



**Committee against Torture
Consideration of the 5th Periodic Report of Spain**

International Commission of Jurists

October 2009

The International Commission of Jurists (ICJ) wishes to provide its views to the Committee against Torture for its consideration of the 5th Periodic Report of Spain. In this submission, the ICJ highlights several issues which it considers should be of particular concern to the Committee in its consideration of the Spanish report.

In particular, the ICJ is concerned that the law and procedure regarding *incommunicado* detention, and the limited safeguards the law provides for detainees, fail to protect adequately against torture or ill-treatment by police or other state officials. These problems are particularly acute in regard to those held on charges of terrorism or organised crime, who may be detained *incommunicado* for up to 13 days.

In this submission, the ICJ also highlights concerns regarding the credible allegations of Spain's involvement in the CIA-run programme of renditions, and the reliance of Spanish courts on diplomatic assurances against torture in extradition and deportation proceedings. Finally, the ICJ will address a problem with Spain's definition of the offence of torture, which does not reflect the requirements of Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and is covered by a statute of limitations. Finally, the ICJ is concerned at recent attempts to limit the scope of Spanish universal jurisdiction to prosecute and try crimes under international law, including torture.

1. Counter-terrorism and human rights

The ICJ is conscious of the difficult situation of Spain in facing serious crimes, including acts of terrorism, by *Euskade Ta Askatasuna* (ETA) since 1968. The ICJ is aware that since 1968 there have been hundreds of unlawful killings attributable

to ETA.¹ The ICJ considers it positive that the response by Spain to such acts, including the attacks in Madrid of March 2004, has maintained the primacy of the criminal justice system in countering the threat of terrorism and in avoiding the creation of parallel legal systems to counter terrorism.²

However, the ICJ expresses its concern at some laws and practices used by Spanish authorities in the counter-terrorism policies, in particular by the Spanish *incommunicado* detention regime.

1.1. Police and incommunicado detention: general overview

As a general rule under Spanish law, following arrest, a suspect must be released or brought before a judge within 72 hours.³ However, a judge can extend this period by 48 hours in terrorism cases, to allow a total of five days police or *garde à vue* detention.⁴ Those suspected of terrorism or organised crime may also be made subject to *incommunicado* detention for a total of up to 13 days, justified on the grounds of the seriousness of the crimes and the need to protect the integrity of the investigation.⁵ Under the Spanish Criminal Procedure Act⁶ as amended⁷ a five day period of *incommunicado* police detention may be ordered by a judge. At the end of this period, a judge may issue those suspected of terrorism or organised crime related offences with a further five days of *incommunicado* detention, this time in prison custody, and another three days may be added at any time – either immediately following the ten day period or at a later date, where “the development of investigations or of the trial gives good reasons for this measure.”⁸ During *incommunicado* detention, suspects are not allowed to notify relatives about their detention, receive or send correspondence, meet visitors, or designate their own lawyer. They are instead assigned a lawyer, with

¹ According to statistics of the *Guardia Civil*, up to 2003 the victims of ETA amounted to 817, and, according to the *Asociacion victimas del terrorismo* since 2004 ETA actions caused the death of other 12 people. See, <http://www.guardiacivil.org/terrorismo/acciones/estadistica07.jsp>; see, also, list of victims of torture according to the *Asociacion victimas del terrorismo* at <http://www.avt.org/victimasdelterrorismo.php>. See also, Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain and the Basque Country, 5-8 February 2001, CommDH(2001)2,) March 2001, paragraph III(1).

² See also, Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain, 10 – 19 March 2005, CommDH(2005)08, 9 November 2005, paragraph 7.

³ *Ley de Enjuiciamiento Criminal* (LEC), Article 520(1)

⁴ LEC, Article 520 bis. The Constitution makes general provision that preventative detention may last no longer than the time strictly necessary to carry out investigations and that the arrested person must be set free or handed over to the judicial authorities within a maximum period of 72 hours, but it states that this right may be suspended, subject to judicial and parliamentary controls, “in connection with investigations of the activities of armed bands or terrorist groups.” Article 55(2). See also, Amnesty International, *España: Salir de las Sombras. Es Hora de Poner Fin a la Detencion en Regimen de Incomunicacion*, 15 September 2009, AI Index: EUR 41/001/2009.

⁵ Spanish Constitutional Court, dec. no. 127/2000, para. 3, STC 196/1987, FJ 7, ATC 155/1999, FJ 4.

⁶ *Ley de Enjuiciamiento Criminal* (LEC) Law 53/1978.

⁷ Amended by Organic Law 4/1988 and by Organic Law 13/2003.

⁸ Art. 509 (2), LEC.

whom they are not permitted to consult in private.⁹ *Incommunicado* detainees have the right to be visited and examined by a police medical examiner and, since the adoption of legislation in 2003, by a second forensic medical examiner appointed by a judge.¹⁰ However, this possibility does not amount to a right to be examined by an independent medical practitioner of one's own choice.¹¹

There are reliable reports that the system of police detention and the lack of adequate safeguards for detainees, considered further below, has led to numerous incidents of ill-treatment of detainees, which on some occasions may have amounted to torture. In its report of 2005 following a visit to Spain, the European Committee on the Prevention of Torture (CPT)¹² found many consistent allegations of ill-treatment in custody by police or the Civil Guard, and this Committee has also criticised ill-treatment of those held on terrorism charges.¹³ The Special Rapporteur on Torture in 2004,¹⁴ as well as the Special Rapporteur on Human Rights and Counter-terrorism, in 2008,¹⁵ recommended abolition of the system of *incommunicado* detention, as did this Committee in its previous Concluding Observations on Spain.¹⁶

The reliance on the system of *incommunicado* detention ignores repeated calls of this Committee and the Human Rights Committee. In 1993 this Committee expressed "the desirability of general application of the procedural standards relating to the holding of persons *incommunicado* and to the choice of a trustworthy counsel."¹⁷ In 1996, the Human Rights Committee recommended "that the legislative provisions, which state that persons accused of acts of terrorism or suspected of collaborating with such persons may not choose their lawyer, should be rescinded. It urge[d] the State party to abandon the use of *incommunicado* detention"¹⁸

In 1998, this Committee again stressed that, "[n]otwithstanding the legal guarantees as to the conditions under which it can be imposed, there are cases of

⁹ Article 527 LEC.

¹⁰ Organic Law 13/2003.

¹¹ The Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Spain*. 23/12/2002, CAT/C/CR/29/3, para.14, recommended a joint examination by a forensic physician and a physician chosen by the detainee held *incommunicado*. The European Committee on the Prevention of Torture made a similar recommendation: CPT/Inf (2007)30, *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 10 July 2007.

¹² CPT, *Report to the Spanish Government on its visit to Spain*, *op cit*.

¹³ U.N. Committee against Torture, *Conclusions and Recommendation*, *op cit*, para.10. This recommendation, made in 2002, was in relation to the then five-day period of *incommunicado* detention.

¹⁴ Report on Visit to Spain, E/CN.4/2004/56/Add.2, para.66.

¹⁵ UN Special Rapporteur on Human Rights and Counter-terrorism Concludes Visit to Spain, 14 May 2008

¹⁶ *Concluding observations of the Human Rights Committee: Spain : Spain*. 03/04/96, CCPR/C/79/Add.61.

¹⁷ Report of the Committee against Torture : 24/06/93, A/48/44. (Sessional/Annual Report of Committee), Forty-eighth Session, Supplement No. 44 (A/48/44), paragraph 456, p. 72.

¹⁸ *Concluding observations of the Human Rights Committee: Spain : Spain*. 03/04/96, CCPR/C/79/Add.61, paragraph 18.

prolonged detention *incommunicado*, when the detainee cannot receive the assistance of a lawyer of his choice, which seems to facilitate the practice of torture.”¹⁹ Finally this Committee recommended that “[c]onsideration should be given to eliminating instances in which extended detention *incommunicado* and restrictions of the rights of detainees to be assisted by a defence lawyer of their choice are authorized.”²⁰

The Human Rights Committee has recently examined the fifth periodic report of Spain in the light of the *International Covenant on Civil and Political Rights* and on this legal measure has stated categorically that “[it] does not share the State party’s view that maintaining the practice of *incommunicado* detention is necessary and justified by “the interests of justice”. It considers that the practice can be conducive to ill-treatment, and regrets that it persists despite recommendations by several international bodies and experts that it should be abolished.”²¹ Finally “[t]he Committee recommend[ed] [...] that the necessary measures, including legislative ones, should be taken to definitively put an end to the practice of *incommunicado* detention, and that the right to freely choose a lawyer who can be consulted in complete confidentiality by detainees and who can be present at interrogations should be guaranteed to all detainees. The State party should also systematize the audio-visual recording of interrogations in all police stations and places of detention.”²²

Finally, the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism, after his visit to Spain in 2008, expressed “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.”²³

The ICJ welcomes the new commitments undertaken by the Spanish Government in its Human Rights Plan of December 2008. The Human Rights Plan announces, among other measures, that the Government will propose that *incommunicado* detention be prohibited for minors. Furthermore, it aims to introduce measures to record in video or other audio-visual means the whole time of stay in police detention facilities and to add to the forensic doctor another doctor appointed by the new National Mechanism for the Prevention of Torture.²⁴

¹⁹ *Report of the Committee against Torture* : . 16/09/98. A/53/44. (Sessional/Annual Report of Committee) Fifty-third session, Supplement No. 44 (A/53/44), paragraph 131

²⁰ *Report of the Committee against Torture* : . 16/09/98. A/53/44. (Sessional/Annual Report of Committee) Fifty-third session, Supplement No. 44 (A/53/44), paragraph 135

²¹ *Concluding Observations of the Human Rights Committee: Spain*, 5 January 2009, UN Doc. CCPR/C/ESP/CO/5, paragraph 14.

²² *Concluding Observations of the Human Rights Committee: Spain*, 5 January 2009, UN Doc. CCPR/C/ESP/CO/5, paragraph 14.

²³ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his visit to Spain*, 16 December 2008, UN Doc. A/HRC/10/3/Add.2, paragraph 15. See also, paragraph 32, and *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain*, 10 – 19 March 2005, CommDH(2005)08, 9 November 2005, paragraph 18 on false allegations of torture.

²⁴ *Plan de derechos Humanos*, Medida 97.

While the audio-visual recording meets the recommendations elaborated by this Committee in 2002, the introduction of an additional doctor appointed by the new National Mechanism for the Prevention of Torture, while adding further guarantees, does not fully implement this Committee's recommendation, which suggested "[a] joint examination by a forensic physician and a physician chosen by the detainee held *incommunicado*."²⁵

The ICJ considers that *incommunicado* detention, even where judicially supervised as in the Spanish system, cannot adequately protect the safety of detainees. Prolonged *incommunicado* detention can itself amount to cruel, inhuman or degrading treatment²⁶ and there is good evidence that the system as applied in Spain facilitates ill-treatment of detainees.

The ICJ welcomes the additional guarantees envisaged in the Human Rights Plan. However, Spain cannot meet its obligations under the Convention Against Torture unless it abandons the practice of *incommunicado* detention entirely. As no legislative initiative, either in respect of the Human Rights Plan or otherwise relating to Convention obligations, seems to have been yet tabled in Parliament, the ICJ would request the Committee to ask the Spanish delegation of the intentions of Spain in respect of such legislation.

1.2. Access to lawyers

Risks of arbitrary detention and of torture or other ill-treatment during police detention and in particular in *incommunicado* detention are particularly acute in Spain as a result of limitations on rights of access to lawyers, both in law and in practice.

Under Spanish law, persons arrested and held in police custody have a general right to a lawyer of their choice.²⁷ This right is restricted in respect of terrorism suspects however, who, when held *incommunicado*, do not have the right to nominate a lawyer. Rather, such detainees are assigned a lawyer designated from an official list of the Bar Association.²⁸ The assigned lawyer does not have a right to communicate privately with his or her client.²⁹ The Spanish Constitutional Court has upheld the mandatory assignment of a lawyer, as compatible both with the Spanish Constitution and with Spain's international human rights obligations.³⁰

²⁵ Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Spain*. 23/12/2002, CAT/C/CR/29/3, paragraph 14 (a) and (b).

²⁶ CAT Concluding Observations on the United States, CAT/C.USE.CO/2, 18 May 2006, para.17; HRC General Comment No.20 para.6; report of the Special Rapporteur on Torture on visit to Spain, 2004, op cit, para.34.

²⁷ Article 520 (2), LEC

²⁸ Article 527 (a) LEC

²⁹ Article 527(c) LEC

³⁰ Spanish Constitutional Court, dec. 196/1987, para. 7.

In practice, delays in access to assigned lawyers considerably undermine the protection they offer. The law provides that the lawyer must reach the detention centre within eight hours from his or her appointment, and makes it an offence for any public authority or official to prevent or obstruct the exercise of the right to a lawyer.³¹ However, in practice, the assigned lawyer often arrives only when the detainee is scheduled to make a statement to the police,³² at which point the lawyer's presence has very little practical protective effect. In its 2005 visit to Spain, the CPT found a consistent pattern of lengthy delays between the request for a lawyer and the lawyer's arrival at the law enforcement establishment. Moreover, when a lawyer did arrive for the formal statement of the detainee, "such access was, in general, limited to the lawyer's passive presence while the detained person's statement was taken and signed."³³ It found several cases in which there were credible allegations of ill-treatment, where detainees did not have access to a lawyer for 22 hours or more following arrest.³⁴

This Committee has established that certain basic guarantees must apply to all persons deprived of their liberty in order to comply with the obligation to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" of Article 2 CAT. "Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, **the right promptly to receive independent legal assistance**, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."³⁵ The right of prompt access to a lawyer has been affirmed by the Human Rights Committee in its General Comment No. 32, and prompt access, at least within 48 hours of arrest or detention, is specified by Principle 7 of the UN Basic Principles on the Role of Lawyers.³⁶

The ICJ welcomes measure no 96 of the Spanish Government's Human Rights Plan, by which the Government commits to amending Article 520.4 of the Code of Criminal Procedure in order to reduce the present maximum duration of eight hours within which the right to legal assistance must be made effective. Such a

³¹ Art. 537, Penal Code (CAT/C/55/Add.5)

³² HRW report p.6. CPT report *op cit*, para.24.

³³ CPT report, *op cit*, para.24

³⁴ *ibid* para.23.

³⁵ Committee against Torture, *General Comment no. 2: Implementation of Article 2 by State Parties*, 24 January 2008, UN Doc. CAT/C/GC/2, paragraph 13 (our emphasis). See also, *inter alia*, *Concluding Observations of the Committee against Torture: Hungary*, UN Doc. CAT A/54/44 (1999), paragraph 84; and *Concluding Observations of the Committee against Torture: Cameroon*, 5 February 2004, UN Doc. CAT/C/CR/31/6, paragraph 9(a).

³⁶ See also, Human Rights Committee, *General Comment 20, Prohibition of torture and cruel treatment or punishment*, para.11; *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR, paragraph 13; *Concluding Observations of the Human Rights Committee: Switzerland*, UN Doc. CCPR/C/79/Add.70, paragraph 26; Views of 27 July 1993, Communication no. 326/1988, *Case of Henry Kalenga vs. Zambia*, UN Doc. CCPR/C/48/D/326/1988, paragraph 6.3.

measure could enhance the guarantees to have the presence of a lawyer for *incommunicado* detention detainees. Nevertheless, the ICJ finds that more reforms must be undertaken in order to ensure effectively the detainee's right to prompt access to a lawyer.

The ICJ considers that, in order to reliably protect the Convention rights, the principle of immediate access to a lawyer should be established and implemented in Spanish law. This right should not be compromised under any circumstances, including in terrorism cases. The law must ensure that a detainee's lawyer consults with the detainee in confidence, and in time to give advice prior to any statement being made to the police. Following the initial consultation, access to detainees held in police custody, or in prison custody pending charge, should be regular and substantial, and should respect the confidentiality of lawyer-client meetings and communications.

1.3. Judicial review of detention

Spanish law requires that a person suspected of crimes of terrorism be brought before a judge within 72 hours of arrest.³⁷ If it has been requested within the first 48 hours of arrest, the judge can extend the detention for up to another 48 hours. Judicial authorisation is also required for any imposition of *incommunicado* detention and on any extension of *incommunicado* status for a further five days, and then a further three days.³⁸ Therefore, while most of the period of *incommunicado* detention is supervised by the judicial authority, the first 48 or 72 hours – depending on the choice the police makes – are without judicial authorisation.

There are questions regarding the quality of judicial supervision of detention. The CPT found that the requirement for a detainee to be brought before a judge within 72 hours of arrest was, in practice, not rigorously met: “although judges did issue the decision on a person's release or continued custody within the required time-limits, they did not always do so having physically seen the person.”³⁹ Where, in case of terrorism suspects, a judge is asked to decide whether to extend *garde à vue* for an additional 48 hours, there is no legal requirement for the detainee to appear before the judge in order for the detention to be extended, though the judge may request the detainee's production.⁴⁰ In practice, it appears that judges do not always require detainees to appear before them.

Judicial review of *incommunicado* detention is also in practice limited. The Special Rapporteur on Torture's Report of 2004 noted that he had received “ample information from a variety of sources that in this regard judicial control is more

³⁷ Article 520, LEC

³⁸ Art. 520 *bis*, LEC.

³⁹ CPT report *op cit*, para.43

⁴⁰ Article 526.3 LEC

often of a formal and administrative nature than substantive and scrutinizing.”⁴¹ He noted that judicial extensions of *incommunicado* detention were normally based solely on a reference to an individual’s suspected links with terrorism, and where such links were alleged, the request was usually granted automatically, without the judge exercising his or her right to obtain information personally.⁴²

A further problem relates to challenge to the lawfulness of the detention as protected by Article 9 (4) ICCPR, which is an essential safeguard against ill-treatment and arbitrary detention.⁴³ Under the Spanish system, this right can be exercised by filing a writ of *habeas corpus*.⁴⁴ In most cases, *habeas corpus* petitions are heard by the examining magistrate of the district where the detainee is held. In terrorism cases, however, the application is heard by the Investigative Judge of the *Audiencia Nacional*, who is also likely to have been the very same judge to have ordered the detention.⁴⁵ The right to *habeas corpus* is further undermined by the fact that it is not among the rights that police are required to read to an arrested person. Lack of prompt legal advice, and the isolated state of detainees in *incommunicado* detention, further restricts the use of *habeas corpus*.

The ICJ is concerned that both the law on judicial review of detention, and its application in practice, are insufficient to safeguard detainees against ill-treatment. The law should be amended to ensure that decisions to extend detention always entail the production of the detainee before the court, and the law and practice should ensure that judicial review of detention is real and substantial.

2. Rendition flights through Spain

There have been credible reports, including from the investigation of Senator Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe,⁴⁶ and of the Temporary Committee of the European Parliament (TDIP),⁴⁷ that flights involved in the CIA-run renditions programme landed at Spanish airports, including in Majorca, the Canary Islands and at military bases near Cadiz and Seville, between 2002 and

⁴¹ Report of the Special Rapporteur on Torture, *op cit*, para.60

⁴² *ibid* para.38.

⁴³ *Brogan v UK*, application nos. 11209/84; *Sinan Tanrikulu and others v Turkey* (application nos. 00029918/96, 00029919/96 and 00030169/96, 6 October 2005); *Yasar Bazancir and others v Turkey*, (application nos. 00056002/00 and 0007059/02, 11 October 2005) (6 days detention without judicial supervision breached Article 5.3, despite acute terrorist threat). See also, General Assembly resolution no 34/178, *The right of amparo, habeas corpus or other legal remedies to the same effect*, 106th plenary meeting, 17 December 1979, paragraph 1.

⁴⁴ Organic law 6/1984 on the Regulation of the Procedure for Habeas Corpus.

⁴⁵ *ibid* Article 2

⁴⁶ Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States*, Doc.10957 12 June 2006 para.103.

⁴⁷ European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)) Rapporteur, Giovanni Claudio Fava, A6-0020/2007, para.114.

2006.⁴⁸ Spanish prosecutors continue to investigate the flights and possible crimes on Spanish territory connected with them.⁴⁹ It has been confirmed by the Spanish government that rendition flights have landed in Spain, but the government denies that any crimes occurred on Spanish territory.⁵⁰ The US-led rendition programme has involved crimes under international law, including enforced disappearance and torture, as well as systematic violations of rights protected in the *Convention against Torture*. Violations include both torture and cruel, inhuman or degrading treatment, and *refoulement* to face a risk of such treatment. The use of Spanish airports in the transport of rendered persons engages the responsibility of Spain to protect against such treatment on its territory, and to investigate whether and how it occurred. If Spain facilitated the transfers in violation of the CAT article 3 principle of *non-refoulement*, with knowledge of circumstances of such violation, their responsibility is engaged.⁵¹ As the International Law Commission has pointed out, “knowingly providing an essential facility” or “placing its territory at the disposal of another state” in furtherance of the commission of an internationally wrongful act would constitute complicity in such an act.⁵²

On 30 November 2008, the Spanish newspaper *El País* published a classified government document dated 10 January 2002 noting a request by US officers for the use of Spanish airports and airspace for transfer flights of Al-Qaeda and Taliban prisoners to Guantánamo.⁵³ The document suggests that Spanish government officials knew of and authorised rendition flights through Spanish territory. Judge Ismael Moreno, who has been investigating the rendition flights, opened an investigation on the new disclosures.

The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, highlighted in his report on his 2008 visit to Spain, that he had received information “regarding CIA operated flights

⁴⁸ El País, 4 February 2008, *La fiscalía busca testigos clave del traslado de presos en los vuelos secretos de la CIA*

⁴⁹ El País, 4 February 2008, *op cit*; <http://jurist.law.pitt.edu/printable.php> Spain handing secret rendition intelligence documents to investigating judge; International Herald Tribune, 14 November 2005, *Spain examines CIA “rendition” flights*.

⁵⁰ <http://jurist.law.pitt.edu>, *Spain says CIA rendition flights may have used Spanish airports* 15 September 2006; *Spain says US military flights to Guantanamo not illegal*, 2 June 2008, <http://www.neurope.eu/articles/87123.php>

⁵¹ See, Article 16 (aid or assistance in the commission of an internationally wrongful act), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, adopted at the 53rd session of the ILC, 2001, commended by General Assembly in GA resolutions no. 56/83, UN Doc. A/RES/56/83, 12 December 2001; GA resolution 59/35, UN Doc. A/RES/59/35, 2 December 2004; and GA resolution 62/61, UN Doc. A/RES/62/61, 6 December 2007.

⁵² See, *Commentary of the International Law Commission on Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in “Yearbook of the International Law Commission, 2001”, vol. II, Part Two, “Report of the International Law Commission to the General Assembly on the work of its 53rd session”, UN Doc. A/56/10, pp. 31 - 143, Article 16, paragraphs 1 and 8.

⁵³ See documents on the following news article: El País, *Moratinos justifica la connivencia de Aznar con los vuelos a la prisión de Guantánamo*, 11 December 2008, at http://www.elpais.com/articulo/espana/Moratinos/justifica/connivencia/Aznar/vuelos/prision/Guantanamo/elpepunac/20081211elpepinac_1/Tes

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.”⁵⁴ The Special Rapporteur also noted the “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.”⁵⁵ The Special Rapporteur referred to the establishment of an investigatory commission by the Ministry of Foreign Affairs and urged “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 practices and policies that may facilitate such incidents.”⁵⁶

Spain asserts in its replies to the list of issues that the Government conducted an exhaustive investigation into the allegations on these rendition flights and made public its findings. According to the replies, reports on two flights were communicated. In respect of one flight, it was reported that no persons were present on the plane. In respect of the second flight, linked with the rendition of Khaled Al Masri, it was asserted that Spain could have been implicated in crimes committed in third countries and not in Spain.⁵⁷

The ICJ notes the statement of the Spanish Ministry of Foreign Affairs which asserts that the Executive will collaborate with the investigations and that it will not permit such practices to take place in Spain. The ICJ also welcomes that Spanish Investigate Judges have initiated investigations into flights landing in Spanish airports apparently connected to the renditions programme.

The ICJ welcomes the Spanish government declaration that it will co-operate fully with prosecutors in the investigation of rendition flights, including by providing necessary information and documents. In light of the serious nature of the human rights violations involved, the ICJ requests that the Committee against Torture ask the Spanish government which if any actions it has since undertaken in respect of these investigations and what steps it has taken to ensure that no violations of human rights related to renditions could in future take place on Spanish territory, including at military bases on Spanish territory used by other states.

⁵⁴ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his visit to Spain, 16 December 2008, UN Doc. A/HRC/10/3/Add.2, paragraph 41.*

⁵⁵ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his visit to Spain, 16 December 2008, UN Doc. A/HRC/10/3/Add.2, paragraph 41.*

⁵⁶ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his visit to Spain, 16 December 2008, UN Doc. A/HRC/10/3/Add.2, paragraph 42.*

⁵⁷ See, Pregunta 9 at

http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1_sp.pdf

3. The offence of torture

The Spanish Criminal Code includes the offence of torture in its Article 174. Spain addressed the concern of the Committee against Torture expressed in its Concluding Observations of 2002 and the definition now includes reference to torture “based on discrimination of any kind.”⁵⁸ Nevertheless, the definition of the offence of torture still is not in line with that provided under Article 1 of the Convention against Torture. Article 14 of the Criminal Code addresses only torture committed by authorities and public officers, omitting any “other person acting in an official capacity.” Moreover, the criminal conduct within the definition does not include infliction of pain and suffering for the purpose of “intimidating or coercing him or a third person.”

The ICJ asks the Committee to recommend that Spain reform the offence of torture contained in the Criminal Code accordingly, to accord with Article 1 of the Convention against Torture.

The ICJ is also concerned that, unlike crimes against humanity, genocide and war crimes, the offence of torture is subject to a statute of limitations which imposes limitation periods varying from 10 to 20 years.⁵⁹ The ICJ recalls that torture is a crime under international law crimes and its prohibition is *jus cogens*, as a consequence of which the crime must not be subject to a statute of limitations.⁶⁰

The ICJ asks the Committee to recommend that Spain reform the offence of torture contained in the Criminal Code accordingly, to accord with Article 1 of the Convention against Torture.

The ICJ welcomes the decision of the Spanish Supreme Court that acquitted Hamed Abderrahaman Ahmed from the offence of membership of a terrorist organisation on the basis that the charges relied on interrogations conducted by Spanish officers while Mr Ahmed was detained in Guantanamo. The Court declared all documents and interrogation obtained while Mr Ahmed was detained in Guantanamo and Kandahar null and void, as these places of detention constituted “limbo within the legal community which is defined by several treaties and conventions signed by the International Community”.⁶¹ **The ICJ welcomes this decision as an appropriate implementation of obligations under Article 15 of the Convention against Torture.**

⁵⁸ See, *Concluding Observations of the Committee against Torture: Spain*, 23 December 2002, CAT/C/CR/29/3, paragraph 9.

⁵⁹ See, Article 131 read together with Article 174 of the Penal Code.

⁶⁰ See, ICTY, *Case of Prosecutor v. Furundzija*, Judgment of 10 December 1998, No. IT-95-17/1-T10, paragraphs 155-157.

⁶¹ STS 829/2006 of 20 July 2006, Pon. Joaquin Gimenez Garcia, p. 12 (unofficial translation).

4. Universal Jurisdiction

The ICJ is concerned at recent attempts in the Spanish Parliament to restrict universal jurisdiction for crimes under international law, including genocide, crimes against humanity and torture. The legal provision of universal jurisdiction is a very important mechanism for ensuring an end to impunity worldwide for crimes under international law. The ICJ is concerned that such a retrograde move might create a negative precedent for the development of universal jurisdiction, the utility of which is demonstrated by the many cases, listed by Spain in its report, which were conducted based on Spanish universal jurisdiction.⁶²

Spain provides in its domestic law for universal jurisdiction for a certain number of criminal offences, including torture. Article 23.4 of the *Ley Organica del Poder Judicial* provides: "Spanish jurisdiction will be equally competent to know the facts committed by Spaniards or foreigners outside of the national territory, that can be qualified, according to Spanish law, as one of the following crimes: genocide, terrorism, piracy and hijacking, [...] and any other which, according to international treaties or agreements, must be prosecuted in Spain."⁶³ There are two ordinary limitations on the exercise of universal jurisdiction. First, in Spain trials *in absentia* are generally prohibited. Second, the application of universal jurisdiction is conditional on the lack of any conviction passed *in iudicato* in another State.⁶⁴

The State Party explained the use of universal jurisdiction in Spain under the present legal regime in its replies to the list of issues.⁶⁵ Spain listed the case in Chile against Augusto Pinochet Ugarte, cases of investigations of genocide, terrorism and torture in Chile and in Argentina, including the case of Adolfo Scilingo. The reply also notes the opening of cases against Guatemalan Generals Efraim Rios Montt, Carlos Mejia Victores and others, and proceedings on genocide and torture against authorities of the Popular Republic of China.

The Constitutional Court confirmed the constitutionality and applicability of universal jurisdiction exercised by Spain in a case concerning conduct by Guatemalan officials in Guatemala.⁶⁶ Most recently, universal jurisdiction is being applied to begin investigations on torture and other international crimes allegations related to the detention regime in Guantanamo. On 4 May 2009, the Investigative Judge of the *Audiencia Nacional*, Eloy Velasco Nuñez, sent a request to the US authorities asking whether investigations were ongoing against the former government lawyers, David Addington, Jay S. Bybee, Douglas Feith,

⁶² See, Pregunta 13 at http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1_sp.pdf

⁶³ Article 23(4), *Ley Organica 6/1985, de 1 de Julio, del Poder Judicial* (unofficial translation).

⁶⁴ See, Article 23(5) and (2)(c), *Ley Organica 6/1985, de 1 de Julio, del Poder Judicial*.

⁶⁵ See, Pregunta 13 at http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1_sp.pdf

⁶⁶ STC 237/2005 of 26 September 2005, case *Guatemala*.

William J. Haynes, John Yoo and Alberto R. Gonzales, who, among other accusations, advised and provided legal rationale on policies and practices in respect of detention at the facility at Guantanamo.⁶⁷ Finally, Investigative Judge Baltasar Garzon Real has begun an investigation on torture practices in Guantanamo.⁶⁸

While these steps towards the use of universal jurisdiction to tackle worldwide impunity are underway, the Spanish Parliament, with the agreement of both the main political parties, has proposed to limit the scope of universal jurisdiction in Spain.⁶⁹

A bill now before the Senate would add the following limitation to universal jurisdiction: “without prejudice for what international treaties and covenants subscribed by Spain might establish, for the Spanish courts to consider the above-mentioned offences, it will have to be officially ascertained that the people allegedly criminally liable are present in Spain, or that there are victims of Spanish nationality, or to find any kind of connection with Spain, and, in any case, that a proceeding alleging an effective investigation and prosecution has not begun in another competent country or within an international tribunal”.⁷⁰ The main change that will occur will touch on extradition requests, which were partly successful in the *Pinochet* case, for example. Thus, in cases when there is no connection with Spain, if the investigative judge is unable to ascertain the presence of the suspect within Spanish territorial jurisdiction, the judge will not have the power to request extradition of the suspected person to Spain in order to face justice.

The ICJ recognises that while the establishment of unqualified universal jurisdiction is not an obligation for States under international law, permissive universal jurisdiction is available to States. The ICJ recalls that the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*⁷¹ declares that “States should undertake effective measures, including the adoption or amendment to internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.”⁷² The former Special Rapporteur on Torture, Sir Nigel Rodley, underscored the importance of the use of universal jurisdiction as a means to combat impunity, and recommended that “[i]n countries where legislative provisions do not exist which give authorities jurisdiction to prosecute and

⁶⁷ Auto of 4 May 2009, Diligencias Previas no. 134/2009, Juzgado central de instruccion no. 6, Audiencia Nacional, Madrid.

⁶⁸ Auto de 27 April 2009, Diligencias Previas no. 150/09, Juzgado cenral de instruccion no. 5, Audiencia Nacional, Madrid.

⁶⁹ See, Resolucion no. 39, *Reformas Urgentes de Justicia*, Primero, approved by the Spanish Congress on 19 May 2009.

⁷⁰ *Proyecto de Ley Organica Complementaria de la Ley de Reforma dela Legislacion Procesal para la Implementacion de la Nueva Oficina Judicial, por la que se modifica la Ley Organica 6/1985, de 1 de julio, del Poder Judicial*, no. 621/000018, 7 October 2009, Article 1 (unofficial translation).

⁷¹ E/CN.4/2005/102/Add.1, recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81 of 21 April 2005.

⁷² Principle 21(1).

punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator is (universal jurisdiction), the enactment of such legislation should be made a priority."⁷³ Finally, the Inter-American Commission on Human Rights commended the principles of universal jurisdiction as among the most important developments of contemporary international law, and as contributing to the strengthening of human rights protection and to the consolidation of the primacy of law and of fundamental freedoms.⁷⁴

The ICJ regrets that Spain is planning to restrict the scope of universal jurisdiction. The ICJ considers that universal jurisdiction, as expressed by the present legal regime in Spain, is an invaluable tool to combat impunity worldwide, as many international instruments have recognised.

The ICJ asks the Committee to call on the Spanish authorities to withdraw the proposed legislation and maintain the existing system of universal jurisdiction, which has represented an important contribution by Spain to the fight against impunity for crimes under international law, including torture. The ICJ considers that Spanish courts and Investigative Judges have dealt responsibly with the use of universal jurisdiction and is concerned that the proposed restrictions will constitute a retrogressive precedent for the development of universal jurisdiction and the fight against impunity, including for crimes of torture.

⁷³ *Report of the Special Rapporteur, Sir Nigel Rodley: Civil and Political Rights Including the Question of Torture and Detention*, 25 January 2001, UN Doc. E/CN.4/2001/66, paragraph 1316(a). See also, paragraph 1310.

⁷⁴ Resolución n. 1/03 sobre juzgamiento de crímenes internacionales.