



**Summarized Submission\* in view of the upcoming Consideration of the Report of Spain  
regarding its Implementation of the International Convention for the Protection of All  
Persons from Enforced Disappearance (CED/C/SPA/1)**

**by**

**TRIAL (Track Impunity Always)**

**SEPTEMBER 2013**

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\* Following the instructions issued by the Secretariat in the sense that documents submitted by NGOs in Spanish should, to the extent possible, be translated into English, TRIAL presents this summarized version of its alternative report. However, the integral Spanish version should be considered as the main reference.

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## Preliminary Considerations about the Scope of the State Party Report

1. TRIAL (*Swiss Association against Impunity*) appreciates the opportunity to bring to the attention of the Committee on Enforced Disappearances (“the CED”) information regarding the measures taken by Spain to give effect to its obligations under the International Convention for the Protection of All Persons from Enforced Disappearance (“the Convention”).
2. TRIAL does not share the interpretation proposed by the State party of Art. 35, para. 1, of the Convention, which reads “the Committee shall have *competence* solely in respect of *enforced disappearances* which commenced after the entry into force of this Convention”, nor the consequences drawn by Spain in the sense that in its report it commented on the articles of the Convention taking into account “the fact that *they are applicable solely to enforced disappearances which may have commenced after 23 December 2010*”.<sup>2</sup>
3. Spain unduly confuses the subjects of retroactivity of the competence of the CED and retroactivity of the provisions of the Convention.<sup>3</sup> With regard to the latter, the interpretation proposed by Spain does not respect applicable international law and it would empty the treaty of its meaning, being manifestly contrary to its object and purpose.<sup>4</sup> Further, the Spanish interpretation does not seem to respect the principle according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*).<sup>5</sup>
4. The applicability of the obligations established by the Convention to enforced disappearances commenced before the entry into force of the treaty that continue being committed – taking into account the continuous (or permanent) nature of the crime of enforced disappearance, which has unanimously been recognized under international law and jurisprudence,<sup>6</sup> and that is enshrined in Art. 8, para. 1 (b),

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<sup>2</sup> Report submitted to the CED by Spain, doc. CED/C/ESP/1 of 26 December 2012 (hereinafter “Report submitted by Spain”), para. 6 (emphasis added).

<sup>3</sup> De Frouville, *The Committee on Enforced Disappearances*, in Alston, Megret (eds.) *The United Nations and Human Rights: A Critical Appraisal*, 2<sup>nd</sup> edition, to be published by Oxford University Press in August 2014, currently available at [http://www.frouville.org/Publications\\_files/FROUVILLE-CED-ALSTON.pdf](http://www.frouville.org/Publications_files/FROUVILLE-CED-ALSTON.pdf), p. 9. De Frouville points out that Art. 35 establishes “only a *jurisdictional limitation*. No comparable clause has been adopted in the substantive part of the Convention, so that the **obligations apply to an enforced disappearance which commenced before the entry into force of the Convention for the State concerned, as long as this enforced disappearance continues after the entry into force, i.e., as long as it is ‘unresolved’**” (emphasis is added).

<sup>4</sup> Vienna Convention on the Law of the Treaties (1969), Art. 31, para. 1.

<sup>5</sup> *Ibid.*, Art. 26.

<sup>6</sup> See, among others, Working Group on Enforced or Involuntary Disappearances (WGEID), *General Comment on Enforced Disappearance as a Continuous Crime*, doc. A/HRC/16/48 of 26 January 2011, para. 39; WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, doc. A/HRC/16/48/Add.3 of 28 December 2010, paras. 33-34; Vermeulen, *Enforced Disappearance – Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Antwerp, 2012, pp. 59-60 and 445-447; Ott, *Enforced Disappearance in International Law*, Antwerp, 2011, pp. 216-218; Citroni, Scovazzi, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden, 2007, pp. 309-314; Dijkstra, Klann, Ruimshout, Wijnkoop, *Enforced Disappearances as Continuing Violations*, Amsterdam, 2002; and Mattarollo, *¿Qué puede hacer el derecho internacional frente a las desapariciones?*, in *Las desapariciones: crimen contra la humanidad*, Buenos Aires, 1987.

of the Convention,<sup>7</sup> as well as the status of *jus cogens* attained by the prohibition of enforced disappearances and the corresponding duty to investigate them and sanction those responsible<sup>8</sup> – can be inferred also from the contents of some other provisions of the Convention.

5. In this sense, for instance, Art. 24, para. 6, of the Convention refers to the “*obligation to continue the investigation until the fate of the disappeared person has been clarified*”.<sup>9</sup> On its part, Art. 24, para. 2, recognizes the right to know the truth on the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. If, as Spain seems to suggest, these two provisions and the corresponding obligations would be considered as applicable solely to enforced disappearances commenced after 23 December 2010, this would thwart the object and purpose of the treaty.
6. Provisions contained in international human rights law treaties shall be interpreted in light of the *pro homine* (also called “*pro persona*”) principle, meaning that the interpretation more favourable to the protection of the fundamental human rights of the individual shall be preferred. The object and purpose of international human rights law treaties is the guarantee of fundamental rights of individuals – who are in a most vulnerable position compared to States – and the interpretation that is most conducive to protect individuals must always be favoured. In the case of the Convention, its provisions must be interpreted in the way that is most conducive to the protection of all persons from enforced disappearance and to guarantee victims’<sup>10</sup> rights to justice, truth and reparation.<sup>11</sup>
7. In interpreting the Convention in the light of its object and purpose, the CED must act so as to preserve the integrity of the mechanism envisaged in Art. 29 of the Convention. It would thus be inadmissible to subject this mechanism to restrictions that hamper the general monitoring, through the exam of reports, of the application of the provisions of the Convention. The clause concerning the CED’s competence (Art. 35, para. 1) must be interpreted and applied keeping in mind the special nature of human rights law treaties.<sup>12</sup>
8. Art. 28 of the Vienna Convention on the Law of the Treaties establishes that “unless a different intention

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<sup>7</sup> Art. 8, para. 1 (b), of the Convention expressly refers to the “continuous nature” of the offence of enforced disappearance.

<sup>8</sup> See, among others, Inter-American Court of Human Rights (IACtHR), Case *Goiburú and others v. Paraguay*, Ser. C No. 153, judgment of 22 September 2006, para. 84; Cançado Trindade, *Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights*, in *Nordic Journal of International Law*, Vol. 81, 2012, pp. 507-536; and Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained the Status of Jus Cogens in International Law?*, in *Nordic Journal of International Law*, Vol. 81, 2012, pp. 537-584.

<sup>9</sup> The fact that States retain the obligation to investigate and identify those responsible for enforced disappearances also when the latter commenced before the entry into force of the applicable treaty for the State concerned has repeatedly been held by the Inter-American and the European Court of Human Rights. See, among others, IACtHR, Case *Radilla Pacheco v. Mexico*, Ser. C No. 209, judgment of 23 November 2009; European Court of Human Rights (ECtHR), Case *Varnava and others v. Turkey*, judgment of 18 September 2009 (Grand Chamber), para. 148; and Case *Silih v. Slovenia*, judgment of 9 April 2009, para. 159.

<sup>10</sup> Art. 24, para. 1, of the Convention establishes that “victim means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.

<sup>11</sup> See preamble, Arts. 12 and 24 of the Convention.

<sup>12</sup> Among others, IACtHR, Case *Instituto de Reeducación del Menor v. Paraguay*, judgment of 2 September 2004, Ser. C No. 112, para. 205.

appears from the treaty or is otherwise established, provisions do not bind a party in relation to *any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*.<sup>13</sup> Art. 14, para. 2, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 by the International Law Commission, sets forth that “the breach of an international obligation by an act of a State having a *continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation*”. Para. 3 adds that “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and *extends over the entire period during which the event continues and remains not in conformity with that obligation*”.<sup>14</sup>

9. International case law affirmed that “pursuant with the principles of *pacta sunt servanda*, it is only as of that date [entry into force of the treaty], that the obligations of the treaty are in force for [the concerned State], and by virtue of that, it is *applicable to those facts that constitute violations of a continuous or permanent nature, that is, those that occurred prior to the entry into force of the treaty and persist even after that date, since they are still being committed. Stating the contrary would be the same as depriving the treaty itself and the guarantee of protection established therein of its useful effect, with negative consequences for the alleged victims in the exercise of their right to a fair trial*”.<sup>15</sup>
10. In light of the above, and taking into account that enforced disappearance is the “prototypical continuous act”,<sup>16</sup> and that “the act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual”,<sup>17</sup> it appears that in many cases the enforced disappearances which commenced in Spain during the Civil War and under the Franco regime continue being committed. Accordingly, they must be qualified as enforced disappearances until the fate and whereabouts of the victims are not established with certainty. By failing to consider and examine these situations in its report, Spain is in breach of its international obligations.
11. The report presented by the State on the measures taken to give effect to its obligations under the Convention (Art. 29), must coincide with the scope of application of the Convention, taking into account applicable international law and the continuous (or permanent) nature of enforced disappearance. The CED should apply the same approach in the formulation of its comments, observations and recommendations to the State party.

<sup>13</sup> The ECtHR declared that it cannot be considered “that a disappearance is, simply, an ‘instantaneous’ act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person *gives rise to a continuing situation* [...]”, Case *Varnava and others*, *supra* note 8, para. 148 (emphasis is added).

<sup>14</sup> In its *General Comment on Enforced Disappearance as a Continuous Crime*, *supra* note 5, the WGEID declared that “when a State is recognized as responsible for having committed an enforced disappearance that began before the entry into force of the relevant legal instrument and which continued after its entry into force, the State should be held responsible for all violations that result from the enforced disappearance, and not only for violations that occurred after the entry into force of the instrument” (para. 4). See also para. 3 of the General Comment.

<sup>15</sup> IACtHR, Case *Radilla Pacheco v. Mexico*, *supra* note 8, para. 24 (emphasis is added).

<sup>16</sup> WGEID, *General Comment on Enforced Disappearance as a Continuous Crime*, *supra* note 5, para. 1.

<sup>17</sup> *Ibid.*

12. Finally, TRIAL argues that the word “competence” used in Art. 35, para. 1, of the Convention, refers to the competence of the CED to receive and examine individual and inter-state communications submitted pursuant to Art. 31 and 32 of the Convention, and not to the consideration of States parties’ reports filed pursuant to Art. 29 of the Convention.<sup>18</sup> **The consideration of States’ reports is not related to the competence of the CED to receive and examine communications (subjected to a temporal limitation in order not to overburden the CED). It rather concerns, as already mentioned, the application of the Convention in general terms by a State party.**
13. The above can be inferred both from the wording of the provisions of the Convention, interpreted in the light of the object and purpose of the latter, as well as from the preparatory work of the treaty. Art. 31, para. 1, of the Vienna Convention on the Law of the Treaties establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Moreover, the interpretation proposed by TRIAL is supported by the practice followed so far in the application of the treaty, which shows the agreement of the parties regarding its interpretation. Also doctrine confirms the soundness of the interpretation here proposed.<sup>19</sup>
14. In the first place, it is worth mentioning that among the provisions of the Convention concerning the CED, the word “competence” is expressly used only in Art. 31, 32 and 35.<sup>20</sup> Along the same line, the rules of procedure of the CED refer to the “functions of the Committee”<sup>21</sup> and “competence” is used only when referring to the specific declaration concerning the acknowledgment *vis-à-vis* individual and inter-state communications. The same holds true for the methods of work of the CED.<sup>22</sup> Moreover, during the negotiations of the treaty, the subject of retroactivity was discussed, recalling that there are two kinds of retroactivity: that of the instrument itself, and that of the competence of the monitoring body. Delegations agreed that there was no need for an explicit reference to the former in the text, because general rules of international law would apply.<sup>23</sup>
15. With regard to the CED, even though the limitation of its competence contained in Art. 35 of the Convention was eventually adopted, during the negotiations the word “competence” was used when referring to the reception and consideration of individual and inter-state communications, that is a competence of a quasi-judicial nature relating to specific cases. When referring to the exam of States’ reports, that is a monitoring function of general scope; the expressions “function” or “procedure” of the

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<sup>18</sup> Neither to “urgent actions” (Art. 30), country visits (Art. 33), or to the possibility to inform the General Assembly about the existence of a widespread or systematic practice of enforced disappearance (Art. 34).

<sup>19</sup> De Frouville, *The Committee on Enforced Disappearances*, *supra* note 2, p. 9; and Citroni, Bianchi, *The Committee on Enforced Disappearances: Challenges Ahead*, in *Diritti umani e diritto internazionale*, vol. 6, 2012, pp. 164-166.

<sup>20</sup> The same in the Spanish and French version of the text.

<sup>21</sup> Rules of Procedure of the CED, doc. CED/C/1 of 22 June 2012. The same in the Spanish and French versions of the text of the rules.

<sup>22</sup> Available only in English: <http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx>.

<sup>23</sup> Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, doc. E/CN.4/2004/59 of 23 February 2004, para. 165.

CED were used.<sup>24</sup>

16. Further, Art. 31, para. 3 (b), of the Vienna Convention on the Law of the Treaties requires to take into account also “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Notably, in the practice concerning the exam of States parties’ reports, States referred to enforced disappearances commenced before the entry into force of the Convention,<sup>25</sup> and the CED analyzed the obligations of States parties also with regard to enforced disappearances commenced before the entry into force (and even before the adoption of) the Convention. In particular, the CED affirmed the duty of States parties to guarantee the effective investigation of *all* enforced disappearances (irrespective of when they begun) and the full satisfaction of the rights of victims as enshrined in the Convention.<sup>26</sup> This practice supports the interpretation of Art. 35, para. 1, here proposed.
17. It must be pointed out that Spain already attempted avoiding international scrutiny on enforced disappearances commenced during the Civil War and under the Franco regime and, in particular, on Law 46/1977, of 15 October, on Amnesty,<sup>27</sup> on the occasion of its periodic exam before the Committee against Torture.<sup>28</sup> Indeed, the latter rejected the interpretation proposed by Spain and affirmed the incompatibility of the Amnesty Law with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>29</sup>
18. TRIAL holds that the CED must reject the interpretation of Art. 35, para. 1, of the Convention put forward by Spain, instead following its own practice in the exam of States parties’ reports. In this context, it **must analyze the obligations undertaken by Spain also with regard to enforced disappearances commenced before the entry into force of the Convention and that continue being committed, issuing such comments, observations or recommendations as it may deem appropriate.**

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<sup>24</sup> Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, doc. E/CN.4/2005/66 of 10 March 2005, paras. 121- 150; and doc. E/CN.4/2006/57 of 2 February 2006, paras. 34-68. Moreover, the Parliamentary Assembly of the Council of Europe recommended to interpret Art. 35 “in such a way as to allow the convention to cover also cases in which the disappearance occurred before entry into force of the convention and the whereabouts of the disappeared person have not been clarified until after its entry into force” (resolution 1463 (2005) of 3 October 2005, para. 13.3).

<sup>25</sup> Report submitted by Uruguay to the CED, doc. CED/C/URY/1 of 4 September 2012; Replies from Uruguay to the LOIS submitted by the CED, doc. CED/C/URY/Q/1/Add.1 of 27 March 2013; and Report submitted by Argentina to the CED, doc. CED/C/ARG/1 of 21 December 2012.

<sup>26</sup> CED, *Concluding Observations on Uruguay*, doc. CED/C/URY/CO/1 of 3 May 2013, paras. 13, 14 and 37.

<sup>27</sup> Report submitted by Spain to the CED, *supra* note 1, paras. 3 y 5.

<sup>28</sup> *Replies submitted from Spain to the LOIS presented by the Committee against Torture*, doc. CAT/C/ESP/Q/5/Add.1 of 24 August 2009, para. 167.

<sup>29</sup> Committee against Torture (CAT), *Concluding Observations on Spain*, doc. CAT/C/ESP/CO/5 of 20 November 2009, para. 21.

## I. Definition and Criminalization of Enforced Disappearance (Arts. 1-7)

### ***Art. 1 – Non-derogable Prohibition of Enforced Disappearance***

19. International law subjects the enactment of derogation measures in situations of emergency to a specific regime of restrictive safeguards and provides for the existence of a series of non-derogable rights. Art. 1, para. 2, of the Convention affirms that the right not to be subjected to enforced disappearance is a non-derogable right.
20. **Spanish legislation does not expressly provide for an absolute prohibition of enforced disappearance that would be applicable even in the exceptional circumstances of a state of emergency, state of siege, or any other state of exception.**
21. The declaration of states of exception or public emergency is regulated pursuant to Arts. 55 and 116 of the Constitution and Organic Law 4/1981, of 1 June. Art. 55 of the Constitution allows the derogation of certain fundamental rights and freedoms, including the right to personal liberty and security in situations of “alarm”, “exception” and “state of siege”. Notably, **the declaration of a state of siege would allow also the derogation of fundamental rights of persons deprived of their liberty, such as the access to legal counsel and the right to be informed of the reason of the arrest and of any charges against them.**
22. **The Spanish Constitution therefore fails to expressly establish that no situation of alarm, exception or state of siege may be invoked as a justification for enforced disappearance.** Furthermore, in particular the definition of “state of exception” as enshrined in Art. 13 of Organic Law 4/1981 leaves a considerable margin of discretion to authorities, thus leaving the door open for possible abuse. As such, it may be, and in fact has been, used also in cases of strike or social tensions.<sup>30</sup>
23. 23. Most notably, Art. 55, para. 2, of the Spanish Constitution allows the **derogation *ad personam* of certain rights, including the right to personal liberty, in cases of investigation related to armed groups and terrorist activities. This derogation, although subjected to the control of the parliament and of a judicial authority, would not require the declaration of a state of exception or of siege.**
24. As repeatedly noted by several international human rights bodies, the definitions of “crimes associated with terrorist violence”, “collaboration with terrorist organizations”, “urban terrorism” and “glorification and justification of terrorist acts” contained in the Spanish legislation do not fully respect the principle of legality for their lack of precision in the wording.<sup>31</sup> They accordingly run the risk of being applied to crimes that do not compromise or have sufficient relation to the intentional element of causing deadly or otherwise serious bodily injury.

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<sup>30</sup> In 2010 the emergency legislation was applied to face an ongoing strike of aeroportual personnel which was paralyzing public transport (Decree 1673/2010, of 4 December, further extended by the Congress on 16 December 2010)

<sup>31</sup> Special Rapporteur on Human Rights while Countering Terrorism, *Report on the Mission to Spain*, doc. A/HRC/10/3/Add.2 of 16 December 2008, paras. 8-11.



25. The possibility to derogate, for certain persons, from the right to personal freedom in cases related to armed groups and terrorist activities pursuant to Art. 55, para. 2, of the Constitution raises some concerns and may be abused. Given the strict relation existing between the enjoyment of the right to personal liberty and enforced disappearances, it is all the more important that the impossibility to invoke as a justification for enforced disappearance states of public emergency is clearly spelled out in Spanish legislation.

#### Recommendation

Adopt a provision establishing in the Spanish legislation the non-derogable right of every person not to be subjected to enforced disappearance pursuant to Art. 1 of the Convention, and expressly affirming that no exceptional circumstances of the kind described in Art. 1 of the Convention may be invoked to justify the offence of enforced disappearance.

#### Arts. 2, 4, 5 and 7 – Definition and Codification of Enforced Disappearance as an Autonomous Offence and Enforced Disappearance as a Crime against Humanity

26. Spain argues that offences codified in Arts. 163-172, together with Art. 530, of the Criminal Code would be enough to comply with the obligation established under Art. 4 of the Convention to ensure that enforced disappearance constitutes an offence under domestic criminal law.
27. The CED, following a well established international jurisprudence, already pronounced itself on the obligation undertaken by States parties to codify enforced disappearance as an autonomous offence in their domestic legislation and to punish it with appropriate penalties which take into account its extreme seriousness.<sup>32</sup> On its part, the WGEID pointed out that “a number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but *argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection*”.<sup>33</sup>
28. The situation in Spain fits the above description: **the current Criminal Code codifies various offences that are linked with enforced disappearance. However, none of them encompasses all the constitutive elements of the crime and they are not punishable with penalties that are**

<sup>32</sup> CED, *Concluding Observations on France*, doc. CED/C/FRA/CO/1 of 19 April 2013, para. 13; and CED, *Concluding Observations on Uruguay*, *supra* note 25, para. 12.

<sup>33</sup> WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para. 11.

commensurate to the extreme gravity of the crime. This would not change with the enactment of the Draft Organic Law which would reform the Criminal Code. In order to answer to question No. 3 of the list of issues (“LOIS”) in relation to the report submitted by Spain, it must be highlighted that in the proposed Draft enforced disappearance would not be codified as an autonomous crime and, although it is true that the penalties envisaged for the offences of abduction or unlawful detention would be increased (abduction: deprivation of liberty from 10 to 15 years; unlawful detention: deprivation of liberty from 10 to 20 years, in both cases with aggravating circumstances when the victim is a minor or a disabled person or when the author acted with the intention to damage the sexual freedom or integrity of the victim), this would not yet meet the requirements established by the Convention.

29. According to international jurisprudence, enforced disappearance is an autonomous crime and its definition should include as a minimum the following three cumulative elements: a) deprivation of liberty against the will of the person concerned; b) involvement of government officials, at least indirectly by acquiescence; and c) refusal to acknowledge the deprivation of liberty of the victim or concealment of the fate and whereabouts of the victim.<sup>34</sup> The inherent consequence of an enforced disappearance is that the disappeared person is placed outside the protection of the law.
30. **None of the provisions of the current Spanish Criminal Code referred to by the State contains the three above-mentioned cumulative elements. This would not change with the enactment of the Draft Organic Law to reform the Criminal Code.**
31. In particular, Art. 163 of the Criminal Code, which would not be modified with the envisaged reform, is **only applicable to private individuals** (i.e. non-State agents) and **does not refer to the necessary involvement of governmental officials, at least indirectly by acquiescence; and does not include the constitutive element of the refusal to acknowledge the deprivation of liberty of the victim or concealment of the fate and whereabouts of the victim. The sanctions envisaged (between 4 and 6 years of deprivation of liberty) are not commensurate to the gravity of the crime.**<sup>35</sup>
32. Art. 164 of the Criminal Code, which would not be amended through the envisaged reform, does not meet international standards either. **It does not refer to the deprivation of liberty of the victim in any form, but it requires the intention of the author to “imposing a condition for freeing” the victim**. This requirement is not envisaged under applicable international law. Furthermore, also in this case, the provision only refers to non-State agents, failing to mention the necessary involvement of governmental officials, at least indirectly by acquiescence; and not including the constitutive element of the refusal to acknowledge the deprivation of liberty of the victim or concealment of the fate and whereabouts of the victim either. The sanctions are not proportionate to the gravity of the crime.

<sup>34</sup> *Inter alia*, WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para. 21.

<sup>35</sup> On the standards that should be applied in sanctioning enforced disappearances, see WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, paras. 40, 45 and 46.

33. Art. 165 of the Criminal Code establishes aggravating circumstances, among others, if an abduction or an unlawful deprivation of liberty involves simulation of public authority or functions. Increasing the sanctions envisaged in Arts. 163 and 164 does not make up for the incompatibility of both provisions with the requirements of Art. 2 of the Convention.
34. Art. 166 of the Criminal Code establishes that persons guilty of unlawful detention or abduction who fail to reveal the location of the person detained shall receive more severe penalties, **unless the detained person has been freed**. The Draft reform of the Criminal Code would further increase the envisaged penalties. However, as Art. 166 refers to the offences codified in Arts. 163 and 164, which do not meet the requirements set forth by Art. 2 of the Convention, it is not enough to meet Spain's international obligations either. In particular, **it does not encompass governmental officials, at least indirectly by acquiescence, among potential perpetrators of the crime. The phrase "fail to reveal the location of the person detained" is arguably narrower than the third cumulative element of enforced disappearance, i.e. the refusal to acknowledge the deprivation of liberty of the victim or concealment of the fate and whereabouts of the victim.**
35. Art. 167 of the Criminal Code provides that any public official who, in a manner other than that provided for in law, and where no criminal offence has taken place, commits one of the offences codified in Arts. 163, 164, 165 or 166, shall additionally be disqualified from holding office for 8 to 12 years. Although this provision allows sanctioning public officials responsible for unlawful detention, abduction, or failure to reveal the location of a detained person, **this does not encompass persons or groups of persons acting with the authorization, support or acquiescence of the State**, thus failing to meet the requirements of Art. 2 of the Convention.
36. Arts. 530, 531 and 532 of the Criminal Code, which would not be modified by the envisaged Draft reform, relate to offences committed by public officials against personal liberty. These provisions do not codify autonomous offences, but envisage the specific sanction of disqualification for public officials involved in unlawful deprivations of liberty. **Although disqualification from office is an important deterrent tool, these provisions do not meet the obligations set forth in Arts. 4 and 7 of the Convention, because they do not codify enforced disappearance as an autonomous offence, but simply establish specific penalties applicable to public officials.**
37. To answer to **question No. 5 of the LOIS**, although the maximum penalty provided for under Spanish legislation is 20 years of deprivation of liberty (Art. 36 Criminal Code), for offences such as crimes against the Crown (Art. 485), terrorism (Art. 572) and crimes against *jus gentium* (Art. 605), **the penalty may actually reach 25 to 30 years of deprivation of liberty**. Art. 76 of the Criminal Code provides that for a person responsible for two or more crimes – at least two of which are sanctioned with 20 years of deprivation of liberty –, **the maximum penalty can reach 40 years of deprivation of liberty**. The same applies for a person convicted for two or more offences related to terrorism sanctioned with 20 years of deprivation of liberty. These terms would not be modified by the Draft reform of the Criminal Code.

38. Spain informs the CED that Art. 607 bis of the Criminal Code codifies crimes against humanity “as defined in the Rome Statute for the establishment of the International Criminal Court”<sup>36</sup> (“ICC”).
39. First, **codifying enforced disappearance only when committed as a part of a widespread or systematic attack against civilian population, with the knowledge of such attack, is not enough to meet international obligations concerning the codification of the crime**, pursuant to Art. 4 of the Convention. The WGEID has highlighted that “even if it cannot lead to invoking the jurisdiction of the International Criminal Court, an isolated act of enforced disappearance nonetheless remains an international crime and a gross human rights violation, which determines the criminal responsibility of the perpetrators, as required by several international human rights treaties. It follows that *States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act*”.<sup>37</sup> The WGEID recommended that “the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance”.<sup>38</sup>
40. Art. 607 bis of the Criminal Code, which would not be amended through the Draft reform, establishes that, in order to hold someone responsible for crimes against humanity, the acts concerned must have been committed as part of a general or systematic attack upon the civilian population. Furthermore, the provision indicates that, to constitute crimes against humanity, the acts concerned must have been committed “because the victims belong to a group or category which is persecuted for political, racial, national, ethnic, cultural or religious reasons or for reasons of gender or disability or other motives universally recognized as unacceptable under international law; in the context of an institutionalized regime of systematic oppression and dominance of a racial group over one or more other racial groups, with the intention of maintaining that regime”. Para. 6 of Art. 607 bis establishes that those responsible will be sanctioned with 12 to 15 years’ imprisonment “when a person has been detained and the person detaining him or her has refused to acknowledge that deprivation of liberty or provide information on the fate or location of the person detained”. Para. 7 of the same provision envisages a sanction of 8 to 12 years’ imprisonment when a person has been detained and deprived of his or her liberty in a manner contrary to international rules on detention, and a lower sentence shall be imposed where the detention has lasted fewer than 15 days.
41. Considering the belonging of a victim to “a group or category which is persecuted for political, racial, national, ethnic, cultural or religious reasons or for reasons of gender or disability or other motives universally recognized as unacceptable under international law” as a constitutive element of all crimes against humanity is not in accordance with applicable international law. Namely, **this requirement is not established under the Rome Statute, apart from the crime of persecution, where it is indeed**

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<sup>36</sup> Report submitted by Spain, *supra* note 1, para. 61.

<sup>37</sup> WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para.18 (emphasis is added).

<sup>38</sup> *Ibid.*, para. 15.

a constitutive element and expressly figures in the definition of the crime. Imposing this additional constitutive element to all crimes against humanity is an unduly restrictive condition, which has the consequence to make impossible the prosecution in Spain of cases that, according to the State's international undertakings, should be subjected to prosecution without any further requirement.

42. **Neither para. 6 or 7 of Art. 607 bis of the Criminal Code meet the definition of enforced disappearance as a crime against humanity contained in the Rome Statute interpreted in the light of Art. 2 of the Convention.** In the first place, they only refer to the detention or deprivation of liberty of the victim in a manner contrary to international rules on detention, unduly restricting the formula "arrest, detention or abduction of persons" contained in the Rome Statute. Second, Art. 607 bis fails to indicate who can be considered as the authors of the crime, thus leaving it unclear that it can be State actors or members of a political organization, or persons acting with the authorization, support or acquiescence of, a State or a political organization.
43. To answer to **question No. 4 of the LOIS**, the Spanish Criminal Code provides for the imprescriptibility of crimes against humanity (Arts. 131, para. 4; and 133, para. 2), and regulates superior responsibility as required under Art. 28 of the Rome Statute. Further, Art. 616 bis prohibits to invoke due obedience in cases of genocide and crimes against humanity.
44. Nevertheless, **Spanish legislation does not explicitly establish that official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility for crimes against humanity, nor shall it, in and of itself, constitute a ground for reduction of sentence.** The practice of Spanish courts recognizes absolute immunity for foreign Heads of State. **Spanish legislation does not expressly establish that persons who have or are alleged to have committed crimes against humanity shall not benefit from any special amnesty or similar measures that might have the effect of exempting them from any criminal proceeding or sanction.** The incompetence of military tribunals to judge persons accused of crimes against humanity is not expressly provided for either. These aspects are not regulated under Organic Law 18/2003, of 10 December, of Cooperation with the ICC, thus leaving significant gaps in the domestic legal framework.

### Recommendations

Codify enforced disappearance as a separate offence under Spanish criminal law, adopt a definition in line with Art. 2 of the Convention, making it punishable by appropriate penalties which take into account its extreme seriousness.

Amend the definition of enforced disappearance as a crime against humanity currently provided for under Art. 607 bis of the Criminal Code, making sure that it is in line with the Rome Statute, interpreted in the light of Art. 2 of the Convention.

Amend Art. 607 bis of the Criminal Code so that the belonging of a victim to a group or category which

is persecuted for political, racial, national, ethnic, cultural or religious reasons or for reasons of gender or disability or other motives universally recognized as unacceptable under international law, is not required for all crimes against humanity, apart from persecution, where it is part of the very definition of the crime.

Expressly establish that official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility for crimes against humanity, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Expressly establish under domestic legislation that orders to commit crimes against humanity are manifestly unlawful.

Explicitly provide under Spanish domestic legislation that persons who have or are alleged to have committed crimes against humanity shall not benefit from any special amnesty or similar measures that might have the effect of exempting them from any criminal proceeding or sanction.

Expressly establish under domestic legislation that persons who have or are alleged to have committed crimes against humanity shall never be tried by military, or other similar special courts.

#### ***Art. 6 – Criminal Responsibility***

45. The fact that, as explained above, Spanish criminal legislation does not adequately codify enforced disappearance as a separate offence, **seriously undermines the possibility to hold criminally responsible persons who order, solicit or induce the commission of, attempt to commit, are accomplices to or participate in an enforced disappearance.**
46. Furthermore, **Spanish legislation is not fully in line with applicable international law with regard to superior or commander responsibility.** Art. 615 bis of the Criminal Code only deals with crimes against humanity but **does not cover enforced disappearances that are not committed as part of a widespread or systematic attack against civilian population**, thus failing to comply with the requirements of Art. 6, para. 1 (b), of the Convention.
47. Spanish legislation **does not expressly establish that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an enforced disappearance.** This holds a particular importance in the absence of an adequate codification of the separate offence of enforced disappearance in the domestic criminal legislation. Further, **Spanish legislation does not clearly prohibit orders or instructions prescribing, authorizing or encouraging enforced disappearances, nor does it expressly establish that any person receiving such an order or instruction shall have the right and duty not to obey it.**

## Recommendations

Amend Spanish legislation to make sure that, in line with Art. 6, para. 1 (b), of the Convention, a superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution, is held criminally responsible also in cases of enforced disappearance that are not qualified as crimes against humanity.

Explicitly establish under domestic legislation that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an enforced disappearance, and expressly prohibit such orders.

Establish that any person receiving an order or instruction from any public authority, civilian, military, or other, directing, authorizing or encouraging an enforced disappearance shall have the right and duty not to obey it. Establish that any person receiving an order or instruction from any public authority, civilian, military, or other, directing, authorizing or encouraging an enforced disappearance shall have the right and duty not to obey it.

## II. Criminal Responsibility and Judicial Cooperation in relation to Enforced Disappearance (Arts. 8-16)

### *Art. 8 – Statute of Limitations*

48. The Spanish Criminal Code establishes that crimes against humanity are imprescriptible. The offences codified in Arts. 163-167 of the Criminal Code (unlawful detention and abduction), which Spain erroneously considers as defining the offence of enforced disappearance, are subjected to a statute of limitation of 15 years.
49. The lack of an adequate codification of the offence of enforced disappearance in the Spanish legal framework determines that inappropriately low statutes of limitations may be applied to the crime, which is **not even expressly codified as an offence of continuous (or permanent) nature**. In this context, authorities enjoy a wide margin of appreciation to determine whether to consider offences codified in Arts. 163-166 of the Criminal Code as continuous (or permanent) or not.
50. Interestingly, in its concluding observations on Spain, the Committee against Torture expressed its deep concern because “the offence of torture, which is specifically provided for in article 174 of the Criminal Code, may be subject to a statute of limitations after 15 years, while the only case in which it is not subject to a statute of limitations is when it is classed as a crime against humanity, that is, when it is

committed as part of a generalized or systematic attack against the civilian population or part thereof (Criminal Code, art. 607 bis)”<sup>39</sup> and recommended to the State to ensure that torture is never subjected to a statute of limitations. **The CED should apply this reasoning, *mutatis mutandis*, to the case of enforced disappearance.**

51. **Judgment No. 101/2012 issued on 27 February 2012** (most notably after the entry into force of the Convention for Spain) by the **Supreme Tribunal declared that crimes, including enforced disappearance, committed during the Civil War and under the Franco regime cannot be subjected to investigation and prosecution. Indeed, the Supreme Tribunal held that “given that 20 years have passed since the commission of the crimes, the statute of limitations established under Spanish Criminal Code expired long time ago”.**<sup>40</sup> This finding openly contradicts the principle of imprescriptibility of crimes under international law, including enforced disappearance, and guarantees *de facto* impunity for those responsible. This is not only contrary to Spanish Criminal Code (Art. 615 bis), but also to Art. 8, para. 1, of the Convention.
52. Art. 133 of the Spanish Criminal Code establishes that penalties envisaged for crimes against humanity are not subjected to any term of prescription, while penalties envisaged for other offences prescribe in terms ranging between 15 and 30 years. Given the existing gaps in the Spanish legal framework, the establishment of terms of prescription for penalties may in fact favour impunity for people who have committed enforced disappearances outside a widespread or systematic attack against civilian population.
53. Art. 8, para. 2, of the Convention requires that each State party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation. As it will be explained in detail in subsequent paragraphs,<sup>41</sup> at present victims of enforced disappearance that continue being committed, are not granted access to any effective remedy or access to justice, and the exercise of criminal action is formally precluded under Law 46/1977, of 15 October, of Amnesty.

### Recommendations

Provide that enforced disappearances are not subject to statute of limitations, whether qualified as a crime against humanity or not.

Expressly qualify enforced disappearance as a continuous (or permanent) crime under domestic criminal legislation.

Guarantee that victims of enforced disappearance have access to an effective remedy during the term of limitation. In particular, where a statute of limitations is applied, ensure that it is suspended during any period when effective remedies are ineffective or unavailable until these remedies are re-established.

<sup>39</sup> CAT, *Concluding Observations on Spain*, *supra* note 28, para. 22. See also WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para. 62 (k).

<sup>40</sup> Supreme Tribunal, judgment No. 101/2012 of 27 February 2012, second “*fundamento en derecho*” (legal basis).

<sup>41</sup> *Infra* paras. 65-68.



**Arts. 9, 10 and 11 – Universal Jurisdiction and the *aut dedere aut judicare* Principle**

54. **Organic Law 1/2009, of 3 November**, complementary to the law reforming procedural legislation, amended Organic Law 6/1985, of 1 July, on Judicial Power. The reform **considerably restricted the competence of Spanish tribunals to apply the principles of universal jurisdiction and *aut dedere aut judicare***.<sup>42</sup> Amended Art. 23, para. 4, of the Law on Judicial Power, establishes the jurisdiction of Spanish tribunals to hear cases involving acts committed by Spanish or foreign nationals outside Spanish territory which can be defined under Spanish law as one of the following offences: “(a) Genocide and crimes against humanity; [...]; (h) Any other offence which, pursuant to international treaties and agreements, particularly those relating to international humanitarian and human rights law, is required to be tried in Spain. Without prejudice to the provisions of international treaties and agreements to which Spain is a party, **for Spanish courts to try the aforementioned offences, it must be shown that the suspects are in Spain or that there are victims who are Spanish nationals, or that there is a relevant connection with Spain and that, in any case, no proceedings have been initiated before the competent authorities of another State or before an international tribunal**”.
55. As already pointed out, the **definition of enforced disappearances as crimes against humanity contained in Art. 607 bis of the Criminal Code is not in line with applicable international law**. This would concretely **hinder the possibility to establish Spanish jurisdiction over enforced disappearances committed in the context of a widespread or systematic attack against civilian population by Spanish or foreign nationals outside Spain**.
56. Although Art. 23, para. 4, of the Law on Judicial Power recognizes the possibility to establish Spanish jurisdiction over offences that, pursuant to international treaties, must be tried in Spain, the lack of an adequate codification of the offence of enforced disappearance under domestic legislation would make it impossible to try those responsible. As mentioned by Spain in its report,<sup>43</sup> **the practice of Spanish tribunals is to require an exact transposition in domestic law of crimes defined in international law. Definitions of crimes contained in international treaties ratified by Spain are not considered to be directly applicable by Spanish courts, as this would violate the principle of legality. The lack of a separate offence of enforced disappearance in Spanish criminal legislation thus hinders the possibility to establish jurisdiction of Spanish courts in accordance with the principle of universal jurisdiction principle**.
57. Art. 23, para. 4, of the Law on Judicial Power, as amended in 2009, **unduly limits the exercise of universal jurisdiction before Spanish courts by adding the requirements that, to exercise such jurisdiction, it must be shown that the suspects are in Spain or that there are victims who are Spanish nationals, or that there is a *relevant link* to Spain**. The latter is a restrictive and somewhat vague condition and the burden of proof is left on those promoting the prosecution. The further

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<sup>42</sup> In this sense, CAT, *Concluding Observations on Spain*, *supra* note 28, para. 17.

<sup>43</sup> Report submitted by Spain, *supra* note 1, paras. 28-32.

requirement that “no proceedings have been initiated before the competent authorities of another State or before an international tribunal” in order to establish Spanish jurisdiction is also troublesome.

58. Arts. 9, para. 2, and 11, para. 1, of the Convention envisage the possibility for a State party in the territory under whose jurisdiction a person alleged to have committed an enforced disappearance is found, to surrender him or her to an international criminal tribunal whose jurisdiction it has recognized. Notably, **Organic Law 18/2003 on the Cooperation with the ICC contains a highly problematic provision (Art. 7, para. 2), that enshrines the opposite of the complementarity rule contained in the Rome Statute.** The said article sets forth that “when a complaint related to acts committed abroad, whose alleged perpetrator is not a Spanish national and about which the ICC may be competent, Spanish authorities will refrain from the exercise of any proceedings, limiting themselves to inform the applicant about the chance to directly address the Prosecutor of the ICC who may, where appropriate, initiate an investigation”. In the same circumstances, Spanish judicial authorities and prosecutors will refrain from acting *ex officio*.
59. **The Spanish Organic Law on the Cooperation with the ICC reverts the principle of complementarity preventing domestic authorities from exercising their jurisdiction over cases that would fall under their competence, delegating every responsibility to the Prosecutor of the ICC.** This is contrary to Arts. 9, para. 2, and 11, para. 1, of the Convention.
60. Art. 10 of the Convention obliges States parties to take into custody persons suspected of having committed an offence of enforced disappearance who are present in the territory under their jurisdiction and to ensure their presence. States must immediately carry out a preliminary inquiry or investigation to establish the facts.
61. To trigger the exercise of criminal action, Spanish legislation requires a request from the public prosecutor or an individual. None of the proceedings conducted in Spain under the principle of universal jurisdiction has been initiated pursuant to a request from the public prosecutor. Although the latter is an independent organ, it is governed by instructions and circulars that are often not public. In this sense, the approach of the public prosecutor to the exercise of universal jurisdiction has varied a great deal over the time. Lately, the prosecutor’s office has generally rejected claims based on the principle of universal jurisdiction.
62. With regard to the principle *aut dedere aut judicare*, it must be recalled that **a judicial order to extradite a person is not binding upon the government and the decisions of the latter on the issue are not subjected to any possible appeal**, unless for the so-called “Euro-order”. In this context, the executive plays a crucial role and may disregard a judicial decision relating to extradition.
63. Further, **Spanish legislation on extradition, apart from the case of the so-called “Euro-order”, applies the principle of double incrimination**, meaning that the crime for which extradition is requested must be codified as a criminal offence both in Spain and in the requesting State. Further, in order to be considered an extraditable offence, a penalty of no less than one year of deprivation of liberty must be provided for the relevant crime. **Art. 4, para. 4, of the Law on Passive Extradition**

establishes that extradition will not be granted unless criminal responsibility is prescribed according to Spanish law and to the legislation of the requesting State. Given the already described<sup>44</sup> pitfalls of Spanish law relating to the statute of limitations applicable to enforced disappearance, this may undermine the concession of extradition requests. This actually already occurred.<sup>45</sup>

64. To answer to **question No. 8 of the LOIS**, Art. 117, para. 5, of the Spanish Constitution establishes that military jurisdiction is applicable only to in-service crimes and under the state of siege. Para. 6 of the same provision prohibits “exceptional” courts. Nevertheless, **no provision of the Spanish Military Criminal Code expressly establishes that enforced disappearance can under any circumstance be regarded as an in-service crime.**<sup>46</sup>

### Recommendations

Amend domestic provisions that unduly restrict the exercise of universal jurisdiction by Spanish tribunals. In particular, make sure that Spanish tribunals have the competence to judge alleged perpetrators of enforced disappearance, whether or not it is qualified as a crime against humanity, who are found in any territory under Spanish jurisdiction. Amend in particular provisions that require to show the existence of a “relevant link to Spain” in order for Spanish tribunals to exercise universal jurisdiction.

Ensure that decisions of judicial authorities, especially those relating to the exercise of universal jurisdiction, are adopted in a fully independent manner, and grounded on exclusively legal considerations, without any political interference.

Ensure that in cases of passive extradition the government is not in a position to exercise undue pressures on the issuing of judicial decisions, and that double incrimination is not requested any longer.

Adopt all necessary measures to amend or derogate from paras. 2 and 3 of Art. 7 of the Organic Law on the Cooperation with the ICC, ensuring that the principle of complementarity as enshrined in the Rome Statute and the obligations stemming from Arts. 9, para. 2, and 11, para. 1, of the Convention are adequately applied.

Expressly establish under domestic legislation that no privileges, immunities or special exemptions shall be admitted in trials against persons allegedly responsible for enforced disappearance.

Explicitly provide in the Spanish legislation that enforced disappearances can never be considered as

<sup>44</sup> *Supra* paras. 48-53.

<sup>45</sup> In 2007 Argentina filed an extradition request with regard to former President María Estela Martínez de Perón due to her alleged criminal responsibility for unlawful detentions and enforced disappearances committed by paramilitary forces between 1974 and 1976. The Second Section of the Criminal Chamber of the National High Court (*Audiencia Nacional*) rejected the extradition request, considering that the crimes for which extradition was being requested could not be qualified as crimes against humanity and, as such, should be considered prescribed.

<sup>46</sup> WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para. 62 (l).

an in-service crime and that military or other special courts have no jurisdiction on enforced disappearance.

**Art. 12 – Obligation to Investigate**

65. Currently in Spain the thorough and impartial investigation of thousands of cases of enforced disappearances commenced during the Civil War and under the Franco regime, and the prosecution and sanction of those responsible face insurmountable obstacles, including Law 46/1977, of 15 October, of Amnesty.
66. Notwithstanding the wish of the State party to limit the scope of its report, it is necessary to reaffirm that the obligation to investigate enshrined in **Art. 12 must be read in conjunction with Arts. 8 and 24, para. 6, of the Convention that respectively establish the continuous (or permanent) nature of the offence and the obligation for States parties to continue the investigation until the fate of the disappeared person has been clarified.** Spain is in flagrant breach of these obligations and, even after the ratification of the Convention, it did not undertake any meaningful measure to fulfill its international obligations and to eliminate existing obstacles in this respect.
67. On 14 December 2006, victims, relatives and associations promoting historical memory in Spain submitted a complaint to the National High Court (*Audiencia Nacional*) alleging the commission of crimes against humanity during the Civil War and under the Franco regime, denouncing 114,266 cases of enforced disappearance. In November 2008, **the National High Court affirmed its lack of competence over these cases, which were therefore taken up by local courts. The latter have been demonstrating a trend of systematic dismissal of these cases, without undertaking any measure in view of a potential investigation on the alleged facts.** As anticipated, on 27 February 2012, the Supreme Tribunal issued judgment No. 101/2012, finding several reasons that would prevent Spanish judges from investigating on the crimes committed during the Civil War and under the Franco regime. In particular, **the Supreme Tribunal affirmed that the offences perpetrated between 1936 and 1951 could not be qualified as crimes against humanity, and as such, their prosecution would be time-barred.** Further, the Supreme Tribunal held that **Spanish judges would not be competent due to obstacles existing in domestic legislation, such as the death of those accused of the crimes concerned, and the 1977 Amnesty Law.** The Supreme Tribunal's judgment was issued after the entry into force for Spain of the Convention and it openly breaches the international obligations undertaken by the State.
68. The findings of the Supreme Tribunal are now taken as a reference by local courts to dismiss pending cases related to crimes allegedly committed during the Civil War and under the Franco regime. The 1977 Amnesty Law is being consistently used to prevent any investigation and criminal proceedings over crimes committed between 1936 and 1951 from taking place. **This is in breach of applicable international law, also taking into account the fact that a State cannot invoke the provisions of**

**its internal law as justification for its failure to perform a treaty** (Art. 27 of the Vienna Convention on the Law of Treaties). In this sense, **the 1977 Amnesty Law has been considered incompatible with international human rights law by various international mechanisms that unanimously called on Spain to ensure that crimes under international law, including torture and enforced disappearance, are not subjected to amnesty provisions.**<sup>47</sup>

69. Furthermore, Art. 12, para. 1, of the Convention imposes on the State the obligation to ensure that, among others, persons participating in the investigation of an enforced disappearance are protected against all ill-treatment or intimidation.
70. Taking into account **question No. 9 of the LOIS**, it must be underlined that instances of interference – at times amounting to intimidation – with regard to attempts to investigate cases of enforced disappearance commenced during the Civil War or under the Franco regime have been registered. A notable example is the case of Judge Baltasar Garzón in connection with his attempt to open an investigation on enforced disappearances commenced between 1936 and 1951. He was accused of violating the rules of criminal procedure because of his pretension to derogate from the 1977 Amnesty Law, and in 2009 the Supreme Tribunal admitted a complaint filed against him by the “trade union” *Manos Limpias*, where he was accused of prevarication for having overstepped his competences. Two subsequent similar complaints were also admitted. Under Spanish applicable law, the offence of prevarication may be punished with disqualification from office for between 12 and 15 years. During the proceedings, Judge Garzón was suspended from his functions. Although in 2012 he was eventually acquitted for these specific charges, various international human rights mechanisms declared his prosecution on these grounds incompatible with international human rights law. In particular, the Special Rapporteur on the Independence of Judges and Lawyers and the WGEID issued a joint statement affirming that it was “regrettable that Judge Garzón could be punished for opening an investigation which is in line with Spain’s obligations to investigate human rights violations in accordance with international law principles. [...] supposed errors in judicial decisions should not be a reason for the removal of a judge and, even less, for a criminal proceeding to be launched. [...] autonomy in the interpretation of the law is a fundamental element in the role of a judge and for progress in human rights”.<sup>48</sup> It is indisputable that **what happened to Judge Garzón has the consequence to discourage other prosecutors who may be willing to open investigations over enforced disappearances commenced during the Civil War and under the Franco regime and who would be willing to implement the recommendations issued by international human rights mechanisms.** This situation represents a form of **indirect intimidation that prevents prosecutors from complying with their obligation to investigate**, prosecute and sanction those responsible for enforced disappearance.

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<sup>47</sup> CAT, *Concluding Observations on Spain*, *supra* note 28, para. 21; Human Rights Committee (HRC), *Concluding Observations on Spain*, doc. CCPR/C/ESP/CO/5 of 31 October 2008, para. 9; Report on Spain of the Working Group in the context of the Universal Periodic Review, doc. A/HRC/15/6 of 16 June 2010, para. 86.26; and, in general, WGEID, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, *supra* note 5, para. 62 (i).

<sup>48</sup> Available at: <http://www.un.org/apps/news/story.asp?NewsID=41178#.UiodR8Z3aDo>.

## Recommendations

Adopt all necessary measures, including of legislative nature, to ensure that enforced disappearances are not subjected to any amnesty law, in particular derogating from the provisions of the 1977 Amnesty Law.

Adopt all necessary measures to ensure that all national authorities, including the judiciary, recognize that crimes against humanity are imprescriptible.

Adopt all necessary steps to ensure the internal independence of the judiciary, and guarantee that measures such as removal or transfer of magistrates are not used to hinder the investigation, prosecution and sanction of enforced disappearance. In particular, Spain must ensure by all means the autonomy of judges in the interpretation of the law and guarantee that supposed mistakes in judicial decisions are not considered *per se* a reason for the removal of a judge and, even less, for instituting criminal proceedings against him or her.

### ***Arts. 13 and 16– Extradition and Non refoulement***

71. Art. 13 of the Convention requires States parties to establish that for the purposes of extradition enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence, or as an offence inspired by political motives. Art. 1 of Law 4/1985, of 24 March, on Passive Extradition establishes that “acts of terrorism, crimes against humanity as defined in the Convention for the Prevention and Suppression of the Crime of Genocide [...] and attacks against the life of a Head of State or of members of his or her family will not be regarded as political offences”. This **definition is incomplete and does not expressly encompass enforced disappearance**. This situation is further aggravated by the fact that **various extradition treaties concluded by Spain reproduce the wording of Art. 1 of Law 4/1985, thus not encompassing expressly enforced disappearance either**.
72. As already pointed out,<sup>49</sup> Spanish legislation on Passive Extradition requires double incrimination, and the lack of an adequate codification of enforced disappearance in the Spanish legal framework represents an additional obstacle.
73. It is further noteworthy that although Art. 13, para. 3, of the Convention requires that States parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded by them, **Spain failed to include this express mention in bilateral agreements concluded after the entry into force of the Convention**.<sup>50</sup>
74. To answer to **question No. 13 of the LOIS**, at present **there are no bilateral extradition agreements**

<sup>49</sup> *Supra* para. 63.

<sup>50</sup> See Bilateral Treaty on Extradition between Spain and Kazakhstan, 21 November 2012 and in force since 16 July 2013.

that expressly envisage the possibility to reject an extradition request where there are substantial grounds for believing that the person concerned would be in danger of being subjected to enforced disappearance, although some treaties provide for this possibility when the person would be at risk of torture or other inhuman or degrading treatment. If, on the one hand, the lack of an explicit mention to enforced disappearance could be understandable in the case of treaties concluded before the entry into force of the Convention for Spain, **it must be mentioned that also treaties concluded by Spain after the entry into force of the Convention do not expressly mention the danger of being subjected to an enforced disappearance among the reasons for not extraditing a person.**<sup>51</sup>

75. To answer to questions **No. 12, 14 and 15 of the LOIS TRIAL** wishes to recall the observations formulated on the issue of the application of the principle of *non refoulement* by Spanish authorities, among others, by the Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (“Special Rapporteur on Human Rights while Countering Terrorism”) after his visit to Spain,<sup>52</sup> the Commissioner of Human Rights of the Council of Europe,<sup>53</sup> the Human Rights Committee,<sup>54</sup> and the Committee against Torture.<sup>55</sup> The latter expressed particular concern because of some provisions contained in the **Law on the Right of Asylum and Subsidiary Protection, adopted in October 2009**. This Law contains a clause on exceptions to the prohibition of *refoulement* contained in Art. 33, para. 2, of the 1951 Convention relating to the Status of Refugees. Under the said Law, **applications can be rejected through accelerated procedures, even at the border, without a proper assessment of each application and of every possible ground for inclusion having been carried out beforehand**. International human rights mechanisms further called on Spain to investigate and establish the responsibility of **Spanish agents involved in the programme of “extraordinary renditions”**, given that there are credible allegations that some Spanish airports were used since 2002 for the transfer of prisoners under the said programme. It must be further reported that the **incompatibility with applicable international law of some of the provisions of Law 12/2009, of 30 October, on the Rights to Asylum and Subsidiary Protection, is the subject of applications currently pending before the European Court of Human Rights.**<sup>56</sup> In one case, the latter **ordered to Spain the adoption of interim measures**, considering that the order of expulsion issued by Spanish authorities and confirmed by the National High Court (*Audiencia Nacional*) in virtue of the said legislation exposes the applicant to the risk of being subjected to torture and other forms of ill-treatment.<sup>57</sup>

<sup>51</sup> *Ibid.* Notably, in the same treaty it is not established that enforced disappearance will not be considered a political offence.

<sup>52</sup> Special Rapporteur on Human Rights while Countering Terrorism, *Report on the Mission to Spain*, *supra* note 30, paras. 39-43 and 64-65.

<sup>53</sup> Commissioner for Human Rights of the Council of Europe, *Report on the Mission to Spain*, doc. CommDH(2005)8 of 9 November 2005, para. 86.

<sup>54</sup> HRC, *Concluding Observations on Spain*, *supra* note 46, para. 16.

<sup>55</sup> CAT, *Concluding Observations on Spain*, *supra* note 28, paras. 14-15.

<sup>56</sup> ECtHR, *Case S.E. v. Spain*, application No. 4982/12 of 25 January 2012.

<sup>57</sup> The adoption of interim measures in the case *S.E. v. Spain* was ordered on 26 January 2012.

## Recommendations

Amend Art. 1 of the Law on Passive Extradition, establishing that enforced disappearance shall not be regarded as a political offence, and include this mention in all future extradition treaties.

Ensure that the lack of an autonomous codification of enforced disappearance as a separate offence in domestic legislation does not represent an insurmountable obstacle to extradition in view of the principle of double incrimination.

Include enforced disappearance among extraditable offences in any future extradition treaty concluded by Spain.

Ensure that all new extradition treaties concluded by Spain expressly mention that the State shall not extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

Ensure that under no circumstances diplomatic guarantees are used as a safeguard against enforced disappearance where there are substantial grounds for believing that a person would be in danger of being subjected to enforced disappearance upon return.

Conduct a thorough, effective, independent and impartial investigation on the allegations that some Spanish airports were used since 2002 for the transfer of prisoners under the “extraordinary renditions programme”, and ensure that the results of such investigation are made public and that those responsible are judged and sanctioned.

Review the application of the exclusion clauses established by Law 12/2009, of 30 October, on the Rights to Asylum and Subsidiary Protection to ensure that in no case may the principle of *non refoulement* be infringed

## Arts. 14 and 15 – Legal Assistance and International Cooperation

76. To answer to **question No. 11 of the LOIS**, it must be reported that **recent events disclose a violation by the State party of its obligations pursuant to Arts. 14 and 15 of the Convention**. Given the above-described situation of impunity of those responsible for crimes, including enforced disappearances, committed during the Civil War or under the Franco regime,<sup>58</sup> **Argentine tribunals declared to be willing to exercise universal jurisdiction over complaints concerning genocide and crimes against humanity committed between 1936 and 1977.**<sup>59</sup> Against this background, **Argentine judicial authorities addressed two formal requests to Spain on whether the latter is**

<sup>58</sup> *Supra* paras. 65-70.

<sup>59</sup> On 14 April 2010 a complaint for “genocide and/or crimes against humanity committed in Spain between 17 July 1936 and 15 June 1977” was filed before the *Juzgado Nacional en lo Criminal y Correccional Federal No. 1 de Buenos Aires*.



investigating the said crimes, further demanding legal assistance in connection with the said criminal proceedings.<sup>60</sup> The Spanish State General Prosecutor's Office affirmed that those crimes are being investigated and that Spain would have "primacy" over Argentina to do so. This does not seem to mirror the reality: those crimes are not being investigated in Spain and, furthermore, under international applicable law there would be no such thing as primacy of one State over the other to conduct the investigation.

77. The failure by Spain to provide the information requested from the Argentinean judge Servini de Cubría is contrary to Art. 14, para. 1, of the Convention. The same holds true for the suspension, requested by the Ministry of Foreign Affairs and Cooperation, of the testimonies that should have been taken by the Argentine judge through video-conference from the Consulate in Madrid and that were scheduled on 8, 9 and 10 May 2013.<sup>61</sup>
78. Furthermore, on 10 September 2013 a team of forensic experts from the University of the Basque country and the Aranzadi Society of Sciences published a report called "*Meheris. The Possible Hope. Common Graves and the First Saharawi Disappeared Persons Identified*".<sup>62</sup> The report documents the forensic examination, including DNA matching, carried out by Spanish experts in the area of Fadret Leguiaa, near to Amgala, in Western Sahara, in the territory under the supervision of the United Nations Mission for the Referendum in Western Sahara (MINURSO). The work conducted by experts enabled the identification of the mortal remains of 8 people, including two minors, who were registered as disappeared since 1976. Notably, the identified people were **Spanish citizens** (two identity documents issued by Spain were found in the site).<sup>63</sup> It is therefore of the utmost importance that, pursuant to Art. 15 of the Convention, **Spain affords the greatest measures of assistance to ensure the preservation and restitution of the mortal remains of Spanish citizens recently located and identified in the area of Fadret Leguiaa, near Amgala, in Western Sahara, and establishes close cooperation with Morocco<sup>64</sup> to guarantee the search, localization, exhumation, and return of the mortal remains of disappeared people that may be located in the existing common graves in Western Sahara and in the territory under the jurisdiction of Morocco.**<sup>65</sup>

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<sup>60</sup> A first formal request for information was submitted on 14 October 2010 and a second one on 13 December 2011.

<sup>61</sup> The Ministry of Foreign Affairs and Cooperation issued a *note verbale* to the Argentine Ambassador in Spain, affirming that taking victims' testimonies through video-conference would be contrary to the Extradition Treaty between Spain and Argentina.

<sup>62</sup> The integral version (in Spanish) is available at: [http://publicaciones.hegoa.ehu.es/assets/pdfs/297/Meheris\\_La\\_esperanza\\_posible.pdf?1378901411](http://publicaciones.hegoa.ehu.es/assets/pdfs/297/Meheris_La_esperanza_posible.pdf?1378901411). See also: <http://www.amnesty.org/en/library/asset/MDE29/011/2013/en/9e614160-ea86-4791-b421-36c030961022/mde290112013en.html>.

<sup>63</sup> Among the personal belongings found during the forensic examination conducted in June 2013, two Spanish identity documents were discovered and pertained to Mohamed Moulud Mohamed Lamin (DNI A-4520032) and Mohamed Abdalahe Ramdan (DNI A-4131099), registered as disappeared since 12 February 1976. Other Spanish documents with the name of Salama Mohamed Ali Sidahmed Elkarcha were found.

<sup>64</sup> Morocco is a State party to the Convention since 14 May 2013.

<sup>65</sup> There is evidence about the existence of other common graves in the territory under the jurisdiction of Morocco (near the former clandestine detention facilities of Kalaat M'gouna and Agdez, in Lemsayed, and in the area of El Aaiún, where the mortal remains of disappeared people may be found. In this sense, see Beristain, González, *El Oasis de la memoria*, Bilbao, 2012. [http://publicaciones.hegoa.ehu.es/assets/pdfs/281/TOMO\\_1.pdf?1355488794](http://publicaciones.hegoa.ehu.es/assets/pdfs/281/TOMO_1.pdf?1355488794), pp. 186-209; and WGEID, *Report on the Visit to Morocco*, doc. A/HRC/13/31/Add.1 of 9 February 2010, paras. 41-44 y 106.

## Recommendations

Remove all obstacles to legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at Spain's disposal that is necessary for the proceedings. In particular, ensure that Judge Servini de Cubría obtains without delay the information that has already been repeatedly requested and that victims' testimonies and declarations are collected without further delay through video-conference.

Ensure that the legal assistance offered by Spain in connection with criminal proceedings brought in respect of an offence of enforced disappearance is not conditioned to the previous investigation of the crime by Spanish authorities.

Afford the greatest measures of assistance to ensure the preservation and restitution of the mortal remains of Spanish citizens recently located and identified in the area of Fadret Leguiaa, near Amgala, in Western Sahara, and establish close cooperation with Morocco to guarantee the search, localization, exhumation, and return of the mortal remains of disappeared people that may be located in the existing common graves in Western Sahara and in the territory under the jurisdiction of Morocco.

### III. Measures to Prevent Enforced Disappearances (Arts. 17-23)

#### ***Arts. 17, 18, 20, and 21 – Prevention of Enforced Disappearance and Persons Deprived of their Liberty, Right to Access to Information on Persons Deprived of their Liberty and Limitations, and Release***

79. Art. 17, para. 1, of the Convention establishes that no one shall be held in secret detention. This provision was included in the treaty to make it clear that States must not only codify and sanction the offence of enforced disappearance under their domestic legislation, but they **must also expressly prohibit secret detention**. Spanish legislation **does not include such explicit prohibition and the offence is not codified in accordance with applicable international law**.
80. To answer to **question No. 16 of the LOIS**, the **existing regime on incommunicado detention applicable to those accused of offences related to terrorism and armed groups is contrary to the Convention and has been criticized and held incompatible with international human rights law by several international mechanisms**, including the Committee against Torture,<sup>66</sup> the Special Rapporteur on Human Rights and Terrorism,<sup>67</sup> the Human Rights Committee,<sup>68</sup> the Universal Periodic

<sup>66</sup> CAT, *Concluding Observations on Spain*, *supra* note 28, para. 12.

<sup>67</sup> Special Rapporteur on Human Rights while Countering Terrorism, *Report on the Mission to Spain*, *supra* note 30, paras. 15, 31-32, 38 and 62.

<sup>68</sup> HRC, *Concluding Observations on Spain*, *supra* note 46, para. 14.

Review,<sup>69</sup> and the European Committee for the Prevention of Torture (“CPT”).<sup>70</sup>

81. Considering question **No. 17 of the LOIS** relating to the registries of persons deprived of their liberty, it is worth recalling that, after visiting the country, **the CPT denounced that custody registries are not regularly kept and duly filled, both with regard to detainees held under incommunicado regime and other detainees in general:** “*as was the case in the past, the custody registers examined by the CPT’s delegation at Calle Guzman el Bueno for the period February 2010 to April 2011 lacked most of the details required. In particular, signatures by Guardia Civil officers responsible for a movement or an event pertaining to a detained person were missing in the majority of the cases examined; transfers and movements were also not recorded and there were no entries recorded at all for lengthy periods of time; no references were made to the provision of food, water and access to toilets; even notable incidents appeared not to have been recorded, such as the hospitalisation of one person on 3 March 2011*”.<sup>71</sup> The CPT added that “The CPT’s delegation found that *in several law enforcement establishments, the registers were not filled out properly. For example, in Puente de Vallecas National Police Station in Madrid, the times of apprehension and placement in a detention cell were not recorded accurately. Further, the records did not state what happened to a person after they had spent 72 hours in detention. The CPT recommends that the necessary steps be taken to ensure that all custody records are diligently filled out*”.<sup>72</sup> **This situation amounts to an open breach of Art. 17, para. 3, of the Convention.**
82. With regard to **question No. 18 of the LOIS**, the above-mentioned Art. 55, para. 2,<sup>73</sup> of the Spanish Constitution allows, in cases related to the investigation on terrorist activities and armed groups, the suspension of the enjoyment of the guarantees enshrined in Art. 17, para. 2, of the Constitution concerning the limitation of the duration of preventive custody and the obligation to either free the person deprived of his or her liberty, or to bring him or her before a judicial authority within 72 hours. This possibility seems to enable a significant deviation from the provisions of Organic Law 6/1984, of 24 May, regulating the *habeas corpus* procedure, which establishes that any person who has unlawfully been detained has the right to be immediately brought before a competent judicial authority. The possibility to derogate from the 72-hour limit to either free or bring a detained person before a judicial authority is hardly compatible with Art. 17, para. 2 (f), of the Convention. Additionally, the Committee against Torture observed with concern that “**the right to apply for *habeas corpus* is not explicitly provided for in the list of rights set out in article 520 of the Criminal Procedure Act**”<sup>74</sup> and recommended to Spain to “promptly amend article 520, paragraph 4, of the Criminal Procedure Act, in order to make the right to legal counsel more effective. Furthermore, the Committee — sharing the concern of the Ombudsman in this regard — encourages the State party to carry out a further

<sup>69</sup> Report on Spain of the Working Group in the context of the Universal Periodic Review, *supra* note 46, paras. 87.4-87-6.

<sup>70</sup> European Committee for the Prevention of Torture (CPT), *Report on the Mission to Spain*, doc. CPTInf(2013)6 of 30 April 2013, available at <http://www.cpt.coe.int/documents/esp/2013-06-inf-eng.htm>, para. 13. See, in general, paras. 11-29 of the report.

<sup>71</sup> *Ibid.*, para. 26.

<sup>72</sup> *Ibid.*, para. 40 (emphasis added, bold in the original text).

<sup>73</sup> *Supra* para. 23.

<sup>74</sup> CAT, *Concluding Observations on Spain*, *supra* note 28, para. 10 (emphasis is added).

amendment to article 520 of the Criminal Procedure Act, to ensure that at the crucial stage of detention, when detainees are read their rights, these rights include the right to ask to be brought immediately before a judge".<sup>75</sup>

83. Reference must also be made to special detention facilities for foreigners (*Centros de Internamiento de Extranjeros*),<sup>76</sup> pointing out that access to information regarding people held in these centres is often difficult. Relatives, legal representatives or counsels and NGOs encounter significant obstacles in accessing information on persons deprived of their liberty in these detention facilities. Furthermore, the manner in which people held in these centres are released once the 60-day term to free them expires exposes them to several risks.<sup>77</sup> In this sense, the Committee on the Elimination of Racial Discrimination (CERD) expressed its concern about "*situation of migrants who, after spending the 60 days stipulated by law in a migrant holding centre, are released pending expulsion proceedings, which makes them more vulnerable to abuse and discrimination*". The Committee is also concerned by reports that there are no regulations governing the way in which migrant holding centres operate. As a result, the living conditions and *access to information, legal aid and medical care, as well as access to such centres by non-governmental organizations offering support to inmates, vary from one centre to the next*".<sup>78</sup> This situation does not seem in line with the obligations set forth in Arts. 18 and 21 of the Convention.

### Recommendations

Codify enforced disappearance as a separate offence under Spanish criminal law, adopt a definition in line with Art. 2 of the Convention, making it punishable by appropriate penalties which take into account its extreme seriousness.

Amend the definition of enforced disappearance as a crime against humanity currently provided for under Art. 607 bis of the Criminal Code, making sure that it is in line with the Rome Statute, interpreted in the light of Art. 2 of the Convention.

Amend Art. 607 bis of the Criminal Code so that the belonging of a victim to a group or category which is persecuted for political, racial, national, ethnic, cultural or religious reasons or for reasons of gender or disability or other motives universally recognized as unacceptable under international law, is not required for all crimes against humanity, apart from persecution, where it is part of the very definition of the crime.

Expressly establish that official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility for crimes against humanity, nor shall it, in and of itself, constitute a ground for reduction of sentence.

<sup>75</sup> *Ibid.*

<sup>76</sup> Report submitted by Spain, *supra* note 1, paras. 156 and 163.

<sup>77</sup> See also Commissioner for Human Rights of the Council of Europe, *Report on the Mission to Spain*, *supra* note 52, paras. 79-86.

<sup>78</sup> CERD, *Concluding Observations on Spain*, doc. CERD/C/ESP/CO/18-20 of 11 March 2011, para. 13.

Expressly establish under domestic legislation that orders to commit crimes against humanity are manifestly unlawful.

Explicitly provide under Spanish domestic legislation that persons who have or are alleged to have committed crimes against humanity shall not benefit from any special amnesty or similar measures that might have the effect of exempting them from any criminal proceeding or sanction.

Expressly establish under domestic legislation that persons who have or are alleged to have committed crimes against humanity shall never be tried by military, or other similar special courts.

#### IV. Reparation and Measures to Protect Children from Enforced Disappearance (Arts. 24 and 25)

##### *Art. 24 – Victims of Enforced Disappearance and their Rights*

###### a) The Notion of Victim of Enforced Disappearance

84. As already mentioned several times in this report,<sup>79</sup> **Spanish legislation does not codify the separate offence of enforced disappearance. It is thus evident the impossibility to properly define who are the victims of an offence that does not exist as such in the Criminal Code.**
85. Although Spain refers to Law 35/1995, of 11 December, on Aid and Assistance to the Victims of Violent Crime and Offences against Sexual Rights,<sup>80</sup> and argues that victims of enforced disappearance could benefit from this law, **by no means the latter could ever be applied to victims – direct or indirect – of enforced disappearance.** The mentioned law aims at establishing a system of public aid for **direct and indirect victims of violent offences resulted in the death, or grave physical harm, or grave harm to mental or physical health, committed in Spain** (Art. 1). Art. 2, para. 2, of the mentioned law establishes that those who *suffered grave physical harm or grave harm to their mental or physical health as a direct consequence of the offence* will be regarded as direct victims.
86. Although the reference to “indirect victims” contained in Art. 1 of the law is commendable, **it is self-evident that this definition of victim does not comply with Art. 24, para. 1, of the Convention, and would hardly ever be applicable to a direct victim of enforced disappearance, being the impossibility to establish with certainty whether the victim died, suffered grave physical or mental harms a distinctive characteristic of enforced disappearance and a constitutive element of the offence.**
87. Moreover, the notion of “direct victim” contained in Law 35/1995 **is further restricted, in a manner that is absolutely incompatible with applicable international law, by Art. 2, para. 1, of the Law that establishes that access to the aid system provided for is reserved to “those who, when the**

<sup>79</sup> *Supra* paras. 26–44.

<sup>80</sup> Report submitted by Spain, *supra* note 1, paras. 243 and 247.

offence was committed, were Spanish or European Union (EU) nationals or those who, even without being Spanish or EU nationals, habitually reside in Spain or are nationals of a State that recognizes similar measures of aid to Spanish nationals in its territory”. None of these conditions is mentioned in Art. 24, para. 1, of the Convention, which does not establish any nationality, habitual residence or reciprocity requirement to qualify a person as victim of enforced disappearance.

88. Also the notion of “indirect victims” regulated under Art. 2, para. 3, of Law 35/1995 is not applicable to enforced disappearance cases, because indirect victims could have access to the aid measures provided for “only if the direct victim died, referring to the precise date of death”. It is again self-evident that relatives of disappeared people are unfortunately unable to establish with certainty the fate of their loved ones and even less the precise date of the supposed death. As long as an enforced disappearance continues, the lack of knowledge of the fate or whereabouts of the victim is precisely a constitutive element of the offence. Moreover, international jurisprudence holds that an enforced disappearance must never be dealt with as a direct death.<sup>81</sup>
89. Notably, Law 52/2007, of 26 December, on Historical Memory<sup>82</sup> does not expressly define the notion of “victim” of gross human rights violations, including enforced disappearance, committed during the Civil War and under the Franco regime. Despite the fact that certain provisions of the said law refer to “direct descendants of people violently disappeared during the Civil War or the subsequent political repression and whose fate is unknown” (Art. 11, para. 1), this cannot be considered enough to meet the obligation established under Art. 24, para. 1, of the Convention. First, this law has a limited temporal scope and would not extend to potential victims – direct or indirect – of enforced disappearances occurred after the end of Franco regime. Second, the phrase “direct descendants” is arguably narrower than “any individual who has suffered harm as the direct result of an enforced disappearance”.
90. To answer to question No. 22 of the LOIS, it must be stressed that the proposed draft directive on the statute of victim would not resolve the current absence of a definition of the notion of “victim” of enforced disappearance in the Spanish legal framework. The draft directive would be directed at recognizing “especially vulnerable victims” of the offences of abduction and unlawful detention (Arts. 163-167 of the Criminal Code) and crimes against humanity as currently defined by Art. 607 bis of the Criminal Code. As already argued, these offences are not sufficient to address an enforced disappearance as defined under the Convention and consequently also the notion of “victims” of these offences would not necessarily be applicable to victims of enforced disappearance as provided for

<sup>81</sup> See WGEID, *Annual Report for 2012*, doc. A/HRC/22/45 of 14 February 2013, para. 50; CAT, *Concluding Observations on Algeria*, doc. CAT/C/DZA/CO/3 of 26 May 2008, para. 13; HRC, *Concluding Observations on Bosnia and Herzegovina*, doc. CCPR/C/BIH/CO/2 of 2 November 2012, para. 12; *Concluding Observations on Algeria*, doc. CCPR/C/DZA/CO/3 of 12 December 2007, para. 13; and views delivered on 28 March 2013 on the case *Prutina et al. v. Bosnia and Herzegovina*, para. 9.6.

<sup>82</sup> Chinchón Álvarez, *La Convención internacional para la protección de todas las personas contra desapariciones forzadas: nunca es tarde si la dicha es buena? Examen general y perspectivas en España tras la aprobación de la “Ley de Memoria Histórica”*, in *FORO – Revista de Ciencias Jurídicas y Sociales – Nueva Época*, 2008, pp. 13-55 (available, in Spanish, at: <http://revistas.ucm.es/index.php/FORO/article/view/FORO0808120013A/13556>).

under Art. 24, para. 1, of the Convention.

b) The Right to Know the Truth

91. **The Spanish legislation does not expressly recognize the right to know the truth as defined in Art. 24, para. 2, of the Convention.** Further, in 2012 (i.e. after the entry into force of the Convention) the Supreme Tribunal pronounced itself emptying of any meaning the provision concerned, by affirming that **“the investigation of truth is something that corresponds to the State, through other organs, such as historians, but not to judges**, who see their activity limited by existing rules of criminal procedure”.<sup>83</sup> Art. 24, para. 2, of the Convention clearly sets forth the right to know the truth “on the progress and results of the investigation” on an enforced disappearance, and the findings of the Supreme Tribunal openly frustrate the international undertakings of the State on this respect. The **Law 52/2007 on Historical Memory does not refer in any provision to the right to know the truth**, rather mentioning the “right to recuperation of personal and family memory”.
92. It must be further mentioned that in many cases concerning enforced disappearances commenced during the Civil War and under the Franco regime, when the cases were transferred to **local courts, the latter did not duly notify the applicants that they were assuming the competence on those cases**. In some instances, the **parties (victims and prosecutors) were not even notified about the dismissal of the cases**. The **lack of notification seriously hinders the rights of access to justice and to know the truth**.

c) Location, Exhumation, Respect and Return of Mortal Remains

93. To partially address question **No. 22 of the LOIS**, it must be pointed out that Arts. 11, 12, 13 and 14 of the Law on Historical Memory provide for a number of measures to foster the localization, exhumation and identification of “people violently disappeared during the Civil War or the subsequent political repression and whose fate is unknown”. However, these provisions would not be applicable in cases of enforced disappearance commenced after the fall of the Franco regime. Further, **the practice of local courts after the judgment issued in 2012 by the Supreme Tribunal has been characterized by various instances where the cases were dismissed without adopting any measure to locate, identify and return the mortal remains to the families**. For instance, in dismissing a claim, Tribunal No. 10 of Palma de Mallorca affirmed that **“the purpose of criminal proceedings is not investigation of the disappearance of thousands of people or the identification of the victims of the repression. Nor it is the localization of common graves or burial sites where the mortal remains of those people could be found or their return to the families”**.<sup>84</sup> This openly violates Art. 24, para. 3, of the Convention.<sup>85</sup>

<sup>83</sup> Supreme Tribunal, judgment No. 101/2012 of 27 February 2012, Fundamento de Derecho Primero.

<sup>84</sup> Auto de archivo del Juzgado N° 10 de Palma de Mallorca, DP 1169/2009, p. 2.

<sup>85</sup> With regard to applicable standards to exhumation and identification of mortal remains of victims of gross human rights violations see, among others: Advisory Committee of the Human Rights Council, *Progress Report on Best Practices on the Matter of Missing Persons*, doc. A/HRC/14/42 of 22 March 2010; and *Report on Best Practices on the Matter of Missing Persons*, doc. A/HRC/AC/6/2 of 22 December 2010.



d) The Right to Compensation and to Integral Reparation

94. To answer to **question No. 21 of the LOIS**, it must be highlighted that the **“compensation” provided for under Art. 110 of the Criminal Code must be paid by the person responsible for the crime** (Art. 109, para. 1, of the Criminal Code). The person who suffered the damage may opt for civil proceedings in view of obtaining compensation. In light of the deficiencies of the existing Spanish legal framework with regard to the codification of enforced disappearance and the notion of “victim” of such crime, **Art. 110 does not offer sufficient guarantees to offer to victims of enforced disappearance reparation and prompt, fair and adequate compensation as set forth by Art. 24, paras. 4 and 5, of the Convention**. Moreover, various international human rights mechanisms have clarified that in cases of gross human rights violations, including enforced disappearance, access to **redress must not depend on the conclusion of criminal proceedings and on the victim pursuing judicial remedies**.<sup>86</sup> Further, international mechanisms concur that **monetary compensation is not sufficient redress for victims of gross human rights violations and, in particular, of enforced disappearances**.<sup>87</sup> **Art. 110 of the Spanish Criminal Code does not provide for any form of rehabilitation, or satisfaction or guarantees of non-repetition.**
95. For the reasons explained above, **the system of aid and support established under Law 35/1995<sup>88</sup> cannot be considered an effective measure to implement Art. 24, paras. 4 and 5, of the Convention.**
96. Finally, some of the provisions of the Law of Historical Memory and other legislative measures to which the same law makes direct reference establish a system of social assistance and security for victims of the Civil War and the Franco regime. However, these provisions are not enough either to satisfy the requirements of Art. 24, paras. 4 and 5, of the Convention, because on the one hand, the Law on Historical Memory does not adequately define the victims of enforced disappearance and the measures provided for would not be granted to victims of violations occurred after the end of the Franco regime and, on the other hand, measures of social security cannot replace compensation and reparations.<sup>89</sup>

e) Measures to Regulate the Legal Situation of Disappeared Persons

97. In their current wording, **the provisions of the Spanish Civil Code regulating the “declaration of absence and the declaration of death” do not meet the requirements of Art. 24, para. 6, of the Convention**. In fact, the “declaration of absence” as enshrined in the Spanish Civil Code has a **general scope of application. It has not been conceived to deal with such a complex phenomenon as enforced disappearance and it does not duly address its peculiarities**. Moreover, **after 10 years from the adoption of a declaration of absence, the latter would automatically turn into a**

<sup>86</sup> CAT, *General Comment No. 3*, doc. CAT/C/GC/3 of 13 December 2012, paras. 26-27; and WGEID, *Annual Report for 2012*, *supra* note 80, para. 51.

<sup>87</sup> CAT, *General Comment No. 3*, *supra* note 85, para. 9; and WGEID, *Annual Report for 2012*, *supra* note 80, paras. 53-54 and 56.

<sup>88</sup> *Supra* paras. 85-88.

<sup>89</sup> CAT, *General Comment No. 3*, *supra* note 85, para. 37; and WGEID, *Annual Report for 2012*, *supra* note 80, paras. 50 and 68.



**declaration of death. This would cause that an enforced disappearance is unduly dealt with as a direct death.** Many international human rights mechanisms affirmed that this approach does not respect fundamental human rights,<sup>90</sup> and that “it must be presumed that disappeared persons are alive until their fate is determined with certainty” and that “a disappeared person should not be declared dead without sufficient evidence”.<sup>91</sup>

### Recommendations

Adopt in the domestic legislation a definition of “victim of enforced disappearance” in accordance with Art. 24, para. 1, of the Convention, ensuring that the recognition as “victim” is not made dependent on the person’s nationality or habitual residence and without requiring to know with certainty the date of death of the victim of enforced disappearance. The notion of “indirect victims” must not be limited to direct descendants, but must encompass any individual who has suffered harm as the direct result of an enforced disappearance.

Expressly establish under Spanish legislation the autonomous and non-derogable right to know the truth on the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.

Adopt all necessary measures, including of legislative nature, to effectively guarantee the right to know the truth. In particular, guarantee that authorities, including local courts, promptly notify to applicants, victims and prosecutors that they assumed the competence over specific cases, and offer to the parties the necessary guarantees to formally take part to the proceedings. Furthermore, authorities must notify without delay whenever a case is declared closed.

Establish effective mechanisms to ensure the location, exhumation, identification, respect and return to the family of the mortal remains of disappeared persons who died. Ensure that in the pending proceedings concerning crimes, including enforced disappearances, commenced during the Civil War and under the Franco regime, domestic authorities, and especially local courts, adopt all necessary measures to exhume, identify, respect and return to the families the mortal remains, ensuring that relatives can take part to and be closely associated with, the process, so that exhumation is not a merely administrative act, totally disconnected from justice and truth.

Adopt all necessary measures, including of legislative nature, to ensure that victims of enforced disappearance can realize their right to prompt, fair and adequate compensation, covering material and moral damages. Further, victims – direct and indirect – must have access to measures of reparation that encompass restitution, rehabilitation, satisfaction (including restoration of dignity and reputation), and guarantees of non-repetition.

<sup>90</sup> See, among others, WGEID, *Annual Report for 2008*, doc. A/HRC/10/9 of 6 February 2009, para. 114; and WGEID, *General Comment on the Right to Recognition as a Person before the Law*, 2011, at <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>, paras. 8-11.

<sup>91</sup> Advisory Committee of the Human Rights Council, *Report on the Best Practices in the Matter of Missing Persons*, *supra* note 84, para. 60.

Adopt all necessary measures, including of legislative nature, to establish a process to recognize the legal situation of disappeared people, issuing a certificate “of absence due to enforced disappearance” which allows relatives to manage temporarily the disappeared person’s properties, for as long as the enforced disappearance continues, and to receive due assistance from the State through social allowances. In no case access to compensation and reparation as well as to social allowances should be made conditional upon obtaining a certificate of death of the disappeared person.

***Art. 25 – Special Protection of Children Victims of Enforced Disappearance***

98. To answer to **question No. 23 of the LOIS**, besides the fact that if the victims of an offence are minors this is regarded as an aggravating circumstance in Spanish legislation, **the already described gaps of the Spanish Criminal Code determine that enforced disappearance and wrongful removal of children victims of enforced disappearance are not codified as requested by Art. 25 of the Convention**. The offence of illegal adoption codified under Art. 221 of the Spanish Criminal Code does not cover all the conducts described in Art. 25 of the Convention.
99. Despite attempts in the past years to launch investigations in Spain on allegations concerning the existence during the Civil War and under the Franco regime of a systematic plan to subject to “legalized” disappearance thousands of minors who were sons and daughters of Republican mothers and to subsequently falsify their identity, to date no such investigation has been conducted in Spain and recent decisions issued by the highest judicial authorities of the country seem to erase any possibility in this sense.
100. As already mentioned,<sup>92</sup> given the inactivity of Spanish authorities and the lack of investigation of these cases, Argentine tribunals are seeking to open an investigation invoking the principle of universal jurisdiction. However, **Spanish authorities are not offering the necessary legal assistance to Argentine authorities, nor are they assisting their peers in searching for, identifying and locating the persons concerned**. This is contrary to Art. 25, paras. 2 and 3, of the Convention.
101. Finally, to answer to **question No. 24 of the LOIS**, under Spanish legislation adoption is irrevocable and it may be extinguished only through judicial proceedings when this is requested from the father or mother who, for reasons not attributable to them, did not take part to the procedure. The request must be submitted within two years after the adoption (Art. 180, para. 2, of the Civil Code).

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<sup>92</sup> *Supra* paras. 76-77.

## V. About TRIAL

TRIAL (*Swiss Association against Impunity*) is a Geneva-based NGO established in 2002 and in consultative status with the United Nations Economic and Social Council (ECOSOC). It is apolitical and non-confessional. Among its principal goals is the fight against impunity of perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity, enforced disappearances and acts of torture. TRIAL is a member of the International Coalition against Enforced Disappearances, as well as of the International Coalition for the International Criminal Court, serving as the secretariat of the Swiss Coalition for the International Criminal Court.

TRIAL supports victims of gross human rights violations and their families by filing complaints before international human rights bodies, with over 125 cases submitted by mid-2013. Currently, TRIAL works on cases of gross human rights violations perpetrated in Algeria, Bosnia and Herzegovina, Burundi, Kenya, Libya, Mexico, Nepal and Tunisia.

Moreover, TRIAL also submits reports assessing the respect of human rights in certain countries to United Nations Treaty Bodies and Special Procedures.

TRIAL further files criminal complaints before Swiss courts against individuals suspected of having committed crimes under international law who are present on Swiss territory. TRIAL has been involved before Swiss courts in a number of cases concerning alleged perpetrators of torture and crimes against humanity committed in Afghanistan, Algeria, Sri Lanka, Guatemala, Somalia and Tunisia, and investigates numerous other cases on the ground.

TRIAL has also set up “Trial Watch”, an on-line database that provides information on numerous cases and procedures concerning crimes under international law before national or international tribunals. It contains more than 1,000 profiles, each one of them with a brief explanation of the facts, a summary of the legal procedure, and links to documents, including court decisions, NGOs’ reports, bibliographies, and press articles.

To learn more, visit [www.trial-ch.org](http://www.trial-ch.org)