

“HOT RETURNS”¹:

WHEN THE STATE ACTS OUTSIDE THE LAW

LEGAL REPORT²

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¹ Translator’s Note: The term “hot returns” refers to the illegal expulsion of persons on the spot and without carrying out the legally established procedures or meeting the international obligations.

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I. Introduction

1. Images, witnesses and other numerous sources with evidential value accredit the practices that have been coined as “hot returns” in the cities of Ceuta and Melilla and the small islands under Spanish sovereignty.

In this context, the concept of expulsions or “hot returns” by the law enforcement authorities³ is being formed, which consists of handing the foreign citizens who have been intercepted by such authorities in the area under Spanish sovereignty over to the Moroccan authorities on a *de facto* basis without carrying out the legally established procedures or meeting the internationally acknowledged guarantees.

Therefore, the term “hot returns” is applicable whether such practices are carried out affecting the people intercepted when they are climbing over the border fences that separate Ceuta and Melilla from Morocco, have entered those cities by sea or have reached one of the islands under Spanish sovereignty near the Moroccan coast, to mention the cases where such practices have been recorded. “Hot returns” have also been accredited in cases regarding people who were undoubtedly inside the city. This report’s conclusions are also applicable to those expulsions insofar they have been carried out without using any legal channel.

2. Apart from the following legal considerations, we must state right from the start that what is at stake is the effective validity of human rights and respect to our most sacred ethical and cultural heritage. The international legal protection has established that every person is an end in him/herself, worthy of protection and owner of his/her inalienable rights. However, any kind of short-sighted legal pragmatism can make us forget that the treatment of the other, the different one, is the final proof of the values that sustain a civilisation and the regulatory system that it embodies. Specifically, the treatment of foreigners has always been the natural way of validating a culture’s moral and legal stature. From an ethical standpoint, a restrictive reading of rights, the interpretations that are not aimed at their gradual expansion and universality and, obviously, those that breach the regulations that we have established in this respect remove us from civilisation and lead us to barbarism. Human rights as such must form the cornerstone for the gradual moral progress of humanity. However, they will always be “on the sidelines”. That is why they require that citizens, and particularly jurists, should have a critical view of the minimalist re-readings of their substantial content and take a position regarding the actions carried out outside the law, especially when they come from the public power that put real human beings, who have lived awful stories of suffering and injustice, in an extremely vulnerable situation.

3. Returning to the legal issues of this problem, this report is aimed at (I) establishing that “hot returns” breach the immigration legislation (II) and the lack of a legal basis of the Spanish Ministry of the Interior’s attempts to justify the “hot

³ Translators note: Law enforcement authorities are the Civil Guard and the National Police.

returns” based on the concept of an “operational” border (III), the irregular entry through unauthorised border posts (IV) and the agreement between Spain and Morocco regarding the circulation of people, transit and readmission of foreigners who enter illegally (V). Likewise, this report sets out the reasons why a possible reform of the immigration legislation to provide legal coverage to these types of practices would contravene EU regulations and international human rights law, which would expressly discredit them (VI). This report ends with reflections about the criminal implications for those who order, execute or allow “hot returns” (VII) and a section on conclusions (VIII).

II. “Hot returns” breach the immigration legislation

1. “Hot returns” breach Constitutional Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter, LOEx) and Royal Decree 557/2011, of 20 April, which approves its regulation (hereinafter, RLOEx), since this practice does not meet any of the procedures envisaged in those regulations.

2. Spain’s immigration legislation distinguishes three circumstances in this issue: expulsions in the strictest sense (A); refusal of entry (B); and returns (C).

A) Expulsions

Article 57 of the LOEx envisages, within the sanctions system for foreigners⁴, the possibility of expelling foreigners from Spanish territory under certain circumstances. Regarding the purpose of this report, article 53.1.a) of the LOEx establishes that a serious breach is committed by a person who is irregularly on Spanish territory when he/she lacks the authorisation to stay or reside in Spain. Article 57.1 of the LOEx states that, with respect to this breach, “the expulsion from Spanish territory can be applied based on the principle of proportionality, instead of a fine, after the corresponding administrative file is processed and a reasoned resolution is made that assesses the facts that constitute the breach”.

Therefore, a foreigner who is on Spanish territory and lacks the due authorisation for this is committing an administrative breach which, after the corresponding administrative sanction file is processed, can lead to his/her expulsion from Spanish territory.

B) Refusal of entry

Article 26.2 of the LOEx establishes, in relation to the people who try to enter Spain through the authorised border posts, that “the foreigners who do not meet the entry requirements shall be refused entry through a reasoned resolution, with information about the appeals that they can file against this decision, the deadline

⁴ Translator’s note: The sanctions system for foreigners is regulated under Administrative Law

for doing so and the authority where they must formalise it, and of their right to legal assistance, which can be provided free of charge through the legal aid system, and to an interpreter, which shall start at the time that the control is made at the border post”. This legal regime is set out in greater detail in article 15 of the RLOEx.

Therefore, this administrative activity, which is known under several names (returns, prohibition of entry, refusal at the border, etc.), is not a penalty and is carried out when foreigners cannot enter Spanish territory through the authorised border posts on account of not meeting the requirements envisaged in the immigration legislation.

C) Returns

Article 58.3.b) of the LOEx states that “no expulsion file is required for returning the foreigners in the following circumstances: (...) b) those who plan to illegally enter the country”, and article 23.1.b) of the RLOEx states that “foreigners who are intercepted at the border or in its vicinity shall be considered to be included for such purposes”.

On the other hand, article 23.2 of the RLOEx establishes that, in these circumstances, the “law enforcement authorities in charge of guarding the coastline and borders upon the interception of foreigners who plan to illegally enter Spain shall take them to the corresponding police station as soon as possible so that they can be identified and, where applicable, returned”. That administrative decision to return them must be adopted by a resolution from the Government Sub-Delegate or from the Government Delegate in the one-province autonomous regions (article 23.1 of the RLOEx) and requires that the guarantees stated in article 23.3 of the RLOEx be observed: legal assistance and an interpreter if they do not understand or speak the official languages.

Therefore, that administrative activity, which is not a sanction either, is carried out when foreigners who are intercepted at the border or in its vicinity plan to enter Spain through an area that has not been authorised for this.

3. In accordance with the foregoing:

(a) The immigration legislation does not envisage the possibility for the law enforcement authorities to expel foreign citizens under their custody outside Spanish territory on a *de facto* basis.

(b) Foreign citizens who try to enter Spanish territory through unauthorised posts and are intercepted at the border or in its vicinity can be returned, at most, in accordance with the provisions in article 58.3.b) of the LOEx.

(c) Such a devolution is an administrative action which is not a penalty proceeding, and requires a number of requisites such as the fact that (i) these foreign citizens must be taken to a police station (of the national police force), (ii) a lawyer must be appointed for them, (iii) where applicable, an interpreter must be

provided for them, (iv) these citizens must be identified, (v) a resolution for their devolution must be issued by the Government Sub-Delegate or Delegate, where applicable, and (vi) the devolution itself must be carried out by the national police force.

Therefore, the conclusion is that the “hot returns” are being used in the circumstances when at least the devolution procedure should be used, so handing these citizens over to the Moroccan authorities on a *de facto* basis directly breaches the provisions of the immigration legislation.

4. Although the persons responsible for the Ministry of the Interior are aware that the “hot returns” do not have a legal backing, they are trying to justify them with different arguments such as the fact that (i) the foreign citizens have not entered Spanish territory based to this end on a concept of an “operational” border; (ii) it is not necessary to carry out any formalities to expel foreign citizens who try to enter Spanish territory irregularly through unauthorised posts; and (iii) such practices are backed by the agreement between Spain and Morocco regarding the circulation of people, the transit and the readmission of foreigners who have entered irregularly. As we will analyse in the following sections, such arguments do not have any legal grounds.

III. “Hot returns” and the concept of an “operational” border

1. The Ministry of the Interior’s first argument to justify the “hot returns” is based on the idea that this action is a refusal of entry of foreign citizens who have tried to enter Spain through an unauthorised post, and thus have never entered Spanish territory. This idea uses the concept of an “operational” border (A) which, however, cannot be legally applicable (B).

A) The concept of an “operational” border used by the Ministry of the Interior:

The best example of the concept of an “operational” border used by the Ministry of the Interior can be seen in the Report dated 8 February 2014, drafted by the Deputy Operations Division of the Civil Guard and addressed to its Director General, in relation to the events that took place on the Ceuta border on 6 February 2014 and which was submitted by the Ministry of the Interior to the Spanish Parliament on 7 March 2014. According to that report, there would be three types of actions by the Civil Guard in relation to the attempts to access Spanish territory through unauthorised posts from Morocco where a different concept of “operational” border could be applied. They were as follows:

(a) When the migrants try to access Spanish territory directly by sea, “since leaving migrants drifting at sea is impossible as well as illegal, plus the fact that their physical integrity is seriously endangered, the ordinary protocol of the other national, insular or peninsular coastlines is applied in such cases, which consists of,

firstly, rescuing them and, secondly, applying the general immigration regime, as has always been done”. There is nothing to object in this area.

(b) The aforementioned report does not include the cases when the migrants reached the Ceuta beach from Moroccan territory by bordering the breakwater that separates the border between Spain and Morocco. According to the report, “to prevent the danger to the physical integrity of those swimming around the breakwater, the Civil Guard boats do not usually intercept them on the imaginary border on the sea, since this could make them drown; the consolidated practice is for the civil guards to monitor the safety of the swimmers on their boats and intercept them on the adjacent beach waterline with a barrier of agents who form the border for practical purposes”. In other words, as a result of “a free and sovereign decision”, the border is moved backwards to the place where the law enforcement authorities can contain the migrants and refuse their entry, and the border “is materialised and made visible by the line of agents that is established, in each case and under each circumstance, between the breakwater and the waterline that is deemed necessary”.

(c) When entry is attempted by climbing over the fence, “the internal fence materialises the border that the State, in a free and sovereign decision, delimits as its national territory for the sole purpose of the immigration regime”. Based on this, only the migrants who climb over the internal fence “reach Spanish territory and, for such purposes, they are subject to the general immigration regime”. This idea is maintained to justify applying the “hot returns” to the migrants who try to climb over the fence but whom, for example, after climbing the external fence, are trapped in the three-dimensional wire maze between the external and internal fence.

B) The “operational” concept is legally inadmissible:

The idea that a hypothetical border can be created by a line formed by Civil Guard agents on a Spanish beach or by the internal fence in the cities of Ceuta and Melilla in the areas where there are two fences, where foreign citizens enter Spanish territory only if they cross the line of agents or the internal fence, is not legally admissible. This concept of an “operational” border lacks legal grounds (a) and forgets that in their attempt to enter Spanish territory they will be intercepted by the law enforcement authorities in any case and will remain in their custody in Spanish territory (b).

(a) The borders are established by the international rules that are mandatory for all the countries while the border posts are established by the general internal legal rules. Based on those regulations, any Spanish beach, including those of the cities of Ceuta and Melilla, are undoubtedly Spanish territory, just like the seashore of those beaches are areas subject to Spanish sovereignty since they are either internal waters, because they are within the baselines used to delimit the territorial waters, or territorial waters. In the same way, it is well known that the external fence that delimits those cities from Morocco in certain areas and which was erected at first by the Spanish government was built on Spanish territory.

On the other hand, there are no laws that grant legal basis to a border concept that can be determined whimsically on an *ad casu* basis which breaches, among other essential principles, the prohibition of arbitrariness and legal certainty (article 9.3 of the Spanish Constitution). It is not legally acceptable to defend the argument that the government can change at its own free will and “through a free and sovereign decision” the limits of the national territory even if, as the text states, this is done “for the sole purpose of the immigration law”. The argument lacks legal grounds and it cannot be defended in theory, and this legal fiction cannot be sustained based on the contingent and vague “practical effects” stated by the Administration to avoid meeting its legally imposed obligations and restrict the rights acknowledged to foreign citizens in the immigration legislation.

Therefore, under such circumstances, the specific way in which the Ministry of the Interior argues its border concept could have very serious consequences in international law since it has direct effects on the concept of territory under Spanish sovereignty. Apart from this, the legal uncertainty increases since the criterion used for delimiting the border does not explain to what extent the border that delimits the territory under Spanish sovereignty can be moved backwards.

For such purposes, we must remember the Ombudsman’s 2005 Report, which stated as follows: “it is not up to the Spanish Administration to determine where the legislation that governs Spain starts to be applicable. Such territorial application is governed by the international treaties or, where applicable, by the international custom that establishes the limits with the neighbouring states. The laws may also establish the territorial delimitations so that they are in force, but this power corresponds, under Spanish law, to the legislative power, which must be subject to the constitutional rules in any case. In the case at hand, there are no rules in the legal provisions that regulate foreigners’ access to Spanish territory that allow an exception of the full application of the Spanish law to a portion of the national territory. Therefore, the Ombudsman believes that the Administration’s explanation that it can determine where to place the obstacles to be surpassed in order to consider when Spanish territory has been entered cannot be deemed as correct. Entry into Spanish territory is made when the internationally established limits have been crossed and, in this case, the only applicable law is the Spanish one” (page 292).

(b) The acts by public powers are subject to the Spanish Constitution and the other laws of the legal system (article 9.1 of the Constitution) and this is not only the case when the activity of such powers is carried out in the area under Spanish sovereignty but they are also subject to the law simply because such activity is carried out by Spanish civil servants performing their duties (Constitutional Court judgment 21/1997 of 10 February, Legal Basis paragraph 2).

This was also stated by the European Court of Human Rights (hereinafter, ECtHR) regarding the application of the European Convention on Human Rights (hereinafter, ECHR), whereby “whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus

jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual” (European Court of Human Rights judgment of 27 February 2012, *case of Hirsi Jamaa and others vs. Italy*, section 74).

In this way, apart from the considerations about whether the activity carried out by the law enforcement authorities in these situations takes place before or after foreign citizens enter areas under Spanish sovereignty, it is undoubted that they do this as civil servants and while performing their duties. Therefore, they are subject to the duty of strictly complying with the Spanish Constitution and other laws of the legal system, and any migration control procedures must be subject to the immigration legislation. Moreover, apart from the aforementioned legal fiction, the actions coined as “hot returns” are materialised in the handing over of foreign citizens by Spanish civil servants to the authorities of a third country from Spanish territory.

This was also stated in the Ombudsman’s aforementioned 2005 Report: “it must be remembered that the actions carried out by the civil servants of the Spanish law enforcement authorities , inside and outside our territory, and specifically in the neutral areas that separate Ceuta and Melilla from Moroccan territory, are also regulated by Spanish law” (page 292).

2. In accordance with the foregoing:

(a) The concepts of border and territorial area under sovereignty are strictly legal and regulated in the corresponding regulations. Based on those regulations, the beaches of the cities of Ceuta and Melilla and the areas where the external and internal fences that separate them from Morocco are located are Spanish territory, where Spain can fully exercise its sovereignty.

(b) The concepts of an “operational” border, based on the fiction that there is an imaginary line formed by the Civil Guard agents on the Spanish beaches would delimit the area of territorial sovereignty or that Spanish sovereignty starts when the internal protection fence is crossed in the cities of Ceuta and Melilla lacks legal grounds.

(c) Any actions by the Administration inside or outside Spanish territory are carried out by Spanish civil servants when performing their duties subject to the Spanish Constitution and other laws in the legal system. In this sense, even if it is accepted that the foreign citizens were intercepted outside Spanish territory, the “hot returns” are not excluded from the immigration legislation since the foreign citizens are handed over by Spanish authorities from Spanish territory to the authorities of a third country.

Therefore, the conclusion is that the concept of an “operational” border used by the Ministry of the Interior is not legally admissible to sustain the lawfulness of the “hot returns”.

IV. “Hot returns” and irregular access through an unauthorised border post

1. The Ministry of the Interior’s second argument to justify the “hot returns” is based on the idea that it can expel, on a *de facto* basis and without the need to use any procedures, any person who is anywhere in Spanish territory, provided that they have entered irregularly, since only those who have entered through authorised border posts are in national territory.

This theory abounds in the controversial creation of legal limbos and it is not only not included in the immigration legislation but it has been expressly banned by the Spanish Supreme Court, which sustains that, in these cases, rather than devolution proceedings, sanction proceedings must be initiated which, where applicable, will lead to an expulsion sanction.

2. In the small hours of 20 June 2000, the Civil Guard agents intercepted a van in Mijas (Malaga) with 37 Moroccan citizens, suspected of having disembarked shortly before, somewhere along the Spanish coastline between Tarifa and Malaga and who were heading to settle in the Murcia region. Devolution proceedings were applied to them so that they could return to their country of origin, rather than administrative sanction proceedings, which would have enabled their expulsion. In its Consultation 1/2001 of 9 May, the Public Prosecutor stated that this decision was in line with the law in force since “the fact that the migrants were caught with unequivocal signs that they had immediately beforehand committed an administrative breach, consisting of the illegal entry into Spanish territory, justifies considering that this conduct is that included among those (...) which allow the return of those who have been arrested when they are trying to enter Spain.”

By virtue of this doctrine from the Public Prosecutor, the Spanish government included in article 138 of Royal Decree 864/2001, of 20 July, which approved the Regulations for Executing the Immigration Law, when defining the circumstances for devolutions, that these proceedings would be applicable “(...) to foreigners who are intercepted at the border, in its vicinity or inside Spanish territory, in transit or en route, if they did not meet the entry requirements”.

3. As a result of the appeal filed against the unlawfulness of certain provisions of that Regulation, the judgment from the Supreme Court’s Administrative Division of 20 March 2003, issued in appeal no. 488/2001, declared that the provision was null and void. It stated that, considering that article 58.3.b) of the LOEx reserves the devolution proceedings only to those who plan to enter Spain illegally, extending this regulation and applying these proceedings to those who are already inside Spanish territory in transit or en route, without meeting the entry requirements, is beyond the legal framework of the LOEx and is null and void. The argument was that “on the other hand, it is evident that those who are inside Spanish territory, even if they are en route or in transit, do not plan to enter since this is incompatible with “being inside”, i.e. inside Spanish territory”. Therefore, this is an “extended interpretation that goes beyond the legal mandate by extending it

to a case that is not envisaged in it. Therefore, it is an interpretation that contravenes the law which applies an exceptional regime that does not have the guarantees of the expulsion proceedings in cases other than those legally established” (Legal Basis paragraph 18).

This case law was ratified subsequently by a judgment from the Supreme Court’s Administrative Division on 8 January 2007, issued in appeal no. 38/2005 (Legal Basis paragraph 12). By virtue of this, as stated above, the wording of article 23.1.b) of the RLOEx, which is currently in force, omitted any references to the current controversial cases of intercepting foreign citizens who are already inside Spanish territory, in transit or en route, and do not meet the entry requirements.

4. In accordance with the foregoing:

(a) The presence of foreign citizens inside Spanish territory who have entered irregularly through an unauthorised post was defended at the start in the Public Prosecutor’s Circular 1/2001 of 9 May and enshrined in article 138 of Royal Decree 864/2001 of 20 July as one of the cases when the devolution proceedings, and not the expulsion ones, were applicable.

(b) That theory was declared null and void and was fully banned by a judgment from the Supreme Court’s Administrative Division on 20 March 2003, issued in appeal no. 488/2001, which stated that, in this type of case, the proceedings legally established for enabling, where applicable, foreign citizens to return to their countries of origin or provenance were the administrative sanction proceedings for an irregular stay in the country.

Therefore, the conclusion is that the interception in Spanish territory of people who have entered Spain irregularly through an unauthorised post does not justify applying the so-called “hot returns”. Conversely, in accordance with the Supreme Court case law on this issue, the expulsion proceedings are applicable in these cases, with their inherent guarantees.

V. “Hot returns” and the Spain-Morocco readmission agreement

1. The Ministry of the Interior’s third argument to justify the “hot returns” is based on the Agreement between the Kingdom of Spain and the Kingdom of Morocco regarding the circulation of people, the transit and the readmission of foreigners who enter illegally, signed in Madrid on 13 February 1992. The provisional application of this Agreement was published in the BOE (Official State Gazette) no. 100 of 25 April 1992 and its final entry into force was on 21 October 2012, in accordance with the statement included in the BOE no. 299 of 13 December 2012.

However, that Agreement does not provide sufficient legal grounds for the so-called “hot returns” to the detriment of applying the proceedings established in

the immigration legislation. Also, its provisions do not justify handing over foreign citizens to the Moroccan authorities on a *de facto* basis.

2. The Spain-Morocco readmission agreement and the immigration legislation do not coincide in their regulatory purpose. They are applied successively but they do not regulate the same administrative activity that is to be carried out by the Spanish authorities in any case. The immigration legislation establishes the proceedings by virtue of which a foreign citizen can be subject of a coercive exit from Spanish territory. On the other hand, the readmission agreement regulates the way in which this coercive exit must be made when the destination is Morocco. Only when the Spanish administrative authorities have made the decision to return a foreign citizen after applying the immigration legislation can the readmission agreements, whether they are bilateral ones signed by Spain or multilateral ones signed by the European Union, be used to materially hand the citizen over to the authorities of a third country.

In this context, it is obvious that, because of the different subject under regulation, the Spain-Morocco readmission agreement cannot be the legal grounds for providing an exception to the administrative authorities regarding the proceedings established in the immigration legislation with respect to the decision to hand over foreign citizens who have entered Spanish territory irregularly and been intercepted by the law enforcement authorities.

3. On the other hand, the Spain-Morocco readmission agreement does not justify the so-called “hot returns” in the way that they are being carried out by the Ministry of the Interior. That agreement establishes a number of obligations that Spain is not complying with. For example, article 1 requires a formal request from the border authorities of the requesting State, which must include “all the available identity details, the personal documentation that the foreigner may have and how they illegally entered the territory of the requesting State, as well as any other information about him or her that may be available” (paragraph two of article 2). Likewise, it is stated that “when the readmission is accepted, this is documented in a certificate or any other document issued by the border authorities of the requested State, stating the identity and, where applicable, the documents the foreigner may have in his/her possession” (paragraph three of article 2).

In that sense, even leaving aside the obligations arising from the immigration legislation, the Agreement itself establishes other reciprocal obligations on how to carry out the handing over which, (just as the identification and individualisation of the persons handed over, or the written documentation of the handing over), exclude any type of administrative actions on a *de facto* basis.

4. In accordance with the foregoing:

(a) The Spain-Morocco readmission agreement and the immigration legislation have a different regulatory scope which affects different actions of the Spanish Administration. The immigration legislation establishes the procedures for adopting the decisions whereby foreign citizens must exit Spanish territory. The

readmission agreement regulates the way in which such exit decisions are executed when Morocco is the destination.

(b) The Spain-Morocco readmission agreement establishes a detailed procedure on how to hand over the foreign citizens and this implies reciprocal obligations for the authorities of the signatory countries, such as identifying the foreign citizens to be handed over and the written document of the handing over itself.

Therefore, the conclusion is that the Spain-Morocco readmission agreement does not justify applying the so-called “hot returns” since it cannot make an exception, based on the issues it regulates, to applying the procedures established in the immigration legislation. Conversely, that Agreement establishes new obligations on how to hand over the foreign citizens, which are also not being complied with.

VI. The impossibility of providing legal basis to “hot returns”: breach of the European regulations and international law.

1. The so-called “hot returns” are not only incompatible with Spanish law but they also contravene EU regulations and international human rights law. Therefore, the Ministry of the Interior’s plan as stated in several occasions to provide legal basis to them is unfeasible.

2. Human rights are the conquest of dignity against barbarism and a milestone that requires continuous advances in raising its awareness, in including them in positive law and, above all, in ensuring that the achievements in this area are respected by developing mechanisms to ensure that they are effective and that their offenders are legally persecuted and punished. The Spanish State has ratified a multitude of international agreements which make it impossible for it to legitimise practices that manifestly breach peoples’ fundamental rights. The Spanish Constitution itself includes the requirement of an interpretation of the fundamental rights in accordance with the Universal Declaration of Human Rights and the other international agreements that develop and implement them (article 10.2 of the Spanish Constitution).

In that sense, the immigration legislation requirements regarding the need to give an opportunity to the foreign citizens intercepted by the Spanish authorities so that they can state their circumstances arise from the compliance with the international obligations on human rights. These people can be minors, victims of trafficking for sexual exploitation or other purposes, or girls who flee from forced marriages or female genital mutilation. Likewise, they can also be refugees, or they can be people fleeing from war or persecution. The protection needs of vulnerable people and groups such as the aforementioned is what has led to the development and signature of international agreements that recognise and develop guarantees that can defend their indemnity. That is why the immigration legislation of the most developed countries, including Spain, envisages that not all irregular entries into

their territories will have the consequence of return precisely as a response to the circumstances that require greater protection standards (articles 31 of the LOEx and 23.6 of the RLOEx).

3. This report is not aimed at analysing the EU and international regulations that are being breached with these “hot returns”. However, it is necessary to refer to at least the right to asylum and international protection which, as is well known, is the protection that must be given to the refugees who flee from persecution or who escape from situations of indiscriminate violence.

For such purposes, Law 12/2009, of 30 October, which regulates the right to asylum and subsidiary protection, states that asylum is the protection that is given to refugees and that this status is given to “any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions, membership to a particular social group, gender or sexual orientation, is outside the country of nationality and cannot or, because of such fears, does not want to avail him/herself of the protection from that country” (article 3). Together with asylum, the law includes the right to subsidiary protection which, according to article 4, is granted to persons who do not have refugee status but for whom there are founded reasons that, if they return to their country of nationality, or of their last residence in the case of stateless persons, their life and integrity will seriously be endangered under the terms envisaged in article 10 of that Law. An example of subsidiary protection is referred to persons who do not suffer a specific and individual persecution in their country (the requirement for asylum), but who cannot return to their country without their lives being seriously endangered because, for example, there is a war or indiscriminate violence.

Insofar as “hot returns” prevent any allegations or individual treatments of the foreign citizens who are intercepted, they make it impossible to exercise the right to asylum. Therefore, they not only breach Law 12/2009, which regulates this, but also article 13 of the Spanish Constitution, which acknowledges this right, as well as the international commitments signed by Spain, as the signatory of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees and its Protocol of 31 January 1967, and the EU regulations, which also guarantee the full exercise of this right in article 18 of the Charter of Fundamental Rights of the European Union (hereinafter, the Charter).

Therefore, any future reform of the immigration legislation to provide legal protection to the “hot returns”, insofar as this makes it impossible to exercise the right to asylum, would find the unbeatable obstacle of its unconstitutionality and would contradict international and EU law.

4. Likewise, since the “hot returns” do not individualise, identify or document the foreign citizens handed over to the Moroccan authorities, they would also be included under the prohibited collective expulsions.

Article 19.1 of the Charter prohibits collective expulsions. This prohibition not only bans the current Spanish practice of “hot returns” but it also prevents any

intention to provide a legal basis to this type of action in a reform of the immigration legislation, since its determining feature is not that it falls on a more or less numerous group of people (a merely quantitative criterion) but that it does not guarantee the possibility of making allegations or recording who the expelled person is or if the person needs any special protection (a qualitative criterion).

Likewise, article 19.2 of the Charter states the “principle of *non-refoulement*”. In accordance with this provision, “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. This right does not seem to be able to be included in the general exceptions of article 52.1 of the Charter, i.e. no collective expulsions can be carried out for reasons of general interest or for the need to protect the rights and freedoms of others. In relation to this provision, the content of the reports from international organisations and bodies, which doubt Morocco’s respect for the human rights of migrants, especially from Sub-Saharan Africa, must also be taken into consideration when prohibiting the group expulsions to Morocco and making sure that the returns that are made subject to the immigration legislation are carried out after an individual and reasoned analysis of each file to guarantee the “principle of *non-refoulement*”. Morocco’s guarantees about the appropriate treatment and the requirement of the bilateral agreement with Morocco whereby it undertakes to ensure that the migrants reach their destination require, from the viewpoint of the minimum standards for protecting the effectiveness of human rights, detailed monitoring that has yet to be applied.

5. On the other hand, although the ECHR does not expressly refer to the right to asylum, the ECtHR’s interpretation of its article 3, which establishes the prohibition of torture and of inhuman or degrading treatment or punishment, includes the prohibition to expel foreigners to a country where there are sufficient reasons to consider that the expelled person may be subjected to torture or inhuman or degrading treatment. Therefore, the case law includes the principle of “*non-refoulement*” and, although it has been applied to different cases of expulsion or deportation of asylum seekers (European Court of Human Rights judgments of 11 January 2007, *case of Salah Sheekh vs. The Netherlands*; of 23 February 2012, *case of Hirsi Jamaa and others vs. Italy*; and of 19 December 2013, *case of N.K. vs. France*), it is applicable to any case of expulsion since States have the obligation to ensure the treatment that the migrants will receive when they return to their countries of origin or provenance (European Court of Human Rights judgments of 5 May 2009, *case of Selle vs. Italy*; and of 3 December 2009, *case of Daoudi vs. France*).

Within the framework of the Convention, collective expulsions are also prohibited, expressly in article 4 of Protocol 4, which purpose, as established by the ECtHR, is to make sure that no foreigners are expelled without their situation being examined on an individual basis and after having the opportunity to plead their arguments (European Court of Human Rights judgments of 5 February 2002, *case of Conka vs. Belgium*; and of 23 February 2012, *case of Hirsi Jamaa and others vs. Italy*).

Likewise, the procedural guarantee of the right to an effective remedy would be breached (article 13 of the ECHR), also used by the ECtHR to guarantee this right, together with article 3 of the ECHR, in the expulsion processes (European Court of Human Rights judgments of 21 January 2011, *case of M.S.S. vs. Belgium and Greece*; and of 22 April 2014, *case of A.C. and others vs. Spain*). The *de facto* expulsions make it impossible to access the immigration proceedings and, therefore, those expelled do not have the possibility of challenging the unlawfulness of their expulsion and the violation of their rights.

6. In conclusion, there is no possibility to undergo any legislative amendment to provide legal basis to the “hot returns”, as they are being carried out at present, since they violate the European Union legislation and the international law on human rights, especially regarding the right to asylum and international legal protection, the prohibition of collective expulsions and the principle of *non-refoulement*.

VII. “Hot returns” and criminal law

1. The unlawfulness of the so-called “hot returns” is conclusive based on the foregoing. Hence it must be analysed whether forcing a foreign citizen to exit Spanish territory without due regard to that established in laws is a conduct with criminal relevance. Therefore, we must conclude this report by stating in a non-exhaustive manner some of the criminal figures under which “hot returns” could be included.

2. Previously we must focus on the fact that due obedience cannot operate as a valid cause for justification of the criminal liability that this conduct could entail. The agents who execute or, in some way with their actions or omissions, favour “hot returns” or make them possible are not protected by due obedience. Article 5.1.d) of Constitutional Law 2/1986, of 13 March, on the Law Enforcement Authorities, establishes that “in any case, due obedience cannot support orders that entail executing acts which manifestly constitute a felony or contravene the Constitution or the laws”. The exemption of acting to comply with a duty or in the legitimate exercise of a right, function or position (article 20.7 of the Criminal Code) cannot be used either since this would be applicable if such a duty came from the law itself or conformed to its provisions.

3. The “hot returns” could fall within, firstly, article 172 of the Criminal Code, which punishes as the perpetrator of the coercion whoever, without being lawfully authorised, forces another to do something he does not want to do, where he can be punished with a sentence of imprisonment of one year and nine months to three years or with a fine of sixteen to twenty-four months. The punishment will be aggravated if the coercion is aimed at preventing the exercise of a fundamental right.

For criminal law purposes, the aggravating circumstance envisaged in article 22.7 of the Criminal Code would also be applicable. This occurs when the perpetrator of a felony avails himself of his public status; this would happen in this case since the members of the law enforcement authorities are the ones who execute such conduct protected by the authority that they represent.

4. Articles 537 and subsequent of the Criminal Code envisage several criminal acts under the heading of “felonies committed by civil servants against other rights”. Article 537 of the Criminal Code establishes the penalty of a fine and special barring for the “authority or public officer who prevents or hinders a detainee or prisoner in the exercise of his right to legal counsel, who attempts or favours his renunciation to such counsel, or does not immediately inform him of his rights and of the reasons for his arrest in an understandable way”. When members of the law enforcement authorities return a migrant to Moroccan territory on a *de facto* basis, they are preventing him from exercising the rights that he could exercise if the procedures that are legally envisaged were carried out. The goal of article 537 of the Criminal Code is to protect the rights of detainees and prisoners and, clearly, the term detainee can be applied to those who are deprived of their freedom within the devolution and expulsion proceedings and enjoy the rights to legal counsel and an interpreter (article 22.2 of the LOEX) or the right to file a habeas corpus petition (article 17.4 of the Spanish Constitution), without forgetting article 17.3 of the Spanish Constitution, whereby “every person arrested must be informed immediately, and in a way understandable to him or her, of his or her rights and of the grounds for his or her arrest, and may not be compelled to declare”. Therefore, the conduct analysed by this report could fall within article 537 of the Criminal Code for the purposes of potential criminal liability.

Nevertheless, if article 537 of the Criminal Code cannot be applied, article 542 of that Code would be taken into consideration. This provision punishes the conduct that does not fall within the criminal types that precede it, with special barring from public employment and office for a term of one to four years to an authority or civil servant who knowingly prevents a person from exercising other civil rights recognised by the Spanish Constitution and the laws.

5. Article 404 of the Criminal Code regulates the perversion of the course of justice by civil servants in the following way: “The authority or public officer who, being aware of the injustice thereof, were to hand down an arbitrary resolution in an administrative matter, shall be penalised with the punishment of special barring from public employment and office for a term of seven to ten years”.

The requirement of a resolution does not prevent this felony from being assessed for this type of conduct since not only the written or formalised administrative acts or decisions are worthy of this consideration, but the tacit or *de facto* ones also require this. Therefore, the “hot returns” are administrative resolutions that fully dispense with the proceedings, thus incurring in the most serious defect: *void ab initio*, which would also support the unfair and arbitrary nature of that decision. If the “hot return” decision is made by a member or

command of the law enforcement authorities, the perversion of the course of justice would also be supported by the lack of competence to adopt decisions regarding the expulsion or return of foreign citizens since their only task in this area is to enforce orders, in the case of the National Police Force, while the Civil Guard only has the competence to guard the borders but not to execute the devolution and expulsion resolutions.

6. Regarding the possible criminal liability incurred as a result of the “hot returns”, we must remember the general principles of criminal law, where not only those directly executing the typical conduct are criminally liable, but also those who order or make them possible, in addition to the responsible parties or the superiors who, knowing of such practices, do not take any measures to stop this. From the latter’s standpoint, which corresponds to a conduct of criminal relevance in terms of omission, the specific criminal importance of not reacting to the “hot returns” will depend on the position held by the omitting person.

For such purposes, any person who witnesses a public felony (article 259 of the Criminal Procedure Law) or knows of it through other means (article 264) has the duty to report this and, if they know about a felony “because of their position, profession or trade” (article 262), such as the case of the Police or the Civil Guard itself, they are especially obliged to report this. Reporting the felony is a mere act of notifying the event, which does not require any formalities and which can be made at any judicial, prosecution or police authority. Failing to comply with this obligation is punished administratively with fines which, in the case of article 262 of the Criminal Procedure Law, are imposed as a disciplinary measure.

Nevertheless, the omission or inaction regarding the “hot returns” can also constitute a felony. Article 450 of the Criminal Code punishes whoever is able to and does not prevent a felony from being committed that affects the life, integrity, health, freedom or sexual freedom of a person. Article 408 of the Criminal Code punishes the authority or public officer who, failing in the obligations of his office, intentionally ceases to foster the persecution of the felonies that he or his officers have obtained knowledge of. There is even the possibility of establishing the liability for commission of the felonies when the omitting person has the legal or contractual obligation to act or has created a risk for the right protected by law (article 11 Criminal Code).

7. In view of the criminal liability that may be incurred in this type of conduct, the defence can plead that the perpetrators do not know about the unlawfulness of such practices, so the wilful misconduct required for some felonies would not exist, or that the subject has made an error in the prohibition. Such pleadings can be refuted by stating that the unlawfulness of the “hot returns” is proved on the basis of some evidence or circumstances, such as the type of practices carried out, because the unlawfulness of some of them is so obvious that any pleadings stating that they believed to be acting in accordance with the law would lack all credibility. Moreover, it is assumed that the authorities and agents in this area have knowledge of the basic immigration rules, and furthermore, it is a requirement for those

entrusted to make the decision and execute the devolutions and expulsions of foreign citizens to do this.

VIII. Conclusions

1. “Hot returns” is the term coined popularly to the action carried out by the law enforcement authorities and consists of handing the foreign citizens who have been intercepted by those authorities in the area under Spanish sovereignty over to the Moroccan authorities on a *de facto* basis without carrying out the legally established procedures or meeting the internationally acknowledged guarantees.

2. The “hot returns” breach the immigration legislation since (i) the immigration legislation does not envisage the possibility of the law enforcement authorities to expel foreign citizens under their custody on a *de facto* basis; (ii) the foreign citizens who try to enter Spanish territory through unauthorised posts and are intercepted at the border or in its vicinity can, at most, be returned in accordance with article 58.3.b) of the LOEx; and (iii) this return (devolution) is a regulated administrative act which needs a number of requirements to be met, such as the transfer of the foreign citizens to a police station (of the national police force), their identification, the appointment of a lawyer and, where applicable, an interpreter, a resolution for their devolution agreed by the Government Sub-Delegate or Delegate, where applicable, and the devolution itself must be carried out by the national police force.

3. The concept of an “operational” border used by the Spanish Ministry of the Interior, which considers this as the imaginary line formed by the Civil Guard agents on the Spanish beaches or that Spanish sovereignty starts when the internal protection fence is crossed in the cities of Ceuta and Melilla, lacks legal grounds and is legally inadmissible to sustain the lawfulness of the so-called “hot returns” since (i) the concepts of border and territorial area under sovereignty are strictly legal and are regulated in the corresponding regulations, and the fiction of this “operational” border concept lacks legal basis; and (ii) any actions by the Administration inside or outside Spanish territory is carried out by Spanish civil servants in the exercise of their duties which is subject to the Spanish Constitution and other Spanish laws. In this sense, even if it is sustained that the foreign citizens are intercepted outside Spanish territory, the “hot returns” are not excluded from the immigration legislation since the foreign citizens are handed over by Spanish authorities from Spanish territory to the authorities of a third country.

4. The interception in Spanish territory of people who have entered Spain irregularly through an unauthorised post does not justify applying the so-called “hot returns”. Conversely, in accordance with the Supreme Court case law on this issue, the expulsion proceedings are applicable in these cases, with their inherent guarantees

5. The Spain-Morocco readmission agreement does not justify applying the so-called “hot returns” since it cannot make an exception, based on the issues it regulates, to applying the procedures established in the immigration legislation. Conversely, that Agreement establishes new obligations on how to hand over the foreign citizens, which are also not being complied with.

6. There is no possibility to carry out a legislative amendment to provide legal basis to the “hot returns”, as they are being carried out at present, since they violate the Spanish Constitution, the European Union regulations and the international law on human rights, especially regarding the right to asylum and international legal protection, the prohibition of collective expulsions and the principle of *non-refoulement*.

7. The active and passive decisions, executions and collaborations with the “hot returns” leads to criminal liability and disciplinary measures. This conduct can fall within several criminal liabilities, such as coercion (article 172 of the Criminal Code), the felonies by public officers by depriving legal counsel (article 537), depriving the exercise of other civil rights recognised in the Spanish Constitution and laws (article 540), and perversion of the course of justice (article 404). On the other hand, the excluding liability circumstances referring to due obedience, the legitimate exercise of the position or ignorance of the act’s unlawfulness cannot be applicable. Moreover, all citizens are obliged to report any felonies that they witness or which they have knowledge of (articles 259, 262 and 264 of the Criminal Procedure Law) and may even commit a felony in accordance with article 450 of the Criminal Code if, while being able to prevent such practices, they do not do this; whereas the authority or public officer who, failing in the obligations of his office, does not foster the persecution of the felonies, commits a felony in accordance with article 408 of the Criminal Code.

8. It is not possible to use any short cut that result in open contradiction to the Spanish, European and international regulations, which is what the Ministry of the Interior seems to be doing, on the pretext that this provides greater efficacy and efficiency to a migration policy that focuses mainly on controlling human flows, fostered mostly by a flagrant need. This violates the higher values of the Spanish Constitution and the most elementary ethical principles on which our culture is built. The rule of law requires that protecting human rights is the legitimate way in which institutions meet human needs. Violating such rights endangers not only the victims of this outrage but also compromises the moral dignity of our democracies and, especially, of those who, many times against their conscience, are forced to comply with manifestly unlawful orders which could lead to personal liabilities. As Nelson Mandela used to say, everything that includes the principle of negative discrimination in both politics and law ends up demeaning those who suffer it, and especially those who foster it or at least tolerate it.