

**SPAIN:
BRIEFING TO
COMMITTEE
AGAINST
TORTURE**

NOVEMBER 2009

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

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Index: EUR 41/011/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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SPAIN: BRIEFING TO THE UN COMMITTEE AGAINST TORTURE NOVEMBER 2009.

INTRODUCTION

Following the preliminary briefing Amnesty International submitted to the Committee against Torture in February 2009 for its pre-session meeting, the organization submits this updated briefing for consideration by the Committee against Torture in view of its examination in November 2009 of Spain's fifth periodic report on the measures taken by Spain to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). This briefing summarizes some of Amnesty International's main concerns about Spain's failure to implement some of its obligations under the Convention against Torture.

For many years Amnesty International, together with other international and national non-governmental organisations (NGOs), and a range of UN and Council of Europe human rights bodies, have expressed serious concerns regarding torture and other cruel, inhuman or degrading treatment committed by law enforcement officials in Spain and the effective impunity enjoyed by many in relation to these acts.

In a report published in November 2007, (*Spain: Adding insult to injury*, Index: EUR 41/006/2007) Amnesty International highlighted cases of individuals who described being hit, kicked, punched, whipped, threatened with a knife or gun and verbally abused or threatened by police officers both in the street and while in police custody. In one case a detainee related to Amnesty International how police officers told him that if he did not cooperate, they would rape his girlfriend. In another case, a man lost hearing in one ear for several weeks as a result of blows to his head from a police officer during detention. Since the publication of this report, Amnesty International has continued to receive credible reports

of torture and other ill-treatment by law enforcement officials.

In November 2009 Amnesty International will publish an update to this report, *Spain: Adding insult to injury – two years on*, Index: EUR 41/010/2009). This updated report records measures implemented by the Spanish authorities since 2007 to combat torture and other ill-treatment and highlights areas still in need of urgent reform. It also describes what progress, if any, has been made in the individual cases included in the original report. Of the 11 investigations into allegations of torture and other ill-treatment which were still underway when the original report was published in November 2007, two cases have now concluded in convictions but appeals of these convictions are now pending. Of the remaining nine cases, six were closed without ever reaching trial and two are still under investigation (one of which has now been open for more than seven years). One of the cases which did not proceed to trial in Spain has been submitted to the European Court of Human Rights; the applicant in that case has alleged that the authorities have violated their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to a fair trial, and to be free from both torture and other ill-treatment and discrimination. In the last case, the Constitutional Court ruled on appeal in November 2008 that the victim's constitutional rights had not been violated by the trial court's decision to acquit the accused officers despite recognising that torture had taken place.

Amnesty International's research indicates that the continuing allegations of torture and other ill-treatment by law enforcement officials stem from multiple failings by the Spanish authorities to comply with their international legal obligations which require them to take a range of legislative, judicial, and administrative measures to prevent torture and other ill-treatment and to ensure the prompt, independent, impartial and thorough investigation of any case where there is reason to believe such treatment may have occurred. In addition, Spain continues to apply legislation permitting the use of *incommunicado* detention, despite the increased risk of torture and other ill-treatment that such regimes are known to present. Amnesty International has received credible reports of torture and other ill-treatment from detainees held *incommunicado* including sleep deprivation, forced exercise to the point of exhaustion, and asphyxiation. Amnesty International is seriously concerned by the lack of any investigation of such allegations by the relevant legal and political authorities in many cases.

Amnesty International also views with concern actions by the Spanish authorities to extradite, deport, or otherwise forcibly return individuals from Spanish territory to countries where they face a risk of torture or other ill-treatment, in violation of Article 3 of the Convention against Torture. Amnesty International has documented three cases in the past 18 months which the organization considers violate Article 3 of the Convention against Torture. In one of these cases the individual who was forcibly returned has not been seen or heard from by their lawyer or family after being handed into the custody of state agents of the receiving country. The organization is currently campaigning on behalf of two other individuals currently at risk extradition in violation of Article 3 of the Convention. Amnesty International also considers that measures taken by the authorities with the aim of combating irregular migration, particularly on the southern border, have created risks of *refoulement*.

Amnesty International is also concerned that legal measures to combat gender-based violence are failing to provide adequate protection and reparation to women. Migrant women face

particular obstacles to accessing specialized legal and social services, which puts them at increased risk of gender-based violence and killings.

The briefing also addresses failings in the implementation of the principle of universal jurisdiction in Spanish courts, and concludes with information on the investigations into enforced disappearances which took place during the Spanish civil war and during the Franco dictatorship.

TORTURE IN THE CRIMINAL CODE

Articles 1 and 4

DEFINITION

In its 2002 concluding observations on Spain's implementation of the Convention against Torture, the Committee against Torture recommended that Spain consider the possibility of improving the definition of torture in article 174 of the Criminal Code in order to bring it fully into line with Article 1 of the Convention.

While some amendments to the definition of torture in Spanish law were made in 2003, Amnesty International considers that further law reform is necessary in order to ensure the criminalization and prosecution of torture and other ill-treatment as required by the Convention against Torture.

The Spanish Criminal Code defines and prohibits torture in Article 174. In contrast to the definition in Article 1 of the Convention against Torture, the definition of torture in the Spanish Criminal Code does not include acts committed with the intention of intimidating or coercing the victim or a third person, as stated in the Convention.

Furthermore, the law does not explicitly exclude either "due obedience" or "superior orders" as justifications for acts of torture.

While Amnesty International notes that in 2003 the definition of torture was revised to include torture when committed "for any reason based on discrimination of any kind", the organization is concerned, however, that this provision is rarely applied in the courts.

STATUTE OF LIMITATIONS

It should also be noted that the offence of torture is within the section of ordinary and common law crimes within the Criminal Code and not under the heading of "Offences against the International Community" (Section XXIV) which includes genocide, crimes against humanity and "offences against persons and goods that are protected in the event of armed

conflict”, the only offences which, under Article 131.4 of the Criminal Code “shall not be subject to statutory limitations under any circumstances”.¹

Thus an offence of torture, which is meets neither the criteria for crimes against humanity established in Article 607 bis, section 8 of the Criminal Code,² nor the criteria for war crimes set out in Article 609, is subject to a statutory limitation period ranging from five to ten years, depending on the seriousness of the offence.

THE PRINCIPLE OF LEGALITY

Article 2.

Amnesty International notes that the Spanish Government has as of yet failed to address the concerns raised by both Human Rights Committee and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism about revising counter-terrorism legislation to ensure, inter alia, that they are consistent with the principle of legality.

So far, there has been no discussion about ensuring an expert review of laws Criminalizing terrorism with a view to their modification, as recommended by the Special Rapporteur.

On the contrary, on 14 December 2008 the Council of Ministers approved a report by the Minister of Justice on the preliminary draft reform of the Criminal Code which not only failed to consider the need to amend Articles 572 to 579 of the Criminal Code defining a range of terrorism related offences, but also introduced new concepts to the framework of antiterrorist legislation, including “transient association” (“*asociación transitoria*”), a specific type of terrorist funding and the new Criminality of “supervised release” (“*libertad vigilada*”).

The preliminary draft law has been referred to the Council of State, the General Council of the Judiciary (Consejo General del Poder Judicial, CGPJ)³, and the Council of the Prosecution

1 Article 133.2 establishes the non-applicability of statutory limitations to Criminalities imposed for crimes against humanity and genocide and for offences against persons and goods that are protected in the event of armed conflict.

2 Under article 607 bis, it is a pre-condition for the existence of an offence or crime against humanity that “[t]he victim [belongs] to a group or collective that is persecuted on political, racial, national, ethnic, cultural, religious or gender-based grounds or on any other grounds that are universally acknowledged as unacceptable under international law”.

3 The organization has not had access to the reports by the Council of State or the Council of the Prosecution Service. The report prepared by the Comisión de Estudios e Informes, Studies and Reports Committee, of the CGPJ, Informe al Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre del Código Criminal, dated 26 February 2009, can be found at: <http://www.poderjudicial.es/eversuite/GetRecords?Template=default>

Service (Consejo Fiscal), for further comments.

UNIVERSAL JURISDICTION

Articles 5 and 7.

With the exception of two cases (the *Couso* case⁴ and the *Gaza* case⁵), all the proceedings brought before Spanish courts in the exercise of universal jurisdiction have included the offence of torture in combination with other crimes under international law. However, the only case presented specifically for torture, in the form of sexual violence, was the *Atenco* case⁶, which the National Criminal Court (Audiencia Nacional) refused to hear. An appeal of the National Criminal Court's ruling is pending with the Constitutional Court (Tribunal Constitucional) is awaiting settlement.

It is important to emphasize that most of the cases of universal jurisdiction that have been allowed to proceed have faced fierce opposition from the Public Prosecutor's Office (Fiscalía General del Estado). In these cases the victims were forced to get permission for the cases to proceed from the Constitutional Court or the Supreme Court. Throughout the whole process the Prosecutor's Office consistently expressed its opposition. In cases such as those concerning Guatemala⁷ and Rwanda⁸, the Spanish Government has shown little or no interest in obtaining from third states the granting of extradition requests issued by Spanish courts for persons allegedly responsible for crimes under international law.

In the *Atenco* case, Amnesty International was particularly concerned about the court's assessment of what constituted an effective investigation and prosecution of the offence by the Mexican State. In this case (as in the case of another action for war crimes, the *Gaza* case) the courts accepted the relevant government's claims that investigations were being carried out or that court cases relating to the events in question had already been opened. However, as there are no specified criteria for the standards which must be met for a foreign

4 *Couso* case, Sumario (procedimiento ordinario) 27/2007, Juzgado Central de Instrucción Nº 1 (Preliminary investigation (ordinary procedure) 27/2007 by the First Central Court of Preliminary Investigation).

5 *Gaza* case, Diligencias Previas Nº 157/08, Juzgado Central de Instrucción Nº 4 (Preliminary proceedings No. 157/08 by the Fourth Central Court of Preliminary Investigation).

6 *Atenco* case, Diligencias Previas (Procedimiento abreviado) 27/2008, Juzgado Central de Instrucción Nº 3 (Preliminary proceedings (Summary procedure) 27/2008 by the Third Central Court of Preliminary Investigation).

7 *Guatemala* case, Diligencias Previas 331/1999, Juzgado Central de Instrucción Nº 1 (Preliminary proceedings 331/1999 by the First Central Court of Preliminary Investigation).

8 *Rwanda* case, Sumario 3/2.008-D, Juzgado Central de Instrucción Nº 4 (Preliminary investigation by the Fourth Central Court of Preliminary Investigation).

investigation to supersede an investigation in Spain, Amnesty International is concerned that these investigations may not have been sufficiently thorough.

On 25 January 2008 a Spanish woman presented a complaint to the Spanish National Court against various Mexican police officers and their authorities alleging torture, in the form of sexual violence, during the repression of protests organised by a peasant farmers' ("campesinos") group in San Salvador Atenco, Mexico, at the beginning of May 2006. The public prosecutor opposed the admission of the complaint. The Mexican authorities informed the Spanish investigating court that an investigation into the incident at San Salvador Atenco was already underway in Mexico. However, they provided no information on which individuals were being investigated, nor what specific crimes were under investigation, nor any indication of whether there was an investigation into the crimes alleged specifically by the Spanish complainant. Despite this lack of detailed information, the investigating judge decided to refuse the admission of the complaint on the grounds that there was sufficient evidence of an investigation by the state where the crime was alleged to have been committed (in this case, Mexico). Amnesty International is also concerned that the courts which considered the Atenco case did not consider that international law has precedence over ordinary law.

The Spanish Criminal Code does not specifically state that sexual violence may amount to torture when it is committed in custody. National legislation is therefore failing to take on board the important progress made on this matter in international jurisprudence and preventing the courts from considering gender issues when dealing with torture.⁹

A draft amendment to Article 23.4 of the Law on the Judiciary governing universal jurisdiction is currently under discussion.¹⁰ If adopted, it would have the effect of limiting universal jurisdiction to cases in which the victims are Spanish or in which Spain has a "relevant connecting link", where the alleged perpetrator is in Spain and as long as "proceedings implying an effective investigation and prosecution have not been started in another competent country or in an International Court". The criterion for determining what constitutes "effective" in this context is not defined within the draft and the current interpretation being made by the courts, as indicated in the *Gaza* and *Atenco* cases mentioned above, is lax and contrary to Article 7 of the Convention against Torture. According to the draft bill under discussion, criminal proceedings brought under Spanish jurisdiction could be halted merely because there is evidence of "the beginning of another trial" abroad. Such "evidence" may consist simply of notification by a foreign court or government that an investigation is underway, but there are no specified criteria for what type of investigation is sufficient to halt a trial in Spain. Consequently, investigations conducted abroad which may not be in line with international law, for example, investigations lacking independence, impartiality and thoroughness, or sham investigations undertaken with no real

9 See: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008.

10 Proyecto de Ley Orgánica Complementaria de la Ley de Reforma de la Legislación Procesal para la Implantación de la Nueva Oficina Judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, Boletín Oficial de las Cortes Generales, IX Legislatura, Serie A: Proyectos de Ley, 28 de junio de 2009 - Serie A. Núm. 28-1.

intention of leading to prosecutions, may stop criminal proceedings from taking place in Spain.

RIGHT TO INVESTIGATION AND REMEDY

Articles 12, 13 and 14.

THE USE OF SPANISH TERRITORY BY US FLIGHTS INVOLVED IN RENDITION OR OTHER ILLEGAL TRANSFERS

Amnesty International has expressed its concern about the repeated use of Spanish airspace and airports by United States Central Intelligence Agency (CIA) aircraft in the context of the United States-led programme of secret rendition and detention.

In February 2007, the European Parliament (EP) adopted a resolution condemning the acceptance and concealment of such practices by the government authorities of some European countries. This resolution was based on the report of a temporary committee established by the European Parliament in January 2006 to investigate the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, headed by MEP Claudia Fava. In the case of Spain, the report documented 68 landings of CIA aircraft suspected of involvement in the renditions programme at several Spanish airports between 2002 and the end of 2005.¹¹ A report by the Permanent Assembly of the Council of Europe indicated that Palma de Mallorca was one of the places used by CIA agents to prepare rendition operations, including that of the German citizen Khaled El Masri, who was transferred in secret and outside of any legal procedure from Skopje (Macedonia) to Afghanistan in January 2004 in a plane that had come from Mallorca.

Since June 2006, a judge from the National Criminal Court has been investigating alleged offences of torture and unlawful detention related to the passage of rendition-related CIA flights through Spain, including when the alleged torture was committed outside Spain. The judge is also investigating whether US military aircraft transporting detainees to the Guantánamo Naval Base landed at Spanish military bases. The investigation is progressing very slowly. At the end of 2008, the press leaked "secret" documents revealing that, in January 2002, the Spanish authorities allowed the United States to use military bases for transferring prisoners to Guantánamo. Portuguese and Spanish records confirm the existence

¹¹ Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, DocRef(2006/2200(INI)), Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. European Parliament, paras 109-114.

of a dozen landings in Spain by US aircraft flying from or to Guantánamo between 2002 and 2007. The current government has stated that, although there was an agreement between the previous Spanish administration and the US authorities allowing for the transfer of detainees to Guantánamo Bay using Spanish military airports, to the current government's knowledge no Spanish airports were ever used for this purpose. Several aircraft which over a period of years transferred about 200 detainees may not have landed in Spain but they did go through Spanish air space, use of which also requires authorization.

Amnesty International regrets that the Spanish government has not conducted a thorough independent investigation into the extent of stopovers by CIA flights in Spain and the alleged use of military bases for the transfer of detainees to Guantánamo. In its 2006 report, the Parliamentary Assembly of the Council of Europe said that it was “unlikely that European states were completely unaware of what, in the context of the fight against international terrorism, was happening at some of their airports, in their airspace or at American bases located on their territory”.¹² Amnesty International is concerned that the Spanish authorities have not taken effective measures to ensure that Spanish airspace, waters, airports and military bases are not used again in the future for secret detentions, renditions or any other type of activity that violates human rights.

INTERROGATION BY SPANISH POLICE OF DETAINEES AT GUANTÁNAMO BAY AND USE OF SUCH INFORMATION IN CRIMINAL PROCEEDINGS

Articles 5, 7 and 15.

According to reports, at least two police officers attached to the Central Police Unit for Foreign Information (Unidad Central de Información Exterior de la Policía), and a Spanish diplomat travelled to Guantánamo between 22 and 25 July 2002 allegedly to find out whether suspected Al Qaeda collaborators from Spain were detained there. They took with them photographs of over 60 people with alleged links to the terrorist cell and interrogated several detainees, including Hamed Abderrahman Ahmed, a Spanish national, and Lahcen Ikassrien, a Moroccan national who had been living in Spain. The police officers also interrogated Kurdish, Syrian, Algerian, Tunisian, Palestinian, Saudi and Danish detainees. The information obtained was included in a 39-page police report, which named 13 of the people who had been questioned by the Spanish officials. The report was given to the National Criminal Court judge investigating Al Qaeda activities in Spain.

In February 2004, Hamed Abderrahman was extradited to Spain to stand trial for his alleged links with terrorism. In October 2005, the National Criminal Court sentenced him to six years' imprisonment for "being a member of a terrorist organization" on the basis of statements by the Spanish police officers who had interrogated him in Guantánamo. On 20 July 2006, the Supreme Court ordered him to be released on the grounds that the evidence was invalid and that his right to the presumption of innocence had been violated.¹³ In its

¹² Parliamentary Assembly, Council of Europe, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states”, June 2006, para. 230.

¹³ Supreme Court Judgment 4527/2006, Criminal Division, Section 1.

ruling, the Supreme Court confirmed that the police officers interviewed the detainee "without first giving him information about his rights, without providing legal assistance and without authorization or warrant from the competent Spanish judicial authority". The Supreme Court specifically referred to the unlawful nature of the US detention centre in Guantánamo.¹⁴

On 18 July 2005, Lahcen Ikassrien was extradited to Spain at the request of the Spanish judiciary for the alleged offence of belonging to an armed group or terrorist organization. Lahcen Ikassrien has publicly stated that the Spanish police visited the detention centre at Guantánamo while he was held there on several occasions. On 27 July 2005, the fourth section of the Criminal Division of the National Criminal Court ordered him to be released on the grounds that the prosecution had based its case on evidence similar to that which had been ruled invalid in the Supreme Court ruling acquitting Hamed Abderraman Ahmed.

Neither of the two men has obtained reparation for the violations of their human rights leading up to and during their detention at Guantánamo Bay. The Spanish authorities, furthermore, have failed to carry out a thorough and impartial investigation into the extent of interrogations conducted by Spanish police officers at Guantánamo. Amnesty International is concerned at the possible human rights violations which may have occurred as a result of the interrogations by Spanish police officers of detainees at Guantánamo Bay and considers that the trips to Guantánamo made by Spanish police officers and diplomats were not in keeping with the full respect for international human rights law and humanitarian law.

In April 2009, a judge from the National Criminal Court started proceedings to investigate allegations that four former detainees, including Abderraman Ahmed and Lahcen Ikassrien, were tortured while held at the US detention centre in Guantánamo.

Amnesty International is also concerned at reports suggesting that information provided by the Spanish authorities to the intelligence services of other countries, including the United States, may have contributed to the unlawful detention in Guantánamo of Libyan national Omar Deghayes for over five years.

In the 1980s, Deghayes had fled persecution by the Libyan Government and been granted political asylum in the United Kingdom. When the international conflict began in Afghanistan following the attacks on the United States of 11 September 2001, Omar Deghayes was in Afghanistan and fled to Pakistan, together with his wife and baby son. They planned to return to the United Kingdom but he was detained as an "enemy combatant". Before being transferred to the Guantánamo base, Deghayes was held in the Bagram Air Base, operated by the United States, where he was subjected to torture and other ill-treatment.¹⁵

The name of Omar Deghayes appeared on the list of people most sought by the US Federal

¹⁴ Idem.

¹⁵ Amnesty International, "United States. Who are the Guantánamo detainees?", AMR 51/88/2005.

Bureau of Investigation and the photograph accompanying it had been taken from a training video made by a Chechen separatist group. That same video had reached the hands of the Spanish Central Police Unit for Foreign Information in 2000 and they too concluded that the man in the film was Omar Deghayes. Omar Deghayes and his family are convinced that his detention was a case of mistaken identity, an assertion that is supported by the views of experts in facial recognition.

On 19 December 2007, Omar Deghayes and Jamil Al Banna (another former UK resident with refugee status) were returned to the United Kingdom from Guantánamo. On returning to the United Kingdom, the two men were re-arrested on the basis of a European arrest warrant sought by a judge from the Spanish National Criminal Court so that they could be brought before the Spanish courts on charges of alleged links with Al Qaeda in Spain. In March 2008, the Spanish National Criminal Court cancelled the detention orders and abandoned criminal proceedings against the two men, stating that, although the Spanish investigation was initiated before the men's detention in Guantánamo Bay, any information later revealed in court which had any connection to their detention in Guantánamo Bay would be inadmissible as evidence and could contaminate proceedings. The Court also concluded that given the ill-health of the accused, it would be inhumane to continue proceedings. The Court noted that both men had suffered torture and other ill-treatment while detained for a prolonged period of time outside the rule of law in Guantánamo Bay.

IMPUNITY FOR TORTURE AND OTHER ILL-TREATMENT

In interviews with Amnesty International in 2007, representatives of human rights ombudsperson offices, judicial authorities, and police bodies acknowledged incidents of ill-treatment by law enforcement officials. Many of them, however, claimed that such incidents occurred only in isolated instances and that the overwhelming majority of complaints of ill-treatment made against law enforcement officials were false (without specifying whether these complaints had actually been investigated independently, impartially and thoroughly). This phenomenon was noted with concern by the Committee against Torture in its concluding observations (para. 8) on Spain's fourth periodic report in 2002.¹⁶ While Amnesty International does not consider ill-treatment by the Spanish law enforcement officials to be routine, based on its research the organization disputes the suggestion that its incidence is rare and that the responsibility for its occurrence lies exclusively with a handful of rogue police officers. Amnesty International therefore considers that Spain is continuing to fail to meet its obligation to conduct prompt and impartial investigations into allegations of torture and to bring those responsible for torture or other ill-treatment to justice, as they were reminded to do by the Committee against Torture in its Concluding Observations in 2002 (para. 15).

Amnesty International is deeply concerned that the failure of the Spanish authorities to recognize the widespread occurrence of torture and other ill-treatment and the failings of the

¹⁶ Conclusions and recommendations of the Committee against Torture: Spain. 23/12/2002. CAT/C/CR/29/3.

internal disciplinary and criminal investigation system are exacerbating the climate of impunity, which in turn fosters further incidents of ill-treatment.

The failure to ensure a prompt, independent, impartial and thorough investigation into each credible allegation of torture or other ill-treatment also impedes the identification of structural deficiencies that facilitate ill-treatment and thus prevents institutional improvements from being implemented. Finally, Amnesty International is concerned that the failure to ensure accountability of those individuals responsible for ill-treatment has undermined the credibility of the law enforcement bodies in Spain as a whole.

Amnesty International's research indicates that, following an incident of alleged ill-treatment by law enforcement officials, cases frequently follow the same pattern: non-existent or inadequate internal investigations and rapid provisional discharge of any judicial complaint related to the ill-treatment on the basis of a lack of evidence, even when medical or other credible evidence exists to support the allegations. Many alleged victims of torture or other ill-treatment have complained to Amnesty International that investigating judges and prosecutors relied too heavily on statements by police while not giving equal credence to victims or witnesses.

Amnesty International's research indicates that when cases do come to trial, they often end in acquittal due to the non-identification of the officers responsible, or in nominal sentences following conviction. It is not unusual for such proceedings to continue for several years, following repeated appeals against judicial decisions to provisionally discharge the complaint.

Amnesty International is also concerned about cases in which law enforcement officials lodged complaints against people who complained of ill-treatment which appeared to be designed to discredit the complainant's testimony, in an attempt to mitigate or cover up evidence of their own wrongdoing or to intimidate victims of ill-treatment into withdrawing their own complaint against police officers.

Other factors identified by Amnesty International as contributing to effective impunity for ill-treatment by law enforcement officials in Spain include:

- Inadequate initial training and insufficient ongoing training in the appropriate use of force and the applicable human rights standards;
- lack of protocols and clear guidance for police on use of force;
- lack of systematic video and audio-recording in all areas of police stations where detainees may be present (e.g. cells, communal areas, interrogation rooms);
- failure to ensure that detainees are examined by a medical doctor, outside the hearing and presence of the police (unless the doctor concerned requests otherwise in a particular case);
- inaccurate or incomplete medical reports by examining doctors;
- obstacles to an individual being able to register a complaint about police conduct at police stations and courts;
- excessive delay in criminal proceedings against law enforcement officials suspected of ill-treatment and complaints *by* law enforcement officials being heard much sooner than complaints *against* them, even when relating to the same incident;
- difficulty identifying officers responsible for ill-treatment because they are not wearing identifying badges and/or because they wear balaclavas masking their faces;

- failure by police officers to prevent and/or report ill-treatment by colleagues, and a misguided “esprit de corps” which leads to officers covering up unlawful behaviour of others;
- failure of internal police complaints mechanisms to ensure allegations are promptly, thoroughly and impartially investigated;
- failure of the government to establish an effective independent mechanism to investigate allegations of serious human rights violations by police officers;
- granting of pardons to police officers convicted of ill-treatment;
- failure to dismiss or apply other appropriate disciplinary sanctions, and even in some cases, promotion of officers convicted of ill-treatment.

Amnesty International's November 2007 report, *Spain: Adding insult to injury – the effective impunity of police officers in cases of torture and other ill-treatment* (Index: EUR 41/006/007), examines the issue of impunity in detail and includes numerous illustrative case examples of the organization's concerns. What follows below is a summary of some of the key points. Updated information on the status of these cases and developments in policy and practice by the relevant Spanish authorities is contained in the update report, *Spain: Adding insult to injury – two years on* (Index: EUR 41/00/2009). For additional information on this topic, see previous Amnesty International reports:

- *Spain: Crisis of identity: Race-related torture and ill-treatment by State Agents* (Index: EUR 41/001/2002). April 2002.
- *España: Acabar con la doble injusticia: Víctimas de tortura y malos tratos sin reparación.* (Available in Spanish only). December 2004.

LACK OF INDEPENDENT INVESTIGATION

(Articles 12 and 13)

Many of the investigations into complaints of ill-treatment that Amnesty International researched demonstrated an apparent lack of impartiality and objectivity.

At present, criminal investigations into cases of alleged ill-treatment are investigated by investigating judges with the assistance of the judicial police. In some instances the investigating judge will request that evidence be gathered by officers from a police force different to that being investigated (for example, Civil Guards could be asked to investigate allegations against a national police officer, or national police officers might investigate allegations against officers from autonomous regional police forces) but this practice is not standardized or compulsory. In some cases investigated by Amnesty International an officer from the same force as those alleged to have been responsible for the ill-treatment was assigned to investigate the allegations against them. Such investigations do not meet the requisite standards of independence.

Police trade union representatives interviewed by Amnesty International in 2007 considered that police officers would not attempt to cover up wrong-doing by colleagues, but some of them also reported that ill-treatment was tolerated to a certain degree by those in authority “turning a blind eye” to less severe incidents and as a result of a misguided “esprit de corps.” Amnesty International considers it to be of key importance that investigations into cases of alleged police ill-treatment be investigated by personnel who are independent from the rest of the police force.

FAILURE TO INVESTIGATE*(Articles 12 and 13)*

Amnesty International has documented a pattern throughout Spain where complaints against the police are frequently provisionally discharged by investigating judges immediately or after minimal investigation. This appears to be the result, in many cases, of judges and prosecutors relying heavily on statements by police, while not giving equal credence to the statements of victims and other witnesses. Amnesty International has also noted the failure of investigating judges to open investigations on their own initiative into apparent ill-treatment in cases where the victim does not make a formal complaint but evidence exists to indicate ill-treatment may have occurred.

The case of Javier S is illustrative of Amnesty International's concerns about judicial bias in favour of police testimony over the testimony of the complainant.

THE CASE OF JAVIER S

According to the complaint he submitted to the investigating court:

Javier S¹⁷ was arrested by two national police officers in Plaça de la Universitat (Barcelona) on the evening of 3 June 2005 while sitting with a small group of friends who had just participated in a gay pride demonstration. The officers grabbed him, beat him, stamped on his head, neck and back, and then handcuffed him before throwing him into a police car. He was not informed of the reason for his arrest. Along with several others who had also been detained, he was taken to the police station in Via Augusta.

Upon arrival at the police station the detainees - nine in total - were subjected to insults, including homophobic comments. They were refused permission to use the toilet, to have something to drink or to see a doctor. Javier S was beaten with a truncheon on the chest and punched in the face several times by an officer who shouted, "You little faggot, you can't take anything!" One of the police officers kicked him in the chest leaving a boot mark imprinted on his shirt and punched him repeatedly. As a result Javier S was unable to breathe for several seconds and began to have muscle spasms. The other detainees and one of the police officers present were concerned for his welfare and asked for him to be taken to hospital but this request was denied. After a few minutes two police officers picked him up from the bench and he believed he was being taken for medical treatment. However, instead of doing so, the same police officer who had kicked him hit Javier S in the chest again while trying to wipe away his boot print. He insulted Javier S continuously saying, "You're such a little faggot."

Javier S was later taken to Hospital del Mar for a medical examination. The doctor gave him some medication and instructions on how to treat his injuries; but upon return to the police station the police officers ignored the medical advice and did not give him the medication. Javier S spent the night sleeping on the floor of the police cell without a mattress before being transferred the next day to the police station in Via Laietana.

Javier S told Amnesty International that immediately after their release from police custody on 7 June 2005, he

¹⁷ Full name withheld to protect privacy.

and four others of those arrested with him made formal complaints of ill-treatment at Investigating Court 22. Their complaints were rejected by the judge on 2 September 2005 who concluded that the police had acted with the minimal force necessary at the time of the arrest. The judge did not comment on the allegations of ill-treatment inside the police station and did not call any of the complainants to make a statement.

According to court documents which Amnesty International has reviewed, the judge concluded that “there is no reason to consider... that the police report is contrary to the truth.”¹⁸ He reasoned that although police action should be independently investigated, “this requirement does not imply that the police ... must always and automatically be excluded on grounds of partiality from reporting on the events.”¹⁹

The complainants appealed against this decision on 19 October 2005; the judge continued to reject the complaint. Javier S appealed again, to the Provincial Criminal Court of Barcelona, which on 7 December 2005 overruled the lower court’s decision and ordered it to investigate the allegations. In contrast to the investigating court, the appeal court noted in its decision the “patent lack of impartiality” and indeed “positive interest”²⁰ of the police to produce reports favourable to their colleagues when investigating such allegations.

As a result, the investigating court ordered several police officers to appear and give statements. Javier S, his lawyer, and the other complainants went to the court on 15 February 2006 to participate in the proceedings but Javier S told Amnesty International only the lawyers were allowed to enter the building. However, while waiting outside Javier S and the other plaintiffs saw the “accused” police officers arriving and realised that only one of them had been present during the incident. Javier S informed his lawyer of this fact, who transmitted this information to the investigating judge and refused to participate further in the proceeding, calling it a “farce.”

On 8 March 2006 the investigating judge closed the case again on the basis that the testimonies given by the police officers who had appeared in court (and who the complainants claimed were not the ones present in the police station during the incident) did not indicate any misconduct had occurred. The complainants appealed again, calling for the investigating judge to request from the police station a full list of officers on duty on the day of the incident in order to identify and question those believed to have been involved in the assaults, but to date they have been unsuccessful in reopening the case.

The repeated closure of the case and the judge’s failure to investigate promptly, thoroughly and impartially have resulted in the case being closed without ever reaching trial. The only recourse left to the complainants under Spanish law is to petition the Constitutional Court on the grounds of denial of due process. This is, however, a lengthy and expensive procedure which Javier S says he is financially unable to pursue.

INCOMPLETE OR INACCURATE MEDICAL REPORTS

It is undisputed that the effective exercise of detainees’ rights to medical examinations is an

¹⁸ Decision of provisional discharge, Investigating Court 22 of Barcelona, 2 September 2005, para 13.

¹⁹ Decision of provisional discharge, Investigating Court 22 of Barcelona, 2 September 2005, para 13.

²⁰ Appeal decision of Provincial Criminal Court of Barcelona, 7 December 2005.

important tool in preventing ill-treatment from occurring and is also of great importance in successfully prosecuting those responsible when ill-treatment occurs. Many Spanish judicial and prosecutorial authorities interviewed by Amnesty International in 2007 said that they considered medical reports from the detention period to be the most important piece of evidence available in cases of alleged ill-treatment by police, particularly in cases in which the ill-treatment was alleged to have taken place in custody, where it is likely to have taken place out of sight of independent witnesses.

However, Amnesty International has received reports that in cases of alleged ill-treatment police officers have remained present during the medical examination of the victim. Amnesty International considers that the presence of police officers during the medical examination of a detainee is likely to intimidate the victim into remaining silent about any ill-treatment and the causes of their injuries out of fear of reprisals. It may result in medical reports that do not accurately reflect the detainee's physical and mental state at the time of examination if the victim does not indicate all their injuries to the examining doctor. This can make the report ineffective as a piece of evidence and may even prejudice the prosecution's case against the accused officers by apparently confirming that no ill-treatment took place.

Amnesty International was also alarmed to discover during research carried out in 2007 that some judges believed it was compulsory for police officers to remain present during medical examinations (in case of risk of flight or injury to the doctor), even stating that they would prosecute police officers for negligence if they left detainees alone with a doctor. This is in direct contradiction of the human rights standards elaborated by the Council of Europe Committee for the Prevention of Torture (CPT), which state that "As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers".²¹

LACK OF PREVENTIVE MEASURES

(Article 11)

For many years human rights bodies including the Committee against Torture, and Amnesty International and other NGOs, have recommended that the Spanish authorities introduce systematic and comprehensive video- and audio-recording in all areas of police stations where detainees may be present (except where it would violate their right to consult with their lawyer or a doctor in private).²²

Amnesty International has welcomed the introduction of video-recording of communal areas of police stations by the Basque autonomous police force (Ertzaintza). However, it should be noted that such video-recording measures do not comprehensively record all areas where detainees may be present (i.e. individual cells, as well as communal areas and interrogation rooms). Consequently, it is not as effective a deterrent as it could be.

²¹ CPT/Inf/E(2002)1-Rev.2006 citing CPT 2nd General Report [CPT/Inf (92) 3] , para. 38.

²² See, for example, Conclusions and recommendations of the Committee against Torture: Spain. 23/12/2002. CAT/C/CR/29/3, para. 14(a).

The organization has also welcomed the commitment expressed by the Catalan autonomous government in 2007 to introduce CCTV video-recording in police stations under its control. The national government has committed in its Human Rights Plan (published on 10 December 2008) to introduce CCTV cameras to monitor detainees held in incommunicado detention.

In interviews with Amnesty International in Spain in 2007, the recommendation to establish video- and audio-recording in police stations was widely supported by police representatives from various trade unions, representatives of the Office of Public Prosecutions, representatives of human rights ombudspersons' offices, ministers and judges. Police and internal affairs representatives from the Ertzaintza interviewed by Amnesty International reported that accusations of ill-treatment have shown a significant decline since the introduction of video surveillance in the detention areas and interrogation rooms of their police stations.

However, the measures currently applied across Spain still fall short of the recommendations made by the Committee against Torture, the CPT and other human rights bodies aimed at combating ill-treatment and impunity most effectively, as video- and audio-recording equipment is restricted at present to a comparatively limited number of police stations across Spain.

INTIMIDATION OF COMPLAINANTS

(Article 13)

In many cases of ill-treatment investigated by Amnesty International, individuals making claims of ill-treatment by police have been charged with resisting authority, resisting arrest, assault on a public officer, or other serious offences. Complainants in such cases have told Amnesty International that they believed such charges were filed in order to pressure or intimidate them into withdrawing their complaint, or were used as a tactic aimed at undermining the credibility of their complaints against the police.

This practice was recognized by members of various police forces interviewed by Amnesty International in 2007, who acknowledged the "automatic habit" of filing such charges as a "self-defence tactic" aimed at protecting themselves against accusations of false imprisonment or assault. One officer remarked to Amnesty International delegates that it was difficult even for other officers to know if their colleague's claim was true or not as some officers had been known to tear their own uniforms in order to lend credence to their story if they knew they had used excessive force. The determination of what force was "necessary" appeared to be interpreted extremely broadly by some of those police officers interviewed by Amnesty International.

THE "PRESUMPTION OF TRUTH"

(Articles 12, 13 and 14)

In the course of its research into police ill-treatment and related impunity in Spain, Amnesty International has noted a recurring pattern of investigating judges dismissing cases after giving more weight to police testimony than that of alleged victims of ill-treatment and other

witnesses - even in cases where there was additional evidence which contradicted the testimony of the police. Even in cases in which multiple victims corroborated each other's testimony and police statements contradicted each other and themselves, or where there was physical evidence such as medical reports to support victims' allegations, it appears that judges accepted the word of police witnesses as sufficient proof to provisionally discharge a case. As a result, cases are often closed without thorough investigation; a number of cases cited in Amnesty International's report *Spain: Adding insult to injury*, Index: EUR 41/006/2007 illustrate this pattern.

While recognizing that the presumption of innocence applies to all persons charged with a crime, Amnesty International is concerned about a pattern that emerged in cases it investigated where it appeared that investigating judges were ignoring evidence that contradicted statements of police officers who were under investigation for criminal conduct. Enquiries by the Council of Europe Commissioner for Human Rights into a case of alleged police misconduct in Spain highlighted this contradiction by asking "How ... can it be possible for a judge investigating allegations of ill-treatment simply to ask the alleged perpetrators for information and take their word for it and drop the cases without further investigation."²³

A matter of particular concern to Amnesty International is the repeated reference by police officers, prosecutors and judges interviewed by Amnesty International delegates to the concept of "presumption of truth" ("la presunción de la veracidad") in relation to police testimony, according to which the word of a police officer is *a priori* taken as truth. Amnesty International's research has indicated that police testimony is not just taken as truth in the absence of other evidence, but even when it is directly contradicted by other evidence. Individual police officers, parliamentarians, staff of human rights ombudspersons and public prosecutors all referred to this concept, although representatives of the judiciary and the Public Prosecutor assured Amnesty International that the "presumption of truth" was not legal doctrine. The general confusion over the existence and/or legal status of the concept raises clear concerns over institutionalised and individual lack of impartiality in which police testimony is weighted more favourably than any other evidence, even when that testimony is from a party with an interest in the case under investigation. Amnesty International considers that the application of "the presumption of truth" is inconsistent with the obligation to ensure impartial investigation of crimes, including torture and other ill-treatment, and to ensure that justice is not only done but seen to be done.

LACK OF IMPARTIALITY, DELAYED AND INEFFECTIVE INVESTIGATIONS (Articles 12, 13 and 14)

Amnesty International's research also highlights that where judges and public prosecutors show reluctance to investigate a case of alleged police ill-treatment, the investigatory stage may proceed extremely slowly. The case of Sergio LD illustrates this issue.

²³ Commissioner for Human Rights Report on Spain 2005, para 14.

THE CASE OF SERGIO LD

On 16 March 2002, Sergio LD²⁴ attended an anti-globalisation demonstration in the centre of Barcelona. Towards the end of the event some violent incidents occurred and around 100 people were arrested. Among those arrested was Sergio LD, who was later charged with public disorder, damaging property and causing injury to several national police officers. He has always denied responsibility for these offences and claims he was the victim of mistaken identity.

Sergio LD reported that during his arrest and detention he was subjected to a series of assaults and threats which resulted in physical injuries that lasted for several months. For the past five years he has been undergoing counselling for the resulting psychological harm. In his complaint to the investigating court, Sergio LD states that:

Sergio LD was arrested in the Plaza de Colón (Barcelona) by four masked plainclothes national police officers who threw him to the ground, handcuffed him and then pushed him into a police van where he landed on the floor. There were no other detainees present in the van. As he lay immobile one of the police officers closed the door repeatedly on his right leg causing injury to his shin and ankle. The same officer then beat him repeatedly on the left leg with his truncheon and pinched the injured areas roughly with his hand. Another police officer stamped on his head several times. Another officer tried to twist back his fingers. At the same time, police officers were spitting on him and threatening him, saying, "We're going to kill you, you'll pay for all of them." They also called to the driver of the van saying, "What a pain it's your turn to drive, you're missing all the fun."

The van was driven away and after a short time Sergio LD was pulled out of the vehicle and thrown to the ground. Two officers then picked him up and transferred him to a police car, forcing him violently against it head first "like a battering ram" before pushing him inside.

Upon arrival at the La Verneda national police station an officer from the station punched Sergio LD in the stomach. He was then transferred to a room where he was made to kneel and look at the floor, while still wearing handcuffs. A police officer closed the window blinds and then three officers kicked and punched Sergio LD all over the body until he began to have muscle seizures and became temporarily incontinent. He believed they were going to kill him. Following this Sergio LD was made to sit on a chair with his hands tied behind his back while another officer took his identity papers. Sergio LD had begun to vomit at this time and the police officer gave him a rubbish bin to be sick in. Afterwards a police officer dressed in riot gear entered the room and, encouraged by those already present, hit Sergio LD in the face so hard that he fell off the chair. The officer then stamped on his head.

At this point, Sergio LD was taken to the medical unit inside the police station where his injuries were cleaned. The police officers remained present throughout the medical examination, leaving Sergio LD unable to speak to the doctor in private and report the abuse he had suffered. He was given a tranquilizer and the doctor recommended that he be taken to the emergency ward at the hospital due to his head injuries.

Instead, he was returned to the room where he had been assaulted. A police officer wearing a scarf which covered the bottom part of his face took out a knife and pressed it against Sergio LD's leg saying "Now you're

²⁴ Full name withheld to protect privacy

going to tell me everything.” He was transferred to another room where the same officer and another, who also had his face covered with a scarf, began to interrogate him regarding the demonstration he had attended and personal details about himself. They asked him repeatedly about a tattoo on his body, at which point he realised he had been wrongly identified as he does not have such a tattoo. While they interrogated him, one of the officers took out a whip and used it to beat Sergio LD on the soles of the feet. The threats continued and they told him they would throw him out of the window.

Finally Sergio LD was taken for fingerprinting and moved to a cell with other detainees. During the night he did not sleep but lost consciousness several times and suffered nausea. Throughout the night his cellmates requested medical attention for him but he was not taken to the hospital until 9am the following morning, after which he was returned to the police station and then taken before the judge and charged with public disorder, damage to property and assaulting a police officer.

Sergio LD told Amnesty International that on 6 September 2002 he made a formal complaint to Investigating Court 2 of Barcelona regarding torture, assault on personal integrity and injury. As there were no CCTV cameras in the police station there was no video evidence to substantiate his allegations, but they were supported by numerous medical reports and positive identification of several of the officers during identity parades. Despite the gravity of the facts alleged, the public prosecutor and investigating judge classified the case as one of “faltas” (misdemeanours) instead of “delitos” (crimes) which meant that no in-depth preliminary investigation was conducted into the incident and the case was provisionally discharged in January 2003 on the basis of a lack of evidence.

Sergio LD presented an appeal against this decision to the Provincial Criminal Court of Barcelona which ruled, on 9 December 2003, that the actions of the lower court had been incorrect and “absolutely unacceptable” and ordered the lower court to open an investigation into a possible crime of torture.

In June 2007, Sergio LD was convicted by Barcelona Criminal Court No 18 of public disorder, damaging property and assaulting police officers, on the basis of police testimony and some video footage which appeared to show him being arrested (but not committing a crime). The police officers who testified against him are the same officers who are accused of torturing him. He was sentenced to a total of two years and nine months imprisonment and fines and damages totalling over €15,000. Sergio LD’s appeal was rejected but the sentence itself has been suspended pending a decision on his request for a “pardon”. If this fails, he will have to serve the prison sentence. He maintains his innocence of all charges against him.

In September 2009 Sergio LD’s own complaint against the police was still in the investigation phase. He has told Amnesty International that he is losing hope of ever seeing someone convicted or even brought to trial for the torture he suffered. He told Amnesty International, “It’s easy for them to convict you, but almost impossible to see a police officer convicted. They’re untouchable”.

For the past seven years, Sergio LD has been receiving counselling for the psychological harm he suffered as a result of his detention. In March 2008 Sergio LD was examined by an independent psychiatrist specializing in cases of ill-treatment and abuse. After interviewing Sergio LD and examining the medical reports issued immediately after his detention by the forensic doctor at the investigating court, the psychiatrist concluded that:

“Given the total congruence between the facts related and the psychological, somatic and behavioural repercussions, in my capacity as expert, I consider that it is possible to affirm with the greatest degree of

conviction, despite the time that has elapsed, that the facts related by [Sergio LD] are true and do not contain any substantive elements of distortion which alter the essential core."²⁵

FAILURE TO IMPOSE APPROPRIATE SANCTIONS

(Articles 2 and 4(2))

Amnesty International is concerned about cases in which the sentence imposed on police officers convicted of ill-treatment (including ill-treatment leading to death in custody) do not adequately reflect the grave nature of the offence. This practice is inconsistent with the government's obligations under Articles 2 and 4 of the Convention against Torture and Amnesty International considers that it contributes to a climate of effective impunity amongst law enforcement officials.

Amnesty International notes that the Committee against Torture considered that the imposition of lighter Criminalities and pardons in a case of torture in Spain violated Articles 4 and 2 of the Convention against Torture in its 2005 decision on the case of *Kepa Urra Guridi* (UN Committee against Torture decision, 17 May 2005, Communication No. 212/2002).²⁶

Amnesty International is concerned that, in the face of investigations into ill-treatment which are ineffective and not impartial, law enforcement officials are perceived by themselves and by the public to be above the law and the climate of impunity spreads. There is also a risk that those who escape justice will continue to ill-treat detainees.

In Amnesty International's report *Spain: Adding insult to injury* (Index: EUR41/006/2007) one of the cases examined concerns a national police officer, who, according to sources interviewed by the organisation, has been accused of ill-treatment in at least four other unrelated cases. Only one of these cases has reached trial; the other cases were closed at the initial investigatory stage. Amnesty International also noted that another group of officers are implicated in two separate cases examined in the report. In another case examined, an officer convicted of torture by the Supreme Court was subsequently promoted to Provincial Superintendent.

One of the officers convicted in relation to the ill-treatment of Juan Martínez Galdeano (who died in police custody following ill-treatment in July 2005) was the subject of a complaint of serious ill-treatment made by another detainee, on 25 February 2005, filed at Investigating Court 2 of El Ejido, Almería. The complainant stated that he had been severely beaten while handcuffed and threatened with death both at the time of arrest and during his three-day detention in police custody. Newspapers reported that the investigating court had taken no action to investigate this complaint at the time of Juan Martínez Galdeano's death five

²⁵ Expert exam conducted by Prof. Pau Pérez-Sales, Doctor in Medicine, psychiatrist, Hospital La Paz Madrid, 12 February and 19 March 2008.

²⁶ The 2004 Amnesty International report *España: Acabar con la doble injusticia. Víctimas de tortura y malos tratos sin reparación* (available in Spanish only) contains further examples of cases in which police officers convicted of ill-treatment were granted pardons by the government, including in cases where this was against the recommendation of the sentencing court.

months later and that the officer in question was still on active duty. According to the internal investigation by the Civil Guard into the death of Juan Martínez Galdeano, the Civil Guard hierarchy had not been informed that the officer had been implicated in any previous allegations of ill-treatment.

Amnesty International considers that the continuing allegations of ill-treatment by police officers result from multiple failings by the Spanish authorities to comply with their international legal obligations which require them to take a range of legislative, judicial, and administrative measures to prevent ill-treatment, bring those responsible to justice, and ensure victims receive reparation.

INCOMMUNICADO DETENTION

Article 11

In September 2009 Amnesty International published the report *Spain: Out of the shadows – time to end incommunicado detention* (Index: EUR 41/001/2009). This report examines in detail the many ways in which Spanish legislation permitting and regulating the use of incommunicado legislation violates detainees' rights to a fair trial and increases their risk of being subjected to torture or other ill-treatment. A summary of the key concerns follows below.

OVERVIEW

Incommunicado detention legislation has been maintained and amplified by successive Spanish governments, despite the calls for over a decade by various UN bodies including the Committee against Torture, the CPT, and human rights organizations, to take measures to remove legislation on incommunicado detention from national law. Most recently, in 2008, the Human Rights Committee²⁷ and the Special Rapporteur on counter-terrorism²⁸ called for the abolition of incommunicado detention legislation in Spain.

Successive Spanish governments have taken no action to implement these recommendations and in fact acted in direct opposition to them in 2003, shortly after the Committee against Torture raised its concerns, by extending the maximum time limit for incommunicado detention (in police custody and on remand) from five to 13 days.

In addition to violating important rights of detainees which are essential to ensure a fair trial, - including prompt, effective access to legal representation - the use of incommunicado detention has been strongly criticised by international human rights bodies for facilitating

²⁷ Draft Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCPR/C/ESP/CO/5, 27 October 2008, para 14.

²⁸ A/HRC/10/3/Add.2, 16 December 2008 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, para 32.

torture and other ill-treatment of detainees.²⁹

Amnesty International is, furthermore, deeply concerned by the propensity of the Spanish authorities to label all allegations of torture or other ill-treatment made by detainees held *incommunicado* as a tactic of an organized criminal strategy to discredit the state. Where such a reaction is made before any investigation into the substance of these allegations has taken place it can only contribute to a climate of impunity for acts of torture and other ill-treatment. It is also contrary to Spain's obligation, including under Article 12 of the Convention against Torture, to ensure a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture may have taken place.

CURRENT LEGISLATION AND PRACTICE

Under the Criminal Procedure Act currently in force, at the request of the police, an investigating judge has the power to order a detainee to be held *incommunicado* 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 terrorism-related offences.³⁰ This 13-day period consists of up to five days of *incommunicado* detention in police custody, which can be extended on orders of the investigating judge by a further five-day period of *incommunicado* detention on remand in prison (provisional imprisonment). A further three-day period of *incommunicado* detention may be imposed on a remand prisoner on orders of the judge at any time during the investigation after the original (10-day) *incommunicado* period has expired.

Under the *incommunicado* regime the rights of detainees are restricted in various manners including the following:

- Individuals held *incommunicado* 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, on request of the police.
- Individuals held *incommunicado* do not have the right to consult with a lawyer in private (namely the duty lawyer appointed to represent them) at any time during their detention *incommunicado* (both in police custody and on remand).
- Individuals held *incommunicado* 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. Furthermore, foreign nationals do not have the right to have such information communicated to their consulate.
- Individuals held *incommunicado* do not have the right to a medical examination by a doctor of their own choice. *Incommunicado* detainees may receive a second medical

²⁹ See, for example, Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras17, 25 July 1996.

³⁰ Code of Criminal Procedure, article 509.2.

examination on request but this will also be conducted by a state appointed doctor.

Furthermore, individuals held on suspicion of involvement in terrorism-related offences or organised crime - whether or not they are being held incommunicado – may be held in police custody for up to five days (120 hours) after arrest before being presented to a judicial authority.

In 2003 the Basque Government (Department of Interior, in consultation with the Department of Justice, Labour and Social Security and Department of Health) introduced the “Protocol for the Coordination of Assistance to Persons Detained Incommunicado” and the “Assistance Service for Relatives of Incommunicado Detainees” for the Ertzaintza. The main features of the protocols include additional and more comprehensive medical exams of detainees, and the facilitation of information to incommunicado detainees’ relatives concerning their whereabouts and physical condition. These protocols represent an improvement on standard Spanish legislation, but do not counteract the most serious concerns regarding such legislation. According to information received by Amnesty International no detainees were held in incommunicado detention by the Ertzaintza in 2007 or 2008, but the organization notes with deep regret reports that at least one person has been held incommunicado by the Ertzaintza since March 2009.

As noted above in January 2008 it was announced that the Spanish Ministry of Interior was taking measures at the national level to install video surveillance cameras to monitor incommunicado detainees throughout the entire period of detention. The move was intended to help prevent possible ill-treatment of detainees, and to deter false allegations of ill-treatment from being made. This commitment was reiterated in the National Human Rights Plan published by the government on 10 December 2008.

However, the use of CCTV cameras to record detainees held incommunicado is not compulsory and is only used when explicitly requested by the judge responsible for the case. Amnesty International was informed by the President of the Criminal Chamber of the National Court in June 2008 that judges only request recording in approximately 50 per cent of cases, making the measure obsolete on many occasions. Other senior judicial representatives interviewed by Amnesty International explained that law enforcement officials considered it a display of personal distrust when judges order the measure, consequently making it a sensitive issue for judges to apply. They stated that in order to be effective, video recording must be made compulsory, by law, in all cases. In its 2008 recommendations, the UN Human Rights Committee called on Spain to ensure systematic audiovisual recording of interrogations in all police stations and places of detention.³¹ The Ertzaintza has used CCTV recording as a matter of routine in their interrogation rooms and communal areas of detention facilities (but not inside individual cells) since October 2005.

The National Human Rights Plan of December 2008 also contained other modifications to the incommunicado regime which would bar minors from being held incommunicado and give detainees the right to a second medical examination by a doctor appointed by the post

³¹ Draft Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCPR/C/ESP/CO/5, 27 October 2008, para 14.

holder of the (still to be created) National Mechanism for the Prevention of Torture. The National Human Rights Plan also specified the creation of guidelines for doctors examining incommunicado detainees. Although these proposals are an improvement on the current system, they do not rectify the concerns raised by international expert bodies.

LACK OF EFFECTIVE LEGAL ASSISTANCE

Individuals being held incommunicado may not be represented by a lawyer of their own choice. A duty lawyer is assigned to the detainee by the Bar Association, on the request of the police, and must attend at the police station within eight hours of being called. Although this lawyer must be present for “formal” police interrogations and when the detainee makes a statement to police, Amnesty International was informed by a representative of a judges’ professional association that in practice incommunicado detainees are also questioned “informally” by police with no lawyer present.³² This allegation was reiterated by other legal professionals. One lawyer even told Amnesty International that it was his practice, upon entering the interrogation room, to ask his client if this was the first time he or she was being questioned. Although the results of any interrogation conducted without a lawyer present are not admissible in court, Amnesty International was told that in practice police reports submitted in evidence sometimes refer to information obtained in such informal interviews.³³ Furthermore, the opportunity may be used to exert illegitimate pressure – physical or psychological – on the detainee.

Furthermore, in violation of the internationally guaranteed right to counsel, the assigned lawyer is not permitted to communicate with their client in private (out of hearing of law enforcement officials) at any time during the period of incommunicado detention, both within police custody and on remand.³⁴ In the case of *Brennan v. UK* (judgment of 16 October 2001) the European Court of Human Rights stated that:

“an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c). If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness”.³⁵

The Court concluded that:

“the presence of the police officer within hearing during the applicant’s first

³² Interview with Amnesty International, 15 June 2008.

³³ Interview with Amnesty International, 16 July 2008.

³⁴ Under Spanish legislation, no detainee (including those not held incommunicado) has access to a lawyer in private before making their statement to the police. Amnesty International believes that this legislation must be reviewed urgently.

³⁵ *Brennan v. the United Kingdom* (00039846/98), 16 October 2001, Para 58.

consultation with his solicitor infringed his right to an effective exercise of his defence rights and ... there has been, in that respect, a violation of Article 6 § 3 (c) of the Convention taken in conjunction with Article 6 § 1" [relating to right to legal assistance of own choosing and fair trial, respectively].³⁶

The Human Rights Committee has clarified that Article 14(3)(b) of the ICCPR requires states to ensure "that Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter."³⁷

In 1996 the Human Rights Committee, in its Concluding Observations on Spain's fourth periodic report of its implementation of the ICCPR, emphasized that the provisions allowing for incommunicado detention of up to five days without a lawyer of choice "are not in conformity with articles 9 and 14 of the Covenant" (relating to freedom from arbitrary detention and right to a fair trial, respectively).³⁸ In 1997 the CAT urged the Spanish government to consider abolition of the restrictions on the right of detainees to a lawyer of their own choice.³⁹

The CPT has also expressed concern that detainees held incommunicado could not consult in private with the officially appointed lawyer either before or after making their statements to police. According to the CPT, "the core of the notion of access to legal assistance for persons in police custody is the possibility for a detainee to consult in private with a lawyer, and in particular during the period immediately following his loss of liberty."⁴⁰ The CPT has therefore recommended that detainees be granted the right "as from the outset of the period of custody, to consult in private with a lawyer, it being understood that, in the case of a detainee held incommunicado, the lawyer shall be officially appointed on his behalf".⁴¹ Where a lawyer is appointed on behalf of a detainee but is unable to consult with their client, as is the case in Spain for incommunicado detainees, the CPT has stated that "Under such circumstances it is difficult to speak of an effective right to legal assistance; the officially appointed lawyer can best be described as an observer".⁴²

³⁶ Para 63, *ibid.*

³⁷ Human Rights Committee General Comment 32, on Article 14 of the ICCPR, 23 August 2007, UN Doc: CCPR/C/GC/32.

³⁸ CCPR/C/79/Add.61, para 12.

³⁹ A/53/44 Conclusions and recommendations of the Committee against Torture Spain, 1997, para 135.

⁴⁰ Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 12 April 1991 (hereinafter CPT Report 1991) para 50 .

⁴¹ *Ibid.*, para 52.

⁴² *Ibid.*, para 51.

Some judges of the National Criminal Court of Spain have expressed support for altering these restrictions to give incommunicado detainees the same rights as ordinary detainees to consult with a lawyer in private after making their statement to police.⁴³

At the end of the police interview, the duty lawyer acting on behalf of the detainee is allowed to put questions to the detainee and have these recorded as part of the formal statement. However, Amnesty International has been informed by a variety of sources that lawyers are sometimes ordered by police officers not to speak.⁴⁴ Lawyers who have attempted to intervene, or who asked for the professional identity number of the police officers present to be recorded, have reported to Amnesty International that such requests were met with aggressive and intimidating treatment from police officers. Amnesty International considers that such practices create a further *de facto* bar to effective legal assistance and are contrary to Spanish legislation and jurisprudence, which recognises the right of an “active presence of the lawyer” during interrogations.⁴⁵

The importance of effective legal representation for detainees making a statement before police is made all the more significant by the fact that, under Spanish law, where a detainee has made a statement in police custody but later chooses to remain silent before the investigating judge or during trial, the police statement may be used as evidence against them. This principle has been upheld by Spanish courts even in cases in which the detainee alleged that the police statement had been extracted under torture.⁴⁶

In its examination of Spain’s fifth periodic report in 2008, the Human Rights Committee expressed its serious concern at the fact, amongst other things, that incommunicado detainees are unable to choose their own lawyer. The Human Rights Committee called on Spain to abolish the incommunicado detention regime and ensure all detainees have the right to appoint the lawyer of their own choice – who should be present in all interrogations - and consult with him or her in confidence.⁴⁷

LACK OF EFFECTIVE JUDICIAL SUPERVISION

For a detainee to be held incommunicado, the law enforcement agency responsible for the individual’s arrest must make a request to the investigating judge for incommunicado

43 Interview with Amnesty International, 16 October 2008.

44 Interview with Amnesty International, 9 July 2008.

45 Constitutional Court Sentence 199/2003 of 10 November 2003.

46 See for example Supreme Court Appeal Sentence 927/2006, 4 October 2006.

47 Draft Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCRP/C/ESP/CO/5, 27 October 2008, para 14.

measures to be imposed within 24 hours after the arrest. The judge has a further 24 hours to grant or deny this request. There is no obligation for the detainee to be presented before the judge when this decision is made, either initially or if it is extended.

Under Spanish law, there is no obligation for the judge personally to see a detainee held on terrorism-related charges (whether or not they are held *incommunicado*) until five days (120 hours) after their arrest.

Every order for *incommunicado* detention must be substantiated in writing by the competent judge in each individual case and each time it is extended. Lawyers interviewed by Amnesty International reported that it is common for the “reasoning” of the judge when granting *incommunicado* measures to be very brief and generic, sometimes simply referring that the measure “has been granted in response to a request from police”.⁴⁸ One lawyer told Amnesty International “‘Copy-paste’ put an end to detainees’ rights”.

Article 520bis of the criminal procedure act authorizes ongoing judicial supervision of the detainee during *incommunicado* detention, granting a judge the power to request information at any time during the *incommunicado* detention period, or seek information personally or by delegation, concerning the detainee’s situation. However, this is left to the judge’s individual discretion. Amnesty International was informed by the President of the Criminal Chamber of the National Court in 2008 that, in practice, judges rarely avail themselves of this power.

LACK OF ACCESS TO DOCTOR OF OWN CHOICE

Spanish law permits detainees held *incommunicado* to see court-appointed forensic doctors every day but does not allow them to be examined by a doctor of their own choice. They may request a medical examination by a second doctor, but s/he will also be state-appointed.

The Committee against Torture and other human rights bodies have repeatedly recommended that in addition to being examined by a state-appointed forensic doctor, detainees held *incommunicado* should be granted the right to be examined by a doctor of their own choice (in the presence of the state-appointed doctor if necessary).⁴⁹ In his most recent report to the Human Rights Council in 2008, following up on the recommendations made on a previous visit to Spain, the Special Rapporteur on torture noted positively that individual judges had, on occasion, allowed *incommunicado* detainees to be examined by a doctor of their own choice, but that the Spanish authorities had failed to apply this measure in a systematic manner.⁵⁰ The President of the Criminal Chamber of the National Court told Amnesty International that he supports this initiative and is aiming to make it standard

⁴⁸ Interview with Amnesty International, 11 July 2008.

⁴⁹ See for example CAT/C/CR/29/3 (23 December 2002), para.14(b); Report of the Visit of the CPT to Spain from 1 to 12 April 1991, para.57, Report of the Visit of the CPT to Spain from 22 November to 4 December 1998 para.26, Report of the Visit of the CPT to Spain from 22 to 26 July 2001 para.9, and Report of Visit of the CPT to Spain from 22 July to 1 August 2003 para.25.

⁵⁰ UN Doc: A/HRC/7/3/Add.2, paras 561 and 614.

practice.

It should be noted that the National Human Rights Plan presented by the government on 10 December 2008 includes a commitment to guarantee incommunicado detainees the right to be examined by a second doctor, selected by the head of the National Preventive Mechanism for the Prevention of Torture; but not a doctor freely chosen by the detainee as has been recommended by CAT and other human rights bodies.

The effective exercise of the right of detainees to medical care and medical examinations while in detention is an important tool in preventing and detecting ill-treatment. Medical reports of examinations during this time are of great importance in successfully prosecuting those responsible when ill-treatment occurs. However, Amnesty International's research on ill-treatment by law enforcement officials in Spain has shown that it is common for police officers to remain present during the medical examination of the detainee, which is likely to intimidate the detainee into remaining silent about any ill-treatment they have suffered. Consequently, forensic medical reports do not always accurately and fully reflect the detainee's physical and mental state at the time of examination. The CPT has repeatedly underscored to the Spanish authorities that "all medical examinations should take place under conditions of confidentiality and in particular be carried out without the presence of law enforcement personnel."⁵¹

Even when police officers are not present, detainees may be afraid to speak to a state-appointed doctor about any injuries caused by torture or other ill-treatment during incommunicado detention, as they perceive the state-appointed doctor to be part of the same authority structure as the police officers inflicting the ill-treatment.⁵² The vice-president of the UN subcommittee on the prevention of the torture, speaking at a conference on "Medical responsibility in the international fight against torture" in April 2008 commented that "the quality of work of doctors based in Spanish detention centres to detect torture is insufficient" and the procedures for transmitting concerns about possible ill-treatment "do not function adequately and demonstrate grave deficiencies when compared with UN criteria".⁵³

A study published in November 2008 in the journal *Forensic Science International*, which examined 425 medical reports issued on incommunicado detainees in the Basque Country between 2000 and 2005⁵⁴, concluded that the quality of reporting was "unacceptable" and reflected "insufficient and inadequate medical examinations". The majority of reports lacked

⁵¹ See for example Report of Visit of the CPT to Spain from 12 to 19 December 2005, para 44 and Report of Visit of the CPT to Spain from from 22 July to 1 August 2003, para 24.

⁵² See Amnesty International's report Spain: Adding insult to injury: The effective impunity of police officers in cases of torture and other ill-treatment (AI Index EUR 41/006/007).

⁵³ Europa Press, 18 April 2008, "El subcomité de la ONU para la prevención de la tortura dice que la prevención en las cárceles españolas es insuficiente".

⁵⁴ B. Morentin, et al., A follow-up investigation on the quality of medical documents from examinations of Basque incommunicado detainees, *Forensic Sci. Int.* (2008), doi: 10.1016/j.forsciint.2008.10.002.

formal structure, contained inadequate information on injuries and state of health, and did not include conclusions from the examining doctor on whether injuries were consistent with allegations of ill-treatment. None of the medical reports followed the standard format recommended by the CPT, and only nine followed the standard format recommended by the Ministry of Interior.

The study notes that “The medical examination is supposed to represent a possibility for the detainee to have a professional assessment of his testimony about ill-treatment and a safeguard for police officers against false accusations”. It concluded that the failure of the appointed doctors to conduct thorough and effective examinations of the detainees in these cases, paying particular attention to examining, assessing and recording any allegations or evidence of ill-treatment, rendered this supposed safeguard useless. The cause of this failure was identified as a combination of inadequate guidance to doctors on the importance of their role as safeguard and duty to report possible ill-treatment; inadequate training on diagnostic procedures for proper documentation of ill-treatment and a lack of formal protocols or reporting guidelines; the dual loyalty felt towards the detainee/patient and the appointing authority; and a lack of privacy during medical examinations which makes detainees less likely to cooperate fully due to fear of reprisals.

LACK OF NOTIFICATION TO FAMILY MEMBERS

Amnesty International is concerned that under current Spanish legislation, *incomunicado* detainees are not permitted to communicate the fact or location of their detention to family members or other persons of their choice, or have this information communicated on their behalf, for the duration of the *incomunicado* period.

The Human Rights Committee has stated that people arrested or detained on criminal charges must be permitted to contact their families “from the moment of apprehension.”⁵⁵ Where this is not possible the committee has called for “the mandatory notification of relatives of detainees without delay”.⁵⁶ The Special Rapporteur on torture has recommended the immediate notification of relatives and that, “In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours”.⁵⁷ The CPT stated that the Spanish limit in notification in 1994 – when it was still at five days - was “not justifiable”⁵⁸ and called for this period to be reduced “substantially”. It recommended that 48 hours should be the maximum time period during which a detainee should be denied

⁵⁵ Human Rights Committee concluding observations on Democratic People's Republic of Korea 2001, UN Doc CCPR/CO/72/PRK, para 18.

⁵⁶ Human Rights Committee concluding observations on India 1997, UN Doc CCPR/C/79/Add.81, para 23.

⁵⁷ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment 2001, UN Doc A/56/156, para 39(f).

⁵⁸ CPT Report 1994, para 60.

communication with family.⁵⁹

Under the “Assistance Service for Relatives of Incommunicado Detainees” protocol introduced by the Basque autonomous government in 2003 for the Ertzaintza, a 24-hour telephone line was established to allow the families of incommunicado detainees to obtain information on the reason for detention, location, and state of health of the detainee, as well as for family members to provide information to the police on the detainee’s medical needs. However, Amnesty International is concerned that the protocol is not always correctly adhered to in practice. Amnesty International was informed by representatives of the Basque Ombudsperson’s Office (Ararteko) that relatives who have called the telephone line to find out where their family member has been detained have been given inadequate information, for example simply, “In the Basque Country”.

The following case highlights the type of torture and other ill-treatment alleged by some detainees who have been held incommunicado, and the lack of any investigation into such allegations by the relevant judicial and ministerial authorities.

THE CASE OF MOHAMMED FAHSI

According to the information received by Amnesty International, Mohammed Fahsi and three other men, known as “A”, “B”, and “C”, were arrested separately by hooded Civil Guard officers at their homes, at approximately 2am on 10 January 2006. All four men have made allegations that they were subjected to torture and other ill-treatment while in incommunicado detention, including forced exercise and being forced to remain standing to the point of exhaustion, sleep deprivation, exposure to severe cold, blindfolding, hallucinogenic drugs, humiliation of a sexual nature, beatings, threats of violence, threats (including threats of sexual violence) against family members, racist and islamophobic verbal abuse, insults and intimidation, and being forbidden to wash.

According to the information received by Amnesty International a number of hooded Civil Guard officers entered the house of Mohammed Fahsi in Vilanova i la Geltrú (Barcelona) that morning after breaking down the door. He says that they threatened him with a gun and insulted him, before handcuffing him and covering his head. He was told he was under arrest for suspected collaboration with an armed terrorist group and instructed to sign a search warrant, which he did. His house was reportedly searched and at approximately 9am he was taken to the shop that he owned and told to sign another search warrant. The shop and storage building were searched. According to information provided to Amnesty International he was then taken, blindfolded, by car to Madrid where he was held in incommunicado detention for four days at the Guzmán el Bueno Civil Guard headquarters, before being remanded into pre-trial detention on the orders of the investigating judge.

Mohammed Fahsi told Amnesty International that upon arrival at the Civil Guard headquarters he was treated in a threatening, aggressive and insulting manner. He was made to strip to his underwear (while still blindfolded) and one of the Civil Guard officers present said, “How strange, they haven’t hit you. There are no marks”. He then lowered Mohammed Fahsi’s underwear and the Civil Guard officers laughed at him and told him “nice arse” and “we’re going to have a lot of fun together”.

⁵⁹ Ibid.

He was then taken to a cell in a basement area at the end of several corridors. He said he was insulted and pushed against the walls as he walked. Civil Guard officers made racist insults at him and told him, "We've ruined your Eid al Adha [a holy Muslim festival], haven't we, you faggot?". He reported that he was made to stand in the cell with his hands on the wall and back to the door while his blindfold was removed and told to remain in that position. Every time a Civil Guard officer came to the cell Mohammed Fahsi allegedly was forced to do press-ups. The cell had no toilet facilities, ventilation, water or light. It was approximately 2m by 3m square and contained a mattress and blanket. Mohammed Fahsi believes there was a camera in the cell because every time he tried to sit down a Civil Guard officer would come to the cell and make him stand again.

Mohammed Fahsi says that during his period in incommunicado detention he was not allowed to pray, wash or use toilet paper when he went to the toilet. Whenever he left the cell to go to the toilet he says he was blindfolded and he says the Civil Guard officers deliberately intimidated him, insulted and laughed at him. He says he received food once on the first day in detention and twice on the second two days. He had to eat immediately or the food would be taken away within a few minutes.

Mohammed Fahsi reported that he was taken out of his cell for questioning, still blindfolded. He was told if he cooperated with the Civil Guard they would ask the public prosecutor to reduce his sentence, but if he did not cooperate they would have it increased. He says they told him his wife and children would be sent to Morocco. He was then questioned about his educational background, his family, and his friends and acquaintances in Vilanova i la Geltrú. The second time Mohammed Fahsi was taken for questioning he fainted and could not remember what he was asked. He heard the sound of an aerosol spray and believes he was drugged.

When he returned to his cell, Mohammed Fahsi says he became aware that other people he knew were also being held in the cells because he heard their voices and he says he heard them being beaten. He told Amnesty International that Civil Guard officers kicked and hit the cell doors and insulted and threatened the detainees continuously. Due to the absence of light he did not know what time of day or night it was. He says that he was visited by a forensic doctor who asked if he was being treated correctly and he told her he was being ill-treated. He says she replied that it was impossible and he was exaggerating.

On 13 January Mohammed Fahsi was taken from his cell, given his own clothes to dress in, and told he was being sent back to Morocco. He says the Civil Guard officers laughed at his physical state because he had not been able to wash for the period that he was in detention. He was taken to the National Criminal Court (Audiencia Nacional) and appeared before the judge after a considerable delay. The judge remanded him in pre-trial detention and he was taken to Soto del Real prison where, on 14 January, he was finally able to contact his family. He says he was kept in isolation until 21 February when he was sent to Mansilla de las Mulas prison (León) and held in isolation for another year before being moved into an area with other prisoners, where he currently remains.

According to information received by Amnesty International, the duty roster lawyer acting for Mohammed Fahsi first met his client at the Guzmán el Bueno facility at 3am, a few hours before he was due to appear before the investigating judge who then remanded him in pre-trial detention. The lawyer and his client were not allowed to speak to each other. The lawyer stated that he saw Mohammed Fahsi and a group of other people being held in an area beyond the Civil Guard headquarters of Guzmán el Bueno behind an old garage, in a brightly lit "room within a room". He said that the detainees were blindfolded, handcuffed and crouched on the floor. He says they were dirty and dishevelled, and when he spoke to them later he discovered they had no idea what time of day or night it was.

According to information received by Amnesty International, "A" was arrested at his own home in the same manner and the same time as Mohammed Fahsi. He says that when the Civil Guard broke down the door to his house he thought they were burglars and he threw himself at one of them in order to protect his children and his wife. He says the Civil Guard officers hit him, including with metal torches, on the back and head. He thought they had fractured his skull. He was made to kneel in the kitchen and his hands were tied. He was told he was accused of belonging to an Islamic terrorist group. He says the Civil Guard officers searched his house (without his presence, as he was forced to remain in one room) and broke many things as they did so, and took away all books in Arabic, including the Qur'an. He was afraid they would hurt his wife or take his children away.

"A" says that the Civil Guard officers insulted him and made him say "Viva Franco". They took photographs of him on their mobile phones and made him listen to the voice of someone shouting in Arabic and who appeared to be being tortured. He says they told him he would find out why the man was shouting "when you get there". He was in a lot of pain around the neck, back and head as a result of the injuries caused to him during his arrest. He later discovered that he had a broken finger.

"A" was then taken to Madrid in a police car. During the journey he was handcuffed with his hands behind his back and made to keep his head between his legs. He says the position was extremely uncomfortable due to the injuries he had received and he found it impossible to stay in that posture but if he asked for the handcuffs to be removed, or began to raise his head, one of the Civil Guard officers next to him hit him. They insulted and threatened him and told him they were "taking him somewhere even worse".

Upon arrival at Guzmán el Bueno Civil Guard headquarters "A" was strip searched and taken barefoot to a cell, which he says was very cold. Although he was allowed to sleep for a while (he does not know how long) he says after that a bright light was turned on in the cell, which remained lit constantly for the entire period he was in detention (which he later learnt was four days). He says he was unable to sleep during this period because he was forced to remain standing or do push-ups on command. He says he lost all sense of time. He could hear the voices of other detainees. When he went to the toilet he was not allowed to wash or use toilet paper. He believes this was to prevent him from cleaning himself properly in order to pray.

"A" says that when he was taken out of the cell to be interrogated the Civil Guard officers asked him where he had injuries and grabbed his broken finger. During the interrogations (which occurred with no lawyer present) he says he was forced to do push-ups while naked, that the officers hit him and threatened to rape his wife, and told him he would never see his children again. He says the officers insulted him personally and all Muslims, saying "You bloody Arabs, you all deserve to die". They made him insult God and the Prophet Mohammed, and to say the Lord's Prayer and "Viva Franco". He says the Civil Guard officers wanted him to incriminate the other detainees. He says that another man arrested in the same operation alleged that he was asphyxiated with a plastic bag.

"B" was arrested at his home in the same manner and at the same time. He says when the Civil Guard officers entered his house they immediately punched him twice in the face, threw him to the ground and handcuffed him. He was told he was under arrest for robbery and drug dealing. His house was searched and his computer and various documents were seized. He was then taken to Madrid, with his hands handcuffed behind his back, his eyes blindfolded and his ears blocked throughout the journey.

Upon arrival at the Civil Guard headquarters of Guzmán el Bueno he was insulted and threatened by Civil Guard officers. He was made to strip to his underwear and taken to a dark, very cold cell where he was told to

stand facing the wall with his hands in the air. If he tried to move he says he was hit by Civil Guard officers. He was also made to push ups. He did not know if it was day or night. He remained in this situation for what he later learnt was four days.

He was taken for questioning and told he was accused of terrorism related charges. He was blindfolded throughout. He says if he gave an answer that he Civil Guard officers did not like he was hit on the head. He was told to incriminate the other detainees and if not he would go to prison for a long time.

The duty roster lawyer appointed to represent "B" told Amnesty International that when she visited her client in incommunicado detention (in the Guzmán el Bueno facility) on 11 and 12 January she saw the extremely distressed state that he was in and noted the freezing cold temperature where the detainees were held. She noted that despite the cold temperature "B" had no shoes on either of the two occasions she met with him there. When "B" made his police statement, she says that she was made to sit on a chair behind her client where he could not see her and he was not allowed to turn to look at her. None of the Civil Guard officers present was in uniform. "B" subsequently told his lawyer about the ill-treatment that he had suffered and she advised him that he should submit a criminal complaint to the investigating court. However, he did not do so he was too afraid of possible retaliation against himself or his family.

"C", another of those arrested as part of the same operation, has made very similar allegations. He says he was taken to Madrid from Barcelona with his hands cuffed behind his back and with his head forced between his legs. During detention in the Civil Guard headquarters of Guzmán el Bueno he was forced to do push-ups and he says he was beaten when he could no longer continue. He says he was not allowed to sleep for four days, that the light was on in his cell constantly, that he was not allowed to clean himself after using the toilet, that he did not know what time of day or night it was, and that he was forced to stand facing the wall with his hands raised while Civil Guard officers shouted at him and told him his wife would be forced into prostitution after he was sent to prison. He says when he was given food and water he had only five minutes to eat before he had to be standing again facing the wall. He says something "like incense" was sprayed into his cell and he began to hallucinate, seeing images of his children on the wall. He says the Civil Guard officers pressured him to incriminate the other detainees.

According to lawyers acting for the detainees, allegations of ill-treatment have been made during declarations before the investigating judge, including at a bail hearing for Mohammed Fahsi and another detainee on 8 January 2007, and in written submissions to the court. Amnesty International has repeatedly written to the Minister of Interior, Attorney General, Madrid Public Prosecutor and General Council of the Judiciary calling for an investigation to be opened into these allegations. However, no such investigation was opened.

In August 2009 Mohamed Fahsi's lawyer presented a written complaint concerning the torture and other ill-treatment he suffered to the court. At the time this report is published, no information was available on whether an investigation had been opened as a result.

Following their appearance before the investigating judge the detainees were remanded into pre-trial detention. "A" and "B" were released on bail in November 2006 pending the conclusion of the judicial investigation, and "C" was released on bail in July 2006. On 23 October 2007 the investigating judge issued an indictment (*auto de procesamiento sumario*) against these four men and several others on charges of membership of a terrorist group and collaboration with a terrorist group, but formal charges were not presented by the public prosecutor until May 2009. According to Mohamed Fahsi's lawyer, more than half of the men detained as part of this counter-terrorism operation were finally released with no formal charges ever

being brought against them.

The trial of Mohamed Fahsi and eight other men began on 20 September 2009 at the National Criminal Court and had not concluded at the time this report was finalized.

NON-REFOULEMENT

Article 3

Amnesty International has documented several cases of the Spanish authorities forcibly returning individuals to countries where they face a real risk of being subjected to torture or other ill-treatment, in violation of the prohibition of *refoulement* enshrined in Article 3 of the Convention against Torture.

The following cases are illustrative of this concern.

BASEL GHALYOUN

Basel Ghalyoun was forcibly returned to Syria from Spain on 22 July 2008, despite the fact that there were substantial grounds for believing that he faced a real risk of torture and other ill-treatment there.

Basel Ghalyoun arrived in Spain on a student visa in 2001. He later obtained a residency and work permit and was present legally in the country when he was arrested in March 2004 connection with the bomb attack on commuter trains in Madrid.

Basel Ghalyoun was convicted by Spain's National Criminal Court in October 2007 of involvement in the attack. However, on 17 July 2008 the Supreme Court acquitted him on appeal of all charges. He left prison later that day, but was immediately told that he was under an expulsion order, and was taken into police custody to await expulsion to Syria. Basel Ghalyoun's lawyer was not given a copy of the expulsion order so was unable to submit an appeal against the order. Neither he nor Basel Ghalyoun knew of the existence of the order until Basel Ghalyoun was taken into custody. He was forcibly returned to Syria on 22 July 2008.

According to information received by Amnesty International, Basel Ghalyoun was arrested by the Syrian authorities immediately upon arrival at Damascus International Airport on 22 July 2008 and detained in incommunicado detention. As of September 2009 Amnesty International has no further information on his whereabouts.

M.S.

M.S., an Algerian national, arrived in Spain in 1991. He was legally resident in Spain when he was arrested in February 2008 as part of a counter-terrorism operation known as "Operación Nova".

M.S. was acquitted on appeal of all charges by the Supreme Court on 7 October 2008. However, on 15 October 2008 he was re-arrested on the basis of an expulsion procedure (No. 24.040/08) made under article 54.1 of

the Foreigners Law (Ley de Extranjería) which classifies as a grave administrative offence "Participating in activities contrary to the external security of the State or which may prejudice relations of the State with other countries, or being implicated in serious activities against the public order as per Organic Law 1/1992" (this despite the fact M.S. had just been acquitted of all such charges by the Supreme Court). The following day Investigating Court Number One of Pamplona ordered the interment of M.S. in the Migration Detention Centre in Madrid.

M.S.'s lawyer appealed against the expulsion order but on 21 November 2008, while the appeal was pending, M.S. was removed from the Migration Detention Centre in Madrid and returned to Algeria.

In July 2009 M.S.'s lawyer told Amnesty International that to date he had never been formally notified by the relevant authorities of his client's expulsion. In response to his active requests for information he received a copy of a note sent by the Border and Foreigners Police Unit to the Pamplona Investigating Court No 1, stating that M.S. was expelled from Spain at midnight on 21 November 2008 from the port in Almeria. His lawyer was informed by a police official that M.S. was taken by ferry to the city of Ghazaouet in Algeria and handed over to the Algerian authorities.

According to information received by Amnesty International, upon arrival in Algeria M.S. was arrested by the Department for Information and Security military intelligence agency and held incommunicado for approximately two weeks. He was allegedly transferred from a military base in Western Algeria to Oran, and finally to Algiers. He was subsequently released without charge.

MURAD GASAEV

Murad Gasaev was extradited from Spain to the Russian Federation on 31 December 2008 despite the real risk that he faced torture or other ill-treatment and unfair trial.

Murad Gasaev fled to Spain in 2005. His claim for international protection in Spain was rejected on the basis of confidential information that neither Murad Gasaev nor his lawyer were ever given access to and thus they were unable to challenge.

Murad Gasaev is charged in the Russian Federation of involvement in a June 2004 attack by an armed group on government buildings in the Republic of Ingushetia. He has claimed that he was detained in Ingushetia in August 2004 by five masked law enforcement officials who took him to the central office of the Federal Security Service in Ingushetia, where he was tortured for three days and questioned about the attack. He was not charged with the attack. Instead he was taken in a van and released in farmland outside the city.

Amnesty International has received reports indicating that Murad Gasaev's name had been mentioned by another individual who had been detained in relation to the June 2004 and allegedly subjected to torture or other ill-treatment in January 2005. Amnesty International has learned that during the trial of this individual, he retracted the statements made during interrogation by officials from an investigation unit of the Directorate of the General Procuracy in the Southern Federal District, based in North Ossetia, as they were untrue.

The Russian non-governmental organization Memorial has researched and documented the cases of several of those convicted of crimes in connection with the June 2004 armed attack. The information it has gathered

reportedly suggests that the investigations, carried out by the investigation unit of the Directorate of the General Procuracy in the Southern Federal District, were flawed; that suspects were tortured and subjected to other ill-treatment, and that their trials failed to meet international standards of fairness. Amnesty International has interviewed several people whose statements concur with these findings by Memorial.

It should be noted that the CPT has taken the extraordinary step of publishing three public statements expressing grave concerns about torture, other ill-treatment and unlawful detention by state officials in Chechnya; that investigations into cases involving allegations of ill-treatment or unlawful detention are rarely carried out in an effective manner; and that the Russian authorities have failed to react adequately to the concerns it has raised.⁶⁰

In 2007 the CPT also took the extraordinary step of publishing extracts from the report of its visit in 2006 to Chechnya, as a result of concern that its detailed recommendations had "received at most a token response and in many respects have quite simply been ignored". The CPT works on the basis of confidentiality between itself and the state parties, and is only authorized to make public statements when a country "fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations." The fact the CPT has felt obliged to resort to a public statement three times, additionally releasing with it detailed excerpts of its report and the Russian authorities' comments, indicates that the CPT considers Russia is failing to effectively tackle torture in Chechnya.

In February 2008 the Spanish National Criminal Court approved the extradition request based on "diplomatic assurances" from the Russian public prosecutor's office that Murad Gasaev would not be sentenced to death or to life imprisonment without parole, and would be able to receive visits from the UN Committee against Torture while he was detained. Upon discovering that the Committee against Torture does not undertake regular visits to detention facilities and that Russia is not party to the Optional Protocol to the Convention against Torture, the Court then requested assurances that the CPT would be able to monitor Murad Gasaev's detention.

The CPT was not consulted about the "diplomatic assurances" given by the Russian public prosecutor until after the National Criminal Court had approved the extradition request. When it was informed of the assurances, however, the CPT stated that it was not prepared to assume the task of monitoring the detention of Murad Gasaev in Russia, as a matter of principle due to concerns over the unreliability of "diplomatic assurances".

Despite this, on 31 December the Spanish authorities extradited Murad Gasaev to Russia with the assurance that staff from the Spanish embassy in Moscow would be able to visit him in detention. In a letter to the national criminal court the Spanish Ministry of Justice stated that although there was no precedent for such action by the Spanish embassy other diplomatic missions in Moscow had undertaken similar tasks, albeit "with certain difficulties". It stated that in such cases the general practice was to visit the detainee once upon arrival in Russia and once after final sentencing.

After arrival in Russia Murad Gasaev was detained in Moscow, before being transferred to the pre-trial detention facility in Piatigorsk. According to the information available to Amnesty International, he did not

⁶⁰ Public statement concerning the Chechen Republic [CPT/Inf (2007) 17]; Public statement concerning the Chechen Republic [CPT/Inf (2003) 33]; Public statement concerning the Chechen Republic [CPT/Inf (2001) 15];

receive any visits or communication from the Spanish embassy in Moscow until approximately one month after his arrival, apparently because they were unaware of his location. Since then, Amnesty International has been informed by Murad Gasaev's lawyer in Spain that the Spanish embassy has visited him approximately once per month.

The Spanish authorities informed Murad Gasaev's lawyer in Spain that he was able to receive family visits and see a doctor of his own choice in detention in Russia, and that he was in good health. However, Murad Gasaev's family told Amnesty International that he needs urgent medical treatment, which he has not been provided, for the hepatitis which he suffers. The family also reported that they were not permitted to visit him in prison. His Russian lawyer told Amnesty International that Murad Gasaev had not been offered the possibility to consult a doctor of his own choice. Due to the location of the prison where Murad Gasaev is being held his lawyer is unable to visit him frequently.

Murad Gasaev's family has reported to Amnesty International that since his return to Russia they have been harassed and threatened by men believed to be representatives of the Russian police and intelligence agencies. In July 2009 his brother was briefly detained, interrogated and threatened but subsequently released.

On 28 August 2009 Murad Gasaev was released from detention without charge as the prosecutor had found no evidence linking him to the June 2004 attack on government buildings in Ingushetia. Although the charges against Murad Gasaev were dropped in June, the Russian authorities held Murad Gasaev in custody for a further two months in relation to a separate incident in August 2003.

As a result of the harassment they have suffered since his detention, Murad Gasaev's family continue to fear for their own and for Murad Gasaev's safety in Russia. His lawyer told Amnesty International that law enforcement officers have repeatedly threatened Murad Gasaev's brother, mother and other relatives.

On 25 March 2009, almost three months after Murad Gasaev was extradited, the Spanish National Court rejected his appeal against his failed asylum claim.

ALI AARRASS AND MOHAMED EL BAY

Ali Aarrass and Mohammed el Bay were arrested in Melilla on 1 April 2008 on the basis of international arrest warrants issued by Morocco on 28 March 2008. On 21 November 2008 the Spanish National Criminal Court authorized the extradition of Ali Aarrass to Morocco, and this decision was confirmed on appeal on 23 January 2009, on the assurance that Ali Aarrass would not be sentenced to the death Criminalty or life imprisonment without the possibility of parole. Ali Aarrass claimed that his joint Belgium-Moroccan nationality should bar his extradition to Morocco, but the court rejected this argument.

According to Amnesty International's knowledge, Ali Aarrass has presented an appeal to the Constitutional Court, but this appeal does not have any suspensive effect on the extradition process. The extradition request is now awaiting final approval or rejection by the Council of Ministers, which may happen at any time.

On 22 December 2008 the National Criminal Court authorized the extradition of Mohamed el Bay, confirmed on

appeal on 12 March 2009, despite the fact Mohamed el Bay has lived in Spain since birth and has been a Spanish citizen since 1976. Under the 1997 extradition agreement between Spain and Morocco, the extradition of a state's own national is prohibited. However, the court relied on a Moroccan ID card in Mohamed el Bay's name, found at his home at the time of arrest, as evidence that he unlawfully held dual nationality and could therefore be legitimately returned to Morocco as a Moroccan citizen. According to Amnesty International's knowledge, Mohamed el Bay has not been formally stripped of his Spanish nationality. The extradition request is now awaiting approval by the Spanish Council of Ministers.

According to Amnesty International's knowledge, Mohamed el Bay's lawyer is preparing an appeal to the Constitutional Court.

Both Ali Aarrass and Mohamed el Bay are wanted by the Moroccan authorities on terrorism-related charges and are accused of belonging to a terrorist group headed by Abdelkader Belliraj. Ali Aarrass is accused of being involved in the May 2003 suicide bomb attacks in Casablanca, Morocco. Ali Aarrass had been under investigation since 2006 by the Spanish National Criminal Court on terrorism-related charges but on 16 March 2009 the court provisionally closed its investigation against him on the basis of lack of evidence.

Amnesty International is concerned that, if extradited, both men would be at risk of torture and other ill-treatment and therefore their extradition would be in breach of the principle of non-refoulement under international law. Amnesty International is also concerned that Ali Aarrass and Mohamed el Bay might be at risk of incommunicado detention and unfair trial if transferred to Morocco. These concerns are based on monitoring of reports of human rights violations committed by Moroccan authorities in the context of counter-terrorism measures in recent years, including allegations of torture and other violations committed in the context of the recent "Belliraj Cell" case. The continued failure of the Moroccan authorities to investigate such allegations has contributed to a climate of impunity for these serious human rights violations.

After a sharp increase in reported cases of torture and other ill-treatment in Morocco following the Casablanca bombings, there has been a decrease in the frequency of reports of torture and other ill-treatment of individuals in the context of counter-terrorism and of the implication of the Directorate for the Surveillance of the Territory in the arrest, detention and interrogation of suspects. However, allegations of human rights violations in the "Belliraj Cell" case followed the pattern documented in previous years by a number of human rights organizations, including Amnesty International in its 2004 report *Morocco/Western Sahara: Torture in the "Anti-Terrorism Campaign" - the case of the Témara Detention Centre* (Index: MDE 29/004/2004).

At the time this report is published a final decision on the extradition of Ali Aarrass and Mohamed el Bay is still pending.

EXPULSIONS AND MIGRATION CONTROL MEASURES

Amnesty International is concerned that measures taken to impede the entry of undocumented persons into Spain (particularly through the southern border - Canary Islands, Ceuta and Melilla, the Andalusian coast and Balearic Islands) are also violating the prohibition of *refoulement* set out in Article 3 of the Convention against Torture.

These measures not only create obstacles for those fleeing areas where they are at risk of human rights violations in order to seek asylum, but also lead to increasingly grave

consequences for migrants who, due to the nature of the obstacles faced in migrating, have been forced to travel dangerous routes by unsafe means creating a greater risk to their lives. In addition, the obstacles have increased the risk of abuses at the hands of criminal networks and others, including officials of countries that have established agreements on migratory control with Spain, during the migratory journey.

According to two reviews presented by the Spanish Ministry of the Interior in 2008 and 2009 there was a significant decrease in the number of irregular immigrants who had arrived in Spain by boat compared to previous years⁶¹. Official statements claim that these results demonstrated the effectiveness of measures adopted to counter irregular migration, including maritime barriers financed by Spain and the EU, the participation of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders), as well as “cooperation agreements” with various African countries including Morocco, Algeria, Mauritania, Senegal, Guinea Bissau, Equatorial Guinea, Mali, Cape Verde, Ghana, and the Gambia. The human cost of these measures and their impact on the human rights of migrants and refugees are not addressed in the review documents.

Amnesty International has raised concern that impeding migration and externalizing border controls can prevent asylum-seekers from being able to realise their right to seek and enjoy asylum, as well as increasing the risk of exposure to ill-treatment in countries of transit. Increasing interceptions of migrants and asylum-seekers at sea raises particular concerns regarding the effective right to seek asylum or claim other rights to which all asylum-seekers and migrants are entitled as, in such circumstances, judicial and public oversight of the situation is highly limited.

In October 2005, Amnesty International received reports of human rights violations against people who had attempted to cross the fence that separates Morocco from Ceuta and Melilla, including excessive use of force by law enforcement officials, collective expulsions, and immediate and illegal expulsions that violated the prohibition of *refoulement*. Thirteen migrants and possible asylum-seekers died in these incidents. Despite repeated requests Amnesty International has been unable to obtain information from the Spanish or Moroccan authorities concerning the existence and/or outcome of investigations into these events (see the Amnesty International report *Spain and Morocco: Failure to protect the rights of migrants – one year on* (Index: EUR 41/009/2006).

The following case illustrates Amnesty International’s ongoing concerns regarding the right of effective access to asylum procedures, protection against *refoulement* and conditions of detention of migrants and asylum-seekers intercepted at sea.

MARINE I CASE

On 30 January 2007, the Spanish sea rescue service intercepted a boat named *Marine I* off the coast of Mauritania, with 369 people aboard. The passengers, originating from Asia and Sub-Saharan Africa, were travelling to the Canary Islands. The Spanish rescue service assisted the boat to a position 12 miles off the coast of Mauritania. The boat remained stranded there for almost two weeks until the Mauritanian and

⁶¹ Balance de la Lucha contra la Inmigración Ilegal 2008, 2009.

Spanish authorities agreed on 12 February to allow the boat to land in Mauritania. Part of the agreement allowed the Spanish authorities to manage the welfare and the processing of the migrants and asylum-seekers in Mauritania. The Spanish authorities agreed to process the claims for international protection of 10 Sri Lankans on board, who were transferred to the Canary Islands along with 25 others. However, despite positive reports from UNHCR, these asylum claims were not admitted into the Spanish asylum procedure and all 10 individuals were deported on 25 March 2007.

In April 2007 it was reported that of the 369 people aboard Marine I, 35 had been returned to Guinea, 161 to India and 115 to Pakistan. Twenty-three people reportedly remained in a hangar in Mauritania under the effective control of Spanish authorities in conditions of detention that did not comply with Spanish law. On 18 May, the 23 were transferred to a detention centre under Mauritanian jurisdiction, and in June 2007, 17 of them were returned to Pakistan. The remaining six were transferred to Melilla, Spain, to receive psychological treatment due to their experience in custody.

For further information, see the Amnesty International reports:

- *Spain and Morocco: Failure to protect the rights of migrants – one year on* (Index: EUR 41/009/2006). October 2006.
- *Mauritania: "Nobody wants to have anything to do with us"* (Index: AFR 38/005/2008). July 2008.

INADEQUATE MEASURES AGAINST GENDER-BASED VIOLENCE

Articles 2, 12 and 16

OVERVIEW

According to government figures the number of women killed by their partner or former partner was 58 women in 2005, 68 in 2006, and 71 women in the year 2007.⁶² In 2008 the officially acknowledged figure was 70 deaths, with seven more cases under investigation; this is the highest figure since 1999.⁶³ In 2008 an official report on the profile of those who were killed revealed that 30 per cent of the victims had made at least one complaint to police about the man who finally killed her.⁶⁴

⁶² Instituto de la Mujer del Gobierno de España: http://www.mtas.es/mujer/mujeres/cifras/violencia/muertes_tablas.htm (6 April 2008).

⁶³ Ministerio de Igualdad. Víctimas mortales por violencia de género, datos provisionales. 2 de enero de 2009 .

⁶⁴ "Informe sobre muertes violentas en el ámbito de violencia doméstica y de género en el año 2007",

Servicio de Inspección del Consejo General del Poder Judicial, 2008, p. 32.

Amnesty International considers that the Basic Law 1/2004 on Comprehensive Protection Measures to Tackle Gender-Based Violence (*Ley Orgánica de Medidas de Protección Integral contra la Violencia de Género*, Law 1/2004)⁶⁵ was an important step in improving the institutional response to gender-based violence in Spain. However, the organization is concerned about the lack of implementation of some of the provisions guaranteed by Law 1/2004, which continues to leave many women at risk of gender-based violence. The organization is particularly concerned by the lack of due diligence in investigating and prosecuting acts of gender-based violence, as well as in protecting women at serious risk.

MIGRANT WOMEN

Amnesty International is particularly concerned about the additional obstacles that irregular migrant women face in accessing justice and specialized services, which puts them at particular risk of gender-based violence and killings. According to official statistics, the death rate of victims of gender-based violence per million is much higher for foreign nationals than for Spaniards: over the last nine years (1999-2007) the average yearly death rate of women was 2.05 per million for Spaniards and 13.18 per million for foreign nationals.⁶⁶

Amnesty International expressed concern that in 2005 the Ministry of the Interior issued Instruction 14/2005 to law enforcement officials, ordering them to investigate the migration status of foreign national women who report ill-treatment with the aim of beginning expulsion proceedings if a woman is found to be an irregular migrant. The organization is concerned that as a consequence of the implementation of this instruction (which is still in force) women who are irregular migrants may decide not to seek help from the law enforcement agencies even when their life is at risk, out of fear of being deported.

In addition, women held in migration detention centres are at particular risk of torture and other ill-treatment by police officers and other officials on duty in such centres. Not only does the nature of closed detention create a risk of ill-treatment, but the likelihood of the victim(s) and/or witnesses being deported makes successful investigation and prosecution difficult. This can contribute to a feeling of impunity amongst those responsible, increasing the risk of further ill-treatment.

Incidents reported at the Migration Detention Centre in Málaga in 2006 illustrate this concern.⁶⁷

MÁLAGA MIGRATION DETENTION CENTRE

In July 2006, the alleged sexual abuse of females detained at the Migration Detention Centre (Centro de Internamiento de Extranjeros, CIE), known as “Capuchinos”, in Málaga gave rise to an investigation by the

⁶⁵ Dated 28 December 2004 and published in BOE number 313 (29 December 2004).

⁶⁶ Instituto de la Mujer del Gobierno de España: http://www.mtas.es/mujer/mujeres/cifras/violencia/muertes_tablas.htm (6 April 2008).

⁶⁷ Information gathered with the help of the Málaga-based organization ACOGE, which brought a prosecution on behalf of the people in the course of the same proceedings. Some aspects of the situation of the victims come from information provided by the lawyers acting for that organization.

Unit to Counter Immigration Networks and the Falsification of Documents of the National Police (Unidad contra las redes de inmigración y falsificación documental).

According to statements provided by cleaners working there, the alleged abuse had been going on for at least eighteen months. In their statements, women detainees said that police officers on night shift used to come and caress them and ask them to dance with them and that some agents had sexual relations with them. According to some of the women,, the officers “did not force any of us to have sex but if a policeman told you to do it, then you did it”, that “they had sex voluntarily because they didn’t dare refuse” and that “although it was not a pleasant situation, they agreed to participate because they were afraid”. According to their statements, the women detainees were unable to have food brought in from outside even though food was scarce or to phone their relatives or have access to their luggage, a situation that was used by the agents to “reward” women detainees who acceded to their requests.

On 26 July 2006, the investigations extended to the conduct of the Head of Security at the CIE, including allegations that he sought sexual favours from a detainee in exchange for taking steps that may have helped to get her released. An officer on another shift was also reported for the alleged sexual abuse of another woman detainee. On 21 July 2006, seven police officers were arrested for their alleged involvement in the above-mentioned incidents. On 22 July the court of preliminary investigation ordered six of them to be remanded in custody. They were all released on 2 August 2006 and as of September 2009 continued to remain at liberty. They were, however, temporarily suspended from their posts without pay and awaiting the outcome of the criminal proceedings.

According to information received by Amnesty International, it is now current practice in that particular CIE to ensure that there is at least one female officer on all of the guard shifts in the women’s block. The organization is not aware that measures have been taken to prevent such kind of abuse in other CIEs.

After the complaint was filed, the ten women who testified against the police officers asked for protection and for their identity to be kept confidential for fear of possible reprisals. The court decided to consider them “protected witnesses” but the judicial protection offered was confined to omitting their identity from the proceedings since they were all still being held in the CIE after the complaint was made. Despite the fact that, a week after the initial complaint was filed, an additional complaint was lodged by several of the victims stating that they had faced reprisals from police officers who, “from the start of the proceedings, were more aggressive towards them (...), [and] were treating them very badly from the moment the policemen were imprisoned”, the court took no steps to protect them. When, on 26 July 2006, the court-appointed lawyer acting for the victims asked for them to be transferred to a detention centre staffed by civilian personnel or released from detention with an obligation to report to the court every fortnight, the judge responded by claiming that she was not competent to rule on such issues and the women remained in the CIE.

The victims’ lawyers also asked for any deportation orders against them to be stayed, given their status as victims and protected witnesses in proceedings for offences of great importance. The judge said that it was not for her to decide on that issue.

One of the detained witnesses, who was pregnant, began to suffer vaginal bleeding on 17 August 2006. Although inmates sought help from the guards for over an hour, no help was immediately forthcoming and her transfer to hospital was delayed. Once in hospital, she was kept handcuffed to the bed and all the gynaecological tests she was given were done in the presence of two police officers, one of them male. Lastly, in her own words, “while I was miscarrying and the doctor was removing the foetus, the two officers were in

the middle of the room. I started shouting for them to be removed. The doctor agreed (...) I was kept handcuffed the whole time".⁶⁸ The "protected witness" complained to officials from both the CIE and the hospital but the complaint was closed by the court without a statement being taken from the complainant. Although her lawyer asked the Director General of the National Police and the Government Representative in Málaga to open disciplinary proceedings, this has reportedly not been done.

On 2 March 2009, the judge agreed to continue proceedings against the police officers for "sexual abuse with defect in consent" and for "failure to prevent the commission of an offence". Seven of the ten protected witnesses have been deported.

Amnesty International is deeply concerned at the failure to take preventive measures with regard to the sexual abuse alleged to have been inflicted by State officials. The organization is also alarmed that women who make complaints are not provided with adequate protection, are exposed to the risk of reprisals, and can be deported with serious negative consequences on the investigation of their complaints.

LACK OF DUE DILIGENCE IN INVESTIGATION AND PROSECUTION

Since 1999 gender-based domestic violence has been a crime which can be prosecuted *ex officio* in Spain. However, Amnesty International considers that this legal reform contrasts with a lack of diligence in investigating and prosecuting such crimes. Thus the reality is that, notwithstanding the law, victims of gender-based violence continue to bear responsibility for making complaints and providing evidence.

PROTECTION MEASURES FOR WOMEN AT RISK

Amnesty International is also concerned at the high rate of refusal of judicial protection measures for victims in situations of serious risk to life. According to official information of 112,081 protection orders requested in the last three years 26,424 were denied.⁶⁹ More than 25 per cent of women murdered by their partner or former partner in 2007 had not been supported by the public prosecutor when they had requested protection measures against their aggressor. In these cases, the public prosecutor had advised the court against granting the protection measure requested.

Amnesty International is also concerned at the ineffectiveness of some of the judicial protection measures which have been granted to women at risk of gender-based violence. According to official information⁷⁰ at least 10 of the women killed in 2008 had a judicial protection measure in force.

68 Written testimony of the victim given to Amnesty International by her lawyer in Madrid on 29 April 2009.

69 Datos estadísticos judiciales en aplicación de la Ley Orgánica 1/2004, de medidas de protección integral contra la violencia de género. Resumen de los tres primeros años de aplicación, Consejo General del Poder Judicial, Noviembre 2008, p. 7.

70 Ministerio de Igualdad Víctimas Mortales por violencia de género, datos provisionales, 2 de enero de 2009.

The following case of Sylvina Bassani highlights the lack of action by the judiciary and the prosecution, despite the law.

SYLVINA BASSANI

Sylvina Bassani was killed by her estranged husband on 10 April 2008. In September 2006 she had told a court that she feared for her life as he had repeatedly threatened to kill her, and a restraining order was issued against him. Her estranged husband repeatedly breached this order but no action was taken against him. Sylvina Bassani made 28 further requests to the court for protection and investigation measures between September 2006 and April 2008, all of which went unanswered or were refused. Six days after Sylvina Bassani's death her lawyer received a letter from the court responding to her requests, some of them a year old, and stating that the Public Prosecutor had dropped its case against her husband.

The right to reparation was not specifically addressed in the Comprehensive Law, and the Spanish Government has also failed to develop an appropriate normative framework for making this right a reality in cases of gender-based violence. Neither have accessible channels been developed to enable victims or their relatives to obtain reparation for situations in which the violence suffered is related to a serious lack of diligence on the part of a State institution or actor.⁷¹

Amnesty International has documented the practical consequences of the lack of political and legislative protection of the right to reparation, through the experiences of women who, having survived assaults, in some cases extremely serious ones, have been left to recuperate virtually on their own, without support.

ASCENSIÓN ANGUIITA QUESADA

Eight years after being punched fifteen times in her vital organs when her ex-husband attempted to kill her, Ascensión Anguita Quesada⁷² has received insufficient state support to assist her to fully recuperate, from the serious physical and psychological after-effects she is suffering as a result of the assaults. The only income she has is a monthly pension of € 401.04 for total incapacity for work awarded to her by Social Security because of the after-effects and which, together with a few loans from friends, is all she and her two daughters have to live on.

Apart from being concerned at the lack of support available for aiding her recovery and that of her daughters

⁷¹ The case of Sylvina Bassani, who was murdered on 10 April 2008 after submitting numerous written requests for court protection, is a typical example. Despite the fact that her death occurred against a background in which the courts failed to act in response to a request for protection, no one has been held accountable and the proceedings initiated by the General Council of the Judiciary following the murder to obtain further information did not lead to the opening of disciplinary proceedings. See Amnesty International – Spanish Section: *Obstinada realidad, derechos pendientes. Tres años de la Ley de Medidas de protección Integral contra la Violencia de género*, July 2008.

⁷² Amnesty International interview with Ascensión M. Anguita Quesada in Seville on 2 December 2008 and further information on the case received on 21 March 2009.

and at her lack of financial independence, for over a year Ascensión has also had fears for her safety. In July 2008, her attacker started being allowed to leave prison on license and she is afraid that while he is out on license he will try to kill her once again. She has requested protection from various bodies, including the National Police unit responsible for protecting women who are the subject of a judicial protection order. However, the reply she received from them worried her even more: “They told me that there was one inspector for every 150 battered women, that they don’t have enough resources and that, if he wants to kill me, he will.” Although in the end the Andalusian Women’s Institute (Instituto Andaluz de la Mujer) gave her a GPS mobile phone, she said that “the security forces themselves and equality bodies told me that it is useless, that if he wants to attack me, he will and all I can do is to try to prevent it by not going out at the same time, not taking the same route and not going out alone”. During the six days per month that her attacker is allowed out of prison on license, Ascensión leaves her home and hides in another municipality. She said that “I spend the six days sleeping”. The lack of security makes it difficult for her to consolidate her recovery and she has been diagnosed with “indefinite post-traumatic shock”.

RIGHT TO REDRESS

Amnesty International has noted with concern that Law 1/2004 does not contain specific provisions which guarantee the right of victims of gender-based violence to reparation. As of September 2009, no legislation had been proposed by the government to address this gap. While the “Law on aid for victims of Violent Crimes and Against Sexual Freedom” (*Ley de Ayuda a Víctimas de delitos violentos y contra la libertad sexual*)⁷³ could be a means for a victim of gender-based violence to claim some forms of reparation, Amnesty International considers that the requirements established under the law are difficult for victims of gender-based violence to meet. Furthermore, under this law, compensation is awarded only to victims who can demonstrate that they suffered serious physical injuries; compensation is not available under this law for the effects of psychological violence.

For further information see the Amnesty International reports:

- *Mas riesgos y menos protección: Mujeres inmigrantes en España frente a la violencia de género*. November 2007. (Available in Spanish only).
- *Obstinada realidad, derechos pendientes: Tres años de la Ley de Medidas de Protección contra la Violencia de Género*. July 2008. (Available in Spanish only).

ENFORCED DISAPPEARANCES

Articles 2, 12 and 16

73 Ley 35/1995, de 11 de diciembre (BOE nº 296, de 12 de diciembre de 1995).

On 24 September 2009 Spain ratified the International Convention for the Protection of All Persons from Enforced Disappearance. However, the enforced disappearance of persons is still not included as a distinct offence in the Spanish Criminal Code.⁷⁴ Article 166 of the Criminal Code refers to the ordinary or common law offence of unlawful detention or kidnapping in which no explanation with regard to the whereabouts of the person concerned is provided by the accused. The definitions contained in the Convention for the Protection of All Persons from Enforced Disappearance and the Declaration on the Protection of All Persons against Enforced Disappearance⁷⁵ are similar and both embody customary international standards on the subject. There is therefore nothing to stop the Spanish State from properly incorporating that definition into the section of the Criminal Code entitled “Offences against the international community” rather than “imperfectly” applying it by way of internal analogy.⁷⁶ Any such definition should seek to ensure punishment of the crime of enforced disappearance whether perpetrated by State actors or individuals or groups of individuals acting with the authorization, support or acquiescence of the State.

In line with Article 6 of the Convention, the Criminal Code should expressly address the issue of the criminal responsibility⁷⁷ of military chiefs and other senior officers for acts of enforced disappearance. Amnesty International recommends that Articles 615 (bis) and 616 (bis) of the Criminal Code (which make it possible to hold military chiefs and other senior officers for acts of genocide, crimes against humanity and war crimes) be expanded to include the offence of enforced disappearances. While conspiracy and instigation to commit an offence are punishable in Spain, they can only be applied in cases specifically determined in law. Amnesty International has recommended that the crime of incitement to commit the offence of enforced disappearance should be expressly introduced into the wording of the Criminal Code.⁷⁸ Articles 131.4 and 133.2 of the Criminal Code should also be amended to extend the non-applicability of statutory limitations to the prosecution and punishment of the offence of enforced disappearance. However, even when such time limits exist, they only begin from the moment that the crime ceases; in other words, once what happened has been clarified, the fate of the disappeared person has been established with certainty or their remains have been located or identified. Article 8.2 of the Convention states that an effective remedy shall be ensured during the period of limitation so, if no such remedy is available to

74 For crimes against humanity, see article 607 bis) (2)(7) of the Criminal Code which refers to the international standards governing detention and imprisonment (by way of article 37 of the International Convention for the Protection of All Persons against Enforced Disappearance).

75 Adopted by the United Nations General Assembly in resolution 47/133 of 18 December 1992.

76 Which, furthermore, disregards essential elements of what constitutes enforced disappearance. It is worth recalling that “the prohibition of analogy in the criminal sphere refers exclusively to the substantive framework relating to the standard description [of an offence] and [its] punishability (...)”. See Supreme Court Judgment No. 798/2007 of 1 October in the Scilingo case, FJ 7^o.6, and the individual opinion dissenting from it tabled at the full session of the Criminal Division on 2 December 2008, (IV).6

77 As far as liability as a principal and participation in the commission of an offence is concerned, the Criminal Code covers the various degrees [of responsibility] established in article 6 of the Convention (see articles 27 to 28 of the Criminal Code) and also makes any attempt to commit such an offence punishable.

78 Along these lines, see articles 141 and 142 (concerning homicide), article 579 (terrorist offences) and article 615 (“Common Provisions” for offences included in the chapters concerning Offences against the International Community – genocide, crimes against humanity and war crimes).

the victims or their relatives, it is not possible for the statutory limitation period to begin to run.

LEGAL OBSTACLES STANDING IN THE WAY OF EFFECTIVE PROSECUTION, INVESTIGATION AND PUNISHMENT

In addition to the observations made above, Amnesty International has identified other obstacles in law and judicial practice that have consequence for the prosecution of torture offences and the impunity of those responsible. The application of statutory limitations to the offence, together with prolonged delays in criminal proceedings relating to torture, often mean that, by the time trials are due to start, the alleged perpetrators can no longer be brought to justice.

STATUTORY LIMITATIONS

Under Spanish criminal law, both the bringing of criminal proceedings and the Criminalities applicable are subject to time limits ranging from 10 to 20 years. Torture, like the enforced disappearance of persons, is a crime against international law which should not be subject to any such time limits.⁷⁹

Although the Spanish Criminal Code states that criminal proceedings and Criminalities relating to the offences of genocide, war crimes and crimes against humanity shall not be subject to statutory limitations,⁸⁰ the First Interim Provision of Law 15/2003 of 25 November, which introduced the non-applicability of statutory limitations for war crimes and crimes against humanity, specified that this amendment was non-retroactive in nature.

Amnesty International has called on the authorities in Spain to take the necessary steps to ensure that the Spanish courts can apply the principle of the non-applicability of statutory limitations retroactively; in other words, so that it applies to offences committed before the measure entered into force – whenever they may have been committed – thus ensuring that they do not go unpunished.

IMMUNITY

States have a duty to ensure that their courts can investigate and bring to justice anyone who may be responsible for serious human rights violations which amount to crimes under international law, whatever their rank or official position.

Therefore Amnesty International consider that to the authorities should consider amending

⁷⁹ Prosecutor v. Anto Furundzija (IT-95-17/1-T) Trial Chamber Judgement, 10 December 1998, para. 157 (“It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption”); Inter-American Court of Human Rights, Barrios Altos case (Chumbipuma Aguirre et al. v. Peru), judgment of 14 March 2001, para. 41.

⁸⁰ Articles 131.4 and 133.2 of the Criminal Code. The extension of the non-applicability of statutory limitations to war crimes and crimes against humanity was introduced into the Criminal Code through Organic Law 15/2003, of 25 November, in order to comply with the requirements of the Rome Statute of the International Criminal Court.

Article 21 of the Law on the Judiciary in order to establish an exception to the principle of immunity in the case of the commission of international crimes.

AMNESTIES, PARDONS AND OTHER SIMILAR MEASURES

Amnesties and pardons have not disappeared entirely⁸¹ and, according to the Organic Law on the Judiciary, the granting of a pardon is one of the specific limitations on the exercise of universal jurisdiction.⁸² Amnesty International has called on the Spanish authorities to amend these provisions to prevent such measures from being applied to people who are responsible for crimes against international law and to allow Spanish courts to reject judicial rulings by foreign courts which, by applying amnesties, pardons and similar measures, permit those accused of such crimes escape their criminal responsibility.

RES JUDICATA (*ne bis in idem*)

In Spain a distinction is made between the “effects of res judicata” on final judgments and the principle of *ne bis in idem* as a guarantee of due process. Amnesty International has several observations in this regard, particularly concerning the consequences for the exercise of extraterritorial jurisdiction by the Spanish courts.

The Human Rights Committee has maintained that the scope of the *ne bis in idem* principle is confined to judicial proceedings conducted within the same country and that it has no validity for trials that are conducted abroad.⁸³ The International Law Commission has also stated that, if a national judicial system has not operated in an independent and impartial manner or if the aim of the proceedings was to free the accused from international criminal responsibility, “[t]he international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process”.⁸⁴

The Spanish courts should have a legal mechanism that allows them to independently reject judgments rendered in the course of trials held abroad which do not meet the international standards of criminal investigation and due process, in particular in cases that concern crimes against international law.⁸⁵

⁸¹ Articles 666.4 and 675 of the Code of Criminal Procedure.

⁸² Article 23.4, read in conjunction with articles 23.5 and 23.2.c), of the LOPJ.

⁸³ A.P. v. Italy, Supplement No. 40 (A/43/40), Annex VIII.A, Communication No. 204/1986.

⁸⁴ Report of the United Nations International Law Commission on the work of its 48th session, 6 May - 26 July 1996, A/51/10, Supplement No. 10, p. 38. It is what has come to be known as “fraudulent” or “apparent” res judicata.

⁸⁵ Without violating article 25.1, read in conjunction with article 9.3 of the Constitution, article 666.2 of the Code of Criminal Procedure and article 23.5 of the Law on the Judiciary.

THE CIVIL WAR AND THE FRANCO REGIME

THE STATE'S OBLIGATION TO PROSECUTE TORTURE (UNDER THE 1977 AMNESTY LAW)

(Articles 4, 5 and 2 and Question 14 of the Committee's list of issues)

Amnesty International considers that the Spanish Government has clearly rejected the argument that the Spanish 1977 Amnesty Law conflicts with the Spanish State's obligation to establish jurisdiction over torture and either put on trial or extradite individuals accused of inflicting acts of torture. In contravention of the relevant international legislation and developments in international jurisprudence, it has repeatedly defended the role played by the Amnesty Law in the Spanish post-dictatorship transition.

In October 2005, on examining the Fifth Periodic Report on Spain, the Human Rights Committee addressed the question of the rights of the victims of the Spanish civil war and the Franco regime and called on the Spanish State to respond in compliance with international law. It brought the Spanish State's attention to its General Comment N° 20, which states that amnesties covering gross human rights violations are incompatible with the International Covenant on Civil and Political Rights. It then concluded that Spain should "consider repealing the 1977 Amnesty Law".⁸⁶ In response, the Spanish Government said that "the Committee is discrediting a decision that had the support of the whole of Spanish society and which contributed to the transition to democracy in Spain [...] In addition, not only Spanish society but also world public opinion is aware of and has always supported the process of transition in Spain, which was partly made possible by this law".⁸⁷ The Spanish Government's stance on this issue has resulted in a lack of political will to enforce the right of the relatives of the victims to know the fate of the latter and to have access to effective reparation mechanisms.

THE ESTABLISHMENT OF JURISDICTION (UNDER THE 1977 AMNESTY LAW)

The Spanish courts have repeatedly ruled that amnesties and any other such measures granted by another State for crimes against international law are not binding and therefore have no validity in Spain.⁸⁸ However, this has not prevented differing interpretations of the principle of legality being made by the courts.⁸⁹ Furthermore, recent legal proceedings

⁸⁶ UN Doc. CCPR/ESP/CO/5, 27 October 2008, para. 9.

⁸⁷ UN Doc. CCPR/C/ESP/CO/5/Add.1, 13 January 2009. [Unofficial translation.]

⁸⁸ See, for example, the order of the Juzgado Central de Instrucción No.5, Fifth Central Court of Preliminary Investigation, dated 25 March 1998, confirming jurisdiction.

⁸⁹ In the Scilingo case, the Supreme Court said that the deed imputed to him did not constitute a crime against humanity because the Spanish Criminal Code made no provision for such a crime at the time it was committed (Supreme Court, Judgment No. 798/2007, 1 October 2007). However, in the order giving leave to proceed in the case of the Mauthausen concentration camp, the investigating judge reiterated the argument put forward by the prosecutor, saying that "the Criminal Code in force can be applied retrospectively to earlier conduct that was already criminal under international law at the time it was committed" (Juzgado Central de Instrucción N°2, Diligencias Previas 211/09 L, auto de 17 de julio de 2008, Hechos, 2° [(Second Central Court of Preliminary Investigation, Preliminary Proceedings 211/09 L, order of 17 July 2008, The Facts, 2).

concerning crimes committed during the Spanish civil war and under the Franco regime have highlighted the inconsistency of the standards applicable by national and local courts with regard to their competence to investigate crimes to which the 1977 Amnesty Law would apply.

On 16 October 2008, an investigating judge from the National Criminal Court launched an investigation into the estimated 114,266 enforced disappearances that occurred during the Spanish civil war and early years of the Franco dictatorship. The Public Prosecutor appealed against the opening of the investigation, calling for application of the 1977 Amnesty Law which grants amnesty for all crimes with a political connection committed up till 1977. He also stated that the statute of limitations for the alleged crimes had expired.

On 7 November 2008, responding to a petition from the Public Prosecutor, the National Criminal Court halted (provisionally suspended) the opening of the graves authorized by the investigating judge.

On 18 November 2008, the investigating judge disqualified himself from conducting the investigation, stating that local courts were competent to investigate such crimes if they had been committed within their territorial jurisdiction. On 2 December, the National Criminal Court declared itself incompetent to investigate crimes of that nature. On 26 December, the investigating judge from the National Criminal Court sent information on enforced disappearances to the local courts and reported that 30,960 children, many of whom would still be alive today, had been taken away illegally.

The local courts are reaching differing decisions and relatives still face uncertainty with regard to their right to an effective remedy enabling them to know the fate of the victims. Most of the local judges, to whom the cases were referred after the National Criminal Court disqualified itself, have decided that the cases in question concern common crime and have closed them on the grounds that the statute of limitations had expired.⁹⁰ So far, only three local courts have taken further steps (such as opening graves or taking statements from relatives) and are investigating the case as one of enforced disappearance rather than as a common crime.⁹¹ Only two investigating judges⁹² have, as of September 2009 taken the view that the crimes committed should be investigated by the National Criminal Court and thus returned the case to that court. The court in El Escorial has accepted the categorization of the offences determined by the National Criminal Court, including the linking of offences against the nation's authorities with the offences of systematic killing, enforced disappearance (unlawful detention), torture and enforced exile.⁹³ The return of

⁹⁰ By 30 January 2009, 13 of the 43 courts to whom the case file had been referred by the National Criminal Court had taken this step.

⁹¹ These are the courts of Benavente (Zamora), Palencia and Villacarrillo (Jaén). Information as of 30 June 2009. See: www.memoriahistorica.org/modules.php?name=News&file=print&sid=948.

⁹² The judges from Granada and San Lorenzo del Escorial.

⁹³ Auto del 2 de Julio de 2009, Juzgado de Primera Instancia e Instrucción No. 2 de San Lorenzo de El Escorial, Diligencias previas 427/ 2009, Razonamientos jurídicos, párrafo Tercero [Order of 2 July 2009, Second Court of First Instance and Preliminary Investigation of San Lorenzo de El Escorial, Preliminary Proceedings 427/2009, Legal Arguments, para. 3.]

these cases to the National Criminal Court has led the judge originally in charge of the case to raise a new jurisdictional issue with the Supreme Court⁹⁴; in other words, it is now up to the Supreme Court to determine which court has jurisdiction to hear the case.

STATE POLICIES ON INVESTIGATIONS AND EXHUMATIONS

The Senate's recent rejection, on 11 March 2009, of a draft law calling on the government to take on the task of locating, exhuming and identifying remains is worrying and shows the State's lack of political will with regard to this issue.

Although the second additional provision of Law 52/2007 of 26 December⁹⁵ (the Historical Memory Law) established that "[t]he provisions contained [therein] (...) are compatible with the exercise of legal action and access to the ordinary and extraordinary procedures established in law or in the international treaties or conventions signed by Spain", in reality it only sets up a system for collaborating with the associations of victims' relatives with regard to exhumations. It does not, however, assume or take responsibility for the costs involved.

With the sole exception of the Catalan autonomous government, which on 17 June 2009 passed a Law on Graves (*Ley de fosas*), committing it to paying the costs of exhumations and other measures taken to honour the victims, neither the central government nor the other autonomous governments have taken it upon themselves to pay for excavating the graves that are still appearing throughout the country. In the absence of resources and government or judicial supervision, the associations of relatives are being flooded with requests and only have access to very small annual grants from the Ministry of the Presidency for which they have to compete against other historical memory initiatives. The relatives' associations have complained that 81 per cent of such funds are spent on books, exhibitions and conferences.⁹⁶

Lastly, the Ministry of the Presidency proposed a Protocol for the Conduct of Exhumations (dated 28 November 2008). However, it continued to take the form of State "collaboration" with victims' associations which, according to the protocol, would carry out the exhumations "with their own resources or resources made available as the result of signing the appropriate agreements or contracts". In addition, "the authorization of the relevant Autonomous Community and local government bodies of the place in which the remains are located will be required". Following consultation with the associations of victims' relatives, the protocol was rejected by the latter on the grounds that it does not comply with the requirements of international law.

94 The new jurisdictional issue was submitted to the Supreme Court by the judge from the 5th Court of Preliminary Investigation in the Granada case in the last week of May and, in the case of El Escorial, in the second week of July 2009. The exact dates are not known because the relevant documents have not yet been made public.

95 Law 52/2007 of 26 December "through which rights are recognized and broadened and measures established for the benefit of those who suffered persecution or violence during the civil war and the dictatorship". This law is also known as the Historical Memory Law.

96 Asociación para la Recuperación de la Memoria Histórica, visited on 25 July 2009. See www.memoriahistorica.org/modules.php?name=News&file=print&sid=953

For further information about Amnesty International's concerns regarding enforced disappearances please see the following Amnesty International reports:

- *España: La obligación de investigar los crímenes del pasado y garantizar los derechos de las víctimas de desaparición forzada durante la Guerra Civil y el franquismo.* November 2008. (Available in Spanish only).
- España: Ejercer la jurisdicción universal para acabar con la impunidad. October 2008. (Available in Spanish only).