



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

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Consideration of reports submitted by States parties under article 19 of the Convention

Concluding observations of the Committee against Torture

Spain

1. The Committee against Torture considered the fifth periodic report of Spain (CAT/C/ESP/5) at its 913th and 914th meetings, held on 12 and 13 November 2009 (CAT/C/SR.913 and 914), and adopted the following conclusions and recommendations at its 923rd meeting (CAT/C/SR.923).

A. Introduction

2. The Committee welcomes the fifth periodic report of Spain, submitted in accordance with the Committee's guidelines, and the replies to the list of issues. The Committee also notes with satisfaction the constructive efforts made by the multisectoral delegation to provide information and additional explanations during the discussion of the report.

B. Positive aspects

3. The Committee welcomes the ratification of the following international instruments:

(a) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (4 April 2006);

(b) International Convention for the Protection of All Persons from Enforced Disappearance (24 September 2009);

(c) Convention on the Rights of Persons with Disabilities, and its Optional Protocol (3 December 2007);

(d) Council of Europe Convention on Action against Trafficking in Human Beings (2 April 2009).

4. The Committee notes with satisfaction the efforts being made by the State party to amend its legislation, policies and procedures in order to ensure greater protection of

human rights, particularly the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and in particular:

(a) The adoption of the Historical Memory Act (Act No. 52/2007) on 26 December, which acknowledges and broadens rights, and establishes measures, for those who suffered persecution or violence during the Civil War and the period of dictatorship, including the right to obtain a declaration of redress;

(b) The amendment of article 154 of the Civil Code, explicitly resolving any uncertainties or loopholes that may provide an excuse for using any form of violence or physical punishment against children;

(c) The joint instruction in December 2005, issued by the General Secretary of State and the Police Commissioner-General, together with an information booklet on asylum procedures to be distributed to all persons who arrive in Spain in an irregular manner by sea and are detained in the migrant detention centres in the Canary Islands and Andalucía;

(d) Supreme Court ruling 829/2006, which acquitted Mr. Hamed Abderrahaman Ahmed of the offence of terrorism, on the grounds that the charges relied on interrogations conducted while Mr. Ahmed was detained in Guantanamo, which constituted a “limbo within the legal community as defined by numerous treaties and conventions signed by the international community”;

(e) The adoption of the Human Rights Plan by decision of the Council of Ministers of 12 December 2008;

(f) The adoption of the Plan to Combat Trafficking for the Purposes of Sexual Exploitation, on 12 December 2008, and its follow-up by means of the establishment and development of the Spanish Forum against Trafficking;

(g) The fact that the death penalty has been completely banned since 1995 (the year in which the death penalty in wartime was abolished) and that, in addition, the State party participates actively in international forums to promote a global moratorium on the application of capital punishment.

5. The Committee notes with satisfaction that the State party has issued invitations to various special procedures mechanisms, including the recent invitation to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

6. The Committee appreciates the fact that Spain has not created a parallel justice system to combat terrorism, and notes that the State party has repeatedly acknowledged that the prohibition of torture is absolute and that exceptional circumstances can never be invoked in order to justify torture.

C. Principal subjects of concern and recommendations

1. Definition and offence of torture

7. The Committee notes with satisfaction the amendment of article 174 of the Criminal Code by Organization Act No. 15/2003, which adds the following text to the definition of torture: “... or for any reason based on discrimination of any kind”, which complies with a former recommendation by the Committee. However, notwithstanding the explanation provided by the delegation of the State party, the Committee considers that two important additional elements should be explicitly added to the definition in article 174 of the Criminal Code, to bring this fully into line with article 1 of the Convention: that the act of

torture can also be committed by any “other person acting in an official capacity” and that the purposes of torture may include “intimidating or coercing him or a third person” (art. 1).

The Committee encourages the State party to further align the definition of torture contained in article 174 of the Criminal Code with article 1 of the Convention.

8. The Committee notes that, under article 174 of the Criminal Code, a person guilty of torture “shall be liable to a term of two to six years’ imprisonment if the infringement was a serious one, and a term of one to three years’ imprisonment if it was not”, which does not appear to be in line with article 4, paragraph 2, of the Convention, under which States parties are obliged to punish all acts of torture by appropriate penalties which take into account their grave nature (arts. 1 and 4).

The State party should punish all acts of torture by appropriate penalties which take into account their grave nature, in line with article 4, paragraph 2, of the Convention. In addition, the State party should ensure that in all cases all acts of torture are considered to be of a grave nature, since that is intrinsic and inherent in the very concept of torture.

2. Fundamental safeguards

9. The Committee is concerned at information received from various sources that statements made by detainees held at police stations may be used during proceedings, under certain conditions, and following a change in the case law of the Supreme Court. The Committee takes note, in this regard, of the information provided in paragraph 21 of the State party’s replies to the list of issues, in which it is clearly stated that “according to the Spanish legal system, only evidence given in the court oral proceedings, in the presence of the accused and an attorney of his or her choice, may be taken into account for the purpose of deciding a guilty or not-guilty verdict” (arts. 2 and 15).

The State party — as the State party itself noted in its replies to the list of issues — should ensure respect for the principle that in all cases the crucial stage for giving evidence to be weighed up must be the oral proceedings. This general principle is all the more valid as a safeguard of the principle contained in article 15 of the Convention — that any statement made as a result of torture shall not be invoked as evidence — in those cases in which, regrettably, detainees are interrogated in police stations without the presence of a lawyer of their choice, or where the lawyer is prevented from speaking to the detainee in private (as is the case with the regime of *incommunicado* detention).

10. The Committee notes that under Measure 96 of the Human Rights Plan, in order to better guarantee the detainee’s rights, the Government proposes to amend article 520, paragraph 4, of the Criminal Procedure Act so as to reduce the current maximum time limit of eight hours for ensuring the right to legal counsel. Nevertheless, the Committee notes 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 (art. 2).

The State party should 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 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.

11. The Committee takes note of instruction No. 12/2007 issued by the Secretariat of State for Security, concerning conduct required of the members of the State security forces

to guarantee the rights of persons detained or in police custody. While this is in principle a positive step, the Committee considers that the normative status of this instruction to strengthen guarantees is insufficient (art. 2).

The State party should regulate these matters, which concern fundamental rights such as the right to liberty and to physical integrity, by means of an appropriate regulation, and not merely a decision communicated by a Secretariat of State to its staff.

3. Incommunicado detention

12. The Committee takes note of the steps taken to improve the guarantees of individuals held in incommunicado detention, particularly: (a) the so-called “Garzón Protocol”, which provides for visits by a doctor trusted by the detainee (even though this Protocol has not been applied uniformly); (b) Measure 97 (c) of the Human Rights Plan, which stipulates that an individual held in incommunicado detention may be examined by another doctor affiliated with the public health system, freely appointed by the future national mechanism for the prevention of torture, as well as by a forensic doctor; and (c) Measure 97 (b) which — in accordance with various recommendations by international human rights bodies — provides that the State party shall adopt the necessary legal and technical measures to record, using video-recording or other audiovisual equipment, the entire period that individuals spend in incommunicado detention in police stations. The Committee is also pleased to note the commitment made in Measure 97 (a) to expressly forbid the use of incommunicado detention for minors. Nonetheless, the Committee must reiterate its concern — shared by all relevant regional and international human rights bodies — that the system of incommunicado detention used by the State party for offences involving terrorists or armed gangs, which may last for up to 13 days, undermines the guarantees of the rule of law in respect of ill-treatment and acts of torture. The Committee is especially concerned about the restrictions that incommunicado detention places on the access to and exercise of the fundamental rights and guarantees universally applied to persons deprived of their liberty (art. 2).

The State party must review incommunicado detention with a view to its abolition, and ensure that all persons deprived of their liberty have access to the following fundamental rights of detainees:

- (a) To consult a lawyer of their choice;
- (b) To be examined by a doctor of their choice;
- (c) To have a family member or person of their choice notified of their arrest and current place of detention;
- (d) To meet privately with a lawyer (a right which is currently restricted even in the case of a court-appointed lawyer).

The State party should also implement and strengthen the measures provided for in Measure 97 of the Human Rights Plan; in this respect, it is especially important that the video surveillance system covers all police stations nationwide and is installed in cells and interrogation rooms and is not limited to public areas.

4. Non-refoulement

13. The Committee takes note of the State party’s position that diplomatic guarantees do not contravene the provisions of article 3 of the Convention – if, for example, additional supervisory mechanisms are established which are expressly accepted and observed by the country concerned. In this regard, the Committee wishes to reiterate its previously stated position, that under no circumstances must diplomatic guarantees be used as a safeguard

against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return (art. 3).

If the State party resorts to diplomatic guarantees in any situation other than those excluded under article 3 of the Convention, it must provide in its next report to the Committee information on the number of cases of extradition or expulsion that have been subject to the receipt of diplomatic assurances or guarantees since the consideration of this report; the State party's minimum requirements for such assurances or guarantees; follow-up action taken subsequently in such cases; and the enforceability of the assurances or guarantees given.

14. The Committee takes note of the information provided by the delegation on the allegations that some Spanish airports had been used since 2002 for the transfer of prisoners under the “extraordinary rendition” programme, and also of the State party’s condemnation of the use of such methods and its commitment to investigate and shed light on the allegations (arts. 3 and 12).

The Committee urges the State party to continue to cooperate in the investigations being carried out in this respect by the judicial authorities and to provide the Committee with all relevant information in its next periodic report.

15. The Committee welcomes the adoption, in October 2009, of the Act on the Right of Asylum and Subsidiary Protection, which aims to achieve a common European asylum system that ensures the highest level of protection for refugees and persecuted people. However, it is concerned about the possible use, as grounds for rejecting asylum applications, of the new Act’s clause on exceptions to the prohibition of refoulement contained in article 33, paragraph 2, of the 1951 Convention relating to the Status of Refugees. The Committee is particularly concerned that, under this Act, applications can be rejected under accelerated procedures, even at the border itself, without a proper assessment of each application and of every possible ground for inclusion having been carried out beforehand (art. 3).

The State party must review the application of the exclusion clauses in the new Act to ensure that in no case may the principle of non-refoulement contained in article 3 of the Convention be infringed.

16. The Committee takes note of the bilateral agreements on the assisted return of minors that Spain has signed with Morocco and Senegal. However, the Committee is concerned about the absence of safeguards ensuring the identification of children who may need international protection and may therefore be entitled to use the asylum procedure, in the implementation of these agreements (art. 3).

The State party must ensure that the bilateral agreements on the assisted return of minors signed by Spain contain appropriate safeguards to ensure protection against the repatriation of child victims of trafficking, prostitution and pornography, as well as those who have been involved in conflict or who have fled their country because of a well-founded fear of persecution. The Committee wishes to emphasize that children should be returned to their country of origin only if it is in their best interests.

5. Jurisdiction over acts of torture

17. The Committee recognizes that the State party’s courts have pioneered the application of universal jurisdiction over international crimes, including torture. In this connection, the Committee takes note of a recent legislative amendment, Organization Act No. 1/2009 of 3 November, which establishes conditions for the exercise of such jurisdiction (arts. 5 and 7).

The State party must ensure that this reform will not impede the exercise of its jurisdiction over all acts of torture in accordance with articles 5 and 7 of the Convention and in particular the principle of *aut dedere aut judicare* enshrined in those articles.

6. Training

18. The Committee notes that Measure 103 of the Human Rights Plan provides for the organization of initial and continuing training courses and seminars on the conduct required of all members of the State security forces to guarantee the rights of persons who are detained or held in police custody. The Committee also notes that courses on human rights and the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) are to be included in a continuing education plan as from 2010 (art. 10).

The State party should:

(a) Continue preparing and implementing training programmes to ensure that all civil servants, including law enforcement officials and prison officers, are fully aware of the provisions of the Convention and its Optional Protocol, and that abuse or violations will never be tolerated;

(b) Ensure that all relevant staff receive specific training on how to recognize signs of torture and ill-treatment;

(c) Develop and apply a method for assessing the effectiveness and impact of those training programmes in reducing the number of cases of torture and ill-treatment.

7. Detention conditions

19. While it welcomes the Suicide Prevention Programme established under instruction No. 14/2005 issued by the Directorate-General of Correctional Institutions, which, according to information received, has helped to lower the number of suicides, the Committee still considers the number of suicides and violent deaths both in police custody and in prisons to be high (art. 11).

The State party should continue its efforts to reduce the number of suicides and violent deaths in all places of detention. The Committee also urges the State party to investigate promptly, thoroughly and impartially all deaths of detainees and provide, where appropriate, adequate compensation to the families of the victims.

20. The Committee regrets the scant information provided on measures taken to address the serious concerns expressed by the Ombudsman in his 2009 report on conditions in the centres for minors with behavioural or social problems. In particular, the Committee is concerned about allegations that solitary confinement is practised in many of these centres and that drugs are administered without adequate safeguards (arts. 11 and 12).

The State party should take the necessary steps to ensure humane and dignified conditions in the centres for minors with behavioural or social problems. The State party should also thoroughly investigate all allegations of abuse or ill-treatment committed in these centres.

8. Amnesty Act and the non-applicability of the statute of limitations

21. While it takes note of the State party's comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act, the Committee wishes to reiterate that, bearing in

mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation. The Committee has received various interpretations of article 1, paragraph (c), of the Amnesty Act — which stipulates that amnesty shall not apply to acts that “entailed serious harm to the life or inviolability of persons” — to the effect that this article itself would in any case exclude torture from the offences subject to amnesty (arts. 12, 13 and 14).

The State party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty. In this connection, the Committee encourages the State party to continue to step up its efforts to help the families of victims to find out what happened to the missing persons, to identify them and to have their remains exhumed, if possible. Moreover, the Committee reiterates that, under article 14 of the Convention, the State party must ensure that the victim of an act of torture obtains redress and has an enforceable right to compensation.

22. The Committee is concerned that 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) (arts. 1, 4 and 12).

The State party should ensure that torture is never subject to a statute of limitations.

9. Data on torture and abuse

23. The Committee notes that Measure 102 of the Human Rights Plan provides for the compilation of current data on cases that may have involved violation or infringement of the human rights of persons in police custody. However, the Committee notes that it is currently impossible to provide data on complaints filed during police custody and detention. The Committee welcomes the additional written information provided on this point by the State party, but notes that data on cases of torture may be available but are somewhat imprecise and contradictory, in particular concerning the results of investigations into torture, judicial convictions and penalties imposed (arts. 2, 12 and 13).

The State party should implement Measure 102 of the Human Rights Plan as soon as possible, and ensure that clear and reliable data are compiled on acts of torture and abuse in police custody and in other places of detention. These data must also cover follow-up to allegations of torture and abuse, including the results of investigations held and any judicial convictions and criminal or disciplinary sanctions imposed.

10. Violence against women

24. The Committee welcomes measures taken by the State party to combat gender-based violence, such as Organization Act No. 1/2004 of 28 December on comprehensive protection measures against gender-based violence. However, the Committee remains concerned at reports of an unacceptable number of acts of violence against women, including domestic violence, which sometimes result in murder. In the Committee's view, the extent of this problem in the State party calls for a response that goes beyond legislative provisions and action plans and requires a coordinated, ongoing effort to change the perception of women in society and dispel associated stereotypes (art. 16).

The Committee urges the State party to step up its efforts to make combating violence against women a priority in its political agenda. The Committee further recommends that public awareness-raising campaigns on all forms of violence against women should be broadened.

25. The Committee is concerned about the particularly vulnerable situation of migrant women in an irregular situation who are victims of gender-based violence, given that current legislation requires the police to investigate the status of migrant women who report acts of violence and abuse. In this respect, the Committee notes the existence of a bill to amend Organization Act No. 4/2000 of 11 January on the rights, freedoms and social integration of foreigners in Spain, which aims to encourage foreign women to report instances of gender-based violence and make it possible for foreign women who report such violence to be exempted from administrative liability in respect of their irregular situation (arts. 13 and 16).

The State party should speed up the adoption of the bill to amend Organization Act No. 4/2000, in order to enable foreign women in an irregular situation who are recognized to be victims of gender-based violence to request and obtain a residence or work permit given their exceptional circumstances.

11. Racial violence

26. The Committee takes note of the State party's efforts to combat racism and xenophobia, including the adoption of legislation on the subject and the Strategic Plan for Citizenship and Integration (2007–2010). However, the Committee is concerned about information indicating a higher frequency of acts of intolerance and incidents of racial violence against migrants and persons of different ethnic or religious backgrounds and about allegations that the authorities' responses to these acts are not always timely or adequate (arts. 13–16).

The State party should step up its efforts to thoroughly investigate all acts of racial violence and punish those responsible appropriately. Legislative, investigative and judicial responses to such heinous acts should be accompanied by an expansion of public awareness-raising campaigns.

12. Tasers

27. The Committee notes that the State security forces do not use tasers, but is concerned about information indicating that local police forces do (arts. 2 and 16).

The State party should consider the possibility of putting a stop to the use of tasers by local police forces since, by reason of their effects on the physical and mental state of persons they are used on, they may infringe articles 2 and 16 of the Convention.

13. Trafficking in persons

28. The Committee welcomes the adoption of the Plan to Combat Trafficking for the Purposes of Sexual Exploitation (see paragraph 4 (f) above). However, the Committee notes that the plan focuses more on prevention of the offence than on human rights and the protection of victims. The Committee is further concerned that the Criminal Code contains no criminal offence specifically addressing human trafficking for the purposes of sexual exploitation (art. 16).

The Committee urges the State party to finalize the draft Criminal Code so as to include a section specifically addressing human trafficking for the purposes of sexual and labour exploitation. The State party should further ensure that the Plan to Combat Trafficking recognizes the possibility that victims of trafficking may need international protection. In this respect, the State party should:

- (a) Establish a national mechanism to identify all victims;**

(b) Take the necessary measures to ensure access to the asylum procedure for foreign women victims of trafficking, or at risk of being trafficked, who can show a need for international protection.

14. Optional Protocol and the national preventive mechanism

29. The Committee notes that Organization Act No. 1/2009 established that the Ombudsman would act as the national mechanism for the prevention of torture, in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It further notes that the same Act provides for the creation of an Advisory Board to provide technical and legal cooperation in the exercise of the functions of the national preventive mechanism; and that the Board would be chaired by the deputy to whom the Ombudsman delegates the functions established in this provision (art. 2).

The State party should ensure that the Ombudsman has sufficient human, material and financial resources to discharge his prevention mandate throughout the country independently and effectively. The State party should further ensure that the Advisory Board has a clear jurisdiction and role and that the relationship between the national preventive mechanism and the Board is clearly defined. The Committee encourages the State party to have members of the Board selected through a process that is public and transparent and to include on the Board recognized experts in various areas pertaining to the prevention of torture, including representatives of civil society.

30. The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet party, namely, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

31. The Committee invites the State party to submit a core document in accordance with the requirements for the preparation of a common core document established in the harmonized guidelines for the submission of reports approved by the international human rights treaties bodies (HRI/GEN/2/Rev.6).

32. The State party is urged to ensure wide circulation of the report submitted to the Committee and of the Committee's concluding observations through official websites, the media and non-governmental organizations.

33. The Committee requests the State party to provide information, within one year, in response to the Committee's recommendations in paragraphs 10, 12, 20, 23 and 25 of the present document.

34. The State party is invited to submit its sixth periodic report by 20 November 2013.