

SPAIN

BRIEFING FOR THE COMMITTEE ON ENFORCED DISAPPEARANCES

5TH SESSION OF THE COMMITTEE
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1. INTRODUCTION

Amnesty International is submitting this briefing to the Committee on Enforced Disappearances (hereinafter the Committee) in view of its forthcoming examination of Spain's report on the measures it has taken to meet its obligations under the International Convention for the Protection of All Persons from Enforced Disappearance (the Convention). This is due to take place during the Fifth Period of Sessions of the Committee, to be held in Geneva from 4 to 15 November 2013.

This document provides information on and explains the reasons for Amnesty International's concerns regarding Spain's fulfilment of its obligations under the Convention. The organization particularly wishes to draw the Committee's attention to the definition and criminalization of enforced disappearance, the statute of limitations, proceedings for the expulsion, return, surrender or extradition of migrant persons, incommunicado detention and the right to truth and reparation, in accordance with Articles 2, 4, 5, 6, 7, 8, 16, 17 and 24 of the Convention.

2. DEFINITION AND CRIMINALIZATION OF ENFORCED DISAPPEARANCE (ARTICLES 1 TO 7)

2.1. SPAIN'S OBLIGATION TO INVESTIGATE THE ENFORCED DISAPPEARANCE OF PERSONS: TEMPORAL SCOPE

In its report, and on the basis of the provisions of Article 35(1), Spain's assertion that the date of entry into force of the Convention in Spain prevents "its applicability to alleged enforced disappearances that took place in Spain during the Civil War and the Franco regime, along with the need to abrogate or consider inapplicable Law 46/1977 of 15 October on Amnesty" is incorrect and unfounded.

The International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 2006, codified a crime that already existed in international law and did not give rise to or create a new form of criminal conduct. In fact, in international law, the offence or crime of enforced disappearance dates back to long before the Convention entered into force in 2010.

The General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance¹ in 1992 and the International Law Commission – established to encourage the gradual development and codification of international law –² included enforced disappearance as a crime against humanity in its *Draft Code of Crimes against the Peace and Security of Mankind* in 1996, thus reflecting a norm that the Commission considered a part of international customary law.³ The Rome Statute of the International Criminal Court, to which Spain has been a State Party since 2000, also provides for the repression of enforced disappearance when this has been committed "as part of a widespread or systematic attack directed against any civilian population" and also reflects international custom.⁴

For its part, the International Committee of the Red Cross, in its study on 'Customary international humanitarian law', concluded that a prohibition on enforced disappearance was

¹ A/RES/47/133, 18 December 1992.

² A/RES/174(II), 17 November 1947.

³ Article 18 (i), available at: http://untreaty.un.org/ilc/texts/7_4.htm.

⁴ Rome Statute, Article 7(1)(i).

recognized in customary law,⁵ stating that: “State practice has established this as a rule of customary international law applicable in both international and non-international armed conflicts”.

Spain, in common with all states, has an international law obligation, based on customary law, to investigate all cases of enforced disappearance, whenever they were committed, and, should it find admissible and sufficient evidence, it is obliged to prosecute those allegedly responsible. Moreover, should those individuals be found guilty in a fair trial, it must impose criminal sanctions on them proportionate to the severity of the crime. Should this not be possible, for whatever reason, victims still have the right – as set out in Article 24 – to know the truth regarding the circumstances of the enforced disappearance, the progress in and results of the investigation and the fate of the disappeared person.

In its Concluding Observations on Spain in 2008 (CCPR/C/ESP/CO/5/, 27 October 2008), the Human Rights Committee held that:

“The State Party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims’ bodies, and provide them with compensation where appropriate.”

Moreover, the Committee against Torture has recommended that Spain should ensure that acts of torture – which also include enforced disappearances – are not offences subject to amnesty, should clarify the fate of the missing persons – unconstrained by the principle of legality or the statute of limitation – and should provide victims with redress.⁶

For its part, the Special Rapporteur on the Independence of Judges and Lawyers has stated that: “Reconciliation between the State and the victims of enforced disappearances cannot happen without the clarification of each individual case, and an amnesty law should not allow an end to a State’s obligation to investigate, prosecute and punish those responsible for disappearances”.⁷ The UN Secretary General has also recommended that we “reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually-based international crimes”.⁸

Amnesty International believes Spain is failing in its duty to investigate enforced disappearances committed within its borders in the past and is also refusing to provide assistance to foreign courts which, based on the principle of universal jurisdiction, are

⁵ Customary International Humanitarian Law, Volume I: Rules, Rule 98. “Enforced disappearance is prohibited”, International Committee of the Red Cross. Available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

⁶ Committee against Torture, Concluding Observations, CAT/C/ESP/CO/5, 19 November 2009, para. 21.

⁷ Special Rapporteur on the Independence of Judges and Lawyers, statements made in Geneva on 8 February 2012, <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=11805&LangID=S>.

⁸ Report of the UN Secretary General, “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616), 3 August 2004, conclusion and recommendation 64.c.

endeavouring to investigate those cases.⁹

Amnesty International recommends that the Spanish state:

- comply with its obligation to investigate enforced disappearances that have taken place in the past and to punish those responsible, and;
- ensure that no law (neither the 1977 Amnesty Law nor any other provision or regulation) prevents the investigation of enforced disappearances committed in the past.

2.2. ENFORCED DISAPPEARANCE AS A SEPARATE OFFENCE IN SPANISH LEGISLATION

Article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance states that: “Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”.

It follows that the obligation this provision places on a State Party will be satisfied by the inclusion of a separate offence within its criminal code that covers all the definitions given in Article 2 of the Convention. It is therefore insufficient for a State to claim that it can be concluded from an interpretation of various legal provisions that it has fulfilled its obligation under the Convention. And this is what Spain is claiming when it maintains in its report that a combination of Articles 163 to 172 of the Criminal Code governing “illegal detentions and kidnappings” (Articles 163 to 168) enable it to be concluded that the enforced disappearance of persons is repressed. It is noteworthy that the section in Spain’s report on “adapting the Criminal Code to the Convention” states as follows: “From the transcribed precepts, it emerges that ‘enforced disappearance’, as defined by Article 2 of the Convention, is codified as a crime in the Criminal Code under illegal detention/kidnapping with disappearance”.

Amnesty International does not believe that the Spanish Criminal Code codifies the crime of enforced disappearance in accordance with the requirements of the Convention and international law. On the contrary, the organization considers that the ordinary crime of illegal detention or kidnapping with whereabouts unknown, as contained in Article 166 of the current Criminal Code,¹⁰ does not meet the definition in international law since, as noted by the UN Human Rights Council, “Art. 166 of the Code refers to the common crime of illegal detention or kidnapping with whereabouts unknown, the definition of which is far from satisfying the codification in international law”¹¹ and is lacking in essential elements.

⁹ See Amnesty International, “Casos cerrados, heridas abiertas: el desamparo de las víctimas de la guerra civil y el franquismo en España”, May 2012, available from <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/44110112-6297%20Informe%20heridas%20abiertas?CMD=VEROBJ&MLKOB=31218154242>; and Amnesty International “El tiempo pasa, la impunidad permanece: La jurisdicción universal, una herramienta contra la impunidad para las víctimas de la guerra civil y el franquismo en España”, June 2013, available from <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/EUR4140013-25119%20EI%20tiempo%20pasa%20la%20impunidad%20permanece%20Informe?CMD=VEROBJ&MLKOB=32463093939>

¹⁰ The current draft bill [amending the Criminal Code] increases the punishment for this crime significantly, from 10 to 15 years. It also establishes an aggravated crime (punishable by 15-20 years) if the victim is a minor or the perpetrator attempts to violate the person’s sexual freedom and integrity.

¹¹ UN Human Rights Council Report, A/HRC/13/NGO/91 of 26 February 2010, p. 2.

It should be noted that Article 166 of the Spanish Criminal Code – which Spain claims in its report covers or includes enforced disappearance – provides that:

“A person guilty of illegal detention or kidnapping who does not give an account of the whereabouts of the detainee shall, where appropriate, be punished with heavier sentences than those indicated in the previous Articles of this chapter, unless that detainee has now been released”. The report adds that “it should also be noted that when this report refers to the crime of ‘illegal detention/kidnapping with disappearance’ under Spanish criminal law, it is using a concept equivalent to that of ‘enforced disappearance’ as defined by the Convention” (para.51).

Amnesty International does not agree that this is the case. Article 2 of the Convention establishes that enforced disappearance is: “The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

It can be seen from the above that enforced disappearance may be the result not only of an unlawful deprivation of liberty but also of one that was initially lawful, as noted in Article 166 of the Spanish Criminal Code.

Further still, it should be noted that the same report indicates that: “When a crime has occurred, i.e. when a person’s deprivation of liberty is initially lawful, as opposed to the situation described in letter (c) above, and any one of the detainee’s or prisoner’s guarantees is violated by a state agent, said agent shall be punished with a period of disqualification from office (Criminal Code, Art. 530)”¹². This clearly demonstrates that an initially lawful deprivation of liberty that turns into a concealment of the fate or whereabouts of that person does not in or of itself constitute an enforced disappearance. The penalty imposed in such a case is mere disqualification and not a deprivation of liberty, thus confirming that it is not an adequate definition of the crime of enforced disappearance.

It is therefore unreasonable for Spain to maintain that it has codified the crime of enforced disappearance when this requires a combination of various different norms contained in the Criminal Code alongside an interpretive exercise on the part of the justice system which, clearly, could differ from court to court.

Nor do the current regulations include superiors who were aware that the crime was (or was going to be) committed, who exercised control and responsibility over activities related to the crime or did not take the necessary and reasonable measures to prevent or repress this crime as perpetrators of the crime.

In this regard, the Committee’s recommendation in its recent Concluding Observations on the report submitted by France seems appropriate and applicable to Spain, where the Committee

¹² Spain’s Report, para.60(e).

“recommends that [...] the State Party should hold superiors fully responsible in any case of enforced disappearance, in accordance with Article 6 of the Convention”.¹³

In addition, the norms referred to by Spain all relate to ordinary crimes, with consequent constraints – unacceptable under international law – not only with regard to the stated scope of responsibility and orders of the superior but also the statutory limitation, the applicability of amnesties and the inadmissibility of military jurisdiction, all deriving from standards contained in the Convention.

Amnesty International believes it is both necessary and appropriate that the current reform of the Criminal Code that is being introduced by the government – and which envisages no amendments in this regard – should include the codification of enforced disappearance as a separate crime, preferably under the category of international law crimes, also bearing in mind that the punishment must reflect the severity of the crime and, moreover, be in line with that anticipated for other crimes of a similar nature. The code should also expressly recognize that an exemption can under no circumstances be granted for reasons of “due obedience” or “fulfilment of duty”.

Finally, Amnesty International wishes to draw attention to the fact that Spain has reformed its Criminal Code twice since ratifying the Convention in September 2009 (in addition to the current reform) and yet not one of these has specifically considered codifying this crime as a separate crime under Heading XXIV “Crimes against the international community”.

Amnesty International recommends that the Spanish state:

- promptly take the necessary measures to ensure that enforced disappearance is codified as a separate crime in criminal law, in accordance with the definition given in Article 2 of the Convention.
- provide for sanctions that are in accord with the severity of the crime; in no case should due obedience or fulfilment of duty be a cause for exemption; the criminal responsibility of seniors and other supervisors should be introduced; and punishment for conspiracy and incitement to crime should also be expressly included.

2.3. ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY

Article 607 (a) section 1 of the Criminal Code states: “1. Anyone committing the acts noted in the following section as part of a widespread and systematic attack on any civilian population is guilty of a crime against humanity.

In all cases, committing the following crimes will be considered a crime against humanity:

1.º By virtue of the victim’s membership of a group or collective persecuted for political, racial, national, ethnic, cultural, religious, gender, disability or other reasons universally recognized as unacceptable in accordance with international law.”

As can be seen, this Article imposes a prior condition on the definition of crimes against humanity (by virtue of the victim’s membership of a group or collective persecuted for

¹³ Concluding observations on the report submitted by France in application of Article 29, para 1 of the Convention, approved by the Committee at its 4th period of sessions (8 to 19 April 2013), 8 May 2013, CED/C/FRA/CO/1, para 17.

political, racial, national, ethnic, cultural, religious, gender, disability or other reasons) that is not given in Article 7 of the Rome Statute of the International Criminal Court, to which Spain has been a State Party since 2000.¹⁴

For its part, Article 607 (a) section 2.6 of the Criminal Code establishes that: “Those guilty of crimes against humanity shall be punished (...) with prison sentences of 12 to 15 years when they detain a person and refuse to recognize this deprivation of liberty or to provide information on the fate or whereabouts of the detainee”. In Amnesty International’s opinion, this provision is not in line with the definition of enforced disappearance as a crime against humanity, as established in the Statute. Nor do there exist provisions similar to those given in Articles 615 (a) and 616 (a) of the current Criminal Code (regarding the inapplicability of exemptions from criminal responsibility) in relation to this crime.

For its part, the current draft bill reforming the Criminal Code does not anticipate any amendments in this regard.

Amnesty International recommends that the Spanish state:

- Include the crime of enforced disappearance in the Criminal Code, in accordance with the definition given in the Convention, to which Spain is a State Party.

3. CRIMINAL RESPONSIBILITY AND JUDICIAL COOPERATION WITH REGARD TO ENFORCED DISAPPEARANCE (ARTICLES 8 TO 15)

3.1. STATUTE OF LIMITATION

The failure to bring the ordinary crime of illegal detention or kidnapping with whereabouts unknown, as contained in Article 166 of the current Criminal Code, into line with the Convention, can further be seen in the general statute of limitation that is applicable to it (15 years, Articles 131 and 133 of the Criminal Code).

Amnesty International wishes to draw attention to the fact that enforced disappearance represents an ongoing or continuous crime the imprescriptibility of which, while not imposed by the Convention - unless it falls within the category of crimes against humanity – is not only advisable, in view of its status as international law crime and the *ius cogens* nature of its prohibition, but also quite possible.

When setting statutory limitations for action, Article 8(1)(b) of the Convention obliges states to take the necessary measures to ensure that the term of limitation for criminal proceedings commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature. Spanish legislation contains no rules in this regard and so is failing to comply with the obligation imposed by the Convention in this respect.

Current legislation does recognize the imprescriptibility of the crime of enforced disappearance when it is a crime against humanity (Articles 131.4 and 133.2). However,

¹⁴ Except with regard to the crime of persecution, in which case this condition forms part of the definition of the conduct itself.

when this requirement was introduced in the 2003 reform of the Criminal Code, there was no express recognition that it would apply retroactively.¹⁵ In this regard, Amnesty International has, on a number of occasions, urged the Spanish state to accede to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

Amnesty International recommends that the Spanish state:

- provide for the imprescriptibility of the crime of enforced disappearance or, failing this, incorporate the provisions of Article 8 of the Convention - a term of limitation of long duration and proportionate to the extreme seriousness of this offence; this term must commence from the moment when the offence of enforced disappearance ceases, in other words, when the fate of the disappeared person has been clarified or their remains located or identified.
- commence the accession process, without reservations or interpretative declarations that could establish reservations, to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

4. MEASURES TO PREVENT ENFORCED DISAPPEARANCE (ARTICLES 16 TO 23)

4.1. INCOMMUNICADO DETENTION

Article 17(1) of the Convention establishes that: “No-one shall be held in secret detention” and further adds in point 2: “Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation: (...) d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law”.

For its part, Article 509 of the Code of Criminal Procedure states:

“1. The investigating judge or court may, exceptionally, agree to incommunicado detention or prison to prevent persons allegedly involved in the events under investigation from evading justice, when these people might act against the victim’s legal interests, when they might conceal, alter or destroy evidence related to the crime or if they are likely to commit further offences.

2. This incommunicado detention will last as long as is strictly necessary to take urgent steps aimed at avoiding the dangers referred to in the paragraph above. It may not extend beyond five days. In cases where prison is ordered for any of the crimes referred to in Article 384 (a) or other crimes committed in concert with and in an organized form by two or more people, this incommunicado detention may be extended for another period of no more than five days. Nonetheless, in these same cases, the judge or court hearing the case may order a further period of incommunicado detention even after the previous period has expired, provided subsequent developments in the investigation or trial merit this. This second period of incommunicado detention shall in no case exceed three days.”

¹⁵ First Transitional Provision of Organic Law 15/2003 of 25 November.

In Amnesty International's opinion, the current system of *incomunicado* detention set out in Spanish legislation is in violation of Article 17 above.

It can be seen from the Article 509 above that the investigating judge has the power, at the request of the police, to order a detainee to be held *incomunicado* for up to five days in any case and for up to a total of 13 days if the suspect has been detained on suspicion of involvement in armed groups or terrorism. This 13-day period consists of a maximum five-day phase of *incomunicado* detention in police custody, which can be extended at the order of the investigating judge by a further five-day period of *incomunicado* detention on remand. A further three-day period of *incomunicado* detention may be imposed on a remand prisoner at the order of the judge at any time during the investigation after the original 10-day period has expired.

An analysis of Articles 527, 520 and 520(a) shows that the following restrictions are in place for persons placed under the system of *incomunicado* detention:

- they do not have the right to be assisted by a lawyer of their own choice; legal assistance is provided by a duty lawyer appointed by the Bar Association, at the request of the police;
- they do not have the right to consult with a lawyer in private at any time during their *incomunicado* detention (either in police custody or on remand);
- they do not have the right to communicate, or have communicated, to a family member or other person of their choice the fact and place of their detention; foreign nationals do not have the right to have such information communicated to their consulate;
- they do not have the right to a medical examination by a doctor of their own choice;¹⁶
- individuals held on suspicion of involvement in terrorism-related offences or organized crime – whether or not they are being held *incomunicado* – may be held in police custody for up to five days (120 hours) after arrest before being brought before a judicial authority.

It is therefore Amnesty International's opinion that the current system of *incomunicado* detention is in violation not only of Article 17 of the Convention but also of various international human rights standards (relevant treaties and standards include the International Covenant on Civil and Political Rights (Articles 9 and 14); the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5 and 6); the UN Basic Principles for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; the European Prison Rules; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Standard Minimum Rules for the Treatment of Prisoners).

Amnesty International not only considers that *incomunicado* detention violates the rights of those detained, rights that are essential in order to guarantee a fair trial (such as effective and prompt access to legal representation) but that it is also conducive to torture and other ill-

¹⁶ They can, however, ask to be examined by a second state-appointed doctor (Article 510).

treatment of detainees.¹⁷ In April 1997, the UN Commission on Human Rights stated that “prolonged incommunicado detention [...] can in itself constitute a form of cruel, inhuman or degrading treatment”.¹⁸ ¹⁹ For its part, the UN Special Rapporteur on the question of torture noted, in his report on his visit to Spain in 2003, that “although torture or ill-treatment is not systematic in Spain, the system of detention as it is practised allows torture or ill-treatment to occur, in particular in regard to persons detained incommunicado in connection with terrorist-related activities”.²⁰

Amnesty International recommends that the Spanish state:

- put an end to the use of incommunicado detention, immediately abrogating Articles 509, 520(a) and 527 of the Code of Criminal Procedure authorizing and regulating its use; then:
- guarantee that all persons deprived of their liberty enjoy the right to consult a lawyer of their choice in private, and to have a lawyer present during interrogations and statement taking, from the start of detention and throughout the whole period of custody;
- guarantee that all persons detained have the right to be examined by a doctor of their choice should they so wish;
- guarantee that all persons detained are able to exercise their right to communicate, or have communicated, to a family member or other person of their choice the fact and place of their detention;
- introduce video and audio recording equipment into all custody areas of police stations, except where this would violate the detainee’s right to consult with a lawyer or doctor in private, and establish the obligatory use of these facilities in all cases. All interrogations should be video- and audio-recorded. These recordings must be kept in a secure facility for a reasonable period of time in order to ensure that they are available to investigators and defence lawyers if so required.

4.2. EXPULSION, RETURN, SURRENDER OR EXTRADITION PROCEEDINGS

Article 16(1) of the Convention establishes that: “No State Party shall expel, return (“refouler”), surrender or 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”.

The Spanish authorities have undertaken summary and, on occasions, collective expulsions of migrants. This could be in violation of the principle of non-return, which prohibits Spain from

¹⁷ See, for example, Preliminary Observations of the Human Rights Committee: Peru, UN doc.: CCPR/C/79/Add.67, para. 17, 25 July 1996

¹⁸ Commission on Human Rights, Resolution 1997/38, para. 20

¹⁹ For more information see: *Out of the shadows: End incommunicado detention in Spain*, September 2009, available from <http://www.amnesty.org/en/library/asset/EUR41/005/2009/es/d89853a0-b558-4c66-bf59-b8a0bdc7db26/eur410052009eng.pdf>

²⁰ Report of the Special Rapporteur on the question of torture, Addendum, Visit to Spain, doc. UN: E/CN.4/2004/56/Add.2, 6 February 2004, para. 41.

returning, directly or indirectly, a person to a place where there is a justified fear of persecution or a fear that he or she may be at risk of suffering other serious human rights violations.

For example, in the early hours of 4 September 2012, the Guardia Civil took around 70 migrants who had come from Morocco and were now on the Isla de Tierra (territory under Spanish sovereignty and jurisdiction) by Zodiac (inflatable boat) to the vicinity of the Moroccan beach of Sfiha. No assessment had been conducted of any of these people's personal situations prior to this expulsion. The Moroccan police were waiting for them on Moroccan territory, where they were put into buses and taken, apparently, to Oujda from where, according to some statements, they were directly extradited to Algeria, only to return to the Moroccan border town some while later.

Amnesty International considers that these summary expulsions on the part of the Spanish authorities are collective expulsions prohibited by the international treaties. The treaties require states to ensure that people have the opportunity of being individually assessed, at which time they can challenge their expulsion. In particular, Article 4 of Protocol IV to the European Convention on Human Rights, ratified by Spain in 2009, states that: "Collective expulsion of aliens is prohibited".

Moreover, Spain has failed to comply with its own Law on the Rights and Freedoms of Aliens by depriving migrants of due process and guarantees, including the right to legal assistance, interpretation and effective access to justice.

Amnesty International has serious concerns with regard to the treatment that migrants may be receiving in Morocco. In August and September 2010, the Moroccan authorities adopted robust measures against migrants reportedly living in or entering Morocco without proper authorization. Between 600 and 700 people were detained in Oujda, Rabat, Tangier and other towns. During a number of raids, the security forces used excavators to demolish migrants' homes and, according to our sources, beat people up. They took the detainees to a desert zone close to the border with Algeria and left them there with insufficient food and water and with no possibility of appealing against their expulsion.

Amnesty International recommends that the Spanish state:

- adopt legislative measures that bring Spanish legislation into line with the provisions contained in Article 16 of the Convention
- reaffirm and fully respect the principle of non-return (non-refoulement)
- guarantee that all people have access to an individual asylum procedure aimed at ascertaining whether they require international protection
- guarantee that all extradition decisions are assessed on an individual basis and are subject to due process
- guarantee the availability of access to free, independent and competent legal advice at all stages of the asylum process, including the provision of qualified and independent interpreters, enabling the lawyer to communicate effectively with the asylum seeker.

5. RIGHT TO KNOW THE TRUTH AND REPARATION MEASURES (ARTICLE 24)

The rights to truth, justice and reparation continue to be denied to victims of international law crimes committed in Spain during the Civil War and the Franco regime (1936-1975).

In November 2008, the 5th Central Investigative Court of the National High Court – then under the direction of former Judge Baltasar Garzón - disqualified itself from hearing a case presented in 2006 with regard to murders and enforced disappearances – in the context of crimes against humanity – committed in Spain between 1936 and 1951.²¹ This disqualification meant that the cases had to be heard by numerous competent regional courts, giving rise to the opening of 47 investigations. Amnesty International investigated and documented the Spanish justice system's response to the cases that resulted from this disqualification, and noted a continuing trend on the part of Spanish judges to archive them.²²

In fact, ongoing monitoring of the 47 cases that resulted from the High Court's self-disqualification has enabled the organization to note that at least 38 of these have been archived by the Spanish judges (although the number of files is actually greater).²³

This tendency to archive has increased since the ruling of the Supreme Court on 27 February 2012.²⁴ In this ruling, although former Judge Baltasar Garzón was absolved from the alleged crime of knowingly exceeding his jurisdiction, the Court put forward a number of reasons that would prevent Spanish judges from investigating crimes committed during the Civil War and the Franco regime. These arguments – which Amnesty International finds in violation of international law – are the following: the existence of an Amnesty Law; the statutory limitation on the crime; the impossibility of prosecuting the crimes because, at that time, they were not codified under criminal law; the alleged death of the perpetrator, and the existence of a Law on Historical Memory.²⁵

Amnesty International recommends that the Spanish state:

- guarantee the right to truth, justice and reparation on the part of the victims of the Civil War and the Franco regime
- commence the accession process – without reservations or interpretative declarations that could establish reservations – to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
- adopt immediate measures aimed at fully applying the recommendations of the

²¹ The 5th Central Court of Instruction of the National High Court – under the direction of former Judge Baltasar Garzón- decided, in a ruling on 16 October 2008, to admit and hear the case brought in December 2006 by victims and memorial associations for crimes against humanity. This action included complaints that bore witness to the enforced disappearance of 114,266 people between July 1936 and December 1951. Subsequently, on 18 November 2008, the 5th Central Court of Instruction disqualified itself in favour of the regional courts – a ruling confirmed by a declaration of objective incompetence of the Criminal Division of the same National High Court. From that point on, the investigation passed into the hands of numerous local Spanish courts.

²² Amnesty International, *Casos cerrados, heridas abiertas*, *op cit*.

²³ For more information on the procedural stage of the 47 cases mentioned, see Annexes I, II and III of the Report “El tiempo pasa, la impunidad permanece”, *op cit*.

²⁴ Supreme Court, Criminal Division, Judgment No 101/2012, of 27 February 2012.

²⁵ Law 52/2007, of 26 December, recognising and extending rights and establishing measures in favour of those who suffered persecution or violence during the Civil War and dictatorship.

international bodies in relation to the Amnesty Law and the statute of limitations for international law crimes, bodies including the Human Rights Committee, the Council of Europe, the Working Group on Enforced or Involuntary Disappearances and the Committee against Torture.²⁶

²⁶ The Human Rights Committee has recommended that Spain abrogate the Amnesty Law, take the necessary legislative measures to ensure that national judges do not apply a statute of limitations or the principle of legality to crimes against humanity, and set up a commission of independent experts to establish the truth (Human Rights Committee, Concluding Observations, Spain UN. DOC. CCPR/C/ESP/CO/5 (2009), 5 January 2009, para. 9) The Council of Europe has urged the government to create a commission to investigate the human rights violations committed during the Franco regime, and to submit a report to the Council of Europe (Parliamentary Assembly of the Council of Europe, Recommendation 1736 (2006), of 17 March 2006, condemning the Franco Regime. Doc. 10737, Recommendation 8.2.1). In Resolution 828 (1984) on enforced disappearances, the Council of Europe expressly stated that these should not form the object of an amnesty (para. 13 a). The Committee against Torture has recommended that Spain should ensure that acts of torture – which also includes enforced disappearances – should not be subject to an amnesty, should clarify the fate of the disappeared – unconstrained by the principle of legality or the statute of limitation – and should provide victims with redress (Committee against Torture, Concluding Observations, CAT/C/ESP/CO/5, 19 November 2009, para. 21) The Working Group on Enforced or Involuntary Disappearances reminded the government of its obligation to investigate all acts of enforced disappearances for as long as the fate of the victim of enforced disappearance remains unclarified (Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para. 502.

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