
amnesty international

SPAIN

Submission to the UN Universal Periodic Review

Eighth session of the UPR Working Group of the Human
Rights Council

May 2010



Executive summary

In this submission, Amnesty International provides information under sections B, C and D, as stipulated in the *General Guidelines for the Preparation of Information under the Universal Periodic Review*:¹

- Under section B, Amnesty International raises concerns about national legislation on torture, incommunicado detention, universal jurisdiction, and enforced disappearances.
- Section C highlights Amnesty International's concerns in relation to torture and other ill-treatment by law enforcement officials, and impunity for such acts; the rights of migrants and asylum-seekers; *refoulement*; gender-based violence; investigation of enforced disappearances and mass graves pertaining to the Spanish civil war and dictatorship period; and Spanish involvement in unlawful detentions at Guantánamo Bay.
- In section D, Amnesty International makes a number of recommendations for action by the government.

¹ Contained in Human Rights Council Decision 6/102, Follow-up to Human Rights Council resolution 5/1, section I, adopted 27 September 2007.

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B. Normative and institutional framework of the State

National Legislation

Torture and other ill-treatment

In contrast to the definition of torture in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the definition of torture in the Spanish Criminal Code does not include acts committed with the intention of intimidating or coercing the victim or a third person. Furthermore, the law does not explicitly exclude either "due obedience" or "superior orders" as justifications for acts of torture, nor does it identify individuals acting at the instigation of, or with the consent or acquiescence of, public officials as responsible for torture. The law also does not specifically state that "sexual violence" may amount to torture or other ill-treatment when committed in custody. Although the definition of torture was revised in 2003 to include torture when committed "for any reason based on discrimination of any kind", Amnesty International is concerned that this provision is rarely applied in practice.

Incommunicado detention

Under the Criminal Procedure Act currently in force, detainees held on suspicion of terrorism-related offences may be held incommunicado for up to 13 days (five days for other offences). Under the incommunicado regime, detainees do not have the right to be assisted by a lawyer of their own choice. Legal assistance is provided by a duty lawyer appointed by the Bar Association, at the request of the police. Incommunicado detainees do not have the right to consult with a lawyer in private at any time during their incommunicado detention. They also do not have the right to have their family informed of their detention. Foreign nationals do not have the right to have such information communicated to their embassy or consulate. Individuals held incommunicado do not have the right to a medical examination by a doctor of their own choice. Furthermore, individuals held on suspicion of involvement in terrorism-related offences - whether or not they are being held incommunicado - may be held in police custody for up to five days (120 hours) after arrest before being presented to a judicial authority.

Universal jurisdiction

On 7 October 2009, the Senate adopted an amendment to Article 23.4 of the Organic Law on the Judiciary governing universal jurisdiction. This amendment limits universal jurisdiction to cases in which the victims are Spanish or in which Spain has a "relevant connecting link", where the alleged perpetrator is in Spain and as long as "proceedings implying an effective investigation and prosecution have not begun in another competent country or in an International Court". The criteria for determining what constitutes "effective" in this context are not defined. Amnesty International considers that the current interpretation being made by the courts is vague and contrary to international standards. There are no specified criteria for what type of investigation is sufficient to halt a trial in Spain.

Rights of migrants and asylum seekers

Restrictions on access to the municipal register and expiration of registration included in the Law on Aliens create serious obstacles for migrants, particularly irregular migrants, in accessing the right to education, health and other

social services. The recently adopted Asylum Law excludes EU citizens, in violation of the principle of non-discrimination.

C. Promotion and protection of human rights on the ground

Effective impunity of law enforcement officials for human rights violations

For many years Amnesty International has documented cases of torture and other ill-treatment, excessive use of force and unlawful killings by law enforcement officials in Spain. These human rights violations have been systematically exacerbated by a widespread failure of the police disciplinary bodies and the criminal courts to conduct prompt, effective and impartial investigations into the incidents reported, as required by international law. According to Amnesty International's research, the majority of investigations are closed prematurely, failing to reach trial even when there was credible evidence that torture or other ill-treatment had occurred. Even when such cases have come to court, convictions have been relatively rare or, when they occurred, sentences have mainly been nominal.

Amnesty International considers that the government's continued failure to address these violations has led to a climate of de facto impunity for law enforcement officials. Furthermore, Amnesty International is deeply concerned by the propensity of the authorities to label all allegations of torture or other ill-treatment made by detainees held on terrorism-related charges as a tactic of an organised criminal strategy to discredit the state, without conducting effective investigations into each allegation, contrary to Spain's obligations under international law to ensure a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture may have taken place.

Refoulement

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

Murad Gasaev

Murad Gasaev fled to Spain from the Russian Federation in 2005, but his claim for international protection was rejected on the basis of confidential information that neither Mr. Gasaev nor his lawyer were ever given access to or opportunity to challenge.

Despite the real risk he faced of torture or other ill-treatment and unfair trial, Murad Gasaev was extradited to the Russian Federation on 31 December 2008 on terrorism-related charges, with "diplomatic assurances" from the Russian prosecutor that he would not be sentenced to death and could receive visits from Spanish embassy staff while in detention. Mr. Gasaev was held in the pre-trial detention facility in Piatigorsk until 28 August 2009 when he was released without charge.

Murad Gasaev's family has reported that since his return to Russia they have been harassed and threatened by men believed to be representatives of the Russian police and intelligence agencies. In July 2009, his brother was briefly detained, interrogated and threatened, but subsequently released. Since Murad Gasaev's release from custody, his family continue to fear for his and their own safety and report they have continued to be threatened by law enforcement officers.

Rights of migrants, refugees and asylum seekers

Amnesty International is concerned that measures taken to impede the entry into Spain of undocumented persons (particularly through the southern border - Canary Islands, Ceuta and Melilla, the Andalusian coast and Balearic Islands) violate the prohibition of *refoulement*.

These measures not only create obstacles for those fleeing areas where they are at risk of human rights violations to seek asylum, but also lead to increasingly grave consequences for migrants who are obliged to travel via alternative and dangerous routes by unsafe means creating a greater risk to their lives. In addition, the obstacles increase the risk of abuses during the migratory journey at the hands of criminal networks and others, including officials of countries that have established agreements on migratory control with Spain.

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

Amnesty International is concerned at the expulsion of unaccompanied minors under “family reunification” measures which do not follow due legal process and do not take into account the minor’s family situation. Eleven judicial decisions in 2007 recorded irregularities in the expulsion of minors.

Racism and xenophobia

In recent years, Amnesty International has raised concerns regarding discrimination, racism and xenophobia against foreign nationals and Spanish citizens from ethnic minorities in the field of employment, access to housing, and education, as well as incidents of racism involving law enforcement officials. Although measures to tackle racism are included in the national Human Rights Plan, Spain still does not collect and publish statistics on racist incidents and has not developed an action plan against racism and xenophobia.

Gender-based violence

Amnesty International considers that the Basic Law 1/2004 on Comprehensive Protection Measures to Tackle Gender-Based Violence is an important step in improving the institutional response to gender-based violence in Spain. However, the organization is concerned about the lack of implementation of some of the provisions guaranteed by Law 1/2004, which leaves many women at risk of gender-based violence. The organization is particularly concerned by obstacles to accessing legal assistance and personal protection measures due to lack of police resources, and obstacles to accessing appropriate resources faced in particular by women with drug addiction problems or mental health issues. There is still no comprehensive law regulating all state action relating to gender-based violence.

Amnesty International is also concerned about the additional obstacles that irregular migrant women face in accessing justice and specialized services, which put them at increased risk of gender-based violence and killings. In 2005, the Ministry of the Interior issued Instruction 14/2005 to law enforcement officials, ordering them to investigate the migration status of foreign national women who report domestic violence with the aim of beginning expulsion proceedings if a woman is found to be an irregular migrant. The organization is concerned that as a consequence of this instruction (which is still in force) women who are irregular migrants may decide not to seek help from the law enforcement agencies even when their life is at risk, out of fear of being deported.

Human trafficking, which affects women and girls in particular, continues to be addressed in Spain as a public order and migration issue. Spanish legislation does not include a definition of trafficking in line with international law. The 2009–2012 Integrated Plan against Trafficking for Sexual Exploitation does not establish a mechanism to ensure correct identification of victims. It only provides comprehensive support for victims who collaborate with the Spanish authorities and does not contain specific measures for minors.

Investigation of enforced disappearances and mass graves

On 24 September 2009, Spain ratified the International Convention for the Protection of All Persons from Enforced Disappearance. However, the enforced disappearance of persons is still not included as a distinct offence in the Spanish Penal Code.²

In October 2008, an investigating judge from the National Criminal Court launched an investigation into the estimated 114,266 enforced disappearances that occurred during the civil war and early years of the Franco regime. Subsequently, the investigating judge disqualified himself from conducting the investigation, stating that local courts were competent to investigate such crimes if they had been committed within their territorial jurisdiction. The National Criminal Court declared itself incompetent to investigate.

The local courts are reaching differing decisions in these cases and relatives face uncertainty with regard to their right to an effective remedy and to know the fate of the victims. Most of the local judges, to whom the cases were referred after the National Criminal Court disqualified itself, have decided that the cases in question concern common crimes and have closed them on the grounds that the statute of limitations has expired.³

The Senate's rejection, on 11 March 2009, of a draft law calling on the government to take on the task of locating, exhuming and identifying the remains of victims of the civil war and Franco regime shows the state's lack of political will with regard to this issue. Although the second additional provision of Law 52/2007 of 26 December (the Historical Memory Law)⁴ established that "[t]he provisions contained [therein] (...) are compatible with the exercise of legal action and access to the ordinary and extraordinary procedures established in law or in the international treaties or conventions signed by Spain", in reality it only sets up a system for collaborating with the associations of victims' relatives with regard to exhumations. It does not, however, assume or take responsibility for the costs involved.

With the sole exception of the Autonomous Government of Cataluña, which passed a law in 2009 committing it to paying the costs of exhumations and other measures, neither the central government nor the other autonomous governments have taken it upon themselves to pay for excavating the graves that are still appearing throughout the country.

Spanish complicity in unlawful detentions at Guantánamo Bay

Amnesty International has expressed its concern about the repeated use of Spanish airspace and airports by CIA aircraft in the context of the US-led programme of secret rendition and detention.

The 2006 European Parliament Committee report on such matters documented 68 landings of CIA aircraft suspected of involvement in the renditions programme at several Spanish airports between 2002 and the end of 2005.⁵ Since June 2006, the National Criminal Court has been investigating alleged offences of torture and unlawful detention related to the passage of rendition-related CIA flights through Spain and whether US military aircraft transporting detainees to the Guantánamo Naval Base landed at Spanish military bases. At the end of 2008, the press leaked secret documents revealing that, in January 2002, the Spanish authorities authorised the United States to use Spanish military bases for transferring prisoners to Guantánamo.

At least two police officers attached to the Central Police Unit for Foreign Information and a Spanish diplomat are alleged to have travelled to Guantánamo between 22 and 25 July 2002 and to have interrogated several detainees

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

³ By 30 January 2009, 13 of the 43 courts to whom the case file had been referred by the National Criminal Court had taken this step

⁴ Law 52/2007 of 26 December "through which rights are recognized and broadened and measures established for the benefit of those who suffered persecution or violence during the civil war and the dictatorship". This law is also known as the Historical Memory Law.

⁵ Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, DocRef(2006/2200(INI)), Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. European Parliament, paras 109-114.

there. The Spanish authorities have failed to carry out a thorough and impartial investigation into the extent of interrogations conducted by Spanish police officers of detainees at Guantánamo Bay. Amnesty International is concerned at the possible human rights violations which may have occurred as a result of these interrogations and considers that these trips were not in keeping with the full respect for international human rights law and humanitarian law.

D. Recommendations for action by the State under review

Amnesty International calls on the government:

With regard to torture and other ill-treatment:

- To bring national legislation on torture and other ill-treatment into line with international human rights standards.

With regard to incommunicado detention:

- To abrogate articles 509, 520bis and 527 of the Criminal Procedure Act and to ensure all detainees are brought promptly before a judge.

With regard to universal jurisdiction:

- To ensure the effective implementation of the principle of universal jurisdiction, both in theory and practice, in line with international standards.

With regard to the effective impunity of law enforcement officials for human rights violations:

- To take immediate steps to establish an independent police complaints mechanism with a mandate to investigate all allegations of serious human rights violations by law enforcement officials;
- To extend the compulsory and systematic use of CCTV recording in all areas of police stations where detainees may be present.

With regard to refoulement:

- To refrain from forcibly returning any individual to a country where they may be at risk of torture or other serious human rights violations.

With regard to the rights of migrants and asylum-seekers:

- To ensure all migrants, including irregular migrants, and asylum-seekers have effective access to economic, social and cultural rights;
- To respect the principle of *non-refoulement* and ensure effective access to asylum procedures, including for those intercepted at sea;
- To ensure that all measures taken in relation to unaccompanied minors are in line with national and international law.

With regard to racism and xenophobia:

- To collect and publish statistics on racist incidents and develop a national action plan against racism and xenophobia.

With regard to gender-based violence:

- To ensure that all victims of gender-based violence, including irregular migrants, have effective access to appropriate resources including legal assistance and protection measures;

- To instigate a national plan to combat violence against women and girls, including in relation to human trafficking.

With regard to investigation of enforced disappearances and mass graves:

- To undertake measures to locate, exhume and identify remains in mass graves;
- To criminalise enforced disappearance in Spanish law, whether perpetrated by state actors or individuals or groups acting with the authorization, support or acquiescence of the state;
- To make the relevant declarations under Articles 31 and 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

With regard to Spanish complicity in unlawful detentions at Guantánamo Bay:

- To actively and effectively cooperate with judicial investigations into the use of the Spanish airports and military bases by airplanes suspected of taking part in renditions, secret detention or other human rights violations.

With regard to ratification of international human rights standards:

- To ratify without delay the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Appendix: Amnesty International documents for further reference⁶

On torture and other ill-treatment by law enforcement officials:

- Spain: Adding insult to injury: The effective impunity of police officers in cases of torture and other ill-treatment, AI Index: EUR 41/006/2007, 14 November 2007.
- Spain: Catalan autonomous government must take action against police officers convicted of torture, AI Index: EUR 41/021/2008, 1 December 2008.
- Spain: Five police officers under criminal investigation for ill-treatment reinstated in their duties, AI Index: EUR 41/004/2008, 1 February 2008.
- Spain: No pardon for torture! Four police officers convicted of illegal detention and ill-treatment have pardons confirmed by Supreme Court, AI Index: EUR 41/003/2008, 19 January 2008.
- Spain: Amnesty International calls for a thorough independent and impartial investigation to determine whether human rights were violated during the arrest of Igor Portu, AI Index: EUR 41/001/2008, 8 January 2008.

On the use of incommunicado detention:

- Spain: Out of the shadows – Time to end incommunicado detention, AI Index: EUR 41/001/2009, 15 September 2009.

On counter-terrorism measures:

- Spain: Macroproceso 18/98 trial highlights flaws in Spanish counter-terrorism legislation, AI Index: EUR 41/009/2009, 3 June 2009.
- Destinos inconfesables, obligaciones incumplidas. España en la Guerra contra el terror, October 2008. (Available in Spanish only).

On ETA:

- Spain: Amnesty International condemns killing of Ignacio Uría Mendizábal, AI index: EUR 41/022/2008, 3 December 2008.

On migration and asylum:

- Los derechos de los extranjeros que llegan a las islas Canarias siguen siendo vulnerados, 7 July 2006. (Available in Spanish only).
- Spain and Morocco: Report – Failure to protect the rights of migrants – Ceuta and Melilla one year on, AI Index: EUR 41/009/2006, 25 October 2006.
- Spain: The Southern Border. The State turns its back on the human rights of refugees and migrants, AI Index: EUR/008/2005, 19 June 2005.

On racism and xenophobia

- Entre la desgana y la invisibilidad. Políticas del Estado español en la lucha contra el racismo, April 2008. (Available in Spanish only).

⁶ Copies of these documents can be downloaded from Amnesty International's website: <http://www.amnesty.org/en/region/spain>

On refoulement:

- Spain: Fear of forcible return/Fear of torture or other ill-treatment: Murad Gasayev (m), AI Index: EUR 41/023/2008, 11 December 2008.
- Spain: Further Information on Fear of forcible return/Fear of torture or other ill-treatment: Murad Gasayev (m), AI Index: EUR 41/002/2009, 7 January 2009.
- Spain: Further Information on Fear of forcible return/Fear of torture or other ill-treatment: Basel Ghalyoun (m), AI Index: EUR 41/016/2008, 24 July 2008.
- Spain: Amnesty International condemns forcible return of Basel Ghalyoun to Syria, AI Index: EUR 41/015/2008, 22 July 2008.
- Spain: Fear of forcible return/Fear of torture or other ill-treatment: Basel Ghalyoun (m), AI Index: EUR 41/014/2008, 18 July 2008.

On gender-based violence:

- España: Una vida sin violencia para mujeres y niñas, July 2009. (Available in Spanish only).
- Obstinada realidad, derechos pendientes, October 2008. (Available in Spanish only).
- Más riesgo, menos protección. Mujeres inmigrantes en España frente a la violencia de género, November 2007. (Available in Spanish only).
- Spain: More than words. Making protection and justice a reality for women who suffer gender based violence in the home, AI Index: EUR 41/005/2005, 11 May 2005.

Other:

- Spain: Briefing to the Human Rights Committee, AI Index: EUR 41/012/2008, 1 June 2008.
- Spain: Europe and Central Asia: Summary of Amnesty International's Concerns in the Region, July-December 2007, AI index: EUR 01/001/2008, 2 September 2008.