



Fundación Internacional  
**Baltasar Garzón**

PRO DERECHOS HUMANOS Y JURISDICCIÓN UNIVERSAL

***CONSIDERATIONS OF STATES PARTIES REPORTS IN ACCORDANCE  
WITH ARTICLE 29 OF THE INTERNATIONAL CONVENTION FOR THE  
PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE***

---

**SPAIN**

ADDITIONAL INFORMATION

BALTASAR GARZON INTERNATIONAL FOUNDATION

## Índice

<b>I. INTRODUCTION .....</b>	<b>2</b>
<b>II. AIM OF THE REVIEW.....</b>	<b>3</b>
<b>III. CONSULTATION PROCESS.....</b>	<b>5</b>
<b>IV. GENERAL FRAMEWORK UNDER WHICH ENFORCED DISAPPEARANCES ARE PROHIBITED .....</b>	<b>5</b>
<b>V. INFORMATION IN RELATION TO EACH SUBSTANTIVE ARTICLE OF THE CONVENTION.....</b>	<b>8</b>
<i>Article 1.- Right not to be subjected to enforced disappearance .....</i>	8
<i>Articles 2 and 3. - Definition.....</i>	11
<i>Article 4. - Criminalisation of the crime of enforced disappearance .....</i>	12
<i>Article 5. - Enforced disappearance as a crime against humanity.....</i>	13
<i>Article 6. - Criminal Responsibility.....</i>	14
<i>Article 8. - Statute of limitations.....</i>	14
<i>Article 9 and 11. - Jurisdiction.....</i>	16
<i>Article 10. - Detention of the allegedly responsible suspects .....</i>	16
<i>Article 12. - Obligation to investigate and enact protection measures.....</i>	17
<i>Article 13. - Extradition.....</i>	19
<i>Article 14. - Mutual Judicial Assistance.....</i>	21
<i>Article 15. - Assistance to victims of enforced disappearance .....</i>	22
<i>Article 16. - Principle of non-refoulment (no return) and human rights safeguard ....</i>	22
<i>Articles 17 and 20. - Secret Detention .....</i>	23
<i>Articles 18, 19 and 21. - Registers and access to information.....</i>	25
<i>Article 22. - Criminal offenses related to registers.....</i>	26
<i>Article 23. - Training.....</i>	26
<i>Article 24. - Right to obtain reparation.....</i>	27
<i>Article 25. - Enforced disappearance of children.....</i>	29
<b>VI. RECOMMENDATIONS.....</b>	<b>31</b>

## I. INTRODUCTION

This report responds to the statements expressed in the report submitted by Spain, on 26 December 2012, to the Committee on Enforced Disappearance (the Committee), by virtue of Article 29.1 of the International Convention for the Protection of All Persons from Enforced Disappearance (the Convention). This report intends to provide additional information to the Committee in order to assist with its assessment.

The Convention was adopted on 20 December 2006 by the General Assembly resolution 61/177 and it was entered into force on 23 December 2010, including Spain.

Enforced disappearance amounts to a violation of the right to life, the right to liberty and personal security, the right not to be subjected to torture and the right to recognition of legal personality.

With the aim of preventing and fighting against the impunity of the crime of enforced disappearance, the Convention enshrines the right of every person not to be subjected to enforced disappearance and the right of victims to justice and reparation. Likewise, it reaffirms the right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the freedom to seek, receive and impart information to this end.

Therefore, this is the spirit Spain must take into account when implementing the Convention into its domestic legislation. Its ratification obliges Spain to adopt appropriate legislative or other measures to prevent and eliminate the practice of enforced disappearance. Spain must elucidate the fate of the disappeared persons, and promptly undertake an impartial investigation into every case where there are reasonable grounds to believe that an enforced disappearance has occurred, **irrespective of the time that has elapsed since the commencement of the criminal conduct. Those responsible must be tried and punished.**

## II. AIM OF THE REVIEW

In accordance with Article 29 of the Convention, the Committee will consider the report submitted by Spain on the measures taken to give effect to its obligations under the Convention.

It is to recall that, as stated by the Convention on the Law of Treaties, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26). In addition, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Article 27).

Article 35 (1) of the Convention states as follows:

“The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.”

In this regard, it must be emphasized that Spain falls into an error of interpretation when affirming that the date the Committee needs to be informed about enforced disappearances, it is only the date of entry into force of the Convention, that is, on 23 December 2010. Spain makes an interpretation, which stands against justice for the thousands of victims of enforced disappearances committed during the civil war and francoism, in our country. The interpretation provided clamorously violates the consolidated international principle of no impunity of this crime, all the more since it has been committed in a systematic way, against civil population sectors, and as part of state policy (all crimes against humanity).

Article 35 merely refers to the competence of the Committee, as stated in Articles 31 and 32 of the Convention. In other words, the Committee is competent to consider state or individual complaints regarding facts occurred from the entry into force of the Convention on.

Regarding the applicability of the Convention, the main issue to be elucidated is when the specific crime of enforced disappearance is committed, until when its effects are extended, and whether it is still being committed at the time of the entry into force of the Convention. On that subject, it is a consolidated principle of national and international law that the crime of enforced disappearance is permanent, so that it may exist before and after the entry into force of the norm. This is compounded when there

is a complete lack of any kind of effective and independent investigation by the State into the whereabouts of the victim. That is, the crime is still being committed, and therefore, it remains the state's obligation to investigate even after the entry into force of the Convention until the state's obligation is accomplished. This is entirely notwithstanding of the remaining international instruments under which Spain is obligated to investigate these crimes of international law.

States must not avoid their obligations to investigate and search for victims of enforced disappearances which occurred before the Convention's entry into force. They must avoid using the "competence of the Committee" referred to on the mentioned article 35 of the Convention to evade their obligations. This provision was not intended to limit the Committee's considerations. To the contrary, it requires it.

**Therefore, in accordance with Article 29 of the Convention, the Committee may consider to which extent Spain complies with its obligations under the Convention, including cases of enforced disappearances occurring after its entry into force and those that have occurred before, which have been neither solved nor effectively investigated and therefore, are still being committed today.**

**We seek the Committee request more information from Spain related to the criminal investigation mechanisms it has deployed or intends to deploy to comply with its obligations to investigate all the cases where there has been a lack of state response. And this because Spain has the obligation to notify the victims the measures taken in order to guarantee the right of all persons not to be subjected to enforced disappearance, the right to justice and reparation, the right to know the truth about the circumstances of an enforced disappearance, those responsible and the whereabouts of the victim; and the freedom to seek, receive and impart information to victims. All of that is required regardless of whether an enforced disappearance has taken place before the entry into force of the Convention, since that is its very object and purpose.**

On 8 February 2012, the Working Group, together with another mandate holder, issued a press release concerning the trial of Judge Baltasar Garzón in Spain and its effects on the process to investigate and deal with more than 100,000 cases of enforced disappearances that reportedly occurred during the Spanish civil war and under the Franco regime. **The Working Group emphasized that an investigation should be conducted for as long as the fate of the victim of enforced disappearance remains**

**unclear, and that no amnesty law should bring an end to a State's obligation to investigate, prosecute and punish those responsible for disappearances.<sup>1</sup>**

In this sense, it is recalled the nature of this crime is continuous until the offence of enforced disappearance ceases and there is no longer a possibility of it being qualified as a crime against humanity.

**Therefore, Spain has the obligation to inform the Committee about all the measures taken under the Convention, both in law and practice, regarding all the facts that may amount to a crime of enforced disappearance.**

### **III. CONSULTATION PROCESS**

Spain has not provided enough information that shows how the consultation process has been conducted and what the civil society contributions were.

**Therefore, Spain must provide more information to the Committee on this process.**

### **IV. GENERAL FRAMEWORK UNDER WHICH ENFORCED DISAPPEARANCES ARE PROHIBITED**

The Convention was ratified by Spain on 14 July 2009. In addition, the instrument of ratification was published on the Official State Bulletin (*Boletín Oficial del Estado*) on 18 February 2011. Therefore, as it will be explained later on, the Convention is part of the Spanish legal system and should be directly applicable. By ratifying the Convention, Spain agrees to be bound by this instrument, and it is not possible for Spain to invoke the provisions of its internal law as justification for its failure to perform its duties under the Convention.

**Despite being a party to the Convention, Spain has not recognized its direct application. Likewise, there is no constitutional provision, criminal or**

---

<sup>1</sup> Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, 28 January 2013, UN Doc. A/HRC/22/45, par. 38  
(<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/104/18/PDF/G1310418.pdf?OpenElement>).

**administrative within the Spanish legal system that prohibits enforced disappearances.**

The Spanish constitution does not specify a particular status of international treaties within the hierarchy of norms.

However, every international treaty ratified by Spain and published on the Official State Bulletin is part of the legal system and must be directly applicable in Spain. In addition, pursuant to Article 96 (1) of the Constitution, no provision can be invoked to justify the failure to fulfill a treaty. The aforementioned provision reads as follows:

*"Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may be repealed, amended or suspended only in the manner provided for in the treaties themselves or in accordance with the general rules of international law"*

Pursuant to Article 1 of the Civil Code, which originated in 1889, the sources of law in the Spanish legal system are statutes, customs and general legal principles.

In accordance with Article 1 (3) of the Civil Code, "[c]ustoms shall only be applicable in the absence of applicable statutes, provided that they are not contrary to morality or public policy, and that it has been proven." This article does not limit the interpretation of what is customary law to national customary law only, but rather it includes international customary law as well.

In addition, Article 1 (5) of the Civil Code gives force of law to international treaties.

**Therefore, treaties are not merely a source of interpretation; they are a source of the Spanish legal system.**

To the contrary, this is not the interpretation given by Spain. The Supreme Court (Tribunal Supremo), in its Judgment 798/2007, has stated that regarding the application of international criminal law: "an exact transposition must be made in accordance with domestic law, at least in those systems, such as the Spanish one, which does not provide for direct application of international law [...]"<sup>2</sup>

---

<sup>2</sup> State report, Spain, English, par. 28  
([http://www.ohchr.org/Documents/HRBodies/CED/Session4/CED.C.ESP.1\\_E.pdf](http://www.ohchr.org/Documents/HRBodies/CED/Session4/CED.C.ESP.1_E.pdf))

Furthermore, Spain recognizes that human rights treaties ratified by Spain “set the standard for interpretation of the fundamental rights and freedoms embodied in the Constitution.”<sup>3</sup>

Indeed, fundamental rights must be construed “in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”<sup>4</sup> Hence, its interpretation must not contradict those treaties. As said before, this is not the criteria used by Spain.

Furthermore, paragraph 30 of the Report recounts the Supreme Court jurisprudence on judgment 101/2012 concerning the principle of legality, where the facts may amount to a crime of enforced disappearance. The Court stated that “[h]owever strongly it may be argued in some doctrinal areas, the requirements of the principle of legality cannot be satisfied by the provisions of customary international criminal law unless the act is defined as an offence in domestic law.”<sup>5</sup>

This judgment expresses the most restrictive doctrinal area in interpreting the principle of legality, narrowing it to the national level. It does not take into account the principle of legality at the international level, which binds all Spanish institutions. The interpretation of the Supreme Court focuses exclusively on the guaranteed impunity of the Francoist crimes, which have not been openly investigated despite their massive nature and character as crimes against humanity. The judgment argues and affirms that it is impossible to investigate the crimes of enforced disappearance given that those allegedly responsible died –without verifying it and therefore there is no criminal responsibility. The application of statutes of limitations or amnesty laws is not consistent with the settled basic principles of international criminal law and those applied in a number of national and international human rights courts. The judgment justifies the application of statutes of limitations and the amnesty law claiming that if the enforced disappearances qualified as a crime against humanity –which by itself bars the application of amnesty laws and statute of limitations—criminal law would be applied retrospectively, encroaching, therefore, upon the principle of non-retroactivity of criminal law. Thus, the Supreme Court’s interpretation is not consistent with *jus cogens*, given that the decision was taken despite the existence of crimes against humanity at that time as part of customary international law. The Court wrongly requires an internal transposition.

---

<sup>3</sup> *Idem*. Par. 22.

<sup>4</sup> *Idem*. Par. 20.

<sup>5</sup> *Idem*. Par. 30.

On this emblematic judgment, the Supreme Court closes the door to an investigation into the whereabouts of the victims of enforced disappearances, and that even though the International Convention for the Protection of All Persons from Enforced Disappearance has already entered into force.

**Apart from that, Spain must recognise, both in law and in practice, the direct application of the International Convention for the Protection of All Persons from Enforced Disappearance as part of its legal system.**

## **V. INFORMATION IN RELATION TO EACH SUBSTANTIVE ARTICLE OF THE CONVENTION**

### ***Article 1.- Right not to be subjected to enforced disappearance***

There is no express prohibition within the Spanish legal system against subjugation to enforced disappearance.

Neither is there an express provision that ensures the non-derogability of the prohibition of enforced disappearance. To the extent that, as Spain has expressed, the human rights enshrined in international treaties do not enjoy constitutional rank, there is no provision that establishes the non-derogability of that right, since it is not considered a fundamental right *per se*.

The only legislation related to enforced disappearance is the Law 52/2007 of 26 December, the so-called Historical Memory Law (Ley de la Memoria Histórica), which establishes measures for the identification and localisation of violently disappeared persons during the Civil War or subsequent political repression and whose whereabouts remain unknown. **However, Spain has removed the Budget allocation for Historical Memory from the General State Budget 2013. This is further proof that the Spanish justice system has forgotten the victims, lost the intention to investigate these crimes, and has no intention of providing reparation to victims from the proper institutions.**

Furthermore, the Real Decreto 453/2012, stated the role of the Office for Victims of the Civil War and the Dictatorship within the Pardon and other Rights Division, which

assumes the implementation of the Law 52/2007 of 26 December 2007, recognising and extending rights and establishing measures in favour of those whom suffered persecution or violence during the civil war and the dictatorship. This is also known as the so-called Historical Memory Law.

**Therefore, Spain must expressly enshrine, with constitutional rank, the right not to be subjected to enforced disappearance, and its non-derogability whether a state of war or a threat of war, internal political instability or any other public emergency.**

## **INCOMMUNICADO DETENTION**

We are likewise concerned about the legislation regarding incommunicado detention foreseen by Article 509 (incommunicado detention or prison as an exceptional measure) and Article 520bis (crimes of terrorism) of the Criminal Procedure Code, with the consequences provided for by Article 527 of the same statute. Pursuant to these provisions, the detained person or the imprisoned does not have the right to a lawyer of his/her choice, to consult with a lawyer in private and to communicate the fact and place of his/her detention to a family member or other person of their choice. In its Judgement 196/1987 of 11 December, the Constitutional Court ruled that those consequences were constitutional.

The incommunicado regime, likewise, may amount to a crime of enforced disappearances.

On December 2006, the holder of the Investigative Central Court of the Audiencia Nacional, established a proceeding in the framework of terrorism investigations to reinforce the guarantees of detainees in the incommunicado regime which did respect the UN bodies' international standards and human rights which, at that time were not applied in Spain. These guarantees included:

- a) Video recording of the detained persons during the time they stayed in police premises, keeping the record available to the Court;
- b) The possibility of a medical examination every eight hours –provided that it was necessary, by a doctor of their choice along with an on call service forensic doctor of the Audiencia Nacional;

- c) The police officers' duty to notify their family their detention and whereabouts and;
- d) The police officers' duty to inform the court about any incident which happened during the detention and about the state of the detainees every 12 hours, and when necessary. All of that, notwithstanding the possibility of the judge to appear in the place of detention in order to know the state of the detainees, at any time.

This proceeding, known at a national and international level as "Protocolo Garzón", is being applied by other holders of other Investigative Central Courts and courtrooms of the Audiencia Nacional and stands out as a good practice for the prevention of torture by a number of international human rights protection bodies –among others, the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on follow-up to the recommendations after his visit to Spain, of 18 February 2008 (Human Rights Council, 7th Session); Concluding Observations of the Committee Against Torture on the V Report submitted by Spain (sessions 12 and 13 November 2009)-. Likewise, the Spanish government has accepted the generalization of this 'protocol', including its guarantees to the Human Rights National, approved by the Council of Ministers on 12 November 2008.

However, its practice is neither binding nor generalized, as required by the European Committee for the Prevention of Torture. This effectively means that the opportunity and "efficiency" of terrorism investigations takes priority over the application of the relevant international provisions.

In addition, the Human Rights Committee, in its General Comment N° 20 (1992) on Article 7 (concerning prohibition of torture and cruel treatment or punishment), established the suppression of the incommunicado detention regime, like other international organizations have already done.<sup>6</sup>

---

<sup>6</sup> Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, 6 February 2004, 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, Addendum, Mission to Spain, 16 December 2008, A/HRC/10/3/Add.2, para 32. Concluding observations of the Human Rights Committee, Spain, 5 January 2009, CCPR/C/ESP/CO/5, para 14. Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, 26 February 2010, A/HRC/13/39/Add.6, para 79.

**Therefore, Spain must amend the Criminal Procedure Code and accordingly remove the incommunicado detention regime and recognise the right of detainees to a lawyer of their choice that may be present during interrogations – which must be fully recorded. Spain must require that all the Police Stations of the National Police or of the autonomous regions and Guardia Civil command headquarters apply the abovementioned measures, at a minimum.**

### ***Articles 2 and 3. - Definition***

There is no definition of enforced disappearance in the Spanish legal system consistent with Article 2 of the Convention, failing to fulfill its obligation under the Convention.

However, facts amounting to enforced disappearance are charged as illegal detention, as defined in Articles 163 and 167 of the Penal Code.

This definition was confirmed by the judgment in the *Scilingo* case, of 1 October, Supreme Court Case No. 798/2007.

However, the definition is much narrower than the one established by the Convention, because it does not gather all the elements of an enforced disappearance, which include:

1. The arrest, detention, abduction or any other form of deprivation of liberty;
2. Carried out by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State;
3. The refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, and;
4. The place of such a person outside the protection of the law.

Article 530 of the Penal Code refers to the authority or public officer who, in the course of criminal proceedings, was to order, enforce or prolong any deprivation of freedom of a detainee, prisoner or convict, with breach of the terms or other constitutional or legal guarantees. Therefore, the nature of that provision differs from the definition stated in Article 2.

The Supreme Court, in judgment, N° 101/2012 has reviewed its own doctrine and has further restricted the concept of enforced disappearance, denying any possibility of incidents committed before 2003 as qualifying as crimes against humanity, expressly excluding the Francoist crimes committed during the Civil War and following years.

**Therefore, Spain must provide for a definition of enforced disappearances within its legal system which incorporates all the elements established in Article 2 of the Convention.**

In the same sense, given that there is not a definition of enforced disappearance consistent with the Convention, there is not a definition of enforced disappearance in the legal system that includes persons or groups of persons acting without the authorization, support or acquiescence of the State as perpetrators.

**Therefore, Spain, in providing for a definition of enforced disappearance consistent with the Convention, must include those committed by persons or groups of persons acting without the authorization, support or acquiescence of the State as perpetrators of the conduct.**

#### ***Article 4. - Criminalisation of the crime of enforced disappearance***

Spain has failed completely with its obligations under the Convention, despite constant amendments of the Penal Code, because enforced disappearance is still not an autonomous offence consistent with Article 2 of the Convention.

The crime of enforced disappearance must currently be tried as a crime of illegal detention, kidnapping, torture, manslaughter, assassination or other crimes defined in the Penal Code that may be subsumed within that conduct.

**Therefore Spain must define the crime of enforced disappearance as an autonomous crime within the Penal Code according to the definition given by Article 2 of the Convention.**

### ***Article 5. - Enforced disappearance as a crime against humanity***

Crimes against humanity are foreseen and punished in Article 607 bis of the Penal Code:

1. *“Conviction for crimes against humanity shall befall whoever commits the acts foreseen in the following Section as part of a widespread or systematic attack on the civil population or against part thereof (...)*
  
2. *Those convicted of crimes against humanity shall be punished:*  
(...)  
*6º With a sentence of imprisonment from twelve to fifteen years when they detain any person and refuse to recognise that custodial sentence or to report on the situation or whereabouts of the person arrested;*

That definition is very narrow and does not include the following elements present in the Convention:

- a. the arrest, detention, abduction or any other form of deprivation of liberty.
  
- b. Perpetrators:
  - i. Agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State;
  - ii. Persons or groups of persons acting without the authorization, support or acquiescence of the State.
  
- c. The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

**Therefore, Spain must define enforced disappearance as a crime against humanity consistently with Article 2 of the Convention.**

### ***Article 6. - Criminal Responsibility***

In accordance with Spanish legislation, conspiracy and solicitation (Article 17 of the Penal Code) and Provocation (Article 18 of the Penal Code) to perpetrate an offence shall only be punishable in the cases specifically foreseen in the Law.

In addition, pursuant to Article 20 (7) of the Penal Code, any person who acts in carrying out of a duty or in the lawful exercise of a right, authority or office shall not be criminally accountable.

Likewise, the Penal Code does not provide for responsibility of the superior who knew or should have known that his/her subordinates were committing or were about to commit a crime of enforced disappearance, and has not taken all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

**Therefore, Spain must amend the Penal Code and punish conspiracy, solicitation and provocation to commit a crime of enforced disappearance; establish the superior responsibility consistently with the Convention; and that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.**

### ***Article 8. - Statute of limitations.***

Article 134 (1) of the Penal Code establishes that *"Statutes of limitations shall not apply to crimes against humanity and genocide and crimes against protected persons and objects in war time, excepting for those punished in Article 614."*

Even though is true that the legal system recognizes that statute of limitations does not apply in cases of war crimes and crimes against humanity, it follows that in Spain, only if an enforced disappearance amounts to a crime against humanity statute of limitations will not apply. Thus, when crimes of enforced disappearance do not meet the standard of a crime against humanity the statute of limitations regime for ordinary crimes would apply.

Accordingly, the statute of limitations time period *per se* is neither long enough nor appropriate given the extreme seriousness of this crime, and thus, it is in breach of Article 8 (a) of the Convention.

The report recognizes the permanent nature of the crime of enforced disappearance, which means that the cases which occurred during the civil war and the Spanish dictatorship are still being committed today.

However, there is no express provision in the legal system that provides for the permanent nature of the crime of enforced disappearance. What is more, in the already mentioned judgment n° 101/2012, the Supreme Court stated as follows:

*“Qualifies the facts as a permanent crime of illegal detention without offering grounds of the whereabouts of the victim “within the framework of crimes against humanity” (...) Within that context the resolution of 16 October pulls out consequences that could have only happened from an effectively and clear subsumption into a crime against humanity.”*

In addition, the judgment carries on saying that *“[i]t is not reasonable to argue that a person illegally detained in 1936, whose mortal remains have not been found in 2006, may rationally be thought that is still being detained beyond the statute of limitations time period of 20 years, just to point out a maximum deadline. As a matter of fact, no case that supports it has come up yet. That construction would involve considering that statutes of limitations provided for in the Penal Code does not apply to this crime.”*

Spain, and particularly its Supreme Court, unconscious of the nature of these crimes, as well of its object and purpose of the Convention, fully deny the continuous/permanent character of the crime of enforced disappearance.

Victims are hence denied the right to an effective remedy because of the statute of limitations time period.

**Therefore, Spain must expressly recognise the continuous and permanent character of the crime of enforced disappearance until the offence ceases or an effective and independent investigation is opened; and state that statutes of limitations do not apply as it is the case for crimes of genocide, war crimes and crimes against humanity.**

### ***Article 9 and 11. - Jurisdiction***

Article 23 of the Judiciary Law (Ley Orgánica del Poder Judicial), in granting jurisdiction to the Spanish Courts, contains principles of territoriality, active personality and universal jurisdiction.

Concerning crimes of enforced disappearance committed abroad by nationals or foreigners, Spanish courts shall have jurisdiction if **those allegedly responsible “are in Spain or the victims are of Spanish nationality, or if any link to Spain is proven and, in any case, a criminal proceeding has not been open in other competent state or an international tribunal that leads to an effective investigation into and prosecution, if the case, of those facts.”**

**Given the seriousness of the crime of enforced disappearance, Spain, when applying the principle of universal jurisdiction (Article 23.4 of the Judiciary Law), should not require the presence of the suspect in Spanish territory, this being contrary to their duty to promoting and ensuring respect for human rights. Spain should be able to launch an investigation into facts that would constitute a crime of enforced disappearance in order to provide the comprehensive protection sought by the Convention.**

**Therefore, Spain under Article 11 of the Convention, should amend Article 24.3 of the Judiciary Law in the sense of explicitly establishing universal jurisdiction of the Spanish courts in the case of crimes of forced disappearance of persons, as stated, and in any case, the obligation to judge when Spain does not grant the extradition of the offender who committed the crime abroad and shall be found in Spain.**

### ***Article 10. - Detention of the allegedly responsible suspects***

Derived from the obligation to establish the jurisdiction of national courts, Article 10 of the Convention compels states to detain and adopt provisional measures for those suspected of having committed an offense of enforced disappearance who are present in their territory, regardless of the existing connection with the state in question.

**It should be established that Spain, regardless of what country has jurisdiction over the case, has the obligation to adopt preventive or palliative measures that stop the effects of enforced disappearance and ensure the subsequent**

**investigation of criminal elements. Likewise, Spain should include in its legislation the obligation to inform about the start of these investigations to both the State where the crime was committed and the one the accused and the victims are nationals of.**

***Article 12. - Obligation to investigate and enact protection measures***

Despite Spain's obligation to ensure the right to report the facts before the competent authorities and to conduct an impartial and exhaustive investigation if there are reasonable grounds to believe that a crime of enforced disappearance has been committed, there is a different reality in Spain.

An investigation was initiated by the Investigative Central Court number 5 of the Audiencia Nacional following the report on the alleged enforced disappearances committed during the civil war and Franco's regime. The investigating judge in this case was accused of committing a perversion of justice and was tried for such a crime. Despite the fact that he was acquitted in the end, **the Supreme Court (Tribunal Supremo) confirmed the impossibility of investigating those incidents due to, within other reasons, a lack of recognition of the permanent nature of the crime and the presence of amnesty laws.** These are facts that the Court itself considers that "in the current culture, informed of the validity and expression of human rights would constitute crimes against humanity."<sup>7</sup>

Moreover, the Criminal Procedure Code does not include concrete provisional measures to ensure the effective protection of the complainant, the witnesses, the family of the disappeared and his lawyer, as well as the persons that participate in the investigation.

**Therefore, Spain must expressly permit and include in its legislation the exhaustive and impartial investigation of facts that could constitute enforced disappearances until the fate of the disappeared has been clarified, regardless of when the crime was committed.**

---

<sup>7</sup> See, Supreme Court Decision No. 101/2012, legal prevarication, the so-called "truth trials". Misinterpretation of law and injustice, p. 23

**Furthermore, it must establish the necessary provisional measures for the protection of persons and the impartiality of the investigation.**

The same decision declares that Law 46/1977, "an Amnesty Law –which excludes criminal responsibility, could be considered as an act that restricts and impedes the victim's effective remedy. However, the requirements of the legality principle to which we have been referring demand such rights to be recognized in relation to violations suffered after the entry into force of the Covenant [International Covenant on Civil and Political Rights] and the Convention [European Convention on Human Rights]...

*There have been suggestions directed to Spain, from other monitoring bodies, about abolition of the Amnesty Law (Resolution 828 of the Council of Europe, 26 December 1984, General Observation 20 of the Human Rights Committee of United Nations, 10 March 1992) or has been recalled that statute of limitations do not apply to crimes and violations of human rights (Human Rights Committee, Ninety-fourth session, Concluding observations, Spain, 5 January 2009, para 9). They are suggestions and remarks and not reports on Spain's failure to fulfill its obligations but, for our purposes, it is proof of the ruling legal culture in this subject and the reasonability of contrary opinions when analyzing the Spanish legal system."*

Spain maintains and reasserts the Amnesty Law 46/1977 of 15 October. Two white papers on the modification of the mentioned law have been presented<sup>8</sup>. Both intended to introduce a provision that excluded the application of the law in cases of genocide and crimes against humanity committed before its promulgation.

**Therefore, Spain must specifically exclude from the Amnesty Law's scope of application the crimes of enforced disappearances allegedly committed during the Civil War and Franco's regime.**

In addition, there is no legislation in the Spanish legal system establishing mechanisms for the clarification of the facts related to the enforced disappearances of persons.

---

<sup>8</sup> See Draft Law amending Law 46/1977, of 15 October, of Amnesty introduced by the Parliamentary Group of IU, ICV-EUiA, CHA: "La Izquierda Plural" of 13 March 2012 ([http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/B/B\\_064-01.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/B/B_064-01.PDF) # page = 1) and Draft Law amending Law 46/1977 of 15 October, of Amnesty, introduced by the Joint Parliamentary Group of 27 April 2010 ([http://www.congreso.es/public\\_oficiales/L9/CONG/BOCG/B/B\\_246-01.PDF](http://www.congreso.es/public_oficiales/L9/CONG/BOCG/B/B_246-01.PDF)).

The only existing legislation on that regard is the Historical Memory Law 52/2007 of 26 December. This law foresees the elaboration of a protocol on scientific and multidisciplinary conduct to ensure the institutional collaboration and an adequate intervention in the disinterment of victims of crimes committed during the Civil War and the dictatorship. However, the authorization to exhume relies entirely on the political will of the governing party in the local administration.

**Hence, Spain must modify its Criminal Procedure Code establishing the necessary measures to clarify the fate of every person that could have been victim of the crime of enforced disappearance.**

Section 3(a) of Article 12 establishes the obligation of states to ensure that the judicial authorities of the country "have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation."

Notwithstanding the noncompliance of the Spanish judicial authorities with their obligations, Spain has failed to fulfill this provision by not making all the documents related to Franco's regime public and accessible, which is essential in the investigation of enforced disappearances.

Likewise, Spain has not fulfilled its obligations under Article 12 (4) which states that "**all State Parties must take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation.**"

**Therefore, Spain needs to include the acts that hinder the conduct of investigations related to crimes of enforced disappearances as a crime in its Criminal Code.**

### ***Article 13. - Extradition***

The crime of enforced disappearance is not specifically excluded from the definition of political crime offered in the Law of Passive Extradition (law 4/1985 of 21<sup>st</sup> March) (extradition law).

**Therefore, Spain must specifically establish in its legislation that the crime of enforced disappearance cannot be considered a political crime, a crime related to**

**a political crime nor a crime inspired in political motives and that, in all cases, the perpetrators will be able to be extradited.**

**Moreover, Spain will need to include that the Convention on Enforced Disappearances constitutes the necessary legal basis to extradite a crime of enforced disappearance.**

Likewise, the Extradition Law establishes a number of obstacles to the concession of extradition in crimes of enforced disappearance.

Pursuant to Article 3 (1) of the Law, *"[s]hall not be granted the extradition neither of Spaniards, nor of foreigners when the Spanish Tribunals have jurisdiction over the crimes pursuant to the Spanish legislation."*

Furthermore, Article 3 (2) establishes that, in case of denial based on the above mentioned reasons, the State where the crimes have been committed will have to expressly request for the Prosecutor to be informed of the facts that prompted the request in order to, where appropriate, prosecute the person whose extradition is sought.

However, if the crime was committed outside the territory of the requesting country, Spain will be able to deny any request for extradition if the Spanish legislation does not authorize the prosecution of a crime of the same nature committed outside of the country (Article 3.3 LEXtr). Taking into account the absence of the specific crime of enforced disappearance in the Spanish legislation and its lack of recognition of the permanent nature of the crime, the extradition of the claimed person may be hindered, as will the investigation of the facts and the subsequent trial.

Moreover, Article 6 permits the government to deny an extradition request that has been granted by an appropriate tribunal, in the exercise of its national sovereignty, the principle of reciprocity or security reasons, public order or other essential interests of Spain. This is an interference in the independence of the judiciary that could be inspired by political reasons.

Regarding the sufficient human rights safeguard guarantees, the Extradition Law does not foresee denial in a case where the right of the accused to a fair trial is not ensured.

**Hence, Spain must remove from its legislation all obstacles to the extradition related to crimes of enforced disappearance and it must include sufficient human rights safeguards.**

In addition, Spain has not provided information regarding the extradition treaties it has signed with other states. It has not mentioned those treaties that consider the crime of enforced disappearance as susceptible of extradition and those that include these crimes in the list of crimes for which the extradition is not prohibited, as well as the potential obstacles to its applicability.

**Therefore, Spain must inform the Committee about these issues.**

#### ***Article 14. - Mutual Judicial Assistance***

We are deeply concerned by the obstacles that Spain has placed regarding mutual judicial assistance, and particularly, in the procedure that has been initiated in Argentina for the investigation of crimes committed during Franco's regime.

On March 8, 2013 the judge that runs the investigation of the case, proceeded to suspend the testimonies arranged for that day in the Argentinian consulate in Spain. That was due to the fact that after the Spanish Government was informed of the appointment that day, it required the judge to correct its procedure and apply for assistance by means of a rogatory commission as established in the Treaty on Extradition and Mutual Judicial Assistance in Criminal Matters, which was signed by the countries concerned.

**We therefore ask the Committee to require Spain to provide information regarding the judicial assistance it is giving to the Argentinian tribunals in the mentioned case.**

We underline once more that the temporal competence of the Committee does not exclude Spain's obligation to adopt the necessary measures to fulfill its obligations under the present provision.

### ***Article 15. - Assistance to victims of enforced disappearance***

With regard to judicial cooperation between States, the Spanish legal system has limited legislation. On this topic, there are currently only Articles 276, 277 and 278 of the Organic Law on the Judiciary (Ley Orgánica del Poder Judicial).

These articles establish that Spain will act pursuant to what is stipulated in the international treaties it is part of.

Again, Spain has a very poor legislation, referring to what is established in the international treaties. In principle, what it stipulated in the international treaties is enough to safeguard human rights. The problem arises with the implementation of these treaties in the legal system.

As previously mentioned, despite the fact that Spain is part of the Convention, it has not recognized its direct application. The Spanish Constitution does not give international treaties any specific rank in the normative hierarchy of the legal system and that is how the Government tries to elude its responsibilities, manifestly ignoring its compliance obligations.

Finally, it is obvious that the non effective implementation of the Convention into the legal system of a country makes its compliance very complicated and consequently, the protection and defense of the rights of Spanish citizens is inefficient.

### ***Article 16. - Principle of non-refoulement (no return) and human rights safeguard***

- **Extradition Law**

Article 4.6 of the Extradition Law prohibits the extradition “when the requiring State does not ensure that the required person will not be executed or subject to punishments which threaten his corporal integrity or to inhuman and degrading treatments”. However, it does not extend the protection to the possibility of that person suffering from enforced disappearance or serious damage to his life and personal integrity.

**Hence, Spain must modify its Extradition Law including the prohibition of extradition when the required person could be subject to an enforced disappearance or serious damage to his life and personal integrity.**

- **Immigration Law**

Even though the Immigration Law establishes the banning of expulsion of an individual when his/her expulsion would violate the principle of no return, the prohibition does not apply when the offense consists of activities that could damage national security, those that could be prejudicial to Spain's relationship with other countries, or those that could harm the public order. These activities are considered very serious in the Organic Law on the Protection of Citizen's Security (Ley Orgánica 1/1992, 21 de febrero, sobre Protección de la Seguridad Ciudadana).

**Spain must therefore modify its Immigration Law prohibiting expulsions when it violates the principle of no return in all cases, including when the person could be victim of an enforced disappearance or other acts that could seriously harm his life and personal integrity.**

**Moreover, it must provide the Committee with information regarding the system used to determine a violation of the principle of no return.**

### ***Articles 17 and 20. - Secret Detention***

Despite the fact that the Spanish Criminal Code includes the crime of illegal detention, there are still several worrisome aspects both in legislation and in practice.

Pursuant to Article 496 of the Criminal Procedure Code, the detainee must appear before the judge in the 24 hours after his detention. However, Article 520 establishes a maximum detention period of 72 hours. Moreover, Article 496 stipulates that "if the appearance was delayed exceeding the 24 hours, the person, authority or judicial police agent will be criminally responsible." Nevertheless, the time of the detainee's transfer to the judiciary normally depends on the organization of the detainee's transfer from the police premises to the summary court.

Furthermore, pursuant to Article 509 "The judge or tribunal can exceptionally decide on the incommunicado detention." One of the worrisome aspects is that, in case this

detention is decided, it cannot be communicated to the family of the detainee. In addition, detainees cannot receive or send correspondence, receive visits nor are they able to choose a lawyer. The Human Rights Committee has clearly expressed that the incommunicado detention which impedes the appearance without delay of the detainee before the judge violates paragraph 3.<sup>9</sup> Likewise, the Committee has established that depending on the duration of the detention and other issues, the incommunicado detention can also violate other rights protected by the Covenant like those in Articles 6, 7, 10 and 14.<sup>10</sup> The Committee has also declared that State Parties must allow immediate access to a lawyer to all detainees in criminal cases, from the start of their detention.<sup>11</sup>

This regulation, regarding both the periods for the detainee's transfer to the judiciary and the requirements to decide on an incommunicado detention, is vague and not exhaustive. This could contribute to the commission of enforced disappearances. Spain must rigorously limit these aspects and control them strictly.

Equally worrisome is the fact that Article 520 of the Criminal Procedure Code does not establish the period in which the detention needs to be communicated to the person and to the lawyer of his choice.

Likewise, the right to file a *habeas corpus* claim is not included within the rights listed in Article 520 of the Criminal Procedure Code about which the detainees need to be informed, which clearly violates the Convention. Regarding the possibility of filing this action, it is common practice to dismiss the habeas corpus claim instead of evaluating the merits of the case after the appearance and hearing of the parties. As expressed by the Human Rights committee in its General Observation Number 35, "*the laws which exclude from the revision foreseen in Paragraph 4 a particular category of persons detained violate the Covenant.*"<sup>12</sup> *The practices that make this revision non effectively*

---

<sup>9</sup> 1297/2004, *Medjnoune v. Algeria*, para. 8.7.

<sup>10</sup> 1781/2008, *Berzig [Djebrouni] v. Algeria*, paras. 8.4, 8.5, 8.8; 176/1984, *Lafuente Peñarrieta v. Bolivia*, para. 16.

<sup>11</sup> Concluding observations Algeria 1998, para. [369]; Kuwait 2000, para. [472]; Togo 2011, para. 19.

<sup>12</sup> R.1/4, *Torres Ramírez v. Uruguay*, para. 18; 1449/2006, *Umarov v. Uzbekistan*, para. 8.6.

*available to a person, including the incommunicado detention, constitute as well a violation”.*<sup>13</sup>

**Therefore, Spain must adopt legislative measures which completely abolish the incommunicado detention and recognize the right of all detainees to choose a lawyer who can be present during interrogations.**

**Likewise, Spain needs to establish concrete periods for the detainee’s transfer to the judiciary and the specific reasons which can justify a delay in this process. In any case, it must determine that the detainee will be transferred to the judiciary immediately after the conclusion of the investigation by the police.**

**Moreover, it should modify Article 520 of the Criminal Procedure Code to include the filing of the habeas corpus action, in the list of the detainee’s rights.**

### ***Articles 18, 19 and 21. - Registers and access to information***

Spain has no legal regulation determining the content of the registers and the possibility of any person with a legitimate interest to access that information, regardless of whether or not his lawyer has access.

Pursuant to Article 8.2 of the penitentiary regulation, in order for the detainee’s representative to access his personal information, he needs a special authorization from the detainee. However, this article does not foresee the access of other persons with a legitimate interest in cases of enforced disappearance.

**Hence, Spain must modify its legislation including a legal provision with regard to the configuration and maintenance of a register pursuant to Article 18.**

**Furthermore, it must establish the process for the search of disappeared persons, including a ban on the use of personal information (medical and genetic information included) for purposes different from the search. This should be present despite the use of personal information in criminal proceedings related to a crime of enforced disappearance or proceedings for reparations.**

---

<sup>13</sup> R.1/5, *Hernández Valentini de Bazzano v. Uruguay*, para. 10; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6; 1062/2002, *Fijalkowska v. Poland*, para. 8.4 (state’s failures frustrated the ability of a patient to challenge involuntary committal).

**Therefore, Spain must be required to create a census or a register of the disappeared.**

### ***Article 22. - Criminal offenses related to registers***

Stressing the lack of sufficient criminal offenses to prevent the crime of enforced disappearance, which violates the obligations under the Convention, Spain must take advantage of the current Criminal Code reform to establish the following practices as criminal offenses:

- a) The delays or obstructions of a requirement and process of habeas corpus
- b) the non compliance with the obligation to register all imprisonments, as well as the register of information of which the agent responsible for the official register or records knew or should have known;
- c) The denial to provide information regarding an imprisonment or the provision of inaccurate information when the conditions established in the law to provide it are satisfied.

Hence, the existence of habeas corpus and punishments is relevant to the adequate fulfillment of the obligations under the Convention, but do not constitute prevention in the strictest sense.

### ***Article 23. - Training***

Spain has only mentioned that training is received by the National Police Force, the Civil Guard, the Prison Personnel and the Armed Forces, whereas Article 23 requires the training of both military and civil personnel with regard to applying the law, as well as medical personnel, public officials and "other persons who may be involved in the custody or treatment of any person deprived of liberty."

Likewise, the training currently being imparted to the National Police Force and the Civil Guard does not fulfill the requirements established in this article of the

Convention. The article declares that the training must include “the necessary education and information regarding the relevant provisions of this Convention” and Spain only mentions the study of conventions in one of the departments of the Promotion Center of the Training and Proficiency Division of the National Police Force. However, we do take into account the commitment made by the State Secretariat for Security with regard to the enrichment of the current training by including the study of the content of this Convention.

**In accordance with the remarks made, Spain must provide more information regarding the training that is being given to the medical personnel, the public officials and the people in charge of the custody and treatment of the persons deprived of liberty. Likewise, it is especially relevant that the Committee stresses the importance of the State Secretariat for Security's compliance with its commitment, including adding the study of the Convention to the current training.**

#### ***Article 24. - Right to obtain reparation***

Firstly, it is appropriate and worrisome to note that the Spanish legislation does not have a definition of ‘victim.’

Currently, the draft proposal for the law of the victim's statute is an opportunity to improve the treatment of victims and include their rights in accordance with the standards of international law.

**Therefore, Spain must establish a definition of victim of acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. The definition must cover every person who who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. All of it, regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.**

**Moreover, it must include a definition of victim consistent with the Convention: “any individual who has suffered harm as the direct result of an enforced disappearance.”**

**Likewise, Spain should include the definition of ‘potential victim’ as that person whose rights are threatened for having helped, impeded or stopped a violation of a right of a victim or the commission of a crime.**

Furthermore, Spain has not adopted any measure to ensure the victims’ right to know the truth about the circumstances of the enforced disappearance and the fate of the disappeared during the Civil War and Franco’s regime, whose right to the truth has been far from recognized. Still today, a Truth Commission whose mission is to investigate the serious human rights violations occurred during this period , including enforced disappearance, hasn’t been established in Spain.

Spain has not adopted the necessary measures to find those who have disappeared during this period, to know the truth about the circumstances of their disappearance or it hasn’t satisfied their right to reparation. Clearly, it has not complied with its obligations under the Convention. As evidence of this allegation we have the Supreme Court’s Decision of February 27, 2012, which flatly denied the right of victims of enforced disappearance to the investigation of the circumstances of the enforced disappearance and the fate of those disappeared.

**Therefore, Spain must adopt the necessary measures to establish a Truth Commission that investigates the serious human rights violations, including enforced disappearance, which occurred during the Civil War and Franco’s dictatorship.**

Moreover, regarding Spain’s compliance with this article, we note that no provision of the Criminal Code refers to the victims’ right to rehabilitation, satisfaction (including the reestablishment of his dignity and reputation) and guarantee of no repetition. In violation of the victims’ right to reparation and of Article 24 of this Convention, Spain has not adopted any legislative measure to ensure this right, neither for victims of enforced disappearance nor other victims of violations of human rights and international humanitarian law.

**Hence, Spain must establish a legal framework that ensures the rights of victims of violations of human rights and international humanitarian law in accordance with international law.**

This legal framework must specifically establish reparation measures, medical and psychological care and rehabilitation for any form of physical or mental harm. It must

also establish legal and social rehabilitation measures, the reestablishment of personal liberty, family life, citizenship, job or property, the return of the victim to his or her place of residence and other similar measures of restitution, satisfaction and reparation that allow the suppression of the consequences of the enforced disappearance.

### ***Article 25. - Enforced disappearance of children***

Taking into account that the Spanish Criminal Code does not punish the crime of enforced disappearance as an autonomous crime, neither does it fulfill the requirements established in the Convention with regard to the enforced disappearance of children.

Hence, Spain must take advantage of its current reform and adopt all necessary legislative measures and include the following crimes in its Criminal Code:

- a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
- b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph ( a ) above.

During Franco's dictatorship, around 30.000 children were taken away from their original families for the sole reason they were Republican and they were given to families that were supportive of the new regime established after the military coup d'état of June 18<sup>th</sup> 1936. The Supreme Court's decision 101/2012 flatly denies the right to justice for the victims of enforced disappearances which occurred during Franco's regime, under the basis that the amnesty laws and statutes of limitations apply to these crimes. However, Spain currently declares that judicial cases regarding enforced disappearances of children during that period are still being processed.

We deem indispensable that Spain reports the investigations taking place regarding enforced disappearances and the treatment that is being given to these cases, especially with respect to the characterization of the crime as permanent. We have knowledge of the filing of many cases related to the enforced disappearance of children during this period.

**We request the Committee to ask Spain for more information regarding the judicial proceedings taking place in relation to the enforced disappearance of children.**

**Likewise, Spain must adopt all necessary measures to include as crimes in its Criminal Code the conducts described in this article of the Convention, revise the procedure of adoption, placement and guard of these children and if necessary, annul any adoption or placement of children that originated in an enforced disappearance.**

## VI. RECOMMENDATIONS

### ***Additional information to be presented by Spain***

- Spain has the duty to fulfill its obligations under the Convention with respect to enforced disappearances which have occurred in the past and must, therefore, provide further information in this regard. It must inform about all the measures taken under the Convention, both in law and practice, regarding all the facts that may amount to a crime of enforced disappearance, including the enforced disappearance of children.
- Likewise, it must provide all the information regarding the consultation process with civil society organizations that has been conducted in the elaboration of this report;
- Information regarding the judicial assistance it is giving to the Argentinian tribunals in the mentioned case;
- Information regarding the training that is being given to the medical personnel, the public officials and the people in charge of the custody and treatment of the persons deprived of liberty.
- Likewise, it is especially relevant that the Committee stresses the importance of the State Secretariat for Security's compliance with its commitment, including the study of this convention to the current training.
- Spain must provide information regarding the system used to determine a violation of the principle of no return.

### ***Establishment of a Truth Commission***

- Spain must adopt the necessary measures to establish a Truth Commission that investigates the serious human rights violations, including enforced disappearances, which occurred during the Civil War and Franco's dictatorship.

## **Legislative measures**

Spain must adopt a law implementing the Convention that shall guarantee the maximum protection of all victims of enforced disappearance and adopting all obligations under the Convention. At least, it must adopt the following modifications:

### **Spanish Constitution**

- Include the right not to be subjected to enforced disappearance as a fundamental right non-derogable in case of war, internal political instability or any other public emergency.

### **Penal Code**

- Include as an autonomous criminal offence the crime of enforced disappearance in accordance with the definition provided in Articles 2 and 3 of the Convention.
- Specifically recognize the permanent character of the crime of enforced disappearance and the non application of the statutes of limitations to this crime, regardless of its qualification as crime against humanity.
- Specifically include enforced disappearance as a crime against humanity in accordance with the definition provided in Articles 2 and 3 of the Convention.
- Punish conspiracy, solicitation and provocation to commit a crime of enforced disappearance, as well as establishing the superior responsibility in accordance with the terms of the Convention.
- Include as a crime the acts that hinder the conduct of investigations related to crimes of enforced disappearances.
- Include as crimes:
  - a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
  - b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph ( a ) above.

- Take all necessary measures to revise the procedure of adoption, placement and protection of these children and if necessary, annul any adoption or placement of children that originated in an enforced disappearance.

### **Criminal Procedure Code**

- Abolish the incommunicado detention and recognize the detainees' right to consult a lawyer of their choice.
- Establish the possibility of starting a preliminary investigation or clarification of the facts when there is awareness that an allegedly responsible perpetrator of a crime of enforced disappearance is going to be in Spanish territory and proceed to his/her detention when he arrives.
- Establish the obligation to inform about the start of these investigations to both the State where the crime was committed and the State where the accused and the victims are nationals.
- Specifically permit in its legislation the exhaustive and impartial investigation of facts that could constitute enforced disappearances until the fate of the disappeared has been clarified, regardless of when the crime was committed.
- Establish the necessary provisional measures for the protection of persons and the impartiality of the investigation.
- Establish the necessary measures to clarify the fate of all victims of enforced disappearance, including a ban on the use of personal information (medical and genetic information included) for purposes different from the search. This should exist despite the use of the information in criminal proceedings related to a crime of enforced disappearance or proceedings to satisfy a reparation right.
- Establish concrete periods for the detainee's transfer to the judiciary and the specific reasons that can justify a delay in this process. In any case, it must determine that the detainee will be transferred to the judiciary immediately after the conclusion of the investigation by the police.
- Modify Articles 509 and 520 of the Criminal Procedure Code eliminating the incommunicado detention and including the filing of a habeas corpus action in the list of the detainee's rights.

## **Statute of the Victim**

Establish a definition of 'victim of acts and omissions that constitute a violation of the international law of human rights or a serious violation of international humanitarian law.' The definition must cover every person who has suffered harm, individual or collectively, including physical and mental injuries, emotional suffering, economic losses or a substantial damage of his fundamental rights. All of this should exist regardless of whether he/she is identified apprehended, tried or convicted and/or whether there is a familiar relationship that could exist between author and victim.

Include a definition of 'victim' in accordance with this Convention: "any individual who has suffered harm as the direct result of an enforced disappearance".

Establish a legal framework that ensures the rights of victims of violations of human rights and international humanitarian law in accordance with international law.

## **Organic Law on the Judiciary**

- Remove the requirement by which the allegedly responsible perpetrator needs to be in Spanish territory in the cases of enforced disappearance committed outside the country.
- Modify Article 24.3 of the Organic Law on the Judiciary specifically establishing the universal jurisdiction of the Spanish tribunals in cases of enforced disappearance of persons and the obligation to try the accused when he hasn't been extradited, regardless of the connection of the crime with Spain.

## **Amnesty Law**

- Specifically exclude from the Amnesty Law's scope of application the crimes of enforced disappearances allegedly committed during the Civil War and Franco's regime.

## **Legislation on Extradition**

- Specifically establish in its legislation that the crime of enforced disappearance cannot be considered a political crime, a crime related to a political crime nor a

crime inspired in political motives and that, and in all cases, it will be able to be extradited.

- Establish that the Convention on Enforced Disappearances constitutes the necessary legal basis to extradite a crime of enforced disappearance.
- Remove from its legislation all obstacles to the extradition related to crimes of enforced disappearance and include sufficient human rights safeguards.
- Prohibit the extradition when the required person could be subject to an enforced disappearance or a serious damage to his life and personal integrity.

### **Immigration Law**

- Prohibit the expulsion when it violates the principle of no return in all cases, including when the person could be victim of an enforced disappearance or other acts that could seriously harm his life and personal integrity.

### **Penitentiary regulation**

- Establish the configuration and maintenance of a register pursuant to Article 18.

### **Other**

- Create a census of the victims of Franco's regime and a national register of these victims that shall be of easy access and free of charge for the victims and any other person who wishes to consult it.