



**United Nations Human Rights Council**  
**8<sup>th</sup> Session of the Working Group on Universal Periodic Review, 3-14 May 2010**  
**ICJ Submission to the Universal Periodic Review of Spain**

*November 2009*

The International Commission of Jurists (ICJ) welcomes this opportunity to present its submission to the Universal Periodic Review (UPR) of Spain. In this review, the Working Group on the UPR and the Human Rights Council should address the practice of *incommunicado* detention, and the transfer of persons as part of the alleged cooperation of Spain in the US-led renditions programme. The ICJ also draws attention to the threat to judicial independence posed by the recent prosecution of Investigative Judge Baltasar Garzón Real; to the recent limitations introduced on the use of universal jurisdiction to prosecute crimes under international law; and to the limited scope of the offence of torture contained in the Criminal Code.

***1. Counter-terrorism and human rights***

The ICJ is conscious of the difficult situation that Spain faces in combating serious crime, including acts of terrorism, by members of ETA and international groups, and considers it positive that Spain has avoided the creation of parallel legal systems to counter terrorism. However, while maintaining the focus on the ordinary criminal justice system, Spain has retained, and, in some cases extended, exceptional measures restricting the rights of detainees to be free from arbitrary detention, to legal assistance and to effective review of the lawfulness of their detention. Such restrictions are typified by the Spanish use of *incommunicado* detention, which raises serious questions regarding Spain's international law obligations, including those under Articles 7, 9 and 14 of the *International Covenant on Civil and Political Rights* (ICCPR) as well as the obligation under Article 2 of the *Convention against Torture* to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" and under Article 16 to prevent other acts of cruel, inhuman or degrading treatment or punishment.

Those suspected of terrorism or organised crime may 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.<sup>1</sup> Under Spanish law,<sup>2</sup> a judge may authorise a five-day period of *incommunicado* police detention.<sup>3</sup> At the end of this period, a judge can authorise, in the cases of those suspected of terrorism or organised crime related offences, a further five days of *incommunicado* detention. This second period involves prison custody. Another three days may be added to the detention period at any time – either immediately following the ten-day period or at a later date.<sup>4</sup> In addition to judicial authorization of *incommunicado* detention, Spanish law requires that detained persons be brought before a judge within 72 hours of arrest. In

---

<sup>1</sup> *Ley de Enjuiciamiento Criminal* (LEC), Article 520(1). See ICJ Submission to the Human Rights Committee: Spain, 17 October 2008, available at <http://www.icj.org/IMG/ICJSubmission-Spain-101008.pdf>; ICJ Submission to the Committee against Torture: Spain, 16 October 2009, available at [http://www.icj.org/IMG/ICJ\\_Submission\\_SpainCAT.pdf](http://www.icj.org/IMG/ICJ_Submission_SpainCAT.pdf); and the report of the ICJ Eminent Jurists Panel, *Assessing Damage, Urging Action*, p. 146.

<sup>2</sup> *Ley de Enjuiciamiento Criminal* (LEC) Law 53/1978 as amended by Organic Law 4/1988 and by Organic Law 13/2003

<sup>3</sup> LEC, Article 520 bis. 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. See also, Spanish Constitutional Court, dec. no. 127/2000, para. 3, STC 196/1987, FJ 7, ATC 155/1999, FJ 4.

<sup>4</sup> Art. 509 (2), LEC.

terrorism cases, upon request within the first 48 hours of arrest, the judge can extend the detention for up to another 48 hours.<sup>5</sup>

The ICJ is concerned about the effectiveness of judicial supervision of these detainees. The Committee for the Prevention of Torture (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”.<sup>6</sup> 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, although the judge may request the detainee’s production.<sup>7</sup>

During *incommunicado* detention, suspects are not allowed to notify relatives about their detention, designate a lawyer of their own choice, receive or send correspondence, or meet visitors. They are assigned a lawyer from an official list of the Bar Association, but they are not permitted to consult the lawyer in private.<sup>8</sup> *Incommunicado* detainees also have the right to be visited and examined by a police medical examiner and by a second forensic medical examiner appointed by a judge.<sup>9</sup> However, this does not amount to a right to be examined by an independent medical practitioner of one’s own choice.<sup>10</sup>

There are reliable reports that the system of police detention and the lack of adequate safeguards for detainees have led to numerous incidents of ill-treatment of detainees.<sup>11</sup> Both the Committee against Torture and the Human Rights Committee have recommended the abolition of *incommunicado* detention.<sup>12</sup> The ICJ considers that *incommunicado* detention, even where judicially supervised as in the Spanish system, cannot adequately protect the physical and psychological integrity and well-being of detainees. *Incommunicado* detention, especially where prolonged, can itself amount to cruel, inhuman or degrading treatment.<sup>13</sup> The ICJ considers that, in order to reliably protect the rights under Article 7, 9 and 14 ICCPR and Article 2 CAT, the principle of

---

<sup>5</sup> CCP Article 520. 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)

<sup>6</sup> CPT report *op cit*, para.43

<sup>7</sup> Article 526.3 LEC

<sup>8</sup> Article 527 LEC.

<sup>9</sup> Organic Law 13/2003.

<sup>10</sup> 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.

<sup>11</sup> See, for example, Working Group on Arbitrary Detention, *Opinion 17/2009, Karmelo Landa Mendibe v. Spain*, 4 September 2009. The opinion declared the 19 months detention of Karmelo Landa Mendibe to be arbitrary. Mr Landa Mendibe is a Basque university professor and former EU and Basque Member of the Parliament. He was arrested on 11 February 2008 on charges of membership of a terrorist organisation in connection with membership of the dissolved political party *Batasuna*. The Working Group found that Landa Mendibe had been repeatedly subject to *incommunicado* detention and not been properly informed of the reasons for his detention. The Working Group also found a violation of the presumption of innocence and of the right to be tried within reasonable time. CPT, *Report to the Spanish Government on its visit to Spain, op cit*. See also, U.N. Committee against Torture, *Conclusions and Recommendation, op cit*, para.10. Special Rapporteur on Torture, *Report on Visit to Spain*, E/CN.4/2004/56/Add.2, para.66; *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, para.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, para.18 on false allegations of torture.

<sup>12</sup> 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), para.456, p. 72; *Concluding observations of the Human Rights Committee: Spain: Spain*. 03/04/96, CCPR/C/79/Add.61, para.18; *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), paras.131 and 135; *Concluding Observations of the Human Rights Committee: Spain*, 5 January 2009, UN Doc. CCPR/C/ESP/CO/5, para. 14.

<sup>13</sup> See, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, UN Doc. 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.

immediate access to a lawyer of one's own choosing must be implemented in Spanish law,<sup>14</sup> including in respect of terrorism cases. The law must ensure that a detainee's lawyer is able to consult with the detainee in complete confidentiality and in time to give advice prior to any statement being made to the police. Following the initial consultation, the lawyer's access to detainees held in police custody, or in prison custody pending charge, should be regular and substantial.

The Spanish Government announced in its Human Rights Plan of December 2008 that it would introduce measures to prohibit *incommunicado* detention for minors, to adopt measures to record by video or other audio-visual means for the entirety of the stay in police detention facilities; and to allow for detainees to be visited by an additional doctor appointed by the future National Mechanism for the Prevention of Torture. Furthermore, the Plan suggests a reduction of the present maximum duration of eight hours within which the right to legal assistance must be made effective.<sup>15</sup> While such proposals for reform would increase protection for detainees, they are not sufficient to provide full protection, as they do not allow detainees to appoint their own lawyer, to consult regularly and privately with him/her, or to be visited by a physician of their own choice nor do they oblige the detainee to be present at the judicial confirmation hearings of detention.<sup>16</sup>

**The Working Group and Human Rights Council should call on the Government to:**

- **Take legislative and practical measures to end the practice of *incommunicado* detention;**
- **Amend the law to ensure that decisions to extend detention always involve the production of the detainee before the court, and that judicial review of any detention is real and substantial;**
- **Ensure immediate, regular and confidential access of detainees to a lawyer of own choice, as well as access to independent medical advice, including for those charged with offences related to terrorism;**
- **Provide information on the timetable for legislation to implement the Human Rights Plan.**

## ***2. Allegations of Renditions through Spanish territory***

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,<sup>17</sup> and of the Temporary Committee of the European Parliament (TDIP),<sup>18</sup> that flights involved in the CIA-run rendition programme landed at Spanish airports, including in Majorca, the Canary Islands and at military bases near Cadiz and Seville, between 2002 and 2006.<sup>19</sup> These reports were reinforced by the leak of 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.<sup>20</sup> The Government has maintained that in respect of one of these flights, no detainees were present on the

---

<sup>14</sup> Human Rights Committee, General Comment 20, Prohibition of torture and cruel treatment or punishment, para.11; UN Basic Principles on the Role of Lawyers, Principle 7.

<sup>15</sup> *Plan de derechos Humanos*, Medida 96 y 97, available at [http://www2.ohchr.org/english/issues/plan\\_actions/docs/Spain\\_NHRAP.pdf](http://www2.ohchr.org/english/issues/plan_actions/docs/Spain_NHRAP.pdf)

<sup>16</sup> See, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Spain*, 23/12/2002, UN Doc. CAT/C/CR/29/3, para.14 (a) and (b).

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> El País, 4 February 2008, *La fiscalía busca testigos clave del traslado de presos en los vuelos secretos de la CIA*.

<sup>20</sup> 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](http://www.elpais.com/articulo/espana/Moratinos/justifica/connivencia/Aznar/vuelos/prision/Guantanamo/elpepunac/20081211elpepinac_1/Tes)

plane. In respect of the second flight, linked with the rendition of Khaled El Masri, it asserted that any crimes were committed in third countries and not in Spain.<sup>21</sup>

Investigations into renditions through Spain remain ongoing.<sup>22</sup> The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, in his report on his 2008 visit to Spain, 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.”<sup>23</sup>

The US-led renditions programme has involved crimes under international law, including enforced disappearance and torture. 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 principle of *non-refoulement*, with knowledge of circumstances of such violation, its responsibility is engaged.<sup>24</sup>

**The Working Group and the Human Rights Council should ask the Government:**

- **What progress has been made in investigating Spanish involvement in renditions;**
- **What steps it has taken to review practices and policies to ensure that it desists from any future involvement in renditions or other related practices involving crimes under international law by third states, including by allowing such practices to occur on Spanish territory or over Spanish airspace.**

### *Independence of the Judiciary*

On 8 September 2009, the Second Chamber (Criminal) of the Spanish Supreme Court began the trial against Examining Magistrate Baltasar Garzón Real on charges of intentionally issuing an unjust judgment or ruling (the offence of *prevaricación*), for his investigation into crimes against humanity committed during and after the Spanish Civil War (1936-1939). The case was initiated by a private complaint of the association *Manos Limpias*, later joined by the association *Libertad e Identidad*. On 26 May 2009, the Second Chamber of the Supreme Court admitted the complaint and began the criminal prosecution against Magistrate Garzón.<sup>25</sup>

The ICJ recalls that the Human Rights Committee, the Committee against Torture and the Special Rapporteur on the Independence of Judges and Lawyers found that, according the principle of independence of the judiciary, “judges should not be held criminally liable for handing down “unjust judgments” or committing legal errors in their decisions.”<sup>26</sup> The ICJ considers that criminal proceedings against a judge for a controversial decision taken in his judicial capacity constitute an inappropriate and

<sup>21</sup> See, *Reply of Spain to the Committee against Torture’s List of Issues*, UN Doc. CAT/C/ESP/Q/5/Add.1, Pregunta 9, available at [http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1\\_sp.pdf](http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1_sp.pdf)

<sup>22</sup> *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.

<sup>23</sup> Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, *op cit* para. 42.

<sup>24</sup> 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, 53<sup>rd</sup> 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 2000; *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 53<sup>rd</sup> session”, UN Doc, A/56/10, pp. 31-143, Article 16, paras.1 and 8.

<sup>25</sup> See, ICJ Press Release, *ICJ condemns prosecution of Magistrate Garzón*, 7 September 2009, available at [http://www.icj.org/news.php3?id\\_article=4550&lang=en](http://www.icj.org/news.php3?id_article=4550&lang=en)

<sup>26</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para.65; *Concluding Observations of the Human Rights Committee: Democratic People’s Republic of Korea*, UN Doc. CCPR/CO/72/PRK, 27 August 2001, para.8; and *Concluding observations of the Committee against Torture: Armenia*, in UN Doc. A/56/44, 17 November 2000, paras. 37 and 39.

unwarranted interference with the independence of the judicial process, contrary to Article 14 of the ICCPR, as well as Principles 4, 17 and 18 of the *UN Basic Principles on the Independence of the Judiciary*.

This attempt to interfere with the judicial process is of particular concern since it relates to an investigation into crimes against humanity, which Spain has an international law duty to investigate and prosecute.<sup>27</sup> Under international law, legislation punishing crimes against humanity may be applied retroactively.<sup>28</sup>

**The ICJ calls on the Working Group and the Human Rights Council to propose that the Government reconsider provisions for the offence of *prevaricación* (Articles 446 and 447 of the Criminal Code), which applies only to judges, in light of the potential for abuse through private prosecutions, and the consequences for judicial independence.**

### **The Criminal Offence of Torture**

The definition of the offence of torture, contained in Article 174 of the Penal Code, falls short of that in Article 1 of the *Convention against Torture*. It 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.” Finally, the offence of torture is subject to a statute of limitations varying from 10 to 20 years. The ICJ recalls that torture is a crime under international law and its prohibition is *jus cogens*, as a consequence of which the crime must not be subject to a statute of limitations.<sup>29</sup>

**The Working Group and the Human Rights Council should urge the Government to revise the offence of torture contained in the Criminal Code to accord with Article 1 of the *Convention against Torture*.**

### **The Limitation of Universal Jurisdiction**

The ICJ is concerned at the adoption by the Spanish Parliament of a law which restricts universal jurisdiction for crimes under international law, including genocide, crimes against humanity and torture.<sup>30</sup> The legal provision of universal jurisdiction is essential 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 which were conducted based on Spanish universal jurisdiction.<sup>31</sup>

Although the establishment of unqualified universal jurisdiction is not an obligation for States under international law, permissive universal jurisdiction is available to States. The *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*<sup>32</sup> declares that “States should undertake effective measures, including the adoption or amendment to internal legislation, that are necessary to enable

---

<sup>27</sup> International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, ILC Report on 48<sup>th</sup> Session (1996) A/51/10, 1996, Chapter II(2) paras.46-48; Statute of the International Tribunal for the Former Yugoslavia, Article 5; Statute of the International Tribunal for Rwanda, Article 3; Statute of the International Criminal Court, Article 7.

<sup>28</sup> Article 15(2) ICCPR and Article 7(2) ECHR

<sup>29</sup> ICTY, *Case of Prosecutor v. Furundzija*, Judgment of 10 December 1998, No. IT-95-17/1-T10, paras.155-157.

<sup>30</sup> *Proyecto de Ley Organica Complementaria de la Ley de Reforma de la 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. The Law will be finally adopted after signature of the King.

<sup>31</sup> See, *Reply of Spain to the Committee against Torture's List of Issues*, UN Doc. CAT/C/ESP/Q/5/Add.1, Pregunta 13, available at [http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1\\_sp.pdf](http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ESP.Q.5.Add1_sp.pdf)

<sup>32</sup> UN Doc. E/CN.4/2005/102/Add.1, recommended by Commission on Human Rights resolution 81/2005, UN Doc. E/CN.4/RES/2005/81 of 21 April 2005.

their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.”<sup>33</sup>

The ICJ regrets that Spain has restricted the scope of universal jurisdiction, which, 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 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 for serious violations of human rights.

**The Working Group and the Human Rights Council should call on the Spanish authorities to withdraw the proposed legislation and maintain the unrestricted application of the existing system of universal jurisdiction.**

---

<sup>33</sup> Principle 21(1). See also, *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; and Inter-American Commission on Human Rights, *Resolucion n. 1/03 sobre juzamiento de crímenes internacionales*.