



International Convention for the Protection of All Persons from Enforced Disappearance

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Summary record of the 62nd meeting

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Chairperson: Mr. Decaux

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The meeting was called to order at 3.05 p.m.

Consideration of reports of States parties to the Convention (*continued*)

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

1. *At the invitation of the Chairperson, the delegation of Spain took places at the Committee table.*
2. **Ms. Menéndez Pérez** (Spain), introducing the initial report of Spain (CED/C/ESP/1), said that her Government was committed to combating the practice of enforced disappearance and had encouraged other States to sign and ratify the Convention. The Working Group on Enforced or Involuntary Disappearances, during its visit to Spain in September 2013, had met representatives of all the relevant authorities and had received all the information it had requested. On the occasion of the International Day of the Victims of Enforced Disappearances, the Council of Ministers had issued a statement paying tribute to the victims of enforced disappearance and the various entities working to bring cases of enforced disappearance to light.
3. **Mr. Viada** (Spain) said that the definition of enforced disappearance contained in article 2 of the Convention had been duly incorporated into the Spanish legal order. Article 167 of the Criminal Code classed acts of enforced disappearance committed by agents of the State or persons acting under the authority of the State as a crime, and it contained the key elements set out in the Convention, notably the refusal to provide information on the whereabouts of a disappeared person and their removal from the protection of the law. As from 2003, crimes against humanity and relevant aggravating circumstances had also been included in the Criminal Code, and enforced disappearance was considered to be a crime against humanity. Prior to the entry into force of the Convention, the Government had been working to ensure that the law afforded the victims of enforced disappearance and related crimes better protection and had passed legislation on violent crimes and witness protection. As to extradition, his Government would not agree to hand over an individual when there was a risk of them being mistreated or forcibly disappeared by the requesting State.
4. Provided that the relevant court order had been issued, arrested persons could be held in incommunicado detention for a maximum of 5 days in the case of ordinary crimes and for a maximum of 13 days in the case of terrorist crimes. The fact that the individual was being held in incommunicado detention did not preclude them from seeing a doctor or receiving legal assistance. Incommunicado detention was only used in exceptional circumstances and never as a form of punishment. It could prove necessary in dealing with organized crime, in order to prevent evidence from being destroyed or an investigation from being hindered. Both the Armed Forces and the security forces had received training on international jurisdiction and human rights. The State party report mentioned the crimes and offences to which universal jurisdiction applied. The organic law adopted in 2009 had been amended to reflect the principle of universal jurisdiction.
5. **Mr. Garcé García y Santos** (Country Rapporteur), referring to paragraph 10 of the State party report, requested more detailed information on civil society's involvement in drafting the report, including the time they had been given to submit their contributions; on the nature, scope, content and application of the national plan for human rights 2008; and on the provisions of the plan that were relevant to the Convention. Referring to the provisions for suspension of certain rights of persons under investigation for involvement in armed gangs or terrorist groups, he enquired as to the compatibility of those provisions with article 1, paragraph 2, of the Convention. He also wished to know when the proposed reform of the Criminal Code would be approved. While welcoming the fact that more

severe penalties were being prescribed for crimes relating to the deprivation of liberty, he noted that there was no specific provision in that regard for enforced disappearance.

6. The definitions in the State party report appeared not to be in line with the definition of enforced disappearance or the additional elements set out in article 2 of the Convention. Referring to article 6, paragraph 1 (b), of the Convention on the responsibility of superiors, he noted that that responsibility was characterized as an offence of omission under the general part of the Criminal Code, yet such offences of omission were elsewhere in the Code specifically related only to war crimes and crimes against humanity. He therefore wondered whether the reform of the Criminal Code would broaden the definition of war crimes and crimes against humanity to include enforced disappearance as an isolated act.

7. Referring to article 8 of the Convention, he asked what effect the 2012 Supreme Court ruling would have on Spanish law on the application of the statute of limitations to the crime of enforced disappearance. Noting that the military authorities were competent to hear cases of enforced disappearance committed by military officers, or which arose out of offences set out in the Military Criminal Code, he asked what sentences were applicable to the perpetrators of those acts; whether they could be given suspended sentences; whether their criminal record could be expunged provided that they had not reoffended; and whether military courts could try civilians. He asked whether there were plans to reform the Military Criminal Code and if so, what amendments were being considered. Referring to paragraph 9 of the list of issues, he requested additional information on the measures in place to protect the persons mentioned there.

8. **Mr. Hazan** (Country Rapporteur) said that Spain had set an example to many countries of how to apply the principle of universal jurisdiction and had helped them to tackle the problem of impunity as a result. Referring to article 12 of the Convention, he enquired as to the approach taken by the Government to the investigation of complex crimes such as enforced disappearance. He asked whether there were special courts and prosecutors to deal with such cases; whether there was a State entity that investigated ex officio; and whether there was a mechanism in place to exclude from the investigation security officers who might have been involved in cases of enforced disappearance.

9. Recalling the concluding observations adopted by the Human Rights Committee in 2009, he enquired as to the validity of the 1977 amnesty law in the light of the fact that Spain had ratified both the Convention and the International Covenant on Civil and Political Rights. He asked what stage had been reached in the investigations being conducted by the Spanish criminal court into cases of enforced disappearance that had occurred during the Spanish Civil War and under the dictatorship of General Franco. The Committee had received reports that investigations into cases of enforced disappearance had been abandoned despite the 2012 Supreme Court ruling. He would like to hear the Government's reaction to those reports, especially in view of the State party's obligation to conduct a thorough and impartial investigation into such cases. Referring to article 13 of the Convention, he asked whether the State party had considered amending its legislation to include enforced disappearance among those crimes that were not considered political in nature and whether the extradition agreement that it had signed with Kazakhstan made explicit reference to enforced disappearance, as required by the Convention.

10. **Ms. Janina**, noting that the State party report stated that the Spanish legal order did not allow for the direct application of international law, requested clarification on the applicability of the Convention in Spain.

11. **Mr. Huhle**, referring to article 8 of the Convention, said that he had understood that there was no statute of limitations for crimes against humanity, including enforced disappearance, in the State party; and that since enforced disappearance was a continuing offence, the term of limitation only commenced once the fate of a disappeared person was

uncovered. Was there therefore no time limit on investigations? Could criminal proceedings be brought without restriction?

12. **Mr. Yakushiji** requested more detailed information on the situations and conditions in which the Government considered it necessary for the military authorities to investigate and try cases of enforced disappearance.

The meeting was suspended at 3.55 p.m. and resumed at 4.20 p.m.

13. **Ms. Menéndez Pérez** (Spain) said that she would reply to Mr. Garcé García y Santos's questions the following day after having checked the status of compliance with the national human rights plan.

14. **Mr. Viada** (Spain) said that, with the amendments introduced in the Criminal Code in 2003, enforced disappearance was now considered as a crime against humanity and under article 131 was not subject to the statute of limitations. In accordance with the principle of legality, enforced disappearances committed prior to that date were not covered.

15. Enforced disappearance was considered as a continuing offence until the victim reappeared and then the crime was considered to have ceased. An enforced disappearance or crime against humanity that had ended prior to the entry into force of the amendment to article 131 in 2003 was subject to the statute of limitations from the date on which the victim reappeared, or if sufficient time had passed from the date of their disappearance. An offence that had taken place after that date was not subject to the statute of limitations. Imprescriptibility was not necessarily retroactive, but was time-bound.

16. **Mr. Loma-Osorio** (Spain) said that the Constitution provided for the suspension of certain rights in certain exceptional cases in states of emergency, although no such situation had arisen since the entry into force of the Constitution. The suspension of rights was not automatic and the circumstances would be assessed in accordance with article 1 of the Convention, which specified that no exceptional circumstances whatsoever could be invoked as a justification for enforced disappearance. The detention of a person under a state of emergency in certain circumstances did not count as an enforced disappearance since it would not entail the removal of the person concerned from the justice system, as specified in articles 17 and 18 of the Convention.

17. **Mr. Viada** (Spain) said that it was anticipated that the proposed reforms to the Criminal Code would be approved by spring 2015. The general trend of the proposed reforms was to increase penalties for abduction and unlawful detention and, in particular, offences involving sexual abuse or the abduction of minors. In such cases, maximum penalties of 15 to 20 years were envisaged. He would provide the Committee with a written reply concerning the impact of the proposed reforms on continuing offences once he had consulted the courts.

18. **Mr. Martínez Torrijos** (Spain) said that the office of the public prosecutor in the main criminal court was best placed in the Spanish criminal justice system to investigate enforced disappearances and other human rights offences such as genocide or war crimes. That court had extraterritorial jurisdiction over criminal offences committed outside Spanish territory, as provided for under article 23 of the Organic Act on the Judicial Power.

19. The Organic Act provided for broader jurisdiction than the forums provided for under the Convention, inasmuch as it embodied the passive personality principle whereby Spain could prosecute cases involving Spanish nationals or in which a crime had been committed on Spanish territory. Victims of other nationalities could also obtain justice if an element of a criminal offence had been committed on Spanish territory. Moreover, under article 23, any instance established by any other international convention or treaty could try cases of crimes against humanity.

20. Criminal offences committed abroad, organized crime and cases involving armed gangs and terrorist organizations, came under the jurisdiction of the main criminal court, which was the best placed and best equipped in the Spanish judicial system to deal with such offences. Enforced disappearances, which were usually highly complex, also fell within the jurisdiction of the main criminal court.

21. A set of instructions and procedural guidelines was in place for prosecutors and investigators working on cases of child abduction, with a view to ensuring a uniform approach to such cases throughout the country.

22. **Mr. Esteban** (Spain) said that all special units within the police force responsible for the investigation of enforced disappearances were trained to investigate any kind of crime, although they normally investigated organized crime and enforced disappearances. Specialized police and Guardia Civil units were in place in every province; they received special training in international humanitarian law, human rights law and international law. They were required to report to judges and prosecutors and to adhere to the guidelines for judges and prosecutors.

23. **Mr. Viada** (Spain) said that the Supreme Court had based its ruling of September 2012 on the principle of legality. The cases concerned had been shelved because they had been brought against people alleged to have committed criminal offences during the Civil War or during the Franco era. In view of the time that had elapsed, the various courts had taken the view that the statute of limitations had been exceeded or that, since the alleged perpetrators had died, their criminal liability had been extinguished. Cases involving living persons alleged to have committed criminal offences during the Franco era raised the issue of the statute of limitations; while article 131 properly defined crimes against humanity, the statutory limitations that it introduced were not retroactive.

24. **Mr. Loma-Osorio** (Spain) said that a flexible range of measures was available to judges in order to provide protection to witnesses in investigations; various measures could be adopted taking into account the particular circumstances of a case and the levels of risk involved. Witness protection measures for convicted prisoners included isolation as a further physical protection measure, or where there was a risk of suicide. However, prisoners who were subject to such security measures could remain in contact with other prisoners.

25. **Mr. Martínez Torrijos** (Spain) said that, although enforced disappearances were not specifically included in current legislation related to extradition, article 4 of the Extradition Act prohibited the extradition of persons at risk of being put to death or subjected to torture or to cruel, degrading or inhuman treatment or punishment. The system generally prevented any extradition that might put the fundamental rights of the requested person at risk.

26. **Mr. Viada** (Spain) said that the Amnesty Act of 1977 was an historically important law that had sought to move Spain beyond the era of the Spanish Civil War and from dictatorship to democracy, and had ushered in the modern era. It had sought to establish a constitutional standard for the protection of constitutional rights and had been adopted by a 90 per cent majority in the Chamber of Deputies, following democratic general elections in Spain. The Amnesty Act dealt with criminal offences committed prior to 1977 both by the Franco regime and by its opponents, and with other politically motivated crimes.

27. Not only would repeal of the Amnesty Act not solve any problems, it could have a seriously adverse impact. The Spanish judiciary had never called on the Constitutional Court to review or repeal the Amnesty Act. Moreover, while amnesty laws could hamper the investigation of certain crimes, according to the European Court of Human Rights, States had some room for manoeuvre in the enactment or assessment of legislation in view of historical or political circumstances. The Amnesty Act had been assessed in accordance

with article 15 (2) of the International Covenant on Civil and Political Rights, which Spain had ratified prior to the enactment of the Amnesty Act and which formed part of its domestic legislation, and it had been determined that, because at a given point in time Spain had enacted legislation extinguishing criminal responsibility of a general nature, there had been no violation of article 15.

28. **Mr. Viada** (Spain), referring to article 4 of the Convention, said that Spanish law provided for two ways of incorporating international standards into domestic law: under article 93 of the Constitution, sovereignty in a given area was effectively passed to an international organization and Spain was compelled to comply with international obligations; under article 96, international treaties were published in the Official Gazette and constituted part of the internal legal order but no sovereignty was ceded. In the latter case, non-compliance with a recommendation did not result in penalties other than penalties imposed by the Spanish courts. As a result, whereas European Court of Justice rulings were binding in Spain, unless a convention was incorporated into the legal order, there was no direct effect for failing to comply with obligations under that convention.

29. **Mr. Martínez Torrijos** (Spain) explained that individual members of the security forces implicated in cases of enforced disappearance could face temporary or permanent suspension or a custodial sentence. In the case of the judicial police, the prosecutor leading an investigation could remove an officer from a case without explanation.

30. **Mr. Garcé García y Santos** observed that several questions from the list of issues remained unanswered: in paragraph 2, the delegation was requested to give information on recent allegations of enforced disappearance and cases in which the Convention had been invoked before the courts; in the second part of paragraph 3, the delegation was asked whether there were plans to consider enforced disappearance as a separate offence in the Criminal Code; and in paragraph 6, the delegation was asked about the implementation of article 10, paragraph 2, of the Convention.

31. Regarding article 5 of the Convention, he asked whether there were plans to extend criminal liability for enforced disappearance to cover for subordinates. He asked the delegation to provide further details on witness protection programmes, on the conditions of complainants in incommunicado detention and on the maximum duration of solitary confinement. In the light of information concerning interference with communication with Argentina on cases from the Franco era, he asked what measures had been introduced to ensure compliance with article 14 of the Convention on cooperation between States parties.

32. **Mr. Hazan** asked the delegation to clarify whether the crime of enforced disappearance ceased on the death of the accused or on the death of the victim. He would like information on extradition cases under article 13 of the Convention, which dealt with political offences. He wondered whether an entire judicial police unit involved in an investigation, as opposed to individual members, could be reassigned, given that units sometimes acted as a group to defend the interests of their individual members. He also wished to know whether or not persons in incommunicado detention would have direct contact with a lawyer; whether there were plans to amend article 607 bis of the Criminal Code, which was currently not compliant with the Rome Statute of the International Criminal Court; whether victims of enforced disappearance had access to relevant files; and whether article 9 of the Convention had been transposed into Spanish legislation.

33. **Mr. Huhle** said that, according to the delegation, the statute of limitations for criminal cases could not be retroactive, and yet paragraph 97 of the report implied that the State had discretion to extend the statute of limitations depending on practical and social factors. In other countries' case law on serious offences, the period of limitation had been extended as a substantive right of the people. Was that the case for enforced disappearances in Spain? Also, in view of the continuous nature of enforced disappearance, could victims

initiate criminal or civil proceedings many years after an enforced disappearance, even if there was a short period of limitation?

34. **Mr. Viada** (Spain) said that enforced disappearance had only been established as an imprescriptible offence since 2003. Only crimes against humanity committed after the amendment of article 131 were not subject to the statute of limitations. In reply to Mr. Hazan's question, it was once the victim — not the accused — had died that the crime of enforced disappearance ceased.

35. **Mr. Loma-Osorio** (Spain) said that, in cases of incommunicado detention, individuals had direct access to a lawyer. The aim of incommunicado detention was rather to prevent detainees from communicating with their immediate circle and thus prevent them from continuing their crime or destroying evidence. In reply to question 3 on the list of issues, he said that article 55 of the Constitution made it impossible to carry out enforced disappearance even in exceptional circumstances, and so there was no need to categorize enforced disappearance as a separate offence in Spanish law.

36. **Mr. Martínez Torrijos** (Spain) said that, in accordance with the Passive Extradition Act, enforced disappearance was never regarded as a political offence. Sometimes political actions could be disguised as ordinary offences, and in that case the practice in Spain was to use reports by NGOs and international organizations to determine whether the ordinary offences were actually politically motivated crimes.

37. With regard to the application of article 9 of the Convention, the only circumstances in which extradition to a third country might take place, as opposed to persons being tried in Spain, was under article 23 of Organic Act 6/1995 under the principle of subsidiarity. The country where the crime had been committed was the preferred jurisdiction and so, provided that that country had legitimate jurisdiction under the Rome Statute of the International Criminal Court, Spain would proceed with extradition.

38. **Mr. Loma-Osorio** (Spain) confirmed that victims directly involved in cases could gain access to relevant administrative or judicial files; persons outside the case could access a number of procedural documents, but not files protected by confidentiality laws. The Minister of Justice had proposed an amendment to legislation currently being drafted by the European Union to extend victims' access to files of various kinds, subject to appropriate authorization.

39. **Mr. Esteban** (Spain) said that judges and prosecutors had the right to remove a police unit from an investigation and assign a different one.

The meeting rose at 5.55 p.m.