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### **Committee on Enforced Disappearances**

## **Consideration of reports of States parties pursuant to article 29 of the Convention**

### **Reports of States parties pursuant to article 29, paragraph 1, of the Convention due in 2012**

#### **Spain\***

[26 December 2012]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document has not been edited.

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\* Annexes can be consulted in the files of the Secretariat.

## I. Introduction

### A. Preliminary issues and preparation of this report

1. For the first time, Spain is presenting a report pursuant to article 29 of the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in Spain on 23 December 2010.
2. The purpose of this initial report is to consider the current situation in relation to the exercise of rights under the Convention by persons in the territory of the reporting State or under its jurisdiction, rights which have been applicable since the Convention came into force in Spain.
3. It should be noted that, following the ratification of the Convention by Spain and its entry into force, certain organizations —associations and non-governmental organizations (NGOs) which may or may not have consultative status— have raised the issue of its applicability to enforced disappearances alleged to have taken place during the civil war and under the Franco regime and the need to abrogate or declare inapplicable the Amnesty Act (No. 46/1977) of 15 October.
4. In this regard, it should be recalled that article 35.1 of the Convention provides that the Committee “shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention”.
5. As mentioned above, the Convention entered into force in Spain on 23 December 2010. The Committee is therefore not competent to consider enforced disappearances which commenced before that date.
6. This report, in commenting on the articles of the Convention, therefore takes into account the fact that they are applicable solely to enforced disappearances which may have commenced after 23 December 2010.
7. In the drafting of replies in this report, account has been taken of the harmonized guidelines on reporting and the specific guidelines for the submission of reports to this Committee (CED/C/2).
8. As required under those guidelines, specifically paragraph 9, the consultations for the preparation of this report, which are described below, complied with the reporting process described in paragraphs 132–134 of the core document on Spain (HRI/CORE/ESP/2010), with particular emphasis on the involvement of the Ministries of Justice, the Interior and Defence, whose contributions were coordinated by the Ministry of Foreign Affairs and Cooperation.
9. In Spain, the national institution for the protection and promotion of human rights is the Office of the Ombudsman. The latter has been kept informed in a timely manner at all stages of the preparation of this report and of its contents and has been invited to make the appropriate contributions.
10. A process of consultations with civil society was launched as soon as the first draft of this report had been completed. The civil-society organizations which took part in that process did so after declaring their interest in participating, and did so either on their own initiative or in response to the relevant announcement by the Ministry of Foreign Affairs and Cooperation.
11. No limits were placed on participation and efforts were made to ensure that the participants included organizations having the strongest interest in enforced disappearances.

A favourable response was given to the proposal by a number of representative bodies in the area of human rights to coordinate the contributions of those organizations.

12. Lastly, the report was submitted, for information, to the Foreign Affairs Committee of the Congress of Deputies.

13. The present report is in three parts. It begins with this introduction, which in turn is subdivided into a series of preliminary considerations and a general overview, followed by the general legal framework whereby enforced disappearances are prohibited. The third and last section contains information on each substantive article of the Convention. Lastly, a list of the acronyms used in the report is provided.

## **B. General presentation**

### **1. Ratification of the Convention**

14. The International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter referred to as “the Convention”) was adopted under United Nations General Assembly resolution 61/177, of 20 December 2006, and signed at New York by the Ambassador of Spain on 27 September 2007.

15. The Spanish Parliament (*Cortes Generales*) gave its authorization under article 94.1 of the Constitution of 27 December 1978 (“Before contracting obligations by means of treaties or agreements, the State shall require the prior authorisation of the Cortes Generales in the following cases: (a) treaties of a political nature; (b) treaties or agreements of a military nature; c) treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under title I; (d) treaties or agreements which imply financial liabilities for the Public Treasury; (e) treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution”) and the instrument of ratification was drawn up on 14 July 2009 and deposited on 24 September 2009. Lastly, the instrument of ratification was published in the official journal, the *Boletín Oficial del Estado*, on 18 February 2011.

16. By that series of actions, and in the framework of its policy of promoting and protecting human rights within the United Nations system, the Government of Spain acted with diligence and helped to ensure that the Convention entered into force on 23 December 2010. Spain was among the first 20 Member States to deposit their instruments of ratification, giving effect to the clause on entry into force (art. 39.1 of the Convention).

### **2. Fundamental rights are embodied in the Spanish legal system and links to international human rights instruments**

17. The Spanish Constitution of 27 December 1978 (hereinafter referred to as “the Constitution”) completed the establishment in Spain of the rule of law, ending a long period of dictatorship (1939–1975) and overcoming the consequences of the civil war, a conflict among Spanish nationals, which took place in 1936–1939.

18. The Constitution sought to overcome historical conflicts among Spanish citizens, the most notable of which related to the territorial structure of the State and of political power, the historical weakness of the civil power in relation to the military power, and relations between the civil power and religion. It created a system which, despite its problems and malfunctions, has permitted Spanish society to enjoy 35 years of democracy, the longest such period in the country’s history.

19. To that end, and as an instrument of coexistence which limits and defines the power of the State in relation to the citizen, the Constitution embodies an integral system for the

definition and protection of rights and freedoms. This is the function of part 1 (arts. 10 to 55), entitled “Fundamental rights and duties”, which is derived from traditional ideas and more advanced constitutional constructs; furthermore, it expressly recognizes the inspirational and interpretative force of international treaties and agreements ratified by Spain in the area of fundamental rights and civil liberties.

20. Article 10 of the Constitution provides as follows:

“1. The dignity of the person, inherent inviolable rights, the free development of the individual and respect for the law and for the rights of others are the foundation of political order and social peace.

2. Provisions relating to the fundamental rights and liberties provided for by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”

21. The spectrum of fundamental rights and freedoms enshrined in the Constitution is comprehensive and complete. Given its date, 1978, it is among the most recent among advanced democratic societies; this has made it possible to incorporate all the recent constitutional, legal and doctrinal developments in the field of fundamental rights.

22. As for the link established in article 10.2, the doctrine of the Constitutional Court has invariably construed it as enabling Spanish legislation to be open to international human rights law. The latter therefore sets the standard for the interpretation of the fundamental rights and freedoms embodied in the Constitution. It should be noted that article 10.2 does not incorporate into the Constitution the fundamental rights and freedoms enshrined in international treaties and agreements; what it does is to make them a source of knowledge and interpretation of all the rights and freedoms embodied in the Constitution and which, as mentioned above, include *in extenso* all those recognized by international human rights law.

23. To understand correctly the relation between the Constitution and international human rights law, it may be useful to recall a number of decisions handed down by the Constitutional Court. In the Spanish system, that Court is a constitutional organ which is the ultimate interpreter of the Constitution and which, through the recourse of *amparo*, provides protection from any violations of fundamental rights and civil liberties which may result from provisions, acts, omissions or simple de facto actions on the part of the authorities or their officials or agents. The report will also refer to the jurisprudence of the Second Chamber (Criminal Law) of the Supreme Court. The latter is the highest court in all areas of law except for that of fundamental rights, which comes under the jurisdiction of the Constitutional Court.

24. The Constitutional Court has established that:

“[...] this rule [article 10.2 of the Constitution] merely establishes a link between our own system of fundamental rights and freedoms, on the one hand, and international human rights treaties and agreements, on the other. It gives no constitutional status to the internationally proclaimed rights and liberties inasmuch as they are not also enshrined in our own Constitution, but it requires the provisions of the latter to be interpreted in accordance with the contents of those treaties and agreements; thus, in a way, those contents in practice become the constitutionally declared content of the rights and freedoms set out in part I, chapter 2, of our Constitution...” (Constitutional Court, decision No. 36/1991, 14 February).

25. It has also affirmed that:

“The remedy of *amparo* was established in the Constitution and shaped by the legislature as a procedural means of claiming the protection of the freedoms and

rights proclaimed in articles 14 to 50 of the Constitution [...] and only for the purpose of restoring or preserving those freedoms and rights [...]. Thus, the only applicable judicial measure, both in the constitutional *amparo* process and in preferential and summary proceedings before the ordinary courts under article 53.2 of the Constitution, is that contained in the constitutional provisions recognizing those fundamental rights and civil liberties, whose content and scope must nonetheless be interpreted in accordance with the international treaties and agreements referred to in article 10.2 of the Constitution.

“The interpretation referred to in article 10.2 of the Constitution does not cause such treaties or agreements to become precepts directly applicable to the rules and actions of the State authorities where fundamental rights are concerned. If that were the case there would be no need for the Constitution to proclaim such rights; it would be sufficient for it to refer to international declarations of human rights or, in general, to treaties signed by Spain in the area of fundamental rights and civil liberties. On the contrary, the existence of that proclamation leaves no doubt that the validity of provisions and acts which can be challenged by means of *amparo* must be assessed solely by referring to the constitutional precepts which recognize the rights and liberties which may be protected through such legal challenges; the international agreements and texts referred to in article 10.2 are a source of interpretation which helps to better identify the content of the rights whose protection is the function of this Constitutional Court [...]” (Constitutional Court, decision No. 64/1991, 22 March).

26. Such statements have been reiterated regularly by the Court in decisions 372/1993, of 13 December; 41/2002, of 25 February; 236/2007, 7 November; and 80/2010, of 26 October, among others. Thus, its doctrine can be summarized as follows: “[...] the only admissible rule for resolving *amparo* applications is the constitutional precept which proclaims the right or freedom to which the complaint relates; international norms relating to matters affected by the provision or act which is the object of the application are an additional element for verifying the legal basis of the complaint or the lack thereof [...]”.

27. The Supreme Court has of course held an equivalent position; this is reflected in its decision 798/2007, of 1 October (the “Scilingo case”) and in decision 101/2012, of 27 February (the “Garzón case”), which frequently refers to the former.

28. The first of those decisions states, regarding the application of international criminal law, that “[...] an exact transposition must be made in accordance with domestic law, at least in those systems which, as is the case of the Spanish system, do not provide for direct application of international law [...]” and that “[...] given our legal context, customary international law cannot create comprehensive definitions of criminal offences directly applicable by Spanish courts [...]”.

29. The second decision, acquitting a magistrate of perverting the course of justice under article 446.3 of the Criminal Code (“Any judge or magistrate who knowingly issues an unjust sentence or judgement shall be subject to a penalty of ...”), of which he or she had been accused, states as follows: “Articles 93 et seq. of the Constitution provide for the way in which international treaties shall be incorporated into domestic law in order for them to take effect in accordance with article 10.2 of the Constitution [...], without prejudice [referring to customary international law] to its consideration as an interpretation criterion and a contextual element with regard to indictability under international law and to the tailoring of sentences which is determined by the concurrence of offences covered in the Criminal Code at the time when they were committed. Placing the facts in context in relation to crimes against humanity has an impact on proceedings, international indictability, and an effect which relates to the power to tailor sentences, without causing a new offence to be created [...]”.

30. That same decision goes on: “This Court stated in decision 798/2007, and here repeats, that the existence in our system of the principle of legality requires that international law is incorporated into our domestic legal system in the way provided for in the Constitution and with the effects that it requires. However strongly it may be argued in some doctrinal areas, the requirements of the principle of legality cannot be satisfied by the provisions of customary international criminal law unless the act is defined as an offence in domestic law. If it were so subsequently, the statute could be applied but only from the date of its publication. The guarantee based on the principle of legality and the non-retroactivity of unfavourable punitive provisions (art. 9.3 of the Constitution) prohibits all retroactive application of criminal laws to acts which took place before they came into force (see also articles 1 and 2 of the Criminal Code). This requirement is applicable to international criminal law, both customary and treaty-based; it may be taken into account as a hermeneutic criterion in a human rights-based culture, the arguments of which are intended to inform the courts [...]”

31. That decision goes on to reinforce the same argument, noting that “...successive decisions of the Supreme Court and Constitutional Court have confirmed a strict interpretation of the essential nature of the legality principle, with the resulting consequences in relation to *lex previa*, *lex certa*, *lex stricta* and *lex scripta*. The Criminal Code dedicates its first four articles to defining the legality principle, building upon articles 25.1 and 9.3 of the Constitution, and all recorded jurisprudence reflects this strict definition of the principle [...]”

32. Lastly, the decision refers to a resolution by international human rights bodies, calling for observance of the legality principle as a condition for the application of legal and treaty-based rules. It reasons that this requirement is not alien to the principles of international law, since it was also adopted by the Human Rights Committee of the United Nations. It declared that the International Covenant on Civil and Political Rights could not be applied retroactively for cases of disappearance in Argentina (Communications 275/1988 of 4 April 1990 and 343, 344 and 345/1988 of 5 April 1990). As for the application *ratione temporis* of the Covenant, the Committee recalled that both instruments entered into force on 8 November 1986, noting that the Covenant could not be applied retroactively and that the Committee was unable *ratione temporis* to consider violations which allegedly took place before the entry into force of the Covenant for the State concerned [...]”.

### **3. International human rights agreements and treaties to which Spain is a party**

33. As stated above, international human rights law is essential for the Spanish system as a means of explaining and interpreting the scope and content of the rights and liberties enshrined in the Constitution. For that interpretative function to be effective, however, that international law must be integrated into the Spanish legal system through ratification.

34. Article 10.2 of the Constitution refers directly to the Universal Declaration of Human Rights and to international treaties and agreements ratified by Spain in the area of fundamental rights and freedoms. This poses the question of which international human rights instruments constitute the interpretative reference source for the application of the rights and liberties recognized by the Constitution.

35. Those instruments must be identified in light of international human rights law which has gone through the ratification and integration process referred to in article 96.1 of the Constitution, which provides that “Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may be repealed, amended or suspended only in the manner provided for in the treaties themselves or in accordance with the general rules of international law”.

36. Accordingly, the following treaties whose scope is general or (in the case of United Nations instruments) universal, and others of regional scope, come under the provisions of article 10.2 of the Constitution:

(a) As expressly stated therein, the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations in its resolution 217 A (III) of 10 December 1948.

(b) Universal scope: agreements listed in paragraph 109 of the core document on Spain (HRI/CORE/ESP/2010), to which the following should be added:

(i) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; instrument of ratification dated 23 September 2010 (not yet in force);

(ii) The various Conventions of the International Labour Organization (ILO), which are of particular importance for workers' rights.

(c) Regional scope: further to paragraph 109 of the core document on Spain, the following should be noted in relation to certain instruments to which Spain is a party:

(i) European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted at Rome on 4 November 1950. Ratification instrument dated 26 September 1979 (Official Bulletin No. 243 of 10 October 1979). This Convention certainly has an important role in the interpretation of rights and freedoms and has been cited by the Constitutional Court in over 180 of its decisions. It should be noted that this Convention is also interpreted by the European Court of Human Rights; consequently, the Constitutional Court generally defers to the jurisprudence of that Court for clarification of its provisions and the limits of the relevant rights and freedoms;

(ii) Second Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952; instrument of ratification dated 27 November 1990 (Official Bulletin No. 11, 12 January 1991).

#### **4. Legal and institutional framework. Protection of human rights in Spain**

37. Aside from the contents of paragraph 111 of the core document, the general framework for protecting human rights is found in the Constitution, which provides for an excellent system of safeguards:

(a) Legislative: article 53.1 of the Constitution states that "only by a statute, which in any case must respect their essential content, may the exercise of such rights and freedoms be regulated." Furthermore, article 81 provides that laws relating to the development of fundamental rights and civil liberties shall have the status of organic laws, and their adoption, amendment or repeal shall require an absolute majority of the members of Congress in a final vote on the project as a whole;

(b) Judicial: reinforcing that guarantee, article 53.2 of the Constitution provides that any citizen may request protection of the freedoms and rights recognized in section 14 and in section 1 of chapter 2, by means of a preferential and summary procedure before the ordinary courts. The judicial system is made up of independent and impartial organs with a specific instruction to protect and preserve human rights;

(c) Constitutional: the remedy of *amparo*, which can be invoked before the Constitutional Court once ordinary judicial recourse has been exhausted;

(d) Institutional, through the following agencies: the Ombudsman, the Public Prosecution Service and the Parliamentary Committee of the Congress of Deputies.



38. Article 54 of the Constitution defines the Ombudsman as “high commissioner of the *Cortes Generales* [Parliament], appointed by them to defend the rights contained in [part I of the Constitution]; for this purpose he or she may supervise the activity of the Administration and report thereon to the *Cortes Generales*”. In addition to that task of overseeing and monitoring the activities of the Administration, the Ombudsman, as the defender of individual rights, is authorized to apply for the protection (*amparo*) of individual rights (art. 162 of the Constitution and art. 46 of the Organic Law of the Constitutional Court). He or she also has special authority to request judicial review on grounds of unconstitutionality in the case of laws and provisions having the status of law, pursuant to article 162 of the Constitution, and to petition for *habeas corpus* before the ordinary courts.

39. In the Spanish system, the functions of the Public Prosecution Service include that of guarantor of legality and of the rights of citizens under article 124 of the Constitution; it “has the task of ensuring that justice is done in the defence of the rule of law, of citizens’ rights and of the public interest as safeguarded by the law, whether ex officio or at the request of interested parties, as well as that of protecting the independence of the courts and securing before them the satisfaction of social interest.” It is involved in all *amparo* procedures before the Constitutional Court and has authority to bring *habeas corpus* proceedings before ordinary courts.

40. Parliamentary Committee: the Standing Orders of the Congress of Deputies, dated 10 February 1982 (arts. 40 to 53), establish the competence of the Permanent Constitutional Committee and of the Permanent Petitions Committee, giving to the latter responsibility for considering individual and collective petitions addressed to the Congress of Deputies.

## **II. General legal framework in which enforced disappearances are prohibited**

41. In its guidelines, the Committee on Enforced Disappearances recommends the inclusion of a specific section on the application of the Convention. Since information relating to that legal framework has been included extensively under articles 1 to 4, the reporting State considers that the contents of that specific section have been covered.

## **III. Information in relation to each substantive article of the Convention**

### **Article 1 Purpose**

42. Enforced disappearances are not a thing of the past but a current and global phenomenon, as shown in studies and reports of the Working Group on Enforced or Involuntary Disappearances since its creation in 1980, and they are a matter of the utmost gravity which must be classified universally as a criminal offence and, in certain circumstances, as a crime against humanity. The United Nations has therefore established a process to make combating enforced disappearances a worldwide campaign.

43. Since the adoption in 1992 of the Declaration on the Protection of All Persons from Enforced Disappearance, which describes enforced disappearance as a complex phenomenon involving the violation of various fundamental rights (such as the right to liberty and security of the person, the right to life, the right not to be detained or arbitrarily deprived of liberty and the right not to be subjected to torture and other cruel, inhuman or

degrading treatment or punishment), but which was not binding on States, efforts have been made to prepare a draft Convention which would be binding.

44. Resolution 2001/46 of the Commission on Human Rights expressed deep concern at “[...] the increase in enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared” and began a process of study, reporting and debate which led to the adoption in 2006 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the present report, the Convention is analysed, considered and contrasted with the legal system of the Kingdom of Spain. It should be recalled that enforced disappearance continues to be a worldwide scourge; as recently as 2009, the United Nations reported 476 new cases in a number of countries.<sup>1</sup>

45. The ratification of the Convention and the prohibition of enforced disappearance have entailed the recognition of a new, broader, and essential component of fundamental rights, which is now part of the right to dignity and liberty. While in the Spanish legal system, as explained in paragraph 22 et seq., new fundamental rights do not become part of the Constitution through the ratification of international agreements, new and broader elements can be incorporated through the interpretation of the law.

46. Article 1.2 of the Convention establishes the principle of full non-derogability of the rule, affirming the impossibility of invoking any circumstance, however exceptional, in order to justify enforced disappearance. The Spanish system provides for no circumstance or pretext which can justify or cover a person’s enforced disappearance. The fact that such disappearance is treated as a criminal offence entails the non-derogability of the act.

47. Not even in exceptional circumstances (disaster, paralysis of essential public services, insurrection or war), where the suspension of rights and freedoms as provided for by article 55 of the Constitution (The rights recognized [...] may be suspended when a state of emergency or siege (martial law) is declared under the terms provided in the Constitution), and which were developed by the Organic Law on States of Alarm, Emergency and Siege (Act No. 4/1981) of 1 June, does the Spanish constitutional system enable or make legally feasible the enforced disappearance of persons or allow derogation from the statute which defines and penalizes it as a criminal act.

## **Articles 2 and 3**

### **Definition of enforced disappearance; general principles**

48. A joint response on these two articles is provided below.

49. The definition of enforced disappearance in article 2 of the Convention is based on the necessity of direct or indirect participation by the State. This participation is thus seen to be a necessary condition for enforced disappearance in the strict legal sense to be judged to have occurred. That participation could be through acts of the State itself or of paramilitary or quasi-governmental groups, death squads or similar agents.

50. Notwithstanding the above, article 3 of the Convention establishes the obligation to investigate and bring to justice instances of enforced disappearance brought about by persons or groups acting without any connection to the State apparatus. It should be noted that the Organic Law on the Criminal Code (Act No. 10/1995) of 23 November, as will be seen under article 4, defines three criminal offences which come under the heading of

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<sup>1</sup> See the report of the the Working Group on Enforced or Involuntary Disappearances (A/HRC/13/31).

unlawful detention or abduction or enforced disappearance: (a) that which is committed by private individuals; (b) that which is directly or indirectly committed by the State; and (c) that which constitutes crime against humanity.

51. It should be borne in mind that, in this document, the offence of “unlawful detention/abduction with disappearance” as defined in Spanish criminal law relates to the same offence referred to as enforced disappearance in the Convention.

52. The following sentence (para. 52) needs to be reworded: As will also be noted under article 4, the offence referred to as “unlawful detention/abduction with disappearance” in Spanish law with direct or indirect State involvement is in accordance with the requirements of international criminal law.

53. As will also be seen in the comments on article 10 of the Convention, such offences are of a public nature and are subject to prosecution by the mere fact that they have taken place and that knowledge or notification thereof has been obtained by any means.

## **Article 4**

### **General obligations of States**

54. Reference will be made initially to the provisions of the Criminal Code which define and regulate the offences of unlawful detention and abduction and then to its harmonization with international criminal law, to determine whether, as mentioned above, enforced disappearance as defined in the Convention is a criminal offence in the Spanish legal system.

#### **1. Provisions of the Criminal Code**

55. Within the category of offences against personal liberty (book II, section VI, arts. 163–172 of the Criminal Code) “unlawful detentions and abductions” are covered by articles 163–168.

56. In particular, article 166 of the Criminal Code provides that “Persons guilty of unlawful detention or abduction who fail to reveal the location of the person detained shall, depending on the case, receive penalties greater than those provided for in the previous articles of this section, unless the detained person has been freed”. This provision will be modified by the draft Organic Law to reform the Criminal Code which is currently under consideration. While retaining the definition of the offence, the reform provides for more serious penalties in the manner discussed in this report in the comments on article 7 of the Convention.

57. Since that provision refers to the definition of unlawful detention or abduction in the Criminal Code, the following should be noted:

(a) Article 163 of the Criminal Code provides that:

“Any private individual who detains or imprisons another, depriving him or her of liberty, shall receive a prison sentence of four to six years;

If the guilty person frees the detained or imprisoned person within the first three days of such detention without having achieved his or her chosen objective, a lesser sentence shall be imposed;

The prison sentence shall be five to eight years if the detention or imprisonment has lasted over 15 days;

Any private citizen who detains a person in a manner other than that permitted by law, and presents him or her immediately to the authorities, shall receive a three- to six-month fine.”

(b) Article 164 of the Criminal Code provides as follows: “Abducting a person and imposing a condition for freeing him or her shall be punished with a prison sentence of 6 to 10 years. If the abduction involves the circumstances described in article 163.3, the more severe sentence shall be imposed, and if it involves those described in article 163.2, the lower sentence shall be given;”

(c) Article 165 of the Criminal Code states: “The upper grade of the penalties provided for in the preceding articles shall be imposed in the corresponding cases if the unlawful detention or abduction has involved a simulation of public authority or functions, or if the victim is a minor or disabled or a public official in the exercise of his or her functions;”

(d) Should the aforementioned offences be committed by public personages, agents or officials, article 167 of the Criminal Code provides as follows: “Any public official who, in a manner other than that provided for in law, and where no criminal offence has taken place, commits one of the acts described in the preceding articles (those transcribed above), shall receive the upper grade of the penalties provided for in the respective articles and, in addition, shall be completely disqualified from holding office for 8 to 12 years.

58. The Criminal Code also defines offences committed by public officials against individual liberty, particularly article 530, which provides that “Any public official who, while showing good cause involving a criminal offence, agrees to, commits or prolongs any deprivation of liberty of a detained person, prisoner or sentenced person, contravening the duration of the sentence or other constitutional or legal safeguards, shall receive special disqualification from public office or employment for four to eight years.”

## **2. Harmonization of the Criminal Code with the Convention**

59. It is clear from the provisions listed above that enforced disappearance as described by article 2 of the Convention is defined in the Criminal Code as the criminal offence of unlawful detention/abduction with disappearance. Article 2 describes forced disappearance as the deprivation of liberty committed by State or quasi-governmental agents and the subsequent failure to acknowledge that deprivation or concealment of the person, in such a way that the latter does not benefit from the protection that the legal system provides to any person deprived of his or her liberty.

60. From the aforementioned provisions of the Criminal Code, it can be concluded that:

(a) Any form of deprivation of a person’s liberty by a private individual constitutes the criminal offence of unlawful detention (art. 163 of the Criminal Code) or of abduction if the deprivation of liberty involves imposing a condition for freeing the person (art. 164);

(b) If the person committing the unlawful detention or abduction fails to reveal the location of the person detained or abducted, this constitutes an aggravated offence and a more severe penalty is imposed than that provided for unlawful detention or abduction (art. 166 of the Criminal Code). It should be recalled that a reform currently under consideration would impose a more severe penalty for such offences. Thus, the Spanish Criminal Code penalizes conduct equivalent to enforced disappearance when it is committed by private individuals not connected to the State. This responds to the requirement contained in article 3 of the Convention;

(c) If the person committing unlawful detention or abduction is a public official—in other words, an agent of the State—and fails to reveal the location of the person detained, and fails to show that a criminal offence has been committed, that person shall receive the penalties provided for enforced disappearances committed by private individuals but with increased severity (always the upper grade of the penalty) and is also disqualified from public office or employment (art. 167 of the Criminal Code). This responds to the requirement contained in article 4 of the Convention, in relation to article 2;

(d) If the person committing the unlawful detention or abduction falsely claims to be a public official, the upper grade of the corresponding sentence is imposed (art. 165 of the Criminal Code). This also responds to the requirement contained in article 4 of the Convention, in relation to article 2;

(e) If a criminal offence has been committed, that is, where the deprivation of a person's liberty is initially legal, in contrast with the situation described in (c) above, and if the agent of the State contravenes any of the legal safeguards to which the person detained or imprisoned is entitled, that agent is punished with special disqualification (art. 530 of the Criminal Code);

(f) Lastly, as will be shown below, article 607 *bis* of the Criminal Code defines a criminal offence responding to article 5 of the Convention by considering certain instances of enforced disappearance as crimes against humanity.

## **Article 5**

### **Definition of the offence of enforced disappearance**

61. The current Spanish Criminal Code includes, in its article 607 *bis* and under the heading of “crimes against humanity”, the definition of those crimes as they are described in the Rome Statute of the International Criminal Court, dated 17 July 1998. The ratification of the Rome Statute in 2000 entailed modifications to the Spanish legal system, which were introduced by the Organic Law on Reform of the Criminal Code (Act No. 15/2003) of 25 November.

62. The concept of crimes against humanity arose in order to protect essential and very individual legal rights from massive or systematic attacks that may occur with the participation or tolerance of *de jure* or *de facto* political powers.

63. Article 607 (1) of the Criminal Code provides that:

“Crimes against humanity are acts described in the following paragraph which are part of a general or systematic attack upon the civilian population or part thereof. In all cases, such acts will be considered as crimes against humanity if they are committed:

1. Because the victims belong to a group or category which is persecuted for political, racial, national, ethnic, cultural or religious reasons or for reasons of gender or disability or other motives universally recognized as unacceptable under international law;

2. In the context of an institutionalized regime of systematic oppression and dominance of a racial group over one or more other racial groups, with the intention of maintaining that regime.”

64. This describes the situation or context in which conduct must occur in order to constitute a crime against humanity. The punishable acts must constitute participation in an attack which must be general or systematic and it must be understood as a pattern of conduct which involves multiple instances of the actions concerned in fulfilment of a policy

of a State or organization to commit those acts or promote that policy (supplementary document to the Statute, “Elements of Crimes”, art. 7. Introduction, para. 3). Nonetheless, such an attack does not require the existence of a war or armed conflict, since the current concept of crimes against humanity is independent of any situation of conflict.

65. Article 607 of the Criminal Code lists the concrete behaviour or modalities of crimes against humanity, including unlawful detention with disappearance or enforced disappearance; paragraph 2, items 6 and 7, provide as follows:

“Crimes against humanity shall be punished as follows:

[...]

6. With 12 to 15 years’ imprisonment when a person has been detained and the person detaining him or her has refused to acknowledge that deprivation of liberty or provide information on the fate or location of the person detained;

7. With 8 to 12 years’ imprisonment when a person has been detained and deprived of his or her liberty in a manner contrary to international rules on detention.

The lower sentence shall be imposed where the detention has lasted fewer than 15 days. [...]”

66. In light of the definition of criminal offences and the included reference to international rules, there is absolute correlation and harmonization between the domestic judicial order and international criminal law in this regard.

## **Article 6**

### **Criminal responsibility**

67. The conduct described in this article of the Convention, covered by article 17 of the Constitution and included in the definition of the offences of unlawful detention or abduction, is provided for in both ordinary criminal law (the Criminal Code) and military law (the Military Criminal Code).

68. As for the Criminal Code (Organic Act No. 10/1995, of 23 November), reference will be made firstly to chapter VI, offences against liberty. Section 1 of that chapter relates to unlawful detentions and abductions, notably the following articles:

Article 163. 1. Any private individual who detains or imprisons another, depriving him or her of liberty, shall receive a prison sentence of four to six years. 2. If the guilty person frees the detained or imprisoned person within the first three days of such detention without having achieved the goal he or she had chosen, the lesser sentence shall be imposed. 3. The prison sentence shall be five to eight years if the detention or imprisonment has lasted over 15 days. 4. Any private citizen who, in circumstances other than those permitted by law, detains a person and presents him or her immediately to the authorities, shall receive a three- to six-month fine.

Article 164. Abducting a person and imposing a condition for freeing him or her shall be punished with a prison sentence of 6 to 10 years. If the abduction involves the circumstances described in article 163.3, the higher sentence shall be imposed, and if it involves those described in article 163.2, the lower sentence shall be given.

Article 165. The upper half of the penalties provided for in the preceding articles shall be imposed in the corresponding cases if the unlawful detention or abduction has involved a simulation of public authority or functions, or if the victim is a minor or disabled or a public official in the exercise of his or her functions.

Article 166. Persons guilty of unlawful detention or abduction who fail to reveal the location of the person detained shall, depending on the case, receive penalties greater than those provided for in the previous articles of this section, unless the offender has freed the detained person.

Article 167. Any public official who, in circumstances other than those permitted by law, and in the absence of the commission of a criminal offence, commits one of the acts described in the preceding articles, shall receive the upper half of the penalties provided for in the corresponding articles and, in addition, shall be completely disqualified from holding office for 8 to 12 years.

Article 168. Provocation, conspiracy and incitement to commit the offences listed in this section shall be punished with a sentence one or two degrees below that provided for in the article corresponding to the offence concerned.

69. Part XXI, Offences against the Constitution, includes chapter V, section 1, relating to offences committed by public officials against individual freedom. Of particular note is article 530, which states that “Any public official who, in cases where a criminal offence has been committed, agrees to, commits or prolongs any deprivation of liberty of a detained person, prisoner or sentenced person, contravening the duration of the sentence or other constitutional or legal safeguards, shall receive special disqualification from public office or employment for four to eight years”.

70. It is also noteworthy that article 6.1 of the Criminal Code states that criminal responsibility extends to accomplices as well as the perpetrators of an offence.

71. Article 28 defines the perpetrators as “those who commit the act alone, jointly or through another person whom they use as an instrument. Also to be considered as perpetrators are (a) those who directly incite another person or persons to commit the act, and (b) those who cooperate in committing the offence by means of an act without which the offence would not have occurred”.

72. Thus, the Criminal Code provides a definition of the perpetrator in the strict sense, that is, the person who commits the unlawful act, and another, broader definition for persons also designated as perpetrators, thereby establishing a legal standard without which such persons would not be considered perpetrators.

73. Being a direct perpetrator entails, in the strict sense, the individual or collective realization of the unlawful act; in the case of an indirect perpetrator, it is realized through another person who is used as an instrument.

74. Being a perpetrator in the broad sense or from a legal viewpoint relates to both instigation and cooperation. The jurisprudence of the Supreme Court has set out requirements for incitement: (a) the influence of the instigator affects someone who had not been resolved to commit the offence; (b) the instigation is intense and sufficient to motivate the perpetration; (c) it targets a particular person and a determined offence; (d) the person who is the target carries out the offence; and (e) the instigator acts with the dual intent to bring about the decision to commit the crime and to ensure that the offence is actually committed (see Supreme Court decisions of 5 May 1988, 30 June 1993 and 27 April 2007).

75. The decisive factors in cooperation are its effectiveness, its necessity and its significance for the final result of the act (see Supreme Court decisions of 28 January 1991 and 16 June 1991). There is necessary cooperation — penalized in the same way as perpetration — where there is collaboration with the direct perpetrator, providing actions without which the offence would not have been committed; when cooperation is in the form of providing something which is difficult to obtain otherwise; or when the cooperator could prevent the offence being committed by withdrawing his or her support (see Supreme Court decision of 28 October 2004).

76. Article 29 of the Criminal Code refers to accomplices: “Accomplices are those who, while not covered by the previous article, cooperate in the execution of the act with previous or simultaneous actions.”

77. The jurisprudence has made it clear that it must be an incidental and non-determining participation having lower, secondary importance, to be distinguished from the co-perpetratorship because of its lack of functional control of the act and from necessary cooperation because of the secondary nature of the involvement (see Supreme Court decision of 13 December 2006).

78. Spanish law penalizes not only the actual offence but also the attempt to commit it (arts. 15 and 16 of the Criminal Code). Also penalized are conspiracy, solicitation and incitement to commit offences, where the law so provides (arts. 17 and 18 of the Criminal Code) and this express provision is applicable to the offences of unlawful detention/abduction; article 168 of the Criminal Code provides that “conspiracy, solicitation and incitement to commit the offences covered in this chapter (chapter I “on unlawful detention and abduction”, arts. 163 to 168) are punishable by a penalty one or two degrees lower than those provided for the offence in question”.

79. On the basis of this set of provisions, and of the related jurisprudence and doctrine, it can be concluded that the Criminal Code offers an excellent framework which is well adapted to the Convention in terms of establishing the criminal responsibility of those who take part in an enforced disappearance in the various ways described in the Convention. It provides for penalizing hierarchy, whose behaviour, depending on the case, may fall within the penal categories of perpetration by means of another, co-perpetration, or instigation of a crime. This is without prejudice to the application of secondary offences involved in the commission of the crime, failure to prevent or, where applicable, failure to prosecute the offences committed.

80. Lastly, article 11 of the Criminal Code contains a clause for cases where the offence is the result of a perpetrator’s neglect to perform a duty attributed to him or her (this may be a duty by law, by contract or due to an earlier dangerous act). In such cases, the result is attributed to the person guilty of failure to act as if he or she had caused it through action. Article 11 states: “Offences or misdemeanours which are the result of the perpetrator’s wilful neglect to perform a duty shall be deemed as such only when failure to perform a duty is equivalent, according to the text of the law, to its causation. To that effect, wilful neglect shall be deemed equal to action: (a) where there is a specific legal or contractual obligation to act, or (b) where the person guilty of the inaction has put at risk what is protected by law through previous action or wilful neglect.”

81. Article 6.2 states that the official or agent of the authority is always part of a hierarchical organizational structure and is therefore required to apply rules and obey orders and instructions that they receive for compliance with those rules and for carrying out their duties.

82. Nonetheless, those principles of hierarchy and obedience may not be invoked to justify committing a criminal offence. This is reflected in Spanish law both in general administrative rules, in those of administrative discipline and in criminal law.

83. This is made clear in the following provisions:

(a) The Public Administration and Common Administrative Procedures Act (No. 30/1992) of 26 November sets out the basis of the legal system, shared administrative procedures and the system of accountability of all Spanish public administrative entities, in accordance with article 103.1 of the Constitution: “The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, devolution and coordination, and in full



compliance with the law”. In regulating nullity, the Act provides that criminal acts by public administrative entities are essentially null. “Automatic nullity. 1. The following acts of public administrative entities shall automatically be null: (a) those which contravene the rights and freedoms protected by the Constitution; [...] (d) Those which constitute criminal offences or take place as a result of such offences. [...] 2. Also automatically null shall be administrative provisions which contravene the Constitution, the laws....” (Legal System of Public Administration and Common Administrative Procedures, art. 62);

(b) The Basic Status of Public Employees Act (No. 7/2007) of 2 April, which regulates the principles of conduct of all civilian public employees, provides that “...they shall obey the professional instructions and orders of their superiors unless they constitute a manifest offence against the law, in which case they shall bring them immediately to the attention of the appropriate inspection bodies” (art. 54.3);

(c) The Royal Decree on the ordinances of the armed forces (No. 96/2009) of 6 February provides that: “If orders entail the commission of acts which constitute criminal offences [...] the serviceman shall not be required to obey them. In any case he or she shall have full responsibility for his or her action or omission.” (art. 48);

(d) Defining the offence of disobedience, the Criminal Code provides that “1. Public servants or officials who openly refuse to comply duly with judicial decisions or decisions or orders from superiors issued within the scope of their respective areas of competence and complying with legal formalities shall be penalized with a fine of 3 to 12 months and special disqualification from public office or employment for six months to two years. 2. Notwithstanding the provisions of the previous paragraph, no criminal responsibility shall apply to public servants or officials for failing to comply with an order which constitutes a manifest, clear and categorical offence against a legal precept or any other general provision”. (Criminal Code, art. 410).”

84. It is therefore clear that in Spanish law, rules, orders or instructions which constitute an offence — here, an offence of unlawful detention, abduction or enforced disappearance — are essentially null, and public agents and officials are exempt from any kind of responsibility for failing to carry them out. Furthermore, compliance with such orders does not exempt them from responsibility for any offences they may have committed.

85. As for military law, part 2, article 77 of the Military Criminal Code (Organic Act 13/1985), relating to offences against the laws and customs of war, provides as follows: “A penalty of two to eight years’ imprisonment shall be imposed on any serviceman who [...] 6. Commits against civilian nationals of a country with which Spain is at war unlawful deportations or transfers, illicit detentions, hostage-taking, coercion to serve in enemy armed forces or deprivation of their right to be judged fairly and impartially.” Thus, Spanish legislation complies with article 6 of the Convention, including its paragraph 2 (No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance), since none of the aforementioned rules modifies or makes any exception to criminal responsibility as a result of compliance with any order or instruction from a superior.

86. In this regard, significant rules are contained in:

(a) Article 5 of the Organic Law on security forces and units (Act No. 2/1896) of 13 March: The basic principles for the activities of the members of security forces and units include compliance in their professional actions with the principles of hierarchy and subordination; however, in no case may the duty of obedience justify orders which involve acts which manifestly constitute criminal offences or are contrary to the Constitution or the law;

(b) Article 8 of the Organic Law on the disciplinary system of the National Police (Act No. 4/2010) of 20 March: Serious offences include [...] (b) Disobedience to superior officers or to those in charge of the service in response to legitimate orders or instructions given by them, unless they constitute manifest offences against the legal system;

(c) Article 7 of the Organic Law on the disciplinary system of the Civil Guard (Act No. 12/2007) of 22 October: Very serious offences include: [...] 15. Serious disobedience or indiscipline in response to the orders or instructions of a superior officer, unless they constitute manifest offences against the legal system.

## **Article 7 Penalties**

87. In relation to article 7.1 of the Convention, the system of penalties is included in the general section of the Criminal Code (book I, part III). Penalties are defined as the deprivation or restriction of legally protected rights that is imposed when a person has been found guilty in a trial before a criminal court.

88. In that system, penalties are classified, on the one hand, as deprivations of liberty, deprivations of rights or fines (Criminal Code, arts 32 and 33) and, on the other, according to their duration, as severe, less severe and light (art. 13). The penalties contained in the Criminal Code for unlawful detention/abduction with disappearance, or enforced disappearance, complies with the provisions of the Convention; as was seen regarding the definition of such offences in the comments on article 4 of the Convention, articles 165 and 167 of the Criminal Code provide for strengthened penalties in relation to those provided for unlawful detention or abduction, which are already very severe, when such offences satisfy the criteria bringing them under the category of enforced disappearance.

89. In the Spanish system, unlawful detention and abduction are serious crimes and, depending on the nature of the offence, are therefore punished by severe penalties ranging from four to eight and even 10 years' imprisonment (this is equivalent to the lower grade of the penalty for homicide, 10 to 15 years' imprisonment). When the location of the person detained unlawfully or abducted is not revealed, that penalty is increased and the upper range is imposed (art. 166 of the Criminal Code). Lastly, if the offences are committed by an agent of the State or someone impersonating such an agent, the upper range of the aforementioned penalty is always imposed and, in the former case, absolute disqualification (a ban from all public positions, honours and employment and from standing for election) for 8 to 12 years.

90. The Supreme Court has stated (decisions of 18 January 1999 and 25 September 2003) that unlawful detention and abduction, in direct connection with article 17 of the Constitution ("1. Every person has the right to freedom and security. No one may be deprived of his or her freedom except as provided for in this section and in the cases and manner determined by the law."), involve depriving the victim of an aspect of his or her right to liberty, such as the right to freedom of movement; thus, this right, an inalienable right, is impaired, as is his or her freedom of choice in terms of where he or she can go and what he or she can do with his or her physical person. This is the reason for the severity of the penalties attached to these offences.

91. In cases where the enforced disappearance can be classified as a crime against humanity pursuant to article 607 *bis* of the Criminal Code (see above comment on article 5 of the Convention), the aforementioned penalties are reinforced, with sentences one grade higher than those imposed when impairment of the right protected by law is a common

criminal offence. In concrete terms, the Criminal Code provides for prison sentences of 8 to 15 years.

92. As for article 7.2 of the Convention, mitigating and aggravating circumstances for these offences are generally provided for in articles 21 and 22 of the general section of the Criminal Code, which also enshrine the criteria to which the Convention refers. Mitigating circumstances include confession of the offence to the authorities and reparation (which, according to the doctrine of the Supreme Court, must be effective, objective and significant) of the harm caused to the victim or reduction of its impact (arts. 21.5 and 21.6 of the Criminal Code). Aggravating circumstances include taking advantage of the vulnerability of the victim in order to perpetrate the crime. This relates to groups such as children, the sick and disabled; the Supreme Court classifies such acts as malicious (Criminal Code, art. 22 1 a).

93. In the case of death of the disappeared person, the Supreme Court has established that the offence defined in article 166 of the current version of the Criminal Code is not that of suspicion or presumption of death (Supreme Court decision 25 June 1990), but rather that the sentence to be applied to perpetrators of illegal detention, who have been identified on the basis of evidence, corresponds to that of murder. in cases where the victim's remains are found subsequently. (Supreme Court decision of 22 July 2002).

94. Nonetheless, the Minister of Justice has reported that in the upcoming reform of the Criminal Code to be brought before Parliament, a simple penalty for the offence of unlawful detention with disappearance will be set at 10 to 15 years' imprisonment (see proposed Draft Organic Law modifying Organic Act No. 10/1995 of 23 November, relating to the Criminal Code of 16 June 2012). It also mentions two aggravating circumstances applicable in cases where the victim is a minor or where the offence is committed for sexual motives or the perpetrator subsequently commits such acts. The proposed reform also provides for the incorporation of a new aggravating circumstance, as follows: "Article 168 *bis*. Persons convicted of one or more of the offences covered in this chapter (referring to the chapter on "unlawful detentions and abductions") may in addition be sentenced to monitored probation."

## **Article 8 Imprescriptibility**

95. The first paragraph of article 8 of the Convention refers back to paragraph 5, which relates to crimes against humanity. In Spanish law, this should be interpreted in relation to the terms of article 131.4 of the Criminal Code, which states that for crimes against humanity there can be no prescription. When it constitutes a crime against humanity (art. 607 *bis*, paras. 6 and 7), enforced disappearance is therefore an offence to which prescription does not apply.

96. As for article 8, paragraph 1, of the Convention, other instances of unlawful detention/abduction with disappearance (enforced disappearance) are subject to the same universal rules of prescription set out in the general section of the Criminal Code (arts. 130.6, 131 and 132).

97. The prescription of criminal offences is the State's decision to waive the exercise of *ius puniendi* because in some manner the passage of time erases the social memory of the offence and tones down its impact. The period required for prescription must of course be proportionate to the seriousness of the offence, and the Criminal Code sets out prescription periods based on the maximum penalty required for each offence.

98. The comments on article 7 of the Convention draw attention to the severity of the penalties provided for in Spanish law for offences of unlawful detention/abduction and its aggravated form, enforced disappearance. It should be noted that, when the penalty called for is 10 to 15 years' imprisonment, the prescription period is 15 years; this fulfils the requirement for that period to be long and to be proportionate to the gravity of the offence.

99. In the case of continuing offences, the *dies a quo*, the date on which the prescription period begins, depends on the date of the final act of the offence, that is, when the offence being considered comes to an end. Prescription begins when the offence is completed, but the type of unlawful detention in which the victim does not reappear is a continuing offence. This is made clear in article 132.1 of the Criminal Code, which states: "The periods provided for in the previous article shall be calculated from the date on which the punishable offence was committed. In the case of a continuing offence or an offence which involves habitual action the periods shall be calculated, respectively, from the date of the final offence or the date on which the unlawful situation or conduct comes to an end."

100. "In the case of attempted murder, forced abortion, torture and offences against liberty, moral integrity, sexual freedom and integrity, privacy, the right to self-image and the inviolability of the home, if the victim is a minor, the periods shall be calculated from the date on which he or she reaches majority, and if he or she dies before reaching it, from the date of death." This has been established by a consistent Supreme Court doctrine (decisions of 30 September 2008 and 5 November 2008).

101. The concept of the continuing offence in Spanish law is equivalent to the term "continuous" defined in the Convention. The technical notion of continuing offence relates to a distinct concept, to the creation of a special sentencing rule for offences that have been committed because on the same occasion there was opportunity, limited by time and circumstances.

102. As for article 8, paragraph 2, as long as prescription has not taken place — the length of the period of prescription and the subordination of its initial date to the cessation of the unlawful detention/abduction are discussed above — criminal proceedings can be initiated without restriction, since the victim has the right to bring a private prosecution, without prejudice to the exercise of the appropriate public prosecution which, under the Constitution, belongs to the Public Prosecution Service.

## **Article 9 Jurisdiction**

103. The Spanish legal system establishes and regulates the scope and limits of the jurisdiction of its courts of law by means of the Organic Law on the Judicial Power (Act No. 6/1985) of 1 July. In particular, regarding criminal jurisdiction, the competence of the courts is affected by the legislation on criminal prosecutions promulgated by the Royal Decree of 14 September 1882, book I, title II, articles 8 et seq., which has been amended a number of times by as many as 43 laws of which 27 are Organic Laws. From these laws, particularly Organic Law 6/1985, the following provisions should be noted, since they define the jurisdiction of Spanish courts of law in the terms called for by the Convention.

104. One general provision is as follows: "The exercise of the jurisdictional power, the issuing and enforcement of judgements, is the sole preserve of the courts specified in laws and international treaties" (Organic Law 6/1985). It is also stated that "Spanish courts shall hear cases arising in Spanish territory between Spanish nationals, between foreign nationals and between Spanish and foreign nationals in relation to the provisions of this Law and of international treaties and agreements to which Spain is a party" (art. 21.1).

105. More specifically, article 23 of that Organic Law sets out the principles of jurisdiction of Spanish criminal courts, including the following:

“1. In the system of criminal law, Spanish courts shall have jurisdiction to try cases for offences committed in Spanish territory or aboard Spanish ships or aircraft, without prejudice to the provisions of international treaties and agreements to which Spain is a party.”

2. “They shall also have jurisdiction over acts defined in Spanish law as criminal offences even if they have been committed outside Spanish territory, provided that the accused persons are Spanish nationals or foreigners having acquired Spanish nationality after the date of the act and that the following requirements are met: (a) The act is punishable at the place of enforcement, unless, pursuant to an international treaty or a normative act of an international organization of which Spain is a member State, that requirement is unnecessary. (b) That the aggrieved person or the Public Prosecution Service lodges a complaint or brings an action before the Spanish courts. (c) That the offender has not been acquitted, pardoned or sentenced in a foreign country or, in the latter case, has not completed the sentence. If he or she has completed it in part, this shall be taken into account in order to make the corresponding reduction.

[...]

4. Spanish courts shall also have jurisdiction to hear cases involving acts committed by Spanish or foreign nationals outside Spanish territory which can be defined under Spanish law as one of the following offences: (a) Genocide and crimes against humanity; [...]; (h) Any other offence which, pursuant to international treaties and agreements, particularly those relating to international humanitarian and human rights law, is required to be tried in Spain. Without prejudice to the provisions of international treaties and agreements to which Spain is a party, for Spanish courts to try the aforementioned offences, it must be shown that the suspects are in Spain or that there are victims who are Spanish nationals. [...].

106. The attribution to Spanish courts of jurisdiction over enforced disappearances “when the disappeared person is one of its nationals and the State Party considers it appropriate” (art. 9.1 (c) of the Convention) should be considered in light of article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is pursuant to that article that jurisdiction has been attributed to Spanish courts under article 23.4 (h) of Organic Law No. 6/1995, which gives them jurisdiction over “any other [offence] which, according to international treaties and agreements, particularly those relating to international humanitarian and human rights law, is to be prosecuted in Spain”.

107. Pursuant to article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that same article recognizes the jurisdiction of Spanish courts in relation to torture suffered by Spanish nationals outside Spain and at the hands of foreign nationals. One such example is the case of torture suffered in Guatemala by Spanish citizens, in respect of which the Supreme Court decided on 25 February 2003 that jurisdiction was restricted to cases affecting Spanish nationals: “As for the torture, Spain and Guatemala are parties to the 1984 Convention, which embodies the passive personality principle under which the victim’s country of nationality can prosecute the case if it considers it appropriate. Complaints include the events at the Spanish Embassy, in which Spanish nationals died; the Government of Guatemala had recognized that those events constituted a violation of the Vienna Convention on Diplomatic Relations and had accepted the consequences which might arise from the case, there is also a complaint regarding the deaths of four Spanish priests, for which public officials or other persons exercising State functions have been blamed; this makes it possible to maintain the jurisdiction of the Spanish courts in respect of both cases.” Subsequently, Constitutional

Court judgement No. 237/2005 of 26 September not only confirmed that jurisdiction but also broadened it to other cases and offences alleged by the complainants.

108. This principle is also enshrined in Supreme Court decision 1092/2007 of 27 December, in which the Court considered that article 8.7 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted at New York on 15 November 2000, together with article 23.4 (h) of Organic Law 6/1995 “assigns jurisdiction, allowing for the adoption of measures in accordance with domestic law, including the preparation of the appropriate statements by the security forces, and fully justify the Spanish courts in hearing the present case”.

109. Article 23.4 (a) of Organic Law 6/1995 directly attributes the hearing of cases of crimes against humanity, including the offence of general or systematic disappearance under article 5 of the Convention (enforced or involuntary disappearances), and for other cases, paragraph (h) of the same instrument, attributing the hearing of “any other which, according to international treaties and agreements, in particular those relating to humanitarian and human rights law, is to be heard in Spain”, would include — according to the current jurisprudence — the common offence of enforced or involuntary disappearance of nationals taking place outside Spain, including at the hands of non-nationals.

110. Lastly, the previous paragraphs clearly demonstrate compliance with the provisions of the Convention. It should be noted in particular that Organic Law 6/1995 repeatedly calls for the jurisdiction of courts that hear criminal cases to be extended to cover the provisions of international humanitarian and human rights law.

## **Article 10 Detention**

111. It is clear from the comments on article 9 of the Convention that Spanish courts have jurisdiction in all cases where the offence of unlawful detention/abduction with disappearance, or enforced disappearance, has been committed in Spanish territory or aboard ships or aircraft registered in Spain. In such cases, and if the person suspected of the offence is known to be in Spanish territory, he or she will be detained by the security forces and brought before a judge so that, once criminal proceedings are under way on the basis of a formal complaint or charges, the judicial process can begin.

112. The same procedure is to be followed when the offence has been committed outside Spanish territory but the suspects are Spanish nationals and the other circumstances required under the aforementioned article 23.2 of Organic Law No. 6/1995 are present. In such cases — offences committed outside Spain — Spanish jurisdiction can extend to foreign nationals in the cases provided for in article 23.4 of the same Organic Law.

113. In cases where Spain does not have jurisdiction, the State will act on requests or complaints by other States or by internationally-recognized criminal-law bodies such as the International Criminal Court. The suspect may be detained in the framework of international legal cooperation, and subject to the provisions of the Passive Extradition Act (No. 4/1985) of 21 March, so that the suspect may be handed over, if appropriate, once the due proceedings have taken place in the Spanish courts the Criminal Chamber of the National High Court (*Audiencia Nacional*).

114. The detention of the suspect, both when the Spanish courts have jurisdiction and in case of an extradition request, and the possible adoption of interim measures such as remand in custody, shall invariably be subject to domestic law, with full protection of the right to legal defence provided for under the legislation on criminal prosecution

promulgated by the Royal Decree of 14 September 1882 (art. 118 et seq.) and in the Passive Extradition Act for offences of all types.

115. As mentioned in the comments on articles 2 and 3 of the Convention, offences of unlawful detention/abduction with disappearance, or enforced disappearance, are of a public nature. It is sufficient that news or knowledge of their perpetration should be received by any means to ensure that they are investigated and prosecuted; there is no need for the victims of the offence to appear in court or to file for a private prosecution (see comments on arts. 11 and 12).

116. To ensure that offences are investigated and prosecuted, the Criminal Code punishes any public official or person in authority who abandons his or her post in order to avoid preventing or prosecuting such acts (art. 407) or who fails to carry out his or her duties by not prosecuting of the offence or its perpetrators (art. 408).

117. Investigating judges, the Public Prosecution Service and the security forces of the State are required to investigate any act which may constitute a criminal offence. In concrete terms, the Public Prosecution Service, which is responsible for conducting criminal prosecutions on behalf of the State, is required to carry them out and is governed only by principles of legality and impartiality, never that of expediency, and without being subject to orders or instructions to the contrary, in accordance with the Organic Statute of the Public Prosecution Service Act (No. 50/1981) of 30 December, amended by Act No. 24/2007 of 9 October.

## **Article 11**

### **Criminal procedure**

118. The provisions of article 11, paragraph 1 of the Convention have been considered in comments on articles 9 and 10, above.

119. As for paragraphs 2 and 3, both the offence of unlawful detention/abduction with disappearance, or enforced disappearance, defined in article 167 of the Criminal Code, and the offence of forced disappearance/crime against humanity, penalized by article 607 *bis*, are serious offences. During their prosecution, the accused enjoy the same rights and safeguards as in a criminal prosecution for any other offence; all the principles and rules which inspire Spanish criminal procedure, strongly protective of individual freedoms, also apply here.

## **Article 12**

### **Reporting and investigation of offences**

120. The Spanish system of criminal procedure requires any person who is aware by any means that an offence has been committed to so inform the security forces of the State, the Public Prosecution Service or the law courts (legislation on criminal prosecution promulgated by the Royal Decree of 14 September 1882, art. 264). This civic duty to report crime is a legal obligation, and failure to comply is punishable by law in the case of any person who has witnessed the perpetration of a criminal offence or who, as a result of his or her office, profession or position, is aware that an offence has been committed (arts. 259 and 262).

121. The reporting of the offence, which may be made by any means, leads to immediate verification of the facts, unless the complaint is manifestly false or the act involved is not a criminal offence (arts. 265 and 269).

122. The reporting of an offence is the starting point for criminal proceedings, without prejudice to the right of any citizen to become a party to the proceedings by lodging a formal complaint by means of either a private prosecution or through third-party action (*acción popular*). That is without prejudice to the criminal proceedings brought by the State; these, as mentioned above, can be conducted *ex officio* by the Public Prosecution Service (arts. 270, 271 *et seq.* of the aforementioned legislation on criminal prosecution).

123. The Spanish system of criminal procedure ensures that reported offences are investigated thoroughly, regardless of any obstacles or pressures, by investigating judges who conduct the investigation and monitor its legality, without prejudice to the involvement of the Public Prosecution Service.

124. This system is applicable without exception to offences of unlawful detention/abduction where the victim does not come to light.

### **Article 13 Extradition**

125. Article 13.3 of the Constitution states that “Extradition shall be granted only in compliance with a treaty or with the law, on a reciprocal basis. No extradition can be granted for political crimes; but acts of terrorism shall not be regarded as such.”

126. Article 4.1 of the Passive Extradition Act states: “Extradition shall not be agreed in the following cases: 1. In cases of political offences, which shall not include acts of terrorism; crimes against humanity [...], or attempts on the life of a Head of State or a member of his or her family.”

127. Those texts do not define “political offences”. Article 1 of the Passive Extradition Act specifies that “the conditions, procedures and effects of passive extradition shall be governed by this Act, except those expressly provided for in treaties to which Spain is a party”.

128. Thus, internal legislation expressly states that the provisions of international treaties and agreements ratified by Spain take precedence. Since the Convention specifies that unlawful imprisonment/abduction with disappearance, or enforced disappearance, cannot be defined as a political offence, there are no doubts concerning the applicability and validity of that prohibition in domestic law.

129. The same argument and reasoning establish that each and every one of the aspects of this precept are transposed into domestic law, both through the incorporation which results from ratification and through the express reference to the Convention contained in the Passive Extradition Act.

130. Lastly, article 2 of the Passive Extradition Act states that “extradition may be granted for acts for which the laws of Spain and those of the requesting Party call for a sentence or security measure of no less than one year, or for more serious offences, or when the request relates to a prison sentence or security measure of no less than four months for offences also defined in Spanish law”. The penalties for those offences are therefore fully compliant with the requirements of article 13 of the Convention. As for the fact — already considered in this report — that under Spanish domestic law, enforced disappearance is dealt with under a number of offences which are not strictly termed “enforced disappearance”, this in no way implies that the Spanish authorities may refuse a request for extradition or legal assistance for such offences on the grounds that the offence is not covered in the laws of both countries. The practice of the Spanish courts in this area is very clear; it has been established repeatedly that the requirement that the offence should exist in



both systems does not require that the *nomen iuris* be identical; the act for which extradition is requested must also be defined as an offence in Spanish law.

#### **Article 14** **Mutual judicial assistance**

131. The system of international legal assistance is regulated in great detail by Organic Act No. 6/1995 (arts. 276 to 278), which relates to both active and passive international legal cooperation and makes that cooperation subject to the international treaties and agreements to which Spain is a party. The following applies to active cooperation: "Requests for international cooperation shall be submitted to the Supreme Court, the High Court of Justice or the Chamber of the Ministry of Justice, which will forward them to the competent authorities of the requested State, either through the diplomatic or consular channel or directly if provided for in treaties or agreements." (Organic Act No. 6/1995, art. 276).

132. Regarding passive cooperation, the law states that "Spanish courts shall provide to foreign judicial authorities such cooperation as they may request in the conduct of their functions, in accordance with international treaties and agreements to which Spain is a party or, failing this, on the basis of reciprocity as provided for in the following article." This ensures full compliance with the provisions of the Convention regarding cooperation.

#### **Article 15** **International cooperation**

133. When assistance is requested through the courts during criminal trials, what was said earlier in the comments on article 14 applies; requests for assistance will therefore be fully honoured by Spain in accordance with the Convention.

134. Furthermore, regarding cooperation between States parties to the Convention in relation to victims, Spain is currently awaiting the finalization of a proposed Directive of the European Union which was approved at first reading by the European Parliament, on 12 September 2012, and is awaiting approval by the Council. Article 26 of that document requires cooperation for the recognition and protection of victims. This Directive will replace Framework Decision 220/2001 JAI in that area. Pending the final text of the Directive, draft legislation on the status of victims is being prepared. This incorporates, on the one hand, the expanded concept of the victim and indirect victim, in accordance with article 24.1 of the Convention, and on the other hand, the enumeration of the victim's rights based on the characteristics of the offence, its seriousness and on prior assessment of his or her personal and family situation, as well as international cooperation in that area.

#### **Article 16** **Expulsion, refoulement, handover or extradition**

135. In the Spanish legal system and judicial practice, many safeguards have been established which are intended to ensure and do in fact ensure that the handover or return of a person requested from a State does not result in any infringement of that person's rights and fundamental freedoms, including the danger of being the victim of an offence caused by the direct or indirect actions of the State, as in the case of enforced disappearance.

136. Under the Passive Extradition Act, the handover of persons in the case of passive extradition is always optional for the Spanish State (art. 2); in extradition proceedings, the

person concerned has a guaranteed right to a hearing and to involvement of the courts and of the Public Prosecution Service (arts. 6, 11, 12 et seq.) because, in such proceedings, the liberty of persons is always at stake. The law provides for extradition to be denied in the case of political or ideological offences or crimes of opinion, in cases where the requesting State does not guarantee that the person concerned will not be subjected to inhuman or degrading penalties or treatment or punishments which infringe on his or her physical integrity, or if there are reasons to believe that his or her rights will be violated.

137. The European arrest warrant and the extradition procedures between member States of the European Union (Framework Decision 2002/584/JAI of the Council) entail mutual recognition of judicial decisions between EU member States without any involvement of the executive branch of government. In Spain, that Framework Decision was transposed into domestic law, superseding existing law for extradition within the EU, by the European Arrest Warrant Act (No. 3/2003) of 14 March.

138. The system is based on recognition of the creation by the EU of a shared space of freedom, security and justice in which the law safeguards, and the courts oversee, the effective protection of citizens' rights, including the right to freedom of movement. This is due to the fact that in all the EU member States, treaty law demands that there should be a uniform and strict level of recognition, protection and monitoring of fundamental rights and freedoms. The offences which can give rise to extradition under that Act include "abduction, unlawful detention and hostage-taking" (art. 9.1).

139. Spanish legislation on the treatment of foreign nationals is based on the Organic Law on the Rights and Freedoms of Foreign Nationals in Spain and their Social Integration (No. 4/2000) of 11 January, which has been amended several times (Organic Laws 8/2000, 14/2003, 2/2009 and 10/2011) and has been the subject of significant decisions by the Constitutional Court. This legislation provides for the deportation of foreign nationals to penalize serious or very serious offences or as a substitute for certain prison sentences.

140. These extradition measures can be restricted as a result of circumstances which may lead the authorities to grant asylum, sanctuary and protection. This may occur, for example, if the foreign national's fundamental rights and freedoms are endangered.

141. Spanish legislation on asylum and sanctuary is based on the Right of Asylum and Subsidiary Protection Act (No. 12/2009) of 30 October, which establishes a complete system to protect the fundamental rights of refugees, based on the framework established by the Convention relating to the Status of Refugees of 1951, the Protocol relating to the Status of Refugees (1967) and Directives 2003/86/EC, 2004/83/EC and 2005/85/EC. This legislation prevents the extradition of persons having refugee status (art. 3) or subsidiary protection (art. 4).

142. Lastly, any alleged risk of violation of the fundamental rights or freedoms of a person who, for any of the reasons mentioned above, is the object of a procedure which may result in his or her surrender or extradition to another State, is always examined by a court of law that can use procedural instruments and precautionary measures enabling it to issue an urgent decision on the reality or credibility of the allegation; if the court decides that the allegations are credible, the person's surrender is suspended. Articles 114 et seq. of the Administrative Judicial Proceedings Act (No. 29/1998) of 13 July provide for a summary, preferential and urgent procedure for the protection of the fundamental rights of the person in relation to administrative acts, developing article 53.2 of the Criminal Code (as described in paras 37–40 of this report).

## Article 17

### Detention and deprivation of liberty

143. Article 17 of the Convention begins by declaring that “No one shall be held in secret detention”, and goes on to impose on States parties a number of obligations in the area of deprivation of liberty, which are to be reflected in the corresponding legislation. It also requires the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, and lists the minimum information that they are required to contain. Comments on this article will therefore be divided into four sections: (a) on deprivation of liberty, (b) on registers, (c) on independent supervision mechanisms for places of detention, and (d) on the administrative unit responsible for inspecting places of deprivation of liberty.

#### 1. Deprivation of liberty

144. The Constitution considers personal liberty as one of the highest values of the Spanish legal system. Article 1.1 states that “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system”. Consequently, a normative framework has been established in the Constitution itself and in organic and ordinary laws in order to guarantee the personal liberty of citizens and regulate the safeguards to which deprivation of liberty is to be subjected.

145. Under article 17 of the Constitution, officers of the security forces can make arrests solely as a result of criminal offences or, where appropriate, for the identification of persons for reasons of public safety, either for crime prevention or the investigation of administrative offences, and always subject to all constitutional and legal safeguards, as provided for in the subsequent articles of the law described below.

146. Compliance with these constitutional rules involves the following five legal instruments, the purpose of which is to safeguard individual liberty and to prohibit and penalize arbitrary detention.

#### (a) The Criminal Prosecutions Act

147. Under the Criminal Prosecutions Act, which exhaustively controls summonses, detention and pre-trial remand (arts. 486 to 519), “no Spanish or foreign national may be detained other than in the cases and manners provided for by the law” (art. 489). It also regulates the situations in which a person may be held in custody pending trial, restricting them to cases where a person has committed an offence or escaped from prison and, generally, to cases where the authorities reasonably believe that the accused has committed or participated in an act which constitutes a criminal offence (art. 492). The person is to be detained by the judicial police or a judicial authority; in exceptional cases (*flagrante delicto*, escape from jail or failure to appear in court), the suspect may be detained by a private citizen (art. 490) provided that he or she is immediately handed over to the authorities.

148. The Criminal Prosecutions Act calls for the detainee to be told immediately, and in a way that he or she is able to understand, what he or she is accused of, the reasons for his or her detention and his or her rights (art. 520.2). Some of those rights clearly do not relate to this report (such as the right to remain silent, not to incriminate oneself and not to admit guilt), but those which are of interest here include those to which the Convention refers: the right to inform a family member, or other person if desired, of the fact that he or she has been detained and the place of his or her detention and, in the case of a foreign national, the right to contact his or her country’s consular office (art. 520.2.d) and the right to request the

assistance of a lawyer to assist him or her in all police and judicial formalities (art. 520.c); if he or she does not so request, a lawyer will be assigned to him or her.

149. All these rights make it impossible for any person to be detained secretly.

**(b) The law of *Habeas Corpus***

150. Regarding issues of unlawful detention, and in light of article 17.4 of the Constitution, Organic Act No. 6/1984 of 24 May, particularly articles 1, 3, 5, 6, 7 and 8, regulates the *habeas corpus* procedure.<sup>2</sup> It establishes a very summary proceeding (24 hours), which is rapid, informal, general and universal, whereby an investigating judge can make an executive decision as to whether or not unlawful, arbitrary, excessive or improper detention has occurred and, if so, to bring it to an immediate end. It also provides for the same judge to use the evidence brought forward in that procedure in order to begin criminal proceedings to prosecute and penalize those who have ordered the unlawful detention of, or held in custody, a person who has been deprived of his or her liberty. Any person who, while responsible for a detained person, has failed to immediately process that person's *habeas corpus* application can also be called to account.

151. The court may begin the procedure on its own initiative; a broad range of persons can be parties to *habeas corpus* proceedings, since they can be brought by detainees, their spouses or persons in equivalent relationships with them, their descendants, ascendants or siblings and, in respect of minors and persons with disabilities, their legal representatives or, indeed, by the Ombudsman and the Public Prosecution Service (art. 3).

152. Regarding the ability of the detainee himself to bring a *habeas corpus* claim, in order to ensure that the latter is not a mere legal formality but a real and effective right, it is provided in Instruction 12/2007 of the State Secretariat for Security of the Ministry of the Interior, under the heading of "the rights of detainees", as duties incumbent upon members of the security forces, that "the detainee shall also be informed of his or her constitutional right to make a *habeas corpus* claim if he or she believes that the detention is legally unjustified or that it is taking place in illegal circumstances. The application form annexed to this document shall be provided to the detainee" (see annex I, State Secretariat for Security Instruction No. 12/2007).

**(c) Laws on public safety and on the security forces**

153. The Organic Law on the Protection of Public Safety (No. 1/1992) of 21 February regulates the requirement for citizens to identify themselves to members of the security forces (art. 20), referring to the provisions of the Criminal Prosecutions Act in relation to any subsequent detention.

154. Article 5 of the Organic Law on the Security Forces (No. 2/1986) of 13 March provides that:

"The following shall be basic principles for the actions of members of the security forces in relation to the treatment of detainees:

[...]

(a) Members of the security forces shall duly identify themselves as such when making an arrest;

(b) They shall protect the lives and physical integrity of persons whom they have detained or who are in their custody, and shall respect personal honour and dignity;

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<sup>2</sup> See [www.boe.es/buscar/doc.php?id=BOE-A-1984-11620](http://www.boe.es/buscar/doc.php?id=BOE-A-1984-11620).

(c) When a person is detained, they shall observe and fulfil with due diligence the formalities, deadlines and requirements provided for by the legal system.”

155. These rules are complemented by instructions issued by the State Secretariat for Security of the Ministry of the Interior; for example, problems relating to the treatment of detainees and their stays on police premises are controlled by the State Secretariat’s Instruction No. 12/2007, on the Behaviour required of Members of the Security Forces to Guarantee the Rights of Detainees and Persons in Police Custody (see annex I).

**(d) Legislation on the rights and freedoms of foreign nationals in Spain and their social integration**

156. Organic Law No. 4/2000 of 11 January, and its enabling regulations approved by Royal Decree 557/2011 of 20 April, relate to situations where undocumented foreign nationals are detained for certain serious and very serious offences, always when that detention is authorized by an investigating judge. The law gives those held in special detention facilities for foreigners a series of rights which are the same as those of other detainees, as described above.

**(e) Criminal Code**

157. Lastly, as described above, the Criminal Code defines the offence of unlawful detention/abduction in its various forms, including enforced disappearance as defined in the Convention.

**2. Registers**

158. In addition, any incident taking place while a detainee is in police premises is recorded in the appropriate register of detainees, which is available to the judicial authorities at all times. The purpose of State Secretariat for Security Instruction No. 12/2009, which regulates the keeping of such registers, is to ensure exhaustive monitoring of the written records of the detainee’s arrival at police premises, the chain of custody and the person’s departure as a result of being freed or handed over to the judicial authorities. Those registers record all the information required under article 17.3 of the Convention (see annex II, State Secretariat for Security Instruction No. 12/2009).

159. The State Secretariat for Security has also devised specific registers for recording cases where persons are brought to police premises merely for identification, for detained minors and for minors or persons with disabilities who are at risk, as called for in the fourth section of the aforementioned Instruction No. 12/2009.

160. In accordance with those Instructions, there are official registers at all police facilities where persons can be detained. They are maintained with guaranteed authenticity, and they are used to record all the details of every detainee and of the circumstances of the detention, the authority which detained him or her, any medical assistance and medications provided, access to a lawyer, the authority or court to which the detainee is handed over, visits received, the date and time of release and any other relevant incident or difficulty. These registers are of course available to the courts and the Public Prosecution Service if they ask to see them or request information in the course of their duties.

161. Police facilities are also required to maintain an identification register, distinct from and compatible with the register described above, in which police are required to record all identifications made, including any difficulties, in compliance with article 20.3 of the Organic Law on the Protection of Public Safety. This register is also available to judges, the courts and the Public Prosecution Service.

162. Persons who are held in prison as a result of a judicial decision requiring a custodial sentence remain subject to the provisions of Organic Law No. 1/1979 of 26 September, the general law on imprisonment and its implementing regulations, approved by Royal Decree 190/1996, of 9 February.

(a) Article 15 of the General Organic Law on Imprisonment (Act No. 1/1979) of 26 September states that “1. The detention of a prisoner, before or after sentencing, at any penitentiary facility shall take place by order of the competent authority. 2. For each inmate, a file shall be created relating to his or her situation in relation to prosecution and sentencing, of which he or she shall have the right to be informed, and a personality assessment protocol shall also be conducted”;

(b) Articles 15 and 18 of Royal Decree 190/1996, of 9 February, approving the prison regulations.<sup>3</sup> Under these provisions, the prison administration is required to carry out the following formalities upon the arrival of each inmate:

(i) Personal identification: This procedure begins with verification of the prisoner’s identity, including the full name, fingerprints and photograph. This information is to be used in future whenever the inmate leaves the establishment for any reason, including his or her release. The name and fingerprints are recorded only on the inmate’s first arrival, since they cannot change, and will remain archived should he or she be released or transferred; thus, they can be used in future should the person return to prison;

(ii) Registration and creation of the file: the person’s name is immediately registered in the record of prisoner arrivals and the personal file is created, containing in chronological order all events relating to the person during his or her stay. The file is reopened at any subsequent imprisonment of the same person and remains archived at the last establishment where the person was held. The inmate has the right to be informed of the contents of his or her personal file at all times.

163. Inmates of centres for the detention of foreign nationals, who in all cases are held as a result of a judicial detention decision by an investigating judge and for a period not exceeding 60 days, are subject to the aforementioned legal provisions and to Organic Law No. 4/2000 and the regulations approved by Royal Decree 557/2011. Each inmate’s situation, including any incidents, is recorded both in the individual file which is created on the arrival of each foreign national at the detention centre and in the Central Register of Foreign Nationals of the Ministry of the Interior, referred to in article 213 of the aforementioned regulations.

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<sup>3</sup> For the text of this Decree see [www.boe.es/buscar/doc.php?id=BOE-A-1996-3307](http://www.boe.es/buscar/doc.php?id=BOE-A-1996-3307).

164. The custody, maintenance and keeping of the registers referred to above is guaranteed not only by disciplinary and administrative rules but also provided for in the criminal law. Those records have the status of documents in the sense of article 26 of the Criminal Code, which states: “Items referred to as documents for the purposes of this Code include all material records reflecting or incorporating information, events and narrative accounts having evidentiary status or any other type of legal significance”. Destruction of such documents, failure to preserve them and their falsification are all punishable by law: “Any State official or person in authority who knowingly removes, destroys, renders unusable or conceals, wholly or partially, documents which are in his or her official care shall incur a prison sentence of one to four years, a 7 to 24 month fine, and special disqualification from public office or employment for three to six years.” (Criminal Code, art. 413). Article 390 of the Criminal Code provides as follows:

“1. Any State official or person in authority who, in the course of his or her duties, commits one of the following fraudulent acts shall be subject to a prison sentence of three to six years, a 6 to 24-month fine, and special disqualification from public office or employment for two to six years:

1. Altering a document in respect of any of its essential characteristics or requirements;
2. Forging a document wholly or partly with intent to mislead as to its authenticity;
3. Alleging that persons who were not involved in an event were in fact involved, or attributing to those involved any declarations or statements other than those that they have in fact made;
4. Committing falsehood in the narration of events. [...]

### **3. Mechanisms for the independent inspection of places of detention**

165. In accordance with that same principle of transparency, all places of detention and custody are subject to supervision by the following mechanisms:

#### **(a) The Committee against Torture of the United Nations and the Committee for the Prevention of Torture of the Council of Europe**

166. The representatives of these Committees may at any time request to inspect facilities and their functioning. They have done so on a number of occasions, but at no time have they drawn attention to any case of disappearance of persons.

167. When a request is made, the Ministry of the Interior issues the credentials within 48 hours, enabling the inspectors to enter any place of detention or custody, while a liaison agent is appointed to assist the representatives of the Committee concerned in any way they may require.

168. When their work is completed, the inspectors request a meeting with the competent authorities and present their preliminary conclusions, without prejudice to their *ad hoc* report.

169. The most recent visit by representatives of the Committee for the Prevention of Torture of the Council of Europe to police facilities and detention centres was between 31 May and 13 June 2011.

**(b) National Mechanism for the Prevention of Torture**

170. Organic Law No. 3/1981 provides as follows:

“Single Final Provision. National Mechanism for the Prevention of Torture.

1. The Ombudsman shall exercise the functions of the National Mechanism for the Prevention of Torture in accordance with the Constitution, the present Law and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. An Advisory Committee is created as a technical and legal cooperation organ in the exercise of the proper functions of the National Mechanism. It shall be chaired by the Deputy to whom the Ombudsman delegates the functions provided for in this Law. The Regulations shall determine its structure, composition and functions.

171. Pursuant to those provisions, the Ombudsman adopts a preventive approach in the same sense as that pursued by the Subcommittee on Prevention of Torture of the United Nations. Accordingly, the Ombudsman conducts regular unannounced inspections of detention facilities, prepares and disseminates an annual report and formulates recommendations to the relevant authorities, makes proposals and observations on current legislation, maintains direct contacts with the Subcommittee and disseminates information and promotes awareness on issues relating to the activities of the National Mechanism for the Prevention of Torture.

172. Having made the appropriate inspections in 2010, the National Mechanism published its first annual report, which is available on its web page, in mid-2011.<sup>4</sup>

**(c) Prison facilities**

173. It should be noted that:

(a) Without prejudice to the implementation of the general regime of safeguards, the General Organic Law on Prisons attaches the following functions, inter alia, to the specific office of Prison Supervisory Judge:

- To safeguard the rights of inmates and rectify any abuses and deviations that may occur in the functioning of the prison regime;
- To approve any measure of solitary confinement exceeding 14 days;
- To resolve, on appeal, complaints relating to disciplinary measures submitted to it by inmates;
- To settle, as appropriate, requests or complaints from inmates in relation to the prison regime and treatment insofar as it affects their fundamental rights or their rights and benefits as prisoners; and
- To conduct such visits to facilities as are required by the legislation on criminal prosecution.

(b) In practice, the Prison Supervisory Judge, who is part of the judicial system and therefore separate from the prison administration, makes daily visits to prison establishments in order, inter alia, to interview inmates and attend to their complaints and requests.

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<sup>4</sup> See [http://mnp.defensordelpueblo.es/es/informes\\_anuales.html](http://mnp.defensordelpueblo.es/es/informes_anuales.html).



(c) Prison establishments are accessible places of coexistence where society shares, through the staff of various institutions and non-governmental organizations, the responsibility of rehabilitating and supporting inmates. Consequently, prisons are open to families, lawyers, religious bodies, associations and a variety of groups which are part of everyday prison life while they are of course also guarantors of its activities. Over 700 organizations are currently working with the prison administration, totalling 6,500 external staff.

#### 4. Administrative Prison Inspection Unit

174. Under the authority of the Ministry of the Interior, through the office of the Secretary-General of Prison Institutions, the Prison Inspection Unit has the status of a subdirector-general and is responsible for inspecting services, organizations and establishments, particularly in relation to personnel, procedures, installations and equipment, as well as the handling of restricted information and disciplinary actions brought against officials. In sum, Spanish law provides for a penal system which is strongly protective of individual freedoms, characterized by transparency, which precludes any possibility of the “secret detention” referred to in article 17 of the Convention.

### Article 18 Safeguards

175. In the comments on article 17, reference was made to the official registers in which prison staff are required to document or record the identification, arrest, custody, detention on official premises or entry to prison of any person, as well as all the circumstances and details of his or her deprivation of the freedom of movement.

176. These registers are available to the competent courts and judges and to the Public Prosecution Service. They can consult the registers in the course of their duties or on behalf of a person who is entitled to do so. A lawyer duly appointed by a person who may be in custody, in a detention centre or in prison can take a variety of actions to protect his or her client’s interests, including requesting or examining the aforementioned documentation.

177. Article 18.1 provides that each State Party shall guarantee to any person with a legitimate right to have access to certain information relating to the person deprived of liberty.

178. *Habeas corpus* proceedings (under the aforementioned Organic Act No. 6/1984, the purpose of which is to bring about the immediate release or continuing custody of a person detained illegally), were discussed under article 17. They can be brought by the detainee himself (Organic Act No. 6/1984, arts. 3 and 5) or on their own authority by courts of law or by the Ombudsman or the Public Prosecution Service. Nonetheless, the law permits a broad range of people to act for the detainee, including the spouse or a person in an equivalent relationship and his or her descendants, ascendants or siblings and legal representatives (art. 3).

179. If the competent court decides to initiate *habeas corpus* proceedings, it will be in this context that those persons and bodies can obtain whatever information the court considers relevant on the detainee and his or her stay on police premises.

180. Whenever a person is legally detained, his or her family members and close friends and his or her lawyer are fully informed of the circumstances of the detention pursuant to the legislation on criminal prosecution (art. 520).

181. Article 537 of the Criminal Code relates to the legal assistance to be provided to detained persons: “Any public official or person in authority who impedes or obstructs the

detained or convicted person's right to the assistance of a lawyer, induces or encourages him or her to renounce that right or fails to inform him or her immediately, and in a way that he or she is able to understand, of his or her rights and the reasons for the detention, shall be subject to a 4 to 10-month fine and special disqualification from public office or employment for two to four years."

182. Also of great significance in the prison system are articles 51 and 52 of Organic Act No. 1/1979 of 26 September, the general law on imprisonment:

"Article 51: 1. Inmates shall be permitted to communicate periodically, orally and in writing, in their own languages, with their family members and friends and with the accredited representatives of organizations that work with prisons, except in case of incommunicado detention. 2. Inmates' communications with defence lawyers, or with lawyers expressly qualified in relation with criminal cases and with their legal representatives, shall take place in appropriate spaces and may not be suspended or monitored except by order of the judicial authority and in cases of terrorism. 3. Inmates may also be permitted to communicate, in the same spaces, with professionals accredited within the framework of their specialized areas, with social workers and with the priests or ministers of their religion. 4. The communications referred to in this article may take place by telephone.

Article 52: 1. In case of the inmate's death, illness or serious accident, the director of the establishment shall inform the closest relative or the person designated by the inmate. 2. The inmate shall be informed of any death or serious illness of a close relative or person having a close relationship with him or her. 3. Inmates shall have the right immediately to inform their family members and their lawyers of the detention and, in case of transfer to a different establishment, to so inform them on arrival at that establishment."

183. Coercion and mistreatment of inmates are prohibited by the legal system, punishable in all instances and may even lead to prosecution of the guilty parties.

184. Article 18.2 of the Convention provides that "appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation or the search for information concerning a person deprived of liberty". Guarantees of security and integrity are provided by articles 1 to 3 of the Organic Law on the protection of witnesses and experts in criminal cases (No. 19/1994) of 23 December.

185. In the case of the victims of criminal organizations involved in trafficking in humans, should those victims cooperate with the judicial or police authorities they are offered opportunities to remain in the country or to be repatriated, in accordance with articles 59 and 59 *bis* of the Organic Law on the rights and freedoms of foreign nationals in Spain and their social integration (Act No. 4/2000) of 11 January.

186. In light of the above provisions, Spain can be said to be in compliance with the provisions of the Convention.

## **Article 19**

### **Protection of personal information**

187. The receipt, possession, computerized processing, use and trafficking of personal information, meaning any information concerning identified or identifiable physical persons, are subject under Spanish law to a sophisticated system of intervention and protection, based on the concept that such actions infringe the fundamental right to privacy.

188. The restrictions on the use of information and the prohibitions embodied in the Convention are reproduced in the regulation contained in the Organic Law on the Protection of Personal Information (No. 15/1999) of 13 December, enacted pursuant to article 18.4 of the Constitution, which states: “The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.”

189. The restrictions established by the Convention are also reflected in article 37 and related provisions of the Public Administration and Common Administrative Procedures Act (No. 30/1992) of 26 November, which regulates access to and use of information contained in Government archives and registers.

190. The explicit reference in the Convention to the specific protection of medical and genetic information and restrictions on its use is reflected in domestic law by the inclusion of such information, inter alia, in the category of “specially protected information”, which gives it an extra layer of protection in the legal system (arts. 7.3 and 8 and related provisions of Organic Act No. 15/1999 of 13 December).

191. Restrictions on the use and revelation of information do not apply to judges and courts with jurisdiction; this is reflected, inter alia, in article 11.2 (d) of that same Organic Law.

192. Also relevant in this respect are Directive 95/46/CE of the European Parliament and Council, dated 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (art. 7) and Organic Law No. 15/1999, as well as public health legislation. Article 7 of the Directive states: “Member States shall provide that personal data may be processed only if: [...] (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).”

193. In the case of genetic information, article 5.1 (g) of Organic Act No. 15/1999 defines as health-related personal information “information relating to an individual’s past, present and future mental and physical health” and adds that “in particular, genetic data and information relating to an individual’s degree of disability shall be considered as health-related information”. Thus, the transmission of such information to third parties is generally subject to the subject’s prior consent or must be covered by law, which in this case would not prevent transmission to the criminal court during prosecution, pursuant to article 19 of the Convention. For others, the general rule of the subject’s prior consent would apply, aside from a limited number of exceptions (art. 11.2 (a) and (c) to (f) of Organic Act No. 15/1999).

194. Organic Act No. 10/2007 of 8 October, which regulates the police database of DNA identifiers, provides as follows:

- The database may contain only DNA profiles revealing the subject’s identity and sex;
- Data use and transfer shall comply with the rules of application and specific regulations for files in which those data are recorded, in accordance with article 7.2. Should the process be used for identifying cadavers or investigations relating to missing persons, particularly children taken at birth from their parents who were told that they had died, data in the database to which this Law applies may be used only in the investigation for which they were obtained;

- Samples or traces taken for biological analysis shall be handed over to the duly accredited laboratories of the National Institute of Toxicology and Forensic Science (INTCF), and the judicial authorities shall decide on any subsequent conservation of such samples or traces;
- Information is to be stored in accordance with article 9.2, so that data on deceased persons are deleted as soon as the database manager learns of the death, except in the cases provided for in article 3.1 (b), which relate to the recording of identifying characteristics from procedures for the identification of tissue from corpses or investigations relating to missing persons, in which case the information is to be retained as long as necessary for the procedures to be completed.

195. In all cases, the deletion from the database of DNA data shall entail the deletion of the DNA profile and the destruction of the original biological sample.

196. The European Union is preparing a new General Data Protection Regulation. The fifty-eighth preambular paragraph of that document will introduce, on the initiative of the Ministry of Justice of Spain, the consideration of the public interest in any official pre-trial investigation of irregularities in the attribution of natural filiation and civil status, enabling the purpose and use of the data to be considered in light of the legitimate interests of the data subject, preserving the general requirement for prior consent for data sharing in such circumstances.

## **Article 20**

### **Right of access to information**

197. This article of the Convention permits exceptions to the right to information referred to in article 18, providing for the possibility of judicial recourse in order to gain access to information, which may in no case be suspended or restricted.

198. The intent is that the exceptional nature of the withholding of information on a person's detention is to be restricted to specific instances of serious crime, in the terms and subject to the safeguards set out in Article 520 *bis* of the Criminal Prosecutions Act:

“1. Any person detained as a suspect in any of the offences listed in article 384 *bis* (offences committed by persons belonging to or connected with armed groups, terrorists or subversives) shall be brought before a competent judge within 72 hours of his or her detention. The detention may, however, be extended for the time necessary for investigative purposes, up to a maximum period of an additional 48 hours, provided that this extension is requested in writing within 48 hours of the detention and authorized by the court within the following 24 hours. The authorization or denial of the extension shall be issued in the form of a reasoned decision.

2. When a person is detained for the reasons mentioned in the previous paragraph, a judge may be requested to order incommunicado detention. The judge is to issue this decision within 24 hours in the form of a reasoned decision. When such detention has been requested the detainee shall remain entirely incommunicado, without prejudice to the right to legal assistance and to the provisions of articles 520 and 527, until the court has issued the relevant decision.

3. During the detention, the judge may at any time request information and determine the situation of the detainee, either in person or by delegation to an investigating judge.”

199. Article 520 of the Criminal Prosecutions Act has already been mentioned in the comments relating to article 18 of the Convention. Article 527 of the Act provides that “During incommunicado detention, the detainee or prisoner may not enjoy the rights provided for in the present section, except for those described in article 520, with the following exceptions: (a) in all cases, he or she shall be provided with a court-appointed lawyer; (b) he or she shall not be entitled to the communication provided for in paragraph 2 (d); and (c) he or she shall not be entitled to an interview with his or her lawyer.

200. Should these provisions not be complied with, article 531 of the Criminal Code provides that: “Any public official who, using the commission of an offence as the reason, agrees to, commits or prolongs the incommunicado status of a detained person, prisoner or sentenced person, contravening the duration of the sentence or other constitutional or legal guarantees, shall receive special disqualification from public office or employment for two to six years”. The provision for incommunicado detention, unique in the Spanish legal system, relates to the activities of armed groups or terrorists; nonetheless, it is subject to permanent monitoring by the judicial authorities. It is understood that the restrictions on information provided for in this instance fall within the exceptional circumstances permitted under article 20 of the Convention.

201. Further evidence of compliance by Spain with article 20 of the Convention is the fact that, in the Spanish legal system, the argument of protection of personal privacy in order to restrict access to the data or information contained in the registers, files or personal dossiers (see comments on art. 17 of the Convention) which are required to contain all the circumstances and events affecting persons whose right to freedom of movement is affected by arrest, custody, formal identification, detention or prison custody, may in no case be invoked in relation to the authorities whose function is the preservation and protection of the fundamental rights and/or the investigation and prosecution of criminal offences.

202. Article 11 of Organic Act No. 15/1999 provides as follows:

“1. Information of a personal nature [...] may be shared only [...] with the prior consent of the person concerned;

2. The consent required in the previous paragraph shall not be required: [...] (d) If the communication to be made is addressed to the Ombudsman, to the Public Prosecution Service or to a judge or a court of law [...] in the course of their assigned duties [...]”.

203. If it is argued that access to such information should be restricted for reasons of security or possible prejudice to a criminal investigation, it is for the judge to decide whether that restriction is appropriate in light of the circumstances of the case; he or she may impose precautionary or protection measures such as *sub judice* status (arts. 301, 302 and related provisions of the Criminal Prosecutions Act).

204. Any refusal by a judicial or administrative body to provide information on a detention to persons entitled to receive it may be reversed by a judge:

(a) If the refusal occurs in the context of a criminal prosecution, the reversal of the decision will take place through the recourse provided for in the Criminal Prosecutions Act;

(b) If the refusal results from an act of the administrative authorities, it may be challenged under the Administrative Disputes Act (No. 29/1998) of 13 July and, where appropriate, through the special process provided for in that Act in relation to the protection of fundamental rights. If a refusal by the administrative authorities (persons in authority, State agents or officials or persons having ordered or carried out the arrest or holding the person concerned in custody) leads to a *habeas corpus* proceeding, the investigating judge

who initiated the process may summarily cancel it (Organic Act No. 6/1994, arts. 5, 7 and related provisions).

## **Article 21**

### **Release**

205. This article requires States to take all necessary measures to ensure that prisoners are released in conditions that make it possible to ensure that they have indeed been freed and to guarantee their physical integrity and the full enjoyment of their rights. The comments made on articles 17 and 18 of the Convention have described all the instruments available in the domestic legal system to give effect to the prohibition of all forms of secret detention. Those measures include the requirement of early judicial involvement — immediate in *habeas corpus* cases — and the documentation and obligatory recording of all events affecting the detainee in official and authentic registers, files and dossiers existing at all detention and custody facilities.

206. The aforementioned instruments also serve to provide certainty of the fact that a person who has been deprived of liberty has been released. The verification of effective release of prisoners in Spain, , in cases where in the past the person was detained illegally, is carried out directly by the judicial authorities as required under Organic Act No. 6/1984, which regulates the *habeas corpus* procedure mentioned above. When any inmate in a prison facility or person detained in such facilities by an official or person in authority, and who has subsequently been brought before a court, is freed, this takes place with the involvement of the judicial authority and the date, time and place are documented, both at the judicial facility and in the registers, files and dossiers at places of detention. That documentation and judicial involvement ensure that the reality and certainty of the person's release are guaranteed.

207. The same certainty is provided by the documentation in the aforementioned registers, files and dossiers at detention facilities, if the person is released immediately without being brought before a court.

208. Lastly, any person who feels that his or her physical integrity or rights are threatened may draw this to the attention of the security forces of the State and claim protection. Once the existence and reality of the threat have been analysed, the Ministry of the Interior adopts the appropriate security measures.

209. Regarding situations of legal detention, reference should also be made to the comments on article 17 of the Convention in relation to custody and release of the detainee from police facilities. Of particular significance in relation to prisons is Organic Act No. 1/1979 of 26 September, the general law on imprisonment, approved by Royal Decree No. 190/1996, of 9 February (art. 30).

210. In all cases, written confirmation exists of the effective release of the detainee or of his or her being handed over to a judge; thus, all the detainee's personal rights are safeguarded.

## **Article 22**

### **Prevention and punishment of illegal deprivation of liberty**

211. The Convention requires States to define enforced disappearance and unlawful detention/abduction with disappearance in law and prosecute all those involved in any way in such offences and to adopt certain preventive measures and penalties in respect of secondary actions related to such disappearances.

212. The following features of the domestic legal system are of note in that regard:

213. The *habeas corpus* procedure fulfils the requirements of article 17.2 (f) of the Convention. The authority and decisions of investigating judges in such cases are executory, and tend to be expeditious given the short deadlines involved (the cases must be resolved within 24 hours). The investigating judge may order the immediate removal of any obstacle which might prevent him or her from hearing the release request, may hear the detainee in person or in whatever place he or she is held in and also hear those who have ordered or carried out the arrest, and may take such evidence as he or she deems necessary to enable him or her to resolve and implement or order the implementation of the decision he or she takes.

214. Resistance to or refusal or obstruction of the investigating judge's decisions are criminal offences. As mentioned under article 17 of the Convention, this is without prejudice to the disciplinary penalties applicable to any obstructive official or person in authority. Article 5 of Organic Act No. 6/1984 provides as follows: "Any person in State authority, agent thereof or civil servant shall bring immediately to the attention of the competent judge any *habeas corpus* application formulated by a person deprived of liberty who is in his or her custody. If he or she should fail to carry out this duty, he or she shall be ordered to do so by the judge without prejudice to any criminal and disciplinary charges".

215. The comments made in this report on article 20.2 of the Convention include a description of possible recourses against any refusal by judicial or administrative authorities to provide the information contained in the registers, files and dossiers of centres of detention or custody.

216. Given this access to the forms of recourse available under the Criminal Prosecutions Act and Act No. 29/1998, these provide the instruments needed to deal with any delays that might occur.

217. Infringements of the duty of officials and persons in authority to correctly keep records in the appropriate administrative registers, files and dossiers of all events occurring during detentions or deprivations of the right to freedom of movement give rise to disciplinary penalties when the offences are of an administrative nature.

218. The same administrative and disciplinary responsibility arises when information contained in the aforementioned records should be provided but is in fact withheld.

## **Article 23**

### **Training of police, military and medical personnel and other public servants**

219. Article 23.1 of the Convention requires States Parties to "ensure that the training of law enforcement personnel, civil or military" and, in particular, of "persons who may be involved in the custody or treatment of any person deprived of liberty" includes the necessary education and information regarding the provisions of the Convention.

220. Within the Ministry of the Interior, considerable importance is attached to the continuing education, both general and specialized, of its officials. This is reflected in the existence of:

(a) Specific training centres for the Directorate-General of Police and the Directorate-General of the Civil Guard. These are the *División de Formación y Perfeccionamiento* (Training and Proficiency Division) for the National Police Force and the *Jefatura de Enseñanza* (Training Headquarters) for the Civil Guard, the functions of which are limited to police training;

(b) Specific training for officials in the *Secretaría General de Instituciones Penitenciarias* (Department of Prisons).

221. Members of the security forces of the State, upon entry to the National Police Force or the Civil Guard and through continuous training throughout their careers, receive specific training modules on criminal law and procedure. They are also trained in the legal requirements of police work, particularly on detention and on the treatment and custody of persons deprived of liberty. Priority is given to instruction in human rights and the use of force, ensuring that the training given to police officers is in compliance with criteria of integrity, dignity and effectiveness, preventing any abusive, arbitrary or discriminatory practices.

222. Taking as an example the *División de Formación y Perfeccionamiento* (Training and Proficiency Division) for the National Police Force, there are three training centres:

(a) Recruitment Training Centre. Here, general training is human rights based and takes into account the real needs of citizens' safety and security as expressed in their wishes and opinions relating to police work. Specific areas of training include ethics, professional standards and victimology. There are complementary areas of training which deal with the acquisition of attitudes and the internalization of values, freely and openly. In concrete terms, many hours and spaces are dedicated to reinforcing concepts such as respect and tolerance, with particular attention to the behaviour of police cadets; the aim is to detect and, where necessary, correct any racist, xenophobic, authoritarian, sexist or violent attitudes, which are incompatible with the model of police conduct;

(b) Updating and Specialization Centre: the pedagogical objectives of this centre in the field of human rights focus on:

- Full awareness of the need to respect human rights;
- Analysis of legal, operational and psychological concepts relating to human rights;
- Strengthening of police know-how to ensure that arrests are made in accordance with the laws relating to fundamental rights.

(c) Promotion Centre: This centre has three teaching departments which relate to human rights:

- Human Resources, focusing on issues of torture, discrimination, mistreatment, racism, xenophobia and the treatment of minors;
- Legal Department, for the study of international agreements;
- Police Investigation and Prevention, which deals with all matters relating to the victims of crime, how arrests should be made and how to act proportionately when bringing peaceful assemblies and protests to an end.

223. In sum, the Ministry of the Interior considers that the obstruction of human rights by a single police officer constitutes a failure for the entire police organization.

224. As for the specific training given to officials of the *Secretaría General de Instituciones Penitenciarias* (Department of Prisons), entry to the prison administration requires prior and thorough knowledge of subjects relating to the protection of human rights and of the criminal law, particularly offences that might be committed by officials in the course of their duties. Officials must also follow a period of practical instruction which also includes a human rights module. As for the *Cuerpo de Ayudantes* (Corps of Prison Guards), which makes up a majority of the Department's staff and has the most contact with inmates owing to its surveillance and custody functions, the following modules are taught: "General standards, guarantees and procedures for the protection of human rights",



“System of safeguards of the prison regulations”, “Peaceful conflict resolution” and “Sociological analysis of criminality”. During that period of practical instruction, lasting one year, a special instructor is appointed to monitor the new staff members and determine whether they have the abilities and attitudes required to carry out their duties.

225. Once prison officers have been recruited, the prison administration conducts a programme for their continuing education, with particular attention to human rights and values. This includes a course in personal defence and the correct use of restraint which is required by international law for workers in this sector; its objective is to teach appropriate ways to apply those forms of restraint permitted by law so that the ways in which restraint is applied are justified, balanced and proportionate and that it is always used as little as possible and as a last resort.

226. Nonetheless, given the recent ratification of the Convention, all these training modules can clearly be enriched by incorporating and strengthening the study of these new concepts. The State Secretariat for Security has undertaken to ensure that this takes place.

227. Lastly, under paragraphs 2 and 3 of article 23, persons referred to in paragraph 1 who refuse to obey an order authorizing or encouraging an enforced disappearance are not to be punished and that if they have reason to believe that an enforced disappearance has occurred or is planned, they are to report the matter to their superiors or the appropriate authorities. These paragraphs are considered as reiterations of the previous articles and it is therefore considered that a response has already been given.

228. As for compliance with this article in the area of competence of the Ministry of Defence, the Royal Ordinances for the Armed Forces are a veritable code of ethics applicable to all military personnel. Article 11 (dignity of the person) of the preliminary section requires their conduct to “conform to respect for the human person, to the common good and to international law on armed conflicts”, and section VI, article 112 (protection of particularly vulnerable population groups), calls for protection of “defenceless and vulnerable persons, particularly women and children, from rape, forced prostitution, humiliating and degrading treatment or any form of sexual assault or exploitation”.

229. The compulsory teaching of international humanitarian law, including the dissemination of the text of the Convention, is provided for under article 83 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), ratified by Spain, and is included in the teaching given to military personnel (training, continuing education and advanced studies in the national defence forces). This subject is included in all training courses and in much of the higher and advanced teaching conducted in the area of defence.

230. In addition to this regulatory training, many complementary and outreach activities are conducted, such as seminars, lectures, colloquiums and courses. Of particular note are those relating to international law and humanitarian law, held in collaboration with organizations such as the Red Cross or with state universities in areas related to the aforementioned subjects, and others in defence-related fields.

231. The Spanish armed forces include the Military Justice Corps, with officers covering the whole national territory, providing advice in the area of military law at all levels of command. In each contingent deployed outside the country, an officer of the Corps is appointed as the commanding officer’s legal adviser.

232. Spanish troops involved in operations abroad comply with and promote compliance with the resolutions of the Security Council of the United Nations which urge the parties to armed conflicts to guarantee people’s protection, welfare and rights.

233. All these matters are covered in the modules on international humanitarian law which are included in the instruction programmes provided to Spanish military units prior to their deployment in foreign operations.

234. In relation to article 23, paragraphs 2 and 3, any order which requires, induces or authorizes the commission of a criminal offence such as unlawful detention/abduction with disappearance (enforced disappearance) is illegal. To give such an order is in itself a criminal offence to be penalized depending on the level of involvement in its preparation, communication or implementation.

235. Spanish law provides for no higher level of sanctions than for acts defined as criminal offences (*delitos*) under the Criminal Code.

236. In addition to being defined as offences, such orders or instructions are essentially null and void. They therefore lack the legal status of an act or provision of the Administration and have no effect. This is expressly provided for by the Public Administration and Common Administrative Procedures Act, as has been described in the comments on article 6.2 of the Convention.

237. These same comments have also identified the means that the Spanish legal system provides to persons in authority, officials and agents to report to their superiors any act which may be a criminal offence, and the protection and exoneration from liability offered to them by the legal system so that they can avoid taking part in such acts despite the demands of the chain of command in their official positions.

238. All the above is also compatible with the duty of any official who, through his or her position, profession or duties, becomes aware of a criminal offence, to denounce it to a judge, the Public Prosecution Service or the security forces of the State, in accordance with article 262 and related provisions of the Criminal Prosecutions Act, as was seen in detail in the comments on article 10 of the Convention.

## **Article 24**

### **Rights and safeguards for victims**

239. Comments on article 24 of the Convention will be divided into six sections, as follows.

240. First, article 109 of the Criminal Code, at the beginning of that section of the Code which deals with the regulation of civil responsibility arising out of offences of different types (*delitos* and *faltas*) (arts. 109–122), states that “the commission of an act described in law as a *delito* or a *falta* (negligence) entails the obligation of reparation, in the terms provided for in the legislation, of the harm and damage caused by that act.” That reparation is due to the person affected or directly offended by the offence, in this case the person who has been illegally detained/abducted and disappeared.

241. The legal system also recognizes the right to compensation for other persons, who are included within the concept of victims. Article 113 of the Criminal Code states that “Compensation for material losses and moral harms shall include not only those caused directly to the victim by the act, but also those which may have resulted for family members or third parties”. Thus, Spanish law provides for a broad concept in terms of those harmed by the offence, covering all the legal categories contained in the Convention under the heading of “victims”.

242. Second, since enforced disappearance is a criminal offence and the victim has the right to bring criminal proceedings by means of a private prosecution and any citizen can exercise the right to bring a third-party indictment, it follows that any interested party may,

if he or she so desires, have immediate access to the information on events relating to the criminal investigation and of the subsequent trial by becoming an actor in the criminal prosecution or simply bringing a civil action arising out of the criminal offence.

243. The legal system (see the Aid and Assistance to the Victims of Violent Crime and Offences against Sexual Rights Act (No. 35/1995) of 11 December) also provides for the police to keep victims informed of the progress of an investigation provided that this does not prejudice its outcome, and for the clerk of the court to inform them of their right to compensation for the damage suffered and of the main milestones in the criminal proceedings, even if they have not become parties to the prosecution (art. 15.4).

244. Third, for the same reasons, the investigation of a criminal offence includes all the circumstances in which it takes place. In the case of an unlawful detention/abduction with disappearance, the first objective of the State apparatus is to put an end to the criminal act by bringing about the release of the person deprived of liberty and, should the victim have died, the second priority is to locate his or her mortal remains and return them to the family.

245. Fourth, as mentioned above, the system of *ex delicto* civil responsibility seeks to compensate the victim for the harm caused by a criminal offence. This principle is enshrined in the Criminal Code despite being an institution typical of civil law.

246. The scope of the right of compensation is described in the Criminal Code (art. 110), which states: “The responsibility established in the previous article [see above] includes: 1. Restitution. 2. Reparation of damage. 3. Compensation for material and moral harms. Thus, civil responsibility extends to all material damage and harmful effects caused by the criminal act, whether material or intangible or moral, so that the victim receives fair and complete satisfaction for the harm he or she has suffered.

247. The victim of an enforced disappearance can be covered by article 1 of the aforementioned Act No. 35/1995, which refers to “direct or indirect victims of intentional and violent offences [...] resulting in death, serious physical injuries or serious damage to mental or physical health”, who are entitled to access to the system of public assistance established under that Act.

248. Fifth, for cases where a disappeared person is not found despite having been sought by the apparatus of the State, the legal system has provided for mechanisms which ensure the continuity of his or her legal status and prevent any harm resulting from his or her absence: this is the legal system for the declaration of absence and declaration of death. The Civil Code provides that “in any case where a person has disappeared from his or her domicile and there has been no further contact (once year since the last contact, or three years if he or she has appointed a legal representative or a proxy), a court may, at the request of an interested party or of the public prosecutor, appoint a legal representative to look after the disappeared person’s interests in legal proceedings or business which cannot be delayed without serious harm. This may not apply if the person concerned has a legal representative or proxy” (Civil Code, art. 181, referring to art. 183). The declaration of absence becomes a declaration of death where longer periods of time have passed since the person’s disappearance: 10 years, or five years if the person is aged over 75 years, or one year in case of violent disappearance (arts. 193 et seq.).

249. Sixth, the fundamental freedom of association is recognized by article 22 of the Constitution, which states:

- “(1) The right of association is recognized;
- (2) Associations pursuing ends or using means prohibited by law are illegal;
- (3) Associations set up on the basis of this article must be registered for the sole purpose of public information;

(4) Associations may be dissolved or have their activities suspended only by virtue of a court order stating the reasons for it;

(5) Secret and paramilitary associations are prohibited.”

250. This principle has been developed by the Organic Law on the right of free association (Act No. 1/2002) of 22 March.

251. Thus, citizens are fully guaranteed, without any detraction or limitation, the right to create or participate in associations dedicated to the investigation of enforced disappearances and to assisting their victims.

252. Lastly, work is in hand on proposed draft legislation on the status of victims, to implement the Directive of the European Council and Parliament, approved on first reading by the Parliament in plenary session on 12 September 2012, which will replace Framework Decision 220/2001 JAI. The concept of the victim and of those who are to benefit from the rights set out incorporate the provisions and rights enshrined in article 24 of the Convention. Among particularly vulnerable victims, the draft legislation includes not only those affected by the ordinary offence of unlawful detention and abduction but also victims of crimes against humanity, as defined in article 5 of the Convention, and which are dealt with in article 607 *bis* of the Criminal Code.

## **Article 25**

### **Preventive measures and criminal penalties**

253. In relation to article 25.1, the response is in three subsections:

254. Throughout this report — particularly the comments on article 4 of the Convention — the Spanish authorities have described the criminal offences under Spanish law which incorporate the acts defined in the Convention as enforced disappearances, emphasizing that the offences concerned are those known as unlawful detention/abduction with disappearance recognized in book II, section VI of the Criminal Code under the heading “offences against liberty.”

255. It has also been made clear that, if the victim of the enforced disappearance is a minor, the Criminal Code calls for a more severe penalty: “The upper half of the penalties provided for in the preceding articles [which relate to unlawful detention and abduction] shall be imposed in the corresponding cases if [...] the victim is a minor [...]” (art. 165).

256. Without prejudice to the above, it has also been noted that the Ministry of Justice has prepared a draft organic law for the reform of the Criminal Code. This would increase the penalty for the offence of unlawful detention/abduction with disappearance under article 166 of the Criminal Code, imposing a prison sentence of 10 to 15 years, with a provision that the penalty is 15 to 20 years’ imprisonment if the victim is a minor.

257. Various Supreme Court decisions (788/2003, of 29 May; 492/2007, of 7 June; and 1036/2010, of 10 November) have defined the abduction of a minor as unlawful detention, stating that “[...] the victim may be of age or may be a minor. The fact that a minor cannot manage alone and needs assistance from another person does not mean that he or she is not entitled to the right to personal liberty, even if he or she needs a third party to give effect to that right. [...] The offence of unlawful detention of a minor is committed by taking him or her from the presence of the person who gives effect to the right to freedom of movement or by holding and detaining the latter person, preventing not only that person but also the minor from exercising their liberty” (Supreme Court decision 788/2003).

258. In its decision 492/2007 of 7 June the Supreme Court declared the offence of unlawful detention compatible with that of falsified registration of a birth, defined in article 220 of the Criminal Code.

259. The unlawful adoption of children is defined in the Criminal Code as follows:

“1. Any person who, for financial reward, delivers to another person a son or daughter, descendant or any minor even without a relationship of parentage or kinship, thereby avoiding the legal procedures of custody, fostering or adoption, in order to create a relationship analogous to parenthood, shall receive a prison sentence of one to five years and special disqualification from exercising parental authority, guardianship, curatorship or custody for a period of 4 to 10 years.

2. The same penalty shall apply to the person receiving the child and to the intermediary, even if the child has been delivered in a foreign country.

3. If the offence has been committed with the use of nurseries, schools or other establishments where children are cared for, the offenders shall be disqualified from the exercise of the related professions for a period of two to six years, and the establishments may be closed down temporarily or permanently. In the case of temporary closure, the period may not exceed five years (Criminal Code, art. 221).

260. Should the documents of a disappeared or abducted child be falsified, concealed or destroyed, this constitutes an offence of forgery of public or official documents, defined and penalized by articles 390 et seq. of the Criminal Code, as referred to under article 17 of the Convention.

261. In relation to article 25.2 of the Convention, since the “wrongful removal of children who are subjected to enforced disappearance”, in the various ways in which they are referred to in the Convention, is defined in the domestic legal system as an offence as has just been described, and given that these are public offences, such acts would in any case be investigated.

262. In this regard, without prejudice to the possibility of private or third-party prosecutions, the role of the Public Prosecution Service is of key importance. Subject to the legal framework — Act No. 50/1981 of 30 December — which guarantees its independence and impartiality, the Service acts on behalf of the State in the field of criminal law, opens investigative procedures to determine the facts and, subsequently, to bring cases to court where appropriate in the exercise of criminal justice.

263. In this regard, it should be noted that, following the large numbers of complaints of child abduction which occurred in Spain in the second half of the twentieth century, the authorities have adopted the following measures:

- Establishment of a National DNA Bank, answering to the Ministry of Justice and the National Institute of Toxicology and Forensic Science (INTCF), to facilitate the creation of databases to conduct cross-checking in order to help to identify the family connections of the persons concerned;
- Creation of a census of persons affected by the abduction of infants;
- Harmonization of criteria by the Office of the Attorney-General, issuing instructions to all attorney-generals’ offices on how to act in cases of child abduction;
- Collaboration of the Ministry of the Interior, through the Judicial Police, with the Ministry of Public Health;
- An information service has been set up to assist those affected by possible theft of newborn infants. This will give the suspected victims access to the documentation

and information available in the Administration relating to natural filiation, such as and public records and health files.

264. All this is obviously without prejudice to the continuity of judicial procedures already under way at the various Trial and Investigating Courts.

265. As for article 25.3, as was stated in the comments on articles 14 and 15 of the Convention, the domestic legal system ensures mutual assistance between judicial bodies and between States for the prosecution of offences of enforced disappearance and, consequently, in finding, identifying and locating missing children.

266. Regarding article 25.4 and 25.5, the entire Spanish legal system, whether in family or criminal law or any other branch of law, is based on the principle of protecting the best interests of minors, which takes precedence over all other interests. This means that minors have the right to be heard and that, depending on their levels of reasoning, their views should be taken into account in all respects in which the various organs of the State are involved in their lives.

267. If it is found that a criminal act has resulted in inappropriate custody or adoption, the victims or the Public Prosecution Service may review any legal condition ensuing from unlawful adoption or custody and which affect the person's legal status.

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