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**ПООЩРЕНИЕ И ЗАЩИТА ВСЕХ ПРАВ ЧЕЛОВЕКА, ГРАЖДАНСКИХ,  
ПОЛИТИЧЕСКИХ, ЭКОНОМИЧЕСКИХ, СОЦИАЛЬНЫХ И КУЛЬТУРНЫХ  
ПРАВ, ВКЛЮЧАЯ ПРАВО НА РАЗВИТИЕ**

**Доклад Специального докладчика по вопросу о поощрении и защите  
прав человека и основных свобод в условиях борьбы с терроризмом  
Мартина Шейнина**

**Добавление**

**МИССИЯ В ИСПАНИЮ\***

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## Резюме

По приглашению правительства Специальный докладчик по вопросу о поощрении и защите прав человека и основных свобод в условиях борьбы с терроризмом посетил Испанию 7-14 мая 2008 года. Он изучил ряд ключевых вопросов, с тем чтобы оценить то влияние, которое оказывают меры по борьбе с терроризмом на права человека. В ходе выполнения своей миссии он встречал всестороннее содействие со стороны правительства. Специальный докладчик приветствует усилия, прилагаемые правительством Испании на национальном и международном уровнях в целях поощрения прав человека в контексте борьбы с терроризмом и укрепления терпимости и солидарности как средств предотвращения условий, ведущих к терроризму.

В настоящем докладе Специальный докладчик анализирует положения о терроризме, содержащиеся в испанском законодательстве, и приходит к заключению, что некоторые юридические определения, касающиеся преступлений террористического характера, не обеспечивают более полное соблюдение принципа законности. Он подчеркивает позитивные аспекты, связанные с судебным разбирательством по делу обвиняемых в причастности к взрывам, совершенным 11 марта 2004 года членами международной террористической группировки, но вместе с тем выражает озабоченность в отношении досудебного этапа и права на пересмотр решений вышестоящим судом. Кроме того, Специальный докладчик подробно рассматривает практику содержания под стражей в режиме строгой изоляции. Отмечая создание превентивных механизмов для обеспечения гарантий прав задержанных лиц, он выражает озабоченность в связи с заявлениями о пытках и других видах жестокого обращения, которые поступают от подозреваемых в причастности к терроризму, содержащихся под стражей в режиме строгой изоляции. В заключение Специальный докладчик рекомендует определенные меры, которые надлежит принять для обеспечения того, чтобы меры по борьбе с терроризмом полностью соответствовали международным нормам в области прав человека.

**Annex**

**REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND  
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS  
WHILE COUNTERING TERRORISM, MARTIN SCHEININ, ON HIS  
MISSION TO SPAIN (7-14 May 2008)**

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## I. INTRODUCTION

1. Pursuant to his mandate, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visited Spain from 7 to 14 May 2008 at the invitation of the Government.
2. During his visit the Special Rapporteur visited Madrid and the Basque Autonomous Community. The Special Rapporteur met with the Minister of Foreign Affairs and the Minister of Justice and had meetings at a senior level with representatives of the Ministry of Foreign Affairs, Ministry of the Interior, Ministry of Justice, Ministry of Defence, the Presidency of the Government, and the Spanish Human Rights Ombudsman. He met members of parliament and members of the judiciary, including the President of the Supreme Court (who also serves as the President of the General Council of the Judiciary) and the President of the *Audiencia Nacional*. The Special Rapporteur visited the Soto del Real detention facility, where he was able to conduct confidential interviews with detainees suspected of terrorist crimes, and the *Audiencia Nacional* (the Spanish court with exclusive jurisdiction over terrorist crimes) where he observed ongoing judicial proceedings. In the Basque Autonomous Community, the Special Rapporteur visited San Sebastián-Donostia, Bilbao and Vitoria-Gasteiz, and met with the President of the Government of the Basque Autonomous Community, as well as the Counsellor of Justice, the Counsellor of the Interior, the Basque Human Rights Ombudsman, the Human Rights Director and the delegate of the central Government. He also visited the Basque parliament. Both in Madrid and in the Basque country he met with lawyers, academics, non-governmental organizations (NGOs) and representatives of victims of terrorism.
3. Since the end of the Franco dictatorship and the re-establishment of democracy in 1978, Spain has made remarkable efforts to reconstruct respect for human rights and the rule of law. Parallel to this development, Spain continues its struggle against the terrorist organization *Euskadi Ta Askatasuna* (ETA), whose proclaimed political goal is self-determination for what the organization considers to constitute the Basque country. Mindful of the experience of measures resorted to in the name of combating terrorism during the Franco regime, by the *Batallón Vasco-Español* (BVE) in the late 1970s, and by the *Grupos Antiterroristas de Liberación* (GAL) in the 1980s, which themselves can be classified as terrorism, the Special Rapporteur stresses that acts of terrorism, including those of ETA and other terrorist organizations, amount to the destruction of human rights.
4. Despite Spanish law enforcement and judicial operations that have to a considerable degree weakened the impact of ETA, as well as the decision by the Government in March 2006 to initiate a peace process with the organization, ETA is still considered a consistent threat to security, and has, since the rupture of the peace process in 2007, carried out a number of attacks, which at the time of the visit had taken the lives of six persons. A graphic illustration of the terrorist violence was a bomb attack carried out by ETA against the housing compound of policemen and their families in Legutiano, Álava, on 14 May 2008 during the visit of the Special Rapporteur, which killed a Civil Guard officer. In addition, and particularly since the tragic events of 11 March 2004, Spain has been struggling with the growing threat of international terrorism, partly constituted by repeated references to Spain by Al-Qaida leaders and partly through the development of radicalized Islamist terrorist cells operating both inside Spain and outside its borders, mainly in Morocco and Algeria.

5. Within the United Nations and elsewhere, Spain has an important role in the global fight against terrorism. The International Summit on Democracy, Terrorism and Security (the Madrid Summit) of 2005 and its contributions towards the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly in 2006,<sup>1</sup> as well as the initiative Alliance of Civilizations, represent important phases in that process. While stressing legality and the imperative of respecting human rights as key factors for efficiency in the action against terrorism, Spain has expressed its aim of promoting the implementation of the United Nations Global Counter-Terrorism Strategy at the international level. The Special Rapporteur identifies Spain's active role on the international level as a best practice and calls upon Spain to maintain that role, including through initiatives for further improvements of the United Nations terrorist listing and delisting procedures to bring them into line with human rights and due process.

## **II. LEGISLATIVE FRAMEWORK FOR COUNTER-TERRORISM MEASURES IN SPAIN**

### **A. Definition of terrorism**

6. While the existing international legal framework does not provide for a comprehensive definition of the concept of terrorism, the Special Rapporteur has expressed the view that the cumulative characterization of a terrorist crime, as elaborated by the Security Council in its resolution 1566 (2004), represents an effort to confine counter-terrorism measures to offences of a genuinely terrorist nature. In his view, any offence defined in domestic law as a terrorist crime should meet the following three conditions: (a) committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages; (b) committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) corresponding to all elements of a serious crime as defined by the law. Any law proscribing terrorism must adhere to the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights (the Covenant), be applicable to counter-terrorism alone and comply with the principle of non-discrimination.

7. The Spanish Penal Code establishes specific terrorist crimes in articles 571-579, but does not provide for a definition of the term "terrorism". Article 571, however, establishes the objective elements of terrorism, including a list of serious crimes committed by those who belong to, act for the sake of, or collaborate with terrorist organizations, and whose aim lies in subverting constitutional order or seriously altering the public peace. In the view of the Special Rapporteur this article reflects a proper understanding of the concept of terrorism and complies with the requirements of precision and certainty of the law, as inherent in the principle of legality.

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<sup>1</sup> General Assembly resolution 60/288.

## B. Definitions of terrorism-related crimes

8. Crimes associated with terrorist violence and the penalties for such crimes are prescribed in articles 572-579 of the Penal Code. The Special Rapporteur has several misgivings about these provisions that in his view do not fully respect the requirement of legality as enshrined in article 15 of the Covenant.<sup>2</sup> This is the case with article 574, which punishes “any other crime” committed with the aims of subverting constitutional order or altering public peace. Due to the lack of precision in the wording of this provision it runs the risk of being applied to crimes that do not comprise or have sufficient relation to the intentional element of causing deadly or otherwise serious bodily injury.

9. Article 576 enumerates a number of acts exemplifying the crime of collaboration with terrorist organizations and includes “in general any other equivalent form of cooperation, assistance or complicity, economic or otherwise”. In a recent case, leading to sentence No. 73 by the *Audiencia Nacional*, a number of organizations and media enterprises were declared illegal due to their relationship with ETA, while 47 persons connected to these associations were convicted as members or leaders of ETA or as collaborators with it. In its judgement, the Court characterized collaboration as conduct that typically implies participation in the activities of a terrorist organization, while being a residual type of crime applicable to actions that do not in themselves constitute a punishable act of significance, and that, through simple activity or abstract danger create an offence, the result of which is not specified by the legislator.<sup>3</sup> This reasoning does not unfortunately add precision to the already vague provision on collaboration. In light of criticism by his interlocutors against an ongoing trend of broadening the scope of the practical application of the provisions on terrorist crimes by the *Audiencia Nacional*, the Special Rapporteur is concerned that the vaguely defined crime of collaboration runs the risk of being extended to include behaviour that does not relate to any kind of violent activity. If conduct is criminalized as support to terrorism, it must be clear which elements of such conduct make it a terrorist crime.

10. “Urban terrorism” is criminalized in article 577 of the Penal Code, which comprises offences committed by persons acting with the aims of subverting the constitutional order or seriously altering public peace without belonging to a terrorist organization, or by anyone who contributes to those aims “by threatening the inhabitants of any location or the members of any social, political or professional collective”.<sup>4</sup> Consequently, acts such as the burning of an ATM machine are interpreted as terrorist offences, when committed as part of organized street violence, known as *kale borroka* in the Basque language. *Kale borroka* is practised in Basque cities by gangs of youths that, according to the Spanish authorities, are outside the formal

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<sup>2</sup> See also the concluding observations of the Human Rights Committee 2008 (CCPR/C/ESP/CO/5), para. 10.

<sup>3</sup> *Audiencia Nacional*, Central Court No. 5, sentence No. 73, 19 December 2007, p. 632.

<sup>4</sup> Organic Law 7/2000 of 22 December 2000.

membership of ETA but nonetheless support it.<sup>5</sup> Crimes within the scope of article 577 even when committed by minors, fall under the jurisdiction of the *Audiencia Nacional* and may result in prison sentences of several years, while the same acts committed outside the Basque country would in practice be treated differently and lead to a considerably lower punishment, if any. Having been told that many young persons participating in *kale borroka* are not in any way supporting acts by ETA, and that this violence is directed against physical objects, not individuals, the Special Rapporteur is concerned that making a general link between *kale borroka* and terrorism might have counterproductive effects on the fight against terrorism. Aggravated prison sentences of up to 10 years, including for minors, might result in an escalation of violence and in pushing some individuals into the ranks of ETA.

11. Glorification and justification of terrorist acts or of those involved in carrying them out is penalized in article 578. Despite assurances from the judicial authorities that this provision must be narrowly interpreted and requires acts of a concrete, non-symbolic and public character, the Special Rapporteur takes the view that the vague term of “glorification” must not be used to restrict expression, and that any criminalization relating to the incitement to terrorism should include the requirements of an intent to incite the commission of a terrorist offence, as well as the existence of an actual risk that such an offence will be committed as a consequence.

### C. Freedom of expression, association and the right to political participation

12. Security Council resolution 1373 (2001) requires States to adopt measures to criminalize preparatory acts of terrorism, and in particular mentions “entities involved in terrorist acts”. While recognizing the importance of the preventive dimension of the fight against terrorism and the necessary restrictions this might impose upon certain rights, including the closely interconnected rights of freedom of expression and freedom of association established in articles 19 and 22 of the Covenant, the Special Rapporteur reiterates his view that counter-terrorism measures should not be used to limit the rights of NGOs, the media or political parties. Any measures affecting the exercise of rights fundamental for a democratic society must be applied in accordance with precise criteria established by law, as well as in compliance with the principles of proportionality and necessity.<sup>6</sup>

13. The Spanish Penal Code, in articles 515-516, criminalizes terrorist organizations and membership in such organizations, but does not provide for a definition of the term “terrorist organization”. According to the above-mentioned sentence No. 73, a terrorist organization, apart from the direct use of violent means and a certain degree of permanency of its structure and activities, may consist of a group of unarmed persons working together in order to carry out activities that are coordinated with the violent means of a terrorist organization, and which have the ultimate goal of committing crimes that do not need to be isolated or specified in time and space.<sup>7</sup> The Special Rapporteur notes the complex nature of the situation in Spain, where ETA,

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<sup>5</sup> Rogelio Alonso and Fernando Reinares, “Terrorism, human rights and law enforcement in Spain”, *Terrorism and Political Violence*, vol. 17, Nos. 1 and 2, 2005, p. 265.

<sup>6</sup> See CCPR/C/ESP/CO/5, para. 19.

<sup>7</sup> See CCPR/C/ESP/CO/5, para. 10.



in addition to its military branch, may be able to direct and utilize a number of unarmed associations. He has, however, misgivings about the defining elements of the concept of terrorist organization developed in this case, as they do not seem to provide sufficient precision and may be applied to cover activities that fall outside the scope of crimes of a genuinely terrorist nature. In this respect he recalls that any restriction on fundamental human rights must be lawful, proportionate and efficient in relation to the goal of countering terrorism. This is of particular importance in a context where the activities of several associations, including media enterprises, political groups and grass-roots organizations, have been subject to court proceedings because of alleged links to terrorism.

14. Political parties that act according to a policy not compatible with democracy, such as supporting political violence and the activities of terrorist groups, may under Organic Law 6/2002 on Political Parties be dissolved through non-criminal proceedings. Following the judicial decision in March 2003 to declare illegal, inter alia, the Basque party Batasuna for violation of several articles of the law and for serving as a political complement to ETA,<sup>8</sup> several candidates and electoral groups have been rejected because of their links to this party. More recently, the Basque parties Acción Nacionalista Vasca and Partido Comunista de las Tierras Vascas were declared illegal on the same grounds. The Special Rapporteur is troubled that the broadly formulated provisions of the Law on Political Parties, such as, inter alia, article 9 (2) (c) prohibiting “supplementing and politically supporting the work of terrorist organizations in order to secure their objectives of subverting constitutional order or seriously altering public peace by trying to subject the authorities, specific people or groups within society or the population in general to a climate of terror” might be interpreted to include any political party which through peaceful political means seeks similar political objectives as those pursued by terrorist groups. In this respect, he reiterates that all limitations on the right to political participation must meet strict criteria in order to be compatible with international standards.

#### **D. Incommunicado detention regime**

15. According to the Spanish Law of Criminal Procedure, any individual suspected of membership in an armed band or terrorist group may by judicial authorization be held incommunicado on request by the arresting agency. When authorized by a judge, terrorism suspects may be held incommunicado for up to five days in police custody, possibly followed by another eight days in pretrial detention. The essence of incommunicado detention lies in denying legal assistance of free choice and any contact with third parties during the application of the regime. Despite certain legal safeguards, such as the assistance of an officially appointed lawyer, provided for in Spanish law, the Special Rapporteur is of the view that the continued existence of this regime is on its own highly problematic and both provides a possibility for the commission of prohibited treatment against the detainee and makes it difficult for Spain to defend itself against allegations of such treatment. These aspects are dealt with in detail in chapter III below.

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<sup>8</sup> Supreme Court, Special Chamber on article 61, cumulative proceedings 6/2002 and 7/2002, judgement of 27 March 2003.

### **E. Jurisdiction of the *Audiencia Nacional***

16. All terrorist crimes in Spain are dealt with by the Madrid-seated specialized court, *Audiencia Nacional*, which has jurisdiction throughout Spanish territory and also in certain matters not related to terrorism. Since the amendment of Organic Law 5/2000 of 12 January 2000, terrorist crimes established in articles 571-580 of the Penal Code when committed by minors fall under the jurisdiction of the Minors' Court within the *Audiencia Nacional*.<sup>9</sup> The Special Rapporteur is aware of a judgement by the European Court of Human Rights in 1988, which characterized the *Audiencia Nacional* as an ordinary court,<sup>10</sup> but considers it, however, problematic that a single central specialized court has exclusive competence in applying and interpreting terrorist crimes, the scope of which has become problematically broad, as exemplified by *kale borroka*.

17. As a consequence of the exclusive jurisdiction of the *Audiencia Nacional* as the court of first instance, terrorism cases might only be subjected to cassation review, which is limited to matters of law and procedural rules, by the Second Chamber of the Supreme Court. Furthermore, when a person who is acquitted by the *Audiencia Nacional* is subsequently convicted by the Supreme Court as the court of first instance the remedy of *amparo*, concerning protection of constitutional rights, may be obtained before the Constitutional Court. The remedy in such cases is limited to formal and legal aspects of the sentence, and does not permit a full review of the conviction and sentence. The Human Rights Committee in several cases against Spain has ruled that these procedures may not be considered an appropriate remedy within the meaning of article 14 (5) of the Covenant on the right of all persons convicted of a crime to have their conviction and sentence reviewed by a higher court.<sup>11</sup> Despite ongoing legislative reforms in order to reach compliance with article 14 (5) of the Covenant, the Special Rapporteur notes that sentence No. 73 is currently subject to the limited cassation review and he intends to follow the outcome of those proceedings in order to study how the Supreme Court will succeed in securing compliance with article 14 (5).

### **F. Spheres of competencies of the various police forces**

18. Counter-terrorism operations in Spain are carried out by the Civil Guard and the National Police, which nowadays act under a single command directed and coordinated by the Secretary of State for Security. These law enforcement agencies closely cooperate with the French police in the field of terrorism, and in particular concerning ETA. The police force of the Basque country, Ertzaintza, also engages in counter-terrorism mainly focusing on ETA and *kale borroka*. Since the Madrid bombings in March 2004 Spain has focused on increasing police information

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<sup>9</sup> Organic Law 7/2000 of 22 December 2000.

<sup>10</sup> European Court of Human Rights, No. 10588/1983, judgement of 6 December 1988, para. 53.

<sup>11</sup> See for example *Jacques Hachuel Moreno v. Spain*, communication No. 1381/2005, 25 July 2007. See also CCPR/C/ESP/CO/5, para. 17.

and intelligence capacities, and strengthening coordination among State security agencies, mainly through the National Counter-Terrorism Centre, as well as establishing special plans for prevention and protection.<sup>12</sup>

## **G. Penitentiary system**

### **1. Full and effective serving of sentences**

19. Organic Law 7/2003 of 30 June 2003 was introduced with the purpose of strengthening the full and effective serving of sentences for persons convicted of terrorist crimes. According to article 76 (1) (d) of the law the maximum time in prison shall be 40 years for persons convicted of more than two terrorist crimes, of which at least one is penalized with a prison sentence exceeding 20 years. The general maximum time to be served in prison for prison sentences is 20 years. Furthermore, article 90 establishes that the enjoyment of penitentiary benefits for those convicted of terrorism shall be calculated on the basis of the total number of years imposed by the sentence, thereby making the enjoyment of parole unrealistic for any person convicted of multiple crimes of terrorism amounting to a total prison sentence of up to hundreds of years. By application of the so-called Parot doctrine, established through Supreme Court judgement 197/2006, the granting of parole might be calculated on the total number of years also in relation to terrorism sentences issued before the 2003 amendment and to those who were already granted parole based on the 30 years' maximum time in prison previously applied. The Special Rapporteur was informed of 27 cases where this doctrine has been applied.

### **2. Dispersal of prisoners**

20. Spanish authorities apply a system of dispersal of persons convicted of or charged with terrorist crimes. The policy is justified by the need to remove those ETA prisoners who are willing to abandon terrorist activities from the control of the organization and thereby assist in their resocialization. As a consequence approximately 570 ETA prisoners are dispersed over more than 50 prisons at an average distance of 600 km from the Basque country; a fact that in itself constitutes a risk and an economic burden for visits by family members, as well as a practical obstacle for the preparation of the defence in cases where pretrial inmates are incarcerated long distances away from their lawyers. The system is also applied to persons charged with or convicted of international terrorism. The Special Rapporteur is of the view that the Spanish penitentiary policy on terrorism suspects and convicts, including the law on full serving of sentences and its retroactive application through the Parot doctrine as well as the proposal for a legal reform establishing so-called post-penal surveillance measures to be applied on released ETA prisoners, may result in situations incompatible with the aims of reformation and social rehabilitation of the penitentiary system, as established in article 10 (3) of the Covenant.

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<sup>12</sup> Fernando Reinares, "Do Government and citizens agree on how to combat international terrorism?", *Análisis del Real Instituto, Real Instituto Elcano*.

### **III. INVESTIGATION AND TRIAL OF THOSE ACCUSED OF THE 11 MARCH TERRORIST ATTACKS AND RELATED MATTERS**

21. The Special Rapporteur's mission required specific attention to the tragic terrorist attacks at the Atocha train station in Madrid on 11 March 2004, which caused the death of 192 people and injured more than 1,800. At the European and even global level, the attack was one of the major acts of international terrorism since September 2001 and has deeply affected Spanish society. The Special Rapporteur notes the efforts Spanish authorities have made in order to bring to trial and prosecute in a transparent manner those accused. While the Special Rapporteur was able to identify elements of best practice in the conduct of the trial for the Madrid bombings, he nevertheless has misgivings concerning some earlier stages in the process leading to the trial.

#### **A. Widespread arrests and use of incommunicado detention**

22. In the aftermath of the bombings, approximately 120 people were arrested for involvement in the attacks and consequently subjected to incommunicado detention. The Special Rapporteur is concerned about allegations of continuous interrogations without the presence of a lawyer, combined with threats related to the origin of the detainees, deprivation of sleep and in some cases the use of physical force. According to these allegations, some detainees hesitated to report their situation to the forensic physician visiting them, as they were not always able to distinguish between a physician sent by the authorities and plainclothes interrogators. Considering that a large part of those arrested were later released due to lack of evidence and were not even called to testify, the Special Rapporteur is worried that, in some cases, the incommunicado regime might have been used for the purpose of obtaining information that could further the investigations rather than merely in respect of actual terrorism suspects. The Special Rapporteur stresses that not only does international law guarantee the right not to be compelled to testify against oneself or to confess guilt, as established in article 14 (3) (g) of the Covenant, but prohibits any use in court of evidence that has been extracted through coercive physical or psychological methods in violation of article 7 of the Covenant.

23. Furthermore, the Special Rapporteur received information that most allegations of physical and psychological ill-treatment declared before the investigating judge at the end of police custody, even when repeated in court during trial, were ignored. In this respect it is troubling that, according to reports, the single complaint of ill-treatment during incommunicado detention that has led to an investigation was the one filed by a Spanish citizen. The Special Rapporteur recalls that all States have an obligation to ensure that allegations of torture and other cruel, inhuman or degrading treatment or punishment lead to prompt, independent, impartial and thorough investigations and that counter-terrorism measures strictly comply with the principle of non-discrimination.

#### **B. Pretrial detention**

24. According to article 502 (2) of the Law of Criminal Procedure, pretrial detention may be applied only when it is objectively necessary and when there are no measures less onerous to the right to liberty through which the same goals may be achieved. Article 504 (2) of the Law allows pretrial detention for up to four years, in cases where the person is accused of a serious crime for which the penalty is more than three years in prison and it is unlikely that the case can be brought to trial within a shorter period. The Special Rapporteur acknowledges that the

complexity of the investigation of a major case of international terrorism may result in significant delay before actual trial. He nevertheless notes that pretrial detention was applied in respect of more than half of those initially arrested in the case of the Madrid bombings. Meanwhile the possibility of contesting specific details of the pretrial detention order with the purpose of seeking the release of those detained was substantially diminished because most parts of the investigation were declared secret and sealed for the defence until April 2006. The Special Rapporteur recalls that article 9 (3) of the Covenant establishes that it shall not be the general rule that persons awaiting trial on criminal charges shall be detained in custody, and he furthermore highlights the recommendation made by the Human Rights Committee to Spain in 2008 to limit the duration of pretrial detention in order to reach compliance with article 9 of the International Covenant on Civil and Political Rights, and to stop using duration of the applicable penalty as a criterion for determining the maximum duration of pretrial detention.<sup>13</sup>

25. Most international terrorism suspects detained in Spain are held under a closed regime, which includes strict control over all communications and is normally applied to so-called “first degree” inmates, not necessarily suspected of terrorism but considered extremely dangerous or unable to adapt to the ordinary detention regime. This system was applied to those suspected of involvement in the Madrid bombings. According to international standards, accused persons shall generally be subject to separate treatment appropriate to their status as persons not yet convicted. The Special Rapporteur considers that a general pattern of treating those suspected of international terrorism differently from other inmates in pretrial detention might have negative implications for the right to a presumption of innocence, as well as for the principle of normalcy, according to which the same standards should apply in relation to all inmates in the same situation. A related matter is the continued use of a classification of detainees as “Islamist terrorists”, including convicted and pretrial inmates, in Spanish penitentiary facilities. At the time of the country visit, 120 persons were in this category, further grouped according to the terrorist cell they (presumably) belonged to. After having visited the detention facilities of Soto del Real and having met with two of the three persons classified as “Al-Qaida” in that facility, the Special Rapporteur is worried that the classification “Al-Qaida” might be used as an overall term of convenience applied to foreign Muslim suspects who are not suspected of belonging to any other international terrorist cell.

### **C. Equality of arms and the right to have adequate time and facilities for the preparation of defence**

26. In this particular case, the majority of those accused were of foreign origin, not always with an adequate knowledge of the Spanish language. The Special Rapporteur notes that free and independent interpretation was provided for by the State as of some months before the beginning of the trial in February 2007. However, as some suspects did not know Spanish at all, he considers problematic that in these cases the defence was not able to properly prepare its case during most of pretrial detention. Even more troubling is information on instances where the penitentiary staff did not appear to cooperate fully in facilitating meetings between lawyer and suspect, including by not allowing interpreters into the penitentiary facilities. The Special Rapporteur recalls that principle 14 of the Body of Principles for the Protection of all Persons

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<sup>13</sup> CCPR/C/ESP/CO/5, para. 15.

under Any Form of Detention or Imprisonment establishes that a person who does not adequately understand or speak the language used by the authorities responsible for his arrest is entitled “to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest”.<sup>14</sup>

27. In the present case, all suspects, after the initial arrest, were dispersed throughout Spain in different penitentiary facilities, some of which were located as far away as approximately 600 km from Madrid. The fact that the suspects were not brought back to Madrid until September 2006 had a considerable adverse impact on them, in particular in those cases where they were defended by officially appointed lawyers residing in Madrid, who were not provided with sufficient financial support to cover travel costs for meetings with their clients during the years 2004-2006. The Special Rapporteur has in a previous report noted that disproportionate aggregation of resources between defence and prosecution strikes at the heart of the principle of equality of arms required in the safeguarding of a fair trial.<sup>15</sup>

#### **D. Religious observance while in detention**

28. Compliance with the principle of non-discrimination, as established in a number of international human rights instruments,<sup>16</sup> is crucial for effectively countering terrorism and has been identified in the United Nations Global Counter-Terrorism Strategy as an essential measure in addressing conditions conducive to the spread of terrorism. Both the Spanish authorities and other interlocutors addressed this matter with special reference to incidents of unprofessional and even discriminatory conduct by penitentiary officials against pretrial inmates suspected of involvement in the Madrid bombings. The Special Rapporteur was informed of incidents of religion-related insults, including throwing the Koran on the floor or even tearing it up, and placing practical obstacles to the saying of prayers, such as denying clean clothes and washing facilities. Being aware of similar behaviour in relation to other cases, as well as by police officers against terrorism suspects of Muslim denomination during incommunicado detention, the Special Rapporteur stresses the obligation to adequately handle any complaints filed by inmates on these grounds. While acknowledging that some restrictions might be reasonable and objective, such as measures against recruitment to terrorism in penitentiary facilities under the guise of religious observance, the Special Rapporteur recalls the basic principle “to respect the religious beliefs and moral precepts of the group to which a prisoner belongs” set out in paragraph 6 (2) of the Standard Minimum Rules for the Treatment of Prisoners.

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<sup>14</sup> General Assembly resolution 43/173.

<sup>15</sup> See A/HRC/6/17/Add.3, para. 29.

<sup>16</sup> International Covenant on Civil and Political Rights, arts. 2 (1) and 26 and Convention on the Elimination of All Forms of Racial Discrimination.

### **E. The trial in the Madrid bombings case**

29. The investigation of the Madrid bombings led to the trial of 29 accused persons. Stressing the importance of this case, the Spanish authorities explained that extraordinary measures in order to safeguard the guarantees of the defence were considered necessary. The Special Rapporteur received detailed information on the preparation and conduct of the trial and notes, as elements of best practice, that simultaneous interpretation in up to five languages was provided for during the proceedings of the trial, that the hearings were all video recorded and distributed to the parties of the case on a weekly basis, that all meetings with victims, embassies or police authorities were conducted in the presence of both prosecutors and defence lawyers, and that when the massive investigation file was finally made available to the defence in September 2006, it was given in the form of a searchable and indexed optical disk to facilitate the capacity of the defence to catch up in respect of their manifest disadvantage in preparing for the trial. The Special Rapporteur believes that the transparency of the proceedings was strengthened by the fact that the trial was broadcast on television, but at the same time recalls that the public exposure of those accused of a criminal offence puts an emphasis on the obligations of the authorities and also the responsibility of the media, in respect of the right to presumption of innocence. Ultimately, it is for the trial judge to secure the overall fairness of a trial, irrespective of the degree of public exposure before and during the trial.

30. As noted in paragraph 17 above, judgements issued by the *Audiencia Nacional* in terrorism cases are only subject to cassation review by the Supreme Court, which does not formally allow for the full review of evidence presented at the court of first instance. On 17 July 2008 the Supreme Court issued its decision on 16 appeals in the Madrid bombings case, including on issues of a very precise factual character. The Special Rapporteur notes that the Court, through the right to a presumption of innocence, did in fact reconsider issues relating to facts already assessed at the court of first instance. The Special Rapporteur is not in a position to assess whether the Supreme Court thereby managed to secure the full review of conviction and sentence in each of the cases. He is however concerned that one person was convicted by the Supreme Court as a court of first instance and that the possibility to lodge an application for *amparo* before the Constitutional Court may not meet the standards set by article 14 (5) of the Covenant.

## **IV. PROHIBITION OF TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

### **A. Incommunicado detention regime**

31. According to article 520 (1) of the Law of Criminal Procedure, police detention shall not last longer than 72 hours. Terrorism suspects may however, in line with article 520 bis (1) of the Law, be held in police custody for an additional 48 hours when such extension is requested within the first 48 hours of detention and authorized by a judge within the 24 following hours. Article 520 bis (2) of the Law allows for the holding of a terrorism suspect incommunicado for up to five days in police custody upon a motivated authorization by a judge issued within 24 hours when requested by the arresting agency. According to article 527 (a) of the Law, detainees subject to the incommunicado regime are provided with the assistance of an officially appointed lawyer. They are neither allowed to choose their own lawyer nor to see a physician of their choice. Instead they are regularly examined by State-assigned forensic physicians. The

appointed lawyer is present during police and judicial proceedings when statements are taken, but according to articles 527 (c) and 520 (6) (c) incommunicado detainees do not have the right to confer in private with their lawyer. In some cases they do not see a judge before the end of the first five days in police custody. The suspect may meet with a lawyer of his/her choice only after formal charges are presented and the incommunicado regime is lifted. However, the Special Rapporteur was informed that, in some cases, the detainee's statement before the investigating judge is given while incommunicado, after which the suspect may directly be ordered to be placed in pretrial detention without having seen his/her own lawyer. According to article 509 (2) of the Law a judge may exceptionally order the detainee to be placed in pretrial detention under the incommunicado regime for a further five days, which may be extended by another three days.

32. The Special Rapporteur recalls a number of assessments made and recommendations issued at the international level, among them the concluding observations of the Human Rights Committee of 1996<sup>17</sup> and 2008,<sup>18</sup> and a report by the Special Rapporteur on Torture in 2004,<sup>19</sup> identifying incommunicado detention as a condition which may facilitate the commission of acts of torture and ill-treatment. Further, the Human Rights Committee, in its general comment No. 20 (1992) on article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), has held that provisions should be made against incommunicado detention. The Special Rapporteur calls for the complete eradication of the institution of incommunicado detention and urges Spain to thoroughly consider any initiatives in this direction. The use of this exceptional regime not only entails a risk of prohibited treatment but also makes Spain vulnerable to allegations of torture and as a result weakens the legitimacy of its counter-terrorism measures.

### **B. Preventive mechanisms**

33. The Spanish police authorities have undertaken a number of preventive measures in order to safeguard the rights of detainees held incommunicado. Such measures, initially applied by the Basque Autonomous police force, Ertzaintza, are now also selectively applied by the National Police as well as by the Civil Guard. The Special Rapporteur was assured that these initiatives have led to a decrease in torture complaints. During meetings with Government officials of the Basque Autonomous Community it was explained first that Ertzaintza does not necessarily apply incommunicado detention in all cases where a terrorism suspect is detained, and, secondly, that where this regime is used, the 2003 Basque Protocol for the coordination of assistance to individuals held in incommunicado detention is automatically applied. In addition to the Protocol, a system of continuous video surveillance in detention facilities and interrogation rooms used for incommunicado detainees by Ertzaintza has been installed.

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<sup>17</sup> CCPR/C/79/Add.61, para. 18.

<sup>18</sup> CCPR/C/ESP/CO/5, para. 14.

<sup>19</sup> E/CN.4/2004/56/Add.2, para. 66.



34. In cases where a terrorism suspect is held *incommunicado* by either of the two national police forces, the “Garzón protocol” allows for, *inter alia*, constant video surveillance and examinations by physicians of the detainee’s choice. The Garzón protocol, however, becomes applicable only through a judicial decision in an individual case and hence, by definition, in many cases does not apply from the moment of arrest. In addition, only one third of the investigating judges dealing with terrorism cases apply the protocol. In order to ensure the efficiency and credibility of this mechanism, necessary technology for video and audio tapes has to be available in all places where *incommunicado* detainees are held, and access to the tape records must be given to the defence. The Special Rapporteur stresses that systematic implementation is necessary to prevent ill-treatment as well as to clear any security agents wrongly suspected of misbehaviour.

### **C. Allegations of torture and investigation thereof**

35. Spanish police authorities stress the policy of zero tolerance in relation to any criminal behaviour by officials and have taken several measures aiming to secure the rights of persons in detention and the adequate behaviour by members of the security forces involved in these circumstances. No reference was made to arguments that would deny or reduce the applicability of international human rights law in respect of counter-terrorism measures by Spain. Both national police forces explicitly excluded in their meetings with the Special Rapporteur the use of a necessity defence or analogous arguments as justification for the use of methods of interrogation that by way of exception would depart from Spanish law or international standards.

36. The Special Rapporteur notes that torture and ill-treatment are prohibited both in article 15 of the Spanish Constitution and in articles 173 and 174 of the Penal Code, followed by provisions on penalties and disqualification from office for such crimes. He is, however, concerned that allegations of torture or other forms of ill-treatment are continuously made by terrorism suspects held *incommunicado*. *Incommunicado* detention is allegedly used for non-documented interrogations without the presence of a lawyer, conducted by officials not always appearing in uniform, and with the purpose of obtaining information for further investigations or in order to prepare a statement to be recorded later. In most cases it is alleged that torture and ill-treatment, including both by physical and psychological means, tends to take place during interrogations, while some complaints refer to ill-treatment during the transfer of terrorism suspects to Madrid.

37. The Spanish authorities explained the occurrence of torture allegations as a strategy designed by ETA to undermine the evidence obtained in the investigation of terrorist crimes. Such a strategy, if true, would of course lead to difficulties in distinguishing between credible and false allegations. The Special Rapporteur is concerned to hear of cases where the judge has dismissed or ignored complaints of ill-treatment or has closed cases where no thorough investigation has taken place. Another worrying element is the prolonged investigation of such allegations. The related conflict of jurisdiction, which is partly due to transfers from different Autonomous Communities to Madrid, may also result in delays in initiating investigations.

38. The Special Rapporteur recalls that in order to ensure the international prohibition against torture a State has positive obligations to conduct prompt, independent, impartial and thorough investigations whenever there are reasonable grounds to believe prohibited treatment has taken place, as well as to ensure that victims of torture and ill-treatment have access to an effective

remedy and receive adequate reparation, including compensation. Being mindful of the decision by the European Court of Human Rights in the case of *Martínez Sala and others v. Spain*,<sup>20</sup> where failure to conduct a thorough and effective investigation into the applicants' allegations of torture and ill-treatment resulted in a violation of article 3 of the European Convention on Human Rights, the Special Rapporteur welcomes the recent judgements by the Spanish Constitutional Court, according to which the gravity of the crime of torture, and the particular difficulty in gathering evidence in such cases, creates a special duty of diligence for judicial investigations.<sup>21</sup>

#### **D. Diplomatic assurances, extraordinary renditions and information obtained at Guantánamo Bay**

##### **1. Diplomatic assurances**

39. The Spanish law on passive extradition,<sup>22</sup> article 4 (6), prohibits granting extradition where an individual could be liable to the death penalty or inhuman or degrading treatment. According to Spanish jurisprudence, life imprisonment without possibility of pardon is to be considered inhuman treatment. The Special Rapporteur received assurances that the Spanish authorities strictly comply with international human rights standards when extraditing any person charged with or convicted of terrorism crimes. However, not all bilateral extradition agreements signed by Spain include an express obligation to exclude extradition of individuals if a risk of torture or cruel, inhuman or degrading treatment exists,<sup>23</sup> and the Special Rapporteur recalls the international duty to assess individually the existence of a real risk that a person will be subject to such treatment when deciding upon extradition, irrespective of any assurances possibly given by the receiving country.

40. During his visit, the Special Rapporteur was informed of a pending case concerning a Chechen individual possibly facing extradition to Russia for charges of terrorism. Following lengthy proceedings, the *Audiencia Nacional* approved the extradition on the basis of diplomatic assurances against ill-treatment, and subsequently it amended the conditions set for the extradition without even hearing the individual or his lawyer, which in itself would constitute a violation of article 14 (1) of the International Covenant on Civil and Political Rights. The Special Rapporteur is struck by reports that the extradition was implemented on New Year's Eve 2008, despite his repeated appeals to the contrary. Greatly concerned about the circumstances of the extradition, the Special Rapporteur recalls that there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment, as has been stated in a number of individual cases considered by international

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<sup>20</sup> European Court of Human Rights, application No. 58438/00, judgement of 2 November 2004.

<sup>21</sup> Sentences 52/2008 of 14 April 2008 and 107/2008 of 22 September 2008.

<sup>22</sup> Law 4/1985 of 21 March 1985.

<sup>23</sup> See for instance the 2004 agreement on mutual judicial assistance between Spain and Algeria.

human rights bodies.<sup>24</sup> In a recent ruling by the European Court of Human Rights concerning the extradition of a terrorism suspect, it was established that the fact that terrorism leads to clear difficulties for States in protecting their communities cannot call into question the obligations arising from the absolute prohibition of torture, including the responsibility of a State to deny deporting a person to a country where he would run a substantial risk of being subjected to treatment contrary to article 3 of the European Convention on Human Rights. As a consequence, the Court also rejected any arguments proposing that a higher standard of proof, when assessing the risk of ill-treatment, would be required where the person is considered to represent a serious danger to the community.<sup>25</sup>

## 2. Extraordinary renditions

41. The Special Rapporteur received information regarding CIA operated flights travelling to or from Guantánamo Bay stopping in, or flying over, Spanish territory between 2002 and 2007, including stopovers at Spanish military airports used by the United States of America. The Spanish authorities informed the Special Rapporteur that such flights had in fact landed at Spanish civilian airports at least in early 2004, but that no evidence of human rights violations had been established in relation to these incidents. The Special Rapporteur is also aware of Civil Guard investigations establishing that no illegal activity had been carried out by occupants of alleged CIA flights while landing at Palma de Mallorca, and of ongoing judicial proceedings before the *Audiencia Nacional* in the same context.<sup>26</sup>

42. Deeply concerned about CIA rendition programmes resulting in the transfer of terrorism suspects to secret detention facilities and for interrogation in countries where torture and other ill-treatment are frequently used, the Special Rapporteur recalls that extraordinary rendition on its own entails serious human rights violations, including arbitrary detention and denial of access to any legal process in violation of articles 9 and 14 of the Covenant, as well as enforced disappearances, and torture or ill-treatment. The lack of any chance for these detainees to challenge their transfer constitutes a breach of the principle of non-refoulement, and any State facilitating extraordinary renditions is complicit in violations of human rights and internationally responsible if it acts “with knowledge of the circumstances” of the violation.<sup>27</sup> The Special Rapporteur is concerned about information regarding the possible approval by Spain in early 2002 to allow CIA planes transferring Taliban and Al-Qaida prisoners to Guantánamo Bay to use Spanish airports. He notes the recent establishment of an investigatory commission by the Ministry of Foreign Affairs and urges Spain to comply with the international obligation to conduct thorough, effective and independent investigations into cases of involvement in extraordinary renditions and to take effective measures to guarantee non-repetition by reviewing

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<sup>24</sup> See *Agiza v. Sweden*, Committee against Torture, communication No. 233/2003, para. 13.2, or *Alzery v. Sweden*, Human Rights Committee, communication No. 1416/2005, para. 11.5.

<sup>25</sup> *Saadi v. Italy*, European Court of Human Rights, application No. 37201/06, paras. 138-139.

<sup>26</sup> Committal proceedings 109/06.

<sup>27</sup> Yearbook of the International Law Commission, 2001, vol. II, part 2, article 16 of the set of articles on responsibility of States for internationally wrongful acts.

practices and policies that may facilitate such incidents. Calls for a comprehensive report by the Government of Spain in this matter were in fact already made through a parliamentary resolution in 2006.<sup>28</sup>

### **3. Information obtained at Guantánamo Bay**

43. The Special Rapporteur appreciates the assurances given by his interlocutors that Spain is currently not engaged outside its national territory in any activities that would violate human rights. However, it was acknowledged that in 2002 Spanish consular and intelligence authorities were present at the interrogations of a number of persons detained at Guantánamo Bay. As a consequence two men were brought to Spain to stand trial. Referring to his earlier considerations regarding the problematic conditions at the detention facilities at Guantánamo Bay,<sup>29</sup> the Special Rapporteur welcomes the decision by the Spanish Supreme Court to close the case declaring all evidence originating from Guantánamo Bay null and void.<sup>30</sup>

## **V. VICTIMS OF TERRORISM AND THE IMPORTANCE OF COMMUNITY RELATIONS**

### **A. Victims of terrorism**

44. The Spanish authorities have taken a number of legislative and administrative measures in order to properly address, through material, legal and psychological assistance, the situation experienced by victims of terrorism. Such measures are directed at those who have suffered violent attacks carried out by any terrorist organization in Spain, but also at persons who have been victimized as a result of activities conducted in the name of countering terrorism by GAL in the 1980s. Apart from direct economic support to those personally affected by terrorist attacks, the Spanish Government provides financial subsidies amounting to 1 million EUR per year to associations working in this field.

45. The Special Rapporteur notes, as an element of best practice, that the Spanish authorities regard proper consideration for victims of terrorism as an essential element of the whole framework of counter-terrorism. In addition to financial compensation, much significance is given to moral support for victims of terrorism. The Special Rapporteur was informed of, inter alia, annual ceremonies in honour and in memory of the victims of the Madrid bombings in March 2004. Furthermore, persons affected by terrorism have the possibility to follow court proceedings from a separate room at the *Audiencia Nacional*, thereby avoiding additional victimization through direct contact with the accused.

46. As a possible element of the work with victims of terrorism, the Special Rapporteur also raised the question of building good community relations between victims of terrorism and those strata of society where there might still exist a degree of sympathy towards those resorting to

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<sup>28</sup> Congreso de los Diputados Núm. 547 de 05/04/2006.

<sup>29</sup> A/HRC/6/17/Add.3, paras. 11-15.

<sup>30</sup> Sentence No. 829/06 of 20 July 2006.

acts of terrorism. While acknowledging in principle the importance of such measures the Spanish authorities, however, expressed the view that the situation, in particular in the Basque country, was highly sensitive as a consequence of the ongoing threat of violent attacks and killings. Mindful of the unavoidable difficulties met by efforts to prevent polarization and to bridge gaps within societies faced with terrorism, the Special Rapporteur recalls that counteracting any breeding grounds for and recruitment to terrorism is essential in the fight against terrorism.

### **B. Promotion of solidarity and freedom of expression in the Basque country**

47. The violence perpetrated by ETA has taken more than 820 lives since 1968. Despite constituting a threat throughout the whole territory of Spain, the impact of this form of terrorism is most visible in the Basque country. Within this region 1,200 persons, including politicians, judges, journalists, academics etc., today live with a permanent escort of bodyguards because they have been targeted by ETA. During his visit to the Basque country the Special Rapporteur was informed of the severe impact on the enjoyment of many human rights, including freedom of expression, experienced by many sectors of society. As a consequence of the terrorist threat, which creates an environment that severely affects the possibilities for open dialogue, many people hesitate to freely criticize the means and methods of terrorism publicly for fear of retaliation. Another factor, which is however linked to the counter-terrorism policies of the Spanish State, is that part of the population feels that openly sharing the goals of self-determination for the Basque region, or even raising what they consider to be deficiencies in the field of human rights, in particular in the context of the fight against terrorism, would unjustly cause them to be linked to ETA.

48. The Special Rapporteur stresses the highly important value of fostering tolerance and solidarity within society as a means to avoiding conditions conducive to terrorism. In this respect, he is aware of the commitment announced by the government of the Basque Autonomous Community to promote a culture of peace within the younger generation. With the objective of promoting human rights for all persons a plan for peace and coexistence was approved in 2006.<sup>31</sup> As part of this initiative, the Special Rapporteur notes the development of a pedagogic tool on tolerance directed at promoting awareness among young people of freedoms of expression, opinion, thought and religion, as well as the necessary restrictions on these rights. He was also informed of projects related to the impact of counter-terrorism measures on the rights to freedom of expression and access to information. The Special Rapporteur takes the view that creating an active and open dialogue, based on solidarity and tolerance as well as on respect for the victims of violence, constitutes a fundamental element of reconciliation in a society affected by terrorism.

### **C. Promotion of integration within Muslim communities**

49. Immigration is in general not linked in the minds of the public authorities or the general public to the threat of international terrorism. While remaining aware of the risk that terrorist organizations may take advantage of immigrant communities as recruiting ground, the Spanish authorities do not believe that exclusion and marginalization at present serve as a breeding

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<sup>31</sup> *Plan de Paz y Convivencia*, approved by the Basque Council of Government on 2 May 2006.

ground for violent radicalism leading to terrorism. However, and in particular since the Madrid bombings in March 2004, a series of efforts have been made in order to prevent xenophobia from developing, as well as to further the integration of, specifically, Muslim communities. In this respect the Spanish initiative Alliance of Civilizations, originally based on the need to bridge the gap between the Western world and the Arab and Muslim world, will be implemented within Spanish domestic policies through a series of measures established by its National Plan. Within this framework the Special Rapporteur notes the implementation of educational programmes aimed at favouring the integration of immigrant children, including language lessons in Spanish and Arabic and teaching minority religions in school.

50. From his meeting with the Director General of Religious Affairs, the Special Rapporteur understands that the main objective of this institution is the promotion and protection of religious freedoms. These measures are also considered important in preventing the development of conditions conducive to recruitment to terrorism. In this respect specific attention has been given to religious observance within penitentiary institutions and promoting an adequate understanding of Islam among the staff.

## VI. CONCLUSIONS AND RECOMMENDATIONS

### A. Conclusions

51. **The Special Rapporteur acknowledges the State's long experience in fighting terrorism. During his visit he was able to identify a number of best practices, including measures to support the victims of terrorism; the State's international efforts to promote respect for human rights in the fight against terrorism; measures to ensure transparency at the trial of those charged with the Madrid bombings of March 2004; and the procedural guarantees for them.**

52. **The legislative framework for counter-terrorism in Spain has been to a considerable degree developed as a tool to fight ETA. This is problematic when the legislation is applied to international terrorism. Furthermore, the vagueness of certain provisions on terrorist crimes in the Spanish Penal Code carries with it the risk of a "slippery slope", i.e. the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population. This is particularly worrying in light of the measures triggered by the classification of crimes as terrorism: the application of incommunicado detention; the exclusive jurisdiction of the *Audiencia Nacional*; the applicability to terrorist suspects of up to four years of pretrial detention; aggravated penalties; and often also modifications in the rules related to the serving of sentences.**

### B. Recommendations

53. **The Special Rapporteur emphasizes that the successful and legitimate fight against terrorism requires that provisions on terrorist offences strictly adhere to the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights (the Covenant), so that all elements of the crime are in explicit and precise terms encapsulated in the legal definitions of the crimes. In relation to articles 571-579 of the Spanish Penal Code the Special Rapporteur recommends that the Government initiate a**

process of independent expert review over the adequacy of the current definitions. Such a review should combine domestic and international expertise in the fields of human rights and criminal law and result in concrete proposals for amendments. To facilitate the review, the Special Rapporteur recommends, as his own observations on the need to improve the existing definitions, that:

(a) Article 574 providing for the punishment of “any other crime” be revised in order to comply with the degree of precision required by the principle of legality, and is exclusively applied to crimes that comprise the intentional element of causing deadly or otherwise serious bodily injury, as a defining element for offences of a genuinely terrorist nature;

(b) The crime of collaboration, as established in article 576, be clearly defined in a manner that makes it possible for the individual to regulate his or her conduct, and formulated in a way that clearly establishes what elements of the prohibited conduct make it a terrorist crime. The Special Rapporteur stresses that, when defining crimes associated with terrorism a clear distinction is made between the intent to terrorize a population through violent means and the perceived goals, which may not per se be of a criminal character;

(c) Article 577 be applied to “urban terrorism” only in cases where a link between the conduct of the accused and the intent of furthering terrorist violence, as defined according to international norms and standards, has been established;

(d) The current crime of glorification in article 578 be amended to be applied exclusively to acts intended to incite the commission of a terrorist crime and carrying the risk that such acts are subsequently committed. In this regard, the Special Rapporteur takes the view that other statements falling under the broader notion of “apology” should not be fought with the tool of criminal law.

54. The Special Rapporteur recommends that any proscription of illicit organizations is carried out with scrupulous regard to the conditions required when restricting freedom of association and freedom of expression, i.e. in accordance with the law and the principles of necessity and proportionality. The proscription of organizations, together with the application of vaguely and broadly formulated provisions relating to terrorist crimes, ultimately undermines the strong moral message inherent in strict definitions based on the inexcusable nature of all acts of terrorism.

55. Political pluralism plays a fundamental role in the existence of a genuinely democratic society, and any measures taken by the State to limit the right to political participation must be of a strictly exceptional nature and predictable by law. The Special Rapporteur strongly recommends that Spain brings vaguely formulated expressions in the Organic Law on Political Parties in line with international standards on the limitation of freedom of expression, so as to avoid any risk of applying it to political parties that share the political orientation of a terrorist organization, but do not support the use of violent means.

56. The Special Rapporteur calls for judicial proceedings that in the most scrupulous manner guarantee the procedural safeguards of persons affected by judicial measures that aim to prohibit political candidates from participating in elections, on grounds that they are linked to political parties that have been declared illegal for their connections to a terrorist organization. This is particularly important in regard to electoral groups that have been created with the single purpose of standing for elections and where consequently no evidentiary material exists relating to prior actions by these groups.

57. The Special Rapporteur recommends that Spain revise the existing mechanisms of appeal in terrorist cases, including in cases where a person is convicted by the Supreme Court as the first instance court, and establish a system that is in compliance with article 14 (5) of the Covenant on the right of all persons convicted of a crime to have their conviction and sentence reviewed by a higher court.

58. The Special Rapporteur requests the Spanish Government to give consideration to the possibility of including terrorist crimes in the jurisdiction of ordinary territorial courts, instead of a single central specialized court, the *Audiencia Nacional*.

59. The Special Rapporteur calls for reducing the use of pretrial detention in cases that under current Spanish law have a link to the notion of terrorism but do not entail the intention of deadly or serious violence. He recommends that Spain reduce the duration of pretrial detention. A general pattern of treating pretrial inmates charged with terrorist crimes differently to other inmates and subjecting them systematically to a closed regime might have serious repercussions on their right to a presumption of innocence.

60. The Special Rapporteur calls for reconsideration by the Spanish authorities of the classification of “Al-Qaida” applied to a number of convicted and pretrial inmates categorized as “Islamist terrorists”. Furthermore, the notion of “Islamist terrorist” runs the risk of giving rise to misconceptions as to the nature of Islam, and the Special Rapporteur therefore recommends that the Spanish authorities bring into use terms that are appropriate to a multicultural society which includes a number of coexisting religions.

61. Concerned about information related to discriminatory treatment of Muslim detainees by public officials, including religion-related insults and practical obstacles to the saying of prayers, the Special Rapporteur urges Spain to provide penitentiary and law enforcement staff with adequate human rights education and to take disciplinary measures against any official involved in discriminatory conduct.

62. The Special Rapporteur recommends the complete eradication of the institution of *incomunicado* detention as this exceptional regime not only entails a risk of prohibited treatment against the detainee, but also makes Spain vulnerable to allegations of torture and as a result weakens the legitimacy of its counter-terrorism measures. The Special Rapporteur calls for the systematic application of preventive measures against torture and ill-treatment, including in particular continuous video surveillance over detention facilities and examinations by physicians of the detainee’s choice.

63. The Special Rapporteur is gravely concerned about allegations of torture and ill-treatment by terrorism suspects who have been held *incomunicado*, and about



**information concerning the failure of the Spanish authorities to systematically address these allegations. The Special Rapporteur strongly recommends the Spanish authorities to ensure that prompt, independent, impartial and thorough investigations are conducted in any case where there is reason to believe ill-treatment may have occurred, and to bring to trial all persons responsible for such offences. Systematic compliance with all aspects of the international prohibition against torture, together with the abolition of the incommunicado regime, would strengthen the credibility of counter-terrorism measures by the law enforcement bodies as a whole and would at the same time further ensure that those falsely accused of ill-treatment are cleared.**

**64. The Special Rapporteur is extremely concerned about the decision by the *Audiencia Nacional* to approve an extradition based on diplomatic assurances in respect of the risk of torture, and about the recent implementation of the extradition despite repeated calls by the Special Rapporteur to the contrary. He urges Spain to comply with its international obligations arising from the absolute prohibition of torture.**

**65. Recalling that extraordinary renditions entail serious human rights violations, and that any State knowingly facilitating such transfers is complicit in and responsible for the violation, the Special Rapporteur urges Spain to thoroughly and independently investigate all circumstances surrounding its involvement in CIA rendition programmes.**

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