



International Convention for the Protection of All Persons from Enforced Disappearance

Distr.: General
3 December 2014
English
Original: French

Committee on Enforced Disappearances

Fifth session

Summary record of the 63rd meeting

Held at the Palais des Nations, Geneva, on Wednesday, 6 November 2013, at 10 a.m.

Chairperson: Mr. Decaux

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The meeting was called to order at 10 a.m.

Consideration of reports submitted by States parties under article 29 of the Convention (continued)

Reports submitted by States parties under article 29, paragraph 1, of the Convention due for submission in 2012 (continued)

Initial report of Spain (continued) (CED/C/ESP/1; CED/C/ESP/Q/1 and Add.1)

1. *At the invitation of the Chairperson, the delegation of Spain took places at the Committee table.*
2. **Mr. Garcé García y Santos** (Country Rapporteur) asked the delegation of Spain to explain how, in order to respect the principle of non-refoulement, the Spanish authorities actually evaluated the danger of a person being subjected to enforced disappearance if that person were returned to the border, and how it could consider that the detention centres for aliens, which the Human Rights Observatory of the University of Barcelona had described as unconstitutional, were compatible with articles 1, 10, 13 and 14 of the Spanish Constitution. He also asked the delegation to explain how incommunicado detention could be considered to be compatible with the Convention and why, as part of the ongoing legislative reform, it had been decided to supplement that regime with monitoring measures rather than simply to abolish it. The delegation might also explain whether incommunicado or informal detention was specifically prohibited in the State party. He asked for clarification as to whether the Advisory Committee of the National Mechanism for the Prevention of Torture had made any specific recommendations in respect of the regime of incommunicado detention, whether it had confidential access, without notice, to all persons deprived of their liberty, including those held incommunicado and whether it had sufficient human and financial resources to carry out its various missions – which needed to be specified. He invited the delegation to explain how Spain guaranteed that registers of detention were duly completed and that the “Garzón Protocol”, which, although not binding, had been globally recognized as a model of good practices, was widely disseminated.
3. **Mr. Hazan** (Country Rapporteur) said that he would appreciate information on whether any specific training on the Convention was provided for the categories of personnel referred to in its article 23. As the Committee had received information that the number of enforced disappearances during the civil war and the Franco regime had been at least 100,000, it would like to know whether the State party kept a register that would allow it to confirm or invalidate those estimates; it would also like to know what public agency was responsible for coordinating action in that respect – in particular with regard to reparation, centralization of information on the sites at which exhumations should be carried out and psychological support for families. He also asked whether the State party planned to establish a truth commission.
4. He asked what judicial and extrajudicial remedies were available in order to obtain full reparation and whether there were any plans to adopt a definition of the term “victim” in conformity with that in article 24 of the Convention. He invited the delegation to respond to the information that the Historical Memory Act was not fully applied, that families came up against obstacles when they attempted to recover the bodies of the disappeared and that the grants awarded for exhumations had been reduced. He also asked for details of the methods used to search for disappeared persons, of the institution responsible for conducting DNA analyses and managing the genetic database, if there was one, and on the project for a national DNA databank. He invited the delegation to indicate whether the State party had progressed with investigations into child abductions and whether it intended to define enforced disappearance of children as a specific criminal offence.

5. **Ms. Menéndez Pérez** (Spain) said that the Ombudsman's Office was the national human rights institution. In that capacity, it had played an active role in preparing the report from the very beginning, and in particular by attending all the interministerial coordination meetings. For its part, civil society had been consulted once the draft report had been written, as was customary with reports submitted to the treaty bodies. All the non-governmental organizations in regular contact with the Human Rights Office had been informed of the process. Approximately 10 of them had expressed an interest and 4 had made comments. The national human rights plan had been adopted in December 2008. It provided for the establishment of a committee, which had been formed in June 2009, to follow-up the implementation of the plan. The plan had been organized around two main themes: firstly, equality, non-discrimination and integration for all, and secondly guarantees for the protection of human rights, with a list of 172 specific commitments. The most emblematic of the measures had been the abolition of the death penalty, ratification of the Convention and the establishment of an office for the victims of the civil war and the dictatorship. A second human rights plan was being drawn up. The Working Group on Enforced or Involuntary Disappearances had been invited to put forward suggestions for the plan, and she took the opportunity to invite the Committee to do the same.

6. **Mr. Viada** (Spain) said that since 2006, 46 complaints concerning enforced disappearances had been lodged under the Historical Memory Act. They had made it possible to locate 13 mass graves containing the remains of 90 people.

7. **Mr. Loma-Osorio** (Spain) said that article 76 of the Military Criminal Code laid down penalties of from 10 to 25 years' prison for the offence of enforced disappearance, and article 27, penalties of from 2 to 8 years' prison. The fact of having acted on orders received from a superior could be considered a mitigating circumstance, unless the order was manifestly illegal. In principle, the military courts heard only offences committed by military personnel (including civilians who had been called up), except during a state of war or siege. In those circumstances, civilians could be tried by a military court, provided the offence involved the defence of the country against an external threat.

8. **Mr. Martínez Torrijos** (Spain) said that whenever anyone was held incommunicado, the competent judge was immediately informed; throughout the detention, the judge determined whether it was necessary. Anyone held incommunicado still had the right to seek a writ of habeas corpus, either themselves or via a relative. The offence of enforced disappearance had been included in the category of war crimes and crimes against humanity. Non-feasance could be invoked as grounds for criminal proceedings against a superior, provided a causal link was established between the omission (the fact that the superior had not attempted to prevent the offence) and the offence itself. Where international legal assistance was concerned, Spain applied the principle that when there was a clash of jurisdiction the relevant jurisdiction was that of the country in which the offence had been committed.

9. **Mr. Loma-Osorio** (Spain) said that where the rights of persons who had been expelled or returned were concerned, the situation was always dealt with on a case-by-case basis taking into consideration the information provided by the person concerned and by the Ministry of the Interior regarding the human rights situation and the threat of persecution in the country of origin. Decisions taken by the executive branch in that respect were subject to judicial supervision by an administrative court with jurisdiction over return and expulsion. As far as the detention centres for aliens were concerned, notwithstanding the principle of freedom of movement, it was difficult to envisage the absence of any administrative control. Persons held in the centres were not deprived of their liberty because they were aliens but because they had committed offences against Spanish law for which the penalty was return to their country of origin. In the case of incommunicado detention, although there was no specific provision, it was not authorized by Spanish law.

Unlawful detention was punishable as an offence under criminal law and the remedy of *amparo* was available.

10. **Mr. Viada** (Spain) added that the regime of incommunicado detention was used to combat organized crime and terrorism and that its length was limited to 5 or 13 days depending on the circumstances. There were no plans to abolish it under the draft legislative reform.

11. **Mr. Martínez Torrijos** (Spain) confirmed that Spain applied the “Garzón Protocol”, which completed the provisions on incommunicado detention.

12. **Mr. Esteban** (Spain) said that registers of persons deprived of liberty were subject to national regulations that applied to all the law-enforcement bodies. The three autonomous police forces that were competent in certain regions kept their own register. A specific supervisory body ensured that the instructions concerning the management of the registers were complied with. The information referred to in article 17, paragraph 3 of the Convention was duly recorded.

13. **Mr. Viada** (Spain) said that a written reply to the question on the resources assigned to the Ombudsman’s Office and to the national mechanism for prevention of torture would be provided within 48 hours by the Office; however, the Ombudsman did not necessarily require significant additional resources because all State and regional bodies and institutions were required to collaborate with the Office. The Ombudsman could carry out inspections of detention centres without notice.

14. **Mr. Loma-Osorio** (Spain) said that Spain complied with the obligation to provide the training referred to in article 23 of the Convention and that all personnel belonging to the bodies mentioned in the article received not only basic training, but also in-service training on the international instruments and on human rights. As to the definition of the term “victim” in the bill concerning the status of victim, it also encompassed indirect victims, in other words the relatives of persons who had disappeared. The property of disappeared persons could be managed by their defending counsel or by their representative. Under the Civil Code, those persons were appointed by a decision of the court and at the request of the family. Where measures concerning disappearances involving child abduction were concerned, circular No. 2 of 2012 offered the possibility of DNA analyses in connection with an investigation. It assimilated child abduction to unlawful detention. The period of statutory limitation began only from the time when the person whose civil status had been altered became aware of the fact. The Government had set up a working group among several ministries to identify ways of determining filiation, independently from the outcome of the ongoing judicial proceedings, to enable citizens to gather evidence and to avoid the statutory period of limitation. An office had been opened to enable anyone who thought they had been the victim of abduction or an illegal adoption to open a protected electronic file containing all the information obtained on their case by the investigation. Investigations were particularly focused on the administrations and the civil records. Plaintiffs searching for their biological parents could also apply to a forensic medical institute with a DNA database to request cross-checking of their genes with the data held by the institute.

15. **Mr. Esteban** (Spain) said that in 2009, the State Secretariat for Security had issued an instruction defining the appropriate procedure in the case of a disappearance that was manifestly involuntary and had set up a database centralizing information on the victims and the investigations. The database also contained the DNA profile of corpses whose identity was unknown and of the relatives of disappeared persons. The National Institute of Toxicology and Forensic Medical Analyses also analysed the DNA of human remains. The databases of both bodies were compared to attempt to identify and locate disappeared persons.

16. **Mr. Garcé García y Santos** (Country Rapporteur) asked whether the members of the national preventive mechanism were able to speak in private with persons held incommunicado and whether the 2007 regulations governing the conduct of security personnel towards persons held in custody were applicable throughout Spain, including in the autonomous regions. He requested details of the penalties to which State officials were liable if they failed to inform detainees of their rights in respect of habeas corpus. He also asked the delegation to comment on the differences between the law on habeas corpus and the provisions of article 17, paragraph 2 (f) of the Convention and for details of the circumstances in which the right of habeas corpus could be suspended by virtue of article 55 of the Spanish Constitution.

17. **Mr. Hazan** (Country Rapporteur) noted that 84 corpses had been exhumed and asked whether they had been identified and whether cross-comparisons had been carried out with the information contained in the database of the State Secretariat for Security. He asked for an explanation of the significance of an anonymous burial. Where disappearances of children were concerned, he wondered why there was a gap between the number of complaints lodged by civil society and the number of files examined by the working group. He inquired whether specialized services, such as psychological support, were provided for the relatives of disappeared persons during the searches which led to exhumations and burials. He asked whether the protocol on the exhumation of victims of the civil war and the dictatorship under the Historical Memory Act had been applied, and if so, what had been the outcome. He also asked whether the fact that an exhumation was carried out without legal authority could have any legal implications for the validity of a judicial identification procedure.

18. **Mr. Garcé García y Santos** (Country Rapporteur) asked for details of the provisions of article 47 of the Military Criminal Code.

19. **Mr. Corcuera Cabezut** asked whether, in addition to the general provisions of civil law, there were any specific provisions of Spanish law that concerned recognition of the victims of enforced disappearance.

20. **Mr. Esteban** (Spain) said that it had not been possible to establish a DNA profile for some of the 84 exhumed corpses and that it was sometimes not possible to cross-check data for lack of genetic data from the relatives of deceased persons. As for the application of habeas corpus, the rights and duties of security personnel were defined in the disciplinary regulations of each body, which provided for penalties ranging from suspension to dismissal.

21. **Mr. Viada** (Spain) said that article 55 of the Constitution authorized parliament to suspend habeas corpus during states of siege and the Government to suspend the right under exceptional circumstances, although suspension was not automatic.

22. **Mr. Loma-Osorio** (Spain) said that anyone who suspected that a child had disappeared or been abducted could deposit a DNA profile with the DNA bank. Civil society might wish to give its opinion on the gap between the number of files examined by the authorities and the number of cases reported. Victims' relatives received assistance from the Ministry of Justice and the autonomous provinces, as well as having access to psychologists. As for the presumption that a person was alive, under Spanish civil law, a disappeared person was presumed to be alive until they had been declared dead.

23. **Mr. Garcé García y Santos** (Country Rapporteur) emphasized that Spanish public law served as a reference for the law faculties in many Latin American countries that were attached to the rule of law and which had also experienced a transition to democracy. He suggested that Spain could cooperate with the Committee to promote the safeguards to which all the victims of enforced disappearance should be entitled, out of respect for the right to justice and truth.

24. **Mr. Hazan** (Country Rapporteur) welcomed Spain's commitment to universal protection from enforced disappearances and commended Spain for having rapidly ratified the Convention. The passage of time gave rise to humanitarian problems connected with the search for disappeared persons, in particular because of the death of the disappeared and of their relatives. In the spirit of the Convention, efforts to combat impunity were one of the pillars of prevention.

25. **Ms. Menéndez Pérez** (Spain) said that she hoped that consideration of the report by Spain would make it possible for the Committee to understand how States interpreted the Convention, and that interpretations could vary. In the opinion of Spain, the Convention and the competence of the Committee were focused on the future and concerned events which had occurred after the Convention came into force. Proof of Spain's commitment to the Convention was the willingness of the delegation of Spain to answer questions that did not fall within the sphere of competence of the Committee, but rather of the Working Group on Enforced or Involuntary Disappearances, while at the same time endeavouring to explain to the Committee its understanding of the situation. In Spain, during the transition to democracy which had begun in 1978, the Amnesty Act had been approved by universal consensus and applied to all. It would be unthinkable to abrogate the Act, although it was possible to take measures to improve it and to enhance recognition for the victims of enforced disappearance and to seek the truth, within the limits of the budgetary resources available and taking into account the need to rank the Government's priorities. She regretted that too many questions had concerned the past. To delve into the past, even though one could consider that the Committee was legally competent to do so, was to run the risk of jeopardizing promotion of the Convention and its universal ambition. It might also hinder analysis of the future obligations of the State under the Convention and thus undermine prevention of enforced disappearances. She emphasized that justice in Spain was independent and respected the most demanding international standards.

26. **The Chairperson** thanked the delegation of Spain for its constructive dialogue with the Committee. He took note of the comments made by the delegation and said that the Committee would have to adopt a more general position of principle regarding its competence and on the time element, although it was necessary to distinguish between, on the one hand the obligations of the State party and the competence of the Committee in respect of particular matters, and on the other the need for the Committee to develop an overview of the situation in a particular country. In his view, the work of the Committee should not overlap with the work of the Working Group, with whom it shared a common objective – ensuring observance of the Convention and of the principles of international law regarding enforced disappearance. He announced that the Committee had completed its consideration of the initial report of Spain.

The meeting rose at 12.40 p.m.