/en/latest/news/2015/02/spain-ceuta-migrant-tragedy-deplorable-disregard-human-life/) (Spanish only); "El Tarajal, Historia de una tragedia sin nombres" ["El Tarajal, History of a tragedy without names"], 5 February 2015, [www.es.amnesty.org/en-que-estamos/blog/historia/articulo/el-tarajal-historia-de-una-tragedia-sin-nombres/](http://www.es.amnesty.org/en-que-estamos/blog/historia/articulo/el-tarajal-historia-de-una-tragedia-sin-nombres/) (Spanish only).

<sup>69</sup> "Amnistía Internacional pide al Estado que se revise la utilización de las pelotas de goma por todas las Fuerzas de Seguridad" ["Amnesty International calls on the State to review the use of rubber bullets by all Security Forces"], 13 April 2012, <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/amnistia-internacional-pide-al-estado-que-se-revise-la->

Catalonia, the Basque Country and Navarre banned the use of rubber bullets between 2014 and 2017, but the National Police and the Civil Guard continue to use them throughout Spain.<sup>70</sup>

As far as Amnesty International is aware, the use of rubber bullets is governed by the Circular on the use of riot control equipment, dated 3 September 2013, drafted by the General Commissariat of Citizen Security with the approval of the Deputy Operational Directorate (DAO).<sup>71</sup> It is not a public circular and the Ministry of the Interior has refused requests for information through the Transparency Portal.<sup>72</sup>

Amnesty International believes these projectiles are inherently inaccurate, which impedes their use from complying with international standards on the use of force, which establish that kinetic impact projectiles should be used only against people involved directly in acts of violence and with the aim of striking the lower part of the body due to the high probability of causing serious injuries if they impact the head or upper torso.<sup>73</sup> The use of rubber bullets in the Spanish state has shown that these weapons cannot be used safely or in compliance with international standards and Amnesty International therefore calls for their prohibition since, given their technical characteristics, they are highly inaccurate and carry a high risk of hitting certain particularly vulnerable parts of the body, in particular the eyes, or even hitting other people who are not the target, such as journalists or pedestrians.

Within the framework of the parliamentary process that thwarted reform of the Organic Law on the Protection of Citizen Security (also known as the Gag Law, *Ley Mordaza*), some parliamentary groups raised the possibility of incorporating a ban on these weapons into the law, but this was rejected, among others, by the majority group of the government coalition. In April 2022, when appearing before the Interior Committee of the Congress of Deputies, the Director General of the National Police defended the use of these weapons.<sup>74</sup>

## 5.2 THE USE OF FOAM PROJECTILES

B&T AG's Swiss-made SIR (Safe Impact Rounds, accurate ammunition) bullets and the more powerful extended-range SIR-X variant were gradually adopted from 2014 following the ban on rubber bullets. However, their misuse by Spanish police forces has resulted in numerous serious injuries. The Catalunya Generalitat has recommended that SIR-X be used at a distance of between 20 and 50 metres, which is not consistent with the range recommended by the manufacturer of more than 30 metres.<sup>75</sup>

According to the information on the use of foam projectiles provided by the Generalitat on its website,<sup>76</sup> the use of this weapon is allowed in circumstances that go beyond the provisions of international standards on the use of kinetic impact projectiles. Thus, the protocol allows the use of these projectiles in cases of "serious public disorder with imminent danger to property" and "dangerous situations for citizen security". Amnesty International notes that these definitions are too broad and do not respect the principle of proportionality: (i) serious public disorder or danger to public safety are not sufficiently precisely defined circumstances; and (ii) the prevention of damage to property is too low a threshold for the use of such a dangerous weapon. In accordance with the principle of proportionality, the use of a weapon with such a high potential for harm can be justified only in order to protect people from acts of violence committed by specific person or persons. Amnesty International also notes that the protocol establishes as one of the objectives to be achieved with the use of this weapon is dispersal in a specified

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utilizacion-de-las-pelotas-de-goma-por-todas/ (Spanish only); Amnesty International, *Spain: The right to protest, under threat*, 24 April 2014 (Index: EUR 41/001/2014), <https://www.amnesty.org/en/documents/eur41/001/2014/en>

<sup>70</sup> Stop Balas de Goma (cited above), p. 65.

<sup>71</sup> This was stated by the government in response to a parliamentary response in February 2018, [https://www.congreso.es/entradap/112p/e7/e\\_0077275\\_n\\_000.pdf](https://www.congreso.es/entradap/112p/e7/e_0077275_n_000.pdf) (Spanish only).

<sup>72</sup> Resolution of the General Directorate of the Police of 21 March 2021.

<sup>73</sup> Office of the United Nations High Commissioner for Human Rights, "United Nations Human Rights Guidance on Less Lethal Weapons in Law Enforcement", [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/LLW_Guidance.pdf)

<sup>74</sup> [https://www.congreso.es/public\\_oficiales/L14/CONG/DS/CO/DSCD-14-CO-653.PDF](https://www.congreso.es/public_oficiales/L14/CONG/DS/CO/DSCD-14-CO-653.PDF)

<sup>75</sup> Amnesty International, *Derecho a la protesta en España: siete años, siete mordazas que restringen y debilitan el derecho a la protesta pacífica en España*, 2022 (Derecho a la protesta en España), [*Right to protest in Spain: seven years, seven gags that restrict and undermine the right to peaceful protest in Spain*] (Index: EUR41700022), <https://doc.es.amnesty.org/ms-opac/image-file/byte?f=/opt/baratz/mediasearch/image-cache/raw/1/00000023/000035052/47075>, p. 46 (Spanish only).

<sup>76</sup> [https://mossos.gencat.cat/ca/els\\_mossos\\_desquadra/Eines-policials/Llancadora/](https://mossos.gencat.cat/ca/els_mossos_desquadra/Eines-policials/Llancadora/)

area where there may be public order disturbances. In this regard, the organization recalls that these weapons should not be used against crowds in order to disperse them.

Amnesty International has documented five cases of serious injuries related to the use of foam kinetic impact bullets: two people lost an eye and two people with severe head trauma (one requiring surgical removal of damaged cranial tissue).<sup>77</sup>

A parliamentary committee on the police model has called on the Catalan government to withdraw the SIR-X projectile and consider replacing all foam projectiles with less harmful options.<sup>78</sup> However, the Ministry of the Interior has told Amnesty International that they do not intend to implement this recommendation in the short term, since they must first identify an alternative weapon that is effective over long distances.<sup>79</sup>

## 5.3 RECOMMENDATIONS

Amnesty International recommends that Spain:

- Refrains from the use of kinetic impact projectiles, such as rubber bullets, which are intrinsically inaccurate and at high risk of causing serious injury and lack the characteristics that would enable them to be used in accordance with international standards.
- In the case of the Autonomous Communities that use foam projectiles, suspend their use pending an evaluation of their use, the protocols governing their use and technical specifications, in order to identify possible shortcomings in their use and, ultimately, whether these police weapons can be used in accordance with international human rights standards.
- Conduct prompt and thorough investigations into cases of excessive use of force and protect those who monitor and report on abuses and violations of rights committed in the context of peaceful assemblies, including members of the press, legal professionals and human rights defenders.
- Develop and publish transparent protocols on the use of force and less lethal weapons, with public participation and consultation with medical experts, including the dissemination of detailed reports on each instance of their use, the amount of ammunition used and immediate medical care for victims.

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<sup>77</sup> See Amnesty International's statement of 14 March 2023, "Decenas de personas muertas y miles de mutiladas por uso indebido de balas de goma por la policía" ["Dozens of people killed and thousands maimed by police misuse of rubber bullets"]: <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/decenas-de-personas-muertas-y-miles-de-mutiladas-por-uso-indebido-de-balas-de-goma-por-la-policia/> (Spanish only).

<sup>78</sup> Official Gazette of the Parliament of Catalonia, p. 98, 20 December 2022: [www.parlament.cat/document/boppc/316366043.pdf](http://www.parlament.cat/document/boppc/316366043.pdf) #page=98, p. 98 (Catalan only).

<sup>79</sup> Meeting of the Ministry of Interior of the Generalitat with representatives of Amnesty International Catalonia and IRIDIA, 9 May 2023.

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# SPAIN

## SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE

77<sup>TH</sup> SESSION, 10 - 28 JULY 2023

Amnesty International has prepared this submission for consideration by the United Nations Committee against Torture on the occasion of the seventh periodic report submitted by Spain on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This document reflects Amnesty International's main concerns regarding Spain's failure to comply with its international human rights obligations under the Convention against Torture. It is not an exhaustive list.