



International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention*

1. The Committee on Enforced Disappearances considered the report submitted by Spain under article 29, paragraph 1, of the Convention (CED/C/ESP/1) at its 62nd and 63rd meetings (CED/C/SR.62 and 63), held on 5 and 6 November 2013. At its 74th meeting, held on 13 November 2013, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the report submitted by Spain under article 29, paragraph 1, of the Convention, drafted in accordance with the reporting guidelines, and the information contained in the report. In addition, the Committee appreciates the constructive dialogue with the delegation from the State party on the measures taken to implement the provisions of the Convention, which dispelled many of its concerns. The Committee also thanks the State party for its written replies (CED/C/ESP/Q/1/Add.1) to the list of issues (CED/C/ESP/Q/1), as supplemented by statements by the delegation, and the additional information submitted in written form.

B. Positive aspects

3. The Committee commends the State party for having ratified almost all of the United Nations core human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

4. The Committee also welcomes the fact that the State party has recognized the competence of the Committee, under articles 31 and 32 of the Convention, in respect of individual and inter-State communications.

5. The Committee also commends the State party on the measures adopted in areas related to the Convention, including the adoption of Instruction No. 12/2009 by the State Secretariat for Security regulating the Register of Detainees, and Instruction No. 12/2007 on the behaviour required of members of the security forces and units to guarantee the rights of detainees and persons in police custody.

* Adopted by the Committee at its fifth session (4–15 November 2013).



6. The Committee is pleased to note that under the universal periodic review Spain is promoting the signature and/or ratification of the Convention.

7. The Committee notes with satisfaction that the State party has extended a standing invitation to all Human Rights Council special procedures mandate holders to visit the country. In that connection, the Committee welcomes the recent visit to Spain of the Working Group on Enforced or Involuntary Disappearances, whose preliminary observations it has noted with interest, and encourages the State party to continue cooperating with that mechanism under its mandate.

C. Principal subjects of concern and recommendations

8. The Committee considers that, at the time of writing, the legislation in force in the State party to prevent and punish enforced disappearances, and certain related decisions, were not in full compliance with the obligations incumbent on the States that have ratified the Convention. The Committee urges the State party to take account of its recommendations, which have been made in a constructive and helpful spirit, with the aim of strengthening existing legislation, and to guarantee that it, and any action taken by the State authorities, is fully consistent with the rights and obligations contained in the Convention. In this connection, the Committee encourages the State party to take advantage of the opportunity provided by the discussions under way on reforms to the Criminal Code and the Criminal Procedure Act, and on the draft organic law on the legal status of victims of crime, to implement the relevant recommendations contained in these concluding observations.

Definition and criminalization of enforced disappearance (arts. 1–7)

9. The Committee takes note of the State party's position that criminal acts which correspond to the definition of enforced disappearance used in the Convention are classified in the Criminal Code as "unlawful detention/abduction with disappearance" (Criminal Code, arts. 163–168 and 530). After analysing these articles, the Committee considered that they were not sufficient to adequately encompass all the constituent elements of enforced disappearance, as defined in article 2 of the Convention and thus comply with the obligation arising from article 4. As a rule, the Committee considers that reference to a range of existing offences is not necessarily enough to meet this obligation. In this context, the Committee's view is that a definition of enforced disappearance as a separate offence that was in accordance with the definition in article 2 and distinguished it from other offences, would enable the State party to comply with the obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those in articles 6 and 7. In the Committee's view, such a definition also makes it possible to correctly encompass the many legal rights affected by enforced disappearances (arts. 2, 4, 6 and 7).

10. The Committee recommends that the State party should adopt the necessary legislative measures to make enforced disappearance a separate offence in line with the definition in article 2 of the Convention and that the offence should be punishable by appropriate penalties that take into account its extreme seriousness.

Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8–15)

11. The Committee notes with satisfaction that, under the criminal law in force in the State party, crimes against humanity are not subject to the statute of limitations. It also welcomes the information that, in accordance with article 132 of the Criminal Code, the term of limitation for continuing offences — the equivalent under Spanish law to offences of a continuous nature in the Convention — would start when "the offence being

considered comes to an end”. However, it notes with concern the information received about the Supreme Court’s opinion regarding the investigation of alleged cases of enforced disappearance (judgement 101/2012) where, among other considerations such as the existence of an amnesty law and the death of the alleged perpetrators, it held that “the argument regarding the continuing nature of the offence is nonetheless a fiction that defies legal logic. It is not reasonable to argue that a person unlawfully detained in 1936, whose remains have not been found in 2006, can be rationally thought to have continued in detention beyond the 20 year term of limitation, to take the maximum” (arts. 8, 12 and 24).

12. **The Committee, taking into consideration the statute of limitation applicable in Spain for continuing offences, urges the State party to ensure that the term of limitation actually commences at the moment when the enforced disappearance ends, i.e., when the person is found alive, his or her remains are found or their identity restored. It also urges the State party to ensure that all disappearances are investigated thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint; the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law, notably the interpretation given to the Amnesty Act; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions; and victims receive adequate reparation that includes the means for their rehabilitation and takes account of gender issues.**

13. The Committee notes the reform introduced by Organic Act No. 1/2009, which established restrictions for the exercise of universal jurisdiction by the courts (art. 9).

14. **The Committee urges the State party to ensure that the courts’ exercise of jurisdiction over offences of enforced disappearance is guaranteed, in accordance with the obligations arising from article 9 of the Convention and, in particular, the principle of *aut dedere aut judicare* set out in that article.**

15. The Committee notes with concern that the military courts are apparently competent to investigate, hear and try offences of enforced disappearance committed in a military context. The Committee considers that, as a matter of principle, military courts do not provide the independence and impartiality required by the Convention to deal with human rights violations such as enforced disappearances (art. 11).

16. **The Committee recommends that the State party should take the necessary legislative or other measures to ensure that all cases of enforced disappearances remain expressly outside military jurisdiction and can only be investigated by ordinary courts.**

17. The Committee notes with satisfaction the information provided by the delegation that officials suspected of having committed an offence may be temporarily suspended by administrative or judicial proceedings and that, if deemed appropriate, judges and prosecutors may order the exclusion from an investigation of an individual member of a security force or an entire security force (art. 12).

18. **The Committee encourages the State party to ensure that, in accordance with article 12, paragraph 4, of the Convention, persons suspected of having committed an offence of enforced disappearance are not in a position to influence investigations by directly or indirectly obstructing them, either themselves or through others. For this reason, it recommends that the State party should adopt an explicit legal provision establishing a mechanism to ensure that security forces whose members are suspected of having committed an enforced disappearance do not participate in the investigation.**

19. The Committee notes with satisfaction that Spanish legislation stipulates that “Spanish courts shall provide to foreign judicial authorities such cooperation as they may request in the conduct of their functions, in accordance with international treaties and agreements to which Spain is a party” and that there is no particular restriction on judicial assistance in cases of enforced disappearance (arts. 14 and 15).

20. **The Committee recommends that the State party should ensure that it provides the necessary judicial assistance, including providing all evidence at its disposal, to the authorities of other States parties that may request it in connection with investigations into possible cases of enforced disappearance. The Committee also encourages the State party to ensure that its authorities afford the greatest measure of assistance possible when they receive requests under article 15 of the Convention.**

Measures to prevent enforced disappearances (arts. 16–23)

21. The Committee notes with satisfaction the information provided by the State party about the safeguards that exist in the legal system to ensure non-refoulement in cases where there is a danger of the person’s fundamental rights being violated, though it notes that no specific reference is made to enforced disappearance. At the same time, while it welcomes the delegation’s assertion that cases are considered individually before persons are handed over or returned and that they are not handed over or returned if there is found to be a threat to the requested person, the Committee notes with concern the reports that in some cases migrants have allegedly been expelled without going through the relevant legal mechanisms, thereby preventing a substantive evaluation of whether the persons might be in danger of being subjected to enforced disappearance (art. 16).

22. **The Committee invites the State party to consider explicitly incorporating into its domestic legislation a prohibition on carrying out an expulsion, refoulement, rendition or extradition when there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance. It also urges it to ensure that the competent authorities strictly comply with the applicable procedures for extradition, refoulement or expulsion and ensure, in particular, that an individual examination is carried out in each case to determine whether there are substantial grounds for believing that the person might be in danger of being subjected to enforced disappearance.**

23. The Committee notes with concern the regime of incommunicado detention provided for by the Spanish legal system, which may last for 13 days in cases involving terrorism or armed gangs, and during which accused persons do not have the right, *inter alia*, to appoint a lawyer of their own choosing, to speak in private with their assigned counsel or to inform a person of their own choosing — which, in the case of aliens, includes the consular authorities — of their detention or of their place of detention. In this connection, while taking note of the delegation’s assertion that incommunicado detention is frequently a necessary measure in the effort to combat organized crime and terrorism, the Committee considers that the regime of incommunicado detention in force does not conform to the obligations arising from the Convention, and in particular from article 17. The Committee also takes note of the information provided about the changes planned as part of the comprehensive reform of the Criminal Procedure Act (art. 17).

24. **The Committee recommends that the State party should adopt the necessary legislative and other measures to ensure that all persons, regardless of the offence with which they are charged, enjoy all the safeguards provided for in the Convention, in particular in article 17, and in other relevant human rights instruments. It also urges it to ensure that the text that emerges from the reform of the Criminal Procedure Act does not include any restrictions on the rights of detained persons, even under a**

discretionary regime, that might violate the provisions of article 17, paragraph 2, of the Convention.

25. The Committee notes with satisfaction both the inclusion in the Constitution of the procedure of habeas corpus, and Organic Act No. 6/1984 which regulates it. However, it is concerned that, under domestic law, it is possible to suspend the right of habeas corpus when a state of emergency or siege has been declared (art. 17).

26. The Committee recommends that the State party should adopt the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure.

27. The Committee notes with interest that Organic Act No. 1/2009 designates the Office of the Ombudsman as the national mechanism for the prevention of torture (national preventive mechanism) and sets forth the relevant regulatory provisions. It also takes note of the information provided by the State party that its current budget makes it possible for the Office of the Ombudsman properly to perform its role as the national preventive mechanism, together with the additional information submitted in that connection after the dialogue. Nevertheless, it is concerned that the current allocation of staff specifically assigned to the task may not be sufficient to enable it effectively to fulfil its mandate as the national preventive mechanism (art. 17).

28. The Committee recommends that the State party should ensure that the Office of the Ombudsman has sufficient financial, human and technical resources effectively to perform its role as the mechanism for the prevention of torture.

Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)

29. The Committee takes note of the information provided by the State party about the reparatory measures provided for in current legislation. However, it is concerned that, in the absence of a definition of victim that conforms to that of the Convention, such measures may not benefit all those natural persons who have suffered harm as the direct result of an enforced disappearance. It also notes that, apart from the exception made in respect of the victims of terrorism, the compensation provided for under the Criminal Code is the responsibility of the person having committed the offence, and the State bears only subsidiary civil liability in respect of a final sentence handed down for intentional and violent offences. Moreover, while recalling that the reparatory measures provided for under the Convention are not limited to compensation or to the opening of criminal proceedings, the Committee points out that domestic legislation contains no system of comprehensive compensation for which the State is responsible and which includes all the reparatory measures provided for under article 24, paragraph 5, of the Convention (art. 24).

30. The Committee recommends that the State party should adopt the necessary legislative or other measures to establish a definition of victim that conforms to that contained in article 24, paragraph 1, of the Convention, and that it should ensure that any natural person who has suffered harm as the direct result of an enforced disappearance is entitled to all the reparatory and compensatory measures provided for under the law, even if no criminal proceedings have been brought. It also recommends that the State party should adopt the necessary legislative or other measures to extend the forms of reparation so that they fully conform to those provided for under article 24, paragraph 5, of the Convention and to other relevant international standards. In this connection, the Committee welcomes the draft organic law on the legal status of victims of crimes. Bearing in mind that the bill is still being

drafted, the Committee urges the State party to take the opportunity to include in it such elements as are relevant to the implementation of this recommendation together with any other obligations regarding the rights of victims under the Convention that are not yet fully covered by current legislation. The Committee also recommends that any measures taken in respect of the rights of victims should be gender sensitive and should also take into account the special situation of children affected by enforced disappearances.

31. The Committee commends the adoption of Act No. 52/2007, known as the Historical Memory Act, which “recognizes and enhances rights and introduces measures on behalf of those who suffered persecution or violence during the civil war and the dictatorship”, and takes note of the information concerning its implementation provided after the constructive dialogue. However, it notes that the measures provided for under this Act for locating and identifying disappeared persons rely on initiatives taken by relatives. It is also concerned about the information received in respect of the various obstacles faced by relatives in the course of their searches (art. 24).

32. **The Committee recalls that the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, inter alia, to know the truth about the fate of their disappeared loved ones. In this connection, the Committee recommends that the State party should adopt all the necessary measures, including the allocation of sufficient human, technical and financial resources, to search for and clarify the fate of disappeared persons. In the same connection, the State party should consider the possibility of setting up an ad hoc body responsible for searching for persons who were the victims of enforced disappearance and endowed with sufficient powers and resources effectively to perform its role.**

33. **The Committee further encourages the State party to make explicit provision for the right of victims of enforced disappearance to know the truth, in conformity with the terms of article 24, paragraph 2, of the Convention and to ensure that all victims are able fully and effectively to enjoy that right. The Committee invites the State party to consider setting up a commission of independent experts charged with establishing the truth about past human rights violations, in particular enforced disappearances.**

34. While taking note of the current provisions of criminal law applicable to the possible removal of a child, the Committee notes that there are no provisions that specifically reflect the situations set out in article 25, paragraph 1, of the Convention. Moreover, while it welcomes the information provided in the State party’s report and by the delegation about the measures taken to investigate cases of removal of children that may have occurred in Spain in the past, the Committee has received reports concerning obstacles to both the documentation of cases and the effectiveness of investigations, despite the important message in Attorney-General’s Circular No. 2/2012. In addition, the Committee takes note of the gap between the number of complaints received and the limited number of genetic samples entered in the national DNA bank (art. 25).

35. **The Committee recommends that the State party should consider revising its criminal legislation with a view to incorporating as specific offences the acts described in article 25, paragraph 1, of the Convention and to provide appropriate penalties that take into account the extreme seriousness of the offences. The Committee also urges the State party to step up its efforts to search for and identify any children who may have been the victims of removal, enforced disappearance and/or identity substitution, in conformity with article 25, paragraph 2, of the Convention. In this respect, it recommends that the State party should also step up its efforts to ensure that the**

national DNA bank holds genetic samples for all cases that have been reported whether through administrative or judicial channels.

D. Dissemination and follow-up

36. The Committee wishes to recall the obligations undertaken by States when ratifying the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when ratifying the Convention and other relevant international instruments. In this regard, the Committee particularly urges the State party to ensure the effective investigation of all enforced disappearances and the full satisfaction of the rights of victims as set forth in the Convention.

37. The Committee also wishes to emphasize the particularly cruel effect of enforced disappearances on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

38. The State party is encouraged to widely disseminate the Convention, its report submitted under article 29, paragraph 1, of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society, in particular organizations of relatives of victims, in the actions taken in line with the present concluding observations.

39. In accordance with the Committee's rules of procedure, by 15 November 2014 at the latest, the State party should provide relevant information on its implementation of the Committee's recommendations as contained in paragraphs 12, 24 and 32.

40. Under article 29, paragraph 4, of the Convention, the Committee requests the State party to submit, no later than 15 November 2019, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with paragraph 39 of the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2). The Committee encourages the State party to promote and facilitate the participation of civil society, in particular organizations of relatives of victims, in the preparation of this information.